

2011 HOUSE POLITICAL SUBDIVISIONS

HB 1162

2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

HB 1162
January 21, 2011
Job # 13223

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to notice of emergency rulemaking and the administrative rules committee carrying over consideration of administrative rules; and to provide an effective date.

Minutes:

Chairman Johnson: Opened the hearing on HB 1162.

Rep. Kaiser: I encourage you to sign up and serve on the administrative rules committee so they may fill it before they get to me and put me back on the committee. I tried to do the best I can on any committee I am put on. There were several issues that arose during the interim relative to the administrative rules process that I bring to you and asked that they be put all in one bill. Most of you weren't here when Governor Shaffer did a second state of the state address, but just as he began his address he took a short pause and asked for staff to carry down on front of the podium as he stood there our books of century codes and then our books of administrative rules. The administrative rules ran the length of this table and about this high. Our Century Code was two stacks that ran about this high. At this time Gov. Schafer said we maybe over regulating in rules in the various business, companies and businesses in this state. If you serve on the administrative rules process it is an interesting thing because we passed legislation yesterday that granted the authority to a department to develop administrative rules. We are in legislative session; we should be setting policy so if you have the rule, develop it, bring it in and put it in the law. That is just part of our general frustration serving on this committee. There are about four changes I want to talk about here. In Section 1; lines 11 & 12 it says that providing notes to the chairman of the administrative rules committee of the emergency status. In our emergency rules process it is a very lengthily, expensive process. There needs to be clarification, make a request for the hearing; they have to do a lot of publicity statewide so our citizens know that administrative rules are forthcoming. They have to conduct hearings, take input and record that and present that to the administrative rules committee. That takes a long time. It takes a minimum of three months up to six to nine months. We have provided for an emergency rule status because we recognize how long it can take and we have created for the opportunity for any department to implement a new rule based on an emergency status and eventually it does come back to the administrative rules committee to be confirmed but the reality is the horse is out of the barn. The question arose several times in this last interim two year period of hearing, why did you invoke the emergency rule status at that time? Was there no adequate time to go through the administrative rule process?

I will give you one specific example: We have an entity within the state gaming commission group that works on and manages and controls gaming. I go to the store and see there are a lot of options to purchasing these lottery tickets. Discussed the lack of the department coming in during the interim period when they were working on the hearing process to inform the administrative rules what was going on. All this section does is saying that it is OK. We want you to maintain the authority to have the power to implement an emergency status rule, but if you do want to implement it, please notify the chairman of the committee because the chairman has the authority to call an administrative rules hearing at any time. It is a safety check and one we have discussed in the committee and it just made sense. We are simply saying if the department wants to implement one please do so, but prior to implementing it notify the chairman of the interim rules committee. Have some discussion with them. Second 2: This is a huge problem for this committee. They come in with administrative rules; these are significant policy changes on occasion and we never have fiscal notes. We need to know what the fiscal impact is by the legislative body. Every WSI bill submitted must have a fiscal note. If there is no impact that is what it says? In a. and b. is relative to add the advertising. We ran into a problem on this issue. We had an emergency rule implemented and it was an extremely important emergency rule. It deals with drugs and a court case. When the case got to court the court ruled that we did not have adequate notice about the notice of emergency status of the rule and therefore it could not be implemented even though it was for the welfare and safety of our citizen. I believe that court case got thrown out and we came through the formal process and it is now rule. We need to make sure by status that the advertising corresponds with the emergency status changes that are occurring. In Section 4: Emergency rules take a great amount of energy and resources and capital to bring to the interim committee. At our last hearing the administrative rules of one of our agencies came up; no one was there to testify and that has never happened before. What we did was carry it over until the next hearing, but the attorney's in legislative council said you should formalize that in your section of the code that deals with it so it automatically carries it over and they have to withdraw it. If they want to withdraw it we think it should require a formal action.

Rep. Koppelman: The administrative rules committee is not an interim committee; it is a statutory committee, which means we need to meet during the session because of the timelines of rule making etc. The bottom of page 2 and top of page 3; the committee has the authority to carry rules forward for consideration at its next meeting. That wasn't always the case. Does this just extend it to the next meeting and then is it the same status as if the committee had voted to hold it over; in which a case you would be in that same position.

Rep. Keiser: No this means it will be continued to be carried over and it will require that department to formally withdraw the proposed rules that are submitted. What happens if the committee at the end does not make the motion to carry it over? It is gone and then technically they have to start the administrative rules process over again. When the rules come in there is never a case when someone intentionally fails to make it.

Howard Anderson, Executive Director, Board of Pharmacy: The Board of Pharmacy does not use the rule making process very often. In February 2010 was the first time we used it. We felt some drugs were being used and people were hurting themselves and showing up in the hospital we worked with the Attorney General's office and the Bureau of Criminal

Investigation and we thought we should probably gain an emergency rule so we went ahead and did that. We worked with the Attorney General's office and they wrote the noticed for us and thought we did everything that the law requires, but obviously some judges disagreed with us that people did not have adequate notice of the rule so we are totally in support of the changes Rep. Kaiser has proposed for you here because we want those things to work. The rule process has grown over the last few years so it is extremely difficult to adopt rules. I like to put things in statues. The language on page 1, line 11 addresses that. I did not realize when we made the emergency rule that when we delivered that to the Legislative Council it says the rule is effective upon filing with the Legislative Council. I did not realize that they did not publish those emergency rules. They have this list of people who would like to know what has been done so they receive notification of the rules from the Legislative Council or they can see them on their website. In the case of the emergency rule that did not happen. I did not realize that until the judges started saying where was this rule. Here is an example of the way the drug enforcement does their controlled substance scheduling; they propose an interim rule. So the rule is effectively in affect with the interim scheduling, but there is a comment period etc. which could match the period you have before you actually go before the interim rules committee and the thing is finally approved as this one was, but not until Oct 1, 2010 so we had from February 26 when the emergency rule was effective until October 1 when we are kind of in limbo with the judges. I did not realize the interim committee had the power to call a special meeting they wanted one. All of you who serve on the Interim Rules committee deserve a big thank you because you have a huge amount of things to deal with. If I had to do this again I would have spent the money to publish the rule because we spent time with the press throughout the country so we certainly felt there was more notice to the public than any other rule we have done. The judges did not agree.

Rep.Devlin Did this bill come from the administrative rules committee since we heard of it in November that we needed these changes to be made?

John Walstad, Legislative Council: Neutral testimony: These are some issues that were discussed by the committee at its last meeting and because of that timing the rules require consideration of a bill draft at one meeting and there was no bill draft to consider at that point so Rep. Kaiser came in and asked if some of these discussion points from the last meeting be prepared as a bill draft and that is how this got here.

Rep.Devlin: The new language in Section 4; we certainly remember when somebody didn't appear for a hearing before. It has happened before and we have always held them over and I thought the language ahead of that that Rep. Koppelman ahead of that covered that. Do you think we need further clarification on that?

John Walstad: Part of the reason for the language that I incorporated here is if the committee forgets to make a motion to carry over rules that is it and it is done. So to have an automatic carryover provision if there is not representative is fine or the committee can make the motion assuming they don't forget, but if nobody shows up the second time, under current law that is it. There is no more carry over. This changes that, if nobody shows up the second time there is another carry over.

