

MINUTES

JOINT COMMITTEE ON ADMINISTRATIVE RULES AND REGULATIONS

July 9, 2007
Room 519-S—Statehouse

Members Present

Representative Carl Holmes, Chairperson
Senator Vicki Schmidt, Vice-Chairperson
Senator Donald Betts
Senator Ralph Ostmeyer
Senator Chris Steineger
Representative John Faber
Representative Jan Pauls
Representative Arlen Siegfried
Representative Josh Svaty
Representative Mark Treaster

Members Absent

Senator Karin Brownlee
Representative Lance Kinzer

Staff Present

Raney Gilliland, Kansas Legislative Research Department
Sharon Wenger, Legislative Research Department
Tatiana Lin, Kansas Legislative Research Department
Kenneth Wilke, Revisor of Statutes Office
Judy Glasgow, Committee Assistant

Others Present

Brenda Kuder, Kansas Health Policy Authority
Margaret Smith, Kansas Health Policy Authority
Kelly Baneduct, PSFS
Reid Stacy, Kansas Health Policy Authority
Ron Seeber, Hein Law Firm
Larry Buening, Board of Healing Arts
John Kiefhaber, Kansas Chiropractic Association
Alex Kotoyantz, P.I.A.

Mark Boranyak, Capitol Strategies
Amy Thornton, Kansas Department of Wildlife and Parks
Dan Heskett, Kansas Department of Wildlife and Parks
Judy Moler, Kansas Association of Counties
Dennis Kriesel, Kansas Association of Counties
Clint Goos, Kansas Corporation Commission
Richard Cram, Department of Revenue
Juliene Maska, Governor's Office
Jamie Bowser, Governor's Office
Erica Haas, Governor's Office
Faith Loretto, Department of Administration
Mary Greb, Department of Administration
Wendy M. Harms, KAPA
Julie Ehler, Kansas Department of Agriculture
Steven Moris, Kansas Department of Agriculture
Kerri Spielman, KAIA
Deletria Nash, Kansas Insurance Department
Ken Abitz, Kansas Insurance Department
Marlyn Burch, Kansas Insurance Department
Ed Van Petten, Kansas Lottery
Keith Kocher, Assistant Attorney General, Kansas Lottery

Morning Session

Chairperson Holmes called the meeting to order at 9:00 a.m. on July 9, 2007.

The Chairperson welcomed Dr. Margaret Smith, Medical Director, to address the proposed rule and regulation noticed for hearing by the Kansas Health Policy Authority. KAR 129-5-1, prior authorization.

Several Committee members had concerns about the drugs that were listed on the prior authorization list. One of the drugs, nabilone, is not a drug approved for use in the United States and the question was raised as to why it would even be on the list for prior authorization. The other drug on the list that was questioned was albuterol solution. Dr. Smith stated that she would look into these and have an answer for the Committee. A Committee member noted that it would be helpful if the economic statement was broken down further, showing what each class of drugs put on the prior authorization list would save or cost the program. A question was raised about the effective date of the rules and regulations and how persons would know when they go into effect. A suggestion was made by the staff that an effective date for the changes could be included in the original notice of hearing. Reid Stacy noted that he would look into how this could be done. Chairman Holmes thanked Dr. Smith for her appearance before the Committee.

The Chairperson asked for action on the minutes of May 22, 2007. *Representative Pauls moved to approve the minutes as presented. Senator Ostmeyer seconded the motion. Motion passed.*

Larry Buening, Executive Director, was recognized by the Chairperson to speak to the proposed rules and regulations noticed for hearing by the Board of Healing Arts. KAR 100-11-1, amount; KAR 100-49-4, fees; KAR 100-73-1, fees; and KAR 100-28a-1, fees.

