

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Adoption
of Amendments to Rules of the
Department of Natural Resources
Governing Personal Flotation Devices,
Minnesota Rules, Part 6110.1200.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on June 8, 1995, at 7:00 p.m. in the Minnesota Pollution Control Agency Boardroom, 520 Lafayette Road, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, determine whether the Minnesota Department of Natural Resources ("DNR" or "the Department") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and assess whether or not modifications to the rules proposed by the Department after initial publication are substantially different from the rules as originally proposed.

David Iverson, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Kim Elverum, Boat and Water Safety Coordinator at DNR.

Two persons attended the hearing and signed the hearing register. The Administrative Law Judge ("ALJ" or "the Judge") received fourteen agency exhibits and two public exhibits during the hearing. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until June 16, 1995, six business days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on June 23, 1995, the rulemaking record closed for all purposes.

The Department must wait at least five working days before it takes any final action on the rule; during that period, this Report must be made available to all interested persons upon request.

When the Department files the rules with the Secretary of State, it 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

Nature of the Proposed Rules and Statutory Authority

1. The proposed rules amend the existing Minnesota rules regarding personal flotation devices (PFDs) on watercraft. The proposed amendments will bring Minnesota Rules in compliance with Federal Law (Title 46 U.S.C. § 4306), which requires that state boating equipment regulations conform to United States Coast Guard requirements in public waters under Coast Guard jurisdiction. The proposed amendments will conform Minnesota rules on personal flotation devices with the federal requirements and the PFD requirements of adjoining states. A significant change proposed in the rule is the elimination of the throwable buoyant cushion as a primary lifesaving device.

2. The existing rule, Minn. Rule 6110.1200, subp. 3, requires personal flotation devices of specified types for each person on a watercraft or being towed by a watercraft. The requirements that each PFD must meet are set out in item D of subpart 3. PFDs fall into four types. Type I is a wearable life jacket designed for rough conditions with no likelihood of immediate rescue. Type II is the traditional "life jacket" which is worn around the neck and down the front of the body, attached by a strap around the wearer's back. Type II is suitable for situations where immediate rescue is likely. Type III is considered a "flotation aid" and is designed for quick rescue situations. The Type III PFD tends to be easy to wear, since the device is worn like a vest or jacket and allows a wide range of motion for the wearers arms. The Type III PFD will not keep an unconscious person's face out of the water. The Type IV PFD is a throwable device, which could be a floating seat cushion or ring buoys. Type V PFDs are special use devices, designed to allow the wearer a full range of motion. The Type V PFD is designed for use by workers in limited situations.

3. The existing rule requires every person on a watercraft to have a PFD and allows the use of Types I through IV to meet the requirement. The DNR's proposed rule would not allow the use of Type IV PFD as a substitute for types I through III, except in limited circumstances. The proposed rule also requires that each watercraft sixteen feet or longer (except canoes or kayaks) carry a Type IV PFD in addition to the PFDs required for each occupant of the boat.

4. Limited exemptions are provided for the Types I through III PFD requirement. Lifeguards in marked swimming areas can carry a Type IV PFD on nonmotorized watercraft. A Type V PFD is allowed as a substitute for any device required in the rule part where the Type V PFD is approved by the U. S. Coast Guard both for the activity engaged in, and as a substitute for the PFD otherwise required.

5. Item C applies the same requirements for persons in a watercraft to persons being towed on water skis or similar devices. The rule does not require the PFD be worn by the water skier. If not worn, the PFD must be in the boat. Item D retains the existing requirements for all PFDs and adds standards for accessibility and availability for Type IV and V PFDs. The proposed rule imposes an effective date of May 1, 1996.

6. The Department cited its authority to set requirements for personal flotation devices for watercraft as Minn. Stat. §§ 86B.211(6) and 86B.501, subd. 1. The Commissioner of Natural Resources is required to adopt rules on standards for lifesaving equipment by Minn. Stat. § 86B.211(6). The number and type of PFDs or lifesaving devices which must be on board watercraft and duck boats can be prescribed by the Commissioner under Minn. Stat. § 86B.501, subd. 1.

7. The Judge finds that the Department has general statutory authority to adopt these rules.

Procedural Requirements

8. On August 8, 1994, the Department published a Notice of Solicitation of Outside Opinion at 19 State Register 295 regarding its proposal to adopt rules governing the carriage of PFDs on watercraft.

