

April 26, 2021

The Honorable James R. Mortenson
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

Re In the Matter of the Proposed Exempt Rules Governing Farmed Cervidae, Minnesota Board of Animal Health, Request for Review and Approval of Exempt Rules Under Minnesota Statutes, Section 14.388; Revisor's ID Number R-04699; *Explanation of Why the Rule Amendment Meets the Requirements of the Good Cause Exemption*

Dear Judge Mortenson:

The Minnesota Board of Animal Health Board (Board) requests to amend Minnesota Rule 1721.0420, Subpart 3, under the Good Cause Exemption authority found in Minnesota Statutes, Section 14.388, Subdivision 1(1), to address a serious threat to public health, safety, or welfare.

Board rules provide that when Chronic Wasting Disease (CWD) is identified in the wild, the ten mile area surrounding the infection is designated as a CWD endemic area. Minn. R. 1721.0420, Subp. 3. Farmed Cervidae within the CWD endemic area are subject to movement restrictions. *Id.* Currently, this rule provides for an exception to the movement restriction and allows for farmed Cervidae herds located in the CWD endemic areas to be excluded from the CWD endemic area if the herd owner prevents commingling. Minn. R. 1721.0420, Subp. 3(A) & (B). Based on evidence the Board has gathered from its most recent epidemiological investigation of CWD-positive farmed Cervidae herds, the Board believes the exceptions in Minn. R. 1721.0420, Subp. 3(A) & (B), are inadequate. Specifically, the exception allowing movement of farmed Cervidae if the farm has prevented commingling does not effectively prevent all routes of exposure to farmed Cervidae from CWD infected wild cervids, and allows for apparently healthy but CWD infected and contagious farmed cervids to be legally moved to other locations in Minnesota. The Board believes it is now unreasonable for the movements allowed under the exceptions to the rule to continue. In addition, since March 2019 the Board has designated all locations within fifteen miles of a confirmed case of CWD in the wild as a CWD endemic area (discussed on page 4, below). The Board believes the rule language regarding the radius of a CWD

endemic area also needs to be changed through the Good Cause Exemption process to give interested parties notice that the radius of a board designated CWD endemic area is fifteen miles, and because all farmed Cervidae premises located within a fifteen mile radius of a confirmed case of CWD will be impacted by the elimination of the exceptions under the current rule.

The Board believes good cause exists to make these amendments through the Good Cause Exemption rulemaking process because the time required to amend this rule through the normal rulemaking process is contrary to the public interest. Potentially CWD infected and contagious animals will continue to legally move during the time it takes the Board to complete its normal rulemaking and amend this rule, posing a serious and immediate threat to the public health, safety, or welfare.

Regulatory background

The statutory mission of the Minnesota Board of Animal Health (Board) is to protect the health of the state's domestic animals. Minn. Stat. §35.03. The Board does this through education and cooperation with veterinarians, producers, owners and communities, and the Board's slogan is "**Healthy animals** for healthy people and communities." Among the domestic animals the Board is charged with protecting are farmed Cervidae. "Cervidae" means animals that are members of the family Cervidae and includes, but is not limited to, white-tailed deer, mule deer, red deer, elk, moose, caribou, reindeer, and muntjac.

Chronic Wasting Disease

Chronic Wasting Disease (CWD) is a disease of deer and elk caused by an abnormally shaped protein, called a prion, that can damage brain and nerve tissue. The disease is always fatal. The disease is most likely transmitted from one animal to another through shedding of abnormal prions in saliva, feces, urine, and other bodily fluids or tissues. CWD is a slow and progressive disease without any known treatment or vaccine. CWD affects farmed and wild Cervidae alike.

Scientific research has documented that CWD prions remain infectious in the environment for a significant amount of time. Prions can be transferred by scavengers, including birds and carnivores, that ingest food containing prions. Prions can be moved with crops harvested from cropland contaminated with feces or saliva containing CWD prions. Prions may be moved with dust particles or blowing soil and can attach to soil particles in water.

Testing methods currently available to detect CWD infection in farmed Cervidae is limited. The primary approved method of testing farmed Cervidae is the collection of brain stem and lymph node tissue from a dead animal for histopathological examination. There is no approved, readily available test for live animals to determine if they are infected with CWD. Lack of availability of live animal testing modalities has proven problematic as CWD is a chronic disease and infected, contagious cervids may appear healthy for months to more than a year before showing any outward signs of disease and

dying.

The multiple potential routes of CWD transmission to farmed Cervidae from infected wild deer, and the limited testing methods available to detect CWD in live animals, allows for outwardly healthy animals that are contagious and infected with CWD to be moved to uninfected farmed Cervidae herds, as implicated by recent detections of CWD in two geographically distant farmed Cervidae herds.

