

# JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

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REP. STEVEN REICK  
REP. CURTIS J. TARVER, II  
REP. DAVE VELLA

## MINUTES

June 13, 2023

### MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on Tuesday, June 13, 2023, at 11:00 a.m. in Room C600 of the Bilandic Building, Chicago. Co-Chair Spain called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee meetings. Other persons are encouraged to submit their comments to the JCAR office in writing.

### ATTENDANCE ROLL CALL

X Senator Cristina Castro	X Representative Eva-Dina Delgado
X Senator Bill Cunningham	X Representative Jackie Haas
X Senator Donald DeWitte	X Representative Steven Reick
X Senator Dale Fowler	X Representative Ryan Spain
X Senator Kimberly A. Lightford	X Representative Curtis J. Tarver, II
X Senator Sue Rezin	X Representative Dave Vella

### APPROVAL OF THE MINUTES OF THE MAY 16, 2023 MEETING

Co-Chair Cunningham moved, seconded by Rep. Reick, that the minutes of the May 16, 2023 meeting be approved. The motion passed unanimously (12-0-0).

### AGENCY RESPONSES

*Department of Human Services – Permanent Supportive Housing & Bridge Subsidy Model for Persons with Mental Illnesses (59 Ill. Adm. Code 145; 46 Ill. Reg. 20109)*

Due to the appropriateness of the agency's response, no further action was taken.

*Law Enforcement Training and Standards Board – Illinois Police Training Act (20 Ill. Adm. Code 1720; 47 Ill. Reg. 216); Intern Training Program (20 Ill. Adm. Code 1725; 47 Ill. Reg. 243); Part-Time Basic Training (20 Ill. Adm. Code 1770; 47 Ill. Reg. 253)*

Due to the appropriateness of the Board's response, no further action was taken.

***State Police Merit Board – Procedures of the Department of State Police Merit Board (80 Ill. Adm. Code 150; 46 Ill. Reg. 8066).***

Due to the appropriateness of the Board's response, no further action was taken.

### **REVIEW OF AGENCY RULEMAKINGS**

***Department of Human Services – Electronic Prescription Monitoring Program (77 Ill. Adm. Code 2080; 46 Ill. Reg. 16961)***

Sen. Rezin moved, seconded by Rep. Delgado, that JCAR, with the concurrence of DHS, extend the 2<sup>nd</sup> Notice period for this rulemaking for an additional 45 days. The motion passed unanimously (12-0-0).

***Department of Public Health – Assisted Living and Shared Housing Establishment Code (77 Ill. Adm. Code 295; 47 Ill. Reg. 356)***

Rep. Vella moved, seconded by Sen. Fowler, that JCAR, with the concurrence of DPH, extend the 2<sup>nd</sup> Notice period for this rulemaking for an additional 45 days. The motion passed unanimously (12-0-0).

***Secretary of State – Secretary of State Standard Procurement (44 Ill. Adm. Code 2000; 47 Ill. Reg. 2619) and Secretary of State Standard Procurement (44 Ill. Adm. Code 2000; 47 Ill. Reg. 4227)***

Irene Lyons, Executive Counsel, represented the Office of the Secretary of State.

Rep. Tarver: I just had a couple quick questions that I think I know the answer to but I prefer to have them on the record. Is there anything in these tabs that would in any way diminish BEP requirements as they relate to the Secretary of State's office or anywhere else?

Ms. Lyons: No.

Rep. Tarver: There was some language that was removed in Tab 31 on page 7 around line 275 that says a list of things that shall be considered and now it just says "includes considering". I want to know the emphasis behind that or if there's any opposition to returning the language to "shall". Because it's a list of things that shall be considered and now says "includes considering". My concern, and now I'll stop rambling, is that if there's a list of seven things and now it says "includes considering" someone could arguably consider 2 or 3 of those things and then be all set and before all 7 would be required to be considered. What is your response to that, please?

Ms. Lyons: We're not opposed to keeping "shall".

Rep. Tarver: OK. That will make life a lot easier for me.

Ms. Lyons: OK. We'll keep "shall".

Co-Chair Spain announced that these rulemakings would remain on the No Objection List.

***Department of Natural Resources – Land and Water Conservation Fund (LWCF) Grant Program (17 Ill. Adm. Code 3030; 47 Ill. Reg. 1286) and Boat Access Area Development Program (17 Ill. Adm. Code 3035; 47 Ill. Reg. 1291)***

Co-Chair Cunningham moved, seconded by Rep. Reick, that JCAR object to these rulemakings for failure to meet the requirement of 1 Ill. Adm. Code 220.900 (a)(2)(A). The Department has not provided the Committee and the public with adequate justification for removing the longstanding practice of permitting the Natural Resources Advisory Board to participate in the grant review process for the aforementioned grant programs. This Board has provided public input and oversight to State supported improvement projects for decades, and should not be removed from this role without adequate justification. The motion passed unanimously (12-0-0).

***Pollution Control Board – Permits and General Provisions (35 Ill. Adm. Code 201; 46 Ill. Reg. 20627), Alternative Control Strategies (35 Ill. Adm. Code 202; 46 Ill. Reg. 20638), and Visible and Particulate Matter Emissions (35 Ill. Adm. Code 212; 46 Ill. Reg. 20644)***

Marie Tipsord, General Counsel, Richard McGill, Senior Attorney for Research and Writing, and Anand Rao, Chief Environmental Scientist, Chloe Salk, Attorney Advisor to Member Gibson, and Daniel Pauley, Staff Attorney and Legislative Liaison, represented PCB. James Jennings, Deputy Director, represented the Illinois EPA.

Co-Chair Spain: We've had robust discussion on this topic, and I know that many of the members of our Committee have questions for this group, but to start things off I wanted to ask representatives of the Pollution Control Board and the EPA if you are agreeable to accepting an Extension on these matters for one month until our July 18 JCAR meeting.

Ms. Tipsord (PCB): The Pollution Control Board will agree to extend to the July meeting this rulemaking so we can continue conversations with the Committee and your staff.

Mr. Jennings (EPA): The IEPA is also in agreement.

Co-Chair Spain: Thank you very much. So, if we could spend a little time, I think there are members who have questions about this topic and I'll open it up for discussion. Maybe the first thing, though, to set the stage, if someone would be willing to discuss the engagement that has happened up until this point with industry stakeholders on this topic. This item has been in place for many years with the U.S. EPA and maybe giving us a bit of a quick historical overview of where we're at and what the specific outreach has been to industry would be a useful place for us to start.

