

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Adoption of
the Rules of the Minnesota Pollution
Control Agency Relating to Hazardous
Waste Licensing and Container
Management. Minn. R. 7045.0020 to
7045.1330.

ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.26

The Minnesota Pollution Control Agency (agency) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26. On April 22, 1997, the Office of Administrative Hearings (OAH) received the documents from the agency required to be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

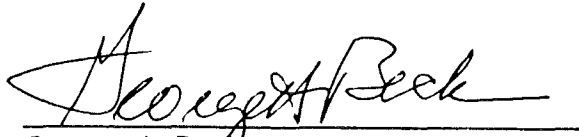
Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rule.
2. The rules were adopted in compliance with the procedural requirements of Minn. Stat., chapter 14 and Minn. R., chapter 1400, with the following exception. The Notice of Intent to Adopt Without a Public Hearing did not contain a reference to the rules of the Office of Administrative Hearings for adopting rules without a public hearing as required by Minn. R. 1400.2080, subp. 2, item A. The administrative law judge has determined that the above omission did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and thus constitutes harmless error under Minn. Stat. § 14.26(3)(d)(1).
3. The adopted rules are not substantially different from the rule as originally proposed.
4. The record for the adopted rules demonstrates a rational basis for the need for and reasonableness of the proposed rule.

5. The adopted rules are constitutional or legal, except for Minn. R. 7045.0230, subpart 1, item F and 7045.0248, subpart 1, item C, which are **DISAPPROVED**. (See Memorandum.)

Dated this 5th day of May, 1997.


George A. Beck
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the administrative law judge is authorized to review adopted rules submitted by agencies as to the rules legality. As stated in the above order, the rules meet the statutory authority, procedural, substantial difference, and rational basis requirements of Minn. Stat. § 14.26 and Minn. R. 1400.2100. However, Minn. R. 7045.0230, subpart 1, item F and 7045.0248, subpart 1, item C, are being disapproved as not meeting the constitutional standards under Minn. R. 2100, item E, because of excessive discretion that is provided to the Commissioner without adequate standards.

Minn. R. 7045.0230, subpart 1, item F and 7045.0248, subpart 1, item C, are new material which provide, as follows:

7045.0230 Content of Initial License Application.

Subpart 1. **Information Required.** Except as provided in subpart 1a, an application must be on a form provided by the commissioner and must include the following information:...

F. any additional information regarding the generator or the waste produced and managed by the generator which has been requested by the commissioner.

7045.0248 License Renewal Application.

Subpart 1. **Applicability.** A licensed generator must submit a license renewal application to the commissioner on forms provided by the commissioner....The application must contain the following information for each hazardous waste produced during the preceding calendar year:...

C. any additional information requested by the commissioner regarding the generator or the waste produced and managed by the generator:...

With regard to part 7045.0230, subpart 1, item F, the MPCA writes in the Statement of Need and Reasonableness (SONAR) that they have added item F to allow the MPCA to request additional information if the Commissioner determines that the information is necessary for the licensing of generators. The agency states the provision is reasonable in order to accommodate changes in the future. As technology and the hazardous waste program change there may be situations where the MPCA will need information that is not specified at this time. For example, the MPCA may be able to do computerized exchange of information or issue licenses by facsimile. (p. 33)

Both of the above rule provisions provide discretion to the commissioner of the agency to request additional information in the initial license application and the license renewal application. However, a rule that grants discretionary authority to the agency must include a reasonably clear policy or standard of action. The rule needs to have specific criteria to avoid excessive agency discretion. Therefore, adequate guidelines are needed to ensure that the rule will be applied in a consistent manner. Blocher Outdoor Advertising Co. v. Minnesota Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984).

The administrative law judge finds that the above provisions provide excessive agency discretion and that additional language in the rule provision is necessary to provide adequate guidance to the regulated industry. To correct this defect, the administrative law judge recommends that the following additional language be added to part 7045.0230, subpart 1, item F:

F. any additional information regarding the generator or the waste produced and managed by the generator which is necessary to a decision on the application and which has been requested by the commissioner.

This same language can be added to part 7045.0248, subpart 1, item C. Although item C is worded a little differently as adopted, the administrative law judge recommends that the two provisions contain the same exact language. The additional language in both of the rule provisions will clarify the intent of the agency to only require additional information that will be necessary for making a decision on the application, as is explained in the agency's SONAR.

Pursuant to Minn. Stat. § 14.26, subd. 3(b) and Minn. R. 1400.2300, subp. 6, this order will be submitted to the chief administrative law judge for approval. Under Minn. R. 1400.2300, subp. 8, the agency may resubmit the rule to the chief judge for review after changing it and may request that the chief judge reconsider the disapproval.

G. A. B.