

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, September 13, 2016
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Bill Devlin, Randy Boehning, Joshua A. Boschee, Kim Koppelman, Scott Louser, Mike Schatz, Mary Schneider, Peter F. Silbernagel, Gary R. Sukut, Blair Thoreson, Nathan Toman, Robin Weisz; Senators Kelly M. Armstrong, Jerry Klein, Connie Triplett

Members absent: Representatives Robert Frantsvog, Gail Mooney; Senator Kyle R. Davison

Others present: Todd Porter, State Representative, Mandan
See [Appendix A](#) for additional persons present.

It was moved by Senator Armstrong, seconded by Representative Thoreson, and carried on a voice vote that the minutes of the June 14, 2016, meeting be approved as distributed.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Craig Thorstenson, Division of Air Quality, State Department of Health, for testimony ([Appendix B](#)) regarding the rules of the department carried over for consideration from the June 14, 2016, meeting. He said the department is not changing any public notice requirements. He said the rule changes under consideration involves the department providing the counties with a link to information regarding a project rather than providing the county with a paper copy of information regarding the project. He said a survey of county auditors indicated providing the county with a link to the information rather than a paper copy was acceptable.

Chairman Devlin said in light of the department's explanation of the department's notification procedure, no additional committee action was needed.

AGRICULTURE COMMISSIONER

Chairman Devlin called on Ms. Rachel Seifert Spilde, Industrial Hemp Program Coordinator, Agriculture Department, for testimony ([Appendix C](#)) regarding the rules adopted by the Agriculture Commissioner.

In response to a question from Representative Koppelman, Ms. Seifert Spilde said the rule changes are intended to bring the rules regarding industrial hemp into alignment with the statute. She said under the state's 2016 industrial hemp pilot program, five producers were chosen. She said the five producers have planted nine varieties of hemp, all of which are of Canadian origin. She said the one producer who has harvested had a good yield. She said the federal government continues to object to the production of industrial hemp. She said the 2014 federal farm bill allowed state departments of agriculture to plant hemp for research purposes. She said if the federal government approves the production of industrial hemp by removing it from the controlled substances list, the Agriculture Commissioner would like to have done as much research as possible.

In response to a question from Senator Triplett, Ms. Seifert Spilde said because the farm bill only allows for hemp research, the maximum size hemp field was changed from 10 acres to one-half acre. She said the intent was to make the rules research friendly.

ATTORNEY GENERAL

Chairman Devlin called on Mr. Randall Miller, Director, Lottery Division, Attorney General's office, for testimony ([Appendix D](#)) regarding rules adopted by the Attorney General.

In response to a question from Senator Triplett, Mr. Miller said the change from weekly to annually in North Dakota Administrative Code (NDAC) Section 10-16-11-04 was a correction. He said the distribution of prizes was always intended to be annual-based.

In response to a question from Senator Klein, Mr. Miller said the game Wild Card 2 was played in North Dakota, South Dakota, Idaho, and Montana. He said when Idaho and Montana decided to drop the game, it was no longer feasible for North Dakota and South Dakota to offer the game. He said Wild Card 2 generated about \$1.5 million per year. He said it was coincidental the game Lucky For Life started as Wild Card 2 ended.

Mr. Miller said sales of Powerball tickets are running about \$8 million higher than the same period last year. He said the extra sales of Powerball tickets were the result of the \$1.5 billion jackpot earlier this year. He said Powerball continues to be the lottery's most recognized game and it generates the most sales. He said of the \$35 million in annual lottery sales, \$18 million was paid out in prizes. He said the state has had two \$1 million winners in the last year. He said the state averages one 2by2 jackpot winner every 3 months.

In response to a question from Representative Boehning, Mr. Miller said retailers are encouraged to place the self-use central lottery terminals in locations visible to the retail staff. He said the retailer can disable the terminal with a remote control if the retailer notices a minor attempting to purchase lottery tickets from the terminal. He said minors are not allowed to redeem tickets or play the lottery. He said minors buying lottery tickets has not been an issue, but the lottery will continue to monitor sales closely.

