MINNESOTA
OFFICE OF
ADMINISTRATIVE
HEARINGS

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April 2, 2025

VIA E-FILING ONLY
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Re: ***In the Matter of Possible Rules Governing Adult-Use Cannabis, Medical Cannabis, and Hemp Products, Revisor ID: R-04844***
OAH 8-9062-40360; Revisor 4844

Dear MN Office of Cannabis Management:

Enclosed herewith and served upon you please find the **ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.389 AND MINN. R. 1400.2410**. With the approval of these expedited rules, the Office of Administrative Hearings has closed this file and is returning the rule record to the MN Office of Cannabis Mangement (Agency) so that the Agency can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365.

Please ensure that the Agency's signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request the finalized rules from the Revisor's office following receipt of that order. The Office of Administrative Hearings will then file the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes and one copy to the MN Office of Cannabis Management. **Pursuant to Minn. Stat. § 14.389, subd. 3 and Minn. R. 1400.2410, subp. 5, the Agency is responsible for filing a copy of the expedited rules with the Governor.**

The Agency's next step is to arrange for publication of the Notice of Adoption in the State Register. The Agency should request copies of the Notice of Adoption from the Revisor's Office. One copy should be placed in the official rulemaking record. Two copies of the Notice of Adoption should be sent to the State Register for publication. Please note that if the final expedited rule is different from the rule originally published, an agency must publish a copy of the changes in the State Register. An expedited rule becomes effective upon publication of the Notice of Adoption in the State Register in accordance with Minn. Stat. § 14.389, subd. 3.

If you have any questions regarding this matter, please contact William Moore at (651) 361-7893, william.t.moore@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,

NICHOLE SLETTEN
Legal Assistant

Enclosure

cc: Legislative Coordinating Commission
Office of the Revisor of Statutes

OAH 8-9062-40360
Revisor R-4844

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Expedited Rules Governing Adult-Use Cannabis	**ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.389 AND MINN. R. 1400.2410**

On March 25, 2025, the Office of Cannabis Management (Office or OCM) filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.389 (2024) and Minn. R. 1400.2410 (2023).

Based upon a review of the written submissions by OCM, and the contents of the rulemaking record,

IT IS HEREBY DETERMINED THAT:

1. The proposed rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14 (2024), and Minnesota Rules, chapter 1400 (2023).

2. Pursuant to Minn. Stat. § 342.02, subds. 1, 2(a) and 5 (2024) (and in furtherance of 33 other statutory directives),[1] OCM has the statutory authority to adopt the proposed rules using the expedited rulemaking process.

IT IS HEREBY ORDERED THAT:

The proposed rule parts are **APPROVED**.

Dated: April 2, 2025

ERIC L. LIPMAN
Administrative Law Judge

[1] *See* Minn. Stat. §§ 342.02 subd. 5; 342.06, subd. 1(b); 342.06, subd. 1(c); 342.07, subd. 1(a); 342.08, subd. 1; 342.08, subd. 2; 342.08, subd. 3; 342.08, subd. 4; 342.13 (g); 342.14, subd. 1(f); 342.15, subd. 1(c); 342.15, subd. 2(a); 342.15, subd. 3; 342.15, subd. 5; 342.23, subd. 1(c); 342.28, subd. 2(c); 342.29, subd. 2(c); 342.30, subd. 4(c); 342.31, subd. 2; 342.31, subd. 4(c); 342.32, subd. 4(d); 342.33, subd. 3(c); 342.35, subd. 3(c); 342.37, subd. 3(b); 342.39, subd. 3(b); 342.41, subd. 3(c); 342.42, subd. 2; 342.42, subd. 3; 342.44, subd. 1(b); 342.515, subd. 3; 342.61, subd. 2(a); 342.61, subd. 3; and 342.63, subd. 3(b) (2024); *see also* 49 *State Register* 779 (Jan. 13, 2025).

