MINUTES
Interim Rules Review Committee

Senator Alan Solano, Chair
Representative Jean Hunhoff, Vice Chair

Three hundred eighty-second meeting
Monday
August 12, 2019

Room 414
State Capitol
Pierre, South Dakota

The three hundred eighty-second meeting of the Interim Rules Review Committee was called to order by Senator Alan Solano (Chair), at 10:01 a.m. CDT, on August 12, 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 and Alan Solano (Chair), and Representatives Ryan Cwach, Jon Hansen, and Jean Hunhoff (Vice Chair). Senator Lance Russell was excused. Staff members present were Wenzel Cummings, 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 Senator Kennedy, that the July 8, 2019 meeting minutes be approved. Motion prevailed on a unanimous voice vote.

Staff Report

Mr. Wenzel Cummings, Code Counsel, LRC, reviewed recent internal and external updates and changes to the rules review process. New guidance has been provided to state agencies, boards, and commissions as to what information to submit when filing rules, and what to provide to Interim Rules Review Committee members prior to the rules hearing. The "Drafting Manual for Administrative Rules of South Dakota" has also been updated. The manual and all necessary forms are available on the LRC website. Periodic training sessions are being considered for state agency personnel who process administrative rules. An informational meeting will be held with LRC staff on August 13 regarding the changes and staff's respective roles in the rules process. Future updates may include a rewrite of Chapter 1-26 and development of an electronic filing system for administrative rules.

Representative Hunhoff noted that some agencies are proposing rules changes without having the proper statutory authority or citing incorrect statutory references; she asked how that situation could be corrected. Mr. Cummings said the issue will be covered during the staff meeting as such errors should be caught during the LRC review process.

Senator Kennedy said rules often contain typographical or grammatical errors that should be corrected before they are brought before the committee for consideration. Mr. Cummings agreed, saying staffers will be comparing the final rules provided by the agency with the style and form edits provided by LRC to ensure corrections are being made.

Senator Solano expressed his appreciation for the recent changes and advised members they will need to discuss possible legislation to improve the administrative rules process.

Rules Reviewed

Department of Agriculture: Amend rules to:

- Add Palmer Amaranth as a prohibited noxious weed seed;
- Clarify that no presence of prohibited noxious weed seed is allowable in seed;
- Move quackgrass from the prohibited noxious weed seed list to the restricted noxious weed seed list;
- Lower the maximum allowable presence of restricted noxious weed seeds; and
- Update references, scientific names, and testing processes.

Ms. Brenda Sievers, Department of Agriculture, reviewed the proposed rules.

Public Testimony

Representative John Lake, self, Gettysburg, spoke in support of the changes.

Representative Hunhoff asked about the fee change for copies of the "Rules for Testing Seeds" manual produced by the Association of Official Seed Analysts. Ms. Sievers explained the manual is updated annually and the fee, which goes to the association, reflects the cost of the current edition.

Senator Solano inquired as to what the state can do to combat noxious weeds that are introduced into seed. Ms. Sievers clarified the proposed rules are seed rules, not noxious weed rules. The Weed and Pest Commission oversees the weed and pest program but because Palmer Amaranth is an annual weed, it does not meet the criteria for the program. She said the department is working to ensure that weed seeds are not brought into the state mixed with other seeds and the proposed rules changes are part of that effort.

Senator Solano asked Representative Lake how the situation impacts producers. Representative Lake replied there is a difference between the weed process and the seed process, and producers are more concerned with the seed process and not having seeds mixed with weed seeds coming into the state. He said South Dakota has become a dumping ground for this particular weed because surrounding states already have rules in place prohibiting it.

Ms. Sievers explained that seed laws are "truth in labeling" laws and inspections are conducted to ensure labels are correct.