Mr. Buening stated that since this is a fee-funded agency and the 2007 Legislature gave it permission to create seven new positions, the increase in fees is necessary to cover the increased costs. He noted that Kansas has a lower fee schedule for licenses and renewals than surrounding states, and the fees have not been raised for five years. He did state that the fees were now at the statutory maximum and the Board would be coming before the Legislature to raise the limits. Mr. Buening stated that the agency will look at these fees again to see how much money is left over at the end of the fiscal year. The Committee recommended that the Board look at having the renewal dates staggered, suggesting every other year or by birthdates, so that the collection of fees would be more evenly divided throughout the year. After responding to the Committee's questions, Mr. Buening was thanked for his presentation before the Committee.

Chairman Holmes introduced Richard Cram to speak to the proposed rules and regulations noticed for hearing by the Department of Revenue. KAR 92-27-1, definition; KAR 92-27-2, application; KAR 92-27-3, filing of quarterly reports; deadline; KAR 92-27-4, record requirements, maintenance, and retention; and KAR 92-27-5, funds erroneously paid.

Mr. Cram stated these are new biodiesel fuel producer incentive regulations. He stated that at this time, the agency has received one application. Staff suggested that the Department of Revenue contact the Department of Agriculture to coordinate the definition of biodiesel and the standards for blends other than B100. Staff noted that the history section needs to be revised to include authority for record retention and record inspection in KAR 92-27-4. A Committee member noted that KAR 92-27-5 should include a dispute and appeal process and a statute of limitation for filing claims. Mr. Cram stated that \$400,000 had been appropriated to the agency for funding this initiative on July 1, 2007. Chairperson Holmes thanked Mr. Cram for his appearance before the Committee.

Amy Thornton, Legal Counsel, was recognized by the Chairman to speak to the proposed rules and regulations noticed for hearing by the Department of Wildlife and Parks Commission. KAR 115-8-7, boating and general restrictions; KAR 115-30-1, display of identification number and decal; KAR 115-30-5, boating; capacity, plate and operation; calculation of person capacity; KAR 115-30-7, boating; steering and sailing requirements; KAR 115-30-8, boating; accident reports; KAR 115-30-10, personal watercraft; definition, requirements, and restrictions; and KAR 115-30-12, marine sanitation devices; vessel requirements.

In KAR 115-30-5, staff noted that paragraph (c) should be rewritten for clarification. A question was raised by nine Committee members as to how many states require testing and the issuance of a license to operate a boat. Dan Heskett stated that only two states have that as a requirement at this time. He stated that in Kansas, those under 21 who wish to operate a boat must have completed a boater's education course. In response to a question by the Committee, Mr. Heskett stated there is normally only one officer on a lake at any time. The Committee noted that as an alternative to increasing penalties, the agency may need to come to the Legislature for additional manpower to enforce existing regulations. The Committee requested a description of areas included in "department lands and water" from KAR 115-8-7. The Committee also suggested that the agency get the new boater regulations into the hands of all boaters. It was suggested that when the yearly registration forms are mailed out each year, the new regulations be included. Chairman Holmes thanked Amy Thornton and Dan Heskett for their presentation before the Committee.

Juliene Maska, Administrator, Governor's Grants Program, was welcomed by the Chairperson to speak to the proposed rule and regulation noticed for hearing by the Department of Administration. KAR 1-64-1, delinquent status; penalties.

Ms. Maska stated that this rule and regulation is the result of HB 2590, passed by the Legislature in 2006. This regulation would allow the Secretary of Administration to assess penalties against a wireless carrier or voice-over Internet protocol (VoIP) provider, who may be deemed to be in delinquent status. The Committee suggested that the amount of the penalty should cover the costs, including the civil penalties and costs of hearing. Ms. Maska stated that this would be taken back for consideration. Staff questioned the term "informal conference" and how it was intended in this rule and regulation. Staff noted that on page 2, [c] line 3, "the request for hearing shall specify the reason or reasons" and the reference to an "informal conference" is contrary to the Kansas Administrative Procedure Act (KAPA). Ms. Maska was thanked for her appearance before the Committee.

Judy Moler, Kansas Association of Counties, was introduced by Chairperson Holmes to testify as a proponent of the proposed rules and regulations and provided written testimony (Attachment 1). She stated that as a Local Collection Point Administrator, the Kansas Association of Counties has experienced difficulty collecting the moneys required by statute. Chairman Holmes thanked her for her testimony before the Committee.