Ms. Tipsord (PCB): I can tell you that for the Pollution Control Board our process starts when we receive the rulemaking filed by the EPA. So, for the Board, once we receive a rulemaking, under Section 28.5 (of the Environmental Protection Act [415 ILCS 5]) in particular we have very specific deadlines we have to meet. We have to schedule immediately, actually we have to go to First Notice within 14 days of receipt, which puts it in the *Illinois Register*. We have to schedule our first hearing within 30 days, and our second hearing within I believe 55 days. So we have two

hearings scheduled—we actually schedule three hearings. The third hearing is optional; generally, the first two hearings are held and the first two were held here. That includes accepting prefiled testimony from all interested participants and parties as well as the proponent, in this case the EPA. So everything before the Board is done on the record, either through public comment or through transcripts. And that's the process after it gets to the Board. But I would defer to EPA to discuss any outreach that they had prior to bringing the proposal to the Board.

Mr. Jennings (EPA): The process for this began quite some time ago, and really there were three varieties of involvement. The IEPA, USEPA, and various industry groups. The IEPA did not have clarity from USEPA on what the expectations for an appropriate filing would be until early last year. At that point in time, the Agency had to do some of its internal analysis and then was in frequent contact with USEPA to determine from them what would actually be approvable. Once it was evident that the only thing that would have been absolutely approvable from their perspective would be removing the totality of the language they found problematic, the Agency then began engaging industry groups. This began sometime late last year, which included a comment period during which time we did receive comments back. Once the rule was filed with the Board, then certainly we would have been part of the conversation with respect to various industry filings, but because of the potential for *ex parte* issues there would have been a little bit of a step back in the degree of engagement. But the question of what led up to this point is actually very timely. Even since we've been sitting in here we've gotten confirmations from USEPA that their staff and our staff are going to be holding some meetings. There were some availability issues on USEPA's end that prevented a response until today, but similar to the commitment we made less than an hour and a half or two hours ago, we will be working with industry groups beginning as early as next week and with USEPA to try to identify a workable solution.

Co-Chair Cunningham: Thank you. I first want to express my appreciation to both agencies for agreeing to an Extension. I do, however, want to express a little bit of disappointment, and I think it's shared with the other members of the Committee, about how this process has been handled from a timing standpoint. The federal rules were put in place towards the end of the Obama administration, so we've known this has been coming for quite some time—8 or 9 years. And now we see that we're up against a deadline. And because of those delays it's my understanding—correct me if I'm wrong—that the Illinois EPA put this rulemaking on a fast track basis which has the natural effect of limiting public comment. It's my understanding that at some point in comment you made a reference to when a request was made for comment in November of 2022, and I believe they had only 2-3 weeks to respond. I don't think that is the best process for dealing with this sort of matter, which I think we all agree is a very important matter. My question to the EPA is, given this short time frame that unfortunately was of the Illinois EPA's choosing, are you willing over the next month to take input from industry and anyone in the public about these rules. I have an understanding that the flexibility is limited by what the federal rules are, but I'm certainly interested to hear if you're willing to talk to people from the industry and listen to their input and see if there is some framework that you can agree to that is what is within what the federal rules allow.

Mr. Jennings (EPA): Absolutely. Having USEPA involved will be particularly beneficial as well. One of the things that the Agency and the 30 or so other states that have been put in a similar position have struggled with on this front has been that to date we haven't received any federal guidance with respect to what alternative standards could be available. As a result, this has dramatically narrowed the suite of options that may be available in a practical sense for developing these rules. And so we will absolutely meet with the industry groups and the commitment USEPA

has made to also be present I think will be also very beneficial because it may give us some light on what alternatives could be available.

Co-Chair Cunningham: What have you observed in other states? As you mentioned, other states have gone through this. Has the Illinois EPA looked at what rules other states have promulgated, and does that provide any prudential guidance to Illinois?

Mr. Jennings (EPA): To a certain degree, up to this point USEPA has not approved any alternative standards. Everything has followed the textual rubric that the Agency has employed in this rule. Certainly that could evolve and if (USEPA) Region V is able to provide additional guidance on that front when we have these conversations that will absolutely be incorporated into how we go forward. But as we sit here right now the approach has been consistent from a linguistic perspective with what the Agency has taken to date.

Co-Chair Spain: Just as a follow-up to that, in other states that have sought these alternative emission standards, you've mentioned that the USEPA has not offered a final approval but is there sort of a forbearance period or how does it work from an industry perspective when you're awaiting further action from the USEPA about these alternatives?

Mr. Jennings (EPA): Two points. One, I should clarify that to date USEPA's guidance has narrowed states to exclusively the route that we're on right now, which is simply to remove language. Various states including Illinois have asked about the viability of alternative standards in the abstract and as we sit here right now the response has been that the item that would be approvable would be exclusively removing the language. As to the forbearance issue, I think this touches on where at least under our regulations the removed language touches an affirmative defense and not an exemption from the law. And so the emissions standards that currently exist and those that have historically existed and the standards that would exist in the future have always been applicable. If a facility during startup, shutdown, or maintenance has an exceedance, that exceedance still exists and would be identified as a potential violation of State law. Ultimately, though, the individual unit would be able to raise as an affirmative defense the fact that the Agency issued a permit or issued some other approval applying that. And so going forward the guidance that we provided and that we've been given from USEPA would be that those potential emissions exceedances would still exist; it's just that once a new rule is adopted the affirmative defense would no longer be available.

Co-Chair Spain: And upon adoption of those rules, are facilities then expected to come into compliance immediately, or is there a period of time for compliance to be achieved?

Mr. Jennings (EPA): I can't speak directly to any potential future noncompliance in the abstract. And the individual emissions standards would always have been applicable. And so if a facility the day after the rules were adopted had an exceedance that would historically have been covered by the SSM rules, the expectations would still be the same. They would develop processes or implement their existing processes to get back within the confines of applicable State law, and then thereafter the Agency as in any case would have the capability to utilize its enforcement discretion, evaluating the most appropriate path forward.

