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ADMINISTRATIVE
HEARINGS

1 **Pollution Control Agency**
2 **Adopted Permanent Rules Relating to Listed Metals in Specified Products**

3 **7039.0010 SCOPE.**

4 The purpose of this chapter is to implement the program created by Minnesota
5 Statutes, section 115A.9651. This chapter establishes the procedures that the Listed
6 ~~Meta~~ Metals Advisory Council will follow for review of specified products.

7 **7039.0020 DEFINITIONS.**

8 Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in
9 Minnesota Statutes, section 115A.9651, and in this part.

10 Subp. 2. **Art supply.** "Art supply" means a specified product which is packaged or
11 sold for individual use and which is intended for use by individuals engaged in the
12 production of works of art which are not mass produced.

13 Subp. 3. **Certification of compliance.** "Certification of compliance" has the meaning
14 given in Minnesota Statutes, section 115A.9651, subdivision 3.

15 Subp. 4. **Chair.** "Chair" means chair of the council.

16 Subp. 5. **Council.** "Council" means the Listed Metals Advisory Council created by
17 Minnesota Statutes, section 115A.9651, subdivision 5.

18 Subp. 6. **Commissioner.** "Commissioner" means the commissioner of the Minnesota
19 Pollution Control Agency or staff delegated by the commissioner to perform the duties
20 of the commissioner.

21 Subp. 7. **Days.** "Days" means calendar days.

22 Subp. 8. **Essential product.** "Essential product" has the meaning given in Minnesota
23 Statutes, section 115A.9651, subdivision 2.

24 Subp. 9. **Exempt product.** "Exempt product" means a product which has been subject

1 to a decision under Minnesota Statutes, section 115A.965, subdivision 3, paragraph (b)
2 or (c), for the duration of that decision and subject to any conditions on that decision.

3 Subp. 10. **Intentionally introduce.** "Intentionally introduce" has the meaning given in
4 Minnesota Statutes, section 115A.9651, subdivision 2.

5 Subp. 11. **Listed metal.** "Listed metal" has the meaning given in Minnesota Statutes,
6 section 115A.9651, subdivision 2.

7 Subp. 12. **Listed product.** "Listed product" has the meaning given in Minnesota
8 Statutes, section 115A.9651, subdivision 2.

9 Subp. 13. **New product.** "New product" has the meaning given in Minnesota Statutes,
10 section 115A.9651, subdivision 2.

11 Subp. 14. **Official.** "Official" has the meaning given in Minnesota Statutes, section
12 115A.9651, subdivision 2.

13 Subp. 15. **Prohibited products list.** "Prohibited products list" means the list of listed
14 products established by Minnesota Statutes, section 115A.9651, subdivision 4.
15 "Prohibited products" are those products which have been discontinued or reformulated
16 to eliminate the listed metals and which therefore no longer meet the definition of a
17 specified product.

18 Subp. 16. **Specified product.** "Specified product" has the meaning given in Minnesota
19 Statutes, section 115A.9651, subdivision 2, paragraph (i).

20 Subp. 17. **Temporary member.** "Temporary member" means a person appointed to
21 the council pursuant to the procedure established in Minnesota Statutes, section
22 115A.9651, subdivision 5, paragraph (f).

23 7039.0030 OFFICERS AND DUTIES.

24 Subpart 1. **Officers.** The chair of the council is appointed by the commissioner. The
25 chair may appoint a vice-chair. The vice-chair shall discharge the duties of the chair
26 during the absence or disability of the chair.

1 Subp. 2. **Vacancies.** Upon vacancy of the chair of the council, the commissioner shall
2 appoint a new chair.

3 Subp. 3. **Removal.** Any council member may be removed from office by the
4 commissioner as provided in Minnesota Statutes, section 15.059, subpart 4.

5 Subp. 4. **Execution of documents.** Recommendations to the commissioner and other
6 documents approved by the council pursuant to law shall be executed on the council's
7 behalf by the chair. In the absence of the chair, the vice-chair or any permanent member
8 of the council who has received approval from the chair may sign the document on
9 behalf of the council.