NORTH DAKOTA MEDIATION SERVICE/CREDIT REVIEW BOARD

Chairman Devlin called on Ms. Jessie Pfaff, North Dakota Mediation Service, for testimony ([Appendix E](#)) regarding rules adopted by the North Dakota Mediation Service.

In response to a question from Chairman Devlin, Ms. Pfaff said the rule changes primarily address the expanded scope of program delivery and delete references to programs or services no longer offered by the North Dakota Mediation Service. She said due to the wide extent of the proposed rule changes, it was decided to delete all of the current program rules and draft new rules. She said credit counselors who work with agriculture producers are no longer allowed to be at the table during mediation.

In response to a question from Representative Koppelman, Ms. Pfaff said the Credit Review Board oversees mediation services. She said the Agriculture Department provides staffing for the board. She said the cost of mediation conducted by the Credit Review Board is considerably less than the cost of private mediation. She said agriculture mediation is \$25 per hour and the first 10 hours are free. She said parties to oil and gas production damage mediation, which are conducted under North Dakota Century Code Chapter 38-11.1, are charged the actual cost of the mediator.

In response to a question from Representative Silbernagel, Ms. Betty Schneider, North Dakota Mediation Service, said the North Dakota Mediation Service employs 2 part-time counselors and 1 part-time mediator. She said the service relies on contract mediators.

In response to a question from Senator Klein, Ms. Pfaff said the number of agriculture mediation cases has nearly doubled over the last year. She said there have been 47 mediation cases under the pipeline reclamation program. She said with respect to oil mediation, of the seven requests for mediation only one was mediated. She said for oil mediation, which is voluntary, both parties must agree to the mediation.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Dale Patrick, Manager, Radioactive Material, Asbestos, and Indoor Air Quality, State Department of Health, for testimony ([Appendix F](#)) regarding rules adopted by the department. He said North Dakota, which has signed an agreement with the Nuclear Regulatory Commission (NRC) to license and regulate nuclear materials, adopts by reference the NRC rules. He said as a result of a number of NRC rule changes, the proposed rule changes are required to remain compatible with the NRC rules.

In response to a question from Senator Klein, Mr. Patrick said North Dakota statute prohibits the disposal of high-level nuclear waste without legislative approval.

In response to a question from Representative Schneider, Mr. Patrick said the NRC exempts technologically enhanced naturally occurring radioactive material, commonly referred to as TENORM, which is regulated by the state.

In response to a question from Senator Triplett, Mr. Patrick said before 2016 the fees were included in the rules. He said for 2016 and going forward, the fees will be tied to the consumer price index.

In response to a question from Representative Schneider, Mr. Patrick said the rule changes will not require additional staffing at this time.

INDUSTRIAL COMMISSION

Chairman Devlin called on Mr. Bruce Hicks, Assistant Director, Oil and Gas Division, Industrial Commission, for testimony ([Appendix G](#)) regarding rules adopted by the Industrial Commission.

In response to a question from Senator Klein, Mr. Hicks said about 1,300 sites would need to be inspected to determine berm requirements. He said there have been instances of berms being effective in stopping a likely environmental impact and instances in which a berm was not used which resulted in a greater environmental impact than would have been with a berm. He said under the rules, existing sites will not be "grandfathered in." He said there are issues with existing berms which will need to be addressed. He said the Industrial Commission wants to require berms for all sites.

In response to a question from Representative Schneider, Mr. Hicks said the Attorney General reviewed the rules and comments to ensure the comments were considered.

Chairman Devlin called on Mr. Ron Ness, President, North Dakota Petroleum Council, for testimony ([Appendix H](#)) regarding the rules.

In response to a question from Representative Silbernagel, Mr. Ness said each site will need to be evaluated to determine the berm requirements.

