

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday, March 14, 2012
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Kim Koppelman, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Kim Koppelman, Randy Boehning, Duane DeKrey, Bill Devlin, Robert Frantsvog, Joe Kroeber, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Joan Heckaman, Jerry Klein, Margaret Sitte

Members absent: Representatives Bill Amerman, Tracy Boe, David Monson, Mike Schatz; Senator Layton Freborg

Others present: See [Appendix A](#)

It was moved by Representative Thoreson, seconded by Senator Sitte, and carried on a voice vote that the minutes of the December 15, 2011, meeting be approved as distributed.

OIL AND GAS DIVISION

Chairman Koppelman called on Mr. Bruce Hicks, Assistant Director, Oil and Gas Division, Department of Mineral Resources, Industrial Commission, for presentation of testimony ([Appendix B](#)) relating to oil and gas industry rules adopted by the Industrial Commission.

Mr. Hicks reviewed the details of the rulemaking and pointed out several rules modifications made after public comments were received. He said the bonding requirements are substantially increased and under the rules would be about two and one-half times the requirements of most states. He said the higher bonding requirements will provide a substantial incentive for operators to comply with the rules. He said the potential for confiscation of the bond and a denial of the permit to operate are significant incentives for compliance.

Mr. Hicks said the enhanced requirements for frac water pits, drilling pits, and waste material disposal will increase compliance costs but also will take thousands of truck trips off the roads. He said hydraulic fracturing standards incorporated in the rules have been self-imposed by the oil industry and are becoming a national standard. He said since last June no incidents of failures have occurred, and during that time, the industry has self-imposed the standards.

Mr. Hicks said leak and spill cleanup requirements and reclamation requirements are enhanced. He distributed copies ([Appendix C](#)) of photographs of the damaged and current status of the Charbonneau Creek saltwater spill. He said the ruptured pipeline

resulted in the largest saltwater spill from oil production in North Dakota. He said many feared the area could not be returned to its original condition, but as the photographs indicate, the site is being returned to its natural state.

Representative Koppelman asked if Mr. Hicks foresees any legislation that may be needed on the topics covered by the rules. Mr. Hicks said the Oil and Gas Division tries to maintain an eye on future needs. He said at this time no pressing issues appear to require legislative action, but carbon dioxide storage may become an issue for legislative consideration.

Senator Klein asked if the increased bonding requirements will compromise the business climate for the oil industry. Mr. Hicks said the bonding requirement was set with concerns for environmental protection and to encourage development, production, and utilization of oil and gas resources. He said he believes the requirement balances those concerns. He said the oil industry is not entirely happy with the amount of the bond requirement but did not balk too much, so it appears the industry understands the need for the increase. Senator Klein asked if the industry would feel differently if oil drops to \$30 per barrel. Mr. Hicks said that would change opinions and would result in rigs being taken out of action.

Representative Frantsvog asked if the bond limits are flexible. Mr. Hicks said the bond amounts are set.

Representative Koppelman said it appears the rules are established not to manipulate the market but to administer the industry. Mr. Hicks said that is correct.

Senator Klein asked what the estimated cost of compliance of the rules change will be for the oil industry. Mr. Hicks said increased compliance costs for the rules would be approximately \$300,000 per well.

Representative Koppelman called on Mr. Ron Ness, Executive Director, North Dakota Petroleum Council, for comments on the rules adopted by the Oil and Gas Division. Mr. Ness distributed copies of a letter ([Appendix D](#)) he submitted to the Oil and Gas Division on November 1, 2011, observing that substantial additional expenses for the oil industry will be imposed by the rules changes, but the oil and gas industry in North Dakota is committed to "doing it right" and supports the major rules changes. He introduced a new staff member of the North Dakota Petroleum Council--Ms. Alexis Brinkman.

Mr. Ness said although the oil industry supports the rules changes, it is important to recognize that these rules are largely targeted to Bakken Formation economics and \$100 per barrel oil. He said not all drilling operations are in these circumstances, and the rules will tend to discourage activity outside the Bakken defined area and limit wildcat operations.