Rep. Koppelman: If this were adopted and this was an automatic trigger that carries a set of rules forward if the agency doesn't appear at the committee that that next meeting would act as its first meeting before the committee. The concern is the committee has the authority to carry rules over for consideration one time. If this substitutes for the committee authority then and when the agency comes the next time, if there are questions, would that mean the committee would not have the authority to hear them then?

John Walstad: I think that is covered. The sentence on line 29, page 2; the rule is initially considered by the committee. I read that to mean the first time somebody shows up so they can talk about it.

Rep. Koppelman: What about notice; obviously that is something you could do in Legislative Council office. Put it on the website or something like that. It occurs to me that that case there might not have been a list of interested parties to notify because you are not dealing with public notice. The think a notice should go out by Legislative Council.

John Walstad: We have never published emergency rules. We do put them on our websites; all of them are on there. Apparently the judge thought there should be something that flashes at you. I don't agree with the judge's decision. I think the board did a terrific job. I think the people selling this stuff were aware of it. We could put something out there with pending emergency rules. I don't want to publish them in the administrative code; they are not final until they are through the rule committee process and approved. They are just pending although they are in effect.

Rep. Shirley Meyer: Going back to Section 1; the only thing that that requires now then is that the notice is provided to the chairman of the administrative rules committee and it is not a public notice?

John Walstad: All the law says is what is not underscores there. This is the one the judge focused on. To make notification of rules that everyone would know; that is a hell of a burden. How does the agency identify who might be affected? What is added is the notice requirement is 23-30-10 which is on page 2 and there are some changes there. Current law does not say you have to identify emergency rules in the notice you put in the paper or in the notice that you file with the Legislative Council. Most agencies do that, but not within the text of a formal notice. This would require that and include information on how you would get a copy of that if you are interested. This also adds a requirement that the chairman of the administrative rules committee gets notice from the agency. That is so the interim committee chairman if it appears to be a big deal can either inform committee members or call the media.

Rep. Klemin: That decision that has been referred to several times; is that a Supreme Court Decision or District court?

John Walstad: That was a district court decision that came out of Fargo and it became a topic for the committee to debate. The committee was faced with a letter from the Attorney General saying the agency met all its obligations for rule making and that those rules were appropriate to publish in the administrative code the way they were submitted. Then a district court decision saying no they did not meet their requirements and the effective date

of those rules would not have been the emergency date because the Attorney General told us that is what it is.

Opposition: None

Neutral: None

Hearing closed.

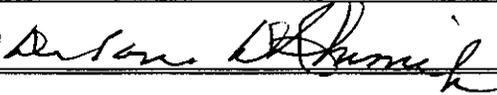
2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

HB 1162
January 28, 2011
Job # 13636

Conference Committee

Committee Clerk Signature



Minutes:

Proposed amendment #1

Chairman Johnson: reopened the hearing on HB 1162. Rep. Kaiser brought this bill forward and it talked about things that he saw happening in the administrative rules meetings that he thought maybe could be addressed differently. The first item was to notify the chair administrative rules if you are doing an emergency rule and that would give the chair the time to determine whether it should be to call a special meeting or just let it wait until the next meeting. The second section was to have fiscal notes required for rules. You have to get better notice out there on the rules. The fourth section was if no one came from the agency to speak to the rules it would automatically be held over and wouldn't require a motion to be held over in that process and it would continue until someone was there to address the rules. The fifth section was the effective date.

Rep. Koppelman: (Handed out proposed amendment #1). The amendments just help clarify that intent and help it to work better. Mr. Anderson from the ND Board of Pharmacy testified about this substance being sold in various retail establishments, not pharmacies but other kinds of stores and it was being used and has the same kinds of properties of marijuana so what happened was the Board of Pharmacy classified that IE and made it illegal. They made it an emergency rule to have that happen. The Cass County State's Attorney's office, then attempted to enforce that and in doing so the judge looked at this section and said you are suppose to take appropriate measures to make interim final rules known to every person who may be affected by them. How do you do that? They would have had to notify every citizen in the state of ND who might chose to buy this product that it is now illegal. This is obviously not practical. We attempted to get at that in the amendment. They clean up that section so it would read the agency shall attempt to make rules known persons who the agency can reasonably be expected to believe have a substantial interest in. That seems to make a lot more sense.

Rep. Shirley Meyer: Who does that work when John Walstad said the reason they are not published is they are not finalized.

Rep. Koppelman: In the old days they would make a rule; then the legislative administrative rules committee would be held. The rule was in effect. The committee could void the rule or agree with an agency to change the rule or amend it if there was some

troubling language or something, but the rule had been in effect for 1-2 or 3 months; all of a sudden the committee comes into town and change it and now that isn't the rule anymore so we have corrected that so now the rules don't take effect until after the committee acts on them. However, emergency rules do and the committee still has the authority to void them. Moving on to page 3 line 1 this just clarifies the question that was raised during the hearing. If they have a hearing schedule before the administrative rules committee on a set of rules and they don't show up the bill would have moved that to the next meeting; however the committee has two meetings to act on that under other sections of law. The first time they appear would be the first meeting.

Rep.Devlin: We have had some state agencies if we say they are not necessarily considered there until a representative appears you would have the same situation. If he doesn't want to come for a year you have the same situation.

Rep. Koppelman: However the rules would then never go into affect so if they want under this amendment. They don't go into effect until the committee acts.

Rep.Devlin: I think if we look back we both can find some agencies that don't want the rule and it is being forced upon them so if they didn't show up they would never go into effect and they would have exactly what they want.

Rep. Koppelman: I suppose you could have that. If they occur it is because the agency initiated activity to make rules. If that is the case they can come in and ask the committee to void the rules and that has happened. I don't think that is a danger.

Rep. Hatelstad: If we have the emergency rule you said it is in effect, but subject to change. What if you schedule a meeting and they don't show up; does the emergency rule remain in effect? So if I want to rule in effect and don't want to justify it I just show up, it says in effect?

Rep. Koppelman: that is a good question. Maybe we do need to hold this for further clarification.

Rep. Klemin: Isn't there a procedure where a person with an interest can petition for rule making and so they are not always initiated by an agency?

Rep. Koppelman: I don't know the answer to that. I will have to check into that.

Rep. Shirley Meyer: You can because we did concerning the racing commission.

Rep. Koppelman: What was the process?

Rep. Shirley Meyer: We made the request to the racing commission to promulgate their rules.

Rep. Koppelman: Were they forced by that request?

Rep. Shirley Meyer: Yes we requested it.

Rep. Koppelman: Maybe Mr. Walstad is around and can assist us.

Rep. Shirley Meyer: When you say we are you talking about the ND Horsemen's Advisory Council.

Rep. Koppelman: the issue of whether agencies who did not want their rules to go into affect under the amendment on page 3 could simply not show up and the rules would never occur.

John Walstad: Actually that happened once and we had a hard time deciding what to do. We ended up voiding them. Yes I guess they could just never show up and the rules would just never take effect. I don't think that would happen a lot. Why would they file them and then change their minds.

