

Minnesota Office of Administrative Hearings

STATEMENT OF NEED AND REASONABLENESS

Proposed Rules Governing Sanitary Districts, Boundary Petitions, and Proceedings, Minnesota Rules, 1408; Revisor's ID Number R-04407

INTRODUCTION

The Minnesota Office of Administrative Hearings (the Agency) proposes to adopt permanent rules of procedure to govern matters relating to the creation, annexation, detachment or dissolution of sanitary districts. The proposed permanent rules would align the procedures in these cases with current statutes, familiar rules of administrative procedure and best practices, as well as with the temporary rules which govern sanitary district proceedings, adopted on January 26, 2015. In this proceeding, the Office of Administrative Hearings seeks to adopt those temporary rules as permanent rules.

ALTERNATIVE FORMAT

Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make a request, contact Katie Lin, Office of Administrative Hearings, P.O. Box 64620, St. Paul, Minnesota 55164, at Telephone: (651) 361-7911, Facsimile: (651) 539-0310, TTD: (651) 361-7878, Email: katie.lin@state.mn.us.

STATUTORY AUTHORITY

The Chief Administrative Law Judge has authority to adopt rules that are reasonably necessary to carry out the duties and powers conferred under Chapter 442A (2016). The agency's statutory authority is set forth in Minn. Stat. § 442A.02, subd. 5, as follows:

The chief administrative law judge may adopt rules that are reasonably necessary to carry out the duties and powers imposed upon the chief administrative law judge under this chapter. The chief administrative law judge may initially adopt rules according to section 14.386. Notwithstanding section 16A.1283, the chief administrative law judge may adopt rules establishing fees.

Acting under this authority, the Office of Administrative Hearings promulgated temporary procedural rules through the exempt rulemaking process defined in Minn. Stat. § 14.386 (2016). See 39 *State Register* 1116 (January 26, 2015). The proposed permanent rules would replace those temporary rules.

REGULATORY ANALYSIS

Minn. Stat. § 14.131 (2016), sets out the eight factors of regulatory analysis that an agency must include in a published Statement of Need and Reasonableness in

support of the adoption of proposed rules. The eight factors are addressed in paragraphs (1) through (8) below.

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The proposed rules will affect the residents, landowners and communities (collectively “stakeholders”) who are within an existing or proposed sanitary district. Specifically, Minn. Stat. § 442A.02, subd. 1, directs the Chief Administrative Law Judge to conduct proceedings, make determinations, and issue orders for the creation of a sanitary district formed under chapter 442A; or the annexation, detachment, or dissolution of a sanitary district previously formed under Minnesota Statutes 2012, sections 115.18-.37. These proposed rules of procedure will impact and benefit the stakeholders involved in the creation or alteration of sanitary districts in communities throughout Minnesota.

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Office of Administrative Hearings does not anticipate that the codification of the existing temporary regulations as permanent rules will result in any additional costs to stakeholders.

Pursuant to Minn. Stat. § 442A.02, subd. 10, and by interagency agreement between the Office of Administrative and the Minnesota Pollution Control Agency (MPCA), the state’s environmental fund defrays some of the administrative costs associated with processing petitions for the creation or adjustment of sanitary districts. The key terms of this agreement have not changed since 2013 when the statutory authority for processing these proceedings was transferred by the legislature from the MPCA to the Office of Administrative Hearings.

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

In an effort to propose the least costly and least-intrusive method of providing for the efficient receipt, review and resolution of sanitary district petitions under Chapter 442A, the Office of Administrative Hearings has proposed adoption of the contested case procedural rules already promulgated in Minnesota Rules Chapter 1400 (2015), when practicable. In those instances wherein the interests of readability or the needs of stakeholders required slight revision of the Rule 1400 contested case rules, the Agency has proposed such.

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The Office of Administrative Hearings is not aware of any method for “adopt[ing] rules that are reasonably necessary to carry out the duties and powers imposed upon the chief administrative law judge under this chapter,” without engaging in rulemaking. The Agency submits that the Minnesota legislature intended, through enactment of Minn. Stat. § 442A.02, subd. 5, that the Office of Administrative Hearings would first adopt rules of procedure for Chapter 442A proceedings under exempt rulemaking and then promulgate a successor set of procedures through ordinary rulemaking. Therefore, carrying out the legislature’s purpose and directive requires this second round of rulemaking.

