

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Monday, December 6, 2004
Fort Union Room, State Capitol
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 9:30 a.m.

Members present: Representatives William R. Devlin, LeRoy G. Bernstein, Jeff Delzer, Duane DeKrey, Rod Froelich, Matthew M. Klein, Kim Koppelman, Jon O. Nelson, Dan J. Ruby, Sally M. Sandvig, Blair Thoreson, Alon Wieland, Dwight Wrangham; Senators John M. Andrist, Dennis Bercier, April Fairfield, Tom Fischer, Layton Freborg, Jerry Klein, Gary A. Lee, Rich Wardner

Others present: See Appendix A

It was moved by Representative DeKrey, seconded by Representative Nelson, and carried on a voice vote that the minutes of the October 20, 2004, committee meeting be approved as distributed. In discussion of the motion, Representative Koppelman said his comments recorded in the minutes of the previous committee meeting regarding concerns about the per diem amount for members of the Board of Veterinary Medical Examiners should have included his comments that he understood there was an effort to standardize per diem amounts for occupational and professional licensing boards.

BOARD OF VETERINARY MEDICAL EXAMINERS

Chairman Devlin called on Dr. John R. Boyce, Board of Veterinary Medical Examiners, for testimony relating to rules of the board carried over from the October meeting. A copy of Dr. Boyce's prepared testimony is attached as Appendix B. Dr. Boyce said the committee expressed concern at the previous meeting regarding the per diem amount for members of the board.

Dr. Boyce said the board has paid its members \$125 per day per diem for board meetings since 1982. He said comparison of per diem amounts paid to members of other North Dakota boards shows a range from zero to \$300 per day. He said members of the chiropractic and dental boards receive per diem similar to that paid to members of the Board of Veterinary Medical Examiners.

Chairman Devlin called on Dr. Boyce for presentation of testimony relating to December 2004 rules of the Board of Veterinary Medical Examiners. A copy of Dr. Boyce's prepared testimony is attached as Appendix C.

After presenting the testimony on behalf of the board, Dr. Boyce said the cost of publication of newspaper notice of rules changes has become substantially higher. He said consideration should be given to having an independent panel review rules and require publication only when significant public interest exists or perhaps using Internet notice of rulemaking to avoid imposing publication costs on small boards. He said for a small board like the Board of Veterinary Medical Examiners, the \$1,380 cost of publishing notice of these rules eats up about one-third of the revenue from the fee increase included in the rules.

Senator Klein suggested that legislation to make these changes would be an option to avoid publication costs. Dr. Boyce said the board's understanding is that rules exist to flesh out the statutory framework established by the Legislative Assembly and these topics are appropriate for the rules process. He said his suggestion is that rules not of general public interest could be excused from the publication requirement.

STATE BOARD OF ANIMAL HEALTH

Chairman Devlin called on Mr. Wade Moser, North Dakota Stockmen's Association. Mr. Moser said he was requested by Dr. Susan Keller from the State Board of Animal Health to appear at the meeting on behalf of the board because the issues raised by the committee at the previous meeting relate mainly to brand inspection rules.

Mr. Moser said these rules were made as a result of passage of 2003 Senate Bill No. 2209. Representative Froelich said he has talked to operators of livestock markets about these rules and they were unaware the rules have been adopted. He said if sale barns are required to impose a bond fee in addition to their other costs, producers will bear the additional cost burden.

Mr. Moser said all out-of-state markets where the North Dakota Stockmen's Association has brand inspection services are located within 35 miles of the border. He said these markets have done this for 40 years. He said these markets have not had the practice of shutting down but that would be a possibility. He said the North Dakota Stockmen's Association has a fee of 75 cents per head for brand inspection for in-state and out-of-state markets. He said there is

no discrimination among markets on the fees charged. He said if a bond is required for an out-of-state market, the facility would have to bear the cost of the bond and there is a significant benefit to the market to have inspection services. He said the North Dakota Stockmen's Association believes these rules are a compromise that benefits producers near the border.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. David Glatt, Environmental Health Section, State Department of Health, for testimony relating to concentrated animal feeding operation rules. A copy of Mr. Glatt's prepared testimony is attached as Appendix D.