MEMORANDUM

I. Features of Expedited Rulemaking

The legal review of proposed administrative rules under expedited rulemaking is very limited. Unlike ordinary rulemaking, there is no inquiry into whether the rules are themselves reasonable.[2] Instead, the focus of the legal review in the expedited process is whether a proposed rule was lawfully issued.[3]

Clearly, there is big difference between whether a given rule is "reasonable" and adequately supported by evidence in the record, on the one hand, and whether the agency making a rule on that subject is "authorized" to do so, on the other. In expedited rulemaking, Administrative Law Judges consider only the latter question – whether the proposed rule is lawfully issued.[4]

Notwithstanding this much narrower set of inquiries, several stakeholders (among the 261 that provided comments upon the proposed rules) raised challenges to the lawfulness of the rules. Those challenges are considered and addressed below.

II. Stakeholder Challenges to the OCM's Authority to Promulgate Rules

A. Claims that a Proposed Rule is Not Authorized by Chapter 342

1. Minn. R. 9810.1001, subp. 2(B) - Disqualification

Several commentators argued that proposed rule Minn. R. 9810.1001, subp. 2(B), relating to the disqualification of those individuals who had earlier been barred by another state from participating in their cannabis industry, was overbroad and unlawful.[5] The Administrative Law Judge disagrees.

Minn. Stat. § 342.15, subd. 5, specifically delegates to OCM the power to determine whether an individual's regulatory misconduct in another state should disqualify that person from cannabis licensure in Minnesota. The statute reads:

> Civil and regulatory offenses; disqualifications. The office may determine whether any *civil or regulatory violations*, as determined by another state agency, local unit of government, *or any other jurisdiction, disqualify an individual from holding or receiving a cannabis business license* issued

[2] *Compare* Minn. Stat. § 14.50 ("…it shall also be the duty of the judge to make a report on ... the degree to which the agency has … in rulemaking proceedings, demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.") with Minn. Stat. § 14.389 ("When a law refers to this section, the process in this section is the only process an agency must follow for its rules to have the force and effect of law.").
[3] *See* Minn. R. 1400.2410, subp. 3.
[4] *Id*; Minn. R. 1400.2100 (A), (C)-(H).
[5] *See e.g.,* Comments of Liam Audet (Feb. 12, 2025); Comments of Grant Gunderson (Feb. 12, 2025); Comments of Roger Korby (Feb. 12, 2025); Comments of Kirsten Libby (Feb. 12, 2025); Annie Showers (Feb. 12, 2025); Comments of Bill Strusinski (Feb. 12, 2025).

> under this chapter or disqualify an individual from working for a cannabis business, and the length of the disqualification. Upon the office's request, a state agency, as defined in section 13.02, subdivision 17, except for the Department of Revenue, may release civil investigative data, including data classified as protected nonpublic or confidential under section 13.39, subdivision 2, if the request is related to a specific applicant and the data is necessary to make a determination under this section.[6]

Additionally, Minn. Stat. § 342.16(a)(7) (2024) prohibits those who "have had a cannabis license, a registration, an agreement, *or another authorization* to operate a cannabis business issued under the laws of *another state revoked*" from obtaining licensure here.[7] Proposed rule Minn. R. 9810.1001, subp. 2(B), is not unlawful.

2. Minn. R. 9810.2101, subp. 2(A) - THC Potency Limits

A number of commentators claimed that proposed rule Minn. R. 9810.2101, subp. 2, which imposes potency limits on products containing tetrahydrocannabinol (THC), was not authorized or intended by the legislature.[8] The Administrative Law Judge disagrees.

Minn. Stat. § 342.02, subd. 1, directs OCM to "establish[] policy, and exercis[e] its regulatory authority over the cannabis industry and hemp consumer industry" to "promote the public health and welfare … [and] protect public safety … ."[9] Additionally, Minn. Stat. § 342.02, subd. 2(17) (2024) specifically empowers OCM to:

> establish limits on the potency of cannabis flower and cannabis products that can be sold to customers by licensed cannabis retailers, licensed cannabis microbusinesses, and licensed cannabis mezzobusinesses with an endorsement to sell cannabis flower and cannabis products to customers… .[10]

Proposed rule Minn. R. 9810.2101, subp. 2, on these limits is not unlawful.