Rep. Koppelman: Since this bill deals with emergency rules he said what happens if an agency creates and emergency rule what if they don't show up and they never show up because they don't want to justify their emergency rule. Do we have a provision where it voided at some point if they don't show up?

John Walstad: There is a statutory provision that an emergency rule adopted by an agency and following all the procedures becomes effective; there is another rule that says an emergency rule is void 180 days later if they have not adopted it as a final rule. The final adoption is by the agency, not the rules committee.

Rep. Koppelman: But the effectiveness of the rule would remain pending approval by the committee. Maybe they could enforce the rule without every getting it finalized. So they could let the 180 days go by; not appear, they would still enforce it maybe without the committee ever dealing with it?

John Walstad: I suppose that could happen.

Rep. Koppelman: There is a statutory ability for a citizen or group to require an agency to make rules to have a request and they have to make rules. She said it happened with the Racing Commission etc. If that is the case then the same question would come up if they really didn't want to make rules and they didn't show up then the rules would never be effective and they could avoid them happening in that process.

John Walstad: The public petition thing, but for the public to do something to force an agency to make rules I don't know where that is. It sounded like if the agency has done nothing some public member can poke them and say make rules. I don't know of anything like that.

Rep. Shirley Meyer: The Horseman's Advisory's Council they were the public group that forced the Racing Commission to make the rules.

John Walstad: I think that was more political pressure than a statutory provision.

Rep. Kilichowski: You said after the 180 days this emergency rule would be just setting there. If the committee met in that time and that agency didn't come to the meeting and appear would the committee not have the right to deny that administrative rule instead of letting it set there?

John Walstad: Yes I think you are right. I am not sure. Maybe the language in the amendment could create a problem.

Chairman Johnson: Let's hold it over a little bit and try to work on addressing some of those other issues.

Rep. Koppelman: I will work with John Walstad.

Hearing closed.

2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

HB 1162
February 4, 2011
Job # 14016

Conference Committee

Committee Clerk Signature 

Minutes:

Proposed amendment #1

Chairman Johnson: Reopened the hearing on HB 1162.

Rep. Koppelman: (See proposed amendment #1). Actually we have looked at most of this amendment already. The number is .01003 is what we are looking at now. One of the concerns is what happens with emergency rules since they go into effect. If something is deemed by an agency to be an emergency they go off and make rules, declare it an emergency. The rules once they are on a fast track go into effect. Then the Administrative Rules comes in for their quarterly meeting and acts on those rules. They can void the rules if there is a major concern; second option is to agree with the agency to amend the rule. Do emergency rules stay in effect for ever? Could you have a scenario where you have an agency decided to go off and create an emergency rule. They didn't want the legislatures opinion on it so they never showed up at the administrative rules committee's meeting and yet that rule is still effective. What this amendment will do is it would say rules are not considered initially by the committee under this subsection until a representative of the agency appears before the administrative rules committee when the rules are scheduled for committee consideration. If no representative of the agency appears before the administrative rules committee to which rules are held over for consideration, the rules are void if the rules were adopted as emergency rules and for rules not adopted as emergency rules the administrative rules committee may amend or void the rules; allow the rules to become effective or hold them over for consideration.

Rep. Klemin: It then leaves in place the language that was on the bottom of page 2 line 31 and goes up to the top of page 3, line 1. Shouldn't that language come out?

Rep. Koppelman: The reason for that is we wanted the ability of the committee to be unchanged at the first meeting the agency appeared at. The concern was if an agency doesn't appear and if we say they can be considered at the next meeting. The way the law is now if the agency doesn't appear the committee can carry them over, but their authority becomes diminished at that second meeting because they can't carry them over again. At the next meeting you would either have to void it, amend it on the spot, or allow it to go into effect.

Motion Made by Rep. Koppelman to move the amendment; Seconded by Rep.Devlin:

Rep. Hatelstad: If I read this correctly; an emergency rule, nobody shows up the emergency rule is void. Is that correct?

Rep. Koppelman: No that is not right; it would be the second meeting. The result of that is they would have to start over again.

Voice vote carried.

Do Pass As Amended Motion Made by Rep. Koppelman: Seconded by Rep.Devlin:

Vote: 12 Yes 0 No 2 Absent Carrier: Rep. Koppelman:

Hearing closed.

:

VR
2/4/11

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1162

Page 1, line 9, overstrike "take appropriate measures" and insert immediately thereafter "attempt"

Page 1, line 10, overstrike "every person" and insert immediately thereafter "persons"

Page 1, line 10, after "who" insert "the agency can reasonably be expected to believe"

Page 1, line 10, overstrike "be affected by" and insert immediately thereafter "have a substantial interest in"

Page 1, line 10, replace ", including compliance" with ". As used in this subsection, "substantial interest" means an interest in the effect of the rules which surpasses the common interest of all citizens. An agency adopting emergency rules shall comply"

Page 1, line 11, replace "providing" with "shall provide"

Page 1, line 14, after "2" insert ". When notice of emergency rule adoption is received, the legislative council shall publish the notice and emergency rules on its website"

Page 3, line 1, after the underscored period insert "Rules are not considered initially considered by the committee under this subsection until a representative of the agency appears before the administrative rules committee when the rules are scheduled for committee consideration. If no representative of the agency appears before the administrative rules committee meeting to which rules are held over for consideration, the rules are void if the rules were adopted as emergency rules and for rules not adopted as emergency rules the administrative rules committee may amend or void the rules, allow the rules to become effective, or hold over consideration of the rules to the next subsequent committee meeting."

Renumber accordingly

Date: 2-4-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1162

House Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended Adopt
Amendment

Rerefer to Appropriations Reconsider

Motion Made By Rep. Koppelman Seconded By Rep. Devlin

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson			Rep. Kilichowski		
Vice Chairman Hatelstad			Rep. Shirley Meyer		
Rep. Beadle			Rep. Mock		
Rep. Devlin			Rep. Zaiser		
Rep. Heilman					
Rep. Klemin					
Rep. Koppelman					
Rep. Kretschmar					
Rep. Maragos					
Rep. Pietsch					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

*Vote
Vote
carried!*

Date: 2-4-11
Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1162

House Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended Adopt
Amendment

Rerefer to Appropriations Reconsider

Motion Made By Rep. Koppelman Seconded By Rep. Devlin

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson	✓		Rep. Kilichowski	✓	
Vice Chairman Hatelstad	✓		Rep. Shirley Meyer	✓	
Rep. Beadle			Rep. Mock	✓	
Rep. Devlin	✓		Rep. Zaiser		
Rep. Heilman	✓				
Rep. Klemin	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Pietsch	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1162: Political Subdivisions Committee (Rep. N. Johnson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1162 was placed on the Sixth order on the calendar.

