



Chairman Callender and members of the Joint Committee on Agency Rule Review:

On behalf of the over 3,000 members of the Ohio Veterinary Medical Association (OVMA), we respectfully submit the attached legal opinion in response to concerns we raised during the rule writing process for proposed OAC 4729:5-15-01.

OVMA will continue to work with the Ohio General Assembly to remedy our legal concern. Should you have any questions please do not hesitate to contact David Frash, Government Relations Director, OVMA.

David Frash
Government Relations Director
Ohio Veterinary Medical Association
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614-436-1300

Cc: Director Larry Wolpert (JCARR), Cameron McNamee (Director of Policy and Communication – State of Ohio Board of Pharmacy)

Attached: Legal Opinion authored by OVMA outside counsel Brigid E. Hied of Eastman &Smith Ltd.

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EMAIL ONLY

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Re: Legal Opinion - Adoption of Ohio Admin. Code 4729:5-15-01
Our File No: O050 - 214314

Dear Mr. Advent and Mr. Frash:

It was a pleasure speaking with you regarding O.A.C. 4729:5-15-01, a proposed rule that has been re-filed with the Joint Committee on Agency Rule Review (JCARR) on September 11, 2019. After reviewing the proposed rule and authorizing legislation in O.R.C. 4729.532, it is my opinion that certain provisions in O.A.C. 4729:5-15-01 are outside of the agency's authority.

O.R.C. 4729.532 restricts the method and means for performing euthanasia on animals in an animal shelter. The statute allows two substances to be used to "perform euthanasia¹ by means of lethal injection on an animal": (1) combination drugs identified in the statute and (2) other substances that both the board of pharmacy and the state veterinary licensing board approve by administrative rule:

(A) No agent or employee of an animal shelter shall *perform euthanasia by means of lethal injection on an animal* by use of any substance other than combination drugs containing Pentobarbital and at least one non-controlled substance active ingredient... whose only indication is for euthanizing animals, *or other substance that the state veterinary medical licensing board and the state board of pharmacy both approve by rule adopted in accordance with Chapter 119 of the Revised Code.* (Emphasis added).

Whereas O.R.C. 4729.532 refers solely to the use of "lethal injection" to "perform euthanasia" on an animal, the proposed rule refers to four drugs which are to be used only to

¹ According to www.merriam-webster.com/dictionary, "euthanasia" is defined as "the act or practice of killing or permitting the death of hopelessly sick or injured individuals (such as persons or domestic animals) in a relatively painless way for reasons of mercy."

anesthetize the animal in preparation for the lethal injection. The relevant sections of the proposed rule O.A.C. 4729:5-15-01 are:

4729:5-15-01 Animal Shelters - Definitions.

As used in Chapter 4729:5-15 of the Administrative Code:

(C) "Controlled substance dangerous drugs used to perform euthanasia" means any of the following:

(1) Combination drugs that contain pentobarbital and at least one noncontrolled substance active ingredient, in a manufactured dosage form, whose only indication is for euthanizing animals; and

(2) Pursuant to division (A) of section 4729.532 of the Revised Code, the board approves the following substances to be administered by euthanasia technicians *only for the purpose of anesthetizing animals for euthanasia*:

- (a) *Tiletamine and zolazepam* for injection; and
- (b) *Ketamine hydrochloride*.

(E) ... Pursuant to division (A) of section 4729.532 of the Revised Code, the board approves *xylazine* to be administered by euthanasia technicians *only for the purpose of anesthetizing animals for euthanasia*.
(Emphasis added.)

The proposed rule O.A.C. 4729:5-15-01 identifies four drugs (tiletamine, zolazepam, ketamine hydrochloride, and xylazine) not identified in O.R.C. 4729.532 and which the rule limits "only for the purpose of *anesthetizing*² animals for euthanasia." The rule therefore exceeds the scope of authority granted in O.R.C. 4729.532 because the statute only grants the authority to identify "other substances" to be used in "lethal injection" to "perform euthanasia."

You have informed me that xylazine is actually a sedative, not an anesthetic so that the indicated use in the rule would be inaccurate. However, in rendering this opinion, I have conducted no independent analysis of the appropriate use of the four drugs and defer to the knowledge and expertise of the agency and the licensing board on the topic.

² According to www.merriam-webster.com/dictionary, "anesthetize" means "to subject to anesthesia" and "anesthesia" means "loss of sensation with or without loss of consciousness."

In rendering this opinion, I have reviewed the following:

1. The proposed rule O.A.C. 4729:5-15-01 (refiled October 2, 2019)
2. The authorizing statute O.R.C. 4729.532,
3. The Board of Pharmacy's "Guide to [in the] Rule-making Process"³,
4. The Joint Committee on Agency Rule Review (JCARR) standard prongs for rule review⁴, and
5. The Register of Ohio webpage for the proposed rule⁵.

Based on my review and analysis of the above documents, and my education, training, and experience as a licensed attorney, it is my legal opinion that certain provisions in the proposed rule are not within the legislative authority granted in O.R.C. 4729.532. In particular, to the extent the proposed rule identifies drugs for anesthetizing animals which are not to be used to "*perform euthanasia by means of lethal injection on an animal*," the rule exceeds the authority granted in O.R.C. 4729.532.

If you require any additional information or would like to discuss this matter further, do not hesitate to contact me. I will be out of the office and unavailable from Thursday, October 10, through Tuesday, October 15, 2019.

Very truly yours,

EASTMAN & SMITH LTD.



Brigid E. Heid

BEH/jrm

³www.pharmacy.ohio.gov/Documents/LawsRules/ProposedRules/Guide%20to%20Public%20Participation%20in%20the%20Rule-Making%20Process.pdf.

⁴ www.jcarr.state.oh.us/about.

⁵ www.registerofohio.state.oh.us/rules/search/details/306612.