In response to a question from Representative Boehning, Mr. Ness said many of the existing pads have been in place for years. He said because each site is unique, the berm requirements are unique as well. He said there are about 1,300 well sites and 8,000 to 10,000 well pads.

In response to a question from Senator Klein, Mr. Ness said 2015 House Bill No. 1358 was very comprehensive. He said the issues he is raising were vetted thoroughly in the bill. He said the intent of the bill was prospective. He said there is nothing in the language of House Bill No. 1358 to indicate the requirements would be retroactive.

In response to a question from Representative Koppelman, Mr. Ness said the items he identified as issues of concern are core aspects of the rules. He said it is important the rules reflect legislative intent.

In response to a question from Senator Armstrong, Mr. Ness said not all the rules changes result from House Bill No. 1358. He said the Industrial Commission made other rules changes as well. He said berms were not mentioned in House Bill No. 1358, which dealt primarily with gathering pipelines.

Chairman Devlin called on Mr. Lawrence Bender, representing Continental Resources, Inc., for testimony ([Appendix I](#)) regarding the rules.

In response to a question from Senator Triplett, Mr. Bender said the Industrial Commission has authority over gas lines. He said there is no federal preemption yet and there may not be for several years.

In response to a question from Representative Silbernagel, Mr. Bender said the tank containment systems are separate from the berms.

At the request of Chairman Devlin, Mr. Hicks provided information ([Appendix J](#)) in response to the testimony of Mr. Ness and Mr. Bender. He said requirements for berms appear in three sections of the rules. He said although House Bill No. 1358 did not address berms, this set of rules does not rely solely on that bill for authority. He said after considering comments, the minimum height of the berms was reduced, an extension of time was allowed when needed, and other modifications are allowed to be requested. He said the rules provide for flexibility. He said the Industrial Commission does not want to grandfather in existing sites.

Mr. Hicks said 2013 House Bill No. 1333 and the rules adopted pursuant to that bill gave the Industrial Commission the authority to regulate all pipelines. He said there is little in the current set of rules regulating natural gas. Regarding the retroactive issue, he said, the bonding authority is for any pipeline. He said it is not overreaching to have a blanket bond to cover all pipelines. He said because the Industrial Commission knew it did not have authority to cover gas pipelines, gas pipelines were not included.

Chairman Devlin called on Mr. Kevin Connors, Pipeline Program Supervisor, Industrial Commission, for testimony regarding bonding of existing pipelines ([Appendix K](#)), leak protection, detection, and monitoring ([Appendix L](#)), and clamping or squeezing produced water gathering pipelines ([Appendix M](#)).

In response to a question from Senator Triplett, Mr. Connors said the Industrial Commission has had a rule in place requiring an operator of any underground gathering pipeline to report leak detection and monitoring methods since April 1, 2014. He said the new rules overstrike the reporting language in one section and move it to more appropriate locations. He said the Industrial Commission wants to know what the operator's plans are regarding leak detection and monitoring.

In response to a question from Representative Weisz, Mr. Connors said there was not and is not a requirement for leak detection to be installed.

In response to a question from Representative Boehning, Mr. Connors said there is not a standard for produced water pipes as there is for natural gas lines.

Mr. Hicks said if there was a standard for produced water, the rules would allow the Industrial Commission to use it. He said the rules provide if the operator installs a detection system, it must be reported to the Industrial Commission. He said there is statutory authority to require the reporting of this information.

Senator Triplett said she agreed the Industrial Commission has the statutory authority to retroactively require bonding.

In response to a question from Senator Triplett, Mr. Hicks said the Industrial Commission has general authority to protect the environment. He said from this authority, the commission has the authority to require certain protections, such as berms. He said not all sites will require berms, such as those sites that have a dike. He said the berm requirements will be handled on a case-by-case basis.

In response to a question from Representative Boehning, Mr. Hicks said not all sites are impermeable. He said the key is for a site to be sufficiently impermeable for emergency holding. He said it is feasible that some sites could still be bermed this year.

