

MINUTES

Rules Review Committee



Senator Alan Solano, Chair
Representative Jean Hunhoff, Vice Chair

Three hundred eightieth meeting
Monday
June 3, 2019

Room 414
State Capitol
Pierre, South Dakota

The three hundred eightieth meeting of the Rules Review Committee was called to order by Senator Alan Solano (Chair), at 10:03 a.m. CDT, on June 3, 2019, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Senators Craig Kennedy, Lance Russell, and Alan Solano (Chair), and Representatives Ryan Cwach, Jon Hansen, and Jean Hunhoff (Vice Chair). Staff members present were Doug Decker, Code Counsel, and Kelly Thompson, Senior Legislative Secretary.

All material distributed at the meeting is attached to the original minutes on file at the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order. This meeting was recorded by South Dakota Public Broadcasting. The archived recording is available at the LRC website at <http://sdlegislature.gov> under "Interim."

Approval of Minutes

Representative Hunhoff moved, seconded by Representative Hansen, that the May 6, 2019 meeting minutes be approved. Motion prevailed on a unanimous voice vote.

Rules Reviewed

Department of Transportation: Amend rules concerning assistance for public transportation to update definitions of terms; address changes in South Dakota law; and modify requirements relating to the application process, eligibility determinations, fund disbursements, and grant performance reviews for federal transit grants, state matching fund grants, and intercity bus service grants.

Ms. Becky Janssen, Department of Transportation, reviewed the proposed rules.

Representative Hunhoff asked what grant administration performance measurements are used and how it is determined to whom funds will be allocated. **Mr. Jack Dokken, Department of Transportation,** said performance measurements include number of rides provided, number of miles driven, local funds expended on the overall program, administrative costs per ride, operating costs per ride, local funds expended per ride, and overall grant administration performance. Funds are allocated on a points system in which providers earn points based on their performance.

Responding to Representative Hunhoff on how funds are allocated to urban versus rural areas, Mr. Dokken explained urban providers receive their federal transit funding directly from the Federal Transit

Administration while their state funding is based on population. Rural providers receive both their federal and state funding through the state Department of Transportation.

Senator Solano asked whether the rules changes negatively impact disabled individuals who use public transportation. Ms. Janssen replied they do not. Mr. Dokken responded to his question regarding if providing grant funding up front creates a cash flow burden for the department by stating there is no such burden on the department but the practice helps rural providers that do experience cash flow issues.

Representative Hunhoff questioned if the monies come from an actual public transportation assistance fund within the department or if that was simply a title that reflected state funds. **Mr. Joel Jundt, Deputy Secretary, Department of Transportation**, replied the allocations come out of the state highway trust fund and the special term relates to the original federal program that is no longer used.

Representative Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Transportation is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.

Department of Transportation: Amend the definitions section of its rules concerning state highway fund loans for local governments to include townships.

Ms. Becky Janssen, Department of Transportation, reviewed the proposed rules.

Representative Cwach inquired if the loan program allows local governments to access funds now in anticipation of a presidential disaster declaration. **Mr. Doug Kinniburgh, Department of Transportation**, said these funds could be used against matched federal emergency relief funds.

Senators Kennedy, Russell, and Solano thanked the department for making the change to include townships in a timely manner.

Senator Russell moved, seconded by Senator Kennedy, that the review of the rules proposed by the Department of Transportation is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.

Department of Game, Fish and Parks: Amend rules to change the starting date of the "no boating zone" on Putney Slough from October 15 to October 20; remove the "no boating zone" for Long Lake; create a "no wake zone" in the area known as Compton's Cove Canal; create special any whitetail deer licenses for residents and nonresidents and establish the fees associated with those licenses; change the number of deer licenses that may be issued in the Black Hills hunting season, West River deer hunting season, and East River deer hunting season; establish allocations of resident and nonresident special any whitetail deer licenses; create new private land units for antlerless whitetail deer in the West River and East River deer seasons; change the number of archery antlerless whitetail deer access permits for Adams Homestead and Nature Preserve; allow antlerless archery hunting in units 05A, 11A, 11B, 17A, 18A, 22A, 23A, 25A, 32A, 39B, 45B, 48A, 50A, and 55A, and close unit 59A; allow for an antlerless archery deer license to be valid for Sand Lake National Wildlife Refuge; alter the number of deer licenses that may be issued for the Sand Lake deer hunting season and the Lacreek deer hunting season; alter the beginning date for hunters

who possess an unfilled antlerless deer license for any Sand Lake deer hunting unit; change the number of days each unit located within the Waubay National Wildlife Refuge would be open; change the number of deer licenses that may be issued in the Custer State Park deer hunting season; and remove a muzzleloader only restriction within unit CUD-2 of Custer State Park.

