

2001 HOUSE JUDICIARY

HB 1028

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1028

House Judiciary Committee

☐ Conference Committee

Hearing Date 01-16-01

Tape Number	Side A	Side B	Meter #
Tape I	x		582 to 2300
Committee Clerk Signature <i>Joan Dues</i>			

Minutes: Chr DeKrey opened the hearing on HB 1028. The clerk will read the title. John Walstad would you like to come forward and explain the bill.

John Walstad: Legislative Council, Code Revisor - Council for the Administrative Rules Committee. Relating to authorization by the administrative rules committee before administrative rules may be effective on an emergency basis; and to provide an effective date. I am not for or against these bills, just giving the explanation. This bill imposes a new step in rule making process with regard to emergency rule making. Under existing law, agencies have the authority to make rule on an emergency basis for three reasons, imminent peril to public health, safety and welfare or because a delay is likely to cause a loss of revenue or to avoid a delay in implementing an appropriation measure. The committee had some concerns with this. He went on to state an example of a delay. This bill draft was developed by the committee and what it does is requires an agency, making emergency rule, to get prior approval from the Administrative Rules Committee that one of those three reason apply. The bill puts a 120 day limit for approval.

He went on to give further explanation of how this would effect an agency or process of rule making. It is drafted in two revisions because of HB 1030.

Rep Kretschmar: The reasons for adopting an emergency rule are the same in current law in the bill.

John Walstad: That is correct. On page 1 of the bill you can see there is some over struck language, we moved them to page 2 lines 3 - 8. It makes the section a little easier to read.

Rep Kretschmar: It is my understanding, the agency would declare one of the three rules, and it would be in effect and within 120 the Rules Committee would have to approve or what ever they would do, if they did not, it would go out of effect.

John Walstad: That is correct. That can be a problem.

Chr DeKrey: If there are no other question, thank you, John. Anyone else wishing to testify on HB 1028.

Melissa Hauer: Director of the Legal Advisory Unit for the Department of Human Services. (see attached testimony).

Rep Klemin: Your comment, that if an agency has abused its power, the action is properly reviewed by the judicial branch. Doesn't that mean, that in order for that to happen, someone is going to have to be harmed and start a law suit, before the judicial can review that action.

Melissa Hauer: That would be correct.

Rep Klemin: Isn't there a rule of statutory construction, whereby if you have a specific statute and a general statute, the specific statute controls.

Melissa Hauer: That is my recollection too.

Rep Klemin: Would that not address your concern about your comment number 3 on page 4?

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House Judiciary Committee
Bill/Resolution Number HB 1028
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Melissa Hauer: I believe that it would.

Rep Kretschmar: Under current law, do you have any knowledge or your agency have any knowledge, whereby an agency has created an emergency rule and later on having been reviewed by the Administrative Rules Committee, they have objected to it or thrown it out?

Melissa Hauer: I was in the Rules Committee when the Milk Marketing Board situation happened. So I have observed that.

Chr DeKrey: Thank you for appearing in front of this committee. Is there anyone else wishing to appear on HB 1028?

Lynn Helms: Director of Oil and gas Division of the North Dakota Industrial Commission. (see testimony attached).

Chr DeKrey: Does anyone have any question for Mr Helms?

Rep Klemin: When did these emergency rules become effective?

Lynn Helms: The rules became effective on February 4th, 1999. And then as Interim Final rules on August 1, 1999.

Chr DeKrey: If there are no further questions for Mr Helms, thank you for appearing. Anyone else wishing to testify on HB 1028? If not, we will close the hearing and I am going to appoint a subcommittee Chr Prep Grande, Rep Klemin and Pre Eckre to come up with amendments to address the concerns.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1028A

House Judiciary Committee

☐ Conference Committee

Hearing Date 01-17-01

Tape Number	Side A	Side B	Meter #
Tape II		x	764 to 1009
Committee Clerk Signature <i>Jean Davis</i>			

Minutes: Chr DeKrey: reopened the hearing on HB 1028.

Rep Grande: (Chr of the sub-committee) The sub committee decided to amend this bill and gave the reasons for the amendment.

Chr DeKrey: We will vote on the amendments first. Do I have a motion. Rep Grande moved the amendments. Rep Maragos seconded. Voice vote on the amendments. Motion carried.

What are the wishes of the committee. Rep Grande moved a DO PASS as amended. second by Rep Brekke. Motion passes 13 YES< 1 NO, and 1 Absent . Carrier is Rep Grande.