Chairman Holmes recognized Clint Goos, Assistant General Counsel, to speak to the proposed rules and regulations noticed for hearing by the Kansas Corporation Commission, Conservation Division (Attachment 2). KAR 82-3-103, notice of intention to drill; penalty; KAR 82-3-603a, spill notification to landowner or representative; penalty; KAR 82-3-123, well bore; commingling of production; KAR 82-3-123a, well bore; commingling of fluids; KAR 82-3-124, dual or multiple-completed wells; KAR 82-3-131, vacuum and high volume pumps; application and approval; KAR 82-3-140, tertiary recovery project certification; KAR 82-3-300, assignment of gas allowables in prorated pools; notice; and KAR 82-3-408, duration of injection well permits; modification penalty.

A Committee member noted that the notice and economic statement on KAR 82-3-603a contained an error concerning the time frame for keeping of documentation of notification. Mr. Goos acknowledged that these would be corrected for the public hearing. Staff recommended that the agency contact the Secretary of State's office about KAR 83-3-103 concerning uniform electronic signature transactions, since that office has been working on these procedures. Staff had questions concerning KAR 82-3-123; KAR 82-3-123a; KAR 82-3-300; and KAR 82-3-408, regarding giving notice according to the provisions of KAR 82-3-135a and the fact that the history section was not uniform. A Committee member recommended that the economic statement for KAR 82-3-119 be amended to state that "wells drilled for fresh water are regulated by the Kansas Department of Health and Environment and Division of Water Resources." Mr. Goos responded to questions from the Committee concerning the commingling of different gases by two different operators. After all questions were answered, the Chairman thanked Mr. Goos for his presentation.

Chairman Holmes reviewed meeting dates for October 2007, and canvassed Committee members regarding moving the date to October 8, 2007. It was agreed by those present that this date would be workable. The Chairman requested that staff contact the absent members to see if this date would work for them. The October meeting date will be finalized at the August meeting. The meeting was recessed until 1:30 p.m.

Afternoon Session

The Chairperson reconvened the meeting at 1:30 p.m. Dennis Baker, Mined-Land Reclamation Program Manager, was recognized by Chairperson Holmes to speak to the proposed

rules and regulations noticed for hearing by the Kansas State Conservation Commission (Attachment 3). KAR 11-8-3, initial site registration; and KAR 11-8-4, site registration renewal.

Mr. Baker stated that the Mined-Land Reclamation Program is a fee-funded program. It was implemented in 1994, and the fees have not been adjusted since the program was initiated. In response to a question from the Committee, Mr. Baker stated that these fees would not produce any extra money, but would cover the cost of the program for several years. After answering all questions from Committee members, Mr. Baker was thanked by the Chairperson for his presentation before the Committee.

Chairperson Holmes called Committee members' attention to the written testimony from Kansas Aggregate Producers' Association in support of the proposed rules and regulations offered by the Mined Land Reclamation Program (Attachment 4).

The Chairperson welcomed Rosanne Rutkowski, State Trauma Program, to speak to the proposed rules and regulations noticed for hearing by the Secretary of Health and Environment. KAR 28-54-1, definitions; KAR 28-54-2, standards for designation; KAR 28-54-3, application for designation; KAR 28-54-4, application for change of designation; KAR 28-54-5, certificate of designation; renewal; KAR 28-54-6, voluntary termination of certificate of designation; and KAR 28-54-7, misrepresentation of certificate of designation.

Staff recommended that in KAR 28-54-2, paragraph (a), the document "resources for optimal care of the injured patient: 2006" be adopted by reference. In KAR 28-54-5, staff had questions concerning the time frame of requiring the certificate of designation be submitted at least six months before expiration date, and if additional information is required, is that required to be in six months before expiration date also? A question was raised about whether this is an appealable order if the Secretary denies the renewal application. Ms. Rutkowski stated that she would have to check into these questions. Committee members had a question concerning KAR 28-54-7 (b), since some hospitals are recognized as trauma facilities by the American College of Surgeons. The Committee had concerns about the form to be completed for level III trauma facilities and was concerned that there was no criteria for the number of "desired" items that would be necessary to qualify. One Committee member suggested that the agency consider tracking the number of bypass orders implemented. After all Committee questions had been responded to, the Chairperson thanked Ms. Rutkowski for her presentation.