10 **7039.0040 COUNCIL MEETINGS.**

11 Subpart 1. **Regular meetings.** The council shall meet at a date, place, and time set by
12 the council. The chair may direct that any regular meeting be canceled, postponed, or
13 advanced. The chair may appoint subcommittees.

14 Subp. 2. **Special meetings.** The chair may call a special meeting of the council when
15 the chair deems it necessary to accomplish council business.

16 Subp. 3. **Quorum.** A majority of council members shall constitute a quorum. A
17 quorum must be present to transact business. When temporary members have been
18 appointed and the issue before the council concerns the product or product group that
19 the temporary members were appointed to consider, a quorum consists of a majority of
20 the members of the council, including both temporary and permanent members.

21 Subp. 4. **Presiding officer.** The chair shall preside at council meetings and shall
22 determine the limits of time and the relevancy of discussion or debate on any matter
23 before the council. If both the chair and vice-chair are absent, the members present shall
24 elect a presiding officer to serve for that meeting or until the chair or vice-chair arrives.

25 Subp. 5. **Voting.** A majority vote by members present for the vote is binding. All
26 members present shall vote or abstain on every matter presented for decision.

1 Subp. 6. **Public participation at meetings.** Meetings of the council shall be open to
2 the public. Participation by persons other than members of the council shall be at the
3 request of the chair. The chair may limit testimony by persons other than council
4 members as needed for efficient and timely conduct of council business.

5 Subp. 7. **Parliamentary procedure.** Except as specifically provided in this chapter,
6 Robert's Rules of Order shall govern questions of parliamentary procedure that arise.

7 Subp. 8. **Record of meetings.** The council shall keep full and accurate minutes of
8 meetings.

9 Subp. 9. **Material to be considered by council.** Material for consideration by the
10 council must be submitted to the staff of the council at least two working days before
11 the council meeting to allow for copying and distribution to council members, unless
12 the chair has given authorization to do otherwise.

13 **7039.0050 CONFLICT OF INTEREST.**

14 No permanent or temporary member of the council who is an employee of a
15 manufacturer or user of a specified product may sit in consideration of that product. As
16 used in this part, "employee" includes officers and directors. No permanent or
17 temporary council member who has a direct and substantial financial interest relating to
18 any matter before the council shall vote on the matter.

19 **7039.0060 TRADE SECRET INFORMATION.**

20 Subpart 1. **Prior identification of trade secret information required.** If a person
21 wishes the council to consider information which the person considers to be trade secret
22 information as defined in Minnesota Statutes, section 13.37, subdivision 1, paragraph
23 (b), the person shall first submit that information to the staff of the council with a cover
24 letter that specifically identifies those portions of the information that the person wishes
25 to have treated as nonpublic data and gives the reasons why the person believes that the
26 information meets the definition of trade secret information and the reasons why the

1 person believes that submission of the trade secret information is necessary to the
2 business of the council. No information received by the council may be treated as trade
3 secret information unless it is identified as such as provided in this part.

4 Subp. 2. **Commissioner response.** Following receipt of information identified as trade
5 secret information, the council staff shall review that information and make a
6 preliminary finding with regard to whether the information meets the requirements of
7 Minnesota Statutes, section 13.37, subdivision 1, paragraph (b). Unless otherwise agreed
8 to by the submitter, the commissioner shall notify the submitter of the commissioner's
9 preliminary determination within ten working days during which time the information
10 shall be treated as nonpublic. If the finding is that the information should be classified
11 as nonpublic, the staff shall notify the submitter and shall thereafter maintain the
12 information as nonpublic. If the finding is that the information should be classified as
13 public, the staff shall notify the submitter and allow the submitter to (1) supplement the
14 rationale for treatment of the information as nonpublic, (2) request that the information
15 be returned to the submitter, or (3) agree to the classification of the information as
16 public. If a submitter disagrees with the decision of the commissioner under this part,
17 the submitter may request a commissioner of administration advisory opinion as
18 provided in Minnesota Statutes, section 13.072. If no advisory opinion is requested, the
19 submitter agrees to comply with the interpretation of the commissioner. All parties shall
20 abide by the decision provided under Minnesota Statutes, section 13.072.