VR
1/17/01

HOUSE AMENDMENTS TO HB 1028

House Judiciary 01-19-01

Page 2, line 6, remove "or"

Page 2, line 8, replace the underscored period with "; or

- (4) Emergency effectiveness is necessary to meet a mandate of federal law.

HOUSE AMENDMENTS TO HB 1028

House Judiciary 01-19-01

Page 3, line 10, remove "or"

Page 3, line 12, replace the underscored period with "; or

- d. Emergency effectiveness is necessary to meet a mandate of federal law.

Renumber accordingly

Date: 01-17-01
Roll Call Vote #: /

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1028

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Rep Grande Seconded By Rep Brekke

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR --Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore		✓			
Rep Rachael Disrud	✓				
Rep Bruce Eckre	✓				
Rep April Fairfield					
Rep Bette Grande	✓				
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney	✓				
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 13 No 1

Absent 1

Floor Assignment Rep Grande

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

REPORT OF STANDING COMMITTEE

HB 1028, as amended, Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). placed on the Sixth order on the calendar.

Page 2, line 6, remove "or"

Page 2, line 8, replace the underscored period with "; or

(4) Emergency effectiveness is necessary to meet a mandate of federal law."

Page 3, line 10, remove "or"

Page 3, line 12, replace the underscored period with "; or

d. Emergency effectiveness is necessary to meet a mandate of federal law."

Renumber accordingly

2001 SENATE JUDICIARY

HB 1028

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2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1028

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 6th, 2001

Tape Number	Side A	Side B	Meter #
1	x		25.6-49
2	x		17.1-20.7
Committee Clerk Signature			

Minutes: **Senator Traynor**, opened the hearing on HB 1028; A BILL FOR AN ACT TO AMEND AND REENACT SUBSECTION 6 OF SECTION 28-32-02 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO AUTHORIZATION BY THE ADMINISTRATIVE RULES COMMITTEE BEFORE ADMINISTRATIVE RULES MAY BE EFFECTIVE ON AN EMERGENCY BASIS; AND TO PROVIDE AN EFFECTIVE DATE.

John Walstead, code revisor for the legislative council; Explains the bill. This amends one section in the clause. 2 amendments are intended to do the same thing. Must do this to conform to bill 1030. This provision relates to emergency rule making. Under current law the three reasons agencies can do emergency rule making is on line 9 -13 of page 1. They are over struck, they are not being eliminated they are being moved. Intention is allowing 120 days.

Senator Traynor, how does the 30 days fit in?

John Walstead, under current law, once an agency has approved a rule and filed a notice, as of that date, the rule is effective. Without the approval of the administrative rules committee. The

law provides for the rule to take place. This bill allows the committee to look over the rule within 120 days. There is a gap when the rule may not be implemented during a review of the rule by the committee.

Bob Harns, council for Governor Hoeven, opposes HB 1028. Concern boils down to 3 things: confusion of emergency, void in the rules and how it effects the agency, and the constitutional standpoint. Legislature has delegated power to agencies to adopt rules. Should a committee of the legislature undo an emergency rule? Those are 3 concerns of the governor. He recommends a do not pass.

Senator Traynor, is the present law working all right?

Bob Harns, we believe that it is and this law is used sparingly.

Senator Traynor, could you give an example visible to all of us?

Bob Harns, I can't but someone else here may give one more enlightening.

Senator Nelson, on line 9 and 10, page 2, is there an objection to adding this?

Bob Harns, that is correct.

Lynn Helms, Director of the Oil and Gas Division of ND, has not taken a position on the bill.

(testimony attached)

Senator Traynor, under the existing law you still need approval of the rules?

Lynn Helms, yes.

Senator Traynor, when did the administrative committee consider these rules?

Lynn Helms, July 1 and then published them Aug. 1

Senator Nelson, what is the definition of an emergency.

Lynn Helms, something that needs to be adopted right away.

Senator Traynor, closed the hearing on HB 1028.

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Senate Judiciary Committee
Bill/Resolution Number 1028
Hearing Date March 6th, 2001

Discussion

SENATOR WATNE MOTIONED TO ADOPT AMENDMENTS, SECONDED BY
SENATOR BERCIER. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND
NOT VOTING. SENATOR WATNE MOTIONED TO DO PASS AS AMENDED,
SECONDED BY SENATOR TRENBEATH. VOTE INDICATED 7 YEAS, 0 NAYS, AND
0 ABSENT AND NOT VOTING. SENATOR TRAYNOR VOLUNTEERED TO CARRY
THE BILL.

