

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

**In the Matter of the Adoption of
the Rules of the Pollution Control
Agency Relating to Aboveground
Storage of Liquid Substances,
Minn. R., Chapters 7001 and 7151.**

**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 August 24, 1998, 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, except for Minn. R. 7151.9600, subp. 1. (See Memorandum.)

2. The rules were adopted in compliance with the procedural requirements of Minn. Stat., chapter 14 and Minn. R., chapter 1400, except that the agency did not mail out a copy of the rule to persons listed on the Agency's registered mailing list. The Dual Notice provides that a copy of the rule amendments is attached to the notice as mailed. In the Agency's notification to the interested persons, the Agency did, however, provide the State Register cite, Agency website address and provide information on how to obtain a copy of the rule from the Agency.

The Administrative Law Judge concludes that the procedural error did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and therefore constitutes a harmless error under Minn. Stat. § 14.26(3)(d)(1).

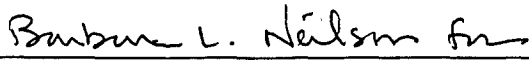
3. The adopted rules are not substantially different from the rule as originally proposed.

4. The record for the adopted rules demonstrates a rational basis for the need for and reasonableness of the proposed rule.

5. Minn. R. 7001.4210, subp. 3; 7001.4220, item E; 7151.2100, subp. 3; 7151.8500; and 7151.9600, subpart 1, of the adopted rule are being **DISAPPROVED**

as not meeting the legal standards of Minn. R. 1400.2100, item D and E. (See Memorandum.)

Dated this 8th day of September, 1998.


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, Minn. R. 7001.4210, subp. 3; 7001.4220, item E; 7151.2100, subp. 3; 7151.8500; and 7151.9600, subpart 1, of the adopted rule are being disapproved as not meeting the legal standards of Minn. R. 1400.2100, item D and E, as discussed below.

7001.4210, subp. 3 and 7151.2100, subp. 3, Incorporations by Reference

Subpart 3 of both Minn. R. 7001.4210 and 7151.2100 contain the same language as follows:

In addition to the documents incorporated by reference in subpart 2, the owners and operators shall ensure that tank service projects are conducted in compliance with guidance specified in applicable industry standards.

In its Order Adopting Rules, the Agency explains that at the request of comments made by interested parties, these new subparts were added to reflect the Agency's understanding that other recommended practices or standard operating procedures can be used by the facilities as appropriate. The Agency states that the list of standards provided in subpart 2 is incomplete and that other standards may be used when appropriate.

The Administrative Law Judge understands the intent of the Agency to allow for flexibility in the use of appropriate standards. However, the phrase "applicable industry standards," as used in this provision is without adequate guidance and is found to be vague. In re Charges of Unprofessional Conduct against N. P. 361 N.W.2d 386, 394 (Minn. 1985).

To correct this defect, the Administrative Law Judge recommends that subpart 3 be deleted. If the agency chooses, it can expand the list of acceptable industry standards in the incorporation by reference section of subpart 2. Even if the agency does not include additional standards in subpart 2, the facilities will be able to use the variance procedures under Minn. R. 7001.4300 to obtain approval of the use of additional standards. The variance procedures allow the facilities flexibility in using the

most appropriate industry standard for the tank service projects. Use of the variance procedures, however, provide the agency with a method to determine if a standard developed by an organization is based on a the same board range of technical information and performance criteria as the standards that are already listed in subpart 2. (See agency Statement of Need and Reasonableness page 68-69).

7001.4220, item E, Permit Application and 7151.8500, Contamination Determination.

Both Minn. R. 7001.4220, item E and 7151.8500 contain the phrase "commissioner determines." Use of this phrase allows for excessive agency discretion and implies that the commissioner can decide on a whim whether or not to require additional information for a permit under 7001.4220 or require an owner or operator to provide additional assessments for the closure of an aboveground storage tank under Minn. R. 7151.8500. See Lee v. Delmont, 36 N.W.2d 530, 538 (Minn. 1949).

To correct this defect the Administrative Law Judge recommends that in part in both rule parts, the Agency strike the phrase "the commissioner determines." By deleting the phrase, the rule will take effect upon the requirements of the rule and not solely on the decision of the commissioner.

7151.9600, subp. 1. Preemption.

Minn. R. 7151.9600 subpart 1, provides:

Subpart 1. General. This chapter shall be in addition to the standards imposed by any other regulations applying to aboveground storage tanks and shall supersede any conflicting provisions.

The Administrative Law Judge finds that the last phrase of the sentence, which provides that this chapter shall supersede any conflicting provisions, to be in excess of the agency's statutory authority. An agency may not adopt a standard beyond the scope of the agency's authority. Francis v. Minnesota Board of Barber Examiners, 256 N.W. 2d. 521, 525 (Minn. 1977).

The agency does not have the statutory authority to state that the rules adopted by the agency would automatically supersede current federal regulations or regulations that may be adopted in the future. It is possible that state regulations could supersede federal regulations, but that depends on the federal regulation under consideration. An overall statement to this effect is in excess of the agency's powers. To correct this defect, the Administrative Law Judge recommends that the Agency deletes the last phrase of subpart 1, "and shall supersede any conflicting provisions."

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.