3. Minn. R. 9810.3100, subp. 1 – Testing Samples of Cannabis Products

Some commentators maintained that OCM does not have the legal authority to "require immediate testing" of a cannabis product that is "suspected to be a potential

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[6] Minn. Stat. § 342.15, subd. 5 (emphasis added).
[7] Minn. Stat. § 342.16(a)(7) (emphasis added).
[8] *See e.g.,* Anthony Newby ("Any potency cap clearly violates multiple of these mandates [in Minn. Stat. § 342.02 (2024)] and thus not only directly violates Minnesota law and the intention of Minnesota's elected leaders it violates the rights of Minnesotans.") (Feb. 12, 2025).
[9] Minn. Stat. § 342.02, subd. 1(1), (2).
[10] Minn. Stat. § 342.02, subd. 2(17).

human health hazard or threat to public safety."[11] The Administrative Law Judge disagrees.

As noted above, OCM's regulatory authority over the cannabis and hemp industries was for the purpose of "promot[ing] the public health and welfare" and "protect[ing] public safety."[12] To these ends, the legislature authorized the OCM:

> (1) to develop, maintain, and enforce an organized system of regulation for the cannabis industry and hemp consumer industry;
>
> (2) to establish programming, services, and notification to protect, maintain, and improve the health of citizens;
>
> ....
>
> (8) to receive reports required by this chapter and inspect the premises, records, books, and other documents of license holders to ensure compliance with all applicable laws and rules;
>
> ....
>
> (19) to order a person or business that cultivates cannabis flower or manufactures or produces cannabis products, medical cannabinoid products, artificially derived cannabinoids, lower-potency hemp edibles, hemp-derived consumer products, or hemp-derived topical products to recall any cannabis flower, product, or ingredient containing cannabinoids that is used in a product if the office determines that the flower, product, or ingredient represents a risk of causing a serious adverse incident; and
>
> (20) to exercise other powers and authority and perform other duties required by law.[13]

Further, OCM is authorized under Minn. Stat. § 342.19 (2024) to "inspect and investigate" whether "any cannabis plant, cannabis flower, cannabis product, artificially derived cannabinoid, lower-potency hemp edible, or hemp-derived consumer product is being distributed in violation of this chapter or rules adopted under this chapter …."[14]

Likewise important, because producing consumer products from cannabis or hemp is a part of a "closely regulated business," under *New York v. Burger*, 482 U.S. 691 (1987), OCM's inspectors are not subject to the requirement of obtaining a warrant before inspecting the healthfulness of cannabis and health products. In "closely regulated

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[11] *See e.g.,* Comments of Roger Korby (Feb. 12, 2025); Comments of Kirsten Libby (Feb. 12, 2025); Comments of Annie Showers (Feb. 12, 2025); Comments of Bill Strusinski (Feb. 12, 2025).
[12] Minn. Stat. § 342.02, subd. 1(1), (2).
[13] Minn. Stat. § 342.02, subds. 2(a)(1), (2), (8), (19), (20).
[14] Minn. Stat. § 342.19, subds. 1(a), 2(b) (2024).

business" – like sales of firearms,[15] intoxicating liquors,[16] commercial seeds[17] or interstate shipping services[18] – the regulations are so "comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."[19] Proposed rule 9810.3100, subpart 1, is not unlawful.

B. Claims that the Proposed Rules Conflict with State Statutes

1. Minn. R. 9810.4100 – Medical Cannabis Consultants and the Practice of Medicine

Alicia Schaal, a registered nurse with Midwest Cannabis Professionals, LLC, asserted that the "proposed role of a 'medical cannabis consultant' constitutes the unauthorized practice of medicine as defined in Minnesota Statutes, section 147.081." The Administrative Law Judge disagrees.

