7-2000-10692-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules Governing Off-Highway Motorcycles, Off-Road Vehicles and All-Terrain Vehicles, Minn. Rules 6102.0001-0090

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on July 21, 1997 at the Ogilvie High School auditorium in Ogilvie, Minnesota. Approximately 15 people attended the hearing and 6 persons signed the hearing register.

The Agency Panel appearing at the hearing were Stephen B. Masten, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101, First Lieutenant Michael Hamm of the Department of Natural Resources (DNR) Enforcement Division and Gloria Johnson, Staff Attorney.

NOTICE

The Commissioner of Natural Resources must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Coordinating Commission for the Commission's advice and comment.

If the Commissioner elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then he shall submit the rule, with the complete

record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, he shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

On May 28, 1997, the DNR filed with the Chief Administrative Law Judge the following documents for review by the Administrative Law Judge:

(a) The Statement of Need and Reasonableness (SONAR);

(b) A copy of the proposed rules, with a certification of approval as to form by the Revisor of Statutes attached;

(c) The Notice of Hearing proposed to be issued.

At the July 16, 1997 hearing, the Department placed into the hearing record the following documents:

(a) The Notice of Solicitation of Outside Information or Opinions published in the State Register on January 16, 1996 (20 SR 2017);

(b) The Proposed Rules, including the Revisor's approval of December 9, 1996;

(c) The Statement of Need and Reasonableness, and the June 18, 1997 amendments to the SONAR;

(d) A copy of the transmittal letter showing that the DNR sent a copy of the Statement of Need and Reasonableness to the Legislative Coordinating Commission on March 27, 1997;

(e) The Notice of Hearing as mailed on June 10, 1997 and as published in the State Register on June 16, 1997 (21 SR 1820);

(f) The Certificate of Mailing the Notice of Hearing and Certificate of Mailing List;

(g) A Certificate of Additional Notice;

(h) Written comments on proposed rules;

(l) Written requests for a hearing received in response to publication by the Department on March 31, 1997 of a Notice of Intent to Adopt Rule Without Public Hearing (21 SR 1394).

The documents noted in the preceding Findings were available for examination at the Office of Administrative Hearings from the date of filing through the close of the record.

The comment period was extended for 20 days following the date of the hearing, to August 11, 1997. The record in this matter closed at the end of the response period (five working days) on August 18, 1997.

Background and Nature of the Proposed Amendments

In 1993, the DNR adopted rules (Minn. Rules 6102.0010-.0060) governing the use of all-terrain vehicles (ATVs). These rules did not regulate off-highway motorcycles (OHMs) and off-road vehicles (ORVs).

The legislature granted authority subsequently to the Department to adopt rules for OHMs and ORVs. Because the proposals for OHMs and ORVs are similar in nature to rules already in place for ATVs, it is proposed by the DNR simply to amend the ATV rules to include regulation of all three types of vehicles. The Department proposes also to use this rulemaking process to update its current rules governing ATVs.

Both the existing ATV rules and the proposed amendments to the ATV rules require specific equipment on recreational vehicles that are operated on public lands or waters. The requirements address operational safety concerns and include specifications for head lamps, tail lamps, brakes and side reflection. New language addressing seat belt requirements for ORVs has been added. Equipment requirements for sleds, trailers and devices towed by a recreational vehicle are retained, and towing provisions are expanded by requiring the towed object to be attached solidly to the towing vehicle if the object being towed contains human passengers, except in certain situations.

Other proposed rule changes include a provision for “point of sale” electronic registration or reporting by allowing for a paperless system, the elimination of specifications for traffic or regulatory signs in favor of a reference to the same information contained in a department reference manual, establishment of an education and training program for ATVs and OHMs and a provision for a variance from the rules for law enforcement purposes.

The Department utilized an internal work group to provide input to the initial draft of the amendments. The group included staff from the Divisions of Enforcement, Forestry, Minerals, Trails and Waterways, and the License Bureau. Input was also provided from the State Patrol, the Department of Transportation, user group enthusiasts, conservation officers, and the Office of the Attorney General.

Statutory Authority for the Proposed Rules

The existing ATV rules and the proposed amendments were developed under the primary authority of Minn. Stat. §§ 84.787 to 84.796 (OHMs), 84.797 to 84.805 (ORVs) and 84.92 to 84.929 (ATVs). Specific rulemaking authority for OHMs is found in §§ 84.79 and 84.795; for ORVs in §§ 84.80 and 84.804; and for ATVs in §§ 84.924 and 84.928. Additional authority is provided by Minn. Stat. §§ 84.03, 86A.06 and 89.19, all of which authorize the Commissioner to adopt rules regulating the use of various lands under the jurisdiction of the Department of Natural Resources.

