

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE ENVIRONMENTAL QUALITY BOARD**

In the Matter of the Proposed Exempt
Rules of the Minnesota Environmental
Quality Board Regarding Amendments to
the Rules Governing Environmental
Review, Minnesota Rules, Chapter 4410

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

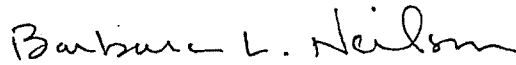
On August 24, 2012, the Minnesota Environmental Quality Board filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. §§ 14.388 and Minn. R. 1400.2400.

Based upon a review of the written submissions by the agency and the written comments submitted by members of the public, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED THAT:

1. The Environmental Quality Board has the authority to use the exempt rulemaking process set forth in Minn. Stat. § 14.388 and Minn. R. 1400.2400 in connection with the proposed rules and has provided adequate justification for its use of that process.
2. The proposed rules that were approved as to form by the Office of the Revisor of Statutes on August 22, 2012 (RD4111) and filed with the Office of Administrative Hearings on August 24, 2012, were adopted in compliance with the procedural requirements of Minnesota Statutes Chapter 14 and Minnesota Rules, Chapter 1400, and are APPROVED.
3. The Environmental Quality Board's additional modification of proposed rule part 4410.2900, as set forth in its letter filed on August 29, 2012, has not been approved as to form by the Office of the Revisor of Statutes. Accordingly, that modification is NOT APPROVED.

Dated: September 7, 2012



BARBARA L. NEILSON
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 Administrative Law Judge then has five working days to review and approve or disapprove the rule. Minn. R. 1400.2400, subp. 5, 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

Nature of Proposed Rules and Use of Exempt Procedures

In this proceeding, the Environmental Quality Board (EQB) seeks to modify certain provisions in its existing rules relating to environmental review in order to render them consistent with statutory amendments to Minnesota Statutes, Chapter 116D, that occurred during the 2011 and 2012 legislative sessions. Specifically, the proposed rules stem from amendments that were made during 2011 to Minn. Stat. §116D.04, subds. 1a,¹ 2a,² and 3a,³ and Minn. Stat. § 116D.045, subds. 1⁴ and 3;⁵ as well as amendments that were made during 2012 to Minn. Stat. § 116D.04, subd. 2a.⁶

The EQB proposes to adopt these amendments using the exempt procedures described in Minn. Stat. § 14.388. Under that statute, an agency may (where certain circumstances are present) adopt, amend, or repeal a rule using more abbreviated and streamlined procedural requirements than are required in the more typical rulemaking process. In this case, the EQB argues that it is entitled to use the exempt procedures under subdivision 1(3) of the statute, which applies where an agency "for good cause finds that the rulemaking provisions of [the Minnesota Administrative Procedure Act, Minnesota Statutes Chapter 14] are unnecessary, impracticable, or contrary to the public interest when adopting, amending, or repealing a rule to . . . incorporate specific changes set forth in applicable statutes when no interpretation of law is required." The EQB contends that the good cause exempt rulemaking process is appropriate because "[t]he legislature has specifically directed the use of the good cause rulemaking process" for all but one of its proposed amendments, no interpretation of the statute is required for the remaining amendment, and the use of the exempt process "is an effective use of resources to implement the changes in an expedient and cost-effective manner. . . ."⁷

¹ 2011 Laws of Minnesota, Chapter 4, Section 5.

² 2011 Laws of Minnesota, Chapter 4, Section 6; 2011 Laws of Minnesota, Chapter 107, Section 87.

³ 2011 Laws of Minnesota, Chapter 4, Section 7.

⁴ *Id.*, Section 9.

⁵ *Id.*, Section 10.

⁶ 2012 Laws of Minnesota, Chapter 272, Section 76.

⁷ Notice of Intent to Adopt Rules under the Good Cause Exemption at 1-2 (Aug. 24, 2012).

Minn. Stat. § 14.388 requires that the agency include its findings and a brief statement of its supporting reasons in the order adopting, amending, or repealing the rule. The statute specifies that the agency must give notice of its intent to adopt the rule to persons who have registered their names with the agency to receive such notice. The notice must include the proposed rule; an explanation of why the rule meets the requirements of the good cause exemption; and a statement that interested parties have five business days after the date of the notice to submit comments to the Office of Administrative Hearings. In this instance, comments were received from six individuals regarding the proposed rules. Those comments are discussed in more detail below.

Rules adopted under the exempt procedures must be approved as to legality by the Office of Administrative Hearings.⁸ The legal review conducted by the Office of Administrative Hearings is narrower than in the more typical rulemaking process, and is governed by the standards set forth in Minn. R. 1400.2100, Items A and D to G.⁹ These standards state that a rule must be disapproved by the Administrative Law Judge or Chief Administrative Law Judge if the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

* * *

- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person or group; [or]
- G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law. . . .

Public Comments on the Proposed Rules

Several of those submitting written comments on the proposed rules, including Kristen Eide-Tollefson, Alan Muller, and Paula Goodman Maccabee on behalf of WaterLegacy, questioned the accuracy and/or sufficiency of the language in the Notice provided by the EQB regarding its intent to adopt the proposed rules, and urged that the EQB be required to withdraw its proposed rules and submit a proper Notice. They

⁸ Minn. Stat. §§ 14.388, subd. 1, and 14.386(a)(3).

