

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

In the Matter of the Proposed Rules
Governing Renovation and Demolition
Solid Waste; Minnesota Rules, Part
7035.0805

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

The Minnesota Pollution Control Agency (Agency or MPCA) 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 March 20, 2009, 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:

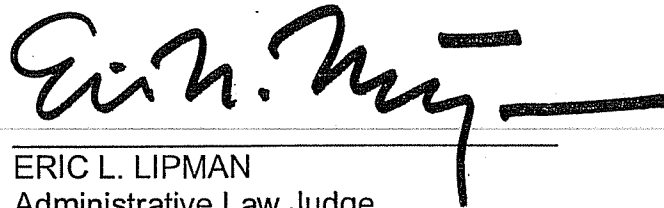
1. The Agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The following provisions of the adopted rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100, items D, E, and G:
 - (a) Minn. R. 7035.0805, Subpart 5;
 - (b) Minn. R. 7035.0805, Subpart 6; and,
 - (c) Minn. R. 7035.0805, Subpart 8.

All other rule parts are approved.

4. The rules as amended in the Revisor's draft AR 3694, dated January 21, 2009, are not substantially different than those that were originally proposed.

5. 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.

Dated: April 3, 2009



ERIC L. LIPMAN
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 Hearings¹ 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 unconstitutional² 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 proposed rules. All other rule parts are approved.

As described by the Agency, the purpose of this rulemaking is:

[T]o bring together in one place all the various items that are generally prohibited from disposal in typical demolition debris management facilities so that the regulated community and the MPCA know what needs to be removed prior to demolition, and to establish the requirement that the items be removed prior to "commencement of renovation or demolition" as defined so that it is possible to enforce the prohibitions that exist prior to the generation of the waste requiring disposal. It is reasonable to provide an extensive list because the parties can then use it as a reference for items

¹ Minn. R. 1400.2100 (2007).

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

that must be removed prior to commencement of renovation or demolition. It is reasonable to require these materials be removed prior to commencement so as to reduce the possibility of release of harmful materials during demolition, handling, transport, and/or disposal.

The Administrative Law Judge notes that the MPCA's goal of grouping together, in one place, information regarding federal and state regulation of renovation and demolition waste, is a salutary purpose. The agency deserves to be commended for its efforts to assist regulated parties and other interested persons in accessing and understanding the applicable law.

Yet, it is also true that under Minn. Stat. § 14.02, rulemaking is a process for drafting formal documents which have special legal significance. Thus, while executive branch agencies can, and do, communicate important messages to regulated parties (and the broader public) through rulemaking, not every message that an agency may wish to communicate can be stylized as an administrative rule.

In the view of the Administrative Law Judge, the MPCA, with the noblest of intentions, inappropriately uses the proposed rules as a method of communicating with its stakeholders on matters that do not constitute "rules."

Defects under Minn. R. 1400.2100, Items D, E and G

The Administrative Law Judge has identified defects in the proposed rule part 7035.0805 on the grounds that the proposed rules are either vague, confer undue discretion to agency officials or do not meet the statutory requirements of a rule. Each of these defects is discussed in turn below.

Subpart 5

"Encourage" language

Subpart 5 addresses the items and materials to be removed before renovation or demolition. In the opening paragraph of Subpart 5, the Agency "encourages" persons authorizing or conducting renovation and demolition to contact the Agency regarding recycling and reuse opportunities and to seek guidance from the Agency as to compliance with the rule.

Minn. Stat. § 14.02, subd. 4 defines a rule as "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."

Nothing in the second sentence of Subpart 5 brings any specificity to the law that will be enforced by the MPCA. The Agency merely urges the regulated parties to act in a certain way without any indication of what regulatory consequences would follow a failure to act as requested. To correct the defect, the Administrative Law Judge recommends the following language, or substantially similar language:

Persons authorizing or conducting renovation or demolition or arranging for removal of items are ~~encouraged to~~ must contact the agency regarding opportunities to reuse or recycle the items and materials listed in this subpart, as well as other materials comprising the structure, and to obtain checklists or other guidance documents that have been developed to assist with compliance with this part.

Changing the proposed language in accordance with this recommendation is needed and reasonable, and will not make Subpart 5 substantially different than the rules as originally proposed.

“Including, but not limited to” language

Subpart 5 consists of a list of sixteen items and materials (Items A through P) to be removed from structures, or portions of structures, before renovation or demolition. Items A, B, F, G, H, I, J, and K all utilize the phrase “including, but not limited to” to broaden the range of materials that are encompassed by the definition.

Use of this phrase is generally disfavored in rulemaking because it introduces ambiguity into a proposed rule. The phrase fails to provide adequate notice to the regulated party as to what items “must be removed prior to the commencement of renovation or demolition.” Likewise, because the listing is unspecific and open-ended, it grants to the agency unduly broad discretion to import new items that are not listed into the regulatory definition.³

To correct these defects, the Administrative Law Judge recommends that the Agency remove the phrase and all of the examples listed after it within each subitem, or in the alternative, remove the “but not limited to” portion of the phrase and retain the listed examples. Changing the proposed language in accordance with this recommendation is needed and reasonable, and will not make Subpart 5 substantially different than the rules as originally proposed.

“May” language

The word “may” appears in the descriptions listed in Subpart 5, Items F, G, and H. For example, proposed Item F reads, “items that *may* contain elemental mercury” As written, these three items are ambiguous and do not give the regulated party clear guidance as to what objects or materials must be removed.