Sen. Rezin: Thank you very much for answering a couple of the questions here. So, if you can go back again to the timeline, the first question that was asked when you knew about the rules that

were implemented during the Obama administration. What happened between that time and why are we seeing this rulemaking fast-tracked that now we have the pressure of having an imposed deadline by the federal government?

Ms. Tipsord (PCB): It's my understanding that IEPA took the time it needed to propose the rule to the Board based on waiting for guidance from USEPA and trying to then figure out exactly what USEPA might approve or might not approve. But again I would defer to IEPA to speak to the delay.

Mr. Jennings (EPA): So in the intervening period there was a series of factors that affected the ability of the IEPA and the other 30 or so states that were similarly situated to identify what the expectations from the federal government were. In 2015 there was a SIP (State Implementation Plan) call that had the effect of getting us to where we are today, which is that the language in our existing rules from the USEPA's perspective was struck. Thereafter, there was a combination of litigation and USEPA guidance that had the effect of curtailing the exact expectations on what states should be providing as part of their SIPs. In 2020, there was another USEPA memo that effectively reversed course and outlined that states would not have the expectations that they would have previously. And then in early 2022 further guidance was provided which clarified the position. In the 15 or so months since then the guidance has been consistent. And so it's hard to determine on the federal level what states are expected to provide as part of their SIPs. And the Agency is working closely with USEPA to identify what they need to see from us. And now that it's clear we've gone forward.

Sen. Rezin: Isn't it true that the USEPA recognized in that 2015 SIP call that there are a number of ways to address excess emissions during SMB (Startup, Malfunction, and Breakdown) events, including alternative standards?

Mr. Jennings (EPA): They did. And as part of that they provided an outline of existing federal law. When we then asked for more specific guidance about what they would hope to see as part of their response to the SIP call, the exclusive guidance at this point had been shepherding states toward removing the language thus far.

Sen. Rezin: Have the affected entities sought a meeting with the IEPA and the USEPA to discuss these concerns?

Mr. Jennings (EPA): Yes.

Sen. Rezin: OK. And if so, how long has it been since they requested these meetings?

Mr. Jennings (EPA): That is an excellent question. I know it has been within at least the last three months, and that we're in the process of identifying a time that is workable for ourselves, the outside groups, and USEPA to have that meeting.

Sen. Rezin: OK. It's my understanding that a meeting was offered and the IEPA declined an invitation to meet with USEPA and the affected entities earlier in the year. Is that true?

Mr. Jennings (EPA): Early in the year there was a request for a meeting that was somewhat related to this rulemaking. Traditionally, the Agency and USEPA, because in these respects we are co-

regulators, have sought to have meetings independently. And so consistent with that practice, yes it's true. That being said, we're going to go forward and we're going to be meeting with the triad of ourselves, USEPA, and outside groups.

Sen. Rezin: So when we had more time, though, why was a meeting declined with USEPA who now you have said has come to the table and is willing to work? If you could answer that and also clarify what this timeline means if we don't meet the timeline.

Mr. Jennings (EPA): Yes. Part of the reason we asked was largely tied to how the Agency has approached working with USEPA. And while the ask was made of us there wasn't necessarily an agreement between ourselves and USEPA on whether that meeting would have been necessarily appropriate. Going forward, the deadline for the State to have a filing would be August 11. If there's no filing by that meeting, the USEPA would be compelled to issue sanctions, which would have a tiered effect. One would be to change the standards expected of non-attainment areas of the State, which are the City of Chicago and the Metro East area. Those would affect future permits and would exist until a SIP is in place. The second tier of potential sanctions would involve the removal of highway funds, which is a further extended potential outcome and would also be fully restored if any were actually removed once an approvable SIP was put in place.

Sen. Rezin: So knowing that there's huge penalties for not meeting this deadline, I guess we're confused or frustrated with the lack of communication or lack of working to come to some resolution with the stakeholders at the table and also the industry as well to get to some kind of alternative standard or at least have a meeting with the USEPA to get more of a definition of what the alternative standards would be.

Mr. Jennings (EPA): I can understand the frustrations, and our guidance to this point has been based exclusively on our workings with USEPA and trying to identify the best path forward so that could be conveyed. Unfortunately, once that was conveyed we were running low on time, but as we committed we'll be having those meetings in short order to identify what, if anything, can be done with this.

Sen. Rezin: Do facilities within the State of Illinois currently operate under air permits that include alternative emissions that apply during SMB events?

Mr. Jennings (EPA): That's a difficult question to answer, just because of the unique nature of both individual facilities, the idiosyncratic design of individual permits, and the fact that each of these types of events can be somewhat different. The fact that this has been issued in the past means that there may be permits that include that language, but as far as individual facilities operating as we sit here today under that type of permitting condition I wouldn't be able to speak directly to whether that's an ongoing issue just because of the temporal nature of that type of event.

Sen. Rezin: How would the IEPA's proposed rules being finalized impact such provisions in these air permits?

Mr. Jennings (EPA): Ultimately, until a permit is revised the permit would control. If there are permits out there that have alternative conditions that would proceed going forward, until that permit is revised, those permit conditions would continue to control.

Sen. Rezin: How long do facilities have to come into compliance with the new emissions standards?

Mr. Jennings (EPA): The emissions standards are ultimately unchanged. The only item that is being altered here is the existence of the affirmative defense. And so if a facility was operating with an understanding of emissions standards today, those same emissions standards would continue to apply in the future. All that would be changed here would be an individual facility's ability as part of an enforcement action to raise a historic Agency approval as an affirmative defense.

Sen. Rezin: So are you saying that if these rules were allowed or were passed today, the existing facilities would they have to update their plants because they can no longer exceed the limitations when they're starting back up after a turnaround or outage? Is that a fair statement?

Mr. Jennings (EPA): The expectation would always be that they endeavor to try to address potential exceedances of applicable standards. What the primary change would be that if there was an ongoing enforcement action involving an individual facility or if there was a new enforcement action, that facility would not be able to rely as an affirmative defense on a historic SSM approval as part of their permit. There are other essential alternatives that could shift the direction of an enforcement action. This would just remove that single tool from the toolbox.

Sen. Rezin: OK. So I'm confused. Currently under the old law that was passed in 1972 these plants could exceed the air pollution limitations when they are starting up. Is that correct?

Mr. Jennings (EPA): To a degree. There's a two-phase process that applies for this type of activity. The initial phase would be the actual operation and the identification of a violation. State law as a general matter prohibits exceeding air quality standards.