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

Department of Game, Fish and Parks: Amend rules to:

- Move the start date for hunting on Sand Lake National Wildlife Refuge in Brown County to an earlier date;
- Decrease the overall number of West River one-tag antelope licenses and increase the total number of two-tag licenses;
- Decrease the total amount of East River one-tag antelope licenses;
- Add Todd County to Unit PRA-50A;
- Remove Hyde County from Unit PRA-36A;
- Create Unit PRA-38A to include Buffalo, Hand, and Hyde Counties; and
- Align the open units of the archery antelope hunting season with those units in the firearm antelope hunting season.

Mr. Tony Leif, Wildlife Division, Department of Game, Fish and Parks, reviewed the proposed rules and advised members that the Game, Fish and Parks Commission at their July meeting did not approve the rules listed on today's agenda regarding hunting on the Sand Lake National Wildlife Refuge and use of centerfire rifles on the Oacoma Game Production Area.

Senator Kennedy asked if the proposed changes in the number of one-tag and two-tag antelope licenses could limit the number of hunters. Mr. Leif said that that potential exists but the quality of the hunt would be improved for those hunters who do get a license.

Representative Hunhoff moved, seconded by Senator Kennedy, 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. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano.

Department of Game, Fish and Parks: Adopt an emergency rule to allow the department to designate Lake Sharpe and Lake Francis Case as containment waters thus requiring boaters to follow decontamination rules as laid out in ARSD 41:10:04:08.

Mr. Tony Leif, Wildlife Division, Department of Game, Fish and Parks, explained the emergency rules which went into effect July 30, 2019. Emergency rules do not require a hearing and become effective the date they are filed with the Secretary of State. The rules are intended to slow the spread of zebra mussels in South Dakota waters. Mr. Leif said the department will suggest to the Game, Fish and Parks Commission at their September meeting that the rules become permanent.

Representative Hunhoff asked what the department is doing to be proactive in eliminating the zebra mussel problem. Mr. Leif replied the realistic goal is to slow their spread; the only way to totally contain the problem is to stop all water activity across the state. He said the boat plug rule is the most important for slowing the spread of the invasive species and while it is difficult to enforce and there has been some resistance, officers are enforcing it.

Representative Hunhoff noted the citation numbers are low in some parts of the state and wondered if the department is holding people to task on the regulations. Mr. Leif responded that enforcement efforts are being stepped up statewide and anglers have better compliance rates with the boat plug rule than do recreational boat users.

Senator Solano stated efforts need to be made to contain all waters that could be affected. Mr. Leif said while the department has taken the primary role on this issue, implications go far beyond hunters, anglers, and boaters. Zebra mussels impact municipalities and water systems, too. Legislation is likely in the 2020 Legislative Session to make containment even more restrictive.

Mr. Leif advised members that there are no predators or cost-effective control measures to contain zebra mussel populations and chemical treatments are being tested but they are extremely expensive.

Senator Solano thanked the department for the discussion and requested the committee be kept informed of further developments.

Department of Transportation: Amend rules to:

- Increase the speed limit on Interstate Highway 190 in Rapid City from 55 to 60 miles per hour;
- Increase the speed limit for a segment of State Trunk Highway 79 from Rapid City to the Custer County line from 60 to 70 miles per hour; and
- Increase from 65 to 70 miles per hour the speed limit on State Trunk Highway 79 from the north side of Hermosa to the Pennington County line.

Ms. Karla Engle, Department of Transportation, reviewed the proposed rules and explained that suggested speed limits are usually based on the 85th percentile speed which is the speed at which or below 85 percent of the vehicles passing a monitored point are traveling.

Senator Kennedy noted a citation was missing on one of the proposed rules. Ms. Engle said it would be added before the rules were filed with the Secretary of State.

Representative Hunhoff asked when the speed limits in the affected areas were last changed and what prompted the proposed change. Ms. Engle replied the issue was raised by the public and subsequently reviewed by the department to determine if the changes were warranted.

