

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Thursday, March 10, 2011  
Brynhild Haugland Room, State Capitol  
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 3:00 p.m.

**Members present:** Senators Jerry Klein, John M. Andrist, Tom Fischer, Layton Freborg, Joan Heckaman; Representatives Wesley R. Belter, Randy Boehning, Bill Devlin, Jim Kasper, George J. Keiser, Kim Koppelman, Joe Kroeber, Jon Nelson, Lonny Winrich, Dwight Wrangham

**Members absent:** Representatives Stacey Dahl, Chuck Damschen, Dwayne DeKrey, Blair Thoreson

**Others present:** See [Appendix A](#)

**It was moved by Representative Keiser, seconded by Representative Nelson, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.**

#### STATE BOARD OF DENTAL EXAMINERS

Chairman Klein called on Ms. Rita Sommers, Executive Director, State Board of Dental Examiners, for testimony ([Appendix B](#)) relating to rules adopted by the board and carried over for consideration from the previous committee meeting. Senator Andrist said that he believes the rule on advertising by dentists as amended in North Dakota Administrative Code Section 20-02-01-01 deprives dentists of First Amendment protection and due process. He said it appears the rule was adopted to protect dentists rather than to protect the public. Ms. Sommers said the board wants to avoid advertising involving competing claims of superior services that cannot be proven. She said if a dentist can prove having superior services, advertising would be acceptable. She said the rule amendment provision regarding advertising about fees allows dentists to advertise fees, but those advertisements cannot be misleading.

#### NORTH DAKOTA LOTTERY

Chairman Klein called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony ([Appendix C](#)) relating to lottery rules.

#### STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. Tom Bachman, Air Quality Division, State Department of Health, for testimony ([Appendix D](#)) relating to Clean Air Act implementation rules adopted by the department.

In response to a question from Representative Keiser, Mr. Bachman said none of the rules adopted exceed federal minimum standards.

In response to a question from Representative Nelson, Mr. Bachman said the State Department of Health is involved in litigation with the Environmental Protection Agency regarding air standards and how monitoring greenhouse gases is to be accomplished.

In response to a question from Representative Koppelman, Mr. Bachman said recognition of carbon dioxide as a greenhouse gas by the Environmental Protection Agency will require permits for emitters of 150,000 tons or more of carbon dioxide. He said this permit is required by federal law.

Representative Kasper asked if the state did not adopt these rules, what result would occur. Mr. Bachman said failure to adopt the rules at the state level would result in withholding some federal highway construction funds, and the Environmental Protection Agency Denver office would become the issuer of permits in North Dakota.

Chairman Klein called on Mr. Scott Radig, Director, Waste Management Division, State Department of Health, for testimony ([Appendix E](#)) relating to underground storage tank rules.

Mr. Radig requested a grammatical correction in Section 33-24-08-48. Committee counsel said the correction will be made as suggested.

#### STATE BOARD OF NURSING

Chairman Klein called on Dr. Constance Kalanek, Executive Director, State Board of Nursing, for testimony ([Appendix F](#)) relating to rules adopted by the board. Committee counsel distributed a copy of a new Section 54-05-03.1-06.2 ([Appendix G](#)), which he said was submitted for publication by the State Board of Nursing but inadvertently omitted from the rules as prepared for committee consideration.

Representative Keiser expressed concern with the definition added to the rules of the phrase "letter of concern." He asked why this provision was included in the rules. Dr. Kalanek said the rule was changed resulting from 2009 legislation. Representative Keiser asked why a letter of concern is not appealable by the individual affected. Dr. Kalanek said a letter of concern is nondisciplinary action. Representative Keiser said the licensee is not allowed to challenge or explain the circumstances when a letter of concern is filed. Dr. Kalanek said a letter of concern is kept on file for one year and is not a part of the licensee's record available to the public or an employer.

In response to a question from Representative Koppelman, Dr. Kalanek said the language in the definition of letter of concern was based on recommendations of counsel. Representative Koppelman said the rule provision covers "conduct," which is much broader than practicing without registration and could cover virtually any activity. Dr. Kalanek said that she believes the term is used in statute.

Representative Devlin said he is concerned that the rule provides for a letter of concern if an individual "may have been engaged" in unacceptable conduct. He said this is a very low standard and could be based on little or no evidence. Dr. Kalanek said a letter of concern would not be a disciplinary action. Representative Devlin asked if disciplinary action, such as suspension, is appealable. Dr. Kalanek said disciplinary action is appealable, and there has been an increased number of instances for emergency suspensions.

Representative Kasper asked what initiates action by the board to prepare a letter of concern. Dr. Kalanek said a complaint may be filed with the board, and the affected individual is notified. She said the board conducts an investigation after the complaint is filed. In some cases, witnesses will not come forward or the conduct does not rise to the level of a formal complaint. She said in these cases, the board may have concerns about the conduct, and a letter of concern will be authorized.