Sen. Rezin: But this has been allowed in the past. It's fair to say that this has been the practice in the past for many, many years.

Mr. Jennings (EPA): It's been a tool that's prevented or served as an affirmative defense. So a violation has always been a violation. It's just that once a violation proceeded toward enforcement a facility had the ability to raise this as an affirmative defense, which in some cases could have altered the overall direction of the enforcement activity. So it's a little different than an exception, which would have been a blanket approval. Rather, it was a tool that would allow for perhaps an alternative examination of what enforcement would be necessarily.

Sen. Rezin: It's fair to say that in the past or before this rule that there has not been enforcement if you considered a violation.

Mr. Jennings (EPA): I can't speak directly to whether there's been no enforcement, but that certainly would have played a role in examining where we use our enforcement resources.

Rep. Tarver: I appreciate Sen. Rezin's line of questioning. In one of your responses you say that you understand her frustration, but I don't think that you do because you come here and you have to answer questions for us. And we have to answer to 108,000 and 216,000 people respectively. So that's the difference. My entire district is in the City of Chicago. So we talk about sanctions and



what is their impact. I don't think that you actually understand that in the way that we do. But moving beyond that, the conception could be, and in my mind actually is—I'll be very candid—that you all sat on this and you have us in a very bad position: that if we don't act then there are sanctions and then it looks like JCAR, a bipartisan committee or commission, is at fault, when in reality the administration is at fault, or maybe two administrations, because this has been a request for 8 years. You kind of glossed over this "late last year", this, that, and the other: it was November 17 that you asked for comments. That's a week before Thanksgiving. You allowed 10 business days; the 11<sup>th</sup> it was due. That was absolutely—I hope this is uncommon. I don't know if it's ineptitude or intention, but you all need to do something different. So one of the questions that Sen. Cunningham actually asked is about engagement. I'd like to know on the record a little more specifically what that engagement looks like in terms of days that you're going to reach out to industry and hear back from them, because 10—and responding on the 11<sup>th</sup>—during the holiday season is absolutely asinine.

Mr. Jennings (EPA): As far as a specific deadline for us to respond, we've committed by July 4 to do the necessary outreach with USEPA and industry groups. Our air program staff are currently working with their counterparts at USEPA to identify some available dates where they would all be able to collectively meet. So it is a bit of an organic situation but it's something where we're actively working. Our hope would be by the end of the week we would know specifically when those meetings would occur.

Rep. Tarver: I'd appreciate you reporting back through the Chairs to JCAR so we have an understanding of what that will look like. That would be helpful for us, especially as we look forward to working together on things going forward, as reestablishing that trust is primary.

Mr. Jennings (EPA): Absolutely.

Co-Chair Spain: I have a question, I think for the Pollution Control Board. Could you help us understand, in speaking with industry stakeholders and with leaders in the administration, one of the things that has been offered to us is that industry will have an opportunity to resolve some of these difficulties or create the pursuit of alternatives through a subdocket that is established or will be established within the Pollution Control Board. Could you talk about where we're at in that subdocket and how you would imagine it would work going forward?

Ms. Tipsord (PCB): Yes. The Board established a subdocket for some of the same reasons that we're hearing from the Committee, and that is industry told us "we need alternative standards". Under 28.5 rulemaking (fast-track rulemaking pursuant to 415 ILCS 5/28.5), the Board is very limited in what it can do. So we decided to proceed with what we needed to do under 28.5 but open a subdocket to address the alternative standards. That subdocket has been opened. We've already received a filing in that subdocket that came in on Friday. The participants have 14 days to respond to that before the Board can act on it at the soonest, which would put it on the Board's July 6 meeting before we can act on it. They asked for a delayed effective date for the 28.5 rule. They also asked whether or not applying for an adjusted standard or a variance, which are two regulatory relief mechanisms available under the Environmental Protection Act, would give them a stay to the provisions of the 28.5 rule. And the third was that we would work on an expedited nature so we could have the same effective date for both the alternative standards and the underlying rule that would lose the affirmative defense. So we have that going now, and when we spoke with staff before we would be willing to commit to a hearing officer or Board order when

we go final that says "hey, in 30 days let's do this" or "in 15 days let's do this" or "14 days", but as I said industry's already engaged and they've already given us stuff. They've given us stuff in the underlying docket which will be part of this subdocket as well. So it's just a matter of how fast we get responses from the participants, and that kind of thing before we can move forward. At this point in time, under the Environmental Protection Act we're required to hold two hearings but we've already held two hearings in this rule, so we would not necessarily need to hold another hearing unless someone requested it pursuant to the Environmental Protection Act. And even if we did, that would be something that we could do fairly quickly as well. We have to have a 30-day newspaper notice, but we could do that so that we could work as quickly as possible consistent with what our resources are to do that. ■ I do think it's worth pulling out, too, that as EPA indicated, this is an affirmative defense that's being removed. But that doesn't mean it's not still a defense. If an enforcement action is brought to the Pollution Control Board, the Pollution Control Board has statutory provisions that require us to look at reasonableness, past compliance, whether or not (the company) is a bad actor. So there are a lot of things under Sections 33(c) and 42(h) of the Act that the Board *must* consider before it issues any kind of penalty or any kind of cease-and-desist order. And quite honestly, in at least one enforcement brought by the Attorney General's office and the EPA, the Board found that industry committed the violation but no penalty was required. And that was actually affirmed by the appellate court and it was found that the industry did everything right. They did everything they were supposed to do, and yes, there was a spill, but industry did everything they could to fix it. And so the Board decided that no penalty under those factors was correct. So while it's no longer an affirmative defense in "I did it, but I'm excused", it's still a defense. It's still "hey, we did everything we could, but this is what happened". So, I just wanted to note that too with all of the concerns about enforcement that at least under the Pollution Control Board if it's brought to us, those are what we're required to do. Not necessarily circuit court, but certainly if it comes to the Board that's what we're required to do.

Co-Chair Spain: So both defense for reasonableness in terms of economic considerations and how about just the technical feasibility for a certain type of industry user? Will that be addressed at the Pollution Control Board level within the subdocket?

