

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT  
Public Facilities Authority

In the Matter of the Proposed Rules of the  
Minnesota Public Facilities Authority  
Governing the Drinking Water Revolving  
Fund and the Water Pollution Control  
Revolving Fund;  
*Minnesota Rules, Chapter 7380*

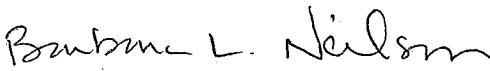
**ORDER ON REVIEW OF  
RULES UNDER MINNESOTA  
STATUTES, SECTION 14.26**

The Minnesota Public Facilities Authority of the Department of Employment and Economic Development ("Authority" or "Agency") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On May 1, 2007, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, 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 rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The following provisions of the adopted rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100, items D and E: rule parts 7380.0260, subp. 4, item B; 7380.0265, subp. 2, item F; 7380.0297, subp. 4, items A and D; 7380.0425, subp. 2, item B; 7380.0430, subp. 2, item F; and 7380.0480, subp. 3, items A and D. All other rule parts are approved.
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.
5. The changes to the rules made subsequent to publication of the rules in the State Register, as reflected in the Revisor's draft AR 3615, dated April 17, 2007, are needed and reasonable and do not make the rules substantially different.

Dated: May 17, 2007

  
BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings<sup>1</sup> identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional<sup>2</sup> or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

In the present rulemaking process, the Administrative Law Judge has found several defects in the rules. The Administrative Law Judge has also recommended two technical corrections, as discussed below. The technical corrections do not reflect defects in the rules, but are merely recommendations for clarification to the rules that the Authority may adopt if it chooses to do so. All other rule parts are approved.

### **Defects under Minn. R. 1400.2100, items D and E**

The Administrative Law Judge has identified several defects in the rules based upon vagueness or undue discretion. Each of these is discussed below.

**Minn. R. 7380.0260, subp. 4, item B**  
**Minn. R. 7380.0425, subp. 2, item B**

The agency proposes to add language to these rule provisions to describe in greater detail what constitutes a complete application and, specifically, how the Authority will determine which applicants have the financial capability to repay the loan.

The proposed rule contains language ("may" and "deemed necessary by the authority") that is not sufficiently specific to notify applicants what information should be

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<sup>1</sup> Minnesota Rules part 1400.2100.

<sup>2</sup> To be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

supplied to the Authority with their applications or to provide the Authority with guidance regarding the types of information on which it will rely in determining creditworthiness. To correct this defect, the Administrative Law Judge proposes the following changes to item B:

B. [T]he applicant has the financial capability to repay the loan based on the authority's analysis of information ~~which may include~~ user charges, special assessments, population trends, major employers, building permits, largest taxpayers, trends of estimated market values, property tax rates, property tax collection, net tax capacity, indebtedness, budget forecasts, planned capital expenditures, and other information ~~deemed necessary~~ requested by the authority to make an informed determination on the creditworthiness of the applicant.

As written, the rule part is vague and grants the Authority undue discretion in that it creates ambiguity about exactly what information should be supplied by applicants and which factors will be considered by the Authority in making a determination of financial capability. Changing the proposed language in accordance with the recommendation of the Administrative Law Judge is needed and reasonable, and will not make rule parts 7380.0260 and 7380.0425 substantially different than originally proposed.

**Minn. R. 7380.0265, subp. 2, item F**

**Minn. R. 7380.0430, subp. 2, item F**

Item F of these subparts makes changes that address the continuing responsibilities of borrowers providing general obligation or revenue bonds to the Authority under the drinking water revolving fund and the water pollution control revolving fund. The proposed subparts allow the Agency to request certain information from the borrower throughout the life of the loan and place an affirmative obligation on the borrower to notify the Authority of any changes that cause the information submitted to the Authority by the borrower to be untrue.

The Administrative Law Judge finds that these portions of the proposed rules contain defects because they are unduly vague regarding the responsibilities of borrowers. The Administrative Law Judge proposes the following restructuring and rewording of item F of subpart 2 of each rule part. These modifications eliminate the use of the word "may," clarify that there is an affirmative obligation on the borrower to report material changes to the application that is independent of the Authority's right to request periodic updates from the borrower, and provide more specific information regarding how quickly the borrower must report those changes to the Authority:

F. Throughout the life of the loan, the borrower shall notify the authority within 10 business days if the borrower becomes aware of any changes that cause the information submitted in the original application to contain an untrue statement or omit a material fact.