Minn. Stat. § 342.51, subd. 3(a) (2024) authorizes a certified medical cannabis consultant to "consult with the patient to determine the proper type of medical cannabis flower, medical cannabinoid product, or medical cannabis paraphernalia, and the proper dosage for the patient after reviewing the range of chemical compositions of medical cannabis flower or medical cannabinoid product."[20]

Additionally, the scope of practice provisions of Minn. Stat. § 147.081, subd. 3(2) (2024) appropriately restricts the power to "prescribe, give, or administer any drug or medicine for the use of another," to duly credentialled medical professionals. And one can read proposed rule 9810.4100 as falling between the twin poles of "consultation" on medical cannabis, and prescribing, giving or administering cannabis products to others. Further, the proposed rules prohibit medical cannabis consultants from performing those latter activities.[21] Proposed rule 9810.4100 is not unlawful.

2. Minn. R. 9810.4200, subp. 2 – Canopy Ratios for Medical Cannabis

Adam Koscielski, Assistant General Counsel of Vireo Health of Minnesota, LLC, maintained that the proposed limitations on the growing "canopies" of cultivators – namely, the total square footage of cultivation areas containing mature, flowering cannabis plants[22] – is contrary to the statutes passed by the legislature. He argues that it

[15] *United States v. Biswell,* 406 U.S. 311, 315-16 (1972).
[16] *Colonnade Corp. v. United States,* 397 U.S. 72, 77 (1970).
[17] *Gunnink v. State*, A09-396, 2010 WL 10388, slip op. at *2-*3 (Minn. Ct. App. Jan. 5, 2010) (unpublished).
[18] *United States v. Nguyen,* 59 F.4th 958, 961–64 (8th Cir. 2023), *cert. denied sub nom. Le v. United States,* 144 S. Ct. 103 (2023).
[19] *New York v. Burger*, 482 U.S. at 703.
[20] Minn. Stat. § 342.51, subd. 3(a).
[21] Ex. A at 123-24 (proposed Minn. R. 9810.4100, subp. 5).
[22] *Id.* at 58 (proposed Minn. R. 9810.2000, subp. 4(A)).

is unlawful to set the annual limits of the size of a growing canopy by "dividing the amount of medical product sales [in the previous year] by the observed canopy":[23]

> This approach seems to conflate the volume of cannabis with the area of plant canopy, which is clearly contrary to the statute's requirement to measure area, not volume.[24]

The Administrative Law Judge disagrees. Minn. Stat. § 342.515, subd. 2(c) (2024), allows the OCM to "authorize a medical cannabis combination business to cultivate cannabis for sale in the adult-use market in an area of plant canopy that is equal to one-half of the area the business used to cultivate cannabis sold in the medical market in the preceding year."[25] Likewise important, this statute goes on to provide that the office "may establish limits on cannabis manufacturing that are consistent with the area of plant canopy a business is authorized to cultivate"[26] and "by rule, establish minimum requirements related to cannabis cultivation … and other relevant criteria to demonstrate active participation in the medical cannabis market."[27]

Establishing a ratio between the prior year's sales of medical cannabis, and the size of the next season's plant canopy, is an authorized method of achieving the legislature's goals. The legislature wanted "combination businesses" that were genuine participants in both the medical use and adult use markets, and the regulatory ratio supports that goal. Proposed rule Minn. R. 9810.4100, subp. 2, is not unlawful.