Ms. Tipsord (PCB): Absolutely. We look at economic reasonableness and technical feasibility. We're required under the Environmental Protection Act to do that. And the Board in every one of its rulemakings does look at that to a certain extent. Now what is economically reasonable or technically feasible is up to the Board and the facts that we have before us. We have found things things that are over a million dollars could be economically reasonable if they're technically feasible. But as you may be aware when we talked about time-limited water quality standards, which is another area, especially with chloride, that has been an issue in Illinois with the fact that we treat roads with road salt and we can't get to the chloride standards without doing some other things. So that is one area where not only in rulemakings, but also in variances, that we've looked at economic reasonableness and technical feasibility to try to come up with a way to resolve the chloride issue with water while at the same time allowing for public safety.

Co-Chair Spain: Can you go back to the timing—understanding how the subdocket will operate? I know that there are a series of motions as you mentioned that will appear on your July 6 agenda. So we'll have sort of a test of this subdocket before we return as a Committee on July 18 as this rulemaking will be extended to the next meeting. What is your anticipation on the timeframe on which the subdocket will consider these items? Will we have resolutions to these requests that were submitted a few days ago after the July 6 meeting that will be informative to JCAR on how

we move forward?

Ms. Tipsord (PCB): It's difficult to say for an absolute, because we don't know what all of the responses are going to look like. We don't know what we're going to hear from our other participants. As well as EPA and industry, we have also had active participation from an environmental group. So we don't know what we're going to see in those responses when those responses come in. Obviously if they're more complicated and require more deliberation on the part of the Board we can't commit to saying that we're going to do it on July 6. But I think that it's anticipated that we'll look at them as fast as we can and try to do something on July 6. But again, and this actually came up in our conversation with Executive Director Schultz: we can only do so much; it's participant-driven. What we get from the participants and how fast we get things from the participants is where we're at. We can direct them to do things, and we can ask them to do things, but it's just going to be a matter of how fast we get information.

Co-Chair Spain: I understand all of that, and that's why maybe the referral to this is sort of a test case of how the subdocket could be a potential solution to considering alternatives. It will be interesting to see: can we see an expedited resolution that moves forward and creates agreement around alternatives or is the subdocket going to be something that from a timeframe standpoint takes a very long time to go through seeking a resolution. I think when we convene with USEPA and industry that will be a major question, right? Can we count on the subdocket to be a provider of solutions or will we be caught in some interim period of time where we're waiting many months for a subdocket to take action? So I think you understand that.

Ms. Tipsord (PCB): We absolutely do, and while we were given language in the underlying document from industry, they didn't really give us technical support for what they wanted to see. So that's something we need to see built in the subdocket. But I think that if we get something fairly quickly from industry that the Agency can sign off on, we have 90 days with the APA: 45 days for First Notice and 45 days for Second Notice. So that's the soonest, obviously, but I think that we could certainly commit to trying to make this a priority. And we want to do that. Like I said, the Board recognized in the underlying docket that there were issues out there that needed to be addressed. And that's we opened the subdocket. Because we knew that our work is not done, that we have more work to do, and we want to get that work done.

Sen. Rezin: Let me take one more try on this. For over 50 years, IEPA and USEPA have allowed power producers to exceed applicable emissions standards during the periods of startup or breakdown if federally approved air permits set forth criteria governing such operations. Is that a fair statement?

Mr. Jennings (EPA): The ultimate effect of those rules would be that there's been allowances made—

Sen. Rezin: So there's been allowances made. And what you're trying to do with this rule is to withdraw the allowances for the startups or breakdowns of these facilities. Is that correct?

Mr. Jennings (EPA): We hope our objective here is to align with USEPA's expectations for a state implementation plan, and based on the guidance we've received at this point, that's the route that we need to go.

Sen. Rezin: So thank you; I'm just trying to get to the ultimate what does it look like, should this bill be passed or this rule be accepted? So the elimination, then, or the ability, then, to exceed the standard in startup or if there's been a breakdown, which has been allowed for 50 years, means that, what do you anticipate? What will companies have to do, if this is the new rule moving forward?

Mr. Jennings (EPA): A couple of potential things. One would be ensure, as they would have been anyway, that they are working to implement any remedial activities as expeditiously as possible. In practice, the primary difference would be that if a matter like this was going to be going for enforcement, instead of having that affirmative defense both the outside entities as well as the Agency, the Attorney General's Office, and ultimately the Board, would be weighing more heavily the Section 42(h) factors on what would warrant reasonable enforcement. And historical practice and prompt response are among the types of things that would be weighed in favor of going an alternative way than pursuing litigation.

Sen. Rezin: Thank you. I'm not an attorney so let me try to put this in practical terms of what this looks like for us. So, regarding if this rule goes into effect then companies will have a couple of different decisions. One, to continue along with the same practice and potentially be fined or have the enforcement enacted, which could be a penalty. Or have the industry invest in the updates, if they can, so they don't exceed the limitations during a startup or after an outage or turnaround, or three, potentially not decide to make the investment, and potentially go offline. Are those really the three options that we're talking about here?

Mr. Jennings (EPA): Absent an epiphany before I finish my sentence, those would be the three primary options that would be both traditionally available and available going forward.

Sen. Rezin: OK. So as we're talking about reliability, which is not a topic in this rule, but I'm trying to get to the practical what potentially could happen if this rule as it stands is implemented, potentially some of the industry could choose instead of to invest in whatever they need to to make sure they fall within the parameters or not invest and maybe go offline, could mean more of our power could go offline, creating a reliability problem. Is that a fair statement?

Mr. Jennings (EPA): I can't speak directly to what the impact of industry choice would be, but I certainly see where the logic in that statement is.

Sen. Rezin: Ok, so industry choice, though, is being dictated by a rule where the industry's been given if this rule goes forward three options. So, thank you for that, though, and I just want to say that I do feel that it is important if other states are looking at alternative standards that we come to some conclusion with industry. We can't afford some of the industry to go offline because of this rule. I understand where you're going and in theory we all agree with it, trying to reduce the carbon, I understand that, but we also have the reliability problem in this State and we can't afford for more of our energy producers who would fall under this to go offline.

