

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

In the Matter of the Proposed Expedited
Rules Relating to Hunting Areas and
Taking Big and Small Game

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. § 14.389
AND MINN. R. 1400.2410**

On April 20, 2011, the Minnesota Department of Natural Resources (Department or DNR) filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. § 14.389 and Minn. R. 1400.2410.

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 ORDERED THAT:

1. The proposed rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
2. According to Minn. Stat. § 84.027, subd. 13a, the Department has the statutory authority to adopt these proposed rules using the expedited rulemaking process, with the exception of Minn. R. 6232.1300, subp. 3B.
3. Minn. R. 6232.1300, subp. 3B, is **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, item D.
4. All other proposed rule parts are approved.

Dated: May 4, 2011

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE

Minn. Rule 1400.2410, subp. 8, provides that an agency may ask the Chief Administrative Law Judge to review a 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 Judge must then review the agency's filing, and approve or disapprove the rule within 14 days of receiving it.

MEMORANDUM

The Department requests approval of proposed expedited rules governing Hunting Areas and the Taking of Big and Small Game. The legislature has authorized the Department to adopt these rules using the expedited process under Minn. Stat. § 14.389. Minn. Stat. § 84.027, subd. 13a, provides:

Subd. 13a. **Game and fish expedited permanent rules.** In addition to the authority granted in subdivision 13, the commissioner of natural resources may adopt rules under section 14.389 that are authorized under:

(1) chapters 97A, 97B, and 97C to describe zone or permit area boundaries, to designate fish spawning beds or fish preserves, to select hunters or anglers for areas, to provide for registration of game or fish, to prevent or control wildlife disease, or to correct errors or omissions in rules that do not have a substantive effect on the intent or application of the original rule; or

(2) section 84D.12 to designate prohibited invasive species, regulated invasive species, and unregulated nonnative species.

The Department published a *Notice of Intent to Adopt Expedited Rules* in the *State Register* on February 14, 2011, and submitted the proposed rules to the OAH for review as to their legality on April 20, 2011.

Standards of Review

In expedited rulemaking, the legal review of the proposed rules is conducted according to the standards of Minn. R. 1400.2100, items A and C to H.¹ These standards state:

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

¹ See Minn. R. 1400.2410, subp. 3(2009).

- 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);
- ...
- C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;
- 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; or
- H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5).

Compliance with Enabling Statute and Other Applicable Laws

As set forth above, the Department has the authority under Minn. Stat. § 84.027, subd. 13a, to use the expedited process to adopt rules authorized under chapters 97A, 97B, and 97C to “describe zone or permit boundaries...to select hunters or anglers for areas, to provide for registration for game or fish, or to correct errors or omissions in rules.” Under the more general rulemaking authority set forth in Minn. Stat. § 84.027, subd. 13, the Department may adopt rules authorized under chapters 97A, 97B, and 97C to “set open seasons and areas.”

Proposed Minn. R. 6232.1300, subp. 3B provides: “Legal bucks may be taken in season option A for a ~~seven-day~~ nine-day period beginning the Saturday nearest November 6.” Because Minn. R. 6232.1300, supp. 3B, modifies the length of the season, the Department exceeded its expedited authority in adopting this rule. While the Department may have authority to propose this modification under the standard full rulemaking process, it does not have expedited authority to do so. To correct this defect the “seven-day period” must not be modified; the modification to a “nine-day”

period must be deleted. Deletion of the proposed language will not make the proposed rules substantially different than originally proposed.

Additional Comments

In the Notice of Intent to Adopt Expedited Rules without a Public Hearing, the Department cited numerous statutes for its authority to adopt the proposed rules, including Minn. Stat. §§ 97B.433 and 97B.435, which do not exist. Presumably, these statutes were cited in error. When the Department resubmits the proposed rules, the references to these statutes in the Order Adopting Rules should be omitted.

The Administrative Law Judge is mindful that several individuals submitted comments expressing concerns about these rules. In expedited rulemaking pursuant to Minn. Stat. § 14.389, however, the scope of review by the Administrative Law Judge is limited.² The Administrative Law Judge encourages all of the commentators to continue to discuss possible future rule revisions with the Department.

B. J. H.

² Specifically, the standard of review does not include the usual “needed and reasonableness” review. See Minn. R. 1400.2410, subp. 3 (2009).