Current Minnesota Rules

Current rules allow for legal movement of farmed Cervidae from the CWD endemic area so long as a herd had been “maintained in such a way that commingling of farmed Cervidae and wild Cervidae has been prevented.” Minn. R. 1721.0420, Subp. 3(A) & (B). Recent data demonstrates that this exception does not adequately mitigate the spread of CWD or protect farmed Cervidae in a CWD endemic area from exposure to CWD. When these rules were promulgated in 2013, the exception was premised on CWD being spread through commingling (i.e., physical, nose to nose contact) between farmed and wild Cervidae. Since that time, as discussed above, the scientific research on CWD has demonstrated that exposure to CWD through prevention of commingling is more complicated than previously thought. Until all mechanisms for preventing commingling are understood, there should be no exceptions to the current rule and the Board believes that continuing to allow farmed Cervidae from CWD endemic areas to move under this rule is neither reasonable nor responsible. It only takes one infected animal to transmit CWD to another part of the state. Additionally, it only takes one infected animal, moved into another herd, to require depopulation of that herd. Based on the current evidence regarding the latest transmission of CWD, allowing any farmed Cervidae to move from a CWD endemic area to another area in the state is not reasonable and presents a very serious and immediate threat to Minnesota’s public health, safety, or welfare.

The Board requests to amend Minnesota Rule 1721.0420, Subpart 3, under the Good Cause Exemption authority found in Minnesota Statutes, Section 14.388, Subdivision 1(1), to address this serious threat to public health, safety, or welfare.

Recent Detection of CWD Positive Farmed Cervidae Premises

The impetus for the Board making our current request to amend this rule through the Good Cause Exempt process, and why the Board believes utilizing this process is necessary to address a serious and immediate threat, is based on very recent evidence we have gathered from the April 2021 detections of CWD in two farmed Cervidae herds. A single Winona County herd sent white-tailed deer into a herd in Houston County in October 2019, and into a herd in Beltrami County herd in September 2019. The Houston County herd detected CWD in one of the source herd animals in October 2020, one year following movement from the Winona County herd, and after the animal died and was tested for CWD. The herd was depopulated earlier this year. The Beltrami County herd detected CWD in one of the

source herd animals earlier this month, one and a half years following the movement from the Winona County herd, after that animal died and was tested for CWD.

Although the Winona County source herd had been double fenced since 2015 (and thus exempt from movement restrictions under Minn. R. 1721.0420, Subps. 3(A) & (B), on the grounds it prevented commingling between its farmed Cervidae inside the fence and wild Cervidae outside the fencing), it has been surrounded by CWD infection in the wild deer population since early 2019. Two herds in opposite parts of the state finding CWD infection in animals transferred from the Winona County herd is strong evidence that the animals were infected with CWD before they moved from the Winona County herd. The chronic nature of this disease can be demonstrated by the amount of time it took for the animals moved to the Houston County and Beltrami County herds to die.

All three producers were compliant with the legal regulations for possessing farmed Cervidae, ruling out compliance as a risk factor for any of these herd's exposures to CWD. Currently, the primary risk factor for exposure of the Winona County herd to CWD is from CWD infection in wild deer outside the fence. This disease does not quickly cause clinical signs, and, in fact, may take months to years to manifest itself as it was a year after the animal moved to the Houston County herd before it died and almost one and a half years after the animal moved to the Beltrami County herd when it died.

Increase CWD Endemic Area from “All Locations Within 10 Miles” to “All Locations Within 15 Miles”

The current rule states, “[i]f the board determines that CWD is endemic in the state, all locations within ten miles of a confirmed case of CWD in wild Cervidae in the state must be designated as part of the endemic area. The board shall designate larger geographic areas of the state as part of a CWD endemic area if necessary to prevent the spread of CWD.” In March 2019 the Board’s five member citizen board exercised its authority under this rule and increased the ten mile radius to fifteen miles as necessary to prevent the spread of CWD. Since March 2019 Board designated CWD endemic areas encompass all locations within fifteen miles of a confirmed case of CWD in the wild.

This change was based on a research finding from the Minnesota Department of Natural Resources (DNR) following and documenting average daily movements of radio-collared white-tailed deer in Southeast MN. The DNR learned from this study that wild deer can range farther than a ten mile radius circle in their average daily movements. On average, collared deer traveled approximately thirteen miles, and some deer traveled much further including a buck traveling 54 miles and a doe setting up an adult range after traveling 77 miles. This means that CWD infected wild cervids could range over a wider area than previously understood and expose farmed Cervidae herds with their average daily movements. Board staff determined that an area with a fifteen mile radius encompasses most of that movement and recommended the board members approve expanding the minimum distance required for a Board-determined CWD Endemic area from ten to fifteen miles due to this concern, which they did.

With the Board's Good Cause Exemption proposed rule amendment, the Board is officially putting into rule language what has been the Board's practice since its board members' decision in March 2019. This practice has determined the extent of each CWD Endemic area in place today and the number of farmed Cervidae herds that are operating within this area and that will be impacted by the Good Cause Exemption rule change. Amending the current rule language to include all locations within "15 miles" is necessary in this Good Cause Exemption process in order to include all of the farmed Cervidae premises currently located in a Board-determined CWD endemic area that will be affected by the elimination of the exclusion in this rule, and to give interested parties notice that the radius of a CWD endemic area is fifteen miles.

