STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1387

Minnesota Deer Farmers Association,
Petitioner,

vs.

Minnesota Department of Natural Resources,
Respondent.

Filed August 15, 2022
Rule declared valid in part; petition dismissed in part
Reyes, Judge

Minnesota Department of Natural Resources

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Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Wheelock, Judge.

SYLLABUS

Under Minn. Stat. § 97A.045 (2020) and Minn. Stat. § 84.027, subd. 13 (2020), the commissioner of the Minnesota Department of Natural Resources has the statutory authority to adopt an expedited emergency rule temporarily prohibiting the movement of farmed white-tailed deer in Minnesota to prevent the spread of disease in wild deer.

OPINION

REYES, Judge

In this declaratory-judgment action, petitioner Minnesota Deer Farmers Association (MDFA) challenges the validity of an expedited emergency rule adopted by respondent Minnesota Department of Natural Resources (DNR) temporarily prohibiting the movement of farmed white-tailed deer in Minnesota. MDFA argues that (1) the rule exceeded the DNR's statutory authority; (2) the DNR adopted the rule without compliance with statutory rulemaking procedures; and (3) the rule violated constitutional due process. Because we conclude that the DNR had the statutory authority to adopt the rule, we declare the rule valid in part. But because we conclude that MDFA's procedural-compliance and due-process challenges are moot, we dismiss MDFA's petition as to those issues.

FACTS

This action involves the DNR's efforts to prevent Minnesota's wild white-tailed deer population from becoming infected with chronic wasting disease (CWD). CWD is a neurodegenerative disease found in cervids, including wild and farmed deer.[1] CWD damages an infected animal's brain and is always fatal. Researchers believe that CWD can be transmitted from one animal to another both directly through physical contact and indirectly through environmental contamination. Because CWD has a long incubation period, it does not usually cause outward symptoms until the late stages of the disease and

[1] "Cervids" is the less formal term for animals belonging to the family Cervidae, which includes various species of deer, elk, moose, caribou, and reindeer. *See* Minn. Stat. § 35.153, subd. 2 (2020).

can be diagnosed only by testing tissues from a dead animal, a CWD-infected deer may infect other animals long before it dies and its disease is discovered. CWD is believed to spread through the human movement of live cervids, the movement of hunter-harvested carcasses from one place to another, and the natural movements of cervids.

In Minnesota, two state agencies share responsibility for cervid management and CWD prevention. Generally, the DNR is responsible for protecting and managing wild cervids, while the Minnesota Board of Animal Health (BAH) regulates farmed cervids. *See* Minn. Stat. § 97A.045, subd. 1(a) (establishing DNR's responsibility to protect wild animals); Minn. Stat. § 17.452, subd. 4 (2020) ("Farmed Cervidae are livestock and are not wild animals for purposes of game farm, hunting, or wildlife laws."); Minn. Stat. § 35.03 (2020) (establishing BAH's obligation to protect domestic animals); Minn. Stat. § 35.155, subd. 13 (2020) (stating that BAH must adopt rules to implement section 35.155 governing farmed cervids). In June 2021, the legislature amended Minnesota Statutes section 35.155, which provides for the regulation of farmed cervids, to give the DNR concurrent authority with the BAH to regulate farmed white-tailed deer. 2021 Minn. Laws 1st Spec. Sess. ch. 6, art. 2, § 17, at 1283-84 (codified at Minn. Stat. § 35.155, subd. 14 (Supp. 2021)).

In September 2021, the DNR learned that a deer farm in Taylor County, Wisconsin, had sent at least 387 CWD-exposed farmed deer to Minnesota and five other states since 2016. Five of the 387 deer had been shipped into Minnesota to three different farms. The BAH, which had been notified of the exposure a month earlier, had already located and identified those five deer. Of those five deer, two had been shipped back to Wisconsin, and three were still on a Minnesota farm. All five deer that had been shipped into

Minnesota were euthanized and tested negative for CWD or were quarantined and remain in quarantine.

In response to its discovery of potential CWD exposure from the Taylor County deer, the DNR adopted Minnesota Rule 6232.0550 (2021) (the rule), an expedited emergency rule temporarily prohibiting the movement of farmed white-tailed deer in Minnesota: "[M]oving white-tailed deer for any reason to another location . . . is prohibited. Both importation of farmed white-tailed deer into Minnesota and intrastate movement of farmed white-tailed deer within Minnesota are included in this temporary prohibition." Minn. R. 6232.0550, subp. 2.[2] The rule identified two exceptions: (1) deer could be transported through the state or from Minnesota to an area outside of the state if the deer stayed in the shipping container at all times and (2) deer could be transported to a slaughtering establishment for slaughter. *Id.*, subp. 3. The rule became effective immediately upon its publication on October 11, 2021, and was set to expire in April 2023. 46 Minn. Reg. 433 (Oct. 11, 2021).