Page 1, line 9, overstrike "take appropriate measures" and insert immediately thereafter "attempt"

Page 1, line 10, overstrike "every person" and insert immediately thereafter "persons"

Page 1, line 10, after "who" insert "the agency can reasonably be expected to believe"

Page 1, line 10, overstrike "be affected by" and insert immediately thereafter "have a substantial interest in"

Page 1, line 10, replace ", including compliance" with ". As used in this subsection, "substantial interest" means an interest in the effect of the rules which surpasses the common interest of all citizens. An agency adopting emergency rules shall comply"

Page 1, line 11, replace "providing" with "shall provide"

Page 1, line 14, after "2" insert ". When notice of emergency rule adoption is received, the legislative council shall publish the notice and emergency rules on its website"

Page 3, line 1, after the underscored period insert "Rules are not considered initially considered by the committee under this subsection until a representative of the agency appears before the administrative rules committee when the rules are scheduled for committee consideration. If no representative of the agency appears before the administrative rules committee meeting to which rules are held over for consideration, the rules are void if the rules were adopted as emergency rules and for rules not adopted as emergency rules the administrative rules committee may amend or void the rules, allow the rules to become effective, or hold over consideration of the rules to the next subsequent committee meeting."

Renumber accordingly

2011 SENATE POLITICAL SUBDIVISIONS

HB 1162

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

HB 1162
March 18, 2011
15571

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to notice of emergency rulemaking and the administrative rules committee carrying over consideration of administrative rules

Minutes:

You may make reference to "attached testimony."

Chairman Andrist opened the committee hearing on HB 1162. All senators present.

Representative Keiser, District 47. Cited story of introduction when he presented the bill on the House side (3:30). For those who have not served on the Administrative Rules committee, there are three ways in the state of North Dakota that law is created. There are legislative statutory changes which we do, there are occasions when the courts determine what the law will be regardless of what the statute may or may not say, and the third way a law occurs is administrative rules. We obviously pass a lot of laws that don't have and they kind of are the framework and the departments do an excellent job. They take that framework and then they try to implement it and through the Administrative rules process try and create the guidelines to implement the law. Administrative rules have the force of law. So when we do something in the law, the administrative rule has the force of one. (Example cited along with a short story relating the understanding of the issues (12:34).

We had concerns that occurred in this last interim relative to the administrative rules process. First of all, in Section 1, it says that the agency shall make interim final rules known. The agency can reasonably be expected to believe they may have a substantial interest in them and then it defines substantial interest. Example cited. This first part of the language is designed to say an attempt has to be made to inform those people with substantial interest, not literally every person in every newspaper in the world. The second part of that on Line 15, is also a really, really important thing. That is that if you're going to initiate emergency rules we are putting in statute that you must also inform the Chairman of the Administrative Rules committee in writing or by phone or however, that you are implementing an emergency rule. That is not designed to delay it, but why do we want the chairman informed? It puts another requirement on the emergency rule process that I believe is very, very important. If there is a true need for emergency rule, you can implement it and inform the chairman and were off and running. If it's really not an emergency, but want to try and use the emergency rule, you can inform the chairman, and he'll call an emergency session of the administrative rules committee or I don't think that's

an emergency we'll carry it over. Example cited. There isn't an over abuse or anything like that of the emergency provision, but the emergency provision means an immediate law today, when that rule is issued. We're just saying one of the checks that we should add to this is to inform the chairman and let the chairman have input whether or not to call an emergency session or not. Whether or not there should be legislative consideration of the rule. Section 2, this is law that is being written. But we have no requirement. So often I would ask the people making the presentations in the rules do you have a fiscal note on this? Well no and they are not required to. And all we're saying in Section 2 is if it's going to have the effect of law then if a fiscal note is appropriate they should issue one so the committee can have that information in its deliberations and at least ask questions relative to fiscal notes. On Section 3, it goes back mostly to the court case, clarification that will prevent bad things from happening. On page 3, Section 4, we have a special, another change in the Administrative Code that I think is very important. If you look at line 5, the new language; 'if no representative of the agency appears before the Administrative Rules committee when rules are scheduled for committee consideration those rules are held over for consideration at the next subsequent committee meeting'. Rules are not considered initially considered by the committee under this subsection until a representative of the agency appears before the administrative rules committee when the rules are scheduled for committee consideration. I know it's a lot of words, but example cited related to this section. We just had an Administrative Rules committee hearing last week and it involved this very situation (example cited). The way it is statutorily set up, is, you can hold it over which we did, and we had to formally move to hold it over one meeting but that meant that at the next meeting all final action had to occur. You cannot hold this over repeatedly. For whatever reason the agency doesn't show up to present their rules, the committee will not consider them entered at that date so they have the opportunity to come back and explain the rules to us. So this is a provision specific to that one occurrence, but we basically either had to adopt the rules or cancel all of them at this last hearing. Senator Andrist brought a very good point about the Constitutionality of one of the rules. But we couldn't carry it over to have people give us additional information on it because of the way it currently is statutorily defined and so what we did, I believe we just removed two of the rules they proposed. We had to just act based on what we had. We couldn't carry it over. That is not a good way to do the business of Administrative Rules. Administrative rules is a very important committee, we don't have the authority to change much on administrative rules, what we do is say does it follow the letter and intent of the law, that we passed. We have to review those rules and they are very expensive. A lot of reading is involved.

Chairman Andrist: This is an important committee. So often we run into constituents at home and they ask what do you mean passing a law like this, well it isn't a law we passed it's a rule that was adopted more often than not. Constituents at home do not understand the difference (Example cited). I like the changes and might remind the committee that we really didn't give the Administrative Rules committee hardly any authority and we amended that quite a bit and give them a few more teeth. I often wished we had more.

Senator Olafson: Thank you for all of the information on Administrative Rules. Can you explain the effective dates, why is it set up the way it is, with an explanation of that date?
Representative Keiser: Again, we're not to my knowledge this was in the original bill. We're not amending any part of that, but, Sections 1&3. I think what we're saying in effect is that any of the rules in process right now, would not be impacted by these changes.

(Example cited). Beginning on July 31, Sections 1&3 would be become effective on the normal date. We did need to provide protection for all of the agencies which were operating on the old standard.

Senator Judy Lee: I do recall that the Administrative Rules committee was only established in 1995 or 1997, and before that time there was no legislative oversight on rules, so I really am grateful for the people who are willing to work on it, it meets all the time. There are a lot of details to it. But I think the work is very important. What it initiated that as you may recall some agency that had come in for rules that was going to put something in place that had been in a bill the legislature had defeated. It was kind of an example of why Administrative Rules Committee was an important committee because you just can't do it by rule because you couldn't get what you wanted through the legislative session.

Representative Keiser: That is absolutely right.

Senator Dotzenrod: On page 1, line 9, is that old language there? It says interim final rules, I understand interim, which would mean something that is temporary, and I understand final, which means that's it the last rule, but an interim final rule is that mean that a legislative interim, period of time that is allowed to pass before the final rules are approved or what is or what does that term mean? **Representative Keiser:** My interpretation of that and I am not that it is right, that the rules that are promulgated during the interim and they come out through the committee as final rules. They are not finalized until the committee hears them. The committee has to hear them and the committee doesn't approve the rules, the committee has to object to an element of the rules. **Senator Dotzenrod:** So the term interim there refers to the legislative interim. **Representative Keiser:** I believe so, but there are lawyers here that know better.

