

MINUTES

Rules Review Committee



Representative Jon Hansen, Chair
Senator Jean Hunhoff, Vice Chair

**Three hundred ninety-sixth meeting
Tuesday, April 6, 2021**

**Room 414 – State Capitol
Pierre, South Dakota**

The three hundred ninety-sixth meeting of the Rules Review Committee was called to order by Representative Jon Hansen, Chair, at 10:00 a.m. (CT) on April 6, 2021, via electronic conference and in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Ryan Cwach, Jon Hansen, Chair, and Kevin Jensen; and Senators Jean Hunhoff, Vice Chair, and Timothy Johns. Senator Troy Heinert was excused. Staff members present were Justin Goetz, Code Counsel, Kelly Thompson, Senior Legislative Secretary, and Hilary Carruthers, IT Support Specialist.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order.

Approval of Minutes

Senator Hunhoff moved, seconded by Representative Jensen, that the March 10, 2021, meeting minutes be approved. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

Staff Report

Mr. Justin Goetz, Code Counsel, told members he has been working with the Bureau of Finance and Management to develop the housing cost impact statement that will be required for certain proposed administrative rules following the passage of [Senate Bill 92](#) by the 2021 Legislature. The proposed form will be presented for committee approval at the May 10, 2021, meeting.

Mr. Goetz reviewed a request from Mr. Hunter Roberts, incoming Secretary, Department of Agriculture and Natural Resources (DANR), asking that a single Interim Rules Review Committee member be assigned to review rules proposed by nearly all of the boards and commissions currently administered under the [soon-to-be consolidated](#) Department of Agriculture and the Department of Environment and Natural Resources, the consolidation of which is effective on April 19, 2021, as well as rules proposed by the resulting DANR. Currently, three committee members – Representatives Hansen and Jensen, and Senator Johns – have that responsibility. Secretary Roberts suggested that Senator Johns could continue to be assigned proposed rules associated with the Petroleum Release Compensation Fund – the only regulatory item under the consolidated DANR that would then be separately assigned.

Representative Hansen, as Chair, directed that Senator Johns will continue to review rules associated with the Petroleum Release Compensation Fund. A further decision on the request will be made following discussions between Representatives Hansen and Jensen.

**Following the meeting, it was determined that Representative Hansen will be assigned the consolidated Department of Agriculture and Natural Resources rules, with the exception of the Petroleum Release Compensation Fund.*

Rules Reviewed

Water Management Board (Department of Environment and Natural Resources): Amend rules to implement a tiered, annual fee system for various industrial stormwater sectors, in order to cover the costs of the industrial stormwater permitting program.

Ms. Kelli Buscher, Department of Environment and Natural Resources, reviewed the proposed rules.

Senator Hunhoff asked how the stormwater program has been meeting its funding needs to date. Ms. Buscher said federal funding targeted for water pollution programs in general has been utilized.

Senator Hunhoff inquired how the funding received through the proposed tiered system will be used and if the board has specific goals for the program going forward. Ms. Buscher identified three goals: increasing inspections to ten percent of sites, developing a training program for industrial sites, and improving their online presence to provide better customer service.

Representative Jensen asked if the current rate of inspections, which is less than five percent, is due to the inspection cost or staffing availability. Ms. Buscher confirmed it is due to staffing issues.

Senator Hunhoff moved, seconded by Senator Johns, that the review of the rules proposed by the Water Management Board (Department of Environment and Natural Resources) is complete. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

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

- Update Ammonia criteria and toxic pollutant criteria;
- Adopt cyanobacteria cyanotoxin criteria;
- Remove the conductivity criteria for irrigation waters;
- Modify the approval procedure for water restoration and enhancement projects;
- Modify the required information to obtain water quality certifications;
- Modify the public notice requirements for water quality certifications;
- Update legal references;
- Make editorial changes to tables;
- Remove lakes with duplicate names;
- Add additional names for certain lakes;
- Add state lake identifier information for each lake;
- Add the immersion recreation use for a segment of Fall River;
- Correct typographical errors and legal locations; and
- Update names of certain streams.

Ms. Kelli Buscher and Mr. Patrick Snyder, Department of Environment and Natural Resources, reviewed the proposed rules. Ms. Buscher advised that the final rules as submitted to the committee contained three minor typographical or grammatical errors and she requested that the Rules Review Committee give their permission to LRC to make the necessary corrections in addition to the proposed rules changes.

Representative Hansen asked if Mr. Goetz as Code Counsel had the authority to make the requested corrections without a motion by the committee. Mr. Goetz replied yes, citing SDCL 1-26A-1 as authority.

Representative Cwach asked why the standards proposed by the Water Management Board for several substances were different than those recommended by the Environmental Protection Agency (EPA). Mr. Snyder responded that the department historically adopts the standards published by the EPA but that the rulemaking process started on these proposed rules as some of the EPA standards are in the process of being updated, so they will be working with the EPA on reconciling the differences when they are finalized.

Representative Cwach inquired about the impact proposed selenium levels could have on the Pallid Sturgeon population in southeast South Dakota. Mr. Snyder stated that selenium is an issue in both soils and groundwater and the EPA has published new criteria for setting levels. The U.S. Fish and Wildlife Service has expressed concern over the criteria and is working with the EPA on mutually acceptable terms. Mr. Snyder said the department will adopt them in the near future.

