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Economic Affairs Interim Committee
64th Montana Legislature

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January 2, 2016

TO: Economic Affairs Interim Committee (EAIC)

FROM: Jameson Walker, Staff Attorney

RE: Committee powers with respect to MAR Notice 32-15-268: Licensee Assessments

BACKGROUND

In the November 12, 2015, Montana Register Notice, the Department of Livestock (Department) published Montana Administrative Register Notice 32-15-268 pertaining to licensee assessments. The Department proposed to amend fees paid per hundredweight on the volume of all classes of milk produced and sold:

32.2.406 LICENSEE ASSESSMENTS (1) Pursuant to 81-23-202, MCA, the following assessment is levied: a fee of ~~\$0.155~~ \$0.275 per hundredweight per month, ~~with a minimum of \$50.00 per month, whichever is greater, or a maximum of \$1,050.00 per month,~~ on the volume of all classes of milk produced and sold by a person licensed by the Milk and Egg Bureau of the department, to be used for the administration of the milk inspection and milk diagnostic laboratory functions of the department. For a dairy licensed by the department, the minimum assessment is \$225.00 per month and the maximum assessment is \$950.00 per month. For other licensees the minimum assessment is \$725.00 per month and the maximum assessment is \$2,850.00 per month. For a person licensed both as a dairy and as another licensee, only one assessment will be levied, whichever amount is higher.

Initially, the Department did not anticipate a public hearing. However, it subsequently issued a public hearing notice in the January 8, 2016, Administrative Register.

EAIC ACTION/LAST PUBLICATION DATE

On January 15, 2016, the EAIC informed the Department that at least five of the eight members of the committee objected to the rule notice. The objection was made under 2-4-305(9), MCA, which allows the committee to delay the publication of the rule until the last possible publication date:

2-4-305. Requisites for validity -- authority and statement of reasons.

[...]

(9) If a majority of the members of the appropriate administrative rule review committee notify the committee presiding officer that those members object to a notice of proposed rulemaking, the committee shall notify the agency in writing that the committee objects to the proposal notice and will address the objections at the next committee meeting. Following notice by the committee to the agency, the proposal notice may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published, unless prior to that time, the committee meets and does not make the same objection. A copy of the committee's notification to the agency must be included in the committee's records.

Initially, the last publication date for MAR Notice 32-15-268 would have been in early May 2016. However, since the Department amended its notice to include a public hearing, 2-4-305(7), MCA, requires the extension of the 6-month publication date. Thus, the last publication date is July 8, 2016, and the last filing date with the Secretary of State is June 27, 2016. *See* Admin. R. Mont. 1.2.419 (Filing and Publication Date Schedule for the Secretary of State).

EAIC ACTION: FEBRUARY 2016

The committee has several options: (1) withdraw its objection; (2) continue its objection; or (3) take additional actions. These are addressed below:

(1) Withdraw its objection

The committee may elect to not renew the objection at its February 2016 meeting. If this occurs, the Department may proceed with publishing the rule in compliance with the Montana Administrative Procedure Act (MAPA). The Department may choose to amend the rule based on comments it received or proceed with the original rule proposal.

(2) Continue its objection under 2-4-305(9), MCA

This action allows the committee to delay the filing and publication of the Department's rule until the last possible filing date: June 27, 2016. It is important to note that the objection under 2-4-305(9), MCA, does not terminate a rule. The objection delays publication of the rule. This option also allows the EAIC to reconsider its objection to the rule at its April 2016 meeting. This option also allows the Department to consider additional options to the rule.

(3) Additional actions

Aside from continuing or withdrawing its objection under 2-4-305, MCA, the EAIC may take the following actions:

(a) Legislative poll

Under 2-4-403, MCA, the committee may conduct a poll of the Legislature to see if the proposed

rules follow legislative intent:

2-4-403. Legislative intent -- poll. (1) If the legislature is not in session, the committee may poll all members of the legislature by mail to determine whether a proposed rule is consistent with the intent of the legislature.

(2) If 20 or more legislators object to a proposed rule, the committee shall poll the members of the legislature.

(3) The poll must include an opportunity for the agency to present a written justification for the proposed rule to the members of the legislature.

(b) Published objection

The EAIC may file an official objection of the Department's rule under certain circumstances. Pursuant to 2-4-406, MCA, the committee must object to the rule and provide a concise statement of its reasons for its actions:

2-4-406. Committee objection to violation of authority for rule -- effect. (1) If the appropriate administrative rule review committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency.

Under this section, the committee may object to the rule because it was not adopted in substantial compliance with 2-4-302 (generally applying to notice, hearing, and submission of views), 2-4-303 (generally applying to emergency or temporary rules), or 2-4-305 (generally applying to adoption procedures and statutory authority for rules). The committee may object to the rule solely for the purpose of shifting the burden to the Department to show the legality of the adoption of the rule if it is challenged in court. It should be noted that the costs of publishing the

objection must be paid by the committee.