The Public Interest Supports the Rule Being Amended Through the Good Cause Exempt Rulemaking Process

The recent detection of CWD in the Beltrami County farmed Cervidae herd not only affects farmed Cervidae producers and the health of farmed Cervidae herds, it is also a broader public welfare concern.

This Beltrami County herd is located within the boundaries of Minnesota's 1855 Ceded Lands. In the Ceded Territories within Minnesota, the tribes retained their rights to hunt, fish, and gather. For many tribal communities, wild venison is an important food source. Although at this time there is no evidence that CWD is a zoonotic disease¹, health officials advise people not to eat meat from a CWD-infected animal.

With each CWD positive farmed Cervidae herd, the DNR implements a plan to conduct CWD testing of hunter harvested white-tailed deer to a certain level within at least 15 miles of the positive farmed Cervidae herd for three sequential hunting seasons to determine if CWD is present in the wild deer population around the herd. DNR staff gave a presentation to the House Environmental Committee hearing on April 19, 2021, that estimated the cost to the DNR for surveillance around the Beltrami County herd will be \$175,890.

The citizens of Minnesota have an interest in a healthy livestock population, and in having a healthy wild deer population. White-tailed deer are on both sides of the fence and are equally susceptible to CWD. The Minnesota legislature has spoken to this issue as, under Minn. Stat. §35.155, CWD-positive farmed Cervidae herds should be removed from the landscape. The Board is charged with enforcing this statute. The detection of CWD in the Beltrami County herd is to date the furthest north in the state that CWD has been detected. Through this Good Cause Exemption rulemaking process, the Board

¹ A zoonotic disease is an infection or disease that is transmissible between animals and humans. *Merriam-Webster.com*. 2021. <https://www.merriam-webster.com> (23 April 2021).

hopes to prevent further CWD-infected farmed Cervidae herds from developing.

In a similar matter regarding a non-zoonotic infectious disease in domestic animals, OAH upheld emergency rules protecting animals as necessary to protect the public health, safety, or welfare. See *In the Matter of the Proposed Exempt Rules of the Minnesota Racing Commission Governing Horse Racing, Minnesota Rules, Chapter 7876*, page 2, OAH 10-9011-33393, May 4, 2016, Judge Perry Wilson. In finding that the safety of domestic animals is an immediate threat to the public health, safety, or welfare of the State of Minnesota, Judge Wilson stated:

“[t]he health and welfare of racehorses is within the purview of the public health, safety and welfare language of the statute because the public has a compelling interest in the good health of animals to which the public may be exposed. The language of section 14.388, subdivision 1(1) is not limited to immediate threats to the health and welfare of human beings.”

Id.

Judge Wilson found that the movement of infected horses between racetracks transmitted the disease to other horses, resulting in the death of horses from the disease. This was sufficient to satisfy the seriousness and immediacy requirements of Minn. Stat. §14.388, Subd. 1(1).

Similar to the Racing Commission matter, current movement restrictions in Minn. R. 1721.0420, Subp. 3(A) & (B), as they apply to farmed Cervidae, are inadequate to protect the public health, safety, and welfare. The existing rule does not effectively prevent all routes of exposure to farmed Cervidae from CWD infected wild cervids, and the rule allows for apparently healthy but CWD infected and contagious farmed cervids to be legally moved to other locations in Minnesota. Although current science has not fully identified all avenues for CWD disease transmission to a farmed Cervidae herd, preventing commingling through exclusionary fencing has proven insufficient. Such movements undermine the Board’s mission of protecting the health of domestic animals (farmed Cervidae) and represent an immediate threat to the public health, safety, or welfare.

Conclusion

Current rules which allow for legal movement of farmed Cervidae from areas of the state where CWD has been detected in wild deer, so long as a herd had been “maintained in such a way that commingling of farmed Cervidae and wild Cervidae has been prevented” do not adequately mitigate the spread of CWD or protect farmed Cervidae from exposure to CWD. The Board requests the current rules be amended through the Good Cause Exemption rulemaking process in order to eliminate the exclusion in this rule for individual farmed Cervidae herds where animals are kept on premises within a Board designated CWD endemic area to not be considered part of a CWD endemic area if the herd has been maintained in such a way that commingling of farmed Cervidae and wild Cervidae is prevented.

The Board is in the process of a normal rulemaking under Chapter 14 to amend its farmed Cervidae rules, with a timeline of finishing this process in late 2021 or early 2022. The additional time required to amend this rule through the normal rulemaking process is contrary to the public interest as potentially CWD infected and contagious animals will continue to legally move during the time it takes the Board to complete its normal rulemaking and amend this rule. It only takes one animal infected with CWD to spread the transmission of CWD in the state. Based on the current evidence regarding the latest transmission of CWD, allowing any farmed Cervidae to move from a CWD endemic area to another area in the state is not reasonable and presents a very serious and immediate threat to Minnesota's public health, safety, or welfare.

Sincerely,

Dr. Beth Thompson, JD, DVM
Executive Director and State Veterinarian

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