21 Subp. 3. **Use of nonpublic information at council meetings.** As provided by
22 Minnesota Statutes, section 471.705, meetings may not be closed to discuss data that are
23 not public data, except as specifically provided in Minnesota Statutes, section 471.705.
24 The council shall avoid public dissemination of trade secret information by using
25 redacted or summary data, except as necessary to conduct the business of the council.

26 **7039.0070 REQUIRED REPORTS AND CERTIFICATIONS.**

1 Subpart 1. **Submittals required.** By July 1, 1998 (for manufacturers), or August 15,
2 1998 (for users), for all specified products that have not been identified as essential
3 products or exempt products under Minnesota Statutes, section 115A.9651, subdivision
4 6, paragraph (f), a manufacturer or user of a specified product must submit a
5 certification that the product no longer contains listed metals as provided in Minnesota
6 Statutes, section 115A.9651, subdivision 3, or a product review report as provided in
7 Minnesota Statutes, section 115A.9651, subdivision 6. Other entities such as
8 manufacturer associations or distributors may prepare a product review report on
9 behalf of a user or manufacturer or group of users or manufacturers, but the product
10 review report must be signed by an official of each manufacturer or user represented by
11 the report.

12 Subp. 2. **Product review reports.** Following receipt of product review reports as
13 provided in subpart 1, the commissioner shall review the reports for completeness and
14 to verify that each product is the subject of an appropriate report. If the product review
15 report is not complete, the commissioner shall indicate in writing that the report is
16 incomplete and shall indicate the information that is needed. Product review reports are
17 required for each product as defined by statute, except that if the ~~formulation~~
18 formulations, uses, and limitations for an entire product line are substantially similar,
19 the product line may be the subject of one product review report. In determining if a
20 product line can be addressed with one report, the commissioner shall consider if the
21 products have substantially similar formulations, uses, and limitations. If there is a
22 dispute about the number of product review reports due, the commissioner shall notify
23 the submitter of the commissioner's preliminary determination. Following an
24 opportunity to comment, the ~~commissioner~~ commissioner shall consider any additional
25 information received and shall issue a decision stating the number of product review
26 reports required.

27 Subp. 3. **Contents of product review reports.** Each product review report shall
28 contain at least the following:

1 A. a policy statement articulating upper management support for eliminating or
2 reducing intentional introduction of listed metals into its products;

3 B. a description of the product and the amount of each listed metal distributed for
4 use in this state;

5 C. a description of past and ongoing efforts to eliminate or reduce the listed metal
6 in the product;

7 D. an assessment of options available to reduce or eliminate the intentional
8 introduction of the listed metal, including any alternatives to the specified product that
9 do not contain the listed metal, perform the same technical function, are commercially
10 available, and are economically practicable;

11 E. a statement of objectives in numerical terms and a schedule for achieving the
12 elimination of the listed metals and an environmental assessment of alternative
13 products;

14 F. a listing of options considered not to be technically or economically practicable;
15 and

16 G. certification attesting to the accuracy of the information in the report signed and
17 dated by an official of the manufacturer or user.

18 Subp. 4. **Annual progress reports and fee.** By July 1, 1999, and annually thereafter
19 until the commissioner takes action under Minnesota Statutes, section 115A.9651,
20 subdivision 9, the manufacturer, user, or other entity submitting the report on behalf of
21 manufacturers and users must submit a progress report and fee. The progress report
22 shall update all information required in the product review report. As used in this part,
23 an "action" by the commissioner under Minnesota Statutes, section 115A.9651,
24 subdivision 9, includes a decision to prohibit the specified product under Minnesota
25 Statutes, section 115A.9651, subdivision 9, paragraph (a), as recommended by the
26 council; a decision not to prohibit the specified product in opposition to the

1 recommendation of the council; and a decision to accept the recommendation of the
2 council not to prohibit a particular product.

3 **7039.0080 DUTIES OF COUNCIL WITH REGARD TO EXISTING PRODUCTS.**

4 Subpart 1. **Recommendations to commissioner.** The council shall recommend to the
5 commissioner the prohibition for distribution for sale or use in this state of an existing
6 specified product that is not an essential product in accordance with this part. A
7 recommendation that the commissioner take action shall include all information
8 required by Minnesota Statutes, section 14.131, that the council can ascertain. The
9 council may also recommend to the commissioner that a product it has considered not
10 be prohibited for distribution for sale or use in this state.