Mr. Tony Leif, Department of Game, Fish and Parks, Wildlife Division, reviewed the proposed rules.

Senator Russell wondered with the changes for Fall River and Butte counties if any additional licenses would be available in those areas or an effort would be made to move hunters from public lands to private lands. Mr. Leif said the allocation of unit-wide licenses could be used on public or private land while additional licenses will be focused on private land only.

Responding to Senator Russell on what outreach efforts were used to engage landowners, Mr. Leif explained open houses are held and game wardens in those areas talk to landowners personally.

Representative Hunhoff asked if private landowners can charge hunters to use their land and if that essentially takes licenses away from individuals who don't have the money to pay to hunt. Mr. Leif said the majority of the licenses allocated will be valid on both public and private land and he was not aware of any commercial operation that was making substantial financial gain off antlerless deer licenses.

Mr. Leif explained the department's deer population management plan which operates on the "carrying and capacity" method, looking at what the land can support in terms of deer numbers. The plan relies on input from hunters and landowners to come up with a balance that allows hunters to hunt without damaging agricultural land.

Senator Solano inquired how the department would measure the impact of private land only licenses on deer population management. Mr. Leif responded the department is trying to address specific places where they know there is an abundance of deer and will evaluate the results of the pilot program over the next few years to gauge its success.

Senator Kennedy wondered if with the new units on private land the number of available tags was being increased. Mr. Leif said it varies by unit, some tag numbers are being shifted while others reflect the addition of new tags.

Senator Russell was concerned that significant changes were being made in some counties without adequate public outreach, exacerbating existing problems between the department and landowners.

Representative Hunhoff and Senator Kennedy stressed the department should carefully analyze the success of these changes and provide follow-up information to lawmakers.

Representative Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Game, Fish and Parks is complete. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano. Voting nay: Russell.

Department of Game, Fish and Parks: Amend rules to allow any enrolled Crow Creek tribal member and their family to enter West Bend Recreational Area without a park entrance license; set application fees and create one Custer State Park any bison license and three super license packages that include tags for one any elk, one any deer, and one any antelope; create one Hunt for Habitat Custer State Park any bison license and three super license packages that include tags for one any elk, one any deer, and one any antelope; and extend the date from May 1 to August 31 that traps, snares, and associated equipment may be used on public lands and improved road rights-of-ways and require that traps, snares, and associated equipment be actively operated and checked in accordance with trap-check rules.

Mr. Scott Simpson, Department of Game, Fish and Parks, Parks and Recreation Division, and Mr. Tony Leif, Department of Game, Fish and Parks, Wildlife Division reviewed the proposed rules which had been previously reverted by the Rules Review Committee at their May 6, 2019 meeting.

Mr. Leif stated the Hunt for Habitat licenses proposed in the rules provide a way for the average citizen or out-of-state hunter to contribute to improving habitat in South Dakota. He also advised members that if the rules were approved today, there is still plenty of time for the department to promote the license raffles and have a drawing in mid-August. Following action by the Game, Fish and Parks Commission at their May 23, 2019 meeting, the trapping rules now restrict live traps only in the summer months.

Public Testimony

Ms. Nancy Hilding, Prairie Hills Audubon Society, spoke in opposition to the nest predator program and the trapping rules as they relate to birds, saying the proposed rules are inconsistent with the rest of the country, and inhumane as live traps are dangerous to birds. Ms. Hilding charged the department did not provide adequate opportunity for public input on the changes and suggested the rules be sent back to the Game, Fish and Parks Commission for deliberation in a public forum.

In rebuttal, Mr. Leif stated the department has spoken to Ms. Hilding on numerous occasions regarding rules and has met the statutory requirements for obtaining public input.

Representative Cwach asked where the funding from the Hunt for Habitat licenses will be applied. Mr. Leif responded the monies will go into the Game, Fish and Parks game fund and be used to manage habitat as specified in Senate Bill 153.

In response to Representative Cwach's question concerning where traps could be placed if the proposed rule passes, Mr. Leif specified traps could be located on all public lands and improved road rights-of-ways. The rule is general to all public lands but if the improved road right-of-way is on private land, the hunter would need to get the landowner's permission to trap there. There are additional separate restrictions on state parks and some federal areas.

Representative Hunhoff wondered if the department will develop a separate line item in their budget to track Hunt for Habitat dollars. Mr. Leif replied coding levels are being set and it will be possible to track every penny that is collected and spent.

