

**IOWA DEPARTMENT OF NATURAL RESOURCES**

<p>Petition by the Iowa Grocery Industry Association for a Declaratory Order on Iowa Code Chapter 455C.6(3)</p>	<p><b>PETITION FOR DECLARATORY ORDER</b></p>
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The Iowa Grocery Industry Association (hereinafter “IGIA”) petitions for a Declaratory Order pursuant to Iowa Administrative Code section 567-5.1 and Iowa Code section 17A.9 requesting an order on the applicability of the current “convenient service” standard in Iowa Code section 455C.6(3) and Iowa Administrative Code section 567-107.4(1)(c).

**RELEVANT FACTS**

Iowa’s Beverage Containers Control law, Iowa Code chapter 455C, commonly referred to as the “Iowa Bottle Bill,” requires consumers to provide an upfront five-cent deposit with each redeemable container with the legal requirement for that deposit to be returned to the consumer when the container is redeemed by a dealer or redemption center. The law allows dealers to decline to redeem containers at their businesses when an approved redemption center provides “a convenient service to consumers for the return of empty beverage containers.”<sup>1</sup> The purpose of redemption centers is to “facilitate the return of empty beverage containers *and to serve dealers of beverages.*”<sup>2</sup> Iowa Code section 455C.6(3) vests the approval of such redemption centers in the Department.

Iowa Code section 455.9 requires that the Environmental Protection Commission of the Department (the “Commission) shall adopt rules necessary to carry out the provisions of the

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<sup>1</sup> IOWA CODE § 455C.6; IOWA ADMIN. CODE r. 567-107.4(1)(c).

<sup>2</sup> IOWA CODE § 455.6(1) (emphasis added).

chapter. In Iowa Admin Code section 567-107.4, the Department provides that “[a] redemption center shall be approved as a redemption center for a dealer if the department determines that the redemption center will provide a convenient service to the dealer’s customers,” requiring that not only must a redemption center be convenient to consumers, but that it must be convenient to consumers of that dealer’s customers. The Department currently administers this rule pursuant to a 10-minute travel standard between the dealer and a proposed redemption center.<sup>3</sup> This travel standard is purportedly determined through a web-based search engine tool with no additional considerations. The Department has advised that their administration of the “convenience standard” has “evolved” from a single mile to their current 10-minute travel standard.<sup>4</sup> The Department does not utilize any additional considerations outlined in making this determination. Moreover, there is no additional statutory or regulatory authority for this standard.<sup>5</sup>

The administration of redemption centers in this manner has resulted in unwarranted refusals to approve otherwise viable redemption centers for IGIA members. For example, in 2019, Fareway Stores, Inc. sought approval for a grocery store in Hiawatha, Iowa to be an approved dealer for a redemption center located 6.4 miles from the store. The request for approval was denied by the Department because, according to the Department’s review of online map services, the drive time from the store to the redemption center was between 13 and 16 minutes each way.<sup>6</sup>

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<sup>3</sup> IOWA DEP’T NAT. RES., DETERMINING YOUR REDEMPTION CENTER CATEGORY, *available at* <https://www.iowadnr.gov/portals/idnr/uploads/waste/bbregisterforbus.pdf?amp;tabid=838> (last visited July 13, 2020).

<sup>4</sup> E-mail from Bill Blum, Iowa DNR Program Planner, to Garrett Pıklapp, Fareway Stores Inc. General Counsel, (Nov. 29, 2018) (on file with IGIA counsel).

<sup>5</sup> E-mail from Bill Blum, Iowa DNR Program Planner, to Dustin Miller, IGIA counsel, (July 26, 2019) (on file with IGIA counsel).

<sup>6</sup> The IGIA seeks a declaratory ruling on the specific question of the Department’s definition of the convenience standard as applied to all applications for redemption centers, not just the example provided. *See City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753 (Iowa 1979) (finding declaratory rulings can apply to purely hypothetical sets of facts and do not need to present live, present controversies).