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

In general, the simplest, least burdensome and most cost-effective means of managing the costs of sanitary district proceedings is to ensure that consistent, predictable and familiar rules of practice are utilized by all parties and by the Office of Administrative Hearings. Tying Chapter 442A proceedings to the contested case procedures in Minn. R. ch. 1400 accomplishes this goal. Because of the close relationship between the proposed rules and the existing contested case procedures, the Agency does not anticipate any additional staffing costs related to the adoption of these proposals. Similarly, the Agency does not anticipate that the adoption of these proposed permanent rules will result in any additional costs to sanitary district stakeholders, including governmental units, businesses or individuals, as all costs are consistent with those set forth in the already adopted temporary rules.

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

Minn. Stat. § 442A.02, subd. 4, requires that the official who presides over a sanitary district proceeding “administer oaths and affirmations; receive testimony of witnesses and the production of papers, books, and documents; examine witnesses; and receive and report evidence.” If the proposed rules are not adopted, the decision-maker in sanitary district proceedings would necessarily have to rely upon a series of *ad hoc* determinations with regard to these matters, in which the methods for giving meaning to the statutory terms is reinvented in each new case. Such a system would be more costly for stakeholders; in the absence of procedures established in advance stakeholders cannot efficiently predict the process that will be used to resolve Chapter 442A petitions or cost-effectively organize their participation in these proceedings. Without rules of procedure that are familiar and clear, sanitary district proceedings would fail to fulfill a key purpose of the Minnesota Administrative Procedure Act: “ensur[ing] a uniform minimum procedure...”, and would thereby fail to meet required standards of due process. See Minn. Stat. § 14.001(3) (2016).

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The Office of Administrative Hearings is unaware of any federal requirements governing the establishment or modification of sanitary districts. As such, any rules of procedures promulgated by the Agency in this matter would not impede or effect any known federal actions, programs or requirements.

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule. . . . '[C]umulative effect' means the impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.

The Office of Administrative Hearings is not aware of any state or federal rules that relate to the formation or adjustment of sanitary districts, and so does not perceive that the proposed rules will result in any cumulative effect with respect to any other governmental regulatory program or action.

PERFORMANCE-BASED RULES

Minn. Stat. §§ 14.002, .131 (2016), require that the Statement of Need and Reasonableness describes a proposing agency's consideration and implementation of certain performance-based standard when developing proposed rules. Performance-based standards emphasize superior achievement in meeting the agency's regulatory objectives and provide maximum flexibility for the regulated party and the agency when meeting those objectives.

The Office of Administrative Hearings emphasizes superior achievement when meeting the agency's regulatory objectives by promulgating procedural rules that are clear, concise and understandable by an ordinary reader. The Agency's proposed four-paged set of clearly-worded provisions will provide direction to sophisticated litigants as well as be accessible to parties without formal training in the law. Drawing upon the hearing and case management practices of Chapter 1400, which are already familiar to most of the stakeholders and participants in sanitary district proceedings, serves the interests of clarity, utility and accessibility, all hallmarks of the Minnesota Administrative Procedure Act, which defines the performance-based standards by which the Agency does its work.

The proposed rules provide maximum flexibility to regulated parties by including very few restrictive standards. Indeed, a sharply-delineated standard only occurs when there is no practicable alternative – such as in the rule setting forth a particular method of computing time for certain actions and the requirement for submissions on standard-sized paper. In these situations, multiple and varied practices would be administratively

impractical. In every other category, parties and participants have opportunities to structure their submissions to the hearing record as they deem appropriate. The wide-range of choices available to regulated parties reflects both the accessibility of the Agency's processes and its commitment to meeting performance-based standards.

ADDITIONAL NOTICE

This Additional Notice Plan was received by the Office of Administrative Hearings and approved in an April 28, 2017 letter by Administrative Law Judge Barbara Neilson.

Minn. Stat. §§ 14.131, .23 (2016), require that the Statement of Need and Reasonableness contains a description of the proposing agency's efforts to provide additional notice to persons who might be affected by the proposed rules or explain why these efforts were not made.

In this instance, the Agency's Notice Plan includes a commitment to provide all notice required by statute. The Office of Administrative Hearings will mail or email a copy of the rules and Notice of Intent to Adopt to every individual who has requested notice by registering on the list maintained by the Agency under Minn. Stat. § 14.14, subd. 1a (2016). Additionally, the Agency will give notice to the Minnesota legislature as required by Minn. Stat. § 14.116 (2016).

