

November 21, 2017

VIA E-FILING ONLY

Nathan Cooley
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**Re: *In the Matter of the Adopted Exempt Permanent Rule: Municipal Effluent Limitations*
OAH 19-9003-34654; Revisor R-4484**

Dear Mr. Cooley:

Enclosed herewith and served upon you please find the **ORDER ON CHIEF JUDGE'S REVIEW OF RULES UNDER MINN. STAT. §§ 14.388 AND MINN. R. 1400.2400** in the above-entitled matter.

If you have any questions regarding this matter, please contact Katie Lin at (651) 361-7911 or katie.lin@state.mn.us.

Sincerely,



TAMMY L. PUST

Chief Administrative Law Judge

Enclosures

cc: Office of the Governor
Paul Marinac
Legislative Coordinating Commission
Representative Tim O'Driscoll
Senator Mary Kiffmeyer

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Exempt Rules of the Minnesota
Pollution Control Agency Governing
Municipal Effluent Limitations

**ORDER ON CHIEF JUDGE'S REVIEW
OF RULES UNDER
MINN. STAT. §§ 14.388
AND MINN. R. 1400.2400**

On October 17, 2017, the Minnesota Pollution Control Agency (MPCA or Agency) sought review and approval of the above entitled rules under Minn. Stat. § 14.388, subd. 1(3) (2016); Minn. R. 1400.2400 (2017).

On October 31, 2017, Administrative Law Judge Jeffery Oxley issued an Order on Review of Rules under Minn. Stat. §§ 14.386 and 14.388. Judge Oxley disapproved the proposed good cause exempt rule.


On November 7, 2017, the MPCA filed a request for the Chief Judge to review the disapproved proposed exempt rule, pursuant to Minn. Stat. § 14.388, subd. 3 (2016); Minn. R. 1400.2400, subp. 5. On November 15, 2017, members of the Minnesota House of Representatives' Environment and Natural Resources Policy and Finance Committee submitted comments objecting to Judge Oxley's disapproval of the proposed rule amendment. On that same date, the Coalition of Greater Minnesota Cities, the League of Minnesota Cities, the Minnesota Environmental Science and Economic Review Board, and the Minnesota Center for Environmental Advocacy (MCEA) also submitted comments.

Based upon a review of the written submissions by the MPCA and the contents of the rulemaking record, including all of the written comments received, the Chief Administrative Law Judge issues the following:

ORDER

The proposed exempt rule, Minn. R. 7001.0150, subp. 2(A), is **DISAPPROVED** as not meeting the requirements of Minn. R. 1400.2100, items D, E (2017).

Dated: November 21, 2017



TAMMY L. PUST
Chief Judge

NOTICE

Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. § 606.06 (2016).

MEMORANDUM

The MPCA requested the Chief Judge to review the Administrative Law Judge's disapproval of the following language that the Agency proposed to add to Minn. R. 7001.0150, subp. 2(A):

For a municipality that constructs a publicly owned treatment works facility to comply with a new or modified effluent limitation, compliance with any new or modified effluent limitation adopted after construction begins that would require additional capital investment is required no sooner than 16 years after the date of initiation of operation of the facility.

The MPCA was directed by the legislature to amend Minn. R. 7001.0150, subp. 2(A), by adding the above language. The legislature also provided that:

[t]he commissioner may use the good cause exemption under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules under this section, and Minnesota Statutes, section 14,386, does not apply, except as provided under Minnesota Statutes, section 14.388.¹

Minn. Stat. § 14.388, subd. 1(3), allows an exemption from ordinary rulemaking where an agency finds the rulemaking provisions of Minn. Stat. ch. 14 (2016) are “unnecessary, impracticable, or contrary to the public interest” when amending a rule to “incorporate specific changes set forth in applicable statutes when no interpretation of law is required.”

I. Standard of Review

In exempt rulemaking, the Administrative Law Judge, and Chief Judge upon review, conduct a legal review of the proposed rules according to the standards set forth in Minn. R. 1400.2100, items A, D-G (2017), as follows:²

A rule must be disapproved by the judge or chief judge if the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

¹ 2017 Minn. Laws ch. 93, art. 2, § 160(b).

² See Minn. R. 1400.2400, subps. 3, 5.