11 Subp. 2. **Selection of specified products for consideration.** The council shall review
12 product review reports submitted as required under Minnesota Statutes, section
13 115A.9651, subdivision 6, to determine which specified products or product groups
14 should be considered for prohibition as provided in subpart 1. The council shall
15 consider potential environmental impacts in prioritizing its review, including the
16 amount of the product or product group used in the state, the amount of listed metals,
17 the toxicity relative to other specified products, and the likely ability of the
18 manufacturers and users of the specified product to switch to a less environmentally
19 harmful alternative.

20 Subp. 3. **Schedule for consideration of specified products or product groups.** The
21 permanent members of the council shall prioritize the council's review of a specified
22 product for consideration and shall publish a notice in the State Register by October 1,
23 1998, identifying those specified products, or groups of products, which will be
24 reviewed by July 1, 2000. By October 1, 2000, the council shall publish a notice in the
25 State Register identifying those remaining specified products, or groups of products,
26 which will be reviewed by July 1, 2005. Following publication of the products or

1 product groups that will be considered by the council, the council shall establish a
2 detailed schedule for consideration. The council shall amend the detailed schedule as
3 information changes or as provided by subpart 4 or as new products are submitted for
4 review or as otherwise appropriate. Council staff shall provide the revised detailed
5 schedule ~~shall be available upon request to council staff.~~

6 Subp. 4. **Expedited review requests.** A manufacturer or user who has submitted a
7 product review report may request, in writing, an expedited review by the council. The
8 council shall consider requests for expedited review at the next council meeting. The
9 council shall grant expedited review if it finds that delay until the time scheduled for
10 consideration is economically or administratively burdensome for the manufacturer or
11 user, or that expedited consideration will not significantly disrupt the schedule. When
12 the council grants a request for expedited review, it shall notify the submitter and
13 amend the schedule.

14 Subp. 5. **Temporary members.** Following publication of the schedule under subpart
15 3, the commissioner shall appoint temporary members in an even number up to six for
16 the first product or product group to be considered. Thereafter, the commissioner shall
17 appoint temporary members at the request of the chair of the council. The chair shall
18 request such appointments as necessary to accommodate the schedule of consideration
19 of products and product groups.

20 Subp. 6. **Notice to manufacturers and users.** Following appointment of the
21 temporary members, the council shall notify manufacturers and users of the product or
22 product group to be considered and invite their participation before the council. Persons
23 receiving notice under this subpart shall have 30 days to supplement product reports or
24 otherwise provide the council with information relevant to the product or product
25 group under consideration, and request an oral presentation.

26 Subp. 7. **Standard of review for existing products.** The council's advice to the

1 commissioner shall be based on an evaluation of the environmental impact of the
2 product or product group and the ability of the manufacturer or user to reduce or
3 eliminate the listed metal. Before making a recommendation to the commissioner as
4 provided in subpart 1, the council must conclude that:

5 A. there is an alternative to the specified product that does not contain the listed
6 metal that performs the same technical function, is commercially available, and is
7 economically practicable; and

8 B. replacement of the product with the alternative will result in an environmental
9 benefit in the state.

10 Subp. 8. **Preliminary report.** Before making a recommendation to the commissioner,
11 the council shall ~~make available its~~ send a written copy of its preliminary
12 recommendation for at least 30 days to receive written comments from to interested
13 persons. Interested persons shall have 30 days to submit written comments on the
14 preliminary recommendation to the council.

15 Subp. 9. **Final report.** Following receipt of comments on the draft recommendation,
16 the council shall make its recommendation to the commissioner. The recommendation
17 may be to prohibit the distribution for sale or use in this state or not to prohibit such
18 distribution.

19 7039.0090 DUTIES OF COUNCIL WITH REGARD TO NEW PRODUCTS.