Representative Hunhoff asked if a raffle drawing winner who wants to hunt on private land could access

money to pay any cost for that permission. Mr. Leif clarified the process is the same as any other license in that the license does not just give the hunter the right to hunt there. Representative Hunhoff inquired if private landowners can get the names of raffle winners to market their land for hunting. According to Mr. Leif, there is a process in place currently for these entities to obtain the list of licensees for a fee. The only time the fee would be waived is if the request comes from a non-profit organization or another state agency.

Representative Hunhoff noted there used to be a bounty system for trapping and wanted to know how the nest predator bounty program is different than that system. Mr. Leif said bounty programs like that used for coyotes are heavily governed by statute (10 state statutes for that program alone). The nest predator bounty program differs in that it is specific to nest predators like skunks, raccoons, fox, and possums. To date, 22,000 tails have been turned in with the majority (75 percent) being raccoons.

Regarding what mechanism exists to identify who has set a trap and whether the responsible individual is checking the trap within the required timeframes, Mr. Leif replied South Dakota does not have a trap tag regulation although rules to that effect have been discussed but not approved. Having an individual's name on the trap does not automatically make them legally liable; a conservation officer must actually observe an individual set or check the trap to be able to prosecute them in a court of law.

Senator Russell offered the department the opportunity to explain their public input process. Mr. Leif said the rules were noticed legally, and public input was obtained by all means possible, including direct interaction with all parties involved. He noted that because the rules were reverted, statute does not require the commission to hold another public hearing before refiling them but the commission thought it was important to give the public another opportunity to vet their opinions.

Responding to Senator Russell on how the program's funding was determined without adequate notification to interested parties, Mr. Leif commented that while that is beyond the scope of the rules being discussed, it was part of the bigger conversation that began with then-candidate Noem who campaigned on a nest predator bounty program. Now Governor Noem continued the discussion with lawmakers, state officials, and the public during the legislative session leading up to the implementation of the program.

Representative Cwach asked why a process was not being dictated as to where live traps can be set up. Mr. Leif stated trapping of nest predators has been a practice for a long time and the goals of the program are to target efforts on areas where game bird populations are impacted, and to grow the next generation of trappers.

Senator Solano questioned what fees are being established for the raffle licenses and if a winner could continue use of the license from one season to the next. Mr. Leif replied the only fee the hunter pays is for the raffle ticket (license) and the winner can carry the license over to any season the tag is valid for or save a tag for a season in the next calendar year.

Senator Kennedy said he read the proposed rule as only trapping furbearing animals not nest predator species. Mr. Leif explained that in the definitions, the species are co-classified in both areas.

Representative Hansen commented that on the trapping issue, the Rules Review Committee is limited in scope only to determine whether the agency has the authority to promulgate the proposed rule. He noted the committee is not a "super legislature" and that some of the issues raised by the opposition are not before the committee at this meeting. Senator Solano agreed but thanked Ms. Hilding for her testimony.

Senator Russell thanked the committee for the clarification on the body's purview but said a broader discussion on the issues was needed because of the way the public felt about their opportunity to participate in the process.

Representative Hansen moved, seconded by Representative Hunhoff, that the review of the rules proposed by the Department of Game, Fish and Parks is complete. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano. Voting nay: Russell.

Department of Education: South Dakota Board of Technical Education: Amend rules to update the yearly facility fund and National Guard tuition benefit fund set-asides from the total state appropriation; and update the yearly per student allocation appropriated by the South Dakota Legislature in the postsecondary technical institute funding formula.

Mr. Scott DesLauriers, South Dakota Board of Technical Education, reviewed the proposed rules.

Representative Hunhoff moved, seconded by Senator Solano, that the review of the rules proposed by the Department of Education: South Dakota Board of Technical Education is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.

Department of Environment and Natural Resources: Amend rules to increase the air fees assessed to businesses that are applicable to the Title V air quality permitting program.

Mr. Kyrik Rombough, Department of Environment and Natural Resources, Division of Environmental Services, reviewed the proposed rules which were prompted by the passage of House Bill 1018 by the 2019 Legislature.

Senator Kennedy commented that if the department intends to gradually increase the fees over time, it will be necessary to keep amending the rules. Mr. Rombough agreed, saying the department considered implementing an automatic fee increase process in 2017 but there were concerns it lacked the statutory authority to do that.

Senator Solano moved, seconded by Senator Kennedy, that the review of the rules proposed by the Department of Environment and Natural Resources is complete. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano. Voting nay: Russell.

Department of Environment and Natural Resources: Board of Water Management: Amend rules to incorporate by reference the most recent published version of the Code of Federal Regulation for drinking water and add an additional section of the federal rules associated with the Revised Total Coliform Rule to the existing administrative rules for drinking water standards.

