

Minnesota Board of Water and Soil Resources

Minnesota Rules, parts 8415.0100 through 8415.0120

Rules Relating to Watershed District Appeals

Statement of Need and Reasonableness

January 31, 2006

I. INTRODUCTION

This proposed rulemaking would convert Minnesota Rules, parts 8415.0100 through 8415.0120 from exempt rule to permanent rule. No other modification to the current, exempt rule is proposed in this rulemaking.

This statement (SONAR) describes and explains the need for and reasonableness of the rules of procedure that govern appeals made to the Board of Water and Soil Resources (board) pursuant to Minnesota Statutes, section 103D.537. It summarizes the evidence and arguments the board is relying upon to justify the proposed rule. It has been prepared to satisfy the requirements of Minnesota Statutes, section 14.23 and Minnesota Rules, part 1400.2070.

Minnesota Statutes, section 103D.537 allows an interested party to make an appeal of a watershed district rule to the board. Also, the statute allows a public transportation authority to make an appeal of a watershed district permit decision to the board. Additionally, and not the subject of this rulemaking, the statute allows an appeal to be filed in district court by an interested party of a watershed district rule, permit decision, or order.

The rule is presented in part V of this statement along with the SONAR information specific to each. Preliminary to part V are sections providing SONAR information about the rule in general.

A. Rules of Procedure

The board, through its Dispute Resolution Committee established pursuant to Minnesota Statutes, section 103B.101, subd. 10, is authorized to hear and resolve appeals made under Minnesota Statutes, section 103D.537 of watershed district rules by interested parties and of watershed district permit decisions by public transportation authorities. The rules of procedure in Minnesota Rules, parts 8415.0100 through 8415.0120 specify the procedures to be followed in appeals made to the board under Minnesota Statutes, section 103D.537.

Procedures governing appeals of watershed district rules are found in Minnesota Rules, part 8415.0120, subparts 1 and 3. Procedures governing appeals of watershed district permit decisions are found in Minnesota Rules, part 8415.0120, subparts 2 and 3, unless an expedited appeal hearing is requested by a public transportation authority, in which case subpart 4 is followed instead of subpart 3.

B. Development of Proposed Rule

The current exempt rule, which is the proposed permanent rule, was developed through close consultation with a stakeholder advisory group. The advisory group consisted of representatives from the Minnesota Department of Transportation, the Association of Minnesota Counties, the Minnesota County Engineers Association, the Minnesota Association of Watershed Districts, watershed districts, various legal counsel, and the board. The representatives were responsible for distributing draft rule language, the proposed exempt rule, and coordinating comments from each of their respective agencies or associations. Consensus was reached on all aspects of the proposed exempt rule. The proposed exempt rule was also distributed for review and comment to the chairs and committee administrators of the Senate Environment and Natural Resources Committee, the Senate Transportation Policy and Budget Division, the House Environment and Natural Resources Committee, and the House Transportation Committee. No comments were received on the proposed exempt rule. The exempt rule became effective on April 12, 2004.

To begin the permanent rulemaking process, an initial request for comments on the proposed conversion of the exempt rule to permanent rule was mailed on February 11, 2005 to the advisory group members for further distribution within their respective organizations. No comments were received and no meeting of the advisory group was requested or held. An initial request for comments was mailed on April 7, 2005 to the chairs and committee administrators of the Senate Environment and Natural Resources Committee, the Senate Transportation Policy and Budget Division, the House Environment and Natural Resources Committee, and the House Transportation Committee. No comments were received on the proposed conversion of the exempt rule to permanent rule. The board published a Request for Comments in the State Register on November 21, 2005. The Request for Comments was mailed on November 18, 2005 to

the advisory group members and the legislative committees previously listed. No comments were received in response to the Request for Comments.

C. Alternative Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Jim Haertel at the Minnesota Board of Water and Soil Resources, 520 Lafayette Road North, Saint Paul, MN 55155; telephone: 651-297-2906; fax: 651-297-5615; e-mail: jim.haertel@bwsr.state.mn.us. TTY users may call the board at 651-282-5332.

II. STATUTORY AUTHORITY

The board's statutory authority to adopt the rule is given in Minnesota Statutes, section 103D.537 (c).