Date: 3/7/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1028

Senate	<u>Judiciary</u>	Committee
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☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Move Amendment

Motion Made By Watne Seconded By Berrier

[illegible]

Total (Yes) 7 No 0

Absent

Floor Assignment _____

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

Date: 3/7/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1028

Senate	Judiciary	Committee
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☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DPA

Motion Made By Watne Seconded By Trenbeath

[illegible]

Total (Yes) 7 No 0

Absent

Floor Assignment Traylor

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

REPORT OF STANDING COMMITTEE

HB 1028, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1028 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "subsection 6 of section 28-32-02 of the North Dakota"

Page 1, line 2, remove "Century Code or In the alternative to amend and reenact"

Page 1, remove lines 6 through 23

Page 2, remove lines 1 through 19

Page 2, line 24, after "agency" insert "with the approval of the governor."

Page 2, line 30, remove "Within one hundred"

Page 2, remove line 31

Page 3, remove lines 1 through 6

Renumber accordingly

2001 TESTIMONY

HB 1028

**TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE
REGARDING
HOUSE BILL NO. 1028
January 16, 2001**

Chairman DeKrey and members of the Committee, my name is Melissa Hauer. I am the Director of the Legal Advisory Unit for the Department of Human Services. I appear before you to testify regarding House Bill 1028. While the Department is neutral regarding this bill, it raises several unanswered questions:

This bill would change how agencies accomplish emergency rulemaking. As you probably know, it is important for agencies to have the flexibility to make administrative rules quickly to deal with emergency situations. The current emergency rulemaking process allows an agency to declare a rule effective immediately if one of the three following criteria is found to exist: 1) Imminent peril to the public health, safety or welfare; 2) a delay in rulemaking is likely to cause a loss of revenues appropriate to support a duty imposed by law upon the agency; or 3) a rule is reasonably necessary to avoid a delay in implementing an appropriations measure.

In addition to making such a finding, the bill would also require that the agency appear in front of the Administrative Rules Committee within one hundred twenty days of the declared effective date of the rule. The Committee would then review the rule and determine if there is truly an emergency which meets one of three criteria described above. If the Committee determines that the situation does not meet one of the three criteria, the agency may proceed with adoption of the rule and it will become effective at the time provided for in regular rulemaking.

The current language of the bill leaves unanswered the following questions:

1. What happens if the Administrative Rules Committee does not meet within one hundred twenty days of the declared effective date of a rule? During a Legislative Session it is quite possible that the meetings of the Administrative Rules Committee would be more than one hundred twenty days apart. For instance, the first meeting of the Administrative Rules Committee in 1997 was not held until July 29. If the Committee does not meet within one hundred twenty days, what happens to the agency's emergency rule? Is the agency no longer required to seek Committee review if the Committee fails to meet within one hundred twenty days? The bill should be amended to clearly state what is required of an agency in this scenario.
2. When is an emergency rule effective if the Administrative Rules Committee determines it does not meet one of the three statutory criteria? For instance, an agency finds an emergency and promulgates an interim final (emergency) rule effective on January 1, 2001. On April 10, 2001, one hundred days later, the agency presents the rule to the Administrative Rules Committee at its next meeting and the Committee finds the statutory basis for emergency rulemaking is not met. As the bill states, the agency is still allowed to proceed to finalize the rule as any "regular" rule and declare it final at the end of the process. So, is the rule effective from January 1 until the Administrative Rules Committee made its decision on April 10 and then becomes effective again when the agency finalizes the rulemaking project some months later? Or was the rule never in effect?

This question was raised by Senator Rich Wardner during the August 29, 2000 meeting of the Administrative Rules Committee. In response, the Committee's counsel stated that it is unclear whether disapproval of emergency status by the Committee would mean that the emergency rules were never effective before Committee consideration or whether they were effective only for a limited duration. Senator Wardner indicated that this brings uncertainty into the question of whether people may rely on emergency rules.

Those people or entities that are regulated will have a difficult time knowing whether they are subject to regulation immediately, for a window of time, or not until the rule project is finalized. Similarly, agencies will not know whether they can rely on a rule that they feel is necessary to deal with an emergency situation and possibly risk liability if the regulation is later overturned by the Administrative Rules Committee. For instance, an agency finds that a facility it regulates is operating in a manner that threatens health, safety or welfare. In response, the agency promulgates an emergency rule to deal with the situation by closing down that facility or restricting its operation. What happens if that emergency rule is later found by the Committee to be ineffective? Does the facility get to open up again until the agency can finalize the rule? Does the agency risk being sued for damages by the facility for shutting it down or restricting the facility's operation?