* * *

- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person or group;
- G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; . . .³

II. Legal Analysis

A. Notice

As an initial matter, the Administrative Law Judge found the lack of evidence in the record that the Agency provided notice of its rulemaking in the manner required by Minn. Stat. § 14.388, subd. 2, to be a procedural defect.

An agency proposing to amend a rule under the good cause exemption is required to give electronic notice of its intent in accordance with Minn. Stat. § 16E.07, subd. 3 (2016); and notice by United States mail or electronic mail to persons who have registered their names with the agency under Minn. Stat. § 14.14, subd. 1a.⁴ The notice must be given no later than the date the agency submits the proposed rule to the Office of Administrative Hearings for review of its legality.⁵ The notice must include:

1. The proposed rule, amendment or repeal;
2. An explanation of why the rule meets the requirements of the good cause exemption under subdivision 1; and
3. A statement that interested parties have five business days after the date of the notice to submit comments to the Office of Administrative Hearings.⁶

On October 17, 2017, the MPCA filed the following documents with the Office of Administrative Hearings:

1. Four copies of the proposed Rules with Revisor's approval;
2. A proposed Order Adopting Rules (Proposed Order); and

³ Minn. R. 1400.2100 (2017).

⁴ Minn. Stat. § 14.388, subd. 2.

⁵ *Id.*

⁶ *Id.*

3. A copy of MPCA's legislative authorization to use the exempt rulemaking provisions under Minn. Stat. § 14.388, subd. 1(3).⁷

The MPCA's Proposed Order⁸ includes the following finding:

On [insert date] the Agency provided the notice of adoption via email to a list of all persons who were registered with the Agency for receiving GovDelivery notice of any rulemaking, good cause exempt rulemaking, new rulemaking announcements, or water rulemaking proceedings. The Agency also attempted to identify and notify persons or classes of persons who it believed the rule might affect. The notice provided satisfies the requirements of Minnesota Statutes, section 14.14, subdivision 1a, as referenced in Minnesota Statutes, section 14.388, subdivision 2.

Other than the Proposed Order, which did not include the date on which the notice was provided, the Agency did not file any documents reflecting service of notice to anyone. As submitted, the record only included the Agency's assertion that the required work was completed on some unknown date.

In its request for review, the Agency states that it is not clear from law or the Minnesota Rulemaking Manual that a copy of the notice or a certificate of mailing was required to be filed with the Office of Administrative Hearings at the time it submitted its proposed rule for review. The Agency contends that its filing of the proposed rule, Proposed Order, and legislative authorization meets the requirements of Minn. Stat. § 14.388, subd. 1; Minn. R. 1400.2400, subp. 2. The Agency also states that it "shared copies of email notices with OAH that included a link to the actual Notice of Submittal."⁹ The Agency maintains that it intended to provide a copy of its notice and a Certificate of Accuracy of the Mailing List when it submitted its final executed Order Adopting Rules following approval of the rule.

In conducting the legal review of the proposed rules, the Administrative Law Judge must determine whether the proposed rule was adopted in compliance with the procedural requirements of Minn. Stat. ch. 14.¹⁰ Minn. Stat. § 14.388, subd. 2, requires an agency to give notice to persons who have registered their names with the agency under section 14.14, subd. 1(a). The notice must be given "no later than the date the agency submits the proposed rule to the Office of Administrative Hearings for review of its legality" and must include a statement that parties have five business days to submit comments.¹¹ The Proposed Order did not indicate on what date the Agency gave the required notice. While the Agency may have copied the Administrative Law Judge's legal assistant on emails it sent to persons on its rulemaking list, its submissions did not reflect

⁷ 2017 Minn. Laws ch. 93, art. 2, § 160.

⁸ See Minn. R. 1400.2400, subp. 2(B).

⁹ MPCA Request for Review, Attachment 1.

¹⁰ Minn. R. 1400.2100(A).

¹¹ Minn. Stat. § 14.388, subd. 2.

fulfillment of the statutory notice requirement. Therefore, a finding of a procedural defect was appropriate.¹²

With its request for review of the disapproved rule, the Agency has now submitted additional documents which demonstrate that it did in fact comply with the notice requirements of Minn. Stat. § 14.388, subd. 2. Therefore, the procedural defect was harmless and corrected.