The exempt rulemaking was authorized in the 2003 legislative session under Senate File Number 905, 3rd engrossment, at line numbers 93.26 to 94.19. The legislation revised Minnesota Statutes, section 103D.537 (b) to allow public transportation authorities to appeal watershed district permit decisions to the board and revised Minnesota Statutes, section 103D.537 (c) to authorize exempt rulemaking. The exempt rule became effective on April 12, 2004 upon publication in the State Register. The exempt rule is effective for two years from the date of publication in the State Register unless it is superseded by permanent rule according to Minnesota Statutes, section 103D.537 (c). Therefore, Minnesota Statutes, section 14.125 does not apply to this rulemaking.

In addition, the board has general rulemaking authority for implementing all its programs pursuant to Minnesota Statutes, section 103B.101, subd. 7.

Under these provisions, the Board has the necessary statutory authority to adopt the proposed permanent rule.

III. THE NEED FOR THE RULE

In addition to the requirement in Minnesota Statutes, section 103D.537 (c) that "...the board shall adopt rules governing appeals to the board...", the rule is necessary to establish uniform and proper legal procedures that ensure fair and equitable treatment to all parties for all appeals made to the board. Also, the rule is necessary to make certain the appeal record and procedures are sufficient upon review by the Court of Appeals.

IV. COMPLIANCE WITH VARIOUS STATUTORY REQUIREMENTS

A. Regulatory Analysis of Factors Required by Minnesota Statutes, section 14.131

Minnesota Statutes, section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and then give the agency's response.

(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.

As with the current exempt rule, if a proper appeal is made to the board, the proposed permanent rule will affect watershed districts, public transportation authorities, and parties that challenge watershed district rules.

Minnesota Statutes, section 103D.537 allows an appeal to be made to district court by an interested party of a watershed district permit decision, order or rule. Additionally, the statute allows an appeal to be made to the board of a watershed district rule by an interested party and of a watershed district permit decision by a public transportation authority. The appeal route to the board is less costly and faster than going to district court. Public transportation authorities and persons making appeals to the board will incur less costs than bringing appeals to district court. Watershed districts whose actions are appealed to the board will incur less costs than defending their actions in district court. Also, certain parties would prefer to bring an appeal to the board because the board is often viewed as more knowledgeable in the subject matter of these types of appeals than district court. Therefore, the beneficiaries are expected to be the same classes as those that are affected.

(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.

As with the current exempt rule, the costs the board will incur in the implementation of the rule will be for the costs of staff time and expenses of board members to process appeals. These costs will be proportional to the number and complexity of appeals made to the board. It is not possible for the board to provide a meaningful estimate of either the number of appeals that will be made to the board or of the complexity of those possible appeals.

No part of the proposed rule is anticipated to have an impact on state revenues.

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

As with the current exempt rule, there is no known method or procedure that would be less costly or less intrusive for achieving the purpose of the proposed rule. Specific legal procedures that ensure due process, which is the foundation of the proposed rule, must be strictly adhered to in order to have a decision by the board on an appeal that will be sufficient upon review by the Court of Appeals. The rules of procedure in the proposed rule are similar to procedures followed by the Minnesota Court of Appeals.

(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.

No alternative method for achieving the purpose of the proposed rule was seriously considered by the agency. Certain legal procedures and due process, which are the foundation of the proposed rule, must be strictly adhered to in order to have a decision by the board on an appeal that will be sufficient upon review by the Court of Appeals. The rules of procedure in the proposed rule are similar to procedures followed by the Minnesota Court of Appeals.

(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.

As with the current exempt rule, the costs to the board of complying with the proposed rule will be proportional to the number and complexity of appeals made to the board. It is not possible to provide a meaningful estimate of either the number of appeals that will be made to the board or of the complexity of those possible appeals.

Watershed districts will incur costs if their actions are appealed to the board, however those costs will be less than if their actions were challenged in district court. Similarly with public transportation authorities and interested parties that make an appeal to the board, costs will be incurred if they make an appeal, however the costs will be less than bringing an appeal to district court.

(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.

