

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF AGRICULTURE

In the Matter of the Proposed Rule
Amendments of the Minnesota
Department of Agriculture Relating to
Compensation for Wolf Damage;
Minnesota Rules, Parts 1515.3000 to
1515.3800.

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Department of Agriculture ("Department") sought review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On April 1, 2011, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows below,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the proposed rules.
2. The rules are needed and reasonable.
3. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400, with the exception that is set forth in the Memorandum below. Accordingly, the rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, item A.
4. The agency shall correct the defect by:
 - (a) Re-sending (by either first-class or electronic mail) a copy of the Notice of Intent to Adopt a Rule, the proposed rules, and the Statement of Need and Reasonableness (SONAR) to the Minnesota Board of Veterinary Medicine; the Minnesota Veterinary Medical Association; and the University of Minnesota College of Veterinary Medicine, so that the materials are received no later than **May 20, 2011**;
 - (b) Posting the Notice, the proposed rules, and the SONAR to the Department's website; and

- (c) Re-submitting the proposed rules to this Office with:
 - i. documentary evidence that the Department has complied with step (a), above;
 - ii. copies of any comments received during the comment period, including comments from any interested parties; and,
 - iii. copies of any responses made by the Department to commentators.

These materials shall be submitted to the Administrative Law Judge for approval following the close of a **second 30-day comment period**.

5. Pursuant to Minn. Stat. § 14.26 (3)(b), and Minn. R. 1400.2300 (6), the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: April 14, 2011

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Office of Administrative Hearings for a legal review.

According to state law, there are several circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. A proposed rule is defective when it:

- (a) is not adopted in compliance with the procedural requirements of state law, unless the judge finds that the error was harmless in nature and should be disregarded;
- (b) is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule;
- (c) is substantially different than the rule as originally proposed and the agency did not comply with required procedures;
- (d) grants undue discretion to the agency, is unconstitutional¹ or illegal;²
- (e) improperly delegates the agency's powers to another entity; or

¹ In order to meet constitutional requirements, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, e.g., *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980)

² See, Minn. Stat. §§ 14.05, 14.51 (2010); Minn. R. 1400.2100 (2009).

- (f) falls outside of the statutory definition of a “rule.”³

Defect in the Proposed Rules

In this matter, the Administrative Law Judge has found one procedural defect in the proposed rules. The defect follows from a failure to provide the Notice of Intent to Adopt a Rule to classes of persons who may be significantly affected by the proposed rules as required by Minn. Stat. § 14.22.

Additional notice

The Administrative Law Judge finds that a procedural error has occurred in this rulemaking process. Minnesota Statutes section 14.22 requires that, in addition to publishing proposed rules and a Notice of Intent to Adopt Rules Without a Public Hearing in the *State Register* and mailing the proposed rules and Notice to the agency’s rulemaking mailing list, the agency must also “make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.” Minnesota Statutes section 14.23 requires that the agency describe its “efforts to provide additional notification . . . or . . . explain why these efforts were not made” in its Statement of Need and Reasonableness (SONAR).

In its SONAR, the Department stated that it would provide the rules and notice of intent to adopt the rules without a public hearing to the Minnesota Cattlemen’s Association, Minnesota Lamb and Wool Producers, and the Minnesota Sheriff’s Association. Earlier in the SONAR, the Department stated that the classes of people affected by the proposed rules are veterinarians, sheriffs, and livestock producers. While the Additional Notice Plan provides notice to the sheriffs and livestock producers referred to in the SONAR, it does not indicate that any notice was provided to veterinarians. Upon further inquiry by this office, the Department demonstrated that they provided some type of notice of the proposed rules to the Board of Animal Health, who included the information in their newsletter. This information should have been included in the SONAR and Additional Notice Plan. The ALJ also notes that notice of the proposed rule change was not posted on the Department’s website.

The Administrative Law Judge finds that the Department’s additional notice plan was insufficient to meet the requirements of Minn. Stat. § 14.22. This procedural error is not merely technical in nature. The failure to develop and implement an additional notice plan has deprived interested persons or entities (veterinarians) of an opportunity to participate meaningfully in the rulemaking process.⁴

³ See, Minn. Stat. § 14.02 (2010); Minn. R. 1400.2100 (2009).

⁴ See Minn. R. 1400.2100 A. and Minn. Stat. § 14.26, subd. 3 (d).

According to the SONAR, the proposed rule affects veterinarians, who have recently become eligible to conduct investigations of wolf predation of livestock.⁵ The proposed rules describe specific procedures for investigation and claims submission, including the imposition of report preparation and filing requirements. The Department may have been well served in this process by the input from the following members of the veterinary community: the Minnesota Board of Veterinary Medicine; the Minnesota Veterinary Medical Association; and the University of Minnesota College of Veterinary Medicine.