³ See, e.g., *In the Matter of the Proposed Rules Governing Wells and Borings*, OAH Docket No. 11-0900-18038-1 (2008); *In the Matter of the Proposed Permanent Rules Governing Water Quality Standards*, OAH Docket No. 10-2200-14812-1 (2002); *In the Matter of the Proposed Permanent Rules Governing Deed Tax*, OAH Docket No. 7-2700-13138-1 (2000); *In the Matter of the Proposed Adoption of Rules Relating to the Petroleum Tank Release Compensation Board*, OAH Docket No. 9-1010-9231-1 (1995); *In the Matter of the Proposed Adoption of Permanent Rules Relating to Surveillance and Utilization Review of Medical Assistance Services*, OAH Docket No. 4-1800-5176-1 (1991).

To correct these defects, the Administrative Law Judge suggests that the Agency removed the word "may" from Items F, G, and H. This proposed change is needed and reasonable and will not make Subpart 5 substantially different than the rules as originally proposed.

Item A

The MPCA proposed Item A as follows: "items that would *normally* be disposed of as mixed municipal solid waste" The Administrative Law Judge finds that the word "normally" adds ambiguity and vagueness to the proposed rule language so as to make it defective.

To correct this defect, the Administrative Law Judge suggests deleting the following language so that the provision reads: "~~items that would normally be disposed of as mixed municipal solid waste, including ... furniture,~~" Changing the proposed language in accordance with this recommendation is needed and reasonable, and will not make Item A substantially different than the rules as originally proposed.

Subpart 6

Item A, Subitem 3

Subpart 6 lists exemptions to subpart 5. Specifically, Item A, Subitem 3 states that the requirement to remove items or materials listed in Subpart 5 prior to renovation or demolition does not apply when "the items or materials are within components of the structure, such as elevators, vertical lifts, or lighting, that need to remain intact during the course of renovation or demolition, provided that the items or materials are removed after use of the component is no longer required."

The Administrative Law Judge finds that this provision is vague because it is not clear what is meant by "after use of the component is no longer required." To correct this defect, the Administrative Law Judge recommends that the Agency clarify its intended objectives. One possible revision would be to revise Item A, Subitem 3 to state:

the items or materials are within components of the structure, such as elevators, vertical lifts, or lighting, and maintaining their intact operation supports that need to remain intact during the course of renovation or demolition, provided that the items or materials are removed after use of the component is no longer required for its intended purpose."

Changing the proposed language in accordance with this recommendation is needed and reasonable, and will not make Subpart 6 substantially different than the rules as originally proposed.

Item B

The MPCA proposed language at Subpart 6, Item B as follows:

If the removal of hazardous materials or items is not required as provided under this subpart, the owner, person who will authorize renovation or demolition, and person who will conduct the renovation or demolition must comply with the requirements of this part *to the extent reasonable*, by removing the items or materials listed in subpart 5 that are accessible before or after renovation or demolition (emphasis added).

The Administrative Law Judge finds that the italicized language renders Item B vague and ambiguous. In Subpart 5, the Agency set forth a series of exemptions to the general rules. If this Item is intended to expand upon those early exemptions, the Agency should clearly set forth the circumstances when any further exemptions apply. One possible revision to correct the defect is to remove the phrase "to the extent reasonable" from the proposed language. Changing the proposed language in accordance with this recommendation is needed and reasonable, and will not make Subpart 6 substantially different than the rules as originally proposed.

Subpart 8

The last sentence of Subpart 8, addressing debris characterization, encourages regulated parties to contact the regional agency solid waste inspector for assistance with compliance with this part. As it was with Subpart 5, use of the word "encourage" is inappropriate in this context. This term does not create a statement of "general applicability and future effect" or "make specific the law enforced or administered" by the agency.⁴

To correct this defect, the Administrative Law Judge recommends that the Agency make the following change: "All persons ~~are encouraged to~~ must contact the regional agency solid waste inspector for assistance with compliance with this part." This proposed change is needed and reasonable and will not make Subpart 8 substantially different than the rules as originally proposed.

Meeting the Agency's Communication Objectives Through a New Subpart 1a

Mindful of the agency's purpose "to bring together in one place all the various items that are generally prohibited from disposal in typical demolition debris management facilities so that the regulated community and the MPCA know what needs to be removed prior to demolition," the Administrative Law Judge recommends that the agency include a new Subpart 1a among the final rules. This subpart would obligate the agency to develop and make available information on the waste disposal practices that were described in the draft rules. The benefit of this approach is that this new subpart would communicate to interested persons, within the text of Part 7035.0805,

⁴ See, Minn. Stat. § 14.02 (4) (2008).

where to obtain such information; and yet, unlike a general narrative on proper waste disposal practice, qualifies as a rule under Minn. Stat. § 14.02, subdivision 4. Such a new subpart could state:

The agency shall publish and make available on its official website an informational pamphlet that addresses such topics as:

- (a) the types of waste items and materials that should be removed prior to the commencement of renovation and demolition;
- (b) the types of waste items and materials that are likely sources of elemental mercury;
- (c) the types of waste items and materials that are likely sources of polychlorinated biphenyls (PCBs);
- (d) the types of waste items and materials that are likely sources of chlorofluorocarbons (CFCs); and,
- (e) the appropriate practice for obtaining compliance assistance from regional agency solid waste staff.

Adding the proposed language in accordance with this recommendation is needed and reasonable, and will not make the suggested Subpart 1a substantially different than the rules as originally proposed.

E. L. L.