

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the
Board of Water and Soil Resources
Governing Metropolitan Area Local Water
Management, Minnesota Rules,
Chapter 8410

**ORDER ON REVIEW OF
RULES UNDER
MINN. STAT. § 14.26**

The Minnesota Board of Water and Soil Resources (Board) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26 (2014). On March 31, 2015, the Office of Administrative Hearings (OAH) received a request for review and approval of the rules from the Board, pursuant to Minn. Stat. § 14.26; Minn. R. 1400.2310 (2013).

Upon request of Administrative Law Judge Jim Mortenson, the Board submitted letters addressing specific questions about statutory authority and the probable costs of complying with the proposed rules on April 7, 2015.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons stated in the Memorandum that follows,

IT IS HEREBY DETERMINED THAT:

1. The Board has the statutory authority to adopt the rules pursuant to Minnesota Statutes sections 103B.101, .211, .227, .231, .235,.239 (2014), **EXCEPT** for Minnesota Rules Part 8410.0105, Subpart 9.
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2014), and Minnesota Rules, Chapter 1400 (2013).
3. The record demonstrates the rules are needed and reasonable, despite the lack of information on the probable costs of complying with the proposed rule, which is a harmless error in this case.
4. The rules contain several substantive defects (largely the result of impermissible vagueness) which render the rules unconstitutional or illegal. Those defects are described in the Memorandum below. Therefore,

IT IS HEREBY ORDERED:

The adopted rules are **DISAPPROVED** for the specific reasons stated below.

Dated: April 21, 2015

s/Jim Mortenson

JIM MORTENSON
Administrative Law Judge

MEMORANDUM

The proposed rules are amendments to the rules that govern the water management program in the seven county metropolitan area. The existing rules were adopted in 1992. They set forth requirements for watershed management plans, local water management plans, plan amendments, plan implementation, joint powers agreements for watershed management organizations, removal of organization representatives, annual audits, annual reports, and non-implementation of plans.

The proposed amendments to the rules specify, among other things, the standards and requirements of watershed management plans submitted to the Board of Water and Soil Resources for approval.

Pursuant to Minn. Stat. § 14.26, the Board has submitted these rules to the Administrative Law Judge for review as to legality. Minnesota Rules Part 1400.2100 identifies the standards of review under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include:

- (1) The rule was not adopted in compliance with the procedural requirements of Minn. Stat. ch. 14 or other law or rule, unless the judge decides that the error was harmless and should be disregarded;
- (2) The rule is not rationally related to the agency's objective or the record does not demonstrate need for or reasonableness of the rule;
- (3) The rule is substantially different from the proposed rule and the agency did not follow the procedures of Minn. R. 1400.2110;
- (4) The rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;
- (5) The rule is unconstitutional or illegal;
- (6) The rule improperly delegates the agency's powers to another agency, person or group;

- (7) The rule is not a “rule” as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or
- (8) The rule is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minn. Stat. § 14.001(2), (4), (5).¹

The rules presented for review contain several substantive defects which render the rules unconstitutional or illegal, in violation of Minn. R. 1400.2100. One rule, Minn. R. 8410.0105, subp. 9, exceeds the Board’s statutory rulemaking authority, in violation of Minn. R. 1400.2100. Another rule, Minn. R. 8410.0080, subp. 7, is not a rule pursuant to Minn. Stat. § 14.02. There is one procedural defect related to the statement of need and reasonableness (SONAR) which is a harmless error. Each of the defects is addressed in detail below.

I. Substantive Defects

a. Proposed Rule 8410.0060, Subpart 1

The rule details which information and analysis is needed for the plans. The proposed rule also includes minimum plan requirements and elements. The relevant part of the rule reads: “Elements to include are...” and then lists specific elements. A rule is impermissibly vague if it is so indefinite that the reader will not know what compliance is demanded by the rule.² It is not clear whether the listed elements are required or discretionary. The proposed language is impermissible due to vagueness and ambiguity.

To correct this defect, the Administrative Law Judge suggests that the language of the rule be revised as follows: “Elements that must be included in each plan are:”

This suggested language would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

b. Proposed Rule 8410.0080, Subpart 2

Under the proposed rule, water quantities must be established to address priority issues with minimum considerations such as, “volume, peak rate, base flow, imperviousness, or similar issues.” A rule is impermissibly vague if it is so indefinite that the reader will not know what compliance is demanded by the rule.³ “Similar issues” is vague and ambiguous. It does not give an expectation or provide any guidance as to the meaning. There is no definite determination of what “similar issues” would be.

¹ Minn. R. 1400.2100.