Angela Kohls, Program Director, Food Safety and Consumer Protection, was welcomed by Chairperson Holmes to address the proposed rules and regulations noticed for hearing by the Department of Health and Environment (KDHE). KAR 28-36-101, definitions; KAR 28-36-101, management and personnel; KAR 28-36-103, food; KAR 28-36-104, equipment, utensils, and linens; KAR 28-36-105, water, plumbing, and waste; KAR 28-36-106, physical facilities; KAR 28-36-107, poisonous or toxic materials; KAR 28-36-108, compliance and enforcement; and KAR 28-36-109, mobile food establishments, pushcarts, and temporary food establishments.

Ms. Kohls stated that these proposed rules and regulations will add the requirement for a Consumer Advisor in food service establishments that serve raw or undercooked foods from animal origins to lower the holding temperature from 140 degrees to 135 degrees, and provide clarification for industry. Staff noted that there is a conflict between the definition of the "food" in the statute and what is used in KAR 28-36-101 regarding "ice." Staff recommended that the Department of Agriculture be contacted to be sure that it is on the same time line schedule concerning KAR 28-36-101 (e) for retail stores. A Committee member requested that KAR 28-36-103 be provided to the Committee, since it was adopted by reference with only the changes highlighted. Ms. Kohls stated that this could be done. Staff suggested in KAR 28-36-109, that reference should be made back to

36-28-101 for reference of definitions of specific terms. Ms. Kohls responded to questions of a general nature concerning how citations are issued and the maximum number of violations that are allowed. The Committee also asked questions regarding the critical violation grid and whether the agency was placing more emphasis on minor issues, such as noting menu items, rather than emphasizing larger, more critical food violations. Ms. Kohls explained who was performing the reviews, stating that KDHE has contracts with seven counties to do their own reviews and KDHE covers the rest of the areas of the state. Staff noted that KAR 28-23-16 would need to be revoked, since it would be in conflict with the new temperature requirements. Ms. Kohls stated that she understood this would be done. Ms. Kohls was thanked by the Chairperson for her presentation before the Committee.

Chairman Holmes recognized Deletria L. Nash, Assistant General Counsel, to speak to the proposed rules and regulations noticed for hearing by the Kansas Insurance Department (Attachments 5, 6, and 7). KAR 40-1-37, audited financial reports; filing requirements; KAR 40-2-28, life insurance; viatical settlements; KAR 40-3-56, fire and casualty insurance companies; health care provider; claims; KAR 40-1-51, revocation; and KAR 40-3-34, revocation.

Ms. Nash stated that KAR 40-1-37 is being proposed so companies will not be required to read two documents. In the past, the Department adopted the model regulations by reference subject to exceptions, which were contained within the body of the regulation. Ms. Nash stated that this new regulation adopts the regulation as policy and makes all changes within the body of the regulation. She stated KAR 40-3-56 defines what constitutes a claim. Currently, the industry has no guidance as to when a person has made a claim against a health care professional.

Staff called attention to the letter received from Ms. Nash and a copy of the ruling by the Supreme Court of Kansas detailing the reasons behind the revocation of KAR 40-1-51, in response to questions that were raised prior to the hearing. The Committee had no questions and Ms. Nash was thanked for her presentation.

The Chairperson asked Ken Wilke to address the Committee on SB 66, passed by the Legislature during the 2007 Legislative Session (Attachments 8 and 9). Mr. Wilke gave the Committee an overview of the bill as it was passed. He pointed out that in Sec. 44, temporary rules and regulations may be adopted by the Kansas Lottery Commission without being subject to the provisions and requirements of KSA 77-415 through 77-438, which is the Rule and Regulation Filing Act.