9. On April 14, 1995, the Department filed the following documents with the Chief Administrative Law Judge:

- a. a copy of the proposed rules certified by the Revisor of Statutes;
- b. the proposed Order for Hearing;
- c. the Notice of Hearing proposed to be issued;
- d. the Statement of Need and Reasonableness ("SONAR");
- e. a statement by the Department of the anticipated duration and attendance at the hearing; and
- g. a notice of discretionary additional public notice pursuant to Minn. Stat. §14.14, subd. 1a.

10. On May 3, 1995, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice, all persons who requested a hearing on these rules, and all persons to whom additional discretionary notice was given by the Department.

11. On May 8, 1995, the Department published the Notice of Hearing and the proposed rules at 19 State Register 2210.

12. On May 12, 1995, the Department filed the following documents with the Administrative Law Judge:

- a. a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;
- b. the Notice of Hearing as mailed;
- c. the Department's certification that its mailing list was accurate and complete as of May 3, and the Affidavit of Mailing the Notice to all persons on the Department's mailing list;
- d. the Affidavit of Mailing the Notice to those persons to whom the Department gave discretionary notice;
- e. a copy of the Notice of Solicitation of Outside Opinion published on August 8, 1994, and all materials that were received in response to the Notice, including summaries of telephone contacts with interested persons; and
- f. the names of Agency personnel or others solicited by it to appear.

Impact on Agricultural Land

13. Minn. Stat. § 14.11, subd. 2 imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The rules proposed by the Department will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2.

Fiscal Note

14. Minn. Stat. § 14.11, subd. 1, requires state agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rules. There will be no costs to local public bodies incurred due to the proposed rules.

Small Business Considerations in Rulemaking

15. Minn. Stat. § 14.115, subd. 2 requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. DNR noted in its SONAR and Notice of Hearing that some small businesses (such as resorts, outfitters, watercraft rental operators, and PFD retailers) might be affected by the proposed rules. The Department noted that no small businesses objected to the proposed rules and many small businesses are already complying with the proposed rule to meet U.S. Coast Guard standards. The costs likely to be imposed by the rules are minimal. Most small businesses affected the by the

rules already have Type I-III PFDs available for boaters. Indeed, any business renting watercraft must provide a PFD or lifesaving device for each person on board, by operation of Minn. Stat. § 86B.501, subd. 2.

16. The low-end cost Type II PFDs is \$3.97 each. The low-end cost of Type IV PFDs is \$7.99 each. The purpose of the proposed rule is to protect the safety of boaters. Accomplishing this goal is inconsistent with exempting small businesses from the proposed rules. No reporting requirements are imposed by the proposed rule. The additional costs imposed by the rules are minimal. The DNR adequately considered the impact of the rules on small businesses.

Reasonableness of the Proposed Rules

17. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules have been established by the Department by an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocher Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach.

18. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of adoption of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for each provision. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

19. The Findings in this Report do not address each part of the proposed rules, rather the Findings primarily address those parts that received public commentary or for which changes have been made since publication in the State Register. After careful review and consideration of the Department's Statement of Need and Reasonableness and based upon the Department's oral presentation at the hearing and comments submitted after the hearing, the Administrative Law Judge finds that the Department has affirmatively established the need and reasonableness of each part of the proposed rule as otherwise qualified or determined by the following Findings and Conclusions.

20. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially

different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3 (1992). The standards to determine if the new language is substantially different are found in Minn. Rules Part 1400.1100. Because the Department made no changes in the proposed rules after publication, the Judge finds that no substantial change has occurred.

Proposed Rule 6110.1200 - Personal Flotation (Lifesaving) Devices

21. John Stasieluk, President of the Minnesota Water Ski Association (MWSA), and Nito Quitevis, Honorary Vice President of the American Water Ski Association (AWSA), objected to the adoption of the new PFD standards. Each objection raised by these commentators will be addressed separately.

Need for Consistency with Neighboring States and the U.S. Coast Guard Standards

22. One reason for adopting the proposed rules cited by the DNR is the need for consistency between Minnesota PFD regulation and that of the U.S. Coast Guard, North Dakota, South Dakota, Iowa, Michigan, and Wisconsin. SONAR, at 3. MWSA asserted that different states and the U.S. Coast Guard have different rules to meet the different needs of topography and traffic. Exhibit 16, at 1. This argument overlooks the fact that states as different as South Dakota and Michigan have, or are adopting, identical PFD regulations. Federal law preempts any inconsistent state regulation where the U.S. Coast Guard has jurisdiction. 46 U.S.C. § 4306. The Department identifies the following public waters that fall under U.S. Coast Guard jurisdiction:

- Rivers - parts or all of the Mississippi, St. Croix, Minnesota, Rainy, Red & St. Louis
- Lakes - Superior, Lake of the Woods, Rainy, Namakan, Saganaga, Vermillion, Leech, Cass, Winnibigoshish, Pokegema, Bemidji, Gull & Whitefish Chains, Big Stone, Traverse and Big Sandy

SONAR, at 2-3.