If the proposed rule is not adopted, the costs incurred by public transportation authorities and parties that file an appeal, and the time period for a decision, will increase if they file an appeal in district court. Similarly with watershed districts, if the proposed rule is not

adopted and an appeal is filed in district court challenging a watershed district action, the costs incurred by the watershed district and the time period for a decision will increase. In the absence of the proposed rule, the increased costs incurred by watershed districts and by public transportation authorities and parties that file an appeal in district court could be in the range of \$15,000 to \$40,000 more than filing an appeal with the board. In the absence of the proposed rule, the increased length of time for a decision on an appeal would be especially important to public transportation authorities that would have requested the expedited appeal route under the proposed rule. In cases where the expedited appeal route could not have been requested, the increased length of time for a decision on an appeal could be meaningful, such as for a road project under construction where a certain segment cannot be started due to the unresolved environmental issues. In such situations, the increased public impact, safety issues and costs could be significant.

If the proposed rule is not adopted and there is no statutory change by the legislature, the board would be required to process appeals with no rules of procedure, thereby jeopardizing uniform and proper legal procedures that ensure fair and equitable treatment to all parties for all appeals made to the board. Also, the appeal record and procedures would be much more likely to fail scrutiny upon any subsequent review by the Court of Appeals.

(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.

There are no known existing federal regulations that must be adhered to in the proposed rule. The rules of procedure in the proposed rule are similar to procedures followed by the Minnesota Court of Appeals.

B. Other SONAR Content Required by Statute

1. Performance-based rules

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

The proposed rule contains specific legal procedures that ensure due process. The procedures are similar to procedures followed by the Court of Appeals. The procedures must be strictly adhered to in order to have a decision by the board on an appeal that will be sufficient upon review by the Court of Appeals.

Consequently, this rulemaking does not offer the opportunity for adopting performance-based rules or providing procedural flexibility. Furthermore, the rules of procedure governing appeals is not a regulatory program, and hence the board has no “regulatory objectives” in this rulemaking.

2. Additional Notice

Minnesota Statutes, section 14.23, requires that the SONAR contain a description of the agency’s efforts to provide additional notice to persons who may be affected by the proposed rules or explain why these efforts were not made. The board is using the following elements to provide additional notice in this rulemaking:

- Posting on the board website. The Notice of Intent to Adopt Rules Without a Public Hearing, the proposed rule, and the SONAR will be posted on the board website. The board has notified all contacts that the board website is the official point of notification for the board.
- Mailing of the Notice of Intent to Adopt Rules Without a Public Hearing to all watershed districts in the state.
- Mailing of the Notice of Intent to Adopt Rules Without a Public Hearing, and a request to distribute the notice among their agency or association members as they see fit, to the advisory group, the Minnesota Department of Transportation, the Association of Minnesota Counties, the Minnesota County Engineers Association, the Minnesota Association of Watershed Districts, the League of Minnesota Cities, the City Engineers Association of Minnesota, and the Minnesota Association of Townships.

The above mailings of the notice will include a copy of the proposed rule, but not the SONAR because it is readily available on the board website. Further, the notice will state that copies of the SONAR are available at the cost of reproduction from the agency contact person and the notice will state its availability on the board website.

Our Notice Plan also includes giving notice required by statute. The Notice of Intent to Adopt Rules Without a Public Hearing will be published in the State Register along with a copy of the proposed rule, as approved by the Revisor of Statutes. The notice will be given to the Legislature as required by Minnesota Statutes, section 14.116.

3. Consultation with Department of Finance on Local Government Unit Impact

As required by Minnesota Statutes, section 14.131, the board has consulted with the Commissioner of Finance. The Commissioner was furnished copies of the documents furnished to the Governor’s Office for review and approval by the Governor’s Office prior to the board publishing the Notice of Intent to Adopt. The copies were delivered on January 31, 2006. The documents included the Governor’s Office Proposed Rule and

SONAR Form, the January 24, 2006 Revisor's draft of the proposed rule, and the January 31, 2006 draft SONAR.