The additional notice plan requirement furthers several of the important purposes of the Administrative Procedure Act, including those which:

- provide oversight of powers and duties delegated to administrative agencies;
- increase public accountability of administrative agencies;
- increase public access to governmental information; and to
- increase public participation in the formulation of administrative rules.⁶

While the Legislature was quick to point out that these purposes do not necessarily result in separate guarantees of substantive rights for regulated parties, it was the lawmakers' collective "expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained."⁷ It is widely acknowledged that direct lines of two-way communication between government agencies and regulated parties benefit the agency, the regulated parties and the broader public.⁸

The rules of the Office of Administrative Hearings (OAH) permit an agency to ask OAH for prior approval of the additional notice plan before publishing the request for comments or the notice of proposed rules.⁹ Once the additional notice plan is approved, the approval is final and the agency can proceed with the rulemaking knowing that an inadequate notice plan will not require the agency to return to the early rulemaking stages. This optional prior approval procedure is frequently used by agencies and boards.

⁵ SONAR at page 1. See also, 2010 Laws of Minnesota, ch. 333, art. 1, § 1 (codified at Minn. Stat. § 3.737, subd. 1 (b)).

⁶ See, Minn. Stat. § 14.001 (1), (2), (4) and (5) (2010).

⁷ See, Minn. Stat. § 14.001 (2010).

⁸ See, *U. S. Dept of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 n. 11 (5th Cir. 1984) (There is a "widely-shared recognition that administrative agencies need direct lines to the public voice because of their distance from the elective process"); *Jewish Community Action, et al. v. Comm'r of Public Safety*, 657 N.W.2d 604, 610 (Minn. App. 2003) ("an administrative agency needs public input to remain informed"); accord, U.S. Senate Report on the federal Administrative Procedure Act of 1946, S.Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946) ("Public participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interest").

⁹ Minn. R. part 1400.2060.

In this case, however, the Department did not seek prior approval of its additional notice plan. Had it done so, the shortcomings in its notice plan could have been identified and remedied at an earlier stage of the process.

The Department can cure this defect by resubmitting the Notice of Intent to Adopt Rules, the proposed rules, and the SONAR to the veterinary organizations listed above by May 20, 2011, and re-opening a 30-day comment period. These materials must also be posted to the Department's website. The Department is not required to republish its Notice in the *State Register* or re-mail the materials to its rulemaking mailing list or its additional notice mailing list. However, the Department must accept comments and requests for hearing from the veterinary community as well as any other interested member of the public during this period. If the second 30-day comment period produces 25 or more requests for a hearing, then the Department will be required to proceed to hearing.

Statement of Need and Reasonableness (SONAR)

The ALJ notes the following issues regarding adequacy of the SONAR. Among the statutory procedural requirements that the ALJ is required to review is "whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rule."¹⁰ The SONAR is a critical part of the rulemaking process because it promotes meaningful public participation in the rulemaking process and provides guidance on how a rule should be interpreted.¹¹ Minn. Stat. § 14.23 emphasizes the importance of the SONAR: "By the date of the section 14.22 notice (Notice of Intent to Adopt Rules), the agency shall prepare a statement of need and reasonableness, which must be available to the public." Minn. Stat. § 14.131 provides that "the agency *must* prepare, review, and make available for public review a statement of the need for and reasonableness of the rule." [Emphasis supplied] Minn. Stat. § 14.131 goes on to list the items of information that must be included to establish the need for and reasonableness of a rule provision.

The Department's SONAR is silent as to three provisions of the proposed rules – Parts 1515.3100, subparts 8 and 9, and 1515.3800. The proposed amendments to these particular provisions are merely grammatical or clerical in nature and do not make any substantive change to the rules. Nevertheless, it is important for the Department to acknowledge that the changes are being proposed and explain the reason for the changes. While these issues do not rise to the level of a defect in this instance, the ALJ offers this comment to the Department to be noted for future rulemaking proceedings.

R. C. L.

¹⁰ Minn. Stat. § 14.26.

¹¹ See *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 104 (Minn. App. 1991), review denied (Minn. July 24, 1991) (agreeing with ALJ's determination that agency's SONAR commenting on the proposed rule's impact supported conclusion that decision not arbitrary or capricious). See also *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 830 (Minn. 2006); and *Saif Food Mkt. v. State*, 664 N.W.2d 428 (Minn. Ct. App. 2003).