

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Exempt
Rules of the Department of Natural
Resources Relating to Display of Paddle
Board Licenses

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. § 14.388, 14.386
AND MINN. R. 1400.2400**

This matter came before Administrative Law Judge LauraSue Schlatter upon the application of the Minnesota Department of Natural Resources (Department) for a legal review under Minn. Stat. § 14.388, subd. 1(3).

The Department initially filed documents on October 8, 2014 with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.388 and Minn. R. 1400.2400. On Friday, October 10, 2014 the Department re-sent its Notice of Intent to Adopt with a plain language introduction and a link to the Department webpage where a copy of the rule amendments are posted. The October 10, 2014 Notice included an incorrect deadline date for the close of the comment period. On Tuesday, October 28, 2014, the Department sent a re-written plain language introduction with its Notice of Intent, and provided the required five business days for public comments.

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 DETERMINED THAT:

1. According to 2013 Minn. Laws, ch.114, art.4, § 104, the Department has statutory authority to adopt the proposed rules using the exempt rulemaking process.

2. The following rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400 and are approved:

- a. Minn. R. 6110.0200
- b. Minn. R. 6110.0300

IT IS HEREBY ORDERED THAT:

3. Minn. R. 6110.0400 is not approved:

Dated: November 12, 2014

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

NOTICE

Minn. R. 1400.2400, subp. 4a provides that when a rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review after it has revised the proposed rules. The ALJ then has five working days to review and approve or disapprove the rule. Minn. R. 1400.2400, subp. 5 also 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

Harmless Procedural Error

The Department issued its initial Notice in this matter on October 8, 2014. The October 8, 2014 Notice provided that interested persons would have five business days after the date of the Notice to submit comments to the Office of Administrative Hearings, which would have been October 15, 2014. The October 8, 2014 Notice failed to include an electronic link to the proposed rule language, so the Department issued a Bulletin accompanying an amended Notice on October 10, 2014. The Bulletin added plain language information about the rule and the Notice was amended to add a webpage link to the rule itself. The October 10, 2014 Bulletin accompanying the amended Notice stated that the comment period would close on October 13, 2014.

The notice required by Minn. Stat. § 14.388, subd. 2 requires "a statement that interested parties have five business days after the date of the notice to submit comments. . . ." The Office of Administrative Hearings contacted the agency and informed it that the October 10, 2014 Notice was defective because it provided insufficient time for comments.

Thereafter, on October 28, 2014, the Department issued a third Notice with an amended Bulletin. The Bulletin language was amended in several places, including the statement regarding closure of the comment period. The October 28, 2014 Bulletin correctly provided that the comment period would close on November 4, 2014. The Notice itself retained the statement that interested persons would have five business days after the date of the Notice to comment.

The Department's inconsistent information regarding the comment period dates in its October 10, 2014 Notice and accompanying Bulletin was procedural error and violated the requirements of Minn. Stat. § 14.388, subd. 2. However, Minn. Stat. § 14.26, subd.3(d) states:

The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirements imposed by law or rule if the administrative law judge finds:

. . . .

(2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

In this case, the Department took corrective action after learning of its error. The Administrative Law Judge received comments from the public after the October 28, 2014 Notice was issued.¹ Therefore, the Administrative Law Judge concludes that the Department committed harmless error when it published the incorrect closing date for acceptance of public comments.

Public Comments

Five members of the public submitted comments in response to the proposed rule amendments. Three of the comments criticized the requirement that paddle boards be licensed.² One suggested different wording for the amendment.³ The fifth comment came from a paddle board manufacturer and generally supported the amendment, but raised concerns about where the license stickers may be displayed, particularly on paddle boards with foam tops.⁴

¹ The Administrative Law Judge received comments after each of the Notices was published. Because Minn. Stat. § 14.388, subd. 2 requires that "[t]he notice must be given *no later than* the date the agency submits the proposed rule to the Office of Administrative Hearings," the Administrative Law Judge finds that the comments received in response to notices provided sooner than the rule was finally submitted (that is, when a correct Notice was issued) were properly received and there was no need for members of the public who submitted comments in response to the earlier Notices to re-submit their comments.