² *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

³ *Id.*

Among the possible cures to this defect would be deleting the terms “similar issues” or listing the other considerations to be addressed.

c. Proposed Rule 8410.0080, Subpart 7

The rule provides goals to address groundwater-surface water interactions. The language at issue provides,

Organizations are encouraged to establish goals to address groundwater issues identified within the area of the organization in the Twin Cities Metropolitan Area Master Water Supply Plan, source water protection plans, and local water supply plans.

This is not a rule. A rule is the Board’s “statement of general applicability and future effect[.]”⁴ Here, the Board’s hopes do not have general applicability. Thus, it is recommended to be removed, or modified from “are encouraged” to “shall” in order to meet the definition of a rule under Minn. Stat. § 14.02, subd. 4.

Either of these suggested changes would correct the defect and would not constitute a substantial change from the rules as proposed.

d. Proposed Rule 8410.0105, Subpart 9

In rule part 8410.0105, subpart 9, the Board proposes to permit organizations to establish environmental trading programs. The proposed rule reads:

An organization may establish and implement an environmental trading program that allows for water-related impacts to be offset at different locations than the site of impact.

In its Statement of Need and Reasonableness, the Board relied on several statutes to determine specific statutory authority for the proposed rule.⁵ Minn. Stat. § 103B.231, subd. 6(b)(4), grants the Board authority to adopt rules regarding “how watershed plans are to specify the controls required to be adopted by the local units of government, including uniform erosion control, storm water retention, and wetland protection ordinances in the metropolitan area.” There is no mention of trade programs in Minn. Stat. § 103B.231, subd. 6(b)(4) or other statutory authorities listed.

The SONAR establishes that proposed rule 8410.0105, subpart 9 is a:

New subpart to acknowledge the common practice implementing environmental trading programs within organizations. It is relatively new practice since the existing rule was promulgated.

⁴ Minn. Stat. § 14.02, subd. 4.

⁵ Ex. C, Statement of Need and Reasonableness at 4-5.

Upon request for additional explanation of the statutory authority for the proposed rule, the Board responded on April 7, 2015. The Board added Minn. Stat. §§ 103B.201, .231, subds. 6(a)(4), (6) as authority.

There is no other information provided by the Board as to the statutory authority to establish trading programs.

The Board has statutory authority to establish specific minimum requirements of water management programs. It does not have the authority to authorize trading programs. Recognizing current practice is not the same as identifying sufficient statutory authority to support the adoption of a rule.

The Board also posits that the Board has general authority to adopt rules necessary to execute its duties pursuant to Minn. Stat. § 103B.101, subd. 7. The Board has not established statutory authority to adopt proposed rule 8410.0105, subpart 9, because it is not clear how its regulation of trading programs is necessary or reasonable. Further, in this context, it is not clear that the Board's recognition of these practices equals a rule that comports with Minn. Stat. § 14.02, subd. 4.

e. Proposed Rule 8410.0180, Subpart 2

The proposed rule provides how to determine failures of implementation of watershed management plans. The relevant subpart language provides that the Board may establish just cause for determining whether the plan was implemented properly with a written petition. The language published March 26, 2015:

The board ~~shall first~~ may establish just cause for ~~the determination determining whether a plan is being properly implemented~~ by review of a written...petition.

A rule is impermissibly vague if it is so indefinite that the reader will not know what compliance is demanded by the rule.⁶ The language provides discretion to the Board to establish just cause by a written petition. It does not specify the conditions under which the Board may so act. This is both vague and provides for too much discretion to the Board.

One suggestion to correct this defect is to return to the requirement to establish just cause, the standards for which are located in Subpart 3 of the rule. The language could be:

The board shall first establish just cause for ~~the determination determining whether a plan is being properly implemented~~ by review of a written...petition.

This suggested language would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

⁶ *Id.*

f. Proposed Rule 8410.0180, Subpart 3

The rule describes the petition review process. The language published March 26, 2015 currently reads, in part:

If the executive director determines just cause does not exist, the petitioner, the organization, and the plan review agencies authorities shall be provided written notice of the decision. The executive director may require more frequent reporting and thorough evaluation than required under part 8410.0150.

A rule is impermissibly vague if it is so indefinite that the reader will not know what compliance is demanded by the rule.⁷ This subpart gives the executive director broad discretion to require more frequent reporting and more thorough evaluation of the plans. It is not clear in what circumstances or why the executive director may provide for more frequent reporting or evaluations. This lack of specificity gives unbridled discretion to the executive director and allows for uncertainty under the rules. This makes the rule impermissibly vague and provides for inappropriate discretion.

One suggestion to correct the defect is to remove the sentence beginning “The executive director may require. . . .”

This change would remove the impermissible vague language without changing the meaning of the rule. If the Board believes the executive director must have authority to require more frequent reporting and thorough evaluation that required under part 8410.0150, it must state the standards for the executive director to exercise such discretion.