Further, as part of its effort to "notify persons or classes of persons who may be significantly affected by the rule being proposed" as required by Minn. Stat. § 14.14, subd. 1a, the Office of Administrative Hearings will mail a copy of the rules and Notice of Intent to Adopt to each sanitary district previously created under Minn. Stat. ch. 115 or otherwise known to the Agency based on MPCA records, and will send a similar notice to Minnesota attorneys who have noted their appearance in sanitary district proceedings and those individuals, groups, and organizations who have inquired about Chapter 442A procedures. In the view of the Agency, and as corroborated by the MPCA, this Additional Notice Plan will notify all known and/or potential stakeholders and others likely to be affected by the procedural rules in the foreseeable future.

The Agency's Additional Notice Plan does not include notifying the Commissioner of Agriculture. This notification is not required because the proposed rules do not affect farming operations, as those terms are used in Minn. Stat. § 14.111 (2016).

CONSULTATION WITH MMB ON LOCAL GOVERNMENT IMPACT

As required by Minnesota Statutes, section 14.131, the Agency consulted with the Commissioner of Minnesota Management and Budget (MMB) concerning the proposed rules. On March 30, 2017, the Agency simultaneously forwarded to MMB copies of the documents sent to the Governor's Office for review and approval. The submitted documents included: the Governor's Office Proposed Rule and SONAR Form; the proposed rules; and the Statement of Need and Reasonableness. On April 21, 2017, the Agency received a memorandum dated the same day from MMB Executive Budget Officer Laura Logsdon which provided general comments and concluded that the Agency

“has adequately analyzed and presented the expected costs and benefits of the proposed rules to local governments.”

To the best of the Agency’s knowledge, there is no feature of these procedural rules that will, as a result of their adoption, require any specific actions of a local unit of government or touch upon any locally-administered program. For example, there is no requirement that any political subdivision of the state (including towns, counties, home rule charter cities and statutory cities) petition for the creation or modification of a sanitary sewer district. To the contrary, petitions for the creation, annexation, detachment or dissolution of a sanitary district may only occur with the consent of the affected municipalities. See Minn. Stat. §§ 442A.04, subd. 2(c)(1), .05, subd. 2(c)(2), .06, subd. 2(c)(2).

DETERMINATION ABOUT RULES REQUIRING LOCAL IMPLEMENTATION

Similarly, the Office of Administrative Hearings is unaware of any feature of these procedural rules that relates to or implicates any local ordinance or other regulation or any locally-administered program. For this reason, the Agency has determined that local units of government (including towns, counties, home rule charter cities and statutory cities) will not be required to adopt or amend an existing ordinance or other regulation, in order to comply with the proposed rules. See Minn. Stat. § 14.128 (2016).

COST OF COMPLYING FOR SMALL BUSINESS OR CITY

As required by Minn. Stat. § 14.127 (2016), the Office of Administrative Hearings has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city. As noted above, the Agency perceives that no feature of these procedural rules will, as a result of their adoption, require any specific actions of a local unit of government or affect any locally-administered program. Likewise, the Agency notes that there is no requirement, or likelihood, that any one business with less than 50 full-time employees will petition for the creation, annexation, detachment or dissolution of a sanitary district as part of its regular business operations. For these reasons, the Office of Administrative Hearing has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small business or small city.

LIST OF WITNESSES

If a public hearing is required, the Office of Administrative Hearings plans to offer a presentation in support of the proposed rules from:

Katie Lin
State Program Administrator Intermediate
Office of Administrative Hearings
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Ms. Lin will briefly describe why the agency has the statutory authority to promulgate the proposed rules; fulfilled all procedural requirements of law and rule; and demonstrated through an affirmative presentation of facts the need for, and reasonableness of, each proposed rule.

The Agency does not anticipate calling any additional witness, nor any witness who is not an employee of the Agency, in support of the proposed rules. See Minn. R. 1400.2070, subp. 1.

LIST OF EXHIBITS

At any required public hearing, the Agency foresees introducing into the record all of those items required by Minn. R. 1400.2220, subp. 1.

RULE-BY-RULE ANALYSIS

Minn. Stat. § 442A.02, subd. 4 requires that the official who presides over a sanitary district proceeding “administer oaths and affirmations; receive testimony of witnesses and the production of papers, books, and documents; examine witnesses; and receive and report evidence.” The proposed rules detail how and when those processes can and should occur.

