OAH 82-9008-32965
Revisor R-4381

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Exempt Permanent Rule Relating to Environmental Review of Recreational Trails	**ORDER ON REVIEW OF RESUBMITTED RULES UNDER MINN. STAT. § 14.388, SUBD. 3 AND MINN. R. 1400.2400**

The Minnesota Environmental Quality Review Board (Board) sought review and approval of the above-entitled rules under Minn. Stat. § 14.388, subd. 3 (2014).

On November 18, 2015, the Board filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.386 (2014) and Minn. R. 1400.2400 (2015). By Order dated December 2, 2015, Administrative Law Judge Barbara J. Case did not approve the proposed rules.

On February 9, 2016, the Board submitted a revised version of the proposed rules.

Based on a review of the written submissions by the Board, and for the reasons set out in the attached Memorandum,

IT IS HEREBY ORDERED THAT:

The proposed exempt rules are **not approved**.

Dated: February 16, 2016

BARBARA J. CASE
Administrative Law Judge

NOTICE

Minnesota Rules, part 1400.2400, subpart 4a, provides that when a proposed rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review after it has revised the proposed rule. The Administrative Law Judge has five working days to review and approve or disapprove the rule. Minnesota Rules, part 1400.2400, subpart 5, provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by an Administrative Law Judge. The request must be made within five working days of receiving the Administrative Law 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

EXEMPT RULEMAKING AUTHORIZATION

In the 2015 Special Legislative Session, the legislature directed the Board as follows:

> RULEMAKING; MOTORIZED TRAIL ENVIRONMENTAL REVIEW.
>
> (a) The Environmental Quality Board shall amend Minnesota Rules, chapter 4410, to allow the following without preparing a mandatory environmental assessment worksheet:
>
> > (1) constructing a recreational trail less than 25 miles long on forested or other naturally vegetated land for a recreational use;
> >
> > (2) adding a new motorized recreational use or a seasonal motorized recreational use to an existing motorized recreational trail if the treadway width is not expanded as a result of the added use; and
> >
> > (3) designating an existing, legally constructed route, such as a logging road, for motorized recreational trail use.
>
> (b) The board may use the good cause exemption rulemaking procedure under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules under this section, and Minnesota Statutes, section 14.386, does not apply except as provided under Minnesota Statutes, section 14.388.[1]

The terms of the legislative authorization allowing the Board to use exempt rulemaking provisions mandate that the rulemaking meet the requirements of Minn. Stat. § 14.388, subd. 1(3) (2014). The amendments to the proposed rules fail to meet these requirements both because the Board failed to show good cause for the use of the exempt process and because the legislative language did not allow the Board to incorporate specific changes without interpretation.

Requirement to Show Good Cause

Minnesota Statutes, section 14.388 (2014), provides an abbreviated set of procedures for promulgating new rules that may be used when “good cause” is present. An agency may use the good-cause rulemaking exemption when an agency

> for good cause finds that the rulemaking provisions of [chapter 14] are unnecessary, impracticable, or contrary to the public interest when adopting, amending, or repealing a rule to:

[1] 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33, at 163.

(1) address a serious and immediate threat to the public health, safety, or welfare;

(2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;

(3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or

(4) make changes that do not alter the sense, meaning, or effect of a rule.[2]

"Normally, to proceed under Minn. Stat. § 14.388, an agency must show that the usual chapter 14 rulemaking process is unnecessary or impractical and must show that the proposed rules fit within one of four very narrow categories set out in the statute. OAH is directed to determine whether adequate justification has been provided for use of the good cause process."[3] In some cases, the legislature has provided the good cause in the legislation and in those cases the agency does not have to meet the good-cause requirement of the good-cause statute.[4] The legislation in this case does not provide good cause and makes use of the good-cause rulemaking process permissive rather than mandatory.[5] Here, the legislature authorized the Board to rely on Minn. Stat. § 14.388, subd. 1(3), when amending its rules.[6] In doing so, the legislature used the word "may," making use of the process permissive. For the Board to utilize the procedures in section 14.388, subdivision 1(3), it must demonstrate that the proposed changes to the rules "incorporate specific changes set forth in applicable statutes [and] no interpretation of law is required."[7] Failure to concretely establish these requirements must result in disapproval of the proposed rules under Minn. Stat. § 14.388.

The Board's "Statement of Supporting Reasons" lacks substantive presentation regarding why chapter 14's (2014) broader rulemaking provisions are "unnecessary, impracticable, or contrary to the public interest." The Board's supporting documents simply state that broader rulemaking is "unnecessary, impracticable, or contrary to the

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[2] Minn. Stat. § 14.388, subd. 1.

[3] *In the Matter of the Adoption of Rules Governing Voter Registration (generally), Voter Registration Data, the Statewide Voter Registration System, Voter Registration Applications, Verification of Registrations Received by Election Officials, Absentee Voting and Mail Balloting, Minnesota Rules, Chapters 8200 and 8210*, Docket No. 70-3500-16046-1, ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.388 (July 22, 2004) (finding that typically an agency has to make a finding of good cause **and** one of the four categories for exemption).

[4] *See id.* In that case, in contrast to the present case, the legislature "supplied good cause for use of the process. Section 39 of Chapter 293 states that, 'Enactment of this article is good cause for the Secretary of State to use the authority of Minnesota statutes, section 14.388[.]' The commenters point out that the legislature could have specified that the expedited rule process in Minn. Stat. § 14.389 (2014) be used. That process allows 30 days for public comment. But the legislative intent is clearly to authorize the process in sections 14.388 and 14.386 that allows only five working days for comment. The legislature also clearly allowed use of the process without the agency having to show good cause itself under the requirements of the statute." *Id.* at 3.

