

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Rules of the
Department of Natural Resources Relating to
Fishing Contests

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

The Minnesota Department of Natural Resources ("Department" or "DNR") has adopted the above-entitled rules pursuant to Minn. Stat. § 14.26. On October 19, 2012, the Office of Administrative Hearings received the documents filed by the Agency as required by Minn. Stat. § 14.26 and Minn. R. 1400.2310. On November 2, 2012, the Administrative Law Judge issued the Order on Review of Rules Under Minnesota Statutes, Section 14.26. As set forth in that Order, portions of the rules were disapproved.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules and the November 2, 2012 Order on Review of Rules Under Minnesota Statutes, Section 14.26,

IT IS HEREBY ORDERED that the findings of the Administrative Law Judge in the November 2, 2012 Order on Review of Rules Under Minnesota Statutes, Section 14.26, regarding the disapproval of portions of the rules are approved. The reasons for the disapproval of the rule and the changes recommended to correct the defects found are as set forth in the attached Order.

Dated: November 6, 2012

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Amendment to and Repeal of Rules of the Minnesota Department of Natural Resources Relating to Fishing Contests; Minnesota Rules parts 6212.2400, 6212.2525, 6212.2600, and 6212.2700.

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

The Minnesota Department of Natural Resources ("Department" or "DNR") is seeking review and approval of the above-entitled rules, which were adopted by the Department without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On October 19, 2012, the Office of Administrative Hearings ("OAH") received the documents that must be filed by the Department 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,

IT IS HEREBY ORDERED as follows:

1. The following rules or parts thereof are not approved:
Minn. R. 6212.2525, Subpart 4, Item A (Initial Language);
Minn. R. 6212.2525, Subpart 4, Item A, Subitem 8; and
Minn. R. 6212.2600, Subpart 3, Item D.
2. All other rules or parts thereof are approved.
3. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: November 2, 2012

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Department has submitted these rules to the Administrative Law Judge (“ALJ”) for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies that the ALJ must approve or disapprove the rules as to their legality and form. In conducting the review, the ALJ must consider the issue of whether the agency has the authority to adopt the rules; whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.

The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.¹ These circumstances include situations in which a rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law; a rule was not adopted in compliance with procedural requirements, unless the Judge finds that the error was harmless in nature and should be disregarded; a rule is not rationally related to the agency’s objectives or the agency has not demonstrated the need for and reasonableness of the rule; a rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; a rule is unconstitutional² or illegal; a rule improperly delegates the agency’s powers to another entity; or the proposal does not fall within the statutory definition of a “rule.”

These standards guide the determinations set forth below.

I. Statutory Authority

The authority of the Commission of Natural Resources under Minn. Stat. § 97C.081, subd. 4, to adopt rules “establishing restrictions on fishing contests to protect fish and fish habitat and for the safety of contest participants” can be traced back to 1993.³ In 2006, the Legislature amended Section 97C.081, subd. 4, to also authorize the Commissioner to adopt fishing contest rules “to restrict activities during high use periods, to restrict activities that affect research or management work, [and] to restrict the number of boats.”⁴ In 2011, the Legislature further amended section 97C.081, subd. 4(a), to specify that the Commissioner “may require mandatory decontamination of boats participating in fishing contests on infested waters.”⁵

Minn. Stat. § 14.125 specifies that an agency that publishes a notice of intent to adopt rules or a notice of hearing within 18 months after the effective date of the law authorizing the rules to be published may subsequently amend or repeal the rules

¹ Minn. R. 1400.2100 (2011).

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

³ *See* 1993 Laws of Minnesota, Chapter 259, Section 51 (adding Minn. Stat. § 97C.081, subd. 4).

⁴ *See* 2006 Laws of Minnesota, Chapter 281, Article 2, Section 43.

⁵ *See* 2011 Laws of Minnesota, Chapter 107, Section 51.

without additional legislative authorization. In 2008, the Department timely adopted its current rules relating to fishing contests, which are set forth in Minn. Rules parts 6212.2400, 6212.2500, 6212.2600, and 6212.2700; as a result, it is permitted to amend or repeal those rules without additional legislative authorization. Moreover, to the extent that the proposed rules relate to decontamination of boats, it is evident that the Notice of Hearing in the current rulemaking proceeding was published within 18 months after the effective date of the 2011 amendments, which was August 1, 2011.

The Administrative Law Judge therefore concludes that the Department has general statutory authority to engage in rulemaking with respect to fishing contest requirements.

II. Defects in the Proposed Rules

A. Minn. R. 6212.2525 – Permitted Fishing Contests Subpart 4 – Permit conditions

1. Item A (Initial Language)

As proposed, Item A of subpart 4 states, “*For the purposes provided in Minnesota Statutes, Section 97C.081, subdivision 4, the following conditions or restrictions may be specified in the permit,*”⁶ followed by a list of several restrictions. A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.⁷ Item A is defective because it fails to furnish a reasonably clear policy to guide the Department in making its determination that restrictions or conditions should be placed on a fishing contest permit. It does not identify the purposes sought to be protected and suggests that, regardless of the circumstances, the Department may or may not decide to place conditions on the permit.

