

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 Governing Listed Metals
Advisory Council and Program, Minn. R.
Chapter 7039.

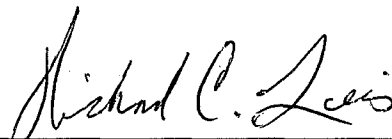
ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.26

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 May 20, 1999, 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.
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 and reasonableness of the proposed rules.
5. The following provisions of the adopted rules are being **DISAPPROVED** as not meeting the requirements of Minn. R. 1400.2100, items D and E: 7039.0050, 7039.0080, subp. 8, and 7039.0110, subp. 1. (See Memorandum.)

Dated this 3rd day of June, 1999.



RICHARD C. LUIS
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. Minn. R. parts 7039.0050, 7039.0080, subp. 8, and 7039.0110, subp. 1 are disapproved as not meeting the legal standard of Minn. R. 1400.2100, items D and E, as discussed below.

7039.0050 Conflict of Interest.

The purpose of this rule part is to prohibit council members from considering a specified product if they are an employee of a manufacturer or user of such a product, or have a financial interest in the specified product. The rule section states, in part, that “[n]o permanent or temporary council member who has a direct and substantial financial interest relating to any matter before the council shall vote on the matter.” (emphasis supplied).

The above underlined language is too vague and grants too much discretion to the agency. The rule part allows for excessive discretion by implying that the board can decide arbitrarily or inconsistently on the question of what is a direct and substantial financial interest.¹ A rule that grants discretionary authority to an agency must include a reasonably clear policy or standard of action. The rule should 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.²

The agency has several options in order to correct the defect. The Administrative Law Judge recommends eliminating the word “substantial” so the passage reads “a direct financial interest.” The term, “a direct financial interest,” is specific enough to avoid excess agency discretion and to ensure consistent application of this rule part. The word “substantial,” however, is vague when it is included in this rule part without any definition or accompanying criteria by which to guide the agency in deciding what is a “substantial” financial interest. In the alternative, the agency may leave the underlined language, but include a definition of direct and substantial, or supply criteria that the agency will consider in order to ensure a consistent application of these terms. Finally, the agency may also replace “direct and substantial” with the word “any.” Any of the suggested alterations will correct the above-mentioned rule defect.

¹ See Lee v. Delmont, 36 N.W.2d 530, 538 (Minn. 1949).

² Blocher Outdoor Advertising Co. v. Minnesota Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984).

7039.0080, subp. 8. Duties of Council with Regard to Existing Products, Preliminary report.

Subpart 8 provides the following: "Before making a recommendation to the commissioner, the council shall make available its recommendation for at least 30 days to receive written comments from interested persons." The ALJ commends the agency for providing due process measures in this situation. Subpart 8, however, is too vague. This rule part lacks the specificity needed to make the opportunity for comment meaningful and to assure consistent application of the due process measures provided. In order to correct the defect, the agency must at least include a provision regarding how interested persons will be informed that the council's recommendation is available. The agency could, for example, mail the recommendation out to all effected parties, post it on the agency's web page, or publish it in the State Register. Minimally, the agency needs to include in subpart 8 how it will inform effected persons that the recommendation is available for their review.

7039.0110, subp. 1. Essential Products Review, Verification.

This rule section states, in part, as follows: "If the commissioner has reason to believe that a product identified as an essential product does not meet the requirements for an essential product, the commissioner shall give notice to the manufacturer or user and provide an opportunity to respond." (emphasis supplied). The underlined portion of this rule is vague and provides too much agency discretion. Specifics need to be included in order to assure consistent application of the due process measures for which the agency provides. To cure this defect, the agency could, for example, state that the commissioner shall give "written notice" and provide a time period for response, such as 30 days.

Recommended technical corrections to the rules:

A. Part 7039.0080, subp. 3. Duties of Council with Regard to Existing Products, Schedule for consideration of specified products or product groups.