Mr. Glatt said feedlots in North Dakota have been regulated by the State Department of Health since the early 1970s. Mr. Glatt said the United States Environmental Protection Agency (EPA) adopted rules in 2002 to regulate large concentrated animal feeding operations and other types of animal feeding operations. He said federal rules mandate that each state develop a state program no less stringent than that required by federal rules. He said states are required to either institute a state-approved program or the program will be administered for the state through the federal National Pollutant Discharge Elimination System program.

Mr. Glatt said the public comment period on these rules included three public hearings and extensive written comments. He said about one-half of the comments received by the department suggested that the draft rules were too stringent and one-half reflected concerns that the rules were not stringent enough. He said the rules as adopted protect the environment and comply with minimum federal requirements and take advantage of flexibility in implementation as allowed under the federal rules. He called on Mr. Dennis Fewless, Division of Water Quality Director, State Department of Health, to review the regulatory analysis on these rules.

In response to a question from Representative Nelson, Mr. Glatt said the cost of putting in a system to comply with the rules can be \$10,000 to \$100,000. He said when you make that kind of expenditure you want to make sure you do it right. He said there has been a learning curve but people are now more aware of what is required by the rules. He said the department is shortening the time for evaluation of requests for approval. Representative Nelson asked what timeline exists for decisions of the department on applications. Mr. Glatt said three to four weeks is the department's target for applications. He said if public notice is required there are added times for notice, hearings, and comments.

In response to a question from Representative Nelson, Mr. Glatt said if a concentrated animal feeding operation has fewer than 1,000 animals, the EPA allows state flexibility and the department must

make a judgment on whether granting an application creates enough local concern, in which case public meetings would be scheduled.

Representative Nelson asked whether there is anything in the rules adopted by the State Department of Health which is more stringent than what the EPA requires. Mr. Glatt said he does not believe there is anything in the rules more stringent than the EPA requirements.

Representative DeKrey said it appears to him that everyone with animals would require a permit. Mr. Glatt said large animal operations with 1,000 or more animals must get an evaluation. He said smaller operations need to come in for review by 2008.

Representative DeKrey said in his area, extensive wetlands are an issue and he asked how these areas would be impacted. Mr. Glatt said the purpose of the rules is to protect water resources, including wetlands. He said to assist animal feeding operations with compliance, there is \$5 million to \$6 million per year of federal cost-sharing money coming into North Dakota for systems to handle waste and runoff from animal feeding operations.

Senator Fairfield said it appears the prior state rules applied to animal feeding operations with 200 or more animals. Mr. Glatt said that is correct and that number has been raised to 300 animals. He said operations with over 1,000 animals must follow federal standards.

Representative Ruby asked how flexible the department would be with aspects of the rules such as overflow limits for holding ponds. Mr. Glatt said in more than 30 years of enforcement, the department has issued 10 violations. He said he hopes the department can remain flexible in enforcement. Representative Ruby said he does not see flexibility in the way the rules are written.

Representative Delzer asked what the cost would be to the state to operate the enforcement program. Mr. Glatt said it is anticipated that three full-time equivalent employee positions would be needed for administration. Representative Delzer said he is not sure that leaving enforcement to the EPA would be such a bad thing.

Chairman Devlin called on Mr. Moser for comments on the concentrated animal feeding operation rules adopted by the State Department of Health. Mr. Moser said the North Dakota Stockmen's Association appreciates the department working with the association on its concerns. He said the association has remaining concerns with the content of the rules in some areas.

Mr. Moser said he believes the State Department of Health did not take all the flexibility available under the federal rules, especially with regard to smaller producers with 300 to 1,000 animals.

Mr. Moser said the North Dakota Stockmen's Association would like every producer to be in

compliance with the rules and feel free to come forward to initiate the process. He said the association is concerned that the rules may impact existing operations that have never caused a problem.