To correct this defect, the Administrative Law Judge suggests that the language of the rule be revised along the following lines: “*Where necessary to protect fish and fish habitat, restrict activities during high use periods, restrict activities that affect research or management work, restrict the number of boats, ensure the safety of contest participants, or decontaminate boats participating in fishing contests on infested waters, one or more of the following conditions or restrictions shall be specified in the permit: . . .*” This language paraphrases the language of the applicable statute to guide the agency’s exercise of discretion and also specifies that the agency “shall” impose one or more of the conditions where necessary.

2. Subitem 8 of Item A

Subitem 8 under Item A states that one of the restrictions or conditions that the Commissioner is able to impose is “handling and transport.” The proposed rule does not explain whether this condition has to do with handling and transporting people, boats, bait, the fish themselves, or something else. A rule is impermissibly vague if it

⁶ Emphasis added.

⁷ *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

fails to provide sufficient standards for enforcement or is so indefinite that one must guess at its meaning.⁸ The Statement of Need and Reasonableness makes it clear that the proposed rule is intended to allow the agency to set conditions for the handling and transport of *fish*. Accordingly, to cure this defect in the proposed rules, the Administrative Law Judge recommends that Subitem 8 be modified to refer to “the handling and transport of *fish*.”

**B. Minn. R. 6212.2600 – Possession of Fish
Subpart 3 – Authority to hold and release fish
Item D**

This subpart of the proposed rule sets forth the criteria to be considered by the Commissioner in determining when a specific location for the release of contest fish should be included in the permit. As proposed, item D states that one criterion is “preferred fish habitat, home range of the contest fish, or where the fish was caught is beyond what the fish species has been reported in the scientific literature to reasonably navigate.” The rule as proposed is impermissibly vague because the intended meaning of the last clause is unclear and there is no description of what is encompassed under “scientific literature.”

The Department’s Statement of Need and Reasonableness notes that the “home range” of a fish is an area that it seasonally inhabits, and expresses concern that contest fish that are moved long distances from a favored habitat to a weigh-in location lacking suitable habitat may have poor chances of survival. To clarify the Department’s underlying concern and cure the defect in the proposed rule, the Administrative Law Judge suggests that item D be revised to simply indicate, consistent with the SONAR explanation, that the Commissioner will consider “whether a particular release location is necessary in light of the preferred habitat and home range of the contest fish.”

None of the recommended changes to the parts of the proposed rules that have been found to be defective would render the rule substantially different from the rule as initially proposed.

III. Recommended Technical Corrections

Assuming that the Department takes appropriate steps to correct the above defects, there are other language changes in the rules as a whole that the Administrative Law Judge recommends be considered to clarify or improve the readability of the proposed rules. These wording changes are merely suggestions for the Department’s consideration and do not denote defects in the proposed rules.

A. Minn. R. 6212.2525, Subpart 4, Item A(3): Subitem 3 indicates that one of the conditions or restrictions that the agency is authorized to impose is “fish holding equipment.” The Administrative Law Judge suggests that the language of this provision be modified slightly to clarify that the condition or restriction would involve “fish holding equipment *requirements*.”

⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

B. Minn. R. 6212.2525, Subpart 4, Item B(1) and (4): Subitems 1 and 4 indicate that, when determining conditions to be included in the fishing contest permit, the Commissioner shall consider, among other things, “whether the activity will advance knowledge, understanding, interpretation, or management of a fish species, fish community, or water body” and “whether the activity is detrimental or helps achieve management objectives for the specific water body.” For purposes of clarity and consistency with other subitems in this portion of the proposed rules, the Administrative Law Judge suggests that these two subitems refer to “the *contest* activity.”

C. Minn. R. 6212.2600, Subpart 3, Items A through F: To improve the clarity of the proposed rules and render them internally consistent, the Administrative Law Judge recommends that Items A through F each begin with the word “whether” and that the word “would” be substituted for “may” in items B and F. In addition, it is suggested that item C be revised to indicate that one criterion to be considered by the Commissioner is “*whether the genetics of the contest fish are consistent with the genetics of the fish population where the contest fish are being released.*” It is further suggested that Item B be modified to state, “*whether barriers such as dams or channels exist that would limit natural fish movement or redistribution.*”

D. Minn. R. 6212.2600, Subpart 4 and Item A: To eliminate redundancies and render item A consistent with the remainder of the rule, it is suggested that item A and the title of subpart 4 simply refer to “donating” fish rather than to “gifting and donating” fish. In addition, to improve readability, it is suggested that the last sentence of item A state, “Contest organizers *who want to apply for a permit to donate* fish must fill out the appropriate sections of the contest application.”

None of these suggested modifications would make the rules substantially different from those published in the State Register on June 18, 2012.

B. L. N.