Part 7039.0080, subp. 3 provides how the council will put together and publish the schedule for product consideration. One schedule will be published in the State Register by October 1, 1998, which will list the products to be reviewed by July 1, 2000. Another schedule will be published by October 1, 2000 and will list the products that will be reviewed by July 1, 2005. After publication, the council is responsible for establishing a "detailed schedule for consideration." Furthermore, the council shall also amend or revise the detailed schedule as necessary.

The information contained in the detailed schedule – revised or unrevised – is important particularly to effected persons because it informs them when the council will review their product. The ALJ's initial concern regarding subpart 3 was whether the agency was providing adequate notice of the information contained in the detailed schedule to effected persons. After discussions with

the agency, however, the ALJ is of the opinion that effected persons are provided adequate notice of when their products will be scheduled for future review by the council.

The ALJ was advised that the detailed schedule is subject to frequent revisions, perhaps as often as monthly in conjunction with council meetings. The agency indicated that the revised detailed schedule is often mailed out to all interested parties on the agency's mailing list. The agency stated, however, that it does not conduct these mailings with every minor or small revision to the schedule because that could cause more confusion than good. Finally, the agency indicated that a schedule similar in content to the detailed schedule is posted on the agency's web page. None of the above-mentioned notification measures, however, are included in the part 7039.0080. This could result in confusion for an interested or effected person who is unfamiliar with the industry, the agency, or the agency's rules. For this reason, the ALJ recommends that the agency include in part 7039.0080 a provision detailing one or more of the additional notification measures described above. For example, the agency could state that a revised schedule will be mailed out to all effected parties on a quarterly basis. This would avoid the confusion resulting from monthly mailings, and would inform an individual reading the rules how she will be notified of the detailed schedule. As subpart 3 already states, if a more up-to-date version of the detailed schedule is desired an interested person may request such a schedule from council staff.

In addition, the language in subpart 3 is confusing. It states that the revised schedule "shall be available upon request to council staff." The language suggests that the revised schedule is available to council staff, not interested persons. The ALJ recommends clarifying this subpart with language similar to the following: "The revised detailed schedule shall be available upon request. Requests for revised detailed schedules shall be made to council staff."

B. Part 7039.0090, subp. 2. Duties of Council with Regard to New Products, Notice.

This subpart states the following: "The chair shall publish notice of its decision to consider a new product by amending the detailed schedule as provided in part 7039.0080." (emphasis supplied). The underlined language is confusing because it is not clear if the chair's decision will be published in the State Register, or whether the agency considers the notice to be published when the detailed schedule is amended. The SONAR suggests that the notice will be published in the State Register. Part 7039.0080, however, does not require that the amended schedule be published in the State Register. The ALJ recommends clarifying this subpart to more accurately reflect the agency's intention regarding publishing notice of the chair's decision to consider a new product.

C. Part 7039.0110, subp. 2. Essential Products Review, Change in status.

This subpart states as follows:

A manufacturer or user who receives information or otherwise knows that a product certified as an essential product no longer meets that definition shall notify the commissioner within 60 days of receipt of the information and shall thereafter no longer use the product which formerly met the definition without first submitting a product review report.

This paragraph is acceptable as written. In its current form, this subpart requires that once the manufacturer or user discovers its product no longer meets the definition of an essential product, it has 60 days to notify the commissioner of the situation. The manufacturer or user may not use the product at issue until it submits a product review report. No time limit is set for submitting the review report. The SONAR, however, suggests that a different interpretation is intended for this subpart.

The SONAR states that “[s]ubpart 2 requires a person who seeks to continue to use a product that formerly met the definition of ‘essential product’ to submit a product review report within 60 days of losing the status or cease to use the product.” The agency’s intention, as expressed in the SONAR, is that the manufacturer or user has 60 days in which to submit a product review report. As written, subpart 2 does not reflect this requirement. It is suggested that the agency either clarify this subpart to reflect more accurately its intentions,³ or leave subpart 2 as is and allow manufacturers or users to submit review reports on their own terms.

The above technical corrections are not defects in the rules but are merely recommendations for clarification to the rules.

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.

R.C.L.

³ If the agency opts to alter subpart 2 to require the review report to be submitted within 60 days, it should consider whether this change produces a substantially different rule.