In response to a question from Representative Silbernagel, Mr. Hicks said the rules allow for clamping or squeezing of pipes if the manufacturer's specifications allow the procedure to be done. He said an operator can appear before the Industrial Commission to present their case regarding whether a particular type of pipe can be clamped or squeezed.

In response to a question from Senator Triplett, Mr. Hicks said because of unforeseen circumstances, it would not be wise to amend the rules at this time to create an exception to the berm requirement. He said policies will be made available for all rules.

Chairman Devlin called on Representative Todd Porter, for testimony regarding the retroactive provisions of the rules and protection and detection issues. He said he served as the chairman of the 2015 House Energy and Natural Resources Committee. He said the Senate Appropriation Committee discussed retroactive application, but the language was not adopted. He said because it was reported to his committee that a system does not exist that can detect or prevent leaks in all situations, the Energy and Environmental Research Center was asked to study the issues.

In response to a question from Representative Silbernagel, Representative Porter said the standing committee did not discuss a berm requirement or clamping or squeezing of produced water gathering pipelines.

In response to a question from Senator Triplett, Mr. Hicks said the rule regarding a detection system only requires the reporting of a detection system if the owner has such a system. He said the intent of the Industrial Commission in adopting this rule is to gather information.

Chairman Devlin called on Mr. Troy Coons, Northwest Landowner's Association, for comments regarding the rules. He said 2015 House Bill No. 1358, as passed, was a combination of seven different bills. He said the rules were vetted well. He said the rules are important to landowners because the rules provide protections and security to landowners when signing easements. He said landowners support detection and prevention.

Committee Discussion

Leak Detection

It was moved by Senator Armstrong and seconded by Representative Koppelman that subdivision a of subsection 8 and subsections 9 and 10 of NDAC Section 43-02-03-29, which relate to leak protection, detection, and monitoring, be held over to the next meeting.

Senator Triplett said she opposed the motion. She said the language only requires the owners to report a protection and detection system if the owner has such a system.

The motion carried on a roll call vote. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Schatz, Silbernagel, Sukut, Thoreson, and Toman and Senators Armstrong and Klein voted "aye." Representative Schneider and Senator Triplett voted "nay."

Bond Requirements

Senator Armstrong said because House Bill No. 1358 did not authorize the bonding requirement to apply retroactively to existing pipelines, NDAC Section 43-02-03-15, the rule adopted relating to bond requirements, should not apply to existing pipelines.

It was moved by Senator Armstrong, seconded by Representative Schatz, and carried on a roll call vote that NDAC Section 43-02-03-15, which relates to bond requirements, be carried over until the next meeting. Representatives Devlin, Boehning, Koppelman, Louser, Schatz, Schneider, Silbernagel, Sukut, and Thoreson and Senators Armstrong, Klein, and Triplett voted "aye." Representative Boschee voted "nay."

Underground Gas Gathering Pipelines

Senator Armstrong said there are concerns about the authority of the Industrial Commission to regulate underground gas gathering pipelines.

Senator Triplett said when looking at retroactivity and legislative intent issues, it is important to focus on the Industrial Commission's broad range of rulemaking authority.

It was moved by Senator Armstrong, seconded by Senator Triplett, and carried on a roll call vote that NDAC Sections 43-02-03-29 and 42-02-03-29.1, which relate to underground gas gathering pipelines, be carried over to the next meeting. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Schatz, Schneider, Silbernagel, Sukut, and Thoreson and Senators Armstrong, Klein, and Triplett voted "aye." No negative votes were cast.

Berm Requirements

It was moved by Senator Armstrong, seconded by Representative Louser, and carried on a roll call vote that NDAC Section 43-02-03-49, subsection 6 of NDAC Section 43-02-03-51.3, and subsection 6 of NDAC Section 43-02-03-53.3, which relate to berm requirements, be held over to the next meeting. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Schatz, Schneider, Silbernagel, Sukut, and Thoreson and Senators Armstrong, Klein, and Triplett voted "aye." No negative votes were cast.