B. Response to Comments

On October 24, 2017, the MCEA and the U.S. Environmental Protection Agency (EPA) filed comments on the proposed exempt rule with the Office of Administrative Hearings. On that same day, the Administrative Law Judge directed his legal assistant to contact the MPCA to see if it was going to file a response to the comments.¹³ In an email dated October 24, 2017, the MPCA responded:

We do not see where in the process [of exempt rule review] the agency is required to respond to comments. We are not prepared to and did not plan to respond to this comment. Can you direct me to any provisions that require my agency to respond to such comments?¹⁴

In its request for review, the Agency maintains that, “without knowledge of Judge Oxley’s intent for the inquiry, [it] was reasonably confused by the request” because the short timeframe for review of good cause exempt rules does not require an agency response to comments.¹⁵ The Agency asserts that, because it did not receive a clarification from the Office, it did not file a response to the comments.

The Chief Judge agrees that nothing in statute or rule *requires* an agency to respond to public comments on proposed exempt rules. However, it is within the administrative law judge’s discretion to invite a response so as to ensure a complete rulemaking record. Judge Oxley could have reasonably concluded that a response from the Agency would better facilitate judicial review of the Agency’s action.¹⁶

¹² The Office of Administrative Hearings has disapproved other proposed rules where there was no evidence that the agency complied with the notice requirements of section 14.388, subd. 2. *See, e.g., In the Matter of the Proposed Exempt Rules of the Minnesota Department of Employment & Economic Development Relating to Unemployment Insurance Hearings*, No. 65-1200-30780, ORDER ON REVIEW OF RULES UNDER MINN. STAT. §§ 14.386 AND 14.388 (Minn. Office Admin. Hearings July 15, 2013). Moreover, Chapter 11 of the Minnesota Rulemaking Manual does include a checklist for submitting exempt rules that includes preparation of a certificate of mailing notice.

¹³ Email from Katie Lin, State Program Administrator Intermediate, Office of Administrative Hearings to Nathan Brooks Cooley, Rulemaking Coordinator, MPCA (Oct. 24, 2017).

¹⁴ Email from Nathan Brooks Cooley to Katie Lin (Oct. 24, 2017, 4:50 p.m. CST).

¹⁵ MPCA Request for Review at *4 (Nov. 7, 2017).

¹⁶ See Minn. Stat. § 14.001(7).

C. Use of Good Cause Exemption

The Agency asserts that the Administrative Law Judge erred by finding that the Agency failed to establish compliance with the good cause exemption under Minn. Stat. § 14.388, subd. 1(3).

An agency may use the abbreviated rulemaking procedures under the good cause exemption to rulemaking if an agency finds the rulemaking provisions of Minn. Stat. ch. 14 are “unnecessary, impracticable, or contrary to the public interest” when adopting, amending, or repealing a rule to:

1. address a serious and immediate threat to the public health, safety, or welfare;
2. comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;
3. incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or
4. make changes that do not alter the sense, meaning, or effect of a rule.¹⁷

After considering the agency’s statement and any comments received, the administrative law judge “shall determine whether the agency has provided adequate justification for its use of this section.”¹⁸

The MPCA maintains that the Minnesota Legislature’s permission to adopt the proposed rule amendment using the good cause exemption under Minn. Stat. § 14.388, subd. 1(3), is sufficient justification for its use of this section. The MPCA also asserts that the statutory phrase “when no interpretation of law is required” refers only to the proposed rule language. In essence, the Agency insists that so long as the proposed rule amendment conforms to the specific statutory language, the amendment requires “no interpretation of law” and meets the criteria in clause 3. The MPCA contends that it did not submit an explanation for why its proposed amendment meets the good cause exemption under Minn. Stat. § 14.388, subd. 1(3), because no such explanation was required. It contends that it merely proposed the exact language provided by the Legislature and, therefore, it did not interpret the law.¹⁹ The MPCA argues that it is unprecedented to apply the “no interpretation of law” requirement to hypothetical actions the Agency may take as a result of the proposed rule amendment.

It is the agency’s burden to show in its submissions to the administrative law judge that the proposed amendment to the rule: (1) incorporate specific changes set forth in applicable statutes and no interpretation of law is required; and (2) that it would be unnecessary, impracticable or contrary to the public interest to proceed with the standard

¹⁷ Minn. Stat. § 14.388, subd. 1.