Chairman Holmes welcomed Ed Van Petten, Executive Director of the Kansas Lottery, to address the Committee on SB 66. Mr. Van Petten gave the Committee an overview of the current operation and noted that the agency had been operating for 20 years under the provisions cited by Mr. Wilke. When asked when the earliest slots could be installed at race tracks, Mr. Van Petten stated that it could be early 2008, but more likely, April or May 2008. Staff noted that the way SB 66 is written, temporary rules and regulations may be adopted by the Lottery Commission without ever becoming permanent rules and regulations or being subject to review by the Legislature. A Committee member asked if the Racing and Gaming Commission would be coming before the Committee with permanent regulations for oversight. Mr. Van Petten stated that this was his understanding. The Chairperson thanked Mr. Van Petten for appearing before the Committee and asked if he would come back to the Committee in August to update Committee members on what progress has been made in implementing SB 66. Mr. Van Petten agreed.

It was the unanimous consensus of the Committee that a letter be sent to the Attorney General requesting an opinion on SB 66, specifically: Does this bill allow the promulgation of temporary regulations – on a permanent basis – without revocation? The Committee also requested

information regarding Nevada's rules and regulations process as it applies to slot machines and casinos.

Raney Gilliland, Kansas Legislative Research Department, called the Committee's attention to the Report on Oversight Activities of the Joint Committee on Administrative Rules and Regulations, June 2006 to May 2007, that had been mailed to each member.

The Chairperson stated the next meeting would be August 14, 2007. The meeting was adjourned.

Committee Comments on Proposed Rules and Regulations

Kansas Department of Health and Environment. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning definitions; standards for designation; application for designation; application for change of designation; certificate of designation, renewal; voluntary termination of certificate of designation; misrepresentation of certificate of designation and definitions; management and personnel; food; equipment, utensils, and linens; water, plumbing, and waste; physical facilities; poisonous or toxic materials; compliance and enforcement; and mobile food establishments, pushcarts, and temporary food establishments and had the following comments.

KAR 28-54-1. The Committee believes that the agency should track the number of times that a trauma center issues a "by-pass" in order to determine whether the facility should retain its designation as a trauma center.

KAR 28-54-2. The Committee believes that the publication "resources for optimal care of the injured patient: 2006" should be adopted by reference.

KAR 28-54-5. The Committee notes that certain required materials are to be submitted to the secretary at least six months before the expiration date on the certificate of designation. The regulation does not speak to the situation where an entity would fail to submit or only partially submits the required materials. Please clarify.

KAR 28-54-7. The Committee believes that this regulation should be clarified and made consistent with previous regulations in this set to reflect the role of the College of Surgeons in the process of designation as a trauma center.

Comment. The chart which lists the criteria for designation as a trauma center is problematic in that there is no code for the letter designations and there is no information included as to whether an entity could have none of the "desirable" criteria and still be considered to be a trauma center. Please consider clarification of the chart of criteria for the various levels of trauma centers.

KAR 28-36-101. The definition of food includes "ice" which appears to be inconsistent with current statute. Please review and adjust accordingly.

KAR 28-36-109. If the definitions contained in KAR 28-36-101 are intended to apply to this regulation, there needs to be some language providing that linkage. Also, any

references in this regulation to provisions contained in other regulations in this set should be cross referenced.

Request. It appears that the holding temperature for food in the regulation conflicts with one in another set of regulations. Please review and revoke the other regulation, if needed.

Comment. The Committee believes that the fines established should be based on the seriousness of the violation. Please comment.

State Board of Healing Arts. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning amount (medical doctors, chiropractors, and osteopathic doctors); fees (podiatry); fees (radiologic technologists) and fees (physician assistants, podiatrists, and radiologic technologists) and had the following comment.

Comment. The Committee believes that the Board should consider the staggering of fees in order to relieve cash flow issues.

Kansas Department of Wildlife and Parks. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning boating and general restrictions; display of identification number and decal; boating, capacity plate and operation, calculation of person capacity; boating, steering, and sailing requirements; boating, accident reports; personal water craft, definition, requirements, and restrictions; and marine sanitation devices, vessel requirements and had the following comments.