4. Section 14.127 Analysis, Cost of Complying for Small Business or City

Section 14.127 (enacted in 2005) of the Administrative Procedures Act requires an agency to determine if the cost of complying with proposed rules in the first year after the rules take effect will exceed \$25,000.00 for any "small business" (less than 50 full-time employees) or "small city" (less than 10 full-time employees). Although this analysis is not required to be included in the SONAR, the board has chosen to place it here, as it is related to the information provided under sections IV.A.5 and IV.A.6 above.

The board has determined that the rule proposed will NOT result in an increased cost of more than \$25,000 for any small business or small city in the first year after enactment. As described in sections IV.A.5 and IV.A.6 above, the proposed rule will result in decreased costs when compared to making an appeal to district court. Further, if an appeal were made to the board without a rule in place, the costs would be almost identical to the costs if the proposed rule is enacted.

V. RULE-BY-RULE ANALYSIS OF REASONABLENESS

8415.0100 PURPOSE

Minnesota Statutes, section 103D.537 allows an interested party to make an appeal of a watershed district rule to the board. Also, the statute allows a public transportation authority to make an appeal of a watershed district permit decision to the board and gives them the option of requesting an expedited hearing. Appeals made to the board under the statute are governed by the procedures established in the proposed rule.

8415.0110 DEFINITIONS.

Subpart 1. Scope. The terms as defined have the meanings given them. Some terms are defined in statute and are included in the proposed rule for consistency and as a convenience to the reader.

Subp. 2. Board. The Board of Water and Soil Resources is authorized in Minnesota Statutes, section 103B.101.

Subp. 3. Day. Several sections of the proposed rule have requirements for how many days an act must take place by. This definition explains how to count the days.

Subp. 4. Dispute resolution committee. The Dispute resolution committee is authorized in Minnesota Statutes, section 103B.101, subd. 10.

Subp. 5. Executive director. The Board's executive director is authorized in Minnesota Statutes, section 103B.101, subd. 4.

Subp. 6. Person. The proposed rule must define who has standing to file an appeal of a rule made by a watershed district. The definition is extremely broad in scope.

Subp. 7. Public transportation authority. The proposed rule must define who has standing to file an appeal of a permit decision made by a watershed district. All state, county, city and town road authorities are included in the definition.

8415.0120 APPEALS.

Subpart 1. Appeal of rules.

A. Minnesota Statutes, section 103D.537 (a) allows an interested party to appeal a watershed district rule to the board. The statute uses the term "party" whereas the proposed rule uses the term "person" because there is a definition of "person" in Minnesota Statutes, section 103D.011, however there is not a definition of "party". The definition of "person" in the statute does not include political subdivisions. The definition of "person" in the proposed rule includes political subdivisions and any other public or private entities, thereby providing wide access to those desiring to file an appeal.

No time period to file the appeal is specified because no time period is given in Minnesota Statutes, section 103D.537.

B. In addition to submittal to the executive director of the board the petition to appeal, it is necessary for a copy of the petition to be provided to the watershed district promptly in order to allow the watershed district sufficient time to prepare the record and its response to the appeal.

C. Subpart 3 sets forth the appeal procedures that must be followed. Minnesota Statutes, section 103D.537 does not allow for an expedited appeal hearing for appeals of watershed district rules, therefore the procedures in subpart 3 must be followed. Appeals of watershed district rules would oftentimes be too involved to process in an expedited manner.

Subp. 2. Appeal of permit decisions.

A. Permit decisions made by watershed districts involving public transportation authorities must be noticed within ten days following the decision because sufficient time must be given public transportation authorities to file an appeal. Minnesota Statutes, section 103D.537 (a) requires an appeal of a permit decision be made within 30 days of the decision.

B. In addition to submittal to the executive director of the board the petition to appeal, it is necessary for a copy of the petition to be provided to the watershed district promptly in order to allow the watershed district sufficient time to prepare the record and its response to the appeal. The timing is especially critical if an expedited appeal hearing is requested.

C. Minnesota Statutes, section 103D.537 (b) requires inclusion of an option that allows a public transportation authority to request an expedited appeal hearing for appeals of watershed district permit decisions. The procedures in subpart 3 must be followed unless an expedited appeal hearing is requested. If an expedited appeal hearing is requested the procedures in subpart 4 must be followed.

Subp. 3. Board appeal procedures.

