

MINUTES

JOINT COMMITTEE ON ADMINISTRATIVE RULES AND REGULATIONS

September 17, 2012
Room 152-S—Statehouse

Members Present

Senator Vicki Schmidt, Chairperson
Senator Oletha Faust-Goudeau
Senator Ralph Ostmeyer
Senator Allen Schmidt
Representative Steve Huebert
Representative Jan Pauls
Representative Caryn Tyson

Members Absent

Representative Carl Holmes, Vice-chairperson
Senator Tim Owens
Representative Joe Patton
Representative Valdenia Winn

Staff Present

Jill Shelley, Kansas Legislative Research Department
Corey Carnahan, Kansas Legislative Research Department
Brian Turnbull, Kansas Legislative Research Department
Nobuko Folmsbee, Office of the Revisor of Statutes
Katherine McBride, Office of the Revisor of Statutes
Judy Glasgow, Administrative Assistant

Conferees

Kelley Melton, Kansas Department of Health and Environment
Chris Tymeson, Kansas Department of Wildlife, Parks and Tourism
Rick Scheufler, Kansas Department of Agriculture
Steve Moris, Kansas Department of Agriculture
Jean Redeker, Kansas Board of Regents
Lane Palmateer, Kansas Corporation Commission
Sarah Byrne, Kansas Department of Revenue
Patricia Scalia, State Board of Indigents' Defense Services
Tom Gross, Kansas Department of Health and Environment

Others Present

Berend Koops, Merck
Bill Eastman, Westar

Dan Wilkns, Westar
Stephanie Hirner, Westar
Sean Miller, Capitol Strategies
Shelly Liby, Kansas Department of Health and Environment
Nicole Churchwell, HID
Susan Zalenski, J & J
Paje Resner, Hein Law Firm
Edward Larson, Kansas Catholic Conference
Tom Day, Kansas Corporation Commission
Randy Stookey, Kansas Grain and Feed Association (KGFA)
Adam Inman, Kansas Department of Agriculture
Julene Miller, Kansas Board of Regents
Leslie Kaufman, Kansas Co-op Council
Rick Brunetti, Kansas Department of Health and Environment
Susan Vogel, Kansas Department of Health and Environment
Miles Stotts, Kansas Department of Health and Environment

Morning Session

Chairperson Vicki Schmidt called the meeting to order at 10:00 a.m. She recognized Kelley Melton to address the rule and regulation noticed for hearing by the Department of Health and Environment (KDHE), Division of Health Care Finance. KAR 129-5-1, prior authorization.

Ms. Melton gave a brief background on how prior authorization works and two reasons medications are placed on the prior authorization list. She explained the three KanCare providers will follow these requirements. There was concern from Committee members about the 48-hour turnaround time for authorization to use a drug on the prior authorization list. This would be especially important if there was an emergency on a weekend or if the person's condition was life threatening. A Committee member questioned why the automated or "smart" prior authorization was not working as had been promised.

Ms. Melton stated each of the three KanCare providers will have its own smart prior authorization system and the agency will learn more details of each system in October. The Committee requested a summary of the October review of these companies. In response to a question by a Committee member, Ms. Melton stated there were about 60 drugs on the backlog to be reviewed for inclusion in this rule and regulation, but of those, only around 30 would come before the Committee. The Chairperson offered the Committee's assistance in dealing with delays in the process outside of the agency.

When asked why the Drug Utilization Review Board had canceled its scheduled meeting to review drugs, Ms. Melton stated the Board does have one vacancy and did not have a quorum. The Committee suggested the vacancy be filled as soon as possible so that would not occur again. A question was raised by a Committee member about the economic impact statement and whether the rebates had been factored in the impact statement. Ms. Melton stated they had not. A concern was expressed that the state's prior authorization system had never been completed and a Committee member asked whether any money spent on that system would be refunded. Ms. Melton said she would provide that information.