20 Subpart 1. **Schedule for consideration of new products.** Within 30 days of receipt of
21 a new product review report, the commissioner shall determine if that report is
22 complete. If the report is not complete, the commissioner shall indicate in writing that
23 the report is incomplete and shall indicate the information that is needed. No new
24 product may be distributed in the state until the commissioner has determined that a
25 complete product review report and fee have been received. When the commissioner
26 determines that a complete new product review report has been received, the

1 commissioner shall notify the chair and request that the chair establish a schedule for
2 consideration of the new product. In determining the schedule for consideration, the
3 chair shall consider whether the new product is similar to products or product groups
4 which are already scheduled for consideration, such that common consideration would
5 be efficient, or if the new product is similar to products already considered by the
6 council, in which case rapid consideration may be given based on the established record
7 and without the appointment of temporary council members. If the chair recommends
8 consideration based on the established record and without the appointment of
9 temporary members, the commissioner must approve the decision of the chair.

10 Subp. 2. **Notice.** The chair shall publish notice in the State Register of its decision to
11 consider a new product by amending the detailed schedule as provided in part
12 7039.0080.

13 Subp. 3. **Procedure.** The council shall follow the procedures established for
14 consideration of products and product groups when considering a new product, except
15 that if approved by the commissioner, no temporary members need be appointed.

16 Subp. 4. **Standard of review for new products.** The council's advice to the
17 commissioner shall be based on an evaluation of the environmental impact of the
18 product and the ability of the manufacturer or user to reduce or eliminate the listed
19 metal. Before making a recommendation that to the commissioner, the council must
20 conclude that:

21 A. there is an alternative to the specified product that does not contain the listed
22 metal that performs that same technical function, is commercially available, and is
23 economically practicable, and replacement of the product with the alternative will result
24 in an environmental benefit in the state; or

25 B. if there is no alternative to the new product, that the use of the listed metal in
26 the new product presents a significant threat to the safe and efficient operation of waste

1 facilities, or use of the listed metal does not increase the useful life span of the new
2 product, reduce the overall toxicity of the final product or of material used in the
3 production of the final product, or otherwise provide a net environmental benefit to the
4 state.

5 **7039.0100 RULEMAKING RECORD.**

6 The commissioner may adopt a council recommendation as the agency's statement of
7 need and reasonableness. Persons seeking to participate in any rulemaking proceeding
8 under Minnesota Statutes, section 115A.9651, subdivision 11, must show, for any
9 information submitted for consideration in the rulemaking proceeding that was not
10 submitted for consideration of the council, that the information was either new or that
11 reasonable justification exists as to why the information was not submitted for
12 consideration of the council. If the administrative law judge determines that the
13 showing required by this part has not been made, no consideration shall be given to the
14 information in determining the need for and reasonableness of the proposed rule.

15 **7039.0110 ESSENTIAL PRODUCTS REVIEW.**

16 Subpart 1. **Verification.** The commissioner shall publish in the State Register a list of
17 essential products for which the commissioner has received ~~certification~~ certifications
18 pursuant to Minnesota Statutes, section 115A.9651, subdivision 7, as provided in that
19 subdivision. If the commissioner has reason to believe that a product identified as an
20 essential product does not meet the requirements for an essential product, the
21 commissioner shall give written notice to the manufacturer or user and provide an
22 ~~opportunity~~ 30 days to respond.

23 Subp. 2. **Change in status.** A manufacturer or user who receives information or
24 otherwise knows that a product certified as an essential product no longer meets that
25 definition shall notify the commissioner within 60 days of receipt of the information and
26 shall thereafter no longer use the product which formerly met the definition without
27 first submitting a product review report.

1 Subp. 3. **New essential products, notice.** A new user of a product which has been
2 certified to the commissioner as an essential product may use the product for the
3 required application without submittal of a certification. A new manufacturer of an
4 essential product must submit a certification. If, after filing the January 1, 1998,
5 certification required by Minnesota Statutes, section 115A.9651, subdivision 7, a new
6 essential product is required (for example, a new military specification is promulgated)
7 a manufacturer or user of that new essential product shall submit a certification within
8 60 days of receiving notice that the use is required.

9 **7039.0120 TERMINATION OF COUNCIL.**

10 As provided by statute, the duties given to the council under this chapter shall be
11 performed by the commissioner following termination of the council on June 30, 2006.