G. Throughout the life of the loan ~~the authority may request and the borrower shall, upon request of the authority:~~

- (1) update pertinent information contained in the original application;
- (2) attest that the information does not contain any untrue statements of material fact; and
- ~~(3) authorize the authority to use the information to meet its continuing disclosure obligations; and~~
- ~~(4) notify the authority if the borrower becomes aware of any changes that cause the information submitted to contain an untrue statement or omit a material fact.~~

The Authority is not obligated to make the 'exact changes' proposed by the Administrative Law Judge, but it must make changes to the rule language that are substantially similar to those recommended above. As for the length of time that a borrower has to notify the Authority of material changes, the Administrative Law Judge has suggested 10 business days, but the Authority may specify a different reasonable time period. Changing the proposed language in accordance with the recommendation of the Administrative Law Judge is needed and reasonable, and will not make rule parts 7380.0265 and 7380.0430 substantially different than originally proposed.

**Minn. R. 7380.0297, subp. 4**

**Minn. R. 7380.0480, subp. 3**

The Authority proposes to add a waiver provision from the audit requirements of these two subparts for borrowers that meet certain conditions.

#### **Item A**

Item A of each rule part lists four conditions that a borrower must meet to be eligible for a waiver. In addition to those four conditions, the rules also require the borrower to demonstrate "satisfactory financial management practices." The Administrative Law Judge finds that this phrase is unduly vague and constitutes a defect in the rules. To cure the defect, the Authority must clarify the meaning of "satisfactory financial management practices." It was not clear to the Administrative Law Judge whether the Authority simply requires that borrowers be current on their loan payments, or whether they must show something more (such as continuing ability to repay the debt, adherence to generally accepted accounting principles, or satisfaction of some other criteria).

The Administrative Law Judge suggests that the defect could be cured by incorporating clarifying language in this rule part or by adding a definition of "satisfactory financial management practices" to part 7380.0250. Adding a definition or changing the proposed language in accordance with the recommendation of the Administrative Law Judge is needed and reasonable, and will not make rule parts 7380.0297 and 7380.0480 substantially different than originally proposed.

## Item D

Item D of each rule part states: "Waivers granted by the authority under this subpart remain in effect until all authority loans are fully repaid, unless revoked by the authority in its sole option and discretion."

The last phrase of this sentence gives the Authority unfettered discretion in determining when a waiver is no longer in effect and constitutes a defect in the rule. The Authority must delineate the reasons why it would revoke a waiver previously granted to the borrower. Adding such reasons or inserting a cross-reference to another rule part or statute containing the reasons would correct this defect. Changing the proposed language in accordance with the recommendation of the Administrative Law Judge is needed and reasonable, and will not make rule parts 7380.0297 and 7380.0480 substantially different than originally proposed.

## Recommended Technical Corrections

The following discussion does not relate to defects in the rules, but merely outlines recommendations for clarification to the rules that the Authority may adopt if it chooses to do so. In each instance, adoption of the suggested approach would be needed and reasonable and would not make the rule part substantially different than the rule as originally proposed.

### **Minn. R. 7380.0250, subp. 28b**

The Administrative Law Judge recommends the following change to the definition of "significant storm water contributor agreement."

"Significant storm water contributor agreement" means a written agreement between a borrower and a significant storm water contributor that will protect the financial interest of the borrower in the event the storm water contributor curtails or ceases its operation. This agreement must include a secured, written guarantee by the significant storm water contributor for its proportional share of the debt payments for the term of the authority's loan with the borrower.

This phrase was included in the definitions of "significant wastewater contributor agreement" and "significant water user agreement." The omission of this phrase in subpart 28b appears to be an oversight by the Authority. Specifically, the SONAR states that the phrase is proposed to be added to subpart 28b, but the language of the rule does not reflect that intention. This recommended change would render the rule consistent with the SONAR.

**Minn. R. 7380.0430, subp. 2, item E**

The Administrative Law Judge proposes the following punctuation change to item E: "Principal and interest payments must be made in the amounts and at the times stated by the authority, in the loan agreement." This recommended change merely omits an extra comma in the sentence.

**B.L.N.**