Sen. DeWitte: Mr. Jennings, I just had one question, and if I heard you correctly earlier you are suggesting that part of the delay in getting to the end of this process has been that the federal EPA has chosen not to enforce since 2015. My concern is the potential penalties if we all don't come to some sort of agreement on how we move forward with this initiative. Since you're putting the blame on the federal EPA for not enforcing these rules since they were filed, how do you intend

to approach the EPA when it comes down to potentially withholding federal highway funds from the State of Illinois because we haven't done our job locally here in getting these federal guidelines established. Do you have an approach—how you intend to keep a billion dollars a year from being withheld from the Illinois Department of Transportation for various potential funding opportunities?

Mr. Jennings (EPA): I don't want to have this come across as if we're blaming USEPA. There have been a lot of intervening factors that would affect their ability to provide direction on this, and they waded through those, which is why we are where we are right now. They have a sense of clarity that they wouldn't have had because of pending litigation and internally conflicting memoranda. So, with that sense of clarity, we have been working with them to identify both what we're supposed to do and, if things were to go sideways and there was a possibility of additional sanctions, what those would look like. In our initial conversations with them, the understanding is that there is a 6-month window where we still have additional time to come into compliance, which is what we would be aggressively working toward through a combination of both some sort of stakeholder meeting directed by this but also the broader need to ensure that these plans are in place. Failing that, USEPA has a hierarchy of the types of projects that would lose their funding first. It's not an all-or-nothing proposition. There are certain projects where funding would be maintained, and those include areas of significant need and where there's a need for public safety. In our discussions with Region V, the technical staff with whom we've been in contact couldn't speak directly to what that would look like or if this ever had to occur. But recognizing that there would be that possibility and that it's our responsibility as stewards of this program to make sure we have a full appreciation of what the outcomes are, we'll continue to have those conversations so we can relay if needed, and hopefully not, to our sister agency IDOT what the expectations will be. All that is to say, though, the conversations we have had with USEPA to this point do point to a potential resolution, but as we came in this afternoon that actually will involve some additional discussions with outside groups.

Sen. DeWitte: I can't press upon you the importance of trying to ensure that these penalties are not implemented, again, based on your representation that perhaps because they didn't press hard enough when this started. I guess I'm happy to hear that you understand the importance of trying to make sure that these penalties are not implemented for the sake of, as you put it, your other sister agencies within the State organization.

Co-Chair Spain: Thank you for being here today. I think you can see the amount of time and attention that the members of JCAR are spending on this topic, so we look forward to the discussions that will happen between this meeting and our next meeting. And I think it's very meaningful and I appreciate again that we've now been able to include USEPA in the discussions that will happen with our industry stakeholders. And we look forward to bringing resolution to this matter.

Sen. Rezin moved, seconded by Rep. Tarver, that JCAR, with the concurrence of the Pollution Control Board, extend the Second Notice period for these rulemakings for an additional 45 days. The motion passed unanimously (10-0-0).

## **COMPLAINT REVIEW: DEPARTMENT OF CHILDREN AND FAMILY SERVICES**

### ***Department of Children and Family Services – Licensing Standards for Day Care Centers (89***

*Ill. Adm. Code 407; 47 IR 8756)*

Jeff Osowski, Administrative Rules Coordinator, Jennifer Cohen-Deihl, Acting Assistant Chief of Policy, Shontée Blankenship, Deputy Director of Licensing, and Jassen Strokosch, Chief of Staff, represented DCFS.

Co-Chair Spain: Thank you all for your participation today. We have two matters for DCFS that come before JCAR today. The first has to do with emergency rulemaking. And so, over the last 3 years during the public health emergency we have had in place through DCFS emergency rules that allowed what I would refer to as the 3-hour rule for daycare providers. There was some effort within the General Assembly's legislative session this spring (House Bill 3566) to make permanent the 3-hour flexibility that was given to providers. That bill actually passed unanimously in both chambers but was awaiting action on a concurrence, and it's my understanding that the agreement would be that the Department will continue working with stakeholders and legislators on this topic but would introduce extended emergency rules that would continue the 3-hour practice for the time being. We have received your emergency rules that have been filed, but with some changes that we're now hearing from providers in response to what they assert is a lack of flexibility within the 3-hour rule. So we've talked about this as a Committee, we've talked with several of you about it, and I wanted to ask if you could explain to us on the record how you believe we will go forward with the resolution regarding the 3-hour rule.

Mr. Strokosch: Thank you for that. I appreciate the conversation we had. I think the simplest way to move forward on this is we'd like to continue with the permanent rule that was proposed, to go through the normal process here where we gather public comment on that which will give us some great information to adjust that rule as necessary based on the public comment, but recognizing the feedback that the emergency rule does not necessarily reflect the best interests of providers in the meantime while we're gathering public comment. We will act as quickly as possible reissue that emergency rule with some rewording that reflects what was under practice over the last few years in the existing guidance that the Department put out before. So, put as plainly as I can, we'll go back to the practice of the 3-hour rule that was in place before the current emergency rule. We'll work out the mechanics of that, whether that's an amendment or rescinding of the existing rule, we can work through those mechanics, but we're committed to doing that as quickly as possible over the next few days and getting that worked out so providers have a return to the practice that was before while we work on the permanent rule.

Co-Chair Spain: Thank you very much. We appreciate your helpfulness on that. For providers, is there any type of lapse period that they need to be concerned with between the existence of these current emergency rules and your expedited reissuing of the new emergency rules?

Mr. Strokosch: No. We'll do this as quickly as possible and obviously from an enforcement or licensing standpoint there would be no concerns there. So we'll get guidance as quickly as possible on this and work through the process, whatever it might be, through JCAR and the Secretary of State to get the new emergency rule issued.

Co-Chair Cunningham: Thank you for your willingness to work on this. I just want to restate and make it clear for the record, just because there are a lot of providers listening to this. So can you confirm that providers will be able to use the 3-hour rule in classrooms with children under 2 outside the first and last 90 minutes of the day with your revised emergency rule?

Ms. Cohen-Deihl: That is not allowed in our current rules that have gone through the full rulemaking process, and it was never intended that the emergency rule would negate our formal rules. So I don't believe that the assistants would be allowed to supervise children under 2. However, what we intend to clarify are the limiting parameters of this 3-hour rule.

Co-Chair Spain: Just to be very clear: what they were operating under as the 3-hour rule for the last few years did not allow for under-2? It's 2 and older? The part of your statement that is absolutely correct and we are agreeing with is the limitations that require this only to be applied to the 90 minutes at the beginning and end of the program day; that piece we are lifting as a requirement with this resubmitted emergency rule. Does that answer your question?

