

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF WATER AND SOIL RESOURCES**

**In the Matter of the Proposed Exempt Rules
Of the Board of Water and Soil Resources
Relating to Appeals of Watershed District
Rules and Permit Decisions,
Minn. R. Chapter 8415.**

**ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.386**

The Board of Water and Soil Resources is seeking review and approval of the above-entitled rules, which the Board intends to adopt pursuant to Minn. Stat. § 14.386. On January 28, 2004, the Office of Administrative Hearings received the documents from the agency required under Minn. Stat. § 14.386 and Minn. R. 1400.2400. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. Minn. R. parts 8415.0120, subparts 2.A. and 4.D. are **DISAPPROVED** pursuant to Minn. R. parts 1400.2400, subpart 3 and 1400.2100, items D and E.
2. The attached Memorandum is incorporated and made a part of this Order.

Dated this 11th day of February, 2004.



GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

In the Special Session of 2003, the Legislature amended Minn. Stat. § 103D.537 to allow public transportation authorities to appeal watershed district permit decisions to the Board. Minn. Stat. § 103D.537 was also amended to exempt the rules governing this new appeal process from all rulemaking provisions of Chapter 14, except section 14.386. The legislation required the notification of select House and Senate committee members at least 30 days prior to the publication of the new rules in the State Register. The Board has complied with these notification requirements, but the following rule provisions present defects under Minn. R. 1400.2100, items D and E.

The final sentence of Minn. R. 8415.0120, subp. 2.A. states, "The watershed district must notify the public transportation authority promptly of its permit decision." The Administrative Law Judge finds that the use of "promptly" is vague and could result in a due process issue since the deadline for the public transportation authority to appeal a watershed district's permit decision is 30 days from the date of the district's decision. This results in a defect as to constitutionality under Minn. R. 1400.2100, item E. The Board may continue to utilize the word "promptly" if it adds a phrase such as "but no later than ___ days," and indicates a reasonable number of days so that a public transportation authority wishing to appeal a permit decision has adequate time to receive the decision and make a timely appeal. Additionally, it is recommended that the sentence cited above be the first sentence of paragraph A rather than the last, for the sake of clarity.

The final sentence of Minn. R. 8415.0120, subp. 4.D. states, "If a board must convene a special board meeting to decide the appeal, it may assess the costs of the special board meeting to the appellant." The Board has indicated no statutory authority for the assessment of fees to the appellant, and therefore, has exceeded its statutory authority and the discretion allowed by its enabling statute or other applicable law. See Minn. R. 1400.2100, item D. Legislative approval is needed to assess fees.

As a final matter, the new provisions of Minn. Stat. § 103D.537 state, in relevant part, "The board shall, upon request of the public transportation authority, conduct an expedited appeal hearing . . ." Yet Minn. R. 8415.0120, subp. 4.D. states, "The board shall make a decision within 30 days of the hearing and apply the standard of review in subpart 3, item F, unless it decides there is not sufficient basis to grant the request to expedite the appeal . . ." This rule provision implies that the Board has criteria in mind that would allow it to refuse a public transportation authority's request for expedited appeal. The Administrative Law Judge recommends that such criteria, if they exist, be added to the rule so that public transportation authorities are aware of the standards by which their requests for expedited appeal will be reviewed. Such additions would provide clarity to the affected public transportation authorities and ensure sufficient justification for requests for expedited appeals.

Pursuant to Minn. R. 1400.2400, subpart 5, the agency may request that the chief judge reconsider the disapproval.

G.A.B.