A. The board or its dispute resolution committee or executive director have 30 days upon receipt of a petition to appeal to make a decision on accepting the petition. The 30-day time period is justified by the need to research the reasons for the filing of a petition before a decision is made to accept the petition. Certain factors are specified that allow a petition to be denied in order to curtail frivolous appeals and untimely appeals.

B. A petition to appeal may be remanded if a local appeal route is available, if a public hearing was not held, or if the record is not adequate. This provision is necessary to not unduly waste time with the board's appeal process when additional work is required at the local level before an appeal is ripe for hearing by the board's dispute resolution committee.

Under remand, a 60-day time period is given the watershed district to make a decision, unless the remand specifies a longer period of time due to unique circumstances. The 60-day time period is a standard time period for making decisions under Minnesota Statutes, section 15.99.

C. When a petition to appeal is granted, the board's dispute resolution committee hears the appeal, brings a recommendation to the full board, and the full board makes a decision within 60 days of the hearing. The 60-day time period is necessary because the full board no longer meets monthly due to fiscal constraints and it is a standard period of time for making decisions under Minnesota Statutes, section 15.99.

Interveners are allowed for appeals involving rules because the effects and impacts of a watershed district rule can be widespread. For appeals involving permit decisions, interveners are allowed only if they have been given intervener status by the watershed district before the permit decision because a permit decision concerns a specific project at a fixed location.

D. When a petition to appeal is granted, the watershed district must forward the record within 30 days because the appeal proceedings must proceed in a timely manner, yet sufficient time must be given to produce the record. A time period of at least 30 days for giving notice of the hearing is necessary to allow adequate time for preparation by the parties. Written and oral argument presentation and having a hearing are common procedures in similar legal proceedings. It is necessary to allow an appeal to be remanded if certain procedural issues exist.

E. For appeals of watershed district rules, the traditional rational-basis test of reasonableness is the standard of review that is applied, as long as no procedural errors prejudicial to a party were made. This is an established standard of review that courts of law apply in similar matters.

F. For appeals of watershed district permit decisions, the substantial evidence test is the standard of review applied to the findings of fact, as long as the watershed district correctly applied the law, watershed district rule and the watershed district's board-approved watershed management plan to the facts, and if no procedural errors prejudicial to a party were made. This is an established standard of review that courts of law apply in similar matters.

The board can affirm the decision, reverse it, amend it, or remand it with instructions for further proceedings. All of these types of actions are consistent with actions a court of law can take.

Subp. 4. Expedited board appeal procedures.

A. A written brief must accompany a petition to appeal when an expedited appeal hearing is requested because a hearing must be held within 30 days of receipt of the petition, therefore time is of the essence. The reasons the appellant is requesting an expedited appeal hearing must be included in the written brief that accompanies the petition because an expedited process should be used only when circumstances justify a speedy decision. The expedited process, because of its time constraints, places an extra burden on all involved and does not allow as much scrutiny of the matter or thoroughness of review as the standard process under subpart 3 does. The written brief must detail the items in dispute to inform the watershed district and the board of the exact subject of the appeal.

Copies of the petition and written brief must be provided promptly to the watershed district to allow the watershed district as much time as possible under the expedited process to prepare the record and its response.

B. Interveners are allowed only if they have been given intervener status by the watershed district before the permit decision because a permit decision concerns a specific project at a fixed location. This is similar to subpart 3, item C.

C. The watershed district is allowed as much time as possible, given the 30-day time limit to hold a hearing, to prepare and submit the record and a written brief. Because of the 30-day time limit, no further written submittals are allowed in most cases because there simply is not sufficient time.

D. Minnesota Statutes, section 103D.537 (b) requires a hearing be held on an expedited appeal within 30 days of receiving the petition. The standard of review applied is the same as subpart 3, item F. If there is not sufficient basis to grant the request to expedite the appeal, then the procedures in subpart 3 apply. The expedited process, because of its time constraints, places an extra burden on all involved and does not allow as much scrutiny of the matter or thoroughness of review as the standard process under subpart 3 does. The expedited process will be used only when justified.

VI. CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

Dated: 1/31/06

/s/ Ronald Harnack
Executive Director
Minnesota Board of Water and Soil Resources