Indeed, the Department's rule may not be in compliance with 2-4-305 because it potentially exceeds its statutory authority. Specifically, the problem arises in that rule authorizes a minimum monthly fee. However, the authorizing legislation, 81-23-202(4), MCA, requires any fee to be based on the volume of milk produced:

81-23-202. Licenses -- disposition of income. (1) A producer, producer-distributor, distributor, or jobber may not engage in the business of producing or selling milk subject to this chapter in this state without first having obtained a license from the department as provided in 81-22-202 or, in the case of milk entering this state from another state or foreign nation, without complying with the requirements of the Montana Food, Drug, and Cosmetic Act and without being licensed under this chapter by the board. The annual fee for the license is \$2, is due before July 1, and must be deposited by the department in the general fund. The license required by this chapter is in addition to any other license required by state law or any municipality of this state. This chapter applies to every part of the state of Montana.

(2) In addition to the annual license fee, the board shall, in each year, before April 1, for the purpose of securing funds to administer and enforce this chapter, levy an assessment upon producers, producer-distributors, and distributors as follows:

(a) a fee per hundredweight on the total volume of all milk subject to this chapter produced and sold by a producer-distributor;

(b) a fee per hundredweight on the total volume of all milk subject to this chapter sold by a producer;

(c) a fee per hundredweight on the total volume of all milk subject to this chapter sold by a distributor, excepting that which is sold to another distributor.

(3) The board shall adopt rules fixing the amount of each fee. The amounts may not exceed levels sufficient to provide for the administration of this chapter. The fee assessed on a producer or on a distributor may not be more than one-half the fee assessed on a producer-distributor.

(4) (a) In addition to the fees established in subsections (1) through (3), the department shall assess a fee per hundredweight on the volume of all classes of milk produced and sold by a person licensed by the department to be used for the administration of the milk inspection and milk diagnostic laboratory functions of the department. The fee must be established pursuant to 81-1-102(2).

(b) A person licensed by the department shall report to the department on a monthly basis the volume of milk produced. All reporting documentation must be submitted on forms approved or provided by the department.

Thus, a rule that establishes a minimum payment regardless of actual production (i.e. per hundredweight) may potentially be outside of the enabling legislation.

Additionally, the EAIC may object to the rule in that it potentially provides a retroactive applicability date. As it currently is drafted, the amendment to ARM 32.2.406 becomes effective January 1, 2016. The enabling legislation does not allow for a retroactive licensee fee date. A retroactive effective date raises potential constitutional issues.

(c) Request an economic impact statement

The committee may request an economic impact statement from the Department under 2-4-405, MCA, and the Department will have 3 months to provide the statement to the committee:

2-4-405. Economic impact statement. (1) Upon written request of the appropriate administrative rule review committee based upon the affirmative request of a majority of the members of the committee at an open meeting, an agency shall prepare a statement of the economic impact of the adoption, amendment, or repeal of a rule as proposed. The agency shall also prepare a statement upon receipt by the agency or the committee of a written request for a statement made by at least 15 legislators. If the request is received by the committee, the committee shall give the agency a copy of the request, and if the request is received by the agency, the agency shall give the committee a copy of the request. As an alternative, the committee may, by contract, prepare the estimate.

(2) Except to the extent that the request expressly waives any one or more of the following, the requested statement must include and the statement prepared by the committee may include:

(a) a description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) a description of the probable economic impact of the proposed rule upon affected classes of persons, including but not limited to providers of services under contracts with the state and affected small businesses, and quantifying, to the extent practicable, that impact;

(c) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenue;

(d) an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction;

(e) an analysis that determines whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule;

(f) an analysis of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(g) a determination as to whether the proposed rule represents an efficient allocation of public and private resources; and

(h) a quantification or description of the data upon which subsections (2)(a) through (2)(g) are based and an explanation of how the data was gathered.

(3) A request to an agency for a statement or a decision to contract for the preparation of a statement must be made prior to the final agency action on the rule. The statement must be filed with the appropriate administrative rule review committee within 3 months of the request or decision. A request or decision for an economic impact statement may be withdrawn at any time.

(4) Upon receipt of an impact statement, the committee shall determine the sufficiency of the statement. If the committee determines that the statement is insufficient, the committee may return it to the agency or other person who prepared the statement and request that corrections or amendments be made. If the committee determines that the statement is sufficient, a notice, including a summary of the statement and indicating where a copy of the statement may be obtained, must be filed with the secretary of state for publication in the register by the agency preparing the statement or by the committee, if the statement is prepared under contract by the committee, and must be mailed to persons who have registered advance notice of the agency's rulemaking proceedings.