This suggested change would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

g. Proposed Rule 8410.0180, Subpart 4

The proposed rule provides for what steps follow a determination on a petition. The language in question is item A, subitem 3, “direct the organization to develop an amended plan within a reasonable time period.”

A rule is impermissibly vague if it is so indefinite that the reader will not know what compliance is demanded by the rule.⁸ “A reasonable time period” does not give the reader an expectation of what would be required. There is no way to determine what that time period would look like. This makes the rule impermissibly vague and provides for inappropriate discretion.

One suggestion to correct this defect would be to remove “within a reasonable time period” from the sentence at item (3). Then, insert a new item (4) stating:

⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

⁸ *Id.*

set a time period for the submission of an amended plan that reflects the complexity of the amendments;

This suggested change would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

h. Proposed Rule 8410.0180, Subpart 5(C)

The proposed rule provides the procedures for an appeal of determinations or decisions. The language currently provided by item C is:

After an appeal is granted, the appeal must be decided by the board within 60 days after submittal of written briefs for the appeal and conclusion of a hearing by the dispute resolution committee. Parties to the appeal are the appellant and the organization. The board or its executive director may elect to combine multiple appeals involving the same organization and process as one decision. An appeal of the board decision may be taken to the state Court of Appeals and must be considered an appeal from a contested case decision for purposes of judicial review under Minnesota Statutes, sections 14.63 to 14.69.

Subpart 5(C) provides language that is confusing. The appeal is decided both after submittal of written briefs and the conclusion of the hearing. This is vague language that does not give the reader any idea when the appeal will be decided.

To correct this defect, the Administrative Law Judge suggests that the language of the rule be revised to:

After an appeal is granted, the appeal must be decided by the board within 60 days after the close of the hearing record ~~submittal of written briefs for the appeal and conclusion of a hearing~~ by the dispute resolution committee. Parties to the appeal are the appellant and the organization. The board or its executive director may elect to join ~~combine~~ multiple appeals involving the same organization and actions into ~~process~~ as one decision. A party aggrieved by the board's final decision may seek judicial review of the decision as provided in Minnesota Statutes, sections 14.63 to 14.69. ~~An appeal of the board decision may be taken to the state Court of Appeals and must be considered an appeal from a contested case decision for purposes of judicial review under Minnesota Statutes, sections 14.63 to 14.69.~~

This language provides for a clear time when the appeal will be decided and provides for standard language for an appeal of an agency decision under Minn. Stat. §§ 14.63-.69.

II. Procedural Defect under Minn. Stat. 14.131, Subd. 5

Pursuant to Minn. Stat. 14.131, the Board is required to prepare information as part of the Statement of Need and Reasonableness of the rule. Particularly, subdivision 5 requires that the agency must ascertain whether “the probable costs of complying with the proposed rule, including those costs or consequence borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.”⁹ In the Statement of Need and Reasonableness the Board posited that the costs will largely be borne by watershed districts, management organizations, counties, cities, and towns in the metropolitan area.¹⁰ The only other information provided was that the costs would be “about the same as with the existing rules.”

This does not provide any information as to the probable costs of complying with the proposed rules and rather provides generalities. The Board further provided a memorandum, through the Commissioner of Minnesota Management and Budget, to help evaluate the fiscal impact and benefit of the proposed rules on local units of government.¹¹ This included some general determinations that the proposed rules would not increase costs for implementing entities. Upon request of the Administrative Law Judge the Board submitted a letter on April 7, 2015, attempting to clarify costs and the variability of information among organizations with regard to costs. Additionally, the Board asserts that the proposed rules will likely result in cost savings by changing printing requirements and allowing for electronic resources.¹² All other costs, the Board determines, will be either the same as required by the current rules or are negligible.¹³

Based upon this information, the Administrative Law Judge concludes that consideration of the fifth regulatory factor in the SONAR was inadequate, which is a procedural defect.

A procedural defect can be “harmless error” under Minn. Stat. § 14.26, subd. 3(d), if:

(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

The Board drafted the rules through a collaborative process with key stakeholders.¹⁴ The entities governed by the proposed rules approve of the amendments, and even

⁹ Minn. Stat. § 14.131, subd. 5.

¹⁰ Ex. C at 8.

¹¹ Ex. Q.

¹² Letter from Jim Haertel, Metro Region Manager, to Judge James Mortenson (Apr 7, 2015) (on file with the Office of Administrative Hearings).

¹³ *Id.*

¹⁴ Ex. D at 2.

where there was disagreement, the updates were seen as a vast improvement to the existing rules.¹⁵ There is no evidence that anyone was deprived of an opportunity to participate or weigh in on this issue by virtue of the Board's failure to express the explicit costs in the Statement for Need and Reasonableness. Accordingly, the Administrative Law Judge finds that this procedural defect was harmless.

J. R. M.

¹⁵ Ex. J.