Senator Johns moved, seconded by Senator Hunhoff, that the review of the rules proposed by the Water Management Board (Department of Environment and Natural Resources) is complete. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

South Dakota Board of Education Standards (Department of Education): Amend rules to:

- Clarify the procedure regarding the final determination in warning, denial, suspension, or removal of accreditation actions; and
- Update the National Association for School Psychologists (NASP) standards edition year in the current language to "2020" and change language recommended by NASP regarding elements of program completion.

Ms. Amanda LaCroix and Ms. Kathy Riedy, Department of Education, reviewed the proposed rules.

Senator Hunhoff asked if the proposed rules were the result of complaints about or problems with the current accreditation program. Ms. LaCroix clarified that the changes reflect the program's desire to be more transparent about the process and were not the result of complaints.

Representative Jensen asked if the proposed change from a graduate degree to a specialist-level degree for school psychologists constituted a reduction in requirements. Ms. Riedy said the language reflects the manner in which they have always been certified and is meant as a clean-up of the rules.

Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the South Dakota Board of Education Standards (Department of Education) is complete. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

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

- Extend the "no wake zone" at the St. Francis Boat Ramp;
- Create a process to establish a transportation lane to a nonmeandered body of water;
- Create a list of transportation lanes and requirements for access of the transportation lane;
- Remove several sections of property from the Antelope Lake State Waterfowl Refuge;
- Add language to the rule that would provide flexibility of when a license is valid;
- Adjust the daily bag limit for duck hunting;
- Modify the open area for the August Management Take;
- Correct nomenclature of a refuge on Waubay Lake;
- Adjust the start date of the early fall Canada goose season;
- Adjust the daily bag limit and possession limit for the early fall Canada goose season; and
- Remove the requirement that certain documents be provided in the application process to the Department.

Mr. Jon Kotilnek and Mr. Tom Kirschenmann, Department of Game, Fish and Parks, reviewed the proposed rules.

Senator Hunhoff requested an explanation of the process used to establish a transportation lane. Mr. Kotilnek said while such a process does not currently exist, one is being developed to allow an individual to submit a petition requesting that a transportation lane be established. Mr. Kirschenmann added that the cost to establish a transportation lane would be minimal and would be computed based on the amount of time staff spent working with the landowner; putting out buoys; making the information public, including on the department's website; and going back on an annual basis to review the situation.

Senator Hunhoff asked if a private landowner can own a refuge on their land. Mr. Kirschenmann stated that administrative rule provides guidance for several different kinds of refuges. A private landowner could request that a refuge be located on their property to establish a "no hunting" area or to restrict hunting on that area to specific kinds of game. Senator Hunhoff then inquired as to whether a landowner could request to remove a refuge from their property. Mr. Kirschenmann replied yes, if the refuge is on private land.

Representative Jensen asked how transportation lanes impact farmland. Mr. Kotilnek clarified that the lanes can only be established over water.

Representative Cwach asked if in the case of a private landowner refuge, a real estate covenant or easement exists on the property. Mr. Kirschenmann responded that no such designation is placed on the title to the property. Responding to Representative Cwach on whether transportation lanes function like a public easement over a person's private lake, Mr. Kotilnek said water is considered a public trust and

the lanes are part of the nonmeandered water compromise reached in a 2017 Special Session, which was prompted by [*Duerre v. Hepler*, 2017 S.D. 8, 892 N.W.2d 209](#), the South Dakota Supreme Court decision regarding the public's right to use waters on private property for recreational purposes.

Representative Cwach asked how, if a landowner has the right to say who can and cannot use the water on their property, a transportation lane differs from a public easement. Mr. Kotilnek said the Supreme Court decision gave the South Dakota Legislature the authority to determine how nonmeandered waters, as a public resource, could be utilized, and that part of the compromise was that transportation lanes could be used if access to public nonmeandered waters was restricted.

Representative Hansen said committee members may find it helpful to read the Supreme Court decision to gain more insight into the issue.

Senator 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 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

Department of Transportation: Amend rules to:

- Reduce the speed limit from 65 miles per hour to 55 miles per hour on U.S. Highway 18 through Dallas;
- Extend the current 55 miles per hour speed limit in a northerly direction for approximately one mile on State Trunk Highway 1804 in Hughes County;
- Implement a 55 miles per hour speed zone on State Trunk Highway 34 in Moody County between the existing 65 miles per hour speed zone outside of Egan and the 35 miles per hour speed zone through Egan; and
- Lengthen the existing 35 miles per hour speed zone and shift the location of the 45 miles per hour transition speed zones on U.S. Highway 12 in and around Selby.

Ms. Karla Engle, Department of Transportation, reviewed the proposed rules.

Senator Johns 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 and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

South Dakota Commission on Gaming (Department of Revenue): Amend rules to add Dakota Duel Draw to the types of poker authorized for play in Deadwood and to adopt a rule to authorize the game as a variation of poker.

Mr. Craig Sparrow, South Dakota Commission on Gaming, reviewed the proposed rules.

Senator Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Commission on Gaming (Department of Revenue) is complete. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

Closing Comments

Mr. Goetz reported on the success of a recent administrative rules training session held for LRC staff and asked for feedback on information he provided to committee members at the March 10, 2021, meeting regarding administrative rules training for agency rules contacts. No comments or suggestions were offered.

Adjournment

Representative Jensen moved, seconded by Senator Johns, that the meeting be adjourned. Motion prevailed on a voice vote with 5 ayes and 1 excused. Voting aye: Cwach, Hansen, Hunhoff, Jensen, and Johns. Excused: Heinert.

Chair Hansen adjourned the meeting at 11:44 a.m.