Mr. Ness said with regard to hydraulic fracturing disclosure, the industry is attempting to dispel some of the misinformation and fear about the environmental effects of hydraulic fracturing. He distributed copies of information ([Appendix E](#)) regarding FracFocus--an informational website providing information availability to the public and governmental officials regarding well completions, hydraulic fracturing stimulation, chemical content of injected fluids, and effects on water. He said the website allows the user to locate an individual well and get information on the depth of drilling and the maximum ingredient concentration of fluid components used in fracing. He said the oil industry thinks disclosure is the right thing to do so the public can understand the facts of oil extraction.

Senator Klein said there may be concern that if we go beyond the stringency level of rules that might apply later in time or in areas outside the Bakken Formation, it may become hard to pull back the level of restrictions. Mr. Ness said it is important for the industry and government to be cognizant of changing economics as development reaches other areas and formations. He said it is important to continue to encourage wildcatting operations to explore new areas.

Senator Andrist asked if there is flexibility in the rules to allow exploration of other areas. Mr. Ness said the oil industry believes the director of the Department of Mineral Resources must have authority to relax standards in areas outside the Bakken core, and the rules contain that flexibility.

Representative Koppelman asked if the industry has any suggestions for committee action on these rules. Mr. Ness said the industry supports these rules but wants it to be acknowledged that these changes impose significant cost increases for the industry.

Senator Klein asked if there is enough authority for the director of the Department of Mineral Resources to make appropriate adjustments for drilling operations in Bottineau County and other areas outside the Bakken area. Mr. Ness said the industry is comfortable these rules provide the necessary flexibility.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Koppelman called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, who provided written testimony ([Appendix F](#)) regarding rules adopted by the Public Employees Retirement System (PERS).

Senator Klein said in the bid specifications rule--North Dakota Administrative Code Section

71-03-01-02--the word "will" is changed to "may" and asked why the change was made. Mr. Collins said the section provides a list of types of insurance for bid solicitations and use of the word "will" may have mislead readers that all of the items on the list would be bid in one solicitation. He said the change was made to make it clear that bids may be sought for individual types of insurance coverage.

Senator Andrist said defined benefit plans around the country appear to be heading for trouble according to news reports. He asked if there are any issues of that kind in North Dakota. Mr. Collins said there are challenges for funding for defined benefit and defined contribution plans. He said PERS came to the Legislative Assembly with a funding recovery plan that was approved in 2011. He said the changes will help, and we had a 21 percent return on our plan last year, which will also help. He said the recovery plan is in place until 2015, and PERS will monitor the recovery and alert the Legislative Assembly in 2013 of any needed changes.

STATE LOTTERY

Chairman Koppelman called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony ([Appendix G](#)) relating to rules of the North Dakota Lottery. Mr. Miller said the rules were adopted as emergency rules effective January 15, 2012.

Senator Klein asked for a description of how the rule came into existence increasing the cost for a play of the Powerball lottery from \$1 to \$2. Mr. Miller said last June the Multi-State Lottery Association approved the change. He said North Dakota is a member of the association and voted no on the motion but a two-thirds vote was obtained, and the change was made by the Multi-State Lottery Association. He said effective January 15, 2012, North Dakota was required to offer the \$2 play for Powerball to continue its participation in the lottery.

In response to another question from Senator Klein, Mr. Miller said North Dakota is seeing about 22 percent increase in Powerball sales, which indicates that the Powerball game is losing some players but showing an increase in revenue.

In response to a question from Senator Sitte, Mr. Miller said the North Dakota Lottery transfers \$50,000 per calendar quarter to a fund for gambling addiction services. He said statistics show that lottery participation is very low on the causes of problem gambling. He said casinos and pulltabs are the highest percentage cause of gambling problems.

Senator Andrist asked if there has been consideration to dropping participation in the Powerball lottery. Mr. Miller said the Constitution of North Dakota requires participation in a multistate lottery and would not allow the state to conduct its own lottery.

Representative Wrangham said there are a couple of issues that are a concern to him. He said the issues relate to an entity from outside the state controlling the actions of the state and requiring use of

emergency rulemaking. He said out-of-state entity control of implementation deadlines requires emergency rulemaking.