The Agency’s regulatory objective is to promulgate a set of procedural rules that both reflect familiar contested case hearing practices and will be accessible to stakeholders who are new to such proceedings. By drawing extensively upon the existing contested case rules, the Office of Administrative Hearings proposes to carry into sanitary district proceedings those methods that are both familiar to Minnesota attorneys and straight-forward enough to be used effectively by litigants with no formal legal training.

The Office of Administrative Hearings has applied the procedural rules of Part 1400 in more than 30,000 contested cases. Over four decades, these rules have been carefully refined and updated to reflect the best practices in administrative hearing management. Extending the practices from Part 1400 to the context of sanitary district proceedings will

both give meaning to the directives of Minn. Stat. § 442A.02, subd. 4, as well as provide litigants in these proceedings the benefit of what has been learned since the founding of the Agency.

1408.0010 SCOPE

This provision defines the applicability of the proposed practice rules. The text is drawn directly from the scoping provision of Minn. Stat. § 442A.02, subd. 1.

1408.0020 SERVICE AND FILING PROCEDURES

Subpart 1. This rule provides that any party to a proceeding under Chapter 442A may utilize any of the filing and service procedures recognized by the Office of Administrative Hearings. These filing methods include: (1) e-Filing through the Office of Administrative Hearings' e-Filing system; (2) United States mail; (3) facsimile transmission; or (4) personal delivery. See 2015 Minn. Laws. Ch. 63, § 7; Minn. R. 1400.5550, subp. 5. The proposed rule further provides that Minn. R. 1400.5550, subps. 1-4, set forth the appropriate methods for serving materials on opposing parties. This wide range of delivery and formatting options includes each option that is made available to other parties appearing in contested case proceedings before the Agency.

Subpart 2. This rule provides that paper submissions must be filed on standard size 8-1/2-inch by 11-inch paper. These formatting standards are consistent with, although less restrictive than, the standards of other Minnesota tribunals. See Rules 6.01 and 6.02 of Gen. R. of Prac. Dist. Ct.; Minn. R. Civ. App. 132.01, subd. 1.

Subpart 3. This rule provides for the use and receipt of non-standard-sized materials such as plat maps and photographs. The proposed rule provides for the use of such items during sanitary district proceedings, and their receipt into the hearing record, provided that a smaller, 8-1/2 inch by 11-inch version of the same item is also filed. The smaller version can be easily incorporated into electronic versions of the hearing record and cost-effectively transmitted to other agencies and the state appellate courts. See Minn. Stat. §§ 14.001(7) and 442A.02, subd. 9 (2016).

Subpart 4. This rule incorporates by reference the computation rules found in Minn. R. 1400.6100. These rules are not only familiar to the practitioners and parties who appear before the Office of Administrative Hearings, they are also consistent with the practices of other state tribunals. See, e.g., Rules 354 and 503 Gen. R. of Prac. Dist. Ct.

1408.0030 COST OF PUBLICATIONS AND MAILINGS.

In several provisions, Chapter 442A requires that certain notices be published in newspapers of general circulation and served upon affected landowners. The statutes also provide that sufficient proof of publication and service are required for a lawful petition. See, e.g., Minn. Stat. § 442A.04, subd. 2(b).

The proposed rule regarding the responsibility for these costs follows directly from the provisions of Minn. Stat. § 442A.10. This statute directs that the “[e]xpenses of the

preparation and submission of petitions in the proceedings under sections 442A.04 to 442A.09 shall be paid by the petitioners.”

1408.0040 INTERVENTION.

The provisions of the proposed rule follow directly from the text of the more familiar intervention rule found at Minn. R. 1400.6200 (2015). Only modest formatting and editorial changes have been made between the proposed rule and the text of Minn. R. 1400.6200. Substantively, the two rules employ the same best practices.

Instead of merely incorporating Minn. R. 1400.6200, the agency has reproduced the substantive provisions of that rule in a reformatted proposed Part 1408.0040. The reformatting improves ease of access and the readability of the proposed rule. The provisions of the proposed rule are likely to be of special interest to non-attorney stakeholders. For that reason, having the full text of the provisions available in Part 1408 will be beneficial to stakeholder and Agency staff alike.

1408.0050 CONTESTED CASE PROCEEDINGS.

Subpart 1. This rule incorporates, to the extent permitted by law, the familiar hearing practices of the contested case rules found in Part 1400.

