

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

**In the Matter of the Adoption
of Permanent Rules of the
Pollution Control Agency
Relating to Procedural Rules,
Minnesota Rules, Chapter 7000.**

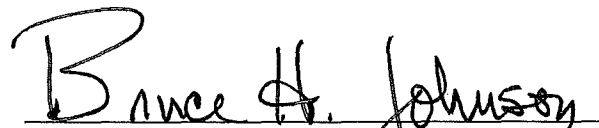
**CHIEF ADMINISTRATIVE
LAW JUDGE'S ORDER ON
REVIEW OF RULES UNDER
MINNESOTA STATUTES,
SECTION 14.26 (3)(B)**

The Minnesota Pollution Control Agency ("Agency" or "MPCA") has adopted the above-entitled rules pursuant to Minnesota Statutes, Section 14.26. On September 16, 2003, the Office of Administrative Hearings received the documents that must be filed by the Agency pursuant to Minnesota Statutes, Section 14.26 and Minnesota Rules, Part 1400.2310. On September 30, 2003, the Administrative Law Judge issued the Order on Review of Rules Under Minnesota Statutes, Section 14.26. As set forth in the September 30th Order, the following provisions of the rules were disapproved as not meeting the requirements of Minnesota Rules Part 1400.2100, item D: 7000.0100, subpart 2 and 7000.1300, subpart 7.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and the September 30, 2003 Order on Review of Rules Under Minnesota Statutes, Section 14.26,

IT IS HEREBY ORDERED: that the findings of the Administrative Law Judge in the September 30, 2003 Order on Review of Rules Under Minnesota Statutes, Section 14.26, regarding the disapproval of 7000.1300, subpart 7 are approved. The reasons for the disapproval of the rule are as set forth in the attached Order. The Memorandum that follows this Order also contains an alternative suggestion for modification of the rules to cure the defect found. The findings of the Administrative Law Judge in the September 30, 2003 Order on Review of Rules Under Minnesota Statutes, Section 14.26, regarding the disapproval of 7000.0100, subpart 2 are not approved. The reasons for the approval of this subpart are set forth in the attached Memorandum.

Dated this 7th day of October, 2003.


BRUCE H. JOHNSON
Acting Chief Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, subd. 3(b), the Administrative Law Judge's Order disapproving a portion of the rules has been submitted to the Chief Administrative Law Judge for review. The Administrative Law Judge's disapproval of proposed Part 7000.1300, subpart 7 is approved, although the Chief ALJ has an alternative suggested correction for that defect, as discussed below. All other rule parts are approved. The Chief ALJ also suggests one technical correction that the Agency may adopt if it chooses to do so.

Proposed rule part 7000.0100, subpart 2.

The ALJ found that the proposed definition of agency was in conflict with the statutory definition. The Chief ALJ agrees with this finding, but does not find this definition to be a defect, because of the language of Minn. R. Part 7000.0100, subp. 1 (which was not proposed for amendment): "Scope. As used in this chapter, the following words shall have the meanings given them." This rule part is therefore approved.

Proposed rule part 7000.1300, subpart 7.

The subpart as proposed provides that "[a]ny evidence containing information classified as not public offered by the commissioner, agency, or a party to the contested case hearing shall be made a part of the hearing record of the case . . ." The Chief ALJ agrees with the ALJ that this subpart conflicts with OAH procedural rules for the reasons stated in the ALJ's Order.

The Chief ALJ suggests an alternative correction for this defect. This defect can be cured by adding the phrase "otherwise admissible" to the subpart, so that it would read: "[a]ny otherwise admissible evidence containing information classified as not public offered by the commissioner, agency, or a party to the contested case hearing shall be made a part of the hearing record of the case . . ."

Adoption of the language suggested, or language having a similar effect, would cure the above-noted defect. It would not constitute a substantial change, and the resulting subpart is needed and reasonable.

In addition to the aforementioned defects in the rules, there is a portion of the proposed rule that could be clarified. The clarification is not a defect, but rather a technical change that the Agency may adopt if it chooses to do so.

Proposed rule part 7000.2000, subpart 1.

The last sentence to the amendment of this subpart states that "written comments or exceptions must be submitted to the commissioner within ten days

after receipt of the administrative law judge's report." There is no indication of whose receipt is intended, although logic would suggest that it is the commenter's receipt of the report that would start the ten-day timeline. Because the MPCA has not limited the right to comment on the report to parties (who receive the ALJ's report by service as does the Commissioner), the Agency may want to consider amending this subpart to state: "within ten days ~~after receipt of~~ the issuance of the administrative law judge's report." Otherwise, a commenter receiving the report weeks after it was issued could conclude that he or she was entitled to ten days from the time of his or her receipt of the report to comment.

On the other hand, the MPCA may have judged the rule to be unambiguous because the Agency only contemplated comment by parties adversely affected, as in Minn. Stat. § 14.61. If that is the case, the Agency should consider amending the rule to reflect that intention, so that the subpart would read: "within ten days after the party's receipt of the administrative law judge's report."

The Chief Administrative Law Judge recommends that subpart 1 be amended to pinpoint the start of the ten-day timeline that applies to those filing written comments. This amendment, or an amendment with similar effect, is needed and reasonable and does not make the rule substantially different than originally proposed.

B.H.J.