- (5) This section does not apply to rulemaking pursuant to 2-4-303.
- (6) The final adoption, amendment, or repeal of a rule is not subject to challenge in any court as a result of the inaccuracy or inadequacy of a statement required under this section.
- (7) An environmental impact statement prepared pursuant to 75-1-201 that includes an analysis of the factors listed in this section satisfies the provisions of this section.

However, this will not require the agency to adjust the adoption or effective date of the proposed rules under an economic impact statement request. Finally, although not officially requested by the EAIC, the Department has already provided the small business economic impact analysis regarding the current rule.

(d) EAIC opinion/publication

Under 2-4-308, MCA, the EAIC may include a statement when the Department's rule is published:

2-4-308. Adjective or interpretive rule -- statement of implied authority and legal effect. (1) Each adjective or interpretive rule or portion of an adjective or interpretive rule to be adopted under implied rulemaking authority must contain a statement in the historical notations of the rule that the rule is advisory only but may be a correct interpretation of the law. The statement must be placed in the ARM when the rule in question is scheduled for reprinting.

(2) The appropriate administrative rule review committee may file with the secretary of state, for publication with any rule or portion of a rule that it considers to be adjective or interpretive, a statement indicating that it is the opinion of the appropriate administrative rule review committee that the rule or portion of a rule is adjective or interpretive and therefore advisory only. If the committee requests the statement to be published for an adopted rule not scheduled for reprinting in the ARM, the cost of publishing the statement in the ARM must be paid by the committee.

(e) General powers

The EAIC may exercise general powers under 5-11-107, MCA:

5-11-107. Powers relating to hearings. (1) In the discharge of its duties, a statutory committee or an interim committee may hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony, and cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in district court.

(2) If a person disobeys a subpoena issued by a statutory committee or an interim committee or if a witness refuses to testify on any matters regarding which the witness may be lawfully interrogated, the district court of any county shall, on application of the committee, compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from a district court or a refusal to testify in the district court.

(f) Recommend legislation

Finally, as a general power, 2-4-402, MCA, allows the EAIC to hold hearings and conduct investigations involving agency compliance with MAPA and other statutes. It may formally recommend legislation to amend the state laws at issue or MAPA procedures:

2-4-402. Powers of committees -- duty to review rules. (1) The administrative rule review committees shall review all proposed rules filed with the secretary of state.

(2) The appropriate administrative rule review committee may:

(a) request and obtain an agency's rulemaking records for the purpose of reviewing compliance with 2-4-305;

(b) prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing;

(c) require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305;

(d) institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies;

(e) review the incidence and conduct of administrative proceedings under this chapter.

CL0106 6034Jwca.

EAIC Action Regarding MAR Notice 32-15-268

November 12, 2015: Department of Livestock Issues Notice 32-15-268. No Public Hearing Anticipated.



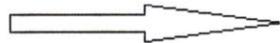
January 8, 2016: Department of Livestock Reissues Notice 32-15-268 To Include Public Hearing. Resets 6-Month Deadline.



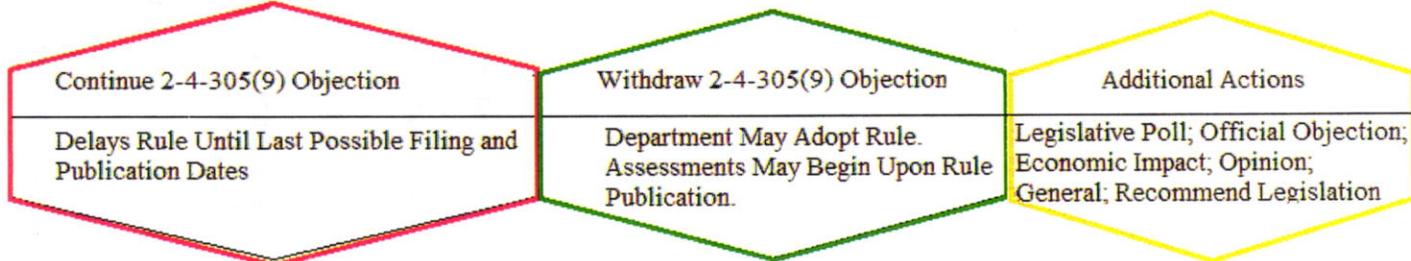
January 15, 2016: At Least 5 EAIC Members Object To Notice 32-15-268.



February 4-5, 2016: EAIC Meeting



Committee Actions



June 27, 2016: Last Filing Date With Secretary of State
 July 8, 2016: Last Publication Date Based on January 2016 Amended Notice