STATE BOARD OF NURSING

Chairman Devlin called on Dr. Stacey Pfenning, Executive Director, State Board of Nursing, for testimony ([Appendix N](#)) regarding rules adopted by the State Board of Nursing. She said the rules authorize an advanced practice registered nurse with prescriptive authority who prescribes controlled substances to have access to the North Dakota prescription drug monitoring program.

In response to a question from Representative Silbernagel, Dr. Pfenning said the State Board of Nursing plans to educate advanced practice registered nurses on this authority by working with nursing associations and providing information through online sources and in newsletters.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Mr. Bob Marthaller, Assistant Superintendent, Department of Public Instruction, for testimony ([Appendix O](#)) regarding rules adopted by the Superintendent of Public Instruction.

In response to a question from Representative Koppelman, Mr. Marthaller said the repealed school accreditation rules are being replaced with a school improvement process. He said the school improvement process allows schools involved in the process to seek accreditation through AdvancEd. He said AdvancEd is a nonprofit, nonpartisan organization that conducts rigorous, onsite external reviews of elementary and secondary schools and school systems to ensure that all learners realize their full potential. He said the accreditation process was input-based while the school improvement process looks at outcomes. He said by statute, the Superintendent of Public Instruction has the authority to select the school improvement process.

Representative Koppelman said Mr. Marthaller may want to consider amending the rules to include language that would adopt the AdvancEd process by reference.

It was moved by Representative Koppelman, seconded by Representative Schatz, and carried on a roll call vote that the rules presented by the Superintendent of Public Instruction be held over to include language that would adopt the AdvancEd process by reference. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Schatz, Schneider, Silbernagel, Sukut, and Thoreson and Senators Armstrong, Klein, and Triplett voted "aye." No negative votes were cast.

PUBLIC SERVICE COMMISSION

Chairman Devlin called on Mr. Patrick Fahn, Director, Public Utilities Division, Public Service Commission, for testimony ([Appendix P](#)) regarding the rules of the Public Service Commission. He said the rules adopt, by reference, the federal regulations relating to response plans for onshore oil pipelines.

In response to a question from Representative Koppelman, Mr. Fahn said for hazardous liquids pipeline safety, the Public Service Commission has statutory authority, but has not initiated a hazardous liquids safety program agreement with the federal Pipeline and Hazardous Materials Safety Administration (PHMSA). He said with legislative budget approval, the Public Service Commission could implement a hazardous liquids safety program in the future. He said, therefore, the Public Service Commission continues to adopt updated PHMSA hazardous liquids pipeline safety rules.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Mr. Jonathan Alm, Legal Advisory Unit, Department of Human Services, for testimony ([Appendix Q](#)) regarding rules adopted by the department. He said the rules adopted by the department relate to child care assistance and the licensing of foster homes for adults.

OTHER BUSINESS

At the request of Chairman Devlin, the Legislative Council staff presented a memorandum entitled [Administrative Rulemaking Statistics 2015-16](#). She said the memorandum summarizes the number of sections and pages reviewed by the committee during the 2015-16 biennium. She said the memorandum also includes a statistical summary of rulemaking by agency. She said the number of sections affected in a biennium is not necessarily reflective of the number of pages of rules. She said a statutory change in the mid-1990s, which allowed the Administrative Rules Committee to reject or carry over rules, has resulted in more carefully drafted rules.

It was moved by Representative Silbernagel, seconded by Senator Klein, and carried on a roll call vote that the Chairman and the Legislative Council staff be requested to prepare a report and to present the report to the Legislative Management. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Schatz, Schneider, Silbernagel, Sukut, and Thoreson and Senators Armstrong, Klein, and Triplett voted "aye." No negative votes were cast.

No further business appearing, Chairman Devlin adjourned the meeting at 3:30 p.m.

Vonette J. Richter
Code Revisor

ATTACH:17