Julie Leer: Attorney with the Department of Human Services. I am here to listen to the testimony, but I rose to answer Senator Dotzenrod' question. The question on what interim final rule is, when it's specific to an emergency rule making process. When emergency rules are adopted they have an effective date that almost always predates their review by the Administrative rules committee. A regular rule gets reviewed by the Administrative Rules committee before the effective date of the rule. The rules that you are talking about that we had presented back in September, would've been effective in October, but because they were held over they weren't effective until January. So those didn't have any finality until the review by the Administrative Rules committee was complete. But the point of an emergency rule is that it can go into effect before the Administrative rules committee actually gets a chance to review it. We'll see that frequently I think at the end of session where you need a rule to go into effect and implement an appropriations measure. So, we'll frequently see that the rule has to be effect by July 1, to coincide with the effective date of the new biennium. But the Administrative Rules Committee because of the time lines and the processes involved, are likely not going to get a chance to review it until a later meeting. It still has to be done. In the meantime that is still called a final rule. The reason it is an interim final rule is because it's not a final, final rule until Representative Keiser said the Administrative Rules Committee gives its final stamp of approval. So it's an interim final rule between the date it goes into effect of an emergency rule and the date that the Administrative rules Committee has an opportunity to review it and approve it. **Senator**

Dotzenrod: The Section 1 of the bill, that Subsection 5, that's being amended here, being changed, does that Subsection 5 the way it fits into 28:32-03 does that just confine itself to emergency, you know the process that is involved where we are dealing with emergency rules or does Section 5 apply to all who make these rules? **Julie Leer:** I believe that is specific to the emergency rule making process.

Lynn Helms, Director of Department of Mineral Resources in support of 1162. It seems like with the oil activity these days I am sending about one complaint a week based on Administrative Rules. Obviously the statutes that we use to govern the oil and gas industry contain a lot of good information but not nearly enough detail to work with the oil and gas attorney's in the arena they work in. I just found out two days ago in a settlement conference how they can spin a word to make it mean something entirely different than what I would've thought it would be spun too and how that will appear before a judge in resistance. We support the changes, we support HB 1162, and it makes some really good changes.

I do want to call one thing to your attention that concerns me. We're glad Representative Keiser sponsored the bill and we think it improves Administrative Rules process especially that business about not making an appearance before the Administrative Rules Committee and the conundrum that creates for the committee, and for the agency. But on page 3, line 14, there is a word 'amend' that concerns us. To this point in the Administrative Rules Committee has had the authority obviously to review a rule, and void it basically sending it to the administrative agency for new hearing process or revision and then bring it back to us again. This would open the door to that committee actually rule amendments in the Administrative Rule Committee hearing meeting process. I don't think the committee wants to do that, they might, we've been before the committee a few times when some members wanted to do that, but I think it short circuits the process because when we do a rule making there are a lot of requirements about notice, hearings, creating a record, responding to every comment that came in, written or verbal about the rule and then writing a final rule, taking it to the Industrial Commission, then bring it before you at the Administrative Rules Committee. This would allow that committee based on one individual who showed up there to amend that rule. This would put the amended rule in place. I don't think that's where the committee wants to go, and I do think it would affect to an extreme the due process of the agency and all the people who took the time and trouble to appear at that hearing or to submit written comments or whatever. I know it is a special case here, where it's the held over rule and nobody appears from the agency. I don't think that is a good idea. That idea of amending rules at the point in the process, I don't think is good policy. I think that committee should and does have the authority to send those rules back to the agency and we're not going to let them be implemented like this. Have them reheard, re-work them and come see us again. To write amendments right there in the committee I don't think that is good policy.

Chairman Andrist: My understanding there is no place where Administrative Rules Committee's permitted to amend rules to begin with. **Lynn Helms:** Not until these amendments to this bill. **Chairman Andrist:** We sometimes use a little coercive authority and say we don't like this rule, if you want us to adopt them you're going to have thought about changing them. But I don't think we can change them. I will see if Representative Keiser changes that or if I misunderstood. **Lynn Helms:** So this wasn't in the original bill,

this was part of the House amendments and just that one word that causes us concern. And I don't feel that's good policy to do it that way.

Chairman Andrist: Representative Keiser, Lynn raises a point that we did not catch and we would welcome. I think the attorneys here can help you come up with the proper language. Contrary to what Lynn just said, we amend rules all the time in Administrative Rules. But we don't amend the intent. Usually it's one word, it's the way something is stated and an objection is raised to that and rather than going all the way back and going through the advertising, and everything else, the rule is okay, but I do think that Lynn raises a great point because amend has a very specific definition. It is not what the intent is here. The intent is a friendly amendment agreed to by the agency. We don't want them to go back and go through the advertising because we need to change one word, and if the agency said we can live with that, you could delete that. Now it does circumvent that process but we're trying to do it in an efficient way. I would hate to see a rule voided, and we don't do it often but it does occur where there's a technical amendment or not a substandard amendment and they really say it really isn't once they've heard the public testimony that isn't really the thrust of this rule. These rule as it stands we could delete that. Now we could force them to go back and come forward. It would be interesting to hear how much the agencies want to do that versus the flexibility to have a discussion and then make an adjustment in the language. But I think he raises a very legitimate point, amend may not be the right term. There might be a way to state it that gives them the authority to make a change to the department approves that doesn't substantially change the way the rule was presented to the public. I support that 100%.

Chairman Andrist: I think at this point, I would like to take the time to confer with John Walstad on this before we act on the bill. I am under the impression that we can't really amend the rule but you're right we do it if the agency says yes that is okay we'll do it ourselves

Lynn Helms: If it's is a *de minimis* (insignificant) change and the agency agrees to it, sometimes language changes are made, but as you might have picked up on , the oil and gas business is quite complicated, and subsurface mineral production is. So frequently Administrative Rule hearings or committee meetings we will appear of course or my assistant director, the representative of the Petroleum Council will appear and quite often one party. There will be in the record hundreds of written comments or comments from people who appeared at our hearing and they have no opportunity to participate in that amendment process. So, the other option beyond voiding it is to hold it over for one more month and let all of the parties be notified and conferred with come- back quarterly. I know it is quite a process but a lot of these rule changes that we do are extremely significant. (Example cited) **Lynn Helms:** Amendment may not be the place to do it and I understand that the process, we need to make it as efficient as possible. We ought to confer and figure out whether amend is the right word there or whether there ought to be somewhat more limiting language there. But there is the option of not just voiding it but also carrying it over to the next administrative rules committee meeting. We don't want too much of that to happen, obviously, but that does allow a period of three months for the rule making agency to confer with all the people that make comments.

Chairman Andrist: I guess I would be comfortable with just removing 'amend' because we're only talking about where nobody showed up from the agency. I can't conceive of the rules committee wanting to amend a rule when there is nobody from the agency present to discuss it with, so I just don't think it would ever happen anyway.

Senator Judy Lee: I get what you're saying when the director doesn't come, but we're in the section that it doesn't limit it only to that. The new language talks about that, that it seems to me it would still be appropriate for us to look at what kind of language it would take to do almost form and style kinds of things rather than substantive things. We'll pick the right word, but I guess I would like to suggest that the committee might want to consider what kind of language we would like to have instead of 'amend', unless the parties who are involved think leaving it entirely is the right thing to do. Because let's make legal what Representative Keiser said we're actually doing in those small cases.