KAR 115-8-7. The Committee is concerned with the manner in which boaters will be informed of the new requirement of speed. In addition, the Committee is unclear as to what is meant by "all departmental land and waters." Is this a defined term or is there a list of water bodies to which this regulation would apply?

Question. The Committee would like to know how the agency intends to enforce this set of regulations.

Kansas Insurance Department. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning audited financial reports, filing requirements and life insurance, viatical settlements; fire and casualty insurance companies, health care provider, claims and revocations and had no comment.

Kansas Health Policy Authority. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning prior authorization and had the following comments.

KAR 129-5-1. The Committee questions the inclusion of the antiemetic drug nabilone. It is the Committee's understanding that this drug is not available in the United States. Please inform the Committee of the agency's rationale for inclusion of the drug.

The Committee is concerned with the drugs being removed from the prior authorization list and whether the equivalent replacement drugs will now be reimbursed at the

generic price established by way of the maximum allowable cost, or the federal upper limit.

The Committee is concerned as to whether the prior authorization list of drugs has been reviewed by the Drug Utilization Review Board. Please inform the Committee of the drug list review process.

The Committee is concerned with the prior authorization review process in that the Kansas Health Policy Authority has yet to review the proposed changes in the regulation. The Committee suggests that the agency review the promulgation process so that the Authority has the opportunity to review the regulation changes prior to their publication for public comment.

With regard to the Economic Impact Statement, the Committee seeks clarification as to whether there is a positive or negative impact with the addition or deletion of each individual drug.

Kansas Department of Revenue. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning definition; application; filing of quarterly reports, deadline; record requirements, maintenance, and retention; and funds erroneously paid and had the following comments.

KAR 92-27-2. The Committee suggests that the agency coordinate with the Kansas Department of Agriculture to ensure that the definition used for "biodiesel" is consistent throughout state government.

KAR 92-27-4. The Committee questions the authority cited for the agency to require the retention and inspection of records. Consider inclusion in the history section reference to the portion of statute which gives the agency this authority.

KAR 92-27-5. The Committee is concerned that the regulation does not contain a dispute resolution process. Consideration should be given for the inclusion of such a process when a dispute arises.

Kansas Department of Administration. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning delinquent status, penalties (VoIP) and had the following comments.

KAR 1-64-1. The Committee is concerned with the provision relating to the request for a hearing or an informal conference. The Committee requests an explanation of how this regulation is intended to operate with the Kansas Administrative Procedure Act. In addition, the language of the regulation regarding "informal conference hearing" should be clarified if something other than a conference hearing pursuant to KSA 77-533 is contemplated.

Comment. The Committee is concerned with the penalty being placed at a flat percent. This means that the actual penalty could be very small as noted in the Economic Impact Statement. The Committee believes that consideration should be given to a minimum penalty in order to cover costs and that there should be a percentage after a certain amount.

State Corporation Commission. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning notice of intention to drill, penalty; and spill notification to landowner or representative, penalty and well bore, commingling of production; well bore, commingling of fluids; dual or multiple-completed wells; vacuum and high-volume pumps, application and approval; tertiary recovery project certification; assignment of gas allowables in prorated pools, notice; duration of injection well permits, modification penalty; and revocation and had the following comments.

KAR 82-3-103. The Committee suggests that the agency contact the Secretary of State's Office in order to discuss the issues surrounding the acceptance of an electronic signature under the Kansas Electronic Transactions Act.

KAR 82-3-123; 82-3-123a; and 82-3-140. The Committee notes that in each of these regulations, reference to a subsection in a regulation is proposed for deletion. Yet, in each regulation another reference to a different subsection is being retained. The Committee believes that unless there is a compelling reason to retain the reference to the subsection that all references to subsections should be deleted.

State Conservation Commission. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning initial site registration; and site registration renewal and had no comment.

Prepared by Judy Glasgow
Edited by Raney Gilliland

Approved by Committee on:

August 14, 2007

date