On October 21, 2021, MDFA, a nonprofit corporation whose members own and operate deer farms in Minnesota, filed a declaratory-judgment petition with this court, challenging the validity of the rule.

[2] The DNR had previously adopted two similar expedited emergency rules prohibiting the movement of farmed white-tailed deer in Minnesota. The DNR adopted its first expedited emergency stop-movement rule in December 2019 after the discovery of CWD in farmed deer in Douglas County. 44 Minn. Reg. 713-14 (Dec. 23, 2019). That rule expired in January 2020. *Id.* at 714. In June 2021, after discovering a CWD outbreak in Beltrami County, the DNR adopted another expedited emergency stop-movement rule, which expired at the end of July 2021. 45 Minn. Reg. 1271-72 (June 1, 2021).

On December 6, 2021, the DNR rescinded the rule, stating that it had learned that it would be impossible to obtain epidemiological information regarding the status of all 387 deer moved from the Taylor County farm. 46 Minn. Reg. 690 (Dec. 6, 2021). Instead of continuing the rule, the DNR stated that it would proceed by "work[ing] in cooperation with the BAH to strengthen rules pertaining to interstate and intrastate movements of farmed cervids to further reduce risk of CWD spread into wild populations." *Id.*

The DNR then moved to dismiss MDFA's petition, arguing that its recission of the rule rendered MDFA's challenge moot. We denied the DNR's motion after concluding that the principal issue of the DNR's authority to adopt an expedited emergency rule prohibiting the movement of farmed white-tailed deer is not moot because it is capable of repetition yet evading review.

ISSUES

I. Did the DNR have the statutory authority to adopt an expedited emergency rule temporarily prohibiting the movement of farmed white-tailed deer in Minnesota to prevent the spread of disease in wild deer?

II. Are MDFA's procedural-compliance and due-process arguments moot?

ANALYSIS

An interested party may challenge the validity of an agency rule when it appears that the rule interferes with or impairs the legal rights or privileges of the petitioner. Minn. Stat. § 14.44 (2020); *see also Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. App. 2009) (stating that, under Minn. Stat. § 14.44, "this court has original jurisdiction to determine the validity of an agency's rules"

(quotation omitted)). We will declare a challenged rule invalid if it "exceeds the [agency's] statutory authority," "was adopted without compliance with statutory rulemaking procedures," or "violates constitutional provisions." Minn. Stat. § 14.45 (2020).

I. The DNR had the statutory authority to adopt an expedited emergency rule temporarily prohibiting the movement of farmed white-tailed deer in Minnesota to prevent the spread of disease in wild deer.

MDFA argues that the DNR lacked the statutory authority to adopt an expedited emergency rule prohibiting the movement of farmed white-tailed deer. We disagree.

"Administrative agencies are creatures of statute and they have only those powers given to them by the legislature." *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010). "An agency's statutory authority may be either expressly stated in the legislation or implied from the expressed powers." *Id.* A rule that exceeds the agency's statutory authority is ineffective and does not have the force of law. *Stasny by Stasny v. Minn. Dep't of Com.*, 474 N.W.2d 195, 198 (Minn. App. 1991), *rev. dismissed* (Minn. Oct. 11, 1991). "Whether an administrative agency has acted within its statutory authority is a question of law." *Hubbard*, 778 N.W.2d at 318. We do not "defer to the agency's [own] determination of [its] authority" when deciding whether the legislature has granted an agency the authority to take the challenged action. *Id.* at 318 n.4.

When interpreting a statute, we first examine the language of the statute to determine whether it is ambiguous because it is "subject to more than one reasonable interpretation." *Tapia v. Leslie*, 950 N.W.2d 59, 61 (Minn. 2020). If the statute is not ambiguous, "we apply the statute according to its plain meaning." *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 177 (Minn. 2020) (quotations omitted). In determining a statute's plain

meaning, we construe words and phrases "according to rules of grammar" and "their common and approved usage." *Id.* (quotations omitted). We interpret a statute as a whole, harmonizing and giving effect to all its parts. *Id.*

In providing notice of the rule, the DNR stated that its statutory authority to adopt the rule arose under various provisions of chapter 97A, including Minn. Stat. § 97A.045, subds. 1 and 11, and Minn. Stat. § 84.027, subd. 13.

Section 97A.045, subdivision 1, sets forth the DNR's general powers and duties. It states, in relevant part:

> (a) The commissioner shall do all things the commissioner determines are necessary to preserve, protect, and propagate desirable species of wild animals. . . .
>
> (b) Notwithstanding chapters 17 and 35[3], the commissioner, in consultation with the commissioner of agriculture and the executive director of the [BAH], *may capture or control nonnative or domestic animals* that are released, have escaped, or are otherwise running at large and causing damage to natural resources or agricultural lands, *or that are posing a threat to wildlife, domestic animals, or human health*.