Representative Keiser: I do hope that that you can find some language and if not strike amend. But if you can't find some language it just adds to a lot of paperwork, a lot of appearances because it doesn't happen all that much but maybe 10-15% of the time when a point is raised in the hearing and they say well we really meant to say this and if everybody says and that would be okay if you said it that way and they say absolutely. It doesn't change anything, it is a *de minimis* change and we can take it right then versus you will get into a situation where somebody could take you to court and say, you made a change, you didn't take it back and have the public hearing and this would give the option for *de minimis* change. If you don't have that, then the committee is going to have to hold over a one word change and I don't think that is what the departments want.

Chairman Andrist: We're only talking about where nobody shows up. So who would we confer with as far as amending the rule if nobody showed up? For the benefit of the other committee members who haven't served on this committee, I can only remember just one instance when an agency didn't show up. **Representative Keiser:** It is just in those cases and you're not voiding or amending. But the point is, and maybe in another section of the code, we do allow them the *de minimis* opportunity for change. I am not sure, but, it is just in where they don't show up.

Chairman Andrist: Maybe we need to clarify for sure that it just in the case where they don't show up.

Senator Judy Lee: Just looking at Subsection 2, to which this is added, if we leave it there and we pull out amend, we're still back to just may finding a rule void. It doesn't give permission in those other circumstances so, so the good unintended consequence of Mr. Helm's having discovered this concern is that maybe we can fixit for all of those circumstances. It looks to me like you can't do the *de minimis* kinds of things in any circumstance right now. You're just doing it in spite of the fact you're really not permitted to do that. Is that not correct? If you look at the first sentence in Subsection 2, on page 3, that doesn't say it's only when somebody doesn't show up, it's the new language that says when somebody doesn't show up. So if we put the rest of the new language in and we delete amend, we have not solved the problem of you're not being able to make those friendly changes that everybody agrees is just a better way to word something.

Chairman Andrist: My suggestion is for to Samantha to call Legislative Council, if Mr. Walstad would be available to talk to the committee. He really has a body of expertise on the whole administrative rules issue.

Lynn Helm: My understanding of this section of the code is the same as Senator Judy Lee's that without the added language, the administrative rules committee is limited to voiding the rule, or holding it over for one month or to the next subsequent meeting which allows people to visit about it, and try to do something about it. It doesn't really allow for form and style changes or anything like that. I don't think what you have to watch out for, is substantive changes or amendments to a rule without putting it back to its due process. Some of them are significantly impacted by those rules. **Chairman Andrist:** I am not sure we'll find out from Mr. Walstad on this, but I am still under the impression that technically the committee does not have authority to amend rules; but, if we've done it sort of by consent with the agency when there's is some kind of agreement that needs to be some to. **Lynn Helm:** That is my understanding too. If language needs to be clarified or something reworded just a little bit to clarify the intent or purpose of the rule or make it fit with one of the comments that the committee asks for that.

Senator Judy Lee: I think the issue is really that as long as everybody agrees it is cool between those outfits that agree. But when the attorney for the third party steps in and there is some ambiguity about it that is where the rub is. So, if we can clarify that, isn't that really the situation? **Representative Keiser:** As I read through this again, these are very, very specific and reflect how difficult this doggone committee is to serve on because let's look carefully at the language we're talking about. If no representative of the agency appears before the Administrative Rules Committee meeting to which rules are held over for consideration, the rules are a void if the rules were adopted as emergency rules. This is clarifying that if an emergency rule is implemented and they don't show up for that subsequent meeting, the rules are void because they didn't show up. And for rules not adopted as emergency rules, but were held over, and someone doesn't show up, the Administrative Rules Committee may amend or void the rules to allow the rules to become effective or hold over consideration of the rules. This is giving us the authority to hold those over again or to take some action. But now we have our real expert here.

John Walstad: Legislative Council, spoke in neutral testimony on 1162. **Senator Andrist:** Have you had a chance to look at 1162? **John Walstad:** Not for a long time, but I tried to read it on the way down the stairs. I think I've got most of it. **Senator Andrist:** We're a little bit stuck on Section 4, subsection 2, page 3 line 14. We have a question whether the Administrative Rules has actual statutory authority to amend rules? **John Walstad:** The Administrative Rules Committee in current law does have authority to amend rules when they are presented but, the existing law is written that the amendment has to be in agreement with the agency. So the agency has got to say that change is acceptable to us and then the committee can approve it by motion and it goes into the code, boom. This is a bit different. This allows an amendment in the absence of the agency, so I guess what we are presuming their absence is their implied agreement.

Senator Judy Lee: I think that is what the term means, but I don't think that is what we want. **John Walstad:** What do we want? **Chairman Andrist:** I was specifically wondering is this authority to amend use state, we can only amend with the consent of the agency with

the agreement of the agency. But if the agency is not there, we obviously can't have the consent of the agency can we? And we are talking specifically aren't we about when the agency is not there? We don't change anything else. **John Walstad:** This would apply only if no agency representative shows up. That is twice. **Chairman Andrist:** That has happened twice? **John Walstad:** If no agency representative shows up for two meetings in a row. I am guessing it won't happen very often and I guess it would happen even less often with this provision in the law. **Chairman Andrist:** It was my understanding from Representative Keiser's testimony that this also addresses if the agency doesn't show up so then we have to carry it over to the next meeting. Then we don't have authority to, if we have problems with it, to carry it over an additional time. So the agency wouldn't have an opportunity to respond. **John Walstad:** That's correct.

Senator Olafson: Since this only would kick into effect when they don't show up for 2 subsequent meetings, wouldn't this give them the incentive to be there, if it is something that is of concern to them? **John Walstad:** I think there is a very strong incentive to show up already. But this, yes, I would make it even more so. Now, I can say I have been the code reviser since 1993, so I've staffed all the rules committee meetings since then and it's never happened that agencies have been absent two meetings in a row. **Chairman Andrist:** Do you see any violence to the bill if we removed the word amend? **John Walstad:** That is certainly the committee's choice. Actually I think having the word amend there, is more beneficial to the agency than not because the remaining option for the committee would be to void the rules and the agency would have to go back to square one and start over. **Lynn Helm:** Yes, Line 15 says it hold over for one more time. **John Walstad:** To me this change is a benefit to the agency. There is a possibility of amending or carrying over doesn't exist now. So at the second meeting of no show, the committee's choice would be let this go, or void it.

Senator Judy Lee: In order to make sure that we're considering all parties concerns about this, would it be reasonable to ask that perhaps the stakeholders could visit with Mr. Walstad and make sure that however we end up the language would be understood and acceptable to everybody who had brought a question and concern about this. Perhaps we could have further committee discussion on another day after getting some kind of consensus. I think we all want to go to the same place, we're just not all quite exactly sure that we're getting there. If we can get our GPS all focused on the same goal here, it would be good then.

Chairman Andrist: I think this is a good suggestion. Perhaps Julie and Lynn can visit with John Walstad and with Rep. Keiser has the time and interest he can do it too. We'll talk about it a little bit later.

Chairman Andrist: Anyone else wants to testify in support of this bill, or who is opposed to the bill, or wishes to provide additional information to the committee on this bill.

Closed hearing on HB 1162.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee Red River Room, State Capitol

HB 1162
March 21, 2011
15652

Conference Committee

Committee Clerk Signature	
---------------------------	---

Explanation or reason for introduction of bill/resolution:

Relating to notice of emergency rulemaking and the administrative rules committee carrying over consideration of administrative rules.