Representative Wrangham asked for information on recent developments in online sales of lottery tickets. Mr. Miller said the United States Department of Justice issued an opinion that cleared state lotteries for online sales of lottery tickets. He said North Dakota has allowed other states to move forward with online sales and is waiting to consider the effects of those sales on retailers and the public. He said the lottery also is considering whether legislation would be needed to implement online sales of North Dakota lottery tickets.

Representative Boehning said North Dakota has a subscription service and asked if the subscription service will continue. Mr. Miller said the subscription service will continue, but online sales of lottery tickets differ. He said the current subscription service method takes about three weeks to become effective and receive lottery numbers. He said the new online approach method would be more of an instant play for participants. He said retailers are concerned with a possible loss of customer traffic if online sales are allowed.

Senator Sitte said she would like the lottery to stay out of online sales because it provides enhanced instant gratification, which is more addictive, without legislative approval.

STATE DEPARTMENT OF HEALTH

Chairman Koppelman called on Mr. Kenan L. Bullinger, Director, Food and Lodging Division, State Department of Health, for testimony ([Appendix H](#)) regarding rules adopted by the department. Mr. Bullinger said his testimony covers four sets of rules adopted by the department regarding environmental health practitioner licensure, the food code, bed and breakfast facilities, and assisted living facilities.

Chairman Koppelman called on Ms. Molly Sander, State Department of Health, for presentation of testimony ([Appendix I](#)) relating to State Department of Health vaccines rules.

SALES TAX

Chairman Koppelman called on Mr. Myles Vosberg, Director, Tax Administration Division, Tax Department, for testimony ([Appendix J](#)) relating to the existing administrative rule regarding contractors under Section 81-04.1-04-20.

Chairman Koppelman called on Mr. Paul Leverington, Custom Marketing Company, West Fargo, for comments on application of the rule for use tax application to contractors. Mr. Leverington said Custom Marketing Company has completed almost 30 years of business in North Dakota. He said the company puts up grain bins that have the capacity to dry grain, which allows farmers to store grain while it is still wet.

Mr. Leverington said the issue of concern to Custom Marketing Company came up a few years ago. He said the issue had not been encountered before, and he believes the application of the rule in question results in a double tax situation on sales by Custom Marketing Company.

Mr. Leverington said Custom Marketing Company is not a contractor. He said the company hires contractors to install its product. He said a change in tax application occurred although the company did not change its practice. He said a substantial assessment for sales taxes was imposed, and the company may be forced to relocate its employees to another state to avoid the double taxation of its product.

Mr. Rodger Mohagen, attorney, West Fargo, said he has been involved as legal counsel with Custom Marketing Company for seven or eight years. He said there are several issues that could be raised regarding sales tax application in the circumstances described, but he would like to focus the committee's attention on a couple of issues. He said Custom Marketing Company has grown into a company with a broader range of sales and sells goods to customers on a national basis. He said Custom Marketing Company is not a contractor and is not licensed as a contractor. He said for the Tax Department to find that Custom Marketing Company is subject to sales taxes, the Tax Department must make the finding that the company is a contractor to impose use tax on out-of-state sales.

Mr. Mohagen said it is the Tax Department's position that if materials come into inventory in North Dakota and are then sold and delivered to a purchaser in another state, they become subject to use tax.

Committee counsel said it is his understanding that if a use tax obligation exists for a North Dakota seller, that seller is entitled to a credit in North Dakota for any sales taxes paid on those goods in another state. Mr. Mohagen said that credit is not available in this circumstance because in North Dakota's view the North Dakota tax applies first, and the tax imposed in Nebraska is applied later. He said the Nebraska view is that North Dakota should not tax the product at all so Nebraska will not allow a credit against the Nebraska tax.

In response to a question from Senator Heckaman, Mr. Mohagen said Custom Marketing Company is agonizing over what to do. He said options being considered are moving the business to another state or beginning a court challenge of the taxes imposed by North Dakota and Nebraska.

Representative Frantsvog asked if there is another state that would not tax these sales like North Dakota does. Mr. Mohagen said that is a difficult question to answer because each state has differing interpretations and administration of sales and use tax provisions.

Senator Andrist said perhaps the committee can ask Mr. Vosberg to ask the Tax Commissioner to seek a solution to this problem.