At various times, the IGIA and its members have sought clarity on the Department's position with regards to the development of its convenience standard. In an email to the General Counsel for Fareway Stores, Inc., a Department employee stated that a convenience standard is "qualitatively different" than the actual purchase of the product to be redeemed and that the convenience standard applied by the Department has evolved over time.<sup>7</sup> The Department employee provided that Department reviews each application "on its own individual merits in regards to consumer convenience," without further detail on criteria used.<sup>8</sup>

The Department has stated that "[t]he bottle bill is set in law, so we can't contradict the law."<sup>9</sup> The law, however, simply requires redemption centers to be convenient to customers. The Department has interpreted the law in its rules to require that the "redemption center will provide a convenient service *to the dealer's customers*." The Department, however, has failed to formally define what constitutes a convenient service to the dealer's customers. Current administration has arbitrarily applied the 10-minute travel standard that is not set by statute or rule. The Department admitted publicly and to IGIA that the standard is not rule-based, but rather that "[t]he system is essentially based on people at the local level dealing with each other in good faith."<sup>10</sup>

The IGIA sent a letter to Department staff on September 3, 2019, questioning the current legality of the convenience standard applied by the Department. In a response dated October 4, 2019, legal counsel for the Department affirmed the Department did not have a rule-based

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<sup>7</sup> E-mail from Bill Blum, Iowa DNR Program Planner, to Garret Pıklapp, Fareway Stores Inc. General Counsel (Nov. 29, 2018) (on file with IGIA counsel).

<sup>8</sup> *Id.*

<sup>9</sup> Lee Rood, *Got a pile of recycling in the garage? All stores expected to take returns again on July 26*, DES MOINES REGISTER (July 4, 2020, 7:00 AM), <https://www.desmoinesregister.com/story/news/2020/07/04/iowa-recycling-deposit-retailers-expected-to-take-empty-cans-bottles-july-26/5365234002> (last updated July 6, 2020, 1:51 PM).

<sup>10</sup> Alex Schuman, *Iowans short-changed when redeeming cans*, KCCI Des Moines (Apr. 10, 2019, 6:19 PM), <https://www.kcci.com/article/iowans-short-changed-when-redeeming-cans/27105416>; E-mail from Bill Blum, Iowa DNR Program Planner, to Dustin Miller, IGIA counsel (July 26, 2019) (on file with IGIA counsel).

standard.<sup>11</sup> Counsel further stated that it must apply the term in a “reasonable manner.” The letter goes on to point out that the Department has not included this change in their regulatory agenda, but if it pursues rulemaking on the issue, the Department would need significant input from the public.<sup>12</sup>

Section 455C.9 of the Iowa Code provides that “[t]he commission shall adopt, upon recommendation of the director, the rules necessary to carry out the provisions of this chapter, subject to the provisions of chapter 17A.” In March 2020, the IGIA filed a Petition for Rulemaking requesting that the Department undertake the rulemaking process pursuant to chapter 17A of the Iowa Code in order to address the amorphous “convenience standard” as administered by the Department. In its Petition, the IGIA requested that the convenience standard be defined as a 15-mile radius from a dealer based on data related to modern travel times of consumers to various activities, commutes to work, and acquisition of the beverages themselves. Despite this petition and the absence of any rulemaking to define the “convenience standard,” the Department advised it would deny the Petition for Rulemaking and rely on the Iowa Legislature to amend Iowa Code chapter 455C. A convenience standard applied without formal rules based solely upon Department-determined vehicle travel times from the dealer to the redemption center is arbitrary, vague, and undefined, and fails to provide certainty to dealers and redemption centers seeking to comply with the statute.

### **APPLICABLE LAW**

1. Iowa Code chapter 455C implements Iowa’s Beverage Containers Control law, which requires dealers to charge a five-cent deposit to a consumer who purchases certain

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<sup>11</sup> Letter from David Scott, Iowa DNR counsel, to Brad Epperly and Dustin Miller, IGIA counsel (Oct. 04, 2019) (on file with IGIA counsel).

<sup>12</sup> *Id.*

beverages and then mandates that a dealer accept all empty beverage containers of the type that was sold to consumers.

2. Under Iowa Code section 455C.4, a dealer may refuse to accept and pay the refund value for empty beverage containers if the dealer is included in an order of the Department approving a redemption center under section 455C.6.

3. Iowa Code section 455C.6 authorizes the Department to approve redemption centers to assist dealers in the return of empty containers, enabling dealers to decline the return of containers to their stores pursuant to Iowa Code section 455C.4. The statute provides that the Department shall approve a redemption center if “the redemption center will provide a convenient service to consumers.” The statute does not define “convenient service to consumers.”

4. Under Iowa Code chapter 17A<sup>13</sup> and section 455C.9, the Department is required to adopt rules for administration of the Beverage Containers Control law at Iowa Administrative Code chapter 567-107.