Minutes:

You may make reference to "attached testimony."

Chairman Andrist opened the Political Subdivision committee meeting for Committee work on HB 1162. All senators are present.

Chairman Andrist: We're here of course to take final action on HB 1162. The key consideration is in item 3 on this highlighted sheet.

Lynn Helms: Director of Division of Mineral Resources. We actively do Administrative Rules because that is how we govern the oil and gas industry; will govern the CO2 storage industry and subsurface minerals. First of all, I want to correct what I said yesterday that the Administrative Rules Committee cannot amend rules.

The highlighted portion of the handout (testimony #1) that I have presented to you this morning sort of qualifies that is that an agency can amend a rule in agreement with that committee. The agency may amend it. If it meets one of the lettered items under testimony #1 28-32-18, a) absence of statutory authority b) emergency relating to public health, safety or welfare c) failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule d) conflict with state law e) arbitrariness and capriciousness f) failure to make a written record of its consideration or written or oral submissions respecting the rule under section 28-32-11.

Chairman Andrist: These are reasons for avoiding. **Lynn helms:** They are also reasons for amending. If you look at the last paragraph it says, 'is necessary to address any of the considerations under subsection 1. So it is limited to those considerations. The Administrative Rules committee and the agency can agree to an amendment if one of those tests a-f is met. That is it! Having said that, I also should say we can live with the bill in its present form, because we will be there at that hearing. That word amend only comes in if you're not present as an administrative agency. As you stated a strong incentive to show up but as you also heard sometimes, that just happens, a family crisis or something that prevents attendance at that hearing. One would hope that committee would then carry over

those rules to the next committee meeting. That might or might not happen. The concern from an Administrative agency standpoint is we're now introducing language where it's not an agreed to amendment, it is the Administrative Rules committee amending the agencies rules, because they didn't show up. That is a very different policy direction from where we've been in the past.

Senator Olafson: The only time this would kick in that the Administrative Rules Committee can amend rules is when the agency hasn't shown up at two subsequent hearings. Correct? That's the way I interpret it. **Lynn Helms:** It can be interpreted that way. I don't think it's necessary to not show up twice. I think if you read the sentence, on page 3, (bill referenced). There is scenario where for example the oil and gas division appears and there is opposition from the oil and gas industry or from environmental segment, the rules are held over and for some reason we can't show up at that second meeting, I don't think you have to not show twice. I think this can kick in if you just don't show at a holdover.

Senator Olafson: So, would it be advisable to revise that sentence so that it's clear that this would only kick in when it's two subsequent meetings. If that second sentence were reworded. **Lynn Helms:** That would be of great assistance because I just can't even envision a scenario where the agents of a responsible agency wouldn't know how to appear twice. If it was amended to make it clear that two consecutive non-appearances justifies the amending of the rule avoiding then, we certainly could live with it.

Chairman Andrist: The reason this is not a high on my radar screen is I can't conceive of them arbitrarily amending a rule. What they are going to do if they are really angry at the agency: the first thing they would do is carry it over; the second thing they are going to do is find one of these 6 reasons for not approving the rules which I just can't conceive of them doing either. So that's why I really don't have any heartburn. I would just as soon take the amend out, but I don't see any harm if we left it in.

Lynn Helms: I would agree. I just wanted to call it to your attention that this is a step in the direction that this committee has not gone before in unilaterally amending proposed rules.

Chairman Andrist: And our statute says we can only amend it with the consent of the agency. **Lynn Helms:** Right. If this type of amendment was also subject to that consent nobody would have any problem with it whatsoever. However, if there was no one there at the meeting, how do you achieve that consent? If it was also subject to an agreement with the agency on the amendment the written consent, then nobody would have any problem with it.

Senator Judy Lee: I agree if it's a large agency or even one with more than one or two staff persons; there is not a chance that someone won't show up because it is just a broader base thing. But there are some small agencies in the state that some emergency that was mentioned yesterday could turn up and it's not that their blowing off the Administrative Rules Committee. It is highly unusual I would certainly agree that's true, but if we could clarify it, maybe just a little more specific in here, I think it might be helpful.

Chairman Andrist: If we wanted to tinker with it, my inclination would be to just remove the work amend, because from my frame of reference I can't imagine a committee every amending a rule without anybody there. **Senator Judy Lee:** I would hate to see the rules

voided in one of those circumstances. I think that would be much more onerous to have it voided than it would be to hang in there until the next meeting. **Chairman Andrist:** Your opening up another issue besides the amend issue. I thought we were stuck on whether or not they should be able to amend them. **Senator Judy Lee:** No, but if you take out amend all that's left if void, that's my point.

Lynn Helms: They could actually carry them over another time. So they actually have three choices under the current language: 1) amend 2) void 3) hold them over again. And so if you removed amend they would have only two choices, void or hold over again for another opportunity for the agency to appear. I guarantee that they will. **Chairman Andrist:** I would like to reassure the committee, based on the experience I've had the last thing they would choose to do is to negate the rules. We've many times held over the whole rule, I can't remember how many times we negated a whole rule, we've sometime negate a section or something.

Senator Olafson: Since I have no experience on the committee and you have extensive experience I would certainly defer to your judgment as to what you think would work.

Chairman Andrist: I really feel there isn't a huge problem leaving it or taking it out, but I guess I would be comfortable taking it out.

Senator Judy Lee: I want to be reassured that Mr. Helms doesn't see a problem with leaving it in, or some other language. If you had your druthers, what would you like to see? Because I would like to know how it works for the agency because we ought to be able to figure out a way to do this that isn't quite so complicated.

Lynn Helms: Our first choice would be to remove the word amend so that the rules would be held over for one more meeting and the agency clearly would have to show up. At that point, if they haven't shown up the rules probably should be voided. That would be our preference. We don't have a huge amount of heart burn with that word amend because we will show up. But I don't want to put all my brother and sister agencies in a position of always having to show up every time or having the rules amended,

Chairman Andrist: I guess I could expand what I said of the rules have come before us, from Lynn those that come from the environmental section of the Health Department, there so comprehensive a lot of the rules are so comprehensive we can't even begin to understand them. There are a lot of rules accepted in trust. What we tend to focus on more are in rules which we think are going to more directly impact you and I and stakeholders.

Julie Leer, Attorney with the Department of Human Services. The department hasn't taken a position on this bill. We'll go with what you say. I can see the good with the amendment, and also the bad. One of the things I would like to point out is that the committee actually right now has four options: 1) void, 2) amend 3) let them go into effect 4) hold them over. Now the way that this sentence is written, you can hold them over, it doesn't mean that it ends after that. There is no limit to the number of times they can be held over. We're a little bit like we have enough staff that we can't imagine a situation when we don't have somebody down there representing our agency. But I also understand a lot of little licensing boards and stuff they don't have that luxury. We have actually gone before the committee

and had a couple of things that we missed and have asked them to amend it on the fly or else they've said we don't like the way this caption reads, in light of the rest of the changes that you've made and can we change it, so we've removed an amendment. We've actually been on both sides where we've actually taken advantage of the opportunity to use that amending power of the committee. The word amend, I think the department can live with that, because the department would expect to have a representative there. If not then someone from the legal department sends somebody from whichever division rules there. Amend is just latitude. The danger in the word amend is that if somebody decides that this is an opportunity to go through and really go whole hog, that kind of gives them the opportunity to maybe get a little amendment happy perhaps. We've never seen that happen. So we could live with either one. I don't see it impacting us tremendously. I see the danger in amend. I think it would be used judiciously in this sense from all of our experiences before the committee. So I don't see it quite getting out of hand. But that is because of our experiences, it's the future that is unknown.

