

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

In the Matter of the Adoption of
the Pollution Control Agency's
Rules Relating to Composting,
Minnesota Rules, Part 7035.2836

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

The Minnesota Pollution Control Agency (agency) is seeking review and approval of permanent rules relating to composting, which were adopted by the agency pursuant to Minn. Stat. § 14.26. On June 17, 1996, the Office of Administrative Hearings received all of 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 rule was adopted in compliance with the procedural requirements of chapter 14 and Minn. R., chapter 1400 with the following exceptions:
 - A. The Notice of Intent to Adopt Rules had the following omissions under Minn. R. 1400.2080:

1400.2080(2)(E). There was no statement that the Statement of Need and Reasonableness contains a summary of who will be affected by the proposed rule and an estimate of the probable cost of the proposed rule.

1400.2080(2)(G). There was no statement that persons may request to be placed on the agency's mailing list to receive notice of future rule proceedings.

1400.2080(3)(E). There was no statement that any person requesting a hearing must identify the portion of the rule to which the person objects or a statement that the person objects to the entire rule, and that a request that does not provide this information is invalid and will not count when determining whether a public hearing must be held.

1400.2080(3)(I). The Notice of Intent to Adopt incorrectly states that the rule and supporting documents will be submitted to the attorney general for review as to legality, instead of the Office of Administrative Hearings.

1400.2080(3)(J). There was no statement that persons who wish to comment on the legality of the rule must do so during the 30-day comment period.

1400.2080(3)(K). There was no statement that persons may request to be notified of the date the rule is submitted to the office of administrative hearings for review.

B. Pursuant to Minn. R. 1400.2070, subpart 3, and Minn. Stat. § 14.23 the Statement of Need and Reasonableness must be prepared before the agency orders publication of its notice of intent to adopt in the State Register. In this case, the agency's final Statement of Need and Reasonableness was not completed and signed until May 22, 1996, which was after the April 22, 1996, publication of the notice of intent to adopt rules in the State Register.

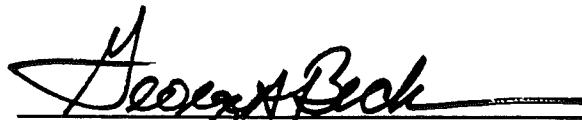
The administrative law judge has determined that the above defects did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and thus constitutes harmless error under Minn. Stat. § 14.26(3)(d)(1).

3. The adopted rule is not substantially different from the rule as originally proposed.

4. The record for the adopted rule demonstrates a rational basis for the need for and reasonableness of the proposed rule as required by Minn. R. 1400.2100, item B and Minn. Stat. § 14.26, subd. 3, with the exception of Minn. R. 7036.2836, subp. 3, item C, which is DISAPPROVED.

5. The adopted rules are constitutional or legal as required by Minn. R. 1400.2100, item E with the following exceptions: 7035.2836, subp. 4, item E; 7035.2836, subp. 5, item J; and 7035.2836, subp. 5, item J, subitem 2, which are DISAPPROVED.

Dated this 1st day of July, 1996.



George A. Beck
Administrative Law Judge

MEMORANDUM

Under Minn. Stat. § 14.26, the administrative law judge is authorized to review adopted rules submitted by agencies as to legality. As stated in the above order the rules meet the statutory authority, procedural requirements, and substantial difference, requirements of Minn. Stat. § 14.26 and Minn. R. 1400.2100. However, four of the above-referenced rule parts are being disapproved as to legality.

Minnesota Rule, part 7035.2836, subpart 3, item C, is being disapproved under Minn. Stat. § 14.26 and Minn. R. 1400.2100, subpart B, because the record does not demonstrate a rational basis for the need and the reasonableness of the proposed rule.

Minn. R. 7035.2836, subpart 3, item C, provides as follows:

Compost will not contain greater than three percent inert materials (dry weight) that are greater than or equal to four millimeters as determined by the testing procedure under subpart 5, item J, subitem (3).

The rationale for this rule provision is stated on page 3 of the Statement of Need and Reasonableness (SONAR) as follows:

The existing rules allowed sharp objects up to one inch in diameter in the yard waste compost. Rather than allow such a large sized sharp object in a yard waste compost that is distributed primarily to homeowners, the present language was deleted and a requirement in Item C, for yard waste compost to contain no greater than 3 percent inerts (greater than 4 mm) was added. Yard waste compost facilities can only accept and compost yard waste. Yard waste is defined in Minn. Stat. 115A.03, subd. 38 as garden wastes, leaves, lawn cuttings, weeds, shrub and tree waste and prunings. It is the compost operator's responsibility to accept only the above materials for composting and to minimize the contamination of the product from improperly disposed of inerts at the facility. Injury to individuals using the compost must be avoided yet to require the operation to finely screen all the compost would be cost-prohibitive and labor intensive. The operator, therefore, must control the problem upfront by preventing and removing inerts during operations at the facility.