Chairperson Schmidt noted a quorum was present and requested action on the July minutes. A Committee member asked whether the Department of Commerce had responded to the Committee's request showing how many of the companies using the High Performance

Incentive Program Act were Kansas companies and what the return on the state's investment was. Staff determined no response had yet been received. Another Committee member asked the minutes to be amended on page 4, line 5, to reword a phrase so that "is" would not appear at the end of the sentence. *Representative Pauls moved the minutes be approved with the amendment. Senator Allen Schmidt seconded the motion. The motion carried.*

Chris Tymeson, Chief Legal Counsel, was recognized by the Chairperson to speak to the proposed rules and regulations noticed for hearing by the Department of Wildlife, Parks and Tourism (KDWPT). KAR 115-1-1, definitions; KAR 115-2-1, amount of fees; KAR 115-2-2, motor vehicle permit fees; KAR 115-4-15, restitution scoring system; white-tailed deer; mule deer; elk; antelope; KAR 115-7-3, fish; taking and use of baitfish or minnows; KAR 115-7-10, fishing; special provisions; KAR 115-8-1, department lands and waters: hunting, furharvesting, and discharge of firearms; KAR 115-8-19, personal conduct on department lands and waters; provisions, restrictions and penalties; KAR 115-18-18, hand fishing permit; requirements, restrictions, and permit duration; KAR 115-18-22, senior pass valid for hunting and fishing; requirements, restrictions, and permit duration; KAR 115-25-6, turkey; spring season, bag limit, permits, and game tags; and KAR 115-25-14, fishing; creel limit, size limit, possession limit, and open season.

The Committee requested KDWPT check all regulations to ensure consistent spelling of "baitfish." KAR 115-1-1, definition, shows "bait fish," two words. Committee members noted in several regulations the words "rule and" had been deleted from the term "rule and regulation," which the Committee strongly prefers. These should be reinserted as the correct term is "rule and regulation"; the Committee requested a letter be sent to the Department of Administration stating this. Staff questioned the history section, stating several of the rules and regulations would become effective before January 1, 2013, and asking for the citation of the authority to promulgate these rules and regulations before that date.

Chairperson Schmidt next welcomed Rick Scheufler, Staff Attorney, to speak to the proposed rules and regulations noticed for hearing by the Department of Agriculture. KAR 4-28-6, fees; food establishment; KAR 4-28-31, fees; education facility with a school lunch program or satellite school lunch program; and KAR 4-28-3, KAR 4-28-4, and KAR 4-28-7, revoked.

Mr. Scheufler stated KAR 4-28-6 was the result of HB 2730 passed by the 2012 Legislature. He stated there is a temporary regulation in place identical to the one before the Committee.

The Committee noted in KAR 4-28-6, paragraph 1, sentence 3, the word "supplied" should be changed to "made available." Mr. Scheufler said KAR 4-28-31 was the result of a mandate in the National School Lunch Act. Staff noted in (b)(1) the application fee should be clarified to show this is a one-time fee, not an annual fee. On page 2, paragraph (e)(2), the Committee questioned whether the dates were in conflict with the new section of HB 2730 stating if the license was not renewed within 30 days, it was not considered a renewal but a new license. Mr. Scheufler and Mr. Moris stated they would look into this. Staff had a question on the economic impact statement and how this would be revenue neutral.

Jean Redeker was recognized by the Chairperson to address the rule and regulation noticed by the Board of Regents (Attachment 1). KAR 88-29-11, requirements for the qualified admission pre-college curriculum.

In response to a question from a Committee member, Ms. Redeker stated a unit is generally defined as would be 120 clock hours. The Committee had questions of a general

nature regarding the inclusion of technical college courses that would apply to technical colleges.