**It was moved by Representative Keiser, seconded by Representative Kasper, and carried on a roll call vote that the committee void the definition of "letter of concern" under Section 54-01-03-01 on the grounds that this rules provision is arbitrary and capricious and contrary to legislative intent and in conflict with state law.** Voting in favor of the motion were Senators Klein, Andrist, Fischer, Freborg, and Heckaman and Representatives Belter, Boehning, Devlin, Kasper, Keiser, Koppelman, Kroeber, Nelson, Winrich, and Wrangham. No negative votes were cast.

Chairman Klein called on Ms. Shelly Peterson, President, North Dakota Long Term Care Association, for testimony (Appendix H) relating to the rules of the State Board of Nursing.

Ms. Peterson expressed opposition of the North Dakota Long Term Care Association to the rule provision regarding a letter of concern to be issued by the State Board of Nursing. She said 2009 House Bill No. 1269 stated that the State Board of Nursing may issue a nondisciplinary letter of concern based upon proof that the person has violated one of the listed areas of conduct. She said the rule as submitted does not require any degree of proof and is not in compliance with the statutory requirement.

Chairman Klein called on Mr. Jerry Jurena, President, North Dakota Hospital Association, for testimony (Appendix I) relating to rules of the State Board of Nursing. Mr. Jurena expressed opposition of the North Dakota Hospital Association to the rule

providing for a letter of concern and thanked the committee for voiding that provision.

## **EDUCATION STANDARDS AND PRACTICES BOARD**

Chairman Klein called on Ms. Janet Welk, Executive Director, Education Standards and Practices Board, for testimony (Appendix J) relating to rules adopted by the board.

## **PUBLIC SERVICE COMMISSION**

Chairman Klein called on Ms. Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, for testimony (Appendix K) relating to rules adopted by the commission.

## **STATE BOARD OF DENTAL EXAMINERS**

Senator Andrist said he believes the advertising rules adopted by the State Board of Dental Examiners are inappropriate for several reasons. He said the rules as presented benefit the dental profession and not the public.

Representative Koppelman agreed with Senator Andrist.

**It was moved by Representative Koppelman and seconded by Representative Kasper that the committee void the State Board of Dental Examiners' amendments to Section 20-02-01-01 on the grounds that the rules are arbitrary and capricious and create a potential conflict with state law.**

Representative Nelson said it appears to him that the Board of Dental Examiners acted in response to public complaints and not to complaints between competing dentists.

Senator Andrist said he would support the motion and encourage the State Board of Dental Examiners to revisit this issue.

Representative Koppelman said the state already has laws in place prohibiting false advertising.

**The motion carried on a roll call vote.** Voting in favor of the motion were Senators Andrist, Fischer, and Freborg and Representatives Belter, Devlin, Kasper, Keiser, Koppelman, and Wrangham. Voting in opposition to the motion were Senators Klein and Heckaman and Representatives Kroeber, Nelson, and Winrich.

**It was moved by Representative Keiser, seconded by Representative Kasper, and carried on a voice vote that the meeting be adjourned.** No further business appearing, Chairman Klein adjourned the meeting at 4:35 p.m.

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John Walstad  
Code Revisor

ATTACH:11

**Presented by:** Illona A. Jeffcoat-Sacco  
General Counsel  
Public Service Commission

**Before:** Administrative Rules Committee  
Senator Jerry Klein, Chairman

**RE:** Rules relating to reclamation, siting, renewable energy  
credit tracking, and agency procedure

**Date:** March 10, 2011

### TESTIMONY

Mr. Chairman and committee members, my name is Illona Jeffcoat-Sacco, General Counsel for the North Dakota Public Service Commission. The Commission asked me to testify today concerning four rulemaking proceedings we recently filed.

The response to the questions posed to us by the Legislative Council's staff are presented below. In each case, the question is restated prior to our response.

**1. Whether the rules resulted from statutory changes made by the Legislative Assembly.**

N.D. Admin. Code Sections 69-05.2-09-02 and 69-05.2-22-07

Yes.

The surface coal mining and reclamation law was amended by the 2009 Legislature to reduce the revegetation responsibility period from ten years to five years for eligible lands that are re-mined. The proposed changes will amend permit application requirements and revegetation success standards to reflect this statutory change.

N.D. Admin Code Article 69-06

One of the siting rule changes was adopted to provide the Commission more flexibility regarding corridor widths given changes made to certain siting act definitions in 2009 House Bill 1032.

N.D. Admin. Code Chapter 69-09-08

No, not regarding any statutory changes made in 2009. This rule slightly revises a rule adopted in 2006, implementing statutory changes made in 2005.

N.D. Admin. Code Section 69-02-01-06

No.

2. **Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.**

N.D. Admin. Code Sections 69-05.2-09-02 and 69-05.2-22-07

Yes.