If an agency has abused its power by promulgating an interim final rule where no true emergency exists, that action is properly reviewed by the judicial branch. The bills need to be amended to clearly state what happens to the effective date of a rule in this situation.

3. When are agencies subject to the requirement to get approval of the Administrative Rules Committee for emergency rulemaking? The Legislative Assembly often passes statutes that specifically give an agency the power to adopt interim final (emergency) rules without the finding that emergency rulemaking is necessary (see, for example, NDCC section 50-30-05). If an agency promulgates emergency rules pursuant to such specific statutory authority, must that agency also get the approval of the Administrative Rules Committee? It would seem that such approval should not be required since the full body of the Legislature approved emergency rulemaking without the statutory finding. But without clarification, agencies will be left in the difficult position of trying to determine when to get approval of the Committee or possibly having to justify why they did not appear before the Committee for approval.

The department would like to see amendments brought to clarify these concerns so that all agencies, and the regulated community, know what is expected of them in regard to administrative rulemaking.

I would be happy to try to answer any questions the Committee members may have.

Presented by:

Melissa Hauer
Director, Legal Advisory Unit
ND Department of Human Services

NORTH DAKOTA INDUSTRIAL COMMISSION

OIL AND GAS DIVISION

Lynn D. Helms
DIRECTOR

<http://explorer.ndic.state.nd.us>

Bruce B. Hicks
ASSISTANT DIRECTOR

House Bill 1028
House Judiciary Committee
Testimony By
Lynn D. Helms
Director
Oil and Gas Division
North Dakota Industrial Commission

Mr. Chairman and members of the committee, my name is Lynn Helms and I am the Director of the Oil and Gas Division of the North Dakota Industrial Commission (NDIC).

The NDIC is the oil and gas regulatory commission for the state of North Dakota. The Oil & Gas Division is the agency that provides the technical expertise needed for creating and enforcing statutes, rules, regulations, and orders of the Commission pertaining to geophysical exploration, drilling, development, production of oil and gas, disposal of oil field brine, and plugging and reclamation of abandoned wells.

On the back of my testimony is the timetable for an actual case of emergency rules adopted by the NDIC to provide financial relief to the oil and gas industry at a time when oil prices had fallen to a 50-year low.

This timetable shows that the process of finalizing these rule changes took 177 days without a regulatory analysis, response to comments, or the approval required in HB1028. In addition the timetable shows that current law requires a review by the Attorney General at 108 days, part of which is the determination that an emergency exists according to the statute.

I respectfully request that you carefully consider how the added approval required in HB1028 complicates the process for making interim final rules final. I also ask that you question the benefit of duplicating the emergency determination that already takes place twice (once by the agency and again by the Attorney General).

HOUSE BILL NO. 1028

Testimony of Lynn D. Helms
Director
NDIC - Oil and Gas Division

DAYS SINCE EFFECTIVE DATE	TIMETABLE FOR EMERGENCY RULES ADOPTED AUGUST 1, 1999	
	Feb 4	Submitted proposed emergency rules to Industrial Commission (IC) for approval.
0	Feb 5	Emergency rules were received by Legislative Council (LC).
		Final rules were received by LC.
14	Feb 19	Sent legal ad to daily papers for emergency rules notice. Sent legal ad to daily papers for final adoption of emergency rules.
17	Feb 22	Daily papers received request for legal ad for emergency and final rules.
24	Mar 1	LC sent out emergency and final rules notice to interested parties.
25	Mar 1-2	All daily papers (ten) published emergency and final rules notice.
26	Mar 2-3	All daily papers except Fargo Forum published 2nd notice of rules.
31	Mar 8	Fargo Forum published 2nd notice of rules notice (legal ads on Mondays only). Hearing date for final rules must be no sooner than 30 days (Apr 7).
61	Apr 7	Hearing for final rules. Thirty-day comment period starts (to receive input on proposed rules).
91	May 7	End of thirty-day comment period. No comments, oral or written were received.
108	May 24	IC approved final rules with ICO #8432. Submitted final rules to Attorney General (AG) for an opinion.
120	Jun 6	Must have obtained approval from Administrative Rules Committee.
123	Jun 8	Final rules were filed with the LC, along with a copy of the AG's opinion.
146	Jul 1	LC published rules. Adoption of final rules on the 1st day of the month following this date (Aug 1).
177	Aug 1	Final rules were adopted today.

Note: The regulatory analysis, response to comments received, and possibly re-writing rules (in response to the comments) would normally have been written, although these particular rules did not require them.