Chairperson Schmidt welcomed Lane Palmateer, Litigation Counsel, to speak to the proposed rules and regulations noticed for hearing by the Kansas Corporation Commission (Attachment 2). KAR 82-3-1200, definitions; compressed air energy storage; KAR 82-3-1201, licensing; financial assurance; KAR 82-3-1202, signatory; signature for reports; KAR 82-3-1203, permit required; permit application; KAR 82-3-1204, notice of application; publication; protest; KAR 82-3-1205, permit amendment; KAR 82-3-1206, permit transfer; KAR 82-3-1207, permit modification, suspension, and cancellation; KAR 82-3-1208, site selection; KAR 82-3-1209, design and construction of storage well; KAR 82-3-1210, storage facility construction and integrity; KAR 82-3-1211; storage well workover; KAR 82-3-1212, operation, monitoring, and measurement requirements for cavern storage wells; KAR 82-3-1213, operation, monitoring, and measurement requirements for reservoir storage wells; KAR 82-3-1214, long-term monitoring, measurement, and testing for cavern storage facilities and cavern storage wells; KAR 82-3-1215, long-term monitoring, measurement, and testing for reservoir storage facilities and reservoir storage wells; KAR 82-3-1216, safety and emergency response plan; KAR 82-3-1217, safety inspection; KAR 82-3-1218, plugging-monitoring status; KAR 82-3-1219, storage well plugging; KAR 82-3-1220, temporary abandonment of reservoir storage wells and reservoir storage facilities; KAR 82-3-1221, decommissioning and abandonment of a storage facility; KAR 82-3-1222, reporting required; record retention; and KAR 82-3-1223, fees.

A Committee member questioned why the rules and regulations were being promulgated. Mr. Palmateer stated the agency wanted these in place if someone expressed interest in the storage of compressed air in Kansas and the rules and regulations are required by statute. He stated at this time only two locations were doing this, one in Germany and one in Alabama. In KAR 82-3-1201, staff questioned whether the listed authorizing statute included authority for the agency to issue or revoke licenses. Mr. Palmateer stated this authority would be found in the oil and gas statutes. Staff noted those statutes should be cited in history section. KAR 82-3-1204 page 1, (b), the Committee suggested the notice also be published in the Hays newspaper, as many oil and gas operations have sites in Ellis or a nearby county.

In KAR 82-3-1205, staff asked whether the terms “substantial change” and “threat to public safety” should be defined. In KAR 82-3-1207, staff noted the terms “material change” and “material deviations” were not defined anywhere. A question was raised about the difference between them and who would make the determination. Mr. Palmateer stated the director would decide. In KAR 82-3-1223, Mr. Palmateer stated the fees in (a) were the same as those in KDHE’s underground natural gas storage well rule and regulation KAR 28-45a-19. The fee in (b) was the Commission’s best estimate as to what it would cost to process an application.

The Chairperson recessed the meeting until 1:30 p.m.

Afternoon Session

The meeting was reconvened at 1:30 p.m. by Chairperson Schmidt. Sarah Byrne, Assistant Attorney General, was welcomed by the Chairperson to speak to the proposed rule and regulation noticed for hearing by the Department of Revenue, Division of Alcoholic Beverage Control. KAR 14-16-25, imposition of penalties for violations.

A Committee member noted the fine and penalty schedule referenced did not specifically define the penalties and had not been readily available.

The Chairperson then recognized Patricia Scalia, Executive Director, to address the proposed rules and regulations noticed for hearing by the State Board of Indigents' Defense Services. KAR 105-7-1, funding approval; court order authorizing services; KAR 105-7-2, claims; KAR 105-7-3, limitations; KAR 105-7-4, investigators; KAR 105-7-6, interpreters; KAR 105-7-8, revoked; and KAR 105-11-1, defendant reimbursement of attorney fees.

Staff said the listed statutes in KAR 105-7-1 do not appear to specifically authorize a requirement for Board approval of services and suggested statutes authorizing that be added to the history session. Ms. Scalia responded to questions of a general nature from the Committee.

Thomas Gross was recognized by the Chairperson to speak to the proposed rules and regulations noticed for hearing by KDHE, Bureau of Air (Attachment 3). KAR 28-19-350, prevention of significant deterioration (PSD) of air quality; KAR 28-19-735, national emission standards for hazardous air pollutants; KAR 28-19-750, hazardous air pollutants; maximum achievable control technology; and KAR 28-19-750a, consolidated federal air regulations; synthetic organic chemical manufacturing industry.

A Committee member noted the economic impact statement for KAR 28-19-350 says noncompliance with federal regulations would result in the loss of affiliated federal transportation funding, but does not state an amount at risk; the amount or formula for the amount was requested.