With the connection of Minnesota waterways to neighboring states and the preemption of inconsistent state regulations when boaters are on the public waters listed above, the adoption of consistent PFD standards is reasonable to ensure that boaters are not confused regarding compliance with appropriate standards.

PFD Standard Based on Obsolete Data

23. AWSA argues that the rule as proposed by the Department is based on data from 1972. Exhibit 15, at 1. As evidence of this, the commentator cites the classification of boats as: 1) those twenty-six feet or longer; 2) those sixteen feet or longer; and 3) exempting canoes and kayaks (which are exempt). AWSA maintains that

the rule requiring a throwable PFD in boats is related to the ability to reboard the particular class of craft and criticizes the exemption of canoes and kayaks on that basis. The commentator's argument overlooks the probability that persons who need PFDs near a canoe or kayak are the occupants of the canoe or kayak.

AWSA stresses that boats under twenty-six feet in length are so maneuverable that a throwable PFD is waste of time and effort. Exhibit 15, at 2. The variety of situations facing a boater with a person in the water (or a boat that is sinking with all its occupants in the water) renders the issue of maneuverability moot. There is an additional level of protection available for boater when a throwable PFD is present that justifies requiring the boater to carry that PFD. There will be situations when a boater cannot accurately throw the PFD, or the person in the water will be unable to reach the PFD. The Department is not required to prove that such situations will not occur. The DNR is only required to show that requiring a throwable PFD is needed and reasonable to protect the safety of boaters. The DNR has done so.

Validity of U.S. Coast Guard Statistics on Boating Deaths

24. In its SONAR, the Department cites the U.S. Coast Guard as estimating that "80 percent of the nation's boating deaths could have been prevented if the victims would have been wearing a lifesaving device." SONAR, at 3. MWSA criticized the statistic as irrelevant to Minnesota boating and questioned what data is included in the 80 percent figure. In its posthearing comment, the DNR indicated that the types of fatal boating accidents are similar in Minnesota to those in the rest of the country. DNR Comment, at 1.

The statistic cited by the Department indicates that that 80 percent of boating deaths would be prevented if the victim was wearing a life jacket. There is no evidence of what percentage of boating deaths would be prevented if an additional PFD was available for use. The proposed rule, consistent with both Minnesota law and federal regulation, only requires a PFD be "readily accessible" or "immediately available." The evidence of boating deaths is not support for the adoption of the proposed rule on an additional Type IV PFD.

Despite the lack of support for the rule from the U.S. Coast Guard statistics, the rule has been shown to be needed and reasonable. In the case of an emergency, the optimal situation is that every occupant of the boat is wearing their PFD. The only option for boaters where a throwable PFD is needed, and no additional PFD is present, is for one of the boaters to give up that person's PFD. The proposed rule is needed and reasonable to allow for immediate emergency response without putting a boater at undue risk. Of course, situations may arise where a number of persons are in the water and in need of PFDs while awaiting rescue. In such situations, having only one Type IV PFD will not meet all the needs present. This does not render the rule unreasonable, since prophylactic regulations cannot provide for every contingency. The proposed rule imposes a minimal requirement on boaters and affords clear protection for persons in the water in emergency situations. The rule as proposed is needed and reasonable.

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

CONCLUSIONS

1. The Minnesota Department of Natural Resources ("the Department") gave proper notice of this rulemaking hearing.
2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2 (1992), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The Department 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) (1992).
4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii) (1992).
5. There were no additions or amendments to the proposed rules suggested by the Department after publication of the proposed rules in the State Register and therefore the rules are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3 (1992), and Minn. Rules pts. 1400.1000, subp. 1, and 1400.1100 (1991).
6. Any Findings which might properly be termed Conclusions are hereby adopted as such.
7. 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 no substantial change is made from the proposed rules as originally published, and 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 as proposed.

Dated this 19th day of July, 1995.

ALLEN E. GILES

Administrative Law Judge

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