[5] 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33, at 163.

[6] *Id.*

[7] Minn. Stat. § 14.388, subd. 1(3).

public interest" without explanation. The Board has not explained why there is good cause for using the exempt rulemaking process. This explanation is critical where the enabling legislation made use of the process permissive.[8]

Requirement to Incorporate Specific Changes with no Interpretation

The type of change permitted under Minn. Stat. § 14.388 is akin to a clerical change when the proposed rule "incorporates specific changes set forth in statute where no legal interpretation is required" if the proffered legislation sets forth specific language to be placed into rule. In those cases, the language provided by the legislature is so clear that the proposed rule simply conforms to specific language in the legislation, which would either trump or augment the rule were the rule not altered. In such a case, the opportunity for public input is provided during the legislative process. It is not necessary to repeat that process via full rulemaking. In this case, the Board's proposed rules do more than incorporate specific changes set forth in statute and so fail to meet the requirements for exempt rulemaking under Minn. Stat. § 14.388, subd. 3.

As stated in the Administrative Law Judge's previous order, the legislation does not provide further instruction regarding the specific changes that are to be made in rule.[9] In response to the Board's first version of the proposed rule, the author of the legislation and representatives from all-terrain vehicle associations commented that "[t]he draft rules as presented by the EQB do not follow the explicit intent of the rule change as was my intent and as directed by the legislature." In its revised rules, the Board proposed, in part, the following language in response to such criticisms:

> In applying items A and B if a proposed trail will contain segments of newly constructed trail and segments that will follow an existing trail but be designated for a new motorized use, an EAW must be prepared if the sum of the quotients obtained by dividing the length of the new construction by ten miles and the length of the existing but newly designated trail by 25 miles, equals or exceeds one. <u>This formula does not apply when adding a new motorized recreational use or a seasonal motorized recreational use to an existing motorized recreational trail if the treadway width is not expanded as a result of the added use or when designating an existing, legally constructed route, such as a logging road, for motorized recreational use.</u>

The revised rules take two pieces of the language provided by the legislature and links them in an interpretive manner. This interpretation violates the limitation in section 14.388, subdivision 3(1), to language which "incorporate[s] specific changes set forth in applicable statutes when no interpretation of law is required." In addition, the proposed rules eliminate the current rule language and alter the current formula without either change having been part of the enabling legislation's language. Where, as here,

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[8] 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33, at 163 ("The board **may** use the good cause exemption rulemaking procedure under Minnesota Statutes, section 14.388, subdivision 1, clause (3) . . . ." (emphasis added)).

[9] Order on Review of Rules under Minn. Stat. § 14.386 and Minn. R. 1400.2400, at 4 (Dec. 2, 2015).

the language provided in the statute is not sufficiently specific to be used consistent with the requirements of section 14.388, subdivision 3(1), it is inevitable that the agency's proposal will be contrary to the good-cause statute. This is because the agency is required, under the circumstances, to clarify the legislative language. The fact that the legislative author has found it necessary to comment on whether the proposed rules meet his intentions further underscores that these proposed rules do not incorporate specific language but rather interpret the statute.[10]

Review under Minnesota Rule 1400.2100 E (2015).

Even if the Board's proposed language met the requirements of Minn. Stat. § 14.388, subd. 1(3), it would nonetheless be disapproved for failing to meet the requirement of Minn. R. 1400.2100 E. The Office of Administrative Hearings is directed to review an exempt rule according to the standards at Minn. R. 1400.2100 A and D to G.[11] Rule 1400.2100 E requires an Administrative Law Judge to disapprove a rule if the rule "is unconstitutional or illegal."

The proposed rule twice uses language in subsection B referring to "designating an existing, legally constructed route, such as a logging road, for motorized recreational use." One commenter contends that even the characteristics and designation of what constitutes a logging road may change depending on the season. "Logging road" is not defined in this chapter or elsewhere in Minnesota statutes. Here, the reader is left to guess at what other routes would be like a logging road. The use of the phrase "*such as*" makes the proposed rule unclear regarding the characteristics of and parameters for a route to be designated for new motorized recreational use.

A rule is impermissibly vague if it is so indefinite that one must guess at its meaning.[12] A rule must establish a reasonably clear policy or standard to control and guide administrative officers so that the rule is carried out by virtue of its own terms and not according to the whim and caprice of the officer.[13] This language is impermissibly vague and therefore unconstitutional.[14]

CONCLUSION

The Board did not meet the requirements of Minn. Stat. § 14.388, subd. 3(1) as required by the authorizing legislation it was attempting to use in this rulemaking

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[10] Letter of Rep. Hackbarth (Feb. 9, 2016).

[11] Minn. R. 1400.2400, subp. 3.

[12] *In re the Proposed Amendment to and Repeal of Rule of the Minn. Dep't of Emp't and Econ. Dev. Relating to Unemployment Ins.; Modifying Appeals, Emp'r Records, and Worker Status Provisions; Minn. Rules Parts 3310 and 3315*, No. 80-1200-31264, 2014 WL 2156996, at *3 (Minn. Off. Admin. Hrgs. May 5, 2014).

[13] *See Hard Times Café, Inc. v. City of Minneapolis,* 625 N.W.2d 165, 171 (Minn. Ct. App. 2001) (stating that "[a] statute is void due to vagueness if it defines an act in a manner that encourages arbitrary and discriminatory enforcement, or the law is so indefinite that people must guess at its meaning" (quotation omitted)).

[14] 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).

proceeding. In addition, the language of the rule is, at least in part, unconstitutionally void for vagueness. Thus, because the proposed rules fail to meet the applicable standard for exempt rulemaking, the rules are not approved.

B. J. C.