The Committee, as a whole, encouraged the Bureau of Air to continue its dialogues with the Environmental Protection Agency to bring the particular issues concerning Kansas, particularly rural Kansas, to that agency's attention.

Jill Shelley called the members' attention to the most recent Joint Committee on Administrative Rules and Regulations annual report and asked members to let her know if they want additional hard copies.

The next meeting is scheduled for November 26, 2012. A Committee member stated he would not be available on that date and suggested November 29, 2012, would be better. Staff will check calendars and poll members if the meeting needs to be changed.

The Chairperson adjourned the meeting at 2:35 p.m.

COMMITTEE COMMENTS ON PROPOSED RULES AND REGULATIONS

Kansas Department of Health and Environment. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning prior authorization. After discussion, the Committee had the following comments.

KAR 129-5-1. The Committee understands prior authorization will be the responsibility of KanCare contractors beginning January 1, 2013, and that the state-developed current system will not be used under KanCare. The Committee requests information on the amount of funding the state has spent to date on developing its own automated prior authorization system and the status of its implementation, *e.g.*, milestones met and not met. The Committee further understands the agency will receive updates from the KanCare contractors on their prior authorization systems in October. The Committee requests a summary

report soon after that update on how contractor prior authorization systems will differ from the current state system. The Committee requests the report also include information on how quickly KanCare contractor prior authorization systems will handle requests for prior authorization of pharmaceuticals (e.g., within 48 hours) and the procedures for handling requests for prior authorization on weekends and holidays. The Committee suggests checking the spelling of the pharmaceuticals in the proposed rule and regulation, as several appear to be misspelled. Finally, the agency's representative mentioned a backlog of pharmaceuticals that should be listed in this rule and regulation; the Committee offers its assistance with any part of that process that it can make more efficient.

Kansas Department of Wildlife, Parks and Tourism. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning definitions; amount of fees; motor vehicle permit fees; restitution scoring system, white-tailed deer, elk, antelope; fish, taking and use of baitfish or minnows; fishing, special provisions; department lands and waters: hunting, furharvesting, and discharge of firearms; personal conduct on department lands and waters, provisions, restrictions and penalties; hand fishing permit, requirements, restrictions, and permit duration; senior pass valid for hunting and fishing, requirements, restrictions, and permit duration; turkey, spring season, bag limit, permits, and game tags (exempt); fishing, creel limit, size limit, possession limit, and open season (exempt). After discussion, the Committee had the following comments.

KAR 115-7-3 and 115-7-10. The Committee requests the agency review these rules and regulations for consistency in spelling of the term "baitfish."

KAR 115-2-1, 115-4-15, 115-8-19. The Committee notes that certain amendments to statutes and session laws cited in the history sections are effective January 1, 2013, and asks the agency to explain its authority for rules and regulations based on the amended authority adopted before that date. The questioned citations are L. 2012, Ch. 154, Sec. 1; KSA 2011 Supp. 32-988 as amended by L. 2012, Ch. 154, Sec. 7; KSA 2011 Supp. 32-1032 as amended by L. 2012, Ch. 154, Sec. 9; and KSA 2011 Supp. 41-719 as amended by L. 2012, Ch. 144, Sec. 29.

Kansas Department of Agriculture. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning fees, food establishment; fees, education facility with a school lunch program or satellite school lunch program; and revocations. After discussion, the Committee had the following comments.

KAR 4-28-6. The Committee suggests the agency, in subsection (a), change "supplied by the department" to "provided by the department," so that a form may be provided on the agency's website and not be required to be mailed to the operator or potential operator.

KAR 4-28-31. Paragraph (e)(2) appears to conflict with the last sentence of 2012 Senate Sub. for HB 2730 (SL Ch. 145), New Section 1(a), which states, "If the licensee does not renew within the thirty-day period, then the license is treated as expired, and the licensee must apply for a new license." The Committee requests an explanation from the agency as to whether the provisions conflict and, if so, the changes to be made to the rule and regulation. Also, the

Committee requests more detailed information on the estimated amount of revenue lost and gained due to the changes in the licensing scheme.