Representative Cwach inquired how the department strikes a balance between public traffic patterns, law enforcement, and public safety. According to Ms. Engle, drivers drive in ways that are influenced by the environment and speed limits are set based on that behavior. Higher speed limits do not always produce more risks; it depends on the type of road, how lanes are divided, and how drivers travel on it.

Senator Kennedy 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 5 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano.

South Dakota State Brand Board (Department of Agriculture): Amend rules to:

- Increase brand program fees;
- Set a brand application fee; and
- Set the fee for brand inspections requested outside the brand inspection area, not to exceed $1.00/head.

Ms. Debbie Trapp, South Dakota State Brand Board, reviewed the proposed rules and advised the committee that the board operates solely on fees and receives no general fund dollars.

Referencing the proposed rule concerning brand registration fees for each location of the brand on an animal, Senator Kennedy asked how many places an animal could be branded. Ms. Trapp replied there are six locations a brand can be placed on an animal.

Senator Solano asked how much of a positive cash flow the fee increases would create and if those funds are put into a reserve fund. Ms. Trapp said the fees were last increased 20 years ago and historically, there is a cash reserve that carries over for 5 years.

Representative Hunhoff commented this was the first time cattle producers had not voiced opposition to the fees; she commended the board for their efforts to communicate with producers as to why the proposed changes were needed.

Representative Cwach moved, seconded by Senator Kennedy, that the review of the rules proposed by the South Dakota State Brand Board (Department of Agriculture) is complete. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano.

South Dakota State Plumbing Commission (Department of Labor and Regulation): Amend rules to update codified law references, processes for declaratory rulings and renewing expired licenses, and the Uniform Plumbing Code.

Ms. Nina Ripley, South Dakota State Plumbing Commission, reviewed the proposed rules.

Representative Cwach asked how replacing the word "prohibited" with "permitted" impacts the Uniform Plumbing Code (UPC). Ms. Ripley clarified the change allows plumbers to do a particular type of plumbing work they were unable to do previously. She said changes to the UPC are based on a general consensus from the plumbers and the commission as to what makes sense for the industry and follows the state's requirements.

Representative Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota State Plumbing Commission (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano.

Board of Minerals and Environment (Department of Environment and Natural Resources): Amend rules to:

- Increase regulatory flexibility and clarity of rules applicable to hazardous waste generators;
- Establish a methodology for the use of electronic manifests;
- Establish procedures for managing and disposing of defective airbag inflators;
- Provide healthcare facilities and pharmacies with management and disposal options for hazardous waste pharmaceuticals;
- Revise requirements involving imports and exports of hazardous wastes; and
- Incorporate corrections made in federal regulations.

Ms. Carrie Jacobson, Department of Environment and Natural Resources, reviewed the proposed rules.

Senator Kennedy referenced a 14-page email from the Environmental Protection Agency (EPA) containing comments on and potential changes to the proposed rules and asked if the department intended to make all of the changes. Ms. Jacobson responded the department made the changes they felt could be made; some of the suggestions needed further discussion based on South Dakota's rule-making process and others could not be incorporated due to the late arrival of the email. At Senator Kennedy's request, she will provide committee members a copy of the EPA changes that were incorporated into the rules.

Representative Hunhoff asked how the department concluded what EPA suggestions needed further discussion. Ms. Jacobson said states are often playing catch-up to federal rules and one of the rules referenced by the EPA appeared in a federal register notice issued too late to be included in the rules being discussed by the committee today. She stated the department will continue to review the agency's recommendations and may be bringing further rules changes this fall.

Senator Kennedy expressed concern over waiting to fix the rules until a later date, saying due to their complexity and significance, they should be done right the first time. Senator Solano said he appreciated the concern but cautioned jumping on federal regulations without evaluating them first to determine if they are something the state actually needs.

Senator Kennedy and Representatives Cwach and Hunhoff agreed that while the discussion was valid, the department had provided no justification for not taking the EPA's suggestions.

