

7-2200-4289-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Revisions of Minnesota Rules
Chapter 7050, Relating to
Water Quality Standards and
Use Classifications for
Waters of the State.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

118. The ALJ expressed concern at the hearing over the Agency's proposed usage in the rules of "the literature" and "credible scientific evidence" to ascertain changes in scientific research. The proposed phrases were reasoned to be too vague or overly-broad. In response, the PCA proposes to add a definition, at part 7050-0218, subp. 3C, of "available scientific data", and to insert the phrase accordingly throughout the rule. Such an approach is found to be necessary, reasonable and not a substantial change. The proposed definition of "available scientific data" is to find as meaning "information derived from scientific literature, including, but not limited to . . . (examples listed)." (Emphasis supplied.)

It is appropriate to comment upon the phrase "including, but not limited to", as used in this context. The phrase is often found to be a grant of impermissibly broad discretion to an agency, thus violative of substantive requirements of law. It is noted that the Agency's comments list several other examples of sources of "available scientific data" beyond those listed in the proposed definition. Since the entire description is modified by its title, "available scientific data", and the phrase "scientific literature" narrows the scope of what is included to sources generally understood by the regulated community, it is found that inclusion of the phrase "including, but not limited to" in this context is not an overly broad grant of discretion to the Agency.

It is suggested, however, that the words "but not limited to" tend to confuse the reader and add nothing to the content of the definition. Simple use of the word "including" would suffice. The Administrative Law Judge recommends that the Agency delete the words "but not limited to" from the proposed definition. If the Agency makes that grammatical change in its adoption of the rule proposals, it is found that the change is necessary and reasonable and not a substantial change.