² Email comments from Ryan Paul (Oct. 8, 2014), Matthew Pawlowski (Oct. 13, 2014), and Brian Finn (Oct. 28, 2014).

³ Email comment from Scott Slocum (Oct. 8, 2014).

⁴ Email comment from Tom Plante, RAVE Sports & AVIVA Sports (Oct. 31, 2014).

The Department had no discretion regarding the underlying licensure requirement.⁵ Nor were questions about sticker placement within the scope of the Department's very limited rule amendment authority, given that it chose to proceed using the exempt rulemaking process pursuant to Minn. Stat. § 14.388, subd. 1(3). In this exempt rulemaking, the Department sought only to "incorporate specific changes set forth in applicable statutes," and make no further interpretations of those statutes (see discussion of rule defect below). The Department appropriately made no changes to the proposed rule amendments in response to the public comments.

Defect in Exempt Rule

The 2013 legislature required the Department to amend Minn. R. 6110.0200, 6110.0300 and 6110.0400 "to exempt paddle boards from the requirement to display license certificates and license numbers, in the same manner as other nonmotorized watercraft such as canoes and kayaks."⁶ The same session law allows the Department to use the good cause exemption under Minn. Stat. § 13.388, subd. 1(3) to adopt the required amendments.

Minnesota statutes, section 13.388, subdivision 1(3) (2014) provides a very narrow exemption from the rulemaking process. The exemption applies only when an agency is "adopting, amending, or repealing a rule to . . . (3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required" The Department's amendment of Minn. R. 6110.0200 and 6110.0300 simply added the phrase "paddle boards" to the other nonmotorized watercraft already listed in those rules as exempt from certain requirements to display registration and license numbers.

In amending Minn. R. 6110.0400, the Department similarly added "paddle boards" to the list of nonmotorized watercraft required to display decals furnished by the Department for such watercraft. The Department also inserted the following additional language at the end of that paragraph:

If it is impossible to display the decals on the forward half of the paddle board so as to provide clear and legible identification, both decals must then be affixed to the stern of the paddle board.

This language falls outside the scope of the changes set forth in the 2013 session laws quoted above. The session law language only directs the Department to put paddle boards on an equal footing with other nonmotorized watercraft. By adding the proposed language at the end of Minn. R. 6110.0400 regarding placement of the decals, the Department treats paddle boards differently than other watercraft, and exceeds the limits of its authority for exempt rulemaking pursuant to Minn. Stat. § 13.388, subd.1(3). While the language may be needed and reasonable, it does more than "incorporate specific changes set forth in applicable statutes when no interpretation of law is required" (emphasis added).

⁵ See Minn. Stat. § 86B.301 (2014).

⁶ 2013 Minn. Laws Ch. 114, art. 4, § 104.

The flaw with the Department's attempt to remedy the problem of where to affix decals on paddle boards through this process was made clear in the Department's response to a public comment. The commenter, a manufacturer of paddle boards, expressed concern with certain aspects of the placement language.⁷ In its response, the Department thanked the commenter for his general support of the rule change "to allow placement at the stern of the paddleboard if it is not possible to display on the forward half of the paddleboard (as is allowed for sailboards)."⁸

If the rule as proposed were approved, the Department would be violating the 2013 legislature's instructions to it, because it would be treating paddle boards differently in the rule by providing them with an exception that is not in the rule for sailboards. The Department can cure the defect in the proposed rule by deleting the sentence quoted above that it proposed to add to the end of Minn. R. 6110.0400.

L.S.

⁷ Email Comment from Tom Plante (October 31, 2014)

⁸ Email Response from Stan J. Linnell ((November 4, 2014)