It is found that the Department of Natural Resources has both general and specific statutory authority to adopt the proposed rule amendments.

Compliance with Minn. Stat. § 14.23

Minn. Stat. § 14.23 requires agencies to include certain information in their Statements of Need and Reasonableness. It is found that the Statement of Need and Reasonableness in this matter complies with the requirements, as follows:

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule. The SONAR stresses that the dealers and manufacturers of ATVs, OHMs and ORVs and owners and users of such vehicles will be affected by the changes in the rules;

(b) The probable costs to the agency or other agencies of the implementation and enforcement of the proposed rules and any anticipated effect on state revenues. The SONAR states that the proposed amendments will consolidate the registration procedures for ATVs, OHMs and ORVs by including them under one set of rules. It is stated further that the rules will not impose any additional costs to the DNR nor generate any additional income to it above expenses that are already incurred or revenue received for registration of the vehicles. Any effect on state revenues would be realized in the proposal to amend Minn. Rule 6102.0020, which institutes a charge of $4.00 per additional plate (beyond the initial plate supplied with the registration certificate) for dealers and manufacturers;

(c) A determination of whether or not there are less costly methods or less intrusive methods for achieving the purpose of the proposed rules. The SONAR notes that the proposed rules have only minimal fiscal impact on dealers and manufacturers and user groups. It is noted that the rules were also reviewed by the Departments of Public Safety and Transportation;

(d) A description of any alternative methods for achieving the purpose of the proposed rules that were considered seriously by

the Agency and the reasons why they were rejected in favor of the proposed amendments. The SONAR emphasizes that the proposed rules are required by law and are based on the existing ATV rules. The Department had considered adopting a separate set of rules for OHMs and ORVs, but determined that the existing ATV rules were a logical place within which to incorporate rules for the other two classes of vehicles. This decision enables the Department to revise the ATV rules and incorporate the rules for the other vehicles under one set of rules, which was determined to be the most efficient and cost-effective way to achieve consistent regulation for these three types of vehicles;

(e) The probable costs of complying with the proposed rules. The SONAR emphasizes that the amendments do not create or establish costs to the user groups beyond what has been established already by statute;

(f) An assessment of any difference between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference. Registration and operation of ATVs, OHMs and ORVs on state managed lands is a state law issue. All references to the Code of Federal Regulations present in the rules are used to establish minimum standards for required reflective material and required muffler equipment;

(g) Additional notification to persons or classes of persons who may be affected by the proposed rule. In addition to publishing the Notice of Intent to Solicit Outside Opinions and Advice and the Notices of Intent to Adopt Rules in the State Register, the Agency also mailed those notices to persons registered with the Agency to receive notification of Department rulemaking and to persons that the Department believed may have an interest in, or be impacted by the proposed rulemaking. Included in these notices were the presidents of the Minnesota Off-Highway Motorcycle, Off-Road Vehicle and All-Terrain Vehicle Organizations, the lobbyist for these organizations and the Executive Director of the Minnesota Sheriff's Association. The Department also compiled a list of dealers and manufacturers and mailed both notices to that group in addition to the list maintained by the Department of persons who have requested to be notified of Department rulemaking activity in all areas. The Department also sent press releases to every general circulation newspaper in the state, every radio station in the state, every television station, specialty magazines, freelance outdoor writers and to several newspapers in neighboring states. Persons who filed written requests for the public rule hearing process in response to

the Notice of Intent to Adopt Rules Without a Public Hearing were mailed individual Notices of Hearing.

In accordance with Minn. Stat. § 16A.1285, pertaining to Department earnings from charges for goods and services, licenses or regulation, the amendments were submitted to the Commissioner of Finance for the Commissioner's review and comment on the charges established or adjusted in the rule amendments. The Commissioner of Finance's comments were appended to the Statement of Need and Reasonableness. In connection with submission of the rules, the DNR submitted to the Commissioner of Finance also a narrative for the Commissioner's review, which document pointed out that some of the fees were already established by preexisting rule, some are provided for specifically by applicable statutes, and specifies that additional costs borne by dealers or manufacturers who purchase additional plates amount to $4.00 per plate. The narrative emphasizes that no new or additional fees are established in the amendments except for duplicate registration plates for dealers and manufacturers, and demonstrates that the fee is adequate to compensate the Department for this service and goods provided without recovering over or under the costs involved in providing the goods and services. Appended also to the Statement of Need and Reasonableness is a written approval filed on behalf of the Commissioner of Finance regarding the earnings proposal submitted by the Department of Natural Resources in connection with these rules.