Senator Klein asked Mr. Vosberg if something happened in 2000 or so that caused a change to administration of these provisions. Mr. Vosberg said because of sales tax confidentiality laws, he cannot describe the circumstances that led to the interpretation.

Representative Koppelman asked if the decision that Custom Marketing Company is a contractor is the key to applying the tax. Mr. Vosberg said that is correct.

Mr. Leverington stated several reasons why he believes Custom Marketing Company is not a contractor.

Mr. Vosberg asked Mr. Leverington if he would agree to Mr. Vosberg disclosing some information about transactions to help the committee understand the situation. Mr. Leverington said that would be acceptable. Mr. Vosberg said Custom Marketing Company contracts with the final customer for a bin to be erected on the customer's site. He said Custom Marketing Company then hires a contractor to install the bin. He said the Tax Department does not view this transaction as a wholesale sale. He said if Custom Marketing Company sold all of the materials to the final customer, and the customer hired a contractor to construct the bin, the Tax Department would not impose use taxes in that circumstance.

Representative Koppelman said it appears from Mr. Vosberg's description that if Custom Marketing Company changed its contracts, the company could avoid being viewed as the contractor and subject to North Dakota use taxes. He asked Mr. Vosberg if that is a correct assumption. Mr. Vosberg said perhaps that would change the circumstances and avoid the tax liability, depending on how the contract is structured.

STATE BOARD OF PHARMACY

Chairman Koppelman called on Mr. Howard C. Anderson Jr., Executive Director, State Board of Pharmacy, for presentation of testimony ([Appendix K](#)) relating to rules adopted by the board.

Mr. Anderson said the rules relate to compounding pharmaceutical preparations, and lengthy consideration was given to the techniques and the best way to compound preparation for effectiveness and for the safety of the patient. He said the rules relate to nonsterile and sterile pharmaceutical compounding. He said compounding involves a pharmacist making a pharmaceutical preparation that is not commercially available.

Senator Heckaman asked if surrounding states are imposing these requirements. Mr. Anderson said surrounding states have adopted these kinds of requirements. He said North Dakota is maybe a little behind on putting these in place. He said the State Board of Pharmacy wanted to give some time to observe how these standards were implemented in other states before taking final action.

PUBLIC SERVICE COMMISSION

Chairman Koppelman called on Ms. Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, for testimony ([Appendix L](#)) relating to pipeline safety and gas safety program rules amendments adopted by the commission. Ms. Jeffcoat-Sacco said the amendments are adopted to maintain compliance with federal gas safety regulations.

In response to a question from Representative Koppelman, Ms. Jeffcoat-Sacco said adopting the federal standards by reference allows the state to enforce the rules.

Ms. Jeffcoat-Sacco provided copies of a request ([Appendix M](#)) by the Public Service Commission for an extension of time to adopt rules to implement 2011 Senate Bill No. 2196 relating to the definition of a wind energy conversion facility.

Representative Sitte asked if there are any provisions in existence requiring wind farm reclamation and imposing a bonding requirement for that purpose. Ms. Jeffcoat-Sacco said no bonds are required for wind farms at this time. She said she would bring the issue up for Public Service Commission consideration.

Chairman Koppelman said the committee practice has been to grant an extension of time to adopt rules with a specified time limit. He asked what length of extension is being requested by the Public Service Commission. Ms. Jeffcoat-Sacco said an extension until the end of November 2012 would be adequate.

It was moved by Representative Thoreson, seconded by Senator Klein, and carried on a voice vote that the Administrative Rules Committee approve an extension of time for Public Service Commission adoption of rules regarding the definition of a wind energy conversion facility through November 2012.

REAL ESTATE COMMISSION

Chairman Koppelman called on Ms. Pat Jergenson, Executive Director, Real Estate Commission, for testimony ([Appendix N](#)) relating to rules adopted by the Real Estate Commission.

DEPARTMENT OF HUMAN SERVICES

Chairman Koppelman called on Mr. Jonathan Alm, Legal Counsel, Department of Human Services, for presentation of testimony ([Appendix O](#)) relating to Medicaid eligibility and children's health insurance program rules.

Mr. Curtis Volesky, Director of Medicaid Eligibility Policy, Department of Human Services, said the rules primarily relate to definitions being moved to more appropriate placement in the rules and clarification of policies.