Co-Chair Cunningham: I believe so, thank you.

Rep. Vella: Thank you for being reasonable and thinking through the process here. I'd like to talk a little about the history of this rule. I've heard a lot from my constituents, especially providers, about the shortage of teachers that is the reason for this rule. Is that correct? Back from 2019 or before, there's been an issue with teacher shortage. Is that correct?

Mr. Strokosch: That's a fair assessment.

Rep. Vella: So this 3-hour rule is placed in there because we were having issues with finding enough teachers for the classrooms. It's my understanding that an emergency rule and a permanent rule were proposed back in July of 2020. Could you speak to that in relation to the 3-hour rule?

Ms. Cohen-Deihl: First of all, thank you for your question. To clarify, there were staff shortages. However, they were exacerbated due to the COVID-19 crisis. So this rule came about to address the issues that were exacerbated during the COVID-19 crisis, and we are currently incorporating the 3-hour rule into Rule 407 (89 IAC 407); we've hit some snags along the way but we are moving forward with the full rulemaking process. We're hoping to get that done as soon as possible.

Rep. Vella: In July 2020, you proposed changes to Rule 407 to include the 3-hour rule. It was ok'd by JCAR, and I believe it lapsed in July 2021. My question is why did you let it lapse back in 2021?

Ms. Cohen-Deihl: I don't have an answer for you at this time, I'm sorry, but I can get an answer for you.

Rep. Vella: It seems like if the 3-hour rule would have been in place we wouldn't be here. So, going forward, is there currently an actual rule that has come through JCAR that you are operating under right now, because I can't find any rules that have gone through JCAR with the 3-hour rule that you're working on right now. Are you operating under rules, is that your understanding?

Ms. Cohen-Deihl: They've all been emergencies.

Rep. Vella: My reading of it, and tell me if I'm wrong, is that you're not actually operating under rule right now; it's just guidance that you've put out, but you've never actually been through the rulemaking process.

Ms. Cohen-Deihl: Correct. We are intending to move forward with the rulemaking process.

Rep. Vella: Yes. And I appreciate the fact that you're coming to it now. I'm new to the rules committee. A lot of things happen down in Springfield; this is something that I felt like we're doing a lot of good here. It seems as though in my looking at the 3-hour rule DCFS has not really shown the proper deference to the fact that rules are very important, and these providers look at these rules and set up their hiring practices and so forth. Could you speak to the idea that it seems like DCFS over the course of the last 3 or 4 years has been using the emergency rules process in a cavalier way when they really could have had a permanent rule back in 2021?

Mr. Strokosch: I appreciate the question, and I think it's a great one. The challenge with going through the pandemic was that the guidance that DCFS relied on for the 3-hour rule was modified many times over the last few years, particularly as it relates to CDC and IDPH guidance that changed regularly. So if you look at the number of times this guidance was reissued and at what intervals, it would have made it very difficult to make it part of the traditional rulemaking process, which was part of the challenge, which is why we went down this road originally. Coming out of the pandemic, and removing that aspect of it where it is being driven by frequently changing public health guidance, obviously makes it more applicable for putting in permanent rulemaking, which we're in no way opposed to. But that was part of the challenge for the last few years that was trying to be addressed by doing it through procedure.

Rep. Vella: So the belief is that you let the rule lapse in 2021 because of changing norms or guidance? Or was it just a mistake?

Mr. Osowski: I don't recall what the rationale was. I know that in May of 2020 we issued the initial emergency rule. We followed up with an emergency on June 12, and then a third emergency on June 26. They were coming in rapid succession. Obviously the guidance and regulations from CDC and Public Health were changing quite rapidly as we learned more about the pandemic, and that's why we went down the avenue of guidance. And I believe the number based on guidance was 12 or 13. We provided that to the Committee and I will also follow up with it again if needed. But I don't have those numbers on hand but I think 12 or 13 updates. They were changing so quickly that to go through the emergency or regular rulemaking process would have made it difficult to make those necessary changes for facilities to remain open and operate and not be in violation of health or safety standards.

Rep. Vella: I appreciate this fact; I just want to make sure going forward that we don't operate outside of rules. It seems like you've suddenly noticed the process we're doing here, and I think there's a separation of powers issue. So I want to make sure that if you're going to make changes to the rules you come to JCAR and not through guidance or any other thing. And I want to say thank you all for being willing to talk to us and think through the process and go through the rules process which I think makes for better rules.

Mr. Osowski: I would just say that it was never our intention to bypass the regular rulemaking process or to try and pass regulation in a nonstandard process. It was really just the exigent circumstances of having a global pandemic and trying to be as responsible as possible for our providers. As long as I've been with the Department it has never been our intention to circumvent the rulemaking process.



Rep. Reick: Thank you for being flexible on this emergency rule. We can work this out. The teacher shortage at daycare centers has been a longstanding issue we've been dealing with basically since I've been in the General Assembly, which is a long time. When did the 3-hour rule actually begin? When was it first implemented?

Ms. Cohen-Deihl: According to my notes, it looks like it was first implemented in late May or early June of 2020 via emergency rule.

Rep. Reick: Was there anything similar in place to provide for relief prior to that emergency rule?

Ms. Blankenship: I don't have the exact date. There was one prior to that came out for emergency daycare facilities when the executive order came out and we had a rule for emergency daycare facilities. But I'm not sure of the exact date when it came out.

Mr. Osowski: The emergency daycare facilities actually came out on May 24—or the 26<sup>th</sup>—I think it was the 24<sup>th</sup>—of 2020. The 3-hour rule actually came into effect on that next emergency rule, which was June 12—I think it was referenced in that June 12 rulemaking, and then we specifically cited to the guidance in the June 26 emergency rulemaking.

Rep. Reick: There have been efforts made in legislation back in the 101<sup>st</sup> to provide more flexibility in terms of hiring and qualifications for daycare teachers so that maybe we would be able to get more teachers without the necessity of going to what we have under the 3-hour rule and things like that. In hindsight, how receptive would the Agency be—for instance there was a bill in the 101<sup>st</sup> General Assembly that allowed daycare teacher assistants with at least 2,080 clock-hours of work experience and Gateways credential level 1 training to serve as lead teachers with proof of either college or university enrollment up to 30 semester hours or enrollment in an early childhood education credential program. That bill went nowhere. It was not supported by the agency. Would you in retrospect be looking at that kind of legislation getting a more favorable response from the agency at this point?