C. Claims that the Proposed Rules are Unduly Vague

Rules promulgated by an Executive Branch agency may not be unduly vague. An unduly vague rule is not lawful because it may "improperly [delegate] the agency's powers to another agency, person, or group;"[28] or it may be so imprecise that it does not meet the requirements of a "rule,"[29] or it may be so indefinite in its reach that it abridges the due process of law.[30] The Administrative Procedure Act forbids such regulations.[31]

1. Minn. R. 9810.0200, subp. 22 – Dwelling

Jacob Schlichter, and others, maintain that the regulatory definition of "dwelling" (and the related prohibition in proposed rule 9810.1100, subpart 4, on conducting cannabis business activities "where people live") is too imprecise to be a proper rule. Mr. Schlichter urged including the modifier "where people *currently* live" in order to make the rule lawful. The Administrative Law Judge disagrees. Proposed rules 9810.0200,

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[23] *Id.* at 127 (proposed Minn. R. 9810.4200, subp. 2(C)(1)(c)).
[24] Comments of Adam Koscielski at 14 (February 12, 2025).
[25] Minn. Stat. § 342.515, subd. 2(c).
[26] Minn. Stat. § 342.515, subd. 3.
[27] Minn. Stat. § 342.515, subd. 5 (2024).
[28] Minn. R. 1400.2100(F).
[29] Minn. R. 1400.2100(G).
[30] Minn. R. 1400.2100(E).
[31] Minn. Stat. § 14.05, subd. 1 ("Each agency shall adopt, amend, suspend, or repeal its rules … only pursuant to authority delegated by law and in full compliance with its duties and obligations.").

subpart 22, and 9810.1100, subpart 4, make clear that commercial cannabis activities may not be conducted in the spaces where people are living, and such rules are lawful.

2. Minn. R. 9810.2000, subp. 5(B) – The Size of Testing Samples

Elliot Ginsburg argues that the rule authorizing OCM inspectors to take samples of cannabis products for "material laboratory analysis to establish whether the cultivator is in compliance with [Chapter 9810] and Minnesota Statutes, chapter 342," is an open-ended license for inspectors to help themselves to cannabis products at no cost.[32] The Administrative Law Judge disagrees. The sampling provision is an authorization to obtain sufficient material for laboratory analysis; and not for the private use of the inspectors. Proposed rule Minn. R. 9810.2000, subp. 5(B), is not unlawful.

III. Technical Correction – Minn. R. 9810.1401, subp. 7

The Administrative Law Judge recommends a technical correction to the proposed rules. A technical correction is not a defect in the proposed rule; but rather a recommendation that the agency may adopt, if it sees fit, to clarify its rules.

Appropriately, the OCM has crafted a special labeling regulation for hemp-derived products that are manufactured outside of Minnesota and imported into this state by licensed retailers and wholesalers. To make the Minnesota market welcoming and accessible to these manufacturers, OCM has not required strict adherence to the labeling requirements that apply to new, Minnesota-based entrants into this industry. For outsiders who may have product labels with features other than those specified in Minn. R. 9810.1401 (2023), OCM permits the labels on imported products to be "substantially similar" to those that comply with our labeling rule. Such a rule is one that "emphasize[s] superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."[33]

While the terms "substantially similar" in this context are not unduly vague, and the agency would be legally entitled to develop the contours of this definition through a series of case-by-case enforcement actions,[34] the better and simpler course would be to provide some additional clarity now. One possible addition to part 9810.1401, subpart 7 might be to borrow from the product testing regulations in part 9810.3100. Under this later rule, product testing is undertaking to avoid potential human health hazards and threats to public safety. Perhaps a product label from another state can be considered "substantially similar" to one under part 9810.1401, if it "provides sufficient detail to a consumer to permit safe use of the product and avoid hazards to human health."

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[32] Comments of Elliot Ginsburg, at 9 (Feb. 12, 2025).
[33] Minn. Stat. § 14.002.
[34] *See AAA Striping Serv. Co. v. MNDOT*, 681 N.W.2d 706, 716-18 (Minn. 2004); *see also* Minn. Stat. § 14.06(b) ("…as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases.").

Again, whether or not to include additional text on this point is one that is entirely within the sound discretion of the agency. If it did add such text to part 9810.1401, however, it would not result in a substantial change from the rule as originally proposed.