Minn. Stat. § 97A.045, subd. 1(a)-(b) (emphasis added).

We conclude that the statute is unambiguous. Section 97A.045, subdivision 1(b), authorizes the DNR to "control nonnative or domestic animals . . . that are posing a threat to wildlife, domestic animals, or human health." The plain language of that provision authorizes the DNR to control domestic animals, including farmed cervids, when those domestic animals are posing a threat to wildlife, domestic animals, or human health.

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[3] Chapter 17 governs the Department of Agriculture, and chapter 35 governs the BAH.

MDFA urges us to take a narrower reading of the statute, arguing that, under subdivision 1(b), the DNR's power to control domestic animals applies only to domestic animals that "are released, have escaped, or are otherwise running at large." But MDFA's interpretation is inconsistent with the structure of the sentence, which states that the commissioner may "control nonnative or domestic animals *that are* released, have escaped, or are otherwise running at large and causing damage to natural resources or agricultural lands, *or that are* posing a threat to wildlife, domestic animals, or human health." Minn. Stat. § 97A.045, subd. 1(b) (emphasis added). The use of the disjunctive "or" and the phrase "*or that are*" indicates that the final clause is separate from, *and in addition to*, the clause establishing the DNR's authority to control released, escaped, and at-large domestic animals. *See Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 552 (Minn. 2016) (stating that word "or" should be given its ordinary meaning as disjunctive and denotes legislature's intent to separate one clause from the next).

MDFA also argues generally that the DNR has no authority to regulate farmed deer under chapter 97A because the legislature gave the BAH exclusive regulatory power over farmed cervids. While it is true that the BAH has general regulatory authority over farmed cervids, MDFA cites no authority supporting its assertion that statutes must be construed to avoid *any* concurrent or overlapping regulatory jurisdiction. And we have recognized before that the DNR may share concurrent regulatory authority with other entities. *See State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs*, 799 N.W.2d 619, 628 (Minn. App. 2011) (recognizing that regulatory authority of county and DNR derived from two chapters of Minnesota Statutes and commending district court for

fashioning remedy "consistent with and respectful of the concurrent regulatory powers of the county and the DNR"). MDFA cites *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 486 (Minn. 1995), for the proposition that an agency is not permitted to adopt rules that conflict with another regulation. But *Hirsch* merely states and applies the axiomatic principle that an agency may adopt regulations *implementing* the language of a statute but cannot adopt a regulation that *conflicts* with the enabling statute. *Id.* And, here, section 97A.045, subdivision 1(b), explicitly states that, "*[n]otwithstanding* chapters 17 and 35," which includes the statute giving the BAH authority to regulate farmed cervids, the DNR "may" control domestic animals when they are "posing a threat to wildlife." In other words, despite the BAH's general authority to regulate farmed cervids, section 97A.045, subdivision 1(b), explicitly recognizes that the DNR may *also* exercise control over domestic animals in certain limited situations. *See Black's Law Dictionary* 1281 (11th ed. 2019) (defining "notwithstanding" as meaning "despite" or "in spite of"). Contrary to MDFA's assertion that the legislature delegated *exclusive* authority over farmed cervids to the BAH, the plain language of the statute confirms that, when a domestic animal poses a threat to wildlife, the DNR also has the authority to respond.

MDFA further argues that the authority to take *emergency* measures related to farmed-deer diseases resides solely with the BAH, which has the power to request an emergency declaration and establish quarantine zones under Minn. Stat. § 35.0661 (2020). But again, while we acknowledge that the BAH has the authority to take emergency measures under section 35.0661, we are not persuaded that the legislature's grant of emergency disease-response powers to the BAH necessarily means that the legislature

could not *also* grant authority to the DNR to adopt emergency rules regarding farmed deer to prevent or control wildlife disease.

The plain language of section 84.027, subdivision 13, establishes that the legislature *did*, in fact, grant the DNR that authority. Section 84.027, subdivision 13(a), gives the DNR the authority to adopt emergency rules through certain statutory provisions, including various provisions of chapter 97A:

> (a) The commissioner of natural resources may adopt rules under sections 97A.0451 to 97A.0459 [authorizing emergency rules] and this subdivision that are authorized under:
>
> (1) *chapters 97A*, 97B, and 97C . . . *to prevent or control wildlife disease*[.]

Minn. Stat. § 84.027, subd. 13(a)(1) (emphasis added).

