

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

In the Matter of the Adoption of
the Rules of the Pollution Control
Agency Relating to Miscellaneous
Air Quality Amendments. Minn. R.
Chapters 7005, 7009, 7011, 7019,
and 7035.

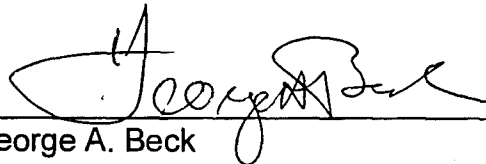
ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.26

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 November 7, 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, except that the Statement of Need and Reasonableness did not contain information regarding the probable costs to other agencies in the implementation and enforcement of the proposed rule and the anticipated effect of the rule on state revenues as required by Minn. Stat. § 14.131(2). The administrative law judge concludes that the omission did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and therefore 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 following provisions of the adopted rules are being **DISAPPROVED** as not meeting the legal standards of Minn. R. 1400. 2100, items D and E; 7007.0800, subp. 6, item C and 7007.1500, subp. 3a, item B. (See Memorandum.)

Dated this 20th day of November, 1997.


George A. Beck
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the agency has submitted these rules to the administrative law judge for a review of their 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, portions of the rules are being disapproved as not meeting the standards under Minn. R. 2100, items D and E, because of excessive agency discretion and vagueness that exist in two of the rule provisions as described below.

7007.0800 Permit Content, subp. 6, item C.

Subp. 6 of the proposed rule provides in part:

The permit shall require the permittee to submit to the agency the reports described in this subpart. The permit shall require that all reports be certified by a responsible official consistent with part 7007.0500, subpart 3....

C. The permit shall require submittal of an annual compliance certification by January 31 of each year to the agency. In the case of part 70 permits, compliance certifications shall be submitted to the administrator as well as the agency, unless the administrator agrees that the submittals are not necessary. The certification shall be on a form approved by the commissioner and shall contain *at least* the following:...(Italics added.)

The administrative law judge recommends that the phrase "at least" be deleted. The phrase implies that unstated substantive requirements could be added to the form by the agency. Adding substantive requirements to the form that are not in the rule grants the agency excessive discretion beyond what is allowed by the requirements of Chapter 14. To the extent that a form imposes substantive requirements, those requirements are considered rules and must be adopted through the rulemaking procedures in Chapter 14. (See Minn. Stat. § 14.03, subd. 3(a)(2)).

In addition to deleting the phrase, "at least," the administrative judge recommends that if there are additional requirements that the agency wants to add to

this rule part that the agency propose such additions and the administrative law judge will review the additions upon the agency's resubmission of the rule.

7007.1500 Major Permit Amendments. Subp. 3a, item B.

Subpart 3a, item B, provides as follows:

B. The agency shall issue written approval to construct, or explain in writing why the approval will not be granted, within 60 days of receiving a complete permit application seeking authorization to construct and operate the affected facility. The application must be accompanied by a written request for approval to construct under this subpart, and a statement certified by a responsible official certifying that requirements of part C (Prevention of Significant Deterioration of Air Quality) or part D (Plan Requirements for Nonattainment Areas) of the act do not apply to the proposed construction. The agency's failure to respond within the 60-day period shall not be deemed approval to construct. The approval to construct shall only apply to the affected facility.

In the first sentence of item B, the agency states that it will issue its decision on whether to approve or not approve an application seeking authorization to construct and operate an affected facility within a 60-day time period. However, in the second to last sentence of the provision, the agency provides that the agency's failure to respond within the 60-day period shall not be deemed approval to construct. So, on one hand the agency provides for a 60-day timeline to issue its decision, then, on the other hand the agency extends the 60-day timeline by stating that failure to respond within 60-day shall not be deemed approval to construct.

The administrative law judge finds that the above two sentences conflict and therefore make the rule provision vague in its meaning. To correct this defect, the administrative law judge recommends that the sentence: "The agency's failure to respond within the 60-day period shall not be deemed approval to construct.", be deleted. In the alternative, if there are situations in which the agency deems it necessary to extend the 60-day timeline, the agency should provide criteria in the rules for those situations if the extension is not contrary to or does not conflict with statute or other applicable rule provisions. Upon resubmission, the administrative law judge will review such additional language to this rule provision.

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.