

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 RULES UNDER
MINN. STAT. § 14.386
AND MINN. R. 1400.2400**

On November 18, 2015 the Minnesota Environmental Quality Board (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). The matter was assigned to Administrative Law Judge Barbara J. Case for legal review.

Based upon a review of the written submissions by the Board, and for reasons set out in the Memorandum which follows below,

IT IS HEREBY ORDERED THAT:

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

Dated: December 2, 2015

s/Barbara J. Case

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

Minnesota Statutes section 14.388 (2014) provides for an abbreviated and streamlined set of procedures for promulgating new rules that may be used when “good cause” is present. An agency may use the good cause exemption to rulemaking 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) 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.¹

Here, the Board was instructed by the legislature that it may rely on Minn. Stat. § 14.388, subd. 1, clause 3, for amending its rules.² Accordingly, it is the Board's burden to show in its submissions to the Office of Administrative Hearings that the proposed changes to the rules “incorporate specific changes set forth in applicable statutes [and] no interpretation of law is required.”³ Failure to concretely establish these elements results in the disapproval of the proposed rules under Minn. Stat. § 14.388.

Under the good cause exemption, both the Board's rulemaking powers and the breadth of the review by the Office of Administrative Hearings are sharply reduced. This is because the good cause exemption, by its terms, contemplates that administrative rules will only be promulgated pursuant to this method in order to meet truly exigent circumstances or when the policy choices underlying the new rules were made through an earlier, publicly-accessible process (such as a prior rulemaking or through the legislature's enactment of a statute which sets forth the specific requirements). In these circumstances, the legal review completed by the Office of Administrative Hearings is narrowed.⁴ As the Minnesota Court of Appeals has noted, the abbreviated, exempt rulemaking process eliminates the public's opportunity to bring to the agency's attention all relevant aspects of the proposed rules.⁵ Public comment is an important element of

¹ Minn. Stat. 14.388, subd. 1.

² 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33, at 163.

³ Minn. Stat. § 14.388, subd. 1(3).

⁴ Unlike a more typical rulemaking proceeding, rules presented under the good cause exemption are not examined as to their need or reasonableness. Compare generally, Minn. Stat. § 14.388, subd.1 with Minn. Stat. § 14.131 (2014).

⁵ *Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003).

the typical rulemaking process and is permitted in order to enhance the quality of the agency decision. The exempt process has a negative impact on the statutory goal of “increase[ing] public accountability of administrative agencies.”⁶ Consequently, it should be used sparingly and rules proposed through the expedited process must be strictly scrutinized.

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 14.388.⁷

The Board attempted to make the changes as directed by placing language modifications in Minnesota Rules Chapter 4410, section 4300, subpart 37 (2015), which regulates recreational trails. This subpart previously allowed construction of a trail less than ten miles in length for recreational use without the preparation of an environmental assessment worksheet (EAW).⁸ The Board changed the number ten in the current rule language to twenty-five and then added the legislature’s language from subparts (2) and (3) above to subpart 37(B) of the existing rule.

However, the legislature provided no direction to the Board with respect to how EAW requirements apply to a new trail that consists of a combination of newly constructed trail and an existing trail newly designated for motorized use. In the current rule, an EAW must be prepared if the sum of the quotients obtained by dividing the length of the new construction by ten miles, and length of existing but newly designated trail by 25 miles,

⁶ *Id.*

⁷ 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33, at 163.

⁸ Minn. R. 4410.4300, subp. 37A.

equals or exceeds one.⁹ In the proposed rule, the Board keeps this formula paragraph but changes the calculation so that 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 length of the new construction plus the length of the existing but newly designated trail equals or exceeds 25.

In response to the Board's 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...." The author states that "[u]nder the application of items A and B, the EQB should not be summing parts of trail A and trail B, because it could result in a mandatory environmental assessment worksheet (EAW) for less than 25 miles of new trail, which is what the legislation I authored specifically prohibited."¹⁰ The author's concerns have merit. The gap between the author's intention and the proposed rules may be instructive to the Board regarding whether exempt rule making is appropriate for these proposed rule changes.¹¹

By its terms, the good cause exception for legislatively directed rule changes presumes and mandates that no interpretation of law by the agency be needed. This typically requires precise line-by-line edits to be provided by the enabling legislation. The legislation cited above did not direct the Board by giving it specific line-by-line changes to the current rule. In addition, the legislation specifies no language changes to the formula paragraph of the rule, the part now in controversy. Yet in order to effectuate the identified intent of the legislation, the Board would have had to alter the formula paragraph or strike it entirely. To do either would go beyond the requirement of subdivision 1(3) of the good cause exemption, which allows the agency only to "incorporate specific changes set forth in the applicable statute when no interpretation of law is required."¹² The Board could not simply implement the legislation by striking and adding language as set forth in the legislation. Therefore, the proposed rules do not fit within the good cause exception from the rulemaking provisions of chapter 14 because the Board is not simply incorporating "specific changes set forth in applicable statutes when no interpretation is required."¹³

Furthermore, the formula paragraph appears to be an application or reiteration of a "threshold test" found at the beginning of Minn. R. 4410.4300, which provides as follows:

An EAW must be prepared for projects that meet or exceed the threshold of any subparts of 2 to 37.... If the proposed project is an expansion or additional stage of an existing project, the cumulative total of the proposed project and any existing stages or components of the existing project must be included when determining if a threshold is met or exceeded.... Multiple projects and multiple stages of a single project that are connected actions

⁹ Minn. R. 4410.4300, subp. 37(B).

¹⁰ Letter comment of Representative Tom Hackbarth dated November 25, 2015.

¹¹ The legislation made exempt rulemaking permissive in this instance.

¹² Minn. Stat. § 14.388, subd. 1(3).

¹³ *Id.*

or phased actions must be considered in total when comparing the project or projects to the thresholds of this part....¹⁴

It is not clear that the proposed rule can be implemented as the legislative author intended without changes to this threshold section of the rule. Such a change is beyond the scope of the Board's authority under the good cause rulemaking exception.

The rules proposed by the Board did not simply incorporate specific changes in applicable statutes. Thus, because the proposed rules fail to meet the applicable standard for exempt rulemaking, the rules are not approved.

B. J. C.

¹⁴ Minn. R. 4410.4300, subp. 1.