The statute allows the DNR to adopt an emergency rule when authorized under chapter 97A "to prevent or control wildlife disease." The DNR is also explicitly authorized under section 97A.045, subdivision 11(c), to "*prevent or control wildlife disease* in a species of wild animal in the state *by . . . emergency rule adopted under section 84.027, subdivision 13*." (Emphasis added.) And finally, section 84.027, subdivision 13(b), authorizes the DNR to adopt an emergency rule through an expedited process "[i]f conditions exist that do not allow the commissioner to comply with" emergency rulemaking procedures.

In sum, the legislature directed the DNR in section 97A.045, subdivision 1(a), to "do all things the commissioner determines are necessary to preserve, protect, and propagate desirable species of wild animals." In furtherance of that broad mandate, the

DNR has authority under section 97A.045, subdivision 1(b), to control domestic animals, including farmed deer, that pose a threat to wildlife. And it has authority under section 97A.045, subdivision 11(c), and section 84.027, subdivision 13, to prevent or control wildlife disease by adopting an expedited emergency rule. We therefore hold that, under section 97A.045 and section 84.027, subdivision 13, the DNR has the statutory authority to adopt a temporary expedited emergency rule regulating the movement of farmed white-tailed deer in Minnesota to prevent the spread of disease in wild deer.

Because we conclude that section 97A.045 and section 84.027, subdivision 13, are not ambiguous, we do not address the parties' other arguments based on legislative history. *See State v. Kirby*, 899 N.W.2d 485, 492 (Minn. 2017) ("[L]egislative history is relevant only if the statute is ambiguous."). For the same reason, we do not, as the parties urge, apply the doctrine of in pari materia and construe sections 97A.045 and 84.027, subdivision 13, together with section 35.155. *See State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017) (noting that in pari materia is extrinsic canon that applies only to ambiguous statutes). We also need not address the parties' arguments regarding the DNR's statutory authority to adopt the rule under section 35.155.

II. MDFA's procedural-compliance and due-process arguments are moot.

MDFA also urges us to declare the rule invalid because (1) the DNR adopted the rule without compliance with statutory procedures and (2) the rule violated constitutional due process. We decline to do so because those issues are moot.

Generally, we will dismiss an action as moot "when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean v. City of*

Winona, 868 N.W.2d 1, 5 (Minn. 2015). There are two discretionary exceptions to the general rule requiring dismissal of moot actions: first, "when an issue is capable of repetition, yet will evade judicial review," *State v. Brooks*, 604 N.W.2d 345, 347 (Minn. 2000); second, when a case is "functionally justiciable" and of "statewide significance," *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984).

After the DNR rescinded the rule in December 2021, we concluded that we would not dismiss MDFA's declaratory-judgment petition because the capable-of-repetition-yet-evading-review exception applied to the principal issue of whether the DNR had the statutory authority to issue an expedited emergency rule prohibiting the movement of farmed white-tailed deer. But we also noted that, "[t]o the extent that any of the issues raised by MDFA turn on the specific factual circumstances underlying [the rule], those issues may not be capable of repetition."

Having addressed the principal issue of the DNR's statutory authority, we conclude that the remaining issues raised by MDFA do indeed turn on the specific factual circumstances underlying the rule, are not capable of repetition, and are therefore moot. MDFA's procedural-compliance argument is based on its contention that the detection of CWD in the Taylor County herd did not pose a risk immediate enough to require the DNR to adopt an expedited emergency rule, rather than an emergency rule. And similarly, the MDFA's due-process argument relies on its assertion that the rule was not rationally related to the DNR's purpose of preventing CWD spread because the BAH had already identified and quarantined the five directly exposed deer by the time the DNR adopted the rule. MDFA's arguments on those issues depend entirely upon whether the Taylor County herd

exposure posed a sufficiently serious and urgent risk to authorize the DNR to impose a statewide expedited emergency stop-movement rule. But we are not persuaded that a factually similar event is likely to reoccur in the future. Nor are we persuaded that the DNR is likely to respond again with the same lengthy statewide stop-movement ban, because it acknowledged when rescinding the rule that a comprehensive multistate epidemiological investigation is impossible. The issues based on the factual circumstances underlying MDFA's remaining arguments are therefore not capable of repetition. *See In re McCaskill*, 603 N.W.2d 326, 328 (Minn. 1999) (declining to apply capable-of-repetition-yet-evading-review exception when appellant's narrow issue of sufficiency of evidence in particular civil commitment would not arise again). Because MDFA's remaining arguments are moot, we decline to address them and dismiss its declaratory-judgment petition as to those issues.

DECISION

The DNR had the statutory authority under section 97A.045 and section 84.027, subdivision 13, to adopt an expedited emergency rule temporarily prohibiting the movement of farmed white-tailed deer in Minnesota to prevent the spread of disease in wild deer. MDFA's remaining arguments regarding the rule's validity are moot.

Rule declared valid in part; petition dismissed in part.