The administrative law judge has determined that the above explanation in the SONAR does not provide adequate rationale as to why this rule provision is needed and reasonable. Both Ramsey county and Anoka county wrote comments objecting to this rule provision as being unnecessary. Ramsey county stated that the testing procedures imposed an additional, unnecessary cost burden on yard waste composting facilities. Ramsey county believes that the current system adequately addresses safety and contamination issues and concludes that the additional testing requirements would

add more costs to yard waste operations but would not result in improvements in safety or marketability of yard waste compost.

Anoka county also expressed concern regarding the cost of the new testing procedures. The county stated that the proposed change in rules would require them to start sampling, testing, and, depending on the outcome of this testing, screening the finished product prior to distribution. Both counties requested that the language of the task force draft language be reinstated. The task force language stated: "The facility must be operated to minimize inerts in the final product."

Prior to the adopted rule, yard waste compost facilities did not have to follow any testing procedures to determine inert material in the compost. Therefore, the testing procedures under item C of this part is a new requirement. It is not clear from the agency's SONAR as to why the previous rule part is no longer adequate to determine the level of inert material. In addition, the SONAR does not address the costs associated with this new testing procedures. The agency's rationale does not address or demonstrate why these additional cost burdens are necessary to meet its goal in the rule.

To correct this defect, the administrative law judge recommends that the agency either reinstate the previous rule part, adopt the recommended language of the task force with a demonstration of need and reasonableness, or provide additional rationale which adequately demonstrates the need and reasonableness of the proposed language.

Minnesota Rule, part 7035.2836, subpart 4, item E; 7035.2836, subpart 5, item J; and 7035.2836, subpart 5, item J, subitem 2, are disapproved under 1400.2100, subpart E as vague and, therefore, allows for excessive agency discretion. The three rule provisions provide as follows:

Minn. R. 7035.2836, subpart 4, item E provides:

E. Liquid in contact with waste, immature compost, and residuals must be diverted to a leachate collection and treatment system. The leachate collection and treatment system must comply with part 7035.2855, subpart 3, item B, and the applicable portions of part 7035.2815, subpart 9, items B to K. The commissioner may require the facility owner or operator to monitor the collected leachate. (Emphasis added).

Minn. R. 7035.2836, subpart 5, item J provides:

The owner or operator must comply with the compost sampling and testing plan approved by the commissioner. Proposed changes to sampling equipment or procedures must be submitted to the commissioner for review and approval. Testing must be conducted when each batch of compost matures.

The commissioner may decrease or increase the parameters to be analyzed for or the frequency of analysis based on monitoring data and changes in the waste stream or processing by the facility. The plan must include the sampling and testing requirements in subitems (1) to (6). (Emphasis added).

Minn. R. 7035.2836, subpart 5, item J, subitem 2, provides in part:

“... PCB's in the compost must be extracted using either method 3540 or 3550 and analyzed with method 8080 or another method approved by the commissioner.” (Emphasis added).

The use of the word “may” in the first two provisions and the phrase “or another method approved by the commissioner” in the third provision are used here without adequate criteria or standards to guide the regulated parties and thus constitutes excessive discretion by the agency. A rule needs to have specific criteria for the institution to follow to avoid excessive agency discretion and 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)

Therefore, to correct these defects, the agency must add criteria, guidelines, or standards to the above provisions. The rule provision should provide a reasonably clear policy or standard which controls and guides both the agency and the compost facilities in determining when the rule will apply. More specific language will avoid excessive agency discretion and will assure that the rule will be applied in a consistent manner.

Finally, the administrative law judge makes the following recommendations and comments on the rules and the SONAR. These are comments of the judge and not specific defects that must be corrected by the agency.

Under Minn. R. 7035.2836, subpart 6, item A, subitem 1, the judge recommends the following amendment:

(1) Class I compost cannot exceed the contaminant concentrations in milligram per kilogram on a dry weight basis as listed in the following table or Code of Federal Regulations, title 40, section 503.13(b)(3), as amended from time to time, with the exception....”

The above amendment will clarify that the amendments to the CFR include, not only amendments that existed at the time the rule was adopted, but also amendments that will occur in the future.

With respect to the analysis provided under Minn. Stat. § 14.131, the administrative law judge notes the lack of detail in this analysis, especially with regard

to the Minn. Stat. § 14.131(5) regarding the probable costs of complying with the proposed rule. The administrative law judge recommends that future analysis conducted pursuant to each item in this section provide more in-depth analysis to the extent the agency, through reasonable effort, can ascertain the information.

The administrative law judge also noted that there were several rule provisions that were not discussed in the SONAR at all. Therefore, it is suggested that for future rule proceedings, all rule parts that have been amended, or in cases such as this where the entire rule is all new material, that all of the rule parts have some justification in the 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.

G.A.B.