Mr. Mark Mayer, Department of Environment and Natural Resources, Board of Water Management, reviewed the proposed rules. Among the proposed changes is the addition of a "find and fix" mechanism that requires a water system not only to identify positive samples but also determine why they occurred and how to fix the problem.

Senator Kennedy noted while current state law refers to compliance with the Federal Safe Drinking Water Act as amended in 2011, the federal regulation was subsequently amended in 2015, 2016, and 2018. He questioned whether the statute needs to be updated and if the law as it exists curtails the agency from imposing penalties. Both Senators Kennedy and Solano requested the department thoroughly review their statutes and bring any necessary updates to the 2020 Legislature.

Senator Solano moved, seconded by Senator Kennedy, that the review of the rules proposed by the Department of Environment and Natural Resources: Board of Water Management is complete. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano. Voting nay: Russell.

Department of Social Services: Amend rules to align language with current practice regarding ceiling tiles in child care programs; expand the income eligibility limit for receiving child care assistance services from 175% to 209% of the federal poverty level; and update a website link.

Ms. Teresa Schulte, Department of Social Services, reviewed the proposed rules.

Senator Russell asked about the aggregate impact to the budget. **Ms. Brenda Tidball-Zeltinger, Department of Social Services,** said the impact is \$1.1 million in federal funds.

Senator Kennedy moved, seconded by Representative Hunhoff, that the review of the rules proposed by the Department of Social Services is complete. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano. Voting nay: Russell.

Department of Labor and Regulation: Division of Insurance: Amend rules to expand the availability of fully-insured and self-funded association health plans while maintaining consumer protections; repeal Rule 505; and amend the requirements for certain hearings where the Division reviews a proposed transaction for fairness.

Ms. Mallori Barnett, Department of Labor and Regulation, Division of Insurance, reviewed the proposed rules, a portion of which resulted from the passage of Senate Bill 37 by the 2019 Legislature.

Public Testimony

Mr. Nathan Sanderson, South Dakota Retailers Association, expressed support for the proposed rules concerning fully-insured and self-funded association health plans.

Representative Hunhoff asked what constitutes a geographic region for the purposes of forming an association health plan. **Mr. Frank Marnell, Department of Labor and Regulation, Division of Insurance,** replied the definition will be based on reasonable standards from federal rule. Responding

to her question about who assumes the risk and financial liability for such entities, Mr. Marnell said it depends on the organization. If it is a self-funded plan, the association assumes the risk.

Senator Solano inquired if stop-loss insurance is required for self-funded plans. Mr. Marnell confirmed the requirement was contained in the proposed rules.

Representative Hunhoff moved, seconded by Senator Russell, that the review of the rules proposed by the Department of Labor and Regulation: Division of Insurance is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.

Office of the Secretary of State: Board of Finance: Amend rules to increase in-state lodging rates for state employees to \$75 plus tax per night and increase per diem rates for state employees to a maximum of \$40 per day for in-state and \$56 per day for out-of-state travel claims.

Mr. Jason Lutz, Office of the Secretary of State, reviewed the proposed rules.

Public Testimony

Ms. Jasper Diegel, South Dakota Hotel and Lodging Association, and Mr. Nathan Sanderson, South Dakota Retailers Association, expressed their organizations' support for the changes.

Representative Hunhoff asked what percentage of South Dakota Hotel and Lodging Association members participate in the state rate program. Ms. Diegel said she could not provide a current number as memberships are still being finalized but past participation rates have ranged close to 85 or 90 percent.

Senator Russell inquired if the rate increase will result in more room availability. Ms. Diegel replied some members who did not participate previously will make more rooms available with the increase but conceded it may still be an issue during peak tourism season.

Senator Kennedy moved, seconded by Representative Hansen, that the review of the rules proposed by the Office of the Secretary of State: Board of Finance is complete. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano. Voting nay: Russell.

Closing Comments

Senator Solano announced the June 3 meeting as Doug Decker's last meeting as Code Counsel; Mr. Decker will retire from LRC on June 7. The Senator thanked him for his 37 years with state government. Mr. Decker was lauded by Senator Kennedy and Representative Hunhoff for his experience, levelheadedness, calm demeanor, and institutional knowledge.

Mr. Decker said it has been an honor to serve as Code Counsel and he was thankful for the opportunity to serve the legislature for so many years.

The next meeting of the Rules Review Committee is July 8, 2019. Currently seven rules packages are up for consideration.

Adjournment

Representative Hansen moved, seconded by Senator Russell, that the meeting be adjourned. Motion prevailed on a unanimous voice vote.

Chair Solano adjourned the meeting at 1:59 p.m.