The statutory change reduces the revegetation responsibility period from ten years to five years for eligible lands that are re-mined. Lands disturbed by coal mining activities prior to January 1, 1970 are eligible for the shortened responsibility period if they are re-mined or otherwise re-disturbed by permitted mining operations. The rules adopted by the Commission must be as effective as counterpart federal rules issued by the federal Office of Surface Mining.

N.D. Admin. Code Article 69-06

No.

N.D. Admin. Code Chapter 69-09-08

No.

N.D. Admin. Code Section 69-02-01-06

No.

3. **A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.**

N.D. Admin. Code Sections 69-05.2-09-02 and 69-05.2-22-07

On August 12, 2009, the North Dakota Public Service Commission issued a formal Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and an abbreviated Notice, proposing to revise other rules and Article 69-05.2 of the N.D. Admin. Code relating to the reduction of

the revegetation responsibility period from ten years to five years for eligible lands that are re-mined and amending permit application requirements and revegetation success standards, on lands permitted for surface coal mining.

The Abbreviated Notice was published once in 52 official county newspapers the week of August 20 through August 26, 2009. The notice was also forwarded to the Legislative Council for publication on August 13, 2009, which was at least 30 days prior to the public hearing.

A public hearing was noticed for and held at 10:00 a.m., September 16, 2009. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until September 26, 2009, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission. The only comments received were of Commission staff and those comments were made at the time of the public hearing.

On November 12, 2009, the Commission submitted the proposed reclamation rules to the federal Office of Surface Mining (OSM). OSM approved the rules on December 27, 2010.

N.D. Admin. Code Article 69-06, Chapter 69-09-08, and  
Section 69-02-01-06

On June 2, 2010, the North Dakota Public Service Commission issued a formal Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and an abbreviated Notice, proposing to revise these rules.

The Abbreviated Notice was published once in 51 official county newspapers on June 13 through June 19, 2010. The Ashley Tribune published the Notice on June 30, 2010. The notice was also forwarded to the Legislative Council at least 30 days in advance of the hearing.

A public hearing was noticed for and held at 1:30 p.m., July 14, 2010. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until July 26, 2010, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission. The only comments received were of Commission staff and those comments were heard at the time of the public hearing.

4. **Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.**

Other than staff testimony explaining and supporting the proposed rule changes, no comments or testimony were received before, at, or after the hearings for any of the proposed rules before the Committee today. The rules were adopted as proposed.

5. **The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.**

The reclamation rulemaking before you today was combined with a gas safety rule case and the Notice of August 12, 2009 covered both proposals. The total cost for publishing the Notices was \$1,887.60. The cost for legal notice associated with just the reclamation rulemaking proceeding before you today was ½, or \$943.80. Other than staff time, no other significant costs were incurred.

The rulemaking Notice of June 2, 2010 covered the other three proposed rules before you today as well as two other proposed rules cases that are already complete. The total cost of publishing the June 2, 2010 Notice was \$2,046.18. The cost of publishing the Notice associated with just the rules relating to siting, renewable energy credit tracking, and the Commission procedures was \$1,227.70. Other than staff time, no other significant costs were incurred.

6. **An explanation of the subject matter of the rules and the reasons for adopting those rules.**

N.D. Admin. Code Sections 69-05.2-09-02 and 69-05.2-22-07

The surface coal mining and reclamation law was amended by the 2009 Legislature to reduce the revegetation responsibility period from ten years to five years for eligible lands that are re-mined. The changes to the North Dakota Administrative Code amend permit application requirements and revegetation success standards to reflect this statutory change.

N.D. Admin Code Article 69-06

The minor change related to determining corridor size specifies a minimum corridor size "unless approved by the Commission." The proposed change substitutes the language "otherwise determined" for the word "approved" to clarify that the Commission can designate a smaller corridor without first receiving a request from the applicant.

The rest of the proposed changes to the siting rules are intended to separate requests for jurisdictional determination from the letter of intent process. Language allowing a letter of intent to include a request for jurisdictional determination is removed and instead there is a new chapter to specify the information required when asking for a jurisdictional determination.

N.D. Admin. Code Chapter 69-09-08

The renewable electricity and recycled energy tracking rule standardizes the content and format of required annual reports of electric retail providers.

N.D. Admin. Code Section 69-02-01-06

This amendment repeals language regarding practice before the Commission that is inconsistent with the North Dakota Admission to Practice Rules.

7. **Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.**

No regulatory analysis was required for any of the rules because none of the rules are expected to have an impact on the regulated community in excess of \$50,000 and neither the Governor nor any member of the Legislative Assembly requested a regulatory analysis.

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8. **Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide a copy.**

the analyses indicated that the rule cases before you today have no economic impact on small entities nor would they have any adverse impact on small entities.

9. **Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.**

No takings assessments were required on any of the rules because they do not effect a regulatory taking.

10. **If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.**

N/A

Mr. Chairman, this completes my testimony. I would be happy to respond to any questions the committee might have.