Mr. Strokosch: That's a good question. I think it's difficult to answer from DCFS' perspective. As the licensing agency here, we are one piece of this, but a lot of what dictates best practices and best standards within the programs are other agencies that fund and set up the programs and curricula, like DHS and the Illinois State Board of Education, and others, and I think where we see progress on that right now is, as you've identified, staffing levels are the root issue that we're trying to address, and doing that in balance with not lowering the standards that we have developed in Illinois, which is exceptional high-quality early childhood education across the State. And so working with them is some of the things that are happening right now, which is a redesign and massive reinvestment in Smart Start, looking at child care assistance program rates, things of that sort which will allow higher salaries and the retention and attraction of higher-quality early childhood education staff is the approach in Illinois to addressing this long term. So I'm not sure going backwards I don't have answers for what would have fixed the past but moving forward I think we're on the right path to start to address those long term staffing issues and eliminate the need to have provisions like the 3-hour rule.

Rep. Reick: I'm going to read from the mission statement of the Illinois DCFS. This is from your website. "The mission of Illinois DCFS is to protect children who are reported to be abused or

neglected and to increase their families' capacity to safely care for them; provide for the well-being of children in our care; provide appropriate, permanent families as quickly as possible for those children who cannot safely return home; support early intervention and child abuse prevention activities and work in partnerships with communities to fulfill this mission." I don't read anything in there that talks about licensing daycare centers. The point I'm trying to make is the fact that I think this licensing function is in the wrong place. It does two things. First of all, it allows things like this to happen, where we have micromanagement of the functions of daycare centers, and it also takes away from the time that could be spent by DCFS doing its core function, which is preventing abuse and neglect, rather than doing the part of licensing daycare centers and doing a lot of other things that mission creep has allowed DCFS to do. I'm not blaming you for the fact that you have the responsibility thrust upon you because that has to a great extent been put on you by us, the members of the General Assembly. But the fact remains is that the function of DCFS is to do a very limited, absolutely critical thing, which is to protect children from abuse and neglect. I don't see how extending the mission of DCFS to licensing daycare centers, where all of the employees are mandated reporters who are obliged to report anything they see, which may be abuse and neglect. I don't see where that jumps over a fence and gives you the authority to do the actual licensing function. I think a lot of this problem we're having right now is because of the fact that you have taken on too many tasks, too many roles, and need to be shed of some of them so we can get back to protecting children who are abused and neglected.

Co-Chair Spain announced that this emergency rulemaking would be removed from the No Objection List and said that JCAR looks forward to the reissuing of the emergency rules with respect to the 3-hour rule.

Co-Chair Spain: Originally, we'd scheduled all of you to be here because of a complaint that was received by JCAR on February 15, 2023. So we will move now to a discussion of that complaint. I think that will be the last matter, and then we will release you from the witness table.

### ***Complaint Review***

Rep. Vella: Just to go back to what we were talking about before, and this is really the main issue I had: in September of 2022, rather than doing another emergency rule, you shifted everything to guidance and operated outside of rules from September 2022 to now. This caused consternation. That's why we had the Objection; that's why we're here now. I will just say I think it's a legitimate objection that people had about the practice. I don't think it was intentional; I think it probably got out of control during Covid like everything else did. But it's a legitimate Objection that caused consternation with businesses, with families with children, and that's why I think the Objection's here.

Mr. Strokosch: I appreciate that, Representative, and I would mirror what I said before, which is there's a lot of lessons learned during Covid and if there's another pandemic I think we'll have a better handle on how to go about things.

Rep. Vella moved, seconded by Rep. Reick, that JCAR object to the Department of Children and Family Services' enforcement of policy outside of rule, over a period of more than 3 years, with regard to licensed day care centers regulated under 89 Ill. Adm. Code 407 (Licensing Standards for Day Care Centers). From February 28, 2020 through February 28, 2023, DCFS policy allowed licensed day care centers to employ individuals in the process of completing their Early Childhood

Teacher qualifications as Interim Conditional Early Childhood Teachers for up to 12 months. Additionally, from May 29 through June 12, 2020 and from June 24 to October 25, 2020, DCFS emergency rules permitted teaching assistants to serve as lead classroom teachers for up to 3 hours per day if an Early Childhood Teacher was not available and the day care center had provided for this substitution in its staffing plan. DCFS proposed but never adopted a rulemaking that would have made this policy permanent. Nearly 2 years later, DCFS included this policy in guidance effective September 23, 2022, through May 31, 2023. DCFS has since adopted an emergency rule effective June 2, 2023, implementing the 3-hour policy with additional restrictions never included in the guidance document or in the previous emergency and proposed rules. Both the Interim Teacher policy and the 3-hour policy had been requested by day care providers to address a persistent teacher shortage that existed before, and was exacerbated by, the COVID-19 public health emergency. Despite these requests, DCFS repeatedly refused to adopt rules and instead enforced these policies as guidance, leaving affected day care providers with no assurance as to how long these policies would continue or whether they could be changed without opportunity for public notice or comment. The motion passed unanimously (8-0-0).

*Department of Financial and Professional Regulation – Rules for the Licensed Certified Professional Midwife Practice Act (68 Ill. Adm. Code 1345; 46 Ill. Reg. 20475)*

*Department of Children and Family Services – Licensing Standards for Day Care Centers (89 Ill. Adm. Code 407; 47 IR 8756)*

Co-Chair Spain announced that these rulemakings were removed from the No Objection List and would be considered at the Committee's July meeting.

### **CERTIFICATION OF NO OBJECTION**

Rep. Tarver moved, seconded by Sen. Fowler, that the Committee inform the agencies to whose rulemakings the Committee has not voted an Objection or Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemaking made by the agency, no Objections will be issued. The motion passed unanimously (8-0-0).

### **ANNOUNCEMENT OF JULY MEETING**

Co-Chair Cunningham announced that the next JCAR meeting will be Tuesday, July 18, 2023, at 11:00 a.m. in Room C600 of the Bilandic Building, Chicago.

### **ADJOURNMENT**

Co-Chair Cunningham moved, seconded by Rep. Haas, that the meeting stand adjourned. The motion passed unanimously (8-0-0).

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