Senator Dotzenrod: One clarification, a long sentence starts on Line 10; the emergency rules there aren't the four choices. Emergency rules you only have one option and that is if the rules were adopted as emergency then you only have one choice and that is the rules are voided. That does seem to me to be a little odd. On line 12, it says the rules are void if the rules were adopted as emergency rules. I am a little puzzled by that because for some reason there was some sort of emergency and somebody couldn't be here, you wouldn't think the only choice open and available would be to void the rules. You would think they would have some other options. Maybe I don't quite get it yet.

Chairman Andrist: What we're talking about here is that the agency has not shown up for the second time emergency rules only not any others will be voided. **Senator Dotzenrod:** Maybe that's the right thing to do. **Chairman Andrist:** I would think that would be the height of irresponsibility on the part of the agency because emergency rules rise to a different level of responsibility for them.

Senator Olafson: I move to take out amend- adopt as an amendment, on Line 14 take out amend and or (page 3, line 14) after made strike 'amend and or' those two words.

2nd- Senator Laffen

Roll Call vote: 5 Yeas, 0 No, 0 Absent

Senator Olafson moves Do Pass as amended

2nd motion: Senator Laffen

Roll call vote: 5 Yeas, 0 No, 0 Absent

Carrier: Chairman Andrist

REPORT OF STANDING COMMITTEE

HB 1162, as engrossed: Political Subdivisions Committee (Sen. Andrist, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1162 was placed on the Sixth order on the calendar.

Page 3, line 14, remove "amend or"

Renumber accordingly

2011 TESTIMONY

HB 1162

#1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1162

Page 1, line 9, overstrike "take appropriate measures" and insert immediately thereafter "attempt"

Page 1, line 10, overstrike "every person" and insert immediately thereafter "persons"

Page 1, line 10, after "who" insert "the agency can reasonably be expected to believe"

Page 1, line 10, overstrike "be affected by" and insert immediately thereafter "have a substantial interest in"

Page 1, line 10, replace ", including compliance" with ". As used in this subsection, "substantial interest" means an interest in the effect of the rules which surpasses the common interest of all citizens. An agency adopting emergency rules shall comply"

Page 1, line 11, replace "providing" with "shall provide"

Page 1, line 14, after the period insert "When notice of emergency rule adoption is received, the legislative council shall publish the notice and emergency rules on its website."

Page 3, line 1, after the underscored period insert "Rules are not considered initially considered by the committee under this subsection until a representative of the agency appears before the administrative rules committee when the rules are scheduled for committee consideration."

Renumber accordingly

#1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1162

Page 1, line 9, overstrike "take appropriate measures" and insert immediately thereafter
"attempt"

Page 1, line 10, overstrike "every person" and insert immediately thereafter "persons"

Page 1, line 10, after "who" insert "the agency can reasonably be expected to believe"

Page 1, line 10, overstrike "be affected by" and insert immediately thereafter "have a
substantial interest in"

Page 1, line 10, replace ", including compliance" with ". As used in this subsection, "substantial
interest" means an interest in the effect of the rules which surpasses the common
interest of all citizens. An agency adopting emergency rules shall comply"

Page 1, line 11, replace "providing" with "shall provide"

Page 1, line 14, after "2" insert ". When notice of emergency rule adoption is received, the
legislative council shall publish the notice and emergency rules on its website"

Page 3, line 1, after the underscored period insert "Rules are not considered initially considered
by the committee under this subsection until a representative of the agency appears
before the administrative rules committee when the rules are scheduled for committee
consideration. If no representative of the agency appears before the administrative
rules committee meeting to which rules are held over for consideration, the rules are
void if the rules were adopted as emergency rules and for rules not adopted as
emergency rules the administrative rules committee may amend or void the rules, allow
the rules to become effective, or hold over consideration of the rules to the next
subsequent committee meeting."

Renumber accordingly

CHAPTER 28-32 ADMINISTRATIVE AGENCIES PRACTICE ACT

28-32-06. Force and effect of rules. Upon becoming effective, rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the administrative rules committee, or determined repealed by the legislative council because the authority for adoption of the rules is repealed or transferred to another agency.

28-32-18. Administrative rules committee may void rule - Grounds - Amendment by agreement of agency and committee.

1. The legislative management's administrative rules committee may find that all or any portion of a rule is void if that rule is initially considered by the committee not later than the fifteenth day of the month before the date of the administrative code supplement in which the rule change is scheduled to appear. The administrative rules committee may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:

- a. An absence of statutory authority.
- b. An emergency relating to public health, safety, or welfare.
- c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.
- d. A conflict with state law.
- e. Arbitrariness and capriciousness.
- f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

2. The administrative rules committee may find a rule void at the meeting at which the rule is initially considered by the committee or may hold consideration of that rule for one subsequent meeting. Within three business days after the administrative rules committee finds that a rule is void, the legislative council shall provide written notice of that finding and the committee's specific finding under subdivisions a through f of subsection 1 to the adopting agency and to the chairman of the legislative management. Within fourteen days after receipt of the notice, the adopting agency may file a petition with the chairman of the legislative management for review by the legislative management of the decision of the administrative rules committee. If the adopting agency does not file a petition for review, the rule becomes void on the fifteenth day after the notice from the legislative council to the adopting agency. If within sixty days after receipt of the petition from the adopting agency the legislative management has not disapproved by motion the finding of the administrative rules committee, the rule is void.

3. An agency may amend or repeal a rule or create a related rule if, after consideration of rules by the administrative rules committee, the agency and committee agree that the rule amendment, repeal, or creation is necessary to address any of the considerations under subsection 1. A rule amended, repealed, or created under this subsection is not subject to the other requirements of this chapter relating to adoption of administrative rules and may be published by the legislative council as amended, repealed, or created. If requested by the agency or any interested party, a rule amended, repealed, or created under this subsection must be reconsidered by the administrative rules committee at a subsequent meeting at which public comment on the agreed rule change must be allowed.

28-32-18.1. Administrative rules committee review of existing administrative rules.

1. Upon request by the administrative rules committee, an administrative agency shall brief the committee on its existing administrative rules and point out any provisions that appear to be obsolete and any areas in which statutory authority has changed or been repealed since the rules were adopted or amended.

2. An agency may amend or repeal a rule without complying with the other requirements of this chapter relating to adoption of administrative rules and may resubmit the change to the legislative council for publication provided:

- a. The agency initiates the request to the administrative rules committee for consideration of the amendment or repeal;
- b. The agency provides notice to the regulated community, in a manner reasonably calculated to provide notice to those persons interested in the rule, of the time and place the administrative rules committee will consider the request for amendment or repeal of the rule; and
- c. The agency and the administrative rules committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community from the amendment or repeal.