Mr. Moser said the North Dakota Stockmen's Association is concerned that every operator in the state will have to get a permit. He said he would like to see reference to "blue line" in the rules because engineers and ranchers are familiar with the terminology and it is used in the federal rules.

Mr. Moser said the definition of wintering operation in the rules is confusing and a simple definition is all that would be needed to identify these operations.

Mr. Moser said one of the biggest concerns of the North Dakota Stockmen's Association relates to transfers of permits. He said the rules require that before a feedlot operator may sell the operation, permission must be obtained from the State Department of Health. He said the North Dakota Stockmen's Association does not believe it is fair to place a government agency between a buyer and seller.

Mr. Moser said the North Dakota Stockmen's Association has concerns about lack of confidentiality regarding business information contained in applications for feeding operation approval.

Mr. Moser said the North Dakota Stockmen's Association is concerned about anonymous complaints against concentrated animal feeding operations.

Mr. Moser said the North Dakota Stockmen's Association would appreciate an opportunity to discuss these and other issues further with representatives of the State Department of Health.

In response to a question from Senator Andrist, Mr. Moser said the North Dakota Stockmen's Association would be willing to take the risk of EPA administration of the concentrated animal feeding operation program if the Administrative Rules Committee sends these rules back for reconsideration.

Chairman Devlin called on Mr. Ken Solberg, livestock buyer, for comments relating to the State Department of Health rules. Mr. Solberg said he shares many of the concerns expressed regarding these rules. He said there is no time certain in the rules for conducting the hearings process. He said anonymous complaints go into the record of producers without an opportunity to face the accuser. He said every livestock producer has the potential to pollute under application of these rules. Mr. Solberg said he would ask that these rules be sent back to the State Department of Health for further consideration because there is much room for improvement.

Chairman Devlin said it appears that it would be appropriate for the committee to carry over consideration of these rules to allow further discussion of issues that have been raised between the department and interested parties. He asked Mr. Moser to take the lead among interested parties in initiating discussions

with the State Department of Health. He requested prompt action so the results of these discussions will be known before the legislative session.

It was moved by Representative Bernstein, seconded by Representative Koppelman, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the concentrated animal feeding operation rules of the State Department of Health.

OFFICE OF ADMINISTRATIVE HEARINGS

Chairman Devlin called on Mr. Allen C. Hoberg, Director, Office of Administrative Hearings, for testimony relating to rules of the Office of Administrative Hearings carried over for consideration from the previous committee meeting. A copy of Mr. Hoberg's prepared testimony is attached as Appendix E.

STATE ELECTRICAL BOARD

Chairman Devlin called on Mr. Don Offerdahl, State Electrical Board, for testimony relating to the December 2004 rules of the board. A copy of Mr. Offerdahl's prepared testimony is attached as Appendix F.

STATE BOARD OF ANIMAL HEALTH

It was moved by Representative Froelich and seconded by Senator Bercier that the Administrative Rules Committee void the bonding requirements imposed for out-of-state livestock markets under the rules of the State Board of Animal Health on the grounds that the rules are arbitrary and capricious. In discussion of the motion, Senator Wardner said he does not believe voiding these rules is appropriate on the grounds allowed by statute for the committee to void rules. Representative Koppelman said he agrees with Senator Wardner and the Administrative Rules Committee has achieved much progress in encouraging agencies and the public to work together to improve rules. He said he would not support the motion because he does not believe appropriate statutory grounds exist to void the rules. The question was called and **the motion failed**. Voting in favor of the motion were Representatives Froelich and Sandvig and Senator Bercier. Voting in opposition to the motion were Representatives Devlin, Delzer, DeKrey, Koppelman, Nelson, Ruby, Thoreson, and Wieland and Senators Fairfield, Fischer, Freborg, Klein, Lee, and Wardner.

No further business appearing, Chairman Devlin adjourned the meeting at 11:45 a.m.

John Walstad
Code Revisor

ATTACH:6