5. The Department adopted a rule interpreting the statute stating “[a] redemption center shall be approved as a redemption center for a dealer if the department determines that the redemption center will provide a convenient service to the dealer’s customers.” Iowa Admin. Code 467-107.4(1)(c). The rule does not define a “convenient service to the dealer’s customers.”

6. Iowa Code section 17A.1(2) “provide[s] a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.” A determination of the standard for what makes a redemption center a “convenient

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<sup>13</sup> Iowa Code § 17A.3(1)(c), (d) (“[E]ach agency shall . . . adopt rules, in addition to those otherwise required by this chapter, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers . . . [and] [m]ake available for public inspection all rules.”).

service to customers” is necessary for the public to understand and comply with the bottle bill, and the procedure for formal rule-making must be followed in making this determination.

### **QUESTION TO BE ANSWERED**

Can the Department approve or deny applications for redemption centers to assist dealers in the return of redeemable empty beverage containers under Iowa Code section 455C.6 based on an undefined 10-minute travel standard without a statutory or regulatory definition of “convenience to the consumer”?

### **DESIRED ANSWERS AND REASONS FOR SUPPORT**

The Department is required to follow the procedural rule-making requirements of Iowa Code chapter 17A to take actions affecting the rights of the public. The Department must following this rule-making process to implement the bottle bill under Iowa Code section 455C.9. The Department has failed to adopt rules defining the “convenient service” standard applicable to redemption centers. The 10-minute travel standard applied by the Department is invalid as it was not created through formal rule-making procedure of Iowa Code chapter 17A. The Department must suspend all actions related to approvals under Iowa Code section 455C.6(3) based on the Department’s current application of the “convenient service” standard.

### **REASONS FOR DECLARATORY ORDER AND INTEREST IN OUTCOME**

After over four decades of administration of chapter 455C by the Department, the rights of IGIA members have been increasingly disregarded. The legislature enacted chapter 455C with broad guidelines and directed the Department to enact rules necessary to carry out the chapter. Instead, the Department has administered the program arbitrarily without formal rules, depriving IGIA members the benefit of redemption centers to assist in the return of redeemable beverage containers. The IGIA objects to the administration of the Department’s current

convenience standard and contests its legality without conducting a rulemaking process directed by the legislature and required by Chapter 17A. IGIA, on behalf of its members, seeks a declaratory order enabling redemption centers to be approved based upon a defined standard.

### **STATEMENT ON OTHER PROCEEDINGS**

The IGIA is not a party to any other proceeding involving the question at issue and we do not have knowledge of these questions being decided by the Department or any governmental entity.

### **DESCRIPTION OF ANY CLASS OF AFFECTED PERSONS**

- All Approved Redemption Centers according to Iowa Code Section 455C.6.
- All Unapproved Redemption Centers according to Iowa Code Section 455C.7.
- All Dealers according to Iowa Code Section 455C.1(5).
- All Distributors according to Iowa Code Section 455C.1(9).
- All Dealer Agents according to Iowa Code Section 455C.1(6).
- All Manufacturers according to Iowa Code Section 455C.1(11).

### **PETITIONERS' ARGUMENTS**

The Iowa Administrative Procedures Act<sup>14</sup> governs the conduct of agencies in the administration of laws enacted by the legislature. Among the various purposes of the Act are to:

- Provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.
- Increase public accountability of administrative agencies; and
- Simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions.<sup>15</sup>

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<sup>14</sup> See generally IOWA CODE ch. 17A.

<sup>15</sup> Iowa Code §§ 17A.1, 17A.2

The convenience standard administered by the Department has not followed this procedure and the Department has made changes over time that has major impacts to our members without any public scrutiny. The minimum procedure outlined in Iowa Code chapter 17A does not dictate the rules put in place by an agency but ensures that those rules have received input from stakeholders.<sup>16</sup> Professor Arthur E. Bonfield, the architect of Iowa’s Administrative Procedures Act, wrote “agencies must make a real and substantial effort to provide, by rule, procedural protections that are adequate, under the particular circumstances, to protect persons affected by agency action against improper exercises of agency power.”<sup>17</sup> A convenience standard controlled only by agency staff, without input from the public, but has a major impact on the operations of commercial enterprises across the state would seem to fit within the protection contemplated by Professor Bonfield and the Iowa Legislature in the development of the Iowa Administrative Procedures Act.