IV. "Expedited" Rulemaking Does Not Mean that the Rulemaking Process Will Conclude Earlier than Ordinary Rulemaking

The "expedited" rulemaking processes under Minn. Stat. 14.389 have certain benefits and particular uses. And, given the process questions and misunderstandings that are reflected in the public's comments in this rulemaking, it is appropriate to conclude this report with a few words about this special process.

As the leading treatise on Administrative Law in Minnesota describes, the "expedited" rulemaking process is among our least formal processes, with far fewer opportunities for public participation in the development of rules than ordinary rulemaking:

> *At the least formal end of the spectrum* are rulemaking procedures such as Minnesota's exempt and *expedited rulemaking processes*, where both the substantive requirements placed on the agency and the structured *opportunities for public participation are comparatively few*. At the most formal end of the spectrum would be ... adoption of a rule with a public hearing in Minnesota. Minnesota's process for adopting a rule without a public hearing falls between these two ends of the spectrum.[35]

Traditionally, expedited rulemaking processes have been reserved for modest updates to well-established regulatory programs, where all of the key policy questions have been fully resolved by other public processes. Two recent expedited rulemaking proceedings make the point plain: The first of these expedited rulemakings adjusted the opening and closing dates of the "whitefish and cisco netting" seasons on certain Minnesota lakes;[36] the second, incorporated the latest edition of the American National Standards Institute's safety practices on outdoor window cleaning, including requirements for the anchors that are used in suspended window cleaning.[37] Questions about the length of the fishing season or best practices for cleaning outdoor windows are not novel policy ideas. Nor do they have the same kind of breadth and impact of the new commercial practices promulgated in this rulemaking.[38]

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[35] Minnesota Administrative Procedure, § 19.2 (2024) (Adopting Rules Without a Hearing: A General Comment) (emphasis added and citations omitted) (https://mitchellhamline.edu/minnesota-administrative-procedure/chapter-19-rulemaking-without-a-hearing/#adopting-rules-without-a-hearing) (last accessed March 18, 2025).

[36] *In the Matter of the Proposed Expedited Rules of the Department of Natural Resources Relating to Netting Whitefish and Ciscoes,* OAH Docket No. 25-9002-40070 (Minn. Off. Admin. Hrgs 2024) (Revisor Number R-4747).

[37] *In the Matter of the Proposed Expedited Permanent Rules of the Department of Labor and Industry Governing Window Cleaning Safety Features*, OAH Docket No. 24-9001-40536 (Minn. Off. Admin. Hrgs 2025) (Revisor Number R-4876).

[38] *See* Exhibit (Ex.) A, Revisor R-4844 (Jan. 1, 2025).

And so, the Administrative Law Judge states here something that only someone with judicial independence and regulatory expertise can say out loud: The legislature should not select expedited rulemaking procedures to promulgate new and far-reaching regulatory programs.

While selecting "expedited rulemaking" was undoubtedly well-intentioned, using these processes to develop big reforms can frustrate the very stakeholders that the legislature hopes to assist and potentially can impair the work that the agency is trying to do. For these reasons, this case presents an important cautionary tale for legislators as to the unintended consequences that can occur when authorizing expedited rulemaking for the roll out of large, new regulatory programs.

The controversy over the establishment of THC potency limits on cannabis products is a good example of the problems that can occur. Under expedited rulemaking, OCM was not required to detail why or how it selected a 70 percent THC potency limit for cannabis concentrates as opposed to any other potency level. And, in their public comments, stakeholders did urge a wide range of other potential potency limits;[39] while still others argued for no potency limits at all.[40]

To OCM's enduring credit, it performed a traditional rule-by-rule analysis and justification of its rules; something that the statute and rules did not require it to do under expedited rulemaking.[41] Yet, that document only became available *after* the public comment period on the proposed rules had closed.[42] What OCM said later may well have persuaded many commentators who had originally expressed doubts over the wisdom of a 70 percent potency limit. OCM explains:

> [Minn. R. 9810.2101, subp. 2 (2023)] sets limits on the amount of THC in select product types. This is necessary to because high potency THC products can cause adverse health effects. The specific limits are reasonable because they strike a balance between consumer safety, commercial needs, market demand, and within the statutory authority of OCM pursuant to section 342.02, subdivision 2(b)(1). There is limited research on the effects of high potency products, given the relatively young age of the cannabis market, however, a recent study from the California Department of Public Health found that "[u]se of high potency cannabis may be especially harmful for certain populations, including people under the age of 26 whose brains are still maturing, those who are pregnant and their infants, and people with a personal or family history of mental health

[39] *See e.g.,* Comments of Randy Anderson (Jan. 18, 2025); Comments of Laura Daak (Feb. 12, 2025); Comments of Cassandra Hainey (Feb. 5, 2025); Comments of Angus Johnson (Jan. 14, 2025); Maria Poirier (Feb. 4, 2025).
[40] *See e.g.,* Comments of Patty Gilk (Feb. 11, 2025); Comments of Matt Hayes (Jan. 13, 2025); Comments of Melani Kane (Feb. 01, 2025); Comments of Roger Korby (Feb. 12, 2025); Comments of David Kunert (Feb. 09, 2025); Comments of Michael Zwack (Feb. 12, 2025).
[41] *Compare* Minn. R. 1400.2100 (B) with Minn. R. 1400.2310, subp. 3.
[42] Ex. K (Minnesota Office of Cannabis Management Memorandum in Support of Order Adopting Rules, and Finding Need and Reasonableness of Rules).

> conditions or substance use disorders." Recognizing that vaporized cannabis concentrates represent the primary way that youth may access cannabis products, the office believes that limitations on the potency of these products is especially reasonable.[43]

In the view of the Administrative Law Judge, the initial uncertainty as to how or why the agency reasoned the way it did was not in the longer-term interests of OCM. Following the expedited procedures, *as the legislature authorized it do,* OCM ended up losing a valuable occasion to persuade open-minded members of the public that it made good choices and that those choices deserve the public's confidence.[44]

The vital exchange of views between regulators and the regulated public that occurs during ordinary rulemaking, does not occur with "expedited" rulemaking. In expedited rulemaking, the agency is not required to address the factors in the Statement of Need and Reasonableness[45] or lay out its reasoning in a Rule-by-Rule analysis.[46]

Such regulatory silence might not be a concern when the agency adjusts the date for opening of the fishing season, or adopts the latest safety technologies for window cleaners, but not so here. By using the expedited process for a large, completely new program, OCM's stakeholders were inadvertently divided into one of two camps: those who had questions about the choices that the agency made and were left to wonder why;[47] and those who took the absence of ready answers as confirming their deep suspicion that the agency did something wrong.[48]

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[43] *Id.* at 943 (footnote and citation omitted).

[44] *See generally* Comments of Timothy Heisel ("There is no support for this limit, and it appears to be an arbitrary cap for no apparent reason. The OCM has not provided any rationale for including a thc cap...") (Jan. 13, 2025); Comments of Joseph Henning ("…how the 70% limit was reached seems entirely arbitrary…") (Jan. 14, 2025); Comments of Anthony Keller ("…please OCM don't screw up MN legal concentrate market for a zero evidence-based rule change proposal.") (Feb. 4, 2025); Brea Rhodes ("Scientific research should guide these regulations, not arbitrary limits that could hinder the evolution of both the cannabis market and its therapeutic potential.") (Jan. 22, 2025); Comments of Shawn Weber ("There's no solid evidence that a 70% potency limit protects consumers or reduces harm.") (Jan. 13, 2025); *see also* Minn. Stat. § 14.001 (The Administrative Procedure Act "…is limited to procedural rights with the expectation *that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.*") (emphasis added).

[45] *See generally* Minn. Stat. § 14.131.

[46] *See* Minn. Stat. § 14.50 (in ordinary rulemaking the agency must demonstrate the need for and reasonableness of each proposed rule "…with an affirmative presentation of facts.").