Board of Regents. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning requirements for the qualified admission pre-college curriculum. After discussion, the Committee had no comments.

Kansas Corporation Commission, Oil and Gas Division. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning definitions, compressed air energy storage; licensing, financial assurance; signatory, signature for reports; permit required, permit application; notice of application, publication, protest; permit amendment; permit transfer; permit modification, suspension, and cancellation; site selection; design and construction of storage well; storage facility construction and integrity; storage well workover; operation, monitoring, and measurement requirements for cavern storage wells; operation, monitoring, and measurement requirements for reservoir storage wells; long-term monitoring, measurement, and testing for cavern storage facilities and cavern storage wells; long-term monitoring, measurement, and testing for reservoir storage facilities and reservoir storage wells; safety and emergency response plan; safety inspection; plugging- monitoring status; storage well plugging; temporary abandonment of reservoir storage wells and reservoir storage facilities; decommissioning and abandonment of a storage facility; reporting required, record retention; and fees. After discussion, the Committee had the following comments.

KAR 82-3-1200 and KAR 82-3-1201. The Commission cites KSA 2011 Supp. 66-1274 as its authority for these rules and regulations. However, that statute uses the phrase “permit issued pursuant to this section” and does not use the term “license.” Under what authority will the Commission license these facilities? If the Commission has licensing authority, the Committee recommends such authority be added to the rule and regulation history sections.

KAR 82-3-1204. The Committee suggests the notice of application be published in the Hays Daily News as well as in the Kansas Register and the Wichita Eagle, because of the many oil and gas companies operating in central and northwestern Kansas where the Hays newspaper circulates widely. Also, if the Commission believes its authority for this rule and regulation is in its general authority as well as in KSA 2011 Supp. 66-1274, that general authority also should be cited in the history section.

Terms requiring clarification. The Committee suggests the terms “substantial change” in KAR 82-3-1205 paragraph (a)(1), “material change” in KAR 82-3-1207 paragraph (a)(1), and “necessary” in KAR 82-3-1208 paragraph (d)(2) be defined, to clarify these requirements for the regulated community and ensure regulatory consistency.

KAR 82-3-1223. The Committee requests information on how the fee of \$18,890 in subsection (a) was determined; the Economic Impact Statement says only that the fee is the same as those used by the Department of Health and Environment in regulating cavern storage of natural gas and does not relate that amount to current or anticipated agency costs. The Committee also requests additional information on the actual costs to the agency related to the \$1,500 license application fee, in subsection (b).

Kansas Department of Revenue, Division of Alcoholic Beverage Control. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning imposition of penalties for violations. After discussion, the Committee had the following comments.

KAR 14-16-25. The Committee requests the agency ensure that the regulated community understands and has access to the penalty schedule listed in subsection (d). Committee members have received comments from constituents indicating the schedule is unclear.

Board of Indigents' Defense Services. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning funding approval, court order authorizing services; claims; limitations; investigators; interpreters; defendant reimbursement of attorney fees; and revocation. After discussion, the Committee had the following comments.

KAR 105-7-1. The Committee questions whether KSA 22-4508 or KSA 22-4512a authorizes a requirement for board approval of services in addition to the *ex parte* application by the appointed attorney described in the statutes and requests the agency review the history section.

Kansas Department of Health and Environment, Division of Environment, Bureau of Air. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning prevention of significant deterioration (PSD) of air quality; National emission standards for hazardous air pollutants; hazardous air pollutants, maximum achievable control technology; and consolidated federal air regulations, synthetic organic chemical manufacturing industry. After discussion, the Committee had the following comments.

General. The Committee commends the agency on its recent efforts and encourages it to continue its dialog with the U.S. Environmental Protection Agency on workable solutions to allow rural states such as Kansas to meet clean air standards.

KAR 28-19-350. The Economic Impact Statement for this rule and regulation states "noncompliance would result in the loss of affiliated federal transportation funding dollars." The Committee requests information about the formula that would be used to calculate that potential amount and an estimate of that amount.

Prepared by Judy Glasgow
Edited by Corey Carnahan and Jill Shelley

Approved by the Committee on:

November 26, 2012
(Date)