It is found that the Department of Natural Resources has complied with all requirements of Minn. Stat. § 14.23 in connection with the rule amendments proposed for adoption in this proceeding.

Need for and Reasonableness of the Proposed Rule Amendments

Any portion of the rule amendments as proposed finally by the Department in this matter not commented on in this Report are found to be needed and reasonable. Any amendments which are changes from the proposed rules published originally in the State Register on June 16, 1997 and not commented on this Report are found to be necessary and reasonable and are found not to constitute substantial changes.

The Statement of Need and Reasonableness (SONAR) filed by the Department in connection with the proposed amendments provides adequate justification of the need for and reasonableness of the proposed amendments published in the State Register on June 16, 1997. The reader is referred to the SONAR and the supplementary SONAR filed on June 18, 1997 (collectively, Ex. E.) for the detailed presentation of facts regarding each amendment proposed originally. The balance of this Report will concentrate on the Department's response to comments made at the hearing and by other persons offered during the period the record remained open in this matter. In that regard, the Department has made several changes to the proposals published in the State Register.

At the hearing, the Administrative Law Judge expressed concern over the fact that no persons appeared at Ogilvie to voice opposition to

the proposed rules. The concern was that a number of persons had filed requests for a public hearing in response to the Notice of Intent to Adopt Rules Without a Public Hearing, and none of those persons were present even though Notices of Hearing had been mailed to each of them. It was noted that the community of Ogilvie was a considerable distance from the population centers where the requests for a public hearing were generated (western Stearns County and St. Louis County). At the hearing, and in its filing prior to the close of the record, the Department noted that Ogilvie was chosen as the hearing site because it had an acceptable facility (the high school auditorium) for the conducting of the hearing and that it was located geographically between Paynesville (the community in western Stearns County that generated a number of written requests for hearing) and Duluth, the seat of St. Louis County. It was noted also that all three communities (Paynesville, Ogilvie and Duluth) are on the same state highway, Highway 23, and that travel should be relatively easy because of the time of year in which the hearing was conducted. Duluth is 100 miles northeast of Ogilvie and Paynesville is 65 miles southwest. The Department noted also that it did not receive any letters or phone calls objecting to the location or time of the public hearing or asking for more than one location or time, even though all persons who wrote letters requesting a public hearing received notice specifically. It is found that Ogilvie was a reasonable location for the hearing in this matter, and that convening the hearing at that location served appropriately the interests of the citizens who had called for the public hearing.

In part 6102.0020, subp. 2, the Department proposes to introduce a comma between the words “research” and “testing”. It is found that this change does not constitute a substantial change because it is a technical change to improve grammar.

At part 6102.0030, subp. 1, the Department proposes to remove the strikeout of the word “an” and strike the proposed language “a responsibly” in the fifth line of the subpart, so that the line will read “. . . in connection with an organized group outing. . .”. This change is proposed to respond to the comment that the term “responsibly” is vague and would be very difficult to enforce. The change proposes reversion of the language to the current rule language. It is found that the proposed change is necessary and reasonable and does not constitute a substantial change.

In the same subpart, the Department proposes to add the words “for the event” after the final word in the second to last sentence, so that the clause will read “permit for the event”. The intent of this change is to clarify that the terms and conditions under which a permit will be issued will relate to the event for which the permit is issued. The change was made in response to a comment that the words “terms and conditions” as used in the originally-drafted amendment were too broad. It is found that the rule as proposed finally at this point is needed and reasonable, that it provides a clarification and is not a substantial change. It is suggested that the clarifying words “for the event” be inserted after the words “terms and conditions” rather than after the word “permit” in the affected sentence. It is reasoned that the clarifying words at that point

make the sentence clearer still. That change, if adopted by the Department, is found to be necessary and reasonable and not a substantial change.

At subpart 2 of 6102.0030, the Department proposes to strike the language ", within 30 days of the date of permit issuance or denial," causing the language at the end of the sentence to read ". . .conditions or is denied, the applicant may file with the Commissioner a written request for review." It is proposed also that the last sentence of subpart 2 as published in the State Register be deleted, and that a new subpart (subpart 3), be added, which reads:

> "Subp. 3. Contested case hearing. If the applicant wishes to appeal the decision of the Commissioner after review under subpart 2, the applicant may file with the Commissioner a written request for a contested case hearing under Minnesota Statutes, chapter 14."

