

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Adoption of Exempt  
Rules Governing Prohibited and Regulated  
Invasive Species

**ORDER ON REVIEW  
OF RULES UNDER  
MINN. STAT. § 14.388  
AND MINN. R. 1400.2400**

This matter came before Administrative Law Judge Laura Sue Schlatter upon the application of the Department Of Natural Resources (Department) for a legal review under Minn. Stat. § 14.388 (2018).

On October 1, 2018 the Department filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. § 14.388 and Minn. R. 1400.2400 (2017).

Based upon a review of the written submissions by the Department, and for the reasons set out in the Memorandum which follows below,

**IT IS HEREBY DETERMINED THAT:**

1. The rules approved below were adopted in compliance with the procedural requirements of Minn. Stat §§ 14.001-.69 (2018), Minn. R. 1400.2000-.8612 (2017).
2. According to Minn. Stat. §§ 14.388, subd. 1 (3), (4), 84D.04, subds. 1 (d), 6, .10, .11, subd. 1(a) (2018), 2015 Minn. Laws 1<sup>st</sup> Spec. Sess. ch. 4, art. 4, §§ 20-24, the Department has statutory authority to adopt the approved proposed rules using the exempt rulemaking process.
3. The rules or parts of rules that are not approved were not adopted in compliance with the requirements of Minn. Stat. § 14.388, subd. 1 (4).

**IT IS HEREBY ORDERED THAT:**

1. All rules or parts of rules not specifically listed in paragraph 3, below, are approved.
2. The Department shall amend its Order Adopting Rules to cite as statutory authority for the rulemaking 2015 Minn. Laws 1<sup>st</sup> Spec. Sess. ch. 4, art. 4, §§ 20-24 in place of 2014 Minn. Laws ch. 289, § 69.

3. The following rules or parts thereof are not approved:

6216.0230 A (9) and B (lines 2.8 through 2.14)

Dated: October 15, 2018



LAURASUE SCHLATTER  
Administrative Law Judge

### NOTICE

Minn. R. 1400.2400, subp. 4a provides that when an exempt rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review after it has revised the proposed rules. The Administrative Law Judge then has five working days to review and approve or disapprove the rule. Minn. R. 1400.2400, subp. 5 provides that an agency may ask the Chief Administrative Law Judge to review an exempt rule that has been disapproved by a Judge. The request must be made within five working days of receiving the Judge's decision. The Chief Administrative Law Judge must then review the agency's filing, and approve or disapprove the rule within 14 days of receiving it.

### MEMORANDUM

Pointing to legislative changes during the 2010 and 2014 legislative sessions, the Department has chosen to use the process applicable to exempt rules under Minn. Stat. § 14.388 subd. 1 (3) and (4) and the corresponding rule, Minn. R. 1400.2400 in order to make changes to several rule parts in Minn. R. 6216.0100-.0600 (2017). Regarding the changes applicable to Minn. R. 6216.0230, the Department explains in its Order Adopting Rules:

The rule amendments update sources of nomenclature for scientific and common names of invasive species, correct or update scientific names for several invasive species, and make other technical corrections that require no interpretation of law.

In addition, the Department amends several rules by reversing a change made pursuant to a 2014 legislative Revisor's instruction in which the word "designate" was to be changed to "list" throughout chapter 6216.<sup>1</sup> The Department cites the 2014 session law containing the Revisor's instruction as its statutory authority to reverse the change.

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<sup>1</sup> See 2014 Minn. Laws, Ch. 289, § 69.

Minn. Stat. § 14.388, subd. 1 directs the OAH to review the rules for legality and to determine whether adequate justification has been provided for use of the good cause exemption process.

## **I. Notice to Interested Persons and Comments from the Public**

Minn. Stat. § 14.388, subd. 2 requires:

An agency proposing to adopt, amend, or repeal a rule under this section must give electronic notice of its intent in accordance with section 16E.07, subdivision 3, and notice by United States mail or electronic mail to persons who have registered their names with the agency under section 14.14, subdivision 1a. The notice must be given no later than the date the agency submits the proposed rule to the Office of Administrative Hearings for review of its legality and must include:

- (1) the proposed rule, amendment or repeal;
- (2) an explanation of why the rule meets the requirements of the good cause exemption under subdivision 1; and
- (3) a statement that interested parties have five business days after the date of the notice to submit comments to the Office of Administrative Hearings.

The Notice of Submission of Rules Proposed for Adoption Without a Public Hearing states that the Department provided a copy of the Notice to all of those persons who requested notification of rulemaking proceedings under Minn. Stat. § 14.14, subd. 1a. The Department also posted a copy of the Notice to its website, in accordance with Minn. Stat. § 14.388, subd. 2. The Notice was also posted on the Office of Administrative Hearings' eComment rulemaking website. Upon this record, the Administrative Law Judge concludes that the notice requirements for these proceedings were satisfied.

Minn. Stat. § 14.388, subd. 2 provides that interested parties have five business days after the date of the Notice of Adoption to submit comments to the Office of Administrative Hearings. This comment period ended on October 8, 2018, at 4:30 p.m. The Office of Administrative Hearings received one comment concerning the proposed rules.

The commenter expressed concern that listing infested lakes on the Department's website would make information about infested lakes less accessible than publishing such a list. The commenter also was concerned that "[c]hanging the requirement so that people only have to drain watercraft when leaving infested waters"

would make people less likely to be in the habit of draining their boats, and more likely to spreading infestations before they are identified.<sup>2</sup>

The Department posted a response to the comments, stating that the 2014 legislature required it “to provide access to a copy of the list of infested waters” and that the Department has done so by providing a copy on the Department’s website. According to the Department’s response, it also makes the list available in other formats on request.<sup>3</sup> The Department also pointed out that this rulemaking does not change the existing law regarding drain plugs, which does require removal of drain plugs when leaving all water bodies, not just infested water bodies.<sup>4</sup>

## **II. Use of the Good Cause Exemption**

Minn. Stat. § 14.388 provides that an abbreviated and streamlined set of procedures for promulgating new rules may be used when “good cause” is present.