Senator Solano asked if there was a risk to South Dakota if the rules were reverted. Ms. Jacobson said the airbag and pharmaceutical waste rules in the proposed packet are essential as a portion of them are going into effect nationwide and South Dakota needs a means to enforce them.

Representative Hansen wondered if when the EPA adopts regulations, the agency wants all states to also adopt them, if possible. Ms. Jacobson stated while every state is different, South Dakota tries to keep in step with the federal regulations. When the state incorporates by reference, they include the entire federal regulation. If a regulation is being considered but not incorporated by reference, the state makes the decision as to its applicability to the state and whether it is necessary to adopt it.

Senator Kennedy asked if incorporating by reference makes the state responsible for enforcing the rules. Ms. Jacobson replied yes; if a regulation is not incorporated by reference, the federal agency would have to enforce those rules in South Dakota.

Senator Kennedy reiterated his opposition to the proposed rules based on the lack of explanation by the department as to why they did not adopt all of the EPA recommendations. Representative Hunhoff said she was reluctant initially but believes the department's actions were based on what best fits South Dakota's needs.

Senator Solano moved, seconded by Representative Hunhoff, that the review of the rules proposed by the Board of Minerals and Environment (Department of Environment and Natural Resources) is complete. Motion prevailed on a roll call vote with 3 ayes and 2 nays. Voting aye: Hansen, Hunhoff, and Solano. Voting nay: Cwach and Kennedy.

Appraiser Certification Program (Department of Labor and Regulation): Amend rules to:

- Require applicants for an initial appraiser credential, a renewing credentialed appraiser, a supervisory appraiser, and an appraisal management company registration to provide the department with an email address; and
- Eliminate the requirement for a notarized affidavit or irrevocable Uniform Consent to Service of Process form.

Ms. Sherry Bren, Appraiser Certification Program, reviewed the proposed rules and read a written comment from **Mr. Jim Hollenbeck, Vice President, Appraisal, Farm Credit Services of America,** supporting the changes. The proposed changes will prepare the program for the implementation of an online application system.

Senator Solano moved, seconded by Representative Hansen, that the review of the rules proposed by the Appraiser Certification Program (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, and Solano.

Division of Insurance (Department of Labor and Regulation): Amend rules to:

- Remove a reference to the National Association of Securities Dealers (NASD) and insert a reference to the Financial Industry Regulatory Authority (FINRA);
- Update the sources referenced in rule; and
- Fix outdated statutory references to SDCL 58-17-4.3.

Ms. Mallori Barnett, Division of Insurance, Department of Labor and Regulation, reviewed the proposed rules and noted a citation error that will be corrected before the final filing of the rules.

Senator Kennedy asked how SDCL 58-17-74.1 correlates with the uniform age bands table contained in the proposed rules. Ms. Barnett said the reference to the citation in the "Law Implemented" section of the rule was the result of a transfer from one statute to another.

Senators Kennedy and Solano requested clarification on how the statute limits rate variations. Ms. Barnett said in the first rule cited by the two members, a 3-to-1 ratio applies. **Ms. Jill Kruger, Division of Insurance,**

Department of Labor and Regulation, noted that the statute was enacted prior to the Affordable Care Act (ACA) and the rules changed after the ACA was implemented. The rule now lays out the four areas – age, geographic location, family size, and tobacco usage – that can allow for different premiums to be charged.

Senator Kennedy inquired if statutory changes are needed in South Dakota to be consistent with the ACA. Ms. Kruger said the division will review that issue.

Senator Kennedy said while the proposed changes were well-intentioned, they are not consistent with state statute and he could not support their passage.

Representative Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the Division of Insurance (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 4 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, and Solano. Voting nay: Kennedy.

Closing Comments

Senator Solano announced the next meeting of the Interim Rules Review Committee is September 9, 2019.

Adjournment

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

Chair Solano adjourned the meeting at 12:50 p.m.