[47] *See e.g.,* Comments of Kyle Bishop (Feb. 4, 2025); Comments of Kayla Fearing (Feb. 8, 2025); Comments of Jamar Foxx (Jan. 16, 2025); Comments of Andrew Gilbertson (Jan. 14, 2025); Comments of Martin Henschel (Feb. 1, 2025); Comments of Steve Metz (Jan. 14, 2025); Comments of Sara Nelsen (Feb. 10, 2025); Comments of Lucas McCapes (Feb 8, 2025); Comments of Alec Thompson (Jan. 27, 2025).

[48] *See e.g.,* Comments of Chet Bronski ("No part of this decision makes any sense unless you're being paid by lobbyists to make such decisions.") (Jan. 28, 2025); Comments of Kenneth Higgins (the "people that can sign up for the social equity probably do not have the funds to pay for these outrageous prices for anybody to grow cannabis or be involved in the business in general. It seems like more of a money, [sic] grab.") (Feb. 12, 2025); Comments of David Loos ("It also appears to me that this was put in place due to some other lobbying groups that are against cannabis entirely ... so I'm not sure why you're cozying up to them … Please for Pete's sake get rid of this rule. It's not only dumb but it's making you guys look really, really corrupt.") (Feb. 9, 2025).

These were lost opportunities to persuade. A key purpose of the Administrative Procedure Act is to build real public confidence around our regulatory programs by giving interested stakeholders more information[49] and more access to the rule development process.[50] This approach reflects our long-standing (and now fully confirmed) belief that Minnesotans will develop better regulatory programs,[51] that enjoy broad public support, when agencies fully engage the "wisdom of the group."[52]

Undoubtedly, the "expedited" rulemaking process was authorized by legislators in the hopes that the retail licensing rules would be issued faster than with ordinary rulemaking. After all, in most other contexts, selecting an "expedited" process implies that the outcomes will arrive sooner than other methods. Not so in this case. Indeed, in Chapter 342, the legislature removed the ordinary 18-month time limit within which OCM had to complete this rulemaking.[53] So, although the "expedited" process was approved, the regulations were not promulgated any earlier than would have otherwise occurred.

The only thing in an "expedited rulemaking" that is, in fact, faster than would have otherwise occurred, is the legal review conducted by the Administrative Law Judge. In "expedited rulemaking," that legal review is completed within two weeks of the last filing.[54] In an ordinary rulemaking, the legal review is completed within 30 days of the last filing.[55] Thus, selecting expedited rulemaking results in a time savings of roughly two weeks over the ordinary process.

And this shorter review period makes sense when you have very modest rule changes, like the two recent examples cited above. Those rulemakings were narrow, highly technical in nature, and all of the key policy questions had long since been resolved in other public settings. In those cases, the review period could be shorter, because 30 days wasn't needed for an Administrative Law Judge to complete the review.

Accordingly, which rulemakings the legislature chooses to "expedite" and which it sends through the ordinary process really does matter. In the end, it influences how many members of the public the agency can effectively reach with its best thinking and persuade about its regulatory choices.

E. L. L.

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[49] *See* Minn. Stat. § 14.001(4).
[50] *See* Minn. Stat. § 14.001(2), (5).
[51] *See* Minn. Stat. § 14.001.
[52] *See generally* Ronald D. Rotunda, *Vertical Federalism, the New States' Rights, and the Wisdom of Crowds,* 11 FIU L. Rev. 307, 327 (2016) ("A fundamental postulate of democracy is that the people, overall, are more likely to be correct than a benevolent dictator or oligarchy. The collective wisdom is better than one person's wisdom, even if that person is an expert. A larger group of people is more likely to come to a better solution than a smaller.").
[53] *Compare* Minn. Stat. § 342.02, subp. 5(b) with Minn. Stat. § 14.125.
[54] Minn. Stat. § 14.389, subd. 4.
[55] Minn. Stat. § 14.15, subd. 2.