In correspondence with the IGIA, the Department admitted that the 10-minute travel standard applied by the agency is not outlined in Iowa Code section 455C.6(3) and is not based upon any rule-based procedure pursuant to Iowa Code chapter 17A. The Department stated that without this legal authority the agency must simply “apply the term in a reasonable manner.”<sup>18</sup>

IGIA members are “persons” as defined in chapter 17A, entitled to the protections of the Act. As stated in Iowa Code section 455C.6(1), redemption centers are not only created to facilitate the return of empty containers, but also to “serve dealers.” The Department’s arbitrary administration of redemption center approval has deprived IGIA members of their rights under

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<sup>16</sup> IOWA LEGISLATIVE SERVS. AGENCY, LEGISLATIVE GUIDE, LEGAL SERVICES DIVISION: RULEMAKING GUIDE 2–3 (2015), *available at* <https://www.legis.iowa.gov/docs/publications/LG/14966.pdf>.

<sup>17</sup> ARTHUR E. BONFIELD, AMENDMENTS TO IOWA ADMINISTRATIVE PROCEDURE ACT: REPORT ON SELECTED PROVISIONS TO THE IOWA STATE BAR ASSOCIATION AND IOWA STATE GOVERNMENT 15–22 (1998).

<sup>18</sup> Letter from David Scott, DNR counsel, to Brad Epperly and Dustin Miller, IGIA counsel (Oct. 04, 2019) (on file with IGIA counsel).

chapter 455C without following required procedure. In the absence of any rulemaking process defining the statutory language “convenience to the consumer,” the Department’s denial of proposed redemption centers to “serve dealers” is void ab initio.

Moreover, even without any rulemaking process or internal guidance, the Department admits in correspondence that its administration has changed over time. This is no doubt due to the changing patterns of behavior in society. In today’s society, our citizens commute further distances to work, school and to shop. According to the most recent statistics from the U.S. Census Bureau, the average commute to work in Iowa is 19.1 minutes.<sup>19</sup> Where once schools were in neighborhoods where children walked, now they are may ride a bus for up to an hour. The shrinking rural population in Iowa has resulted in fewer grocery stores and longer distances to travel for Iowans to purchase their groceries.<sup>20</sup> And even though the distances in metro areas may not be as far to a grocery store, a common commute can still reach 15 to 20 minutes.

The Department cannot define what constitutes a “convenient service to customers” without undertaking a formal rulemaking process to receive public input and establish a standard reflective of today’s society. The Department must administer the approval of redemption centers under chapter 455C not only to reflect the “convenience of the consumer,” but to promote these redemption centers to help “facilitate the return of empty beverage containers”

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<sup>19</sup> U.S. CENSUS BUREAU, <https://www.census.gov/en.html> (search for “average commute time census” in search bar, click “by state” under the top result, and click either “chart” or “table” and see “Iowa”).

<sup>20</sup> See, e.g., Madison Arnold, *Solving food deserts in Iowa: When small towns lose grocery stores, where do residents turn?*, GAZETTE (May 3, 2019, 8:00 AM), <https://www.thegazette.com/IowaIdeas/stories/human-social-services/solving-food-deserts-in-iowa-when-small-towns-lose-grocery-stores-where-do-residents-turn-20190503> (“Lone Tree Mayor Jon Green notes most of the Johnson County city’s residents have vehicles and travel . . . to get groceries[,] [b]ut there is concern for residents, such as senior citizens, who may be less mobile or living on a fixed income.”); JON M. BAILEY, CTR. FOR RURAL AFFS., RURAL GROCERY STORES: IMPORTANCE AND CHALLENGES (2010), available at <https://www.ruralgrocery.org/resources/Importance%20and%20Challenges.pdf> (“In rural Iowa, 43 percent of grocery stores in towns with populations less than 1,000 have closed.”).

and to enable “serve dealers.” Approving redemption centers within at least a 15 mile radius is consistent with the statutory language of Chapter 455C.

**MEETING WITH DEPARTMENT AND PETITIONER REPRESENTATIVE**

Petitioners hereby request a joint meeting between the Director of the Department, legal staff, and IGIA to discuss the agency’s response to this petition pursuant to Iowa Administrative Code 11-8.7(17A). Please address all correspondence regarding this petition to counsel for IGIA at the address below.

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**ATTORNEYS FOR THE IOWA GROCERY  
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