Mr. Alm reviewed prepared testimony ([Appendix P](#)) on rules amendments governing aid to vulnerable aged, blind, and disabled individuals and the program

for expanded service payments for elderly and disabled.

BOARD OF SOCIAL WORK EXAMINERS

Committee counsel said a copy of communication ([Appendix Q](#)) from Ms. Nikki Owings was received to inform the committee that the Board of Social Work Examiners is unable to have a representative present for this meeting. He said under a 2011 statutory change the absence of an agency representative means the rules are automatically carried over for consideration at the next committee meeting.

WORKFORCE SAFETY AND INSURANCE

Chairman Koppelman called on Mr. Rob Forward, staff attorney, Workforce Safety and Insurance, for presentation of testimony ([Appendix R](#)) relating to rules adopted by Workforce Safety and Insurance. Senator Sitte said in Sections 92-01-02-12 and 92-01-02-24 the new language added uses the phrase "amount of miles" which should say "number of miles" to be grammatically correct. Chairman Koppelman said the wording can be changed if agreeable to Workforce Safety and Insurance and approved by the committee. Mr. Forward said Workforce Safety and Insurance would suggest making the grammatical correction. **It was moved by Senator Sitte, seconded by Representative Boehning, and carried on a roll call vote that the committee agree with Workforce Safety and Insurance to change "amount of miles" to "number of miles" in Sections 92-01-02-12 and 92-01-02-24.** Voting in favor of the motion were Representatives Koppelman, Boehning, DeKrey, Devlin, Frantsvog, Kroeber, Thoreson, and Wrangham and Senators Andrist, Heckaman, Klein, and Sitte. No negative votes were cast.

AGRICULTURAL PRODUCTS UTILIZATION COMMISSION

Chairman Koppelman called on Mr. John Schneider, Executive Director, Agricultural Products Utilization Commission, Department of Commerce, for presentation of testimony ([Appendix S](#)) relating to rules adopted by the Department of Commerce. Mr. Schneider said the rules as submitted provided for repeal of Articles 95-02, 95-03, 95-04, and 95-05. He said these repeals were not included in the rules as prepared for committee consideration. Committee counsel said it appears those repeals were omitted by mistake, and they will be added to the changes incorporated in the Administrative Code.

BOARD OF CLINICAL LABORATORY PRACTICE

Chairman Koppelman called on Ms. Sandra Matthey, Board Secretary, Board of Clinical Laboratory Practice, for presentation of testimony ([Appendix T](#)) regarding rules adopted by the board.

Representative Koppelman asked if Section 96-02-10-01 is an appropriate rule since it is stated to provide an exemption from a statutory chapter. Committee counsel said the answer would depend on what statutory provisions provide. Representative Koppelman requested examination of the status of exemption by rule from a statutory provision.

COMMITTEE DISCUSSION

Senator Andrist said he understands that the housing incentive fund receives a 10 percent fee for administration. He said he believes that amount to be an excessive fee and requested information on the status of the housing incentive fund fees. Ms. Karlene Fine, Industrial Commission, said the Housing Finance Agency could address that inquiry at the next committee meeting.

EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Koppelman called on Mr. Michael Heilman, Education Standards and Practices Board member and Assistant Superintendent of Bismarck Public Schools, for presentation of testimony from the board regarding elimination of board rules that have become obsolete because of statutory changes made in 2011. A copy of the board's testimony and request is attached as [Appendix U](#).

It was moved by Representative DeKrey, seconded by Senator Sitte, and carried on a roll call vote that the Administrative Rules Committee agree with the Education Standards and Practices Board on the rules changes suggested by the board to eliminate obsolete provisions in Chapter 67.2-02-02. Voting in favor of the motion were Koppelman, Boehning, DeKrey, Devlin, Frantsvog, Kroeber, Thoreson, and Wrangham and Senators Andrist, Heckaman, Klein, and Sitte. No negative votes were cast.

It was moved by Senator Klein, seconded by Representative DeKrey, and carried on a voice vote that the meeting be adjourned. The meeting was adjourned at 3:30 p.m.

John Walstad
Code Revisor

ATTACH:21