

NDDPC North Dakota Dairy Promotion Commission

2015 Rice Street - St. Paul, MN 55113

TO: Legislative Council, Administrative Rules Committee

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SEP 5 2007

DATE: August 31, 2007

RE: Administrative Rules Exemptions

This letter is in response to your July 31, 2007 letter, in which you requested the Dairy Promotion Commission to respond to four questions relating to its exemption from the Administrative Agencies Practice Act (AAPA), N.D.C.C. ch. 28-32.

I would like to first provide some background information about the commission. The commission's main function is dairy promotion. It promotes North Dakota dairy products using funds that come from an assessment placed on all milk produced in the state. N.D.C.C. § 4-27-05(7). Under N.D.C.C. § 4-27-06, producers are levied an assessment of ten cents per hundredweight on all milk sold. However, North Dakota's dairy promotion program falls within the umbrella of the federal Dairy Promotion Program, which is codified in 7 U.S.C. ch. 76. The federal program requires producers to pay an assessment of fifteen cents per hundredweight of milk to be used in dairy promotion. 7 U.S.C. § 4504(g)(3). Because North Dakota had an existing mandatory assessment, ten of the fifteen cents mandated by the federal program automatically goes to the commission. 7 C.F.R. 1150-153(b)(2).

1. Does the Dairy Promotion Commission require exemption from the rulemaking provisions of N.D.C.C. ch. 28-32, the adjudicative proceedings of N.D.C.C. ch. 28-32, or both? Please explain.

The commission requires exemption from the rulemaking provisions of N.D.C.C. ch. 28-32. As discussed below, the commission does not promulgate rules that "might affect rights or duties of persons outside" the agency. Subjecting the commission to N.D.C.C. ch. 28-32's rulemaking

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requirements would only add unnecessary expense without creating any benefit for the dairy producers the commission serves.

The commission also requires exemption from the adjudicative proceedings provisions of N.D.C.C. ch. 28-32, because it does not exercise any adjudicative power. The National Dairy Promotion and Research Board ("National Dairy Board") is charged with enforcing the assessment. Accordingly, all adjudicative proceedings are conducted by the National Dairy Board using its procedures. In addition to creating unnecessary expense, subjecting the commission to N.D.C.C. ch. 28-32's adjudicative procedures would create confusion over whether state or federal procedures should be followed.

2. Does the Dairy Promotion Commission make any rules, for purposes other than internal management, which are of general statewide application and might affect rights or duties of persons outside your agency? Please explain.

No, the commission does not make any rules that "might affect rights or duties of persons outside" the agency. The commission has only made five rules. N.D.A.C. § 19-01-01-01 lays out the organizational structure of the commission. N.D.A.C. § 19-02-01-01, which states the amount of the assessment, is almost identical to the statutory language in N.D.C.C. § 4-27-05(2). The remaining rules, N.D.A.C. §§ 19-02-01-02 through 19-02-01-04, deal with obtaining a refund of the assessment and are codified almost in their entirety in N.D.C.C. § 4-27-06(3). However, these refund rules are now defunct because producers cannot request a refund from the commission under the federal laws mandating the fifteen-cent assessment. In addition, the commission will not need to make any rules in the future that "might affect rights or duties of persons outside" the agency because the National Dairy Board makes the rules necessary to enforce the assessment.

3. Does the Dairy Promotion Commission hold hearings to act on complaints, applications, or appeals? If so, what rules govern the conduct of the hearing and rights of the parties?

No, the commission does not hold hearings. The commission does not need to hold hearings to act on applications because it does not issue licenses or permits. The commission does not need to hold hearings to act on complaints because it does not have the power to issue any type of penalty. Moreover, the only penalty provided for in N.D.C.C. ch. 4-27 is a criminal penalty that the commission does not have the power to enforce. N.D.C.C. § 4-27-12.

As discussed above, the assessment the commission receives is part of the federal program. Therefore, any complaint or appeals relating to the assessment would likely be handled by the National Dairy Board according to its procedures.

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4. Do you believe the exemption for your agency under subsection 2 of N.D.C.C. § 28-32-01 should be continued unchanged, modified or eliminated?

I believe that the commission's exemption should be continued unchanged because it is not a typical regulatory agency. The commission operates using funds that come from an assessment placed on North Dakota dairy producers. Its main function is to promote these producers' products. In order to effectively promote North Dakota dairy products, the commission must keep its administrative costs as low as possible. Because the commission does not issue rules affecting producer's rights or exercise any adjudicative power, the procedures found in N.D.C.C. ch. 28-32 are simply not applicable to this agency. The National Dairy Board enforces the assessment, and it already has procedures in place that protect the producers' due process rights. Subjecting the commission to N.D.C.C. ch. 28-32 will create unnecessary confusion over whether state or federal procedures should be used. If the commission becomes subject to N.D.C.C. ch. 28-32, the result will be a high cost with no benefit.