Subpart 2. Because disputes arising under Minn. Stat. §§ 442A.04, subd. 3(b), .05, subd. 4(b), .06, subd. 4(b), .07, subd. 3(b), all require contested case proceedings, the accompanying rules of procedure for contested cases are incorporated by reference. Similarly, because Minn. Stat. § 442A.29, subd. 1(b) directs “the chief administrative law judge ... to conduct hearings and issue final orders related to the hearings under sections 442A.01 to 442A.28,” it is reasonable to utilize the procedures that Administrative Law Judges now use for conducting administrative hearings and issuing written orders.

Subpart 3. So as to make proceedings under Chapter 442A accessible to stakeholders who are not legally-trained, the proposed rule provides that “[p]arties may be represented by an attorney ... by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law.” The rule incorporates the familiar provisions of Minn. R. 1400.5800, which provides access to administrative proceedings to litigants who are not legally trained and who may have limited resources to hire an attorney.

Subpart 4. The proposed rule draws all of its text from the existing rule at Minn. R. 1400.5700. So as to provide still greater access to non-attorney litigants, the proposed rule does not include some of the more-restrictive provisions of Minn. R. 1400.5700. Specifically, the deadline for filing a notice of appearance and the penalties for failing to file a conforming notice are not included in the proposed rule. This proposed rule includes the best notice practice but does not impose more requirements than are needed in this context for efficient proceedings.

Subpart 5. Minn. Stat. § 442A.29, subd. 1 authorizes the Chief Administrative Law Judge, under certain circumstances, to require “that disputes over proposed sanitary district creations, attachments, detachments, or dissolutions be addressed in whole or in part by means of alternative dispute resolution processes in place of, or in connection with, hearings that would otherwise be required” Minn. Stat. § 442A.29, subd. 4 further provides that any mediated agreements “may be incorporated into one or more stipulations for purposes of further proceedings *according to the applicable procedures*” (Emphasis added.) Likewise important, the Chief Administrative Law Judge is authorized, under Minn. Stat. § 442A.02, subd. 8, to “require representatives from any petitioner, property owner, or involved city, town, county, political subdivision, or other governmental entity to meet together to discuss resolution of issues raised by the petition or order that confers jurisdiction on the chief administrative law judge”

To carry out these mandates and provide for the “applicable procedures,” the proposed rule carries forward the alternative dispute resolution and issue management provisions of the existing contested case rules. Administrative Law Judges use these procedures to narrow and resolve disputes in contested cases. These familiar and effective methods can likewise narrow and resolve disputes in sanitary district proceedings.

Subpart 6. The proposed rule carries forward, from Minn. R. 1400.6000, the text that is applicable to sanitary district proceedings. Additionally, the applicable portions of the rule are reproduced in full so as to apprise all parties of the penalties for failing to appear at a prehearing conference, settlement conference, hearing, or failing to comply with an order of the Administrative Law Judge.

Subparts 7 through 19. As noted above, because Chapter 442A requires proceedings under Minnesota’s Administrative Procedure Act, the Office of Administrative Hearings proposes to incorporate the accompanying contested case rules of procedure. Further, because Minn. Stat. § 442A.29, subd. 1(b) directs “the chief administrative law judge ... to conduct hearings and issue final orders related to the hearings under sections 442A.01 to 442A.28,” it is reasonable to utilize those procedures that Administrative Law Judges now use for conducting administrative hearings and issuing written orders. Accordingly, the Agency proposes to incorporate the existing rules of procedure and practices for: prehearing conferences; motions; discovery; filing witness lists and exhibits; subpoenas; duties of the parties to the proceedings; calling and sequestering of witnesses; admissibility of evidence; contents of the hearing record; continuances; conduct of hearings; decorum of hearings; reconsideration or rehearing; *ex parte* communications; and development of the Administrative Law Judge’s report. By drawing upon the existing contested case rules, the Agency proposes to carry into sanitary district proceedings those methods that are both familiar to Minnesota attorneys and straight-forward enough to be used effectively by litigants with no formal legal training.

CONCLUSION

For all of these reasons, the Office of Administrative Hearings has the statutory authority to promulgate the proposed rules and has demonstrated, through an affirmative presentation of facts, the need and reasonableness for each rule.

April 28, 2017

A handwritten signature in black ink, appearing to read 'TLP', with a long horizontal line extending to the right.

TAMMY L. PUST
Chief Judge