It is found that the changes proposed in the preceding paragraph do not constitute substantial changes in that they expand, rather than restrict further the language explaining an applicant's appeal rights. The changes are not substantial because the rights for review and appeal specified in the new language exist already under chapter 14 of Minnesota Statutes. The language merely serves to inform applicants of the availability of chapter 14 appeal procedures. As such, it is found to be necessary and reasonable.

In subpart 4, item c. of part 6102.0040, the Department proposes to eliminate the language "or equivalent noise at other distances" and replace it with "or, if different procedures or instruments are used, a noise level equivalent to this level." It is found that the substituting language is a clarification of the amendment proposed originally, and does not constitute a substantial change. The subpart as proposed finally is found to be necessary and reasonable.

At the hearing, it was noted that the Department's proposed use of the phrases "in the format provided" and "in the format prescribed by the Commissioner" at parts 6102.0010, subp. 5 and 6102.0020, subps. 1 and 2 granted overly-broad discretion to the Commissioner regarding what information applicants for registration are required to divulge. In its written comments, the DNR proposed no change in the language because it was proposed only to allow the Department "to utilize emerging technologies for electronic issuance of registrations and permits" (DNR Comments, 8/8/97, p. 6). The problem is that the language as published originally (page 3, lines 3, 19 and 28 of the draft certified by the Revisor - Exhibit D) grants over-broad discretion to the Commissioner because it allows for potential extraction of immaterial information in an arbitrary manner. This violates a substantive principle of law regarding administrative rulemaking.

To correct this defect, it is suggested that the Department include language in each instance relating the format requirement to the subject of the

regulation (applications for registration). This could be accomplished by inserting a clause or sentence clarifying or specifying that the information required to be disclosed in making an application is related to legitimate registration purposes (such as identification of ownership). Inserting language such as "providing information material to registration" after the words "to the Commissioner" in each sentence would relate the application requirement to the subject matter and still allow the Department to keep up with advances in formatting technology. It is found that the language suggested here is needed and reasonable and, if adopted, does not constitute a substantial change from the proposed rules published in the State Register.

The Commissioner of Transportation, in a letter to the DNR on June 10, 1996, suggested that the DNR Sign Manual be consistent with the Minnesota Manual on Uniform Traffic Control Devices when signs are located on the roadway or highway right-of-way. The DNR replied by noting that it has been a participant with the Department of Transportation (MnDOT) since November 1989 in a signed "interagency signing committee" established by a memorandum of understanding, which committee works with the other Department to keep the DNR's Sign Manual up to date. The DNR does not agree with the need to have MnDOT's Manual in these rules when MnDOT already has an active input into the DNR's Sign Manual, including stop signs, yield signs and stop ahead signs. It is noted that the MnDOT Manual is very complex and has little applicability to recreational vehicles. The DNR avoids placing such vehicles in the ditches or roadways whenever possible, and in fact does not have any trails for recreational vehicles that necessitate traveling in a road ditch. The DNR believes its own sign manual is a better way to address signage for recreational vehicles, and notes the manual is readily available at its central headquarters and at all regional and area offices of the Department of Natural Resources. It is found that the DNR's decision not to adopt MnDOT's sign manual is reasonable and within its discretion.

Several commentators expressed concern with the fact that ATVs travel too fast, trespass, are noisy, cause pollution and travel in ditches and on roads. The Department notes that the concerns raised by these written comments involve activities that are authorized by statute and in some cases regulated by existing rules. None of the proposed rule changes or new amendments involve regulations that address such activities. For example, the noise issue is already addressed in existing rules, and the Department is proposing only to add OHMs and ORVs and not to change the noise limit. It is found that it is within the discretion of the Department not to propose for amendment certain rules that already exist, and that the concerns expressed by the writers are outside the scope of the proceeding.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department of Natural Resources gave proper notice of the hearing in this matter.

2. That the DNR has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. That the DNR has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding 21.

4. That the DNR has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the amendments and additions to the proposed rules which were suggested by the DNR after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That the Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3, as noted at Finding 21.

7. That due to Conclusions 3 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

8. That any Findings which might properly be termed Conclusions are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 17th day of September, 1997.

RICHARD C. LUIS
Administrative Law Judge

Reported: Shaddix and Associates. Michelle K. Skoog, Court Reporter. Transcript Prepared.