⁹ See Minn. R. 1400.2400, subp. 3.

pointed out that the EQB stated in the Notice that the Legislature "has specifically directed the use of the good cause rulemaking process" for all of the amendments except those made to part 4410.1100, and argued that this was misleading because the legislation enacted in 2011 and 2012 merely specified that the EQB "may" use the good cause exemption to amend its rules to conform to the statutory amendments.¹⁰ They also raised other concerns regarding the Notice. For example, Mr. Muller objected to the EQB's decision to issue the Notice during the last week of August and provide only five days for public comment, and maintained that this suggested that the EQB intended to limit public awareness and participation. WaterLegacy asserted that the failure of the EQB to set forth the text of the statutory amendments in the Notice or the proposed rules themselves made it difficult for members of the public to evaluate whether the proposed amendments accurately reflected the legislative changes. WaterLegacy also contended that the EQB's Notice did not accurately describe the nature of the amendment to Minn. R. 4410.2900.

The Administrative Law Judge agrees that the Notice could have contained a more complete description of the 2011 and 2012 legislative provisions authorizing the use of exempt rulemaking procedures and a more precise summary of the substance of the proposed amendment to part 4410.2900. However, it is concluded that any shortcomings in the Notice do not rise to the level of a defect, and that the Notice as a whole is sufficient to comply with Minn. Stat. §14.388, subd. 2. While the legislation enacted in 2011 and 2012 did not *mandate* the use of the good cause exempt rulemaking procedures, it is evident that the Legislature did, in fact, explicitly *authorize* the EQB's use of the good cause exempt rulemaking procedures to bring its rules into conformity with the governing statutes. The Notice included citations to the relevant provisions of the Minnesota session laws, which would have facilitated the ability of interested persons to locate and review the legislation. The Notice also identified individuals at the EQB and the OAH who could be contacted to obtain information about the proposed rules and the rulemaking process. Moreover, because copies of the proposed rules were attached to the Notice, the precise language of the proposed rules could easily be reviewed by interested persons. Finally, the designation of a five-day public comment period complies with the requirements of section 14.388, and the mere fact that the Notice was issued during the last week in August does not, in itself, imply that the EQB intended to limit public awareness of the proposed rules or restrict public participation in this process.

Holly Newton, Kenton Spaulding, John Hickman, and WaterLegacy also objected to the proposed amendment to rule part 4410.1100, subp. 1. The existing rule states that any person may request the preparation of an Environmental Assessment Worksheet (EAW) on a project by filing a petition that contains the signatures and mailing addresses of at least 25 individuals. The proposed amendment to the rule would increase the number of signatures from 25 to 100 and require that the individuals signing the petition reside or own property in the state. Those commenting argued that the amendment would discourage citizen participation and make it more difficult and time-consuming to obtain the necessary number of signatures to petition for EAWs,

¹⁰ 2011 Laws of Minnesota, Chapter 4, Section 11; 2012 Laws of Minnesota, Chapter 272, Section 90.

particularly in remote areas where a relatively small number of property owners are affected. WaterLegacy asserted that the good cause exempt procedures should not be used for this rule change, and contended that it is contrary to the mission of the EQB to limit the public rulemaking process in the absence of any indication from the Legislature that the streamlined proceedings are warranted.

The Administrative Law Judge does not agree that the EQB is precluded from using the exempt procedures to amend its rules to ensure that they are consistent with the governing statutes. The exempt process set forth in Minn. Stat. § 14.388 is not restricted to situations in which the Legislature has authorized its use. Rather, the statute specifically allows the use of exempt procedures where an agency shows that it is incorporating specific statutory changes in its rules that do not require legal interpretation. There is no dispute that Minn. Stat. 2116D.04, subd. 2a, was amended by the Legislature in 2011 to require that 100 individuals who reside or own property in the state sign a petition for an EAW. The EQB has shown that it is merely incorporating in its rules a clear and straightforward legislative change that does not require interpretation. Accordingly, the Administrative Law Judge finds that the agency has adequately justified its use of the exempt process for this amendment as well as for the other amendments.

WaterLegacy also expressed broad opposition on policy grounds to nearly all of the proposed amendments to Chapter 4410. The role of the Administrative Law Judge is limited to a review of the legality of the proposed rules. The proposed rules are consistent with the governing legislation and must be approved in the context of this proceeding. To the extent that WaterLegacy's concerns relate to the wisdom of the policy choices made by the Legislature, they should be addressed to that body.

EQB's Proposed Modification to Language of Minn. R. 4410.2900 (which is Not Approved)

On August 29, 2011, the EQB filed a letter with the Office of Administrative Hearings in which it sought to make a further modification to the language of the proposed amendment to part 4410.2900 in order to more accurately reflect the intent of the Legislature. However, the proposed modification to the rule language has not been approved by the Office of the Revisor of Statutes.

The OAH rules require that, before seeking a review of the legality of proposed exempt rules, the agency must file "the rule, including the revisor's approval" with the Office of Administrative Hearings.¹¹ The only version of the proposed rules that is properly before the Administrative Law Judge is the version that was approved as to form by the Revisor's Office on August 22, 2012 (RD4111), and filed with the Office of Administrative Hearings on August 24, 2012. Under the circumstances, the EQB's proposed modification to Minn. R. 4410.2900 cannot be approved.

¹¹ Minn. R. 1400.2400, subp. 2.

Conclusion

For the reasons discussed above, the Administrative Law Judge concludes that the rules proposed and approved as to form by the Revisor's Office on August 22, 2012, and filed with the Office of Administrative Hearings on August 24, 2012, meet the requirements for exempt rulemaking under Minn. Stat. §14.388 and Minn. R. 1400.2400 and are approved as to legality. The modification that was subsequently proposed by the EQB to the language of Part 4410.2900 has not been approved as to form by the Revisor's Office, is not properly before the Administrative Law Judge, and is not approved.

B. L. N.