Good cause exists for approval and adoption of proposed rules when the rules “incorporate specific changes set forth in applicable statutes [and] *no interpretation of law is required.*” Under the good cause exemption, both the agency’s rulemaking powers and the breadth of the review by the Office of Administrative Hearings are sharply reduced. This is because the good cause exemption contemplates that administrative rules will only be promulgated with this method in order to meet truly exigent circumstances,<sup>5</sup> or when the policy choices underlying the new rules were made through an earlier, publicly-accessible process – such as a prior rulemaking or the Legislature’s enactment of a statute setting forth the specific requirements to be incorporated into the revised rule.<sup>6</sup>

In exempt rulemaking, the legality determination is governed by Minn. R. 1400.2100, Items A and D to G.<sup>7</sup> These standards state:

A rule must be disapproved by the judge or chief judge if the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

. . .

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<sup>2</sup> Comments of Steve Mohn (eComment, Oct. 8, 2018).

<sup>3</sup> Department’s Response (eComment, Oct. 10, 2018).

<sup>4</sup> *Id.* See Minn. Stat. § 84D.10 (2018).

<sup>5</sup> See Minn. Stat. § 14.388, subd.1 (1) and 1 (2) (2018).

<sup>6</sup> See Minn. Stat. § 14.388, subd.1 (3) and 1 (4) (2018).

<sup>7</sup> See Minn. R. 1400.2400, subp. 3 (2017).

- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person or group;
- G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law. . . .

For the reasons detailed below, a portion of Minn. R. 6216.0230, as proposed by the Department, exceeds the authority granted to the Department under Minn. Stat. § 14.388, subd. 1(4). Because certain proposed amendments to Minn. R. 6216.0230 fail to meet the requirements for exempt rulemaking, the Department must delete the specified language of the proposed amendment to the rule. All other modifications and repeals of rules included in this proceeding meet the requirements of Minn. Stat. § 14.388 and Minn. R. 1400.2400.

### **III. Analysis of the Proposed Rule**

#### **A. Minn. R. 6216.0230 Nomenclature**

Minnesota Rule, part 6216.0230 lists a number of sources which are incorporated by reference into rule chapter 6216. These sources provide the scientific taxonomic nomenclature used in the rule chapter as a whole. The changes in paragraph A, subparagraphs (1) through (8) of this rulemaking refer to new editions or volumes of sources already included in the rule. Thus, they do not alter the sense or meaning of the rule and are amendments appropriately made through the exempt rulemaking process.

The addition proposed at Minn. R. 6216.0230 A (9) lists a new source, taken from a section of a published book.<sup>8</sup> The addition proposed at 6216.0230 B lists two new sources not available in print, but from two different databases. Both databases, which the rule proposes to incorporate by reference, are "subject to frequent change."<sup>9</sup>

All three new sources, which have not previously been a part of the rule, alter the sense or meaning of the rule because they change the substance of the rule. Therefore, the proposed amendments at Minn. R. 6216.0230 A (9) and B (lines 2.8 to 2.14) must be deleted to cure the defect in these proposed rules. Such a change would permit the proposed rules to meet the requirements of the good cause exemption under Minn. Stat. § 14.388.

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<sup>8</sup> Proposed Minn. R. 6216 A (9) (lines 2.8-2.9)

<sup>9</sup> Proposed Minn. R. 6216 B (lines 2.10-1.14).

## **B. Authority for Changing “List” to “Designate”**

The Proposed Order Adopting Rules cites 2014 Minn. Laws, ch. 289, § 69 as the statutory authority for the amendments at parts 6216.0100, .0250, .0260, .0270, .0290 and .0400, which change the word “list,” or variants thereof, to “designate” or variants thereof. The Department explains the amendments as follows:

The rule amendments change the word “list” back to “designate” in several parts of Minnesota Rules, chapter 6216. Laws of Minnesota, chapter 289, section 69, included a Revisor’s instruction that was intended to be applied only to the parts pertaining to the process of listing infested waters and not to parts pertaining to the process of classifying invasive species. This change returns those parts of the rule pertaining to the process classifying invasive species to their pre-2014 language.

Citation to the 2014 session laws with the Revisor’s instruction does not provide the requisite authority for the Department to reverse the legislature’s 2014 instructions. However, the legislature did provide authority in 2015 for this change to occur. The language at 2015 Minn. Laws 1<sup>st</sup> Spec. Sess. ch. 4, art. 4, §§ 20-24 provides the authority for the Commissioner to amend the rules as it is doing in this exempt rulemaking. For example, 2015 Minn. Laws 1<sup>st</sup> Spec. Sess. ch. 4, art. 4, § 20 amends Minn. Stat. § 84D.01, subd. 13 to read:

“Prohibited invasive species” means a nonnative species that has been ~~listed~~ designated as a prohibited invasive species in a rule adopted by the commissioner under section 84D.12.

To clarify the proper statutory authority under which the Department is proceeding with its amendments that reverse the legislature’s 2014 Revisor’s instruction, the Department shall amend its Order Adopting Rules to cite 2015 Minn. Laws 1<sup>st</sup> Spec. Sess. ch. 4, art. 4, §§ 20-24.

**L. S.**