¹⁸ *Id.*

¹⁹ MPCA’s Request for Review at *4 (Nov. 7, 2017).

rulemaking process. Failure to concretely establish these elements results in the disapproval of the proposed rules under Minn. Stat. § 14.388.²⁰

In some cases, the legislature provides the good cause in the legislation and in those cases the agency does not have to show good cause itself under the requirements of the statute.²¹ The Chief Judge finds the legislature's direction to use the good cause exemption process, while permissive, is sufficient to establish good cause in this case.²² This direction coupled with the proposed amendment's incorporation of specific statutory language meets the requirements of Minn. Stat. 14.388, subd. 1(3).

D. Disapproval under Minn. R. 1400.2100

Although the Agency's proposed amendment is a word-for-word recitation of the statutory language, there is another step to the rule review process. Minn. R. 1400.2400, subp. 3 requires that in reviewing the filing, "the judge must decide whether the rule meets the standards of Minn. R. 1400.2100, items A, D-G, and whether the agency has established its exemption from rulemaking under Minnesota Statutes, section 14.386 or 14.388." Minn. R. 1400.2100, items A, D-G, provides that a rule must be disapproved by the judge or chief judge if the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);
- ...
- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person or group;

²⁰ See *Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604, 609-610 (Minn. Ct. App. 2003) (holding that an agency does not comply with exempt rulemaking requirements when the agency fails to demonstrate with reasonable particularity how rulemaking through the standard public rulemaking procedures set forth in Chapter 14 would harm the public interest).

²¹ See *In the Matter of the Proposed Exempt Permanent Rules Governing the Safe at Home Program, Minnesota Rules, Chapter 8290*, No. 70-3500-19251, ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.388 (Minn. Office Admin. Hearings Oct. 12, 2007) (finding that the Legislature's declaration that "enactment of this section satisfies the requirements of section 14.388, subdivision 1" supplied the required good cause for use of the process).

²² 2017 Minn. Laws ch. 93, art. 2, § 160(b) ("the commissioner may use the good cause exemption under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules under this section . . .).

- G. is not a “rule” as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; . . .

The Administrative Law Judge disapproved the Agency’s proposed rule amendment on the basis that it conflicts with other applicable law²³ and is illegal.²⁴ Specifically, the Administrative Law Judge found that the proposed rule amendment conflicts with federal permitting requirements under the federal Clean Water Act (CWA) and therefore violates the Supremacy Clause of the United States Constitution.²⁵ In reaching this conclusion, the Administrative Law Judge noted that the CWA prohibits the MPCA from issuing National Pollutant Discharge Elimination System (NPDES) permits for terms longer than five years.²⁶ The CWA also prohibits the MPCA from issuing permits that do not include effluent limits that meet new or modified water quality standards.²⁷ Because the proposed rule amendment will, in certain circumstances, prevent the MPCA from enforcing effluent standards against municipal-owned treatment facilities for as long as 16 years, the Administrative Law Judge found that the proposed rule amendment conflicts with federal law and state law, which requires the MPCA to implement the minimum requirements of the CWA.²⁸

The MPCA argues that, “under common principles of statutory construction,” the Administrative Law Judge is required to assume the Minnesota Legislature did not intend to overturn a portion of the CWA. Based on that assumption, the MPCA maintains that the Administrative Law Judge should presume the Legislature intended the statute to be executed only to the extent it does not conflict with federal law. To presume otherwise, according to the MPCA, is to improperly “substitute OAH’s intent for the Legislature’s intent.”²⁹ The MPCA asserts that a conflict with federal law is “unlikely” and if implementation of the proposed rule amendment does produce an unconstitutional result there are adequate judicial remedies available for persons harmed.³⁰

In its comments, the League of Minnesota Cities (League) requested that the proposed rule amendment be approved.³¹ The League maintains that providing municipalities with a 16-year safe harbor from additional capital investment, if a facility has started construction, appropriately balances the need to comply with changing environmental standards with the economic realities local governments face in providing clean water.³² The League asserts that a balance is necessary given that upgrading and

²³ Minn. R. 1400.2100(D).

²⁴ Minn. R. 1400.2100(E).

²⁵ See Minn. R. 1400.2100, items D, E; .2400, subp. 3. See also U.S. Const. Art. VI, clause 2 (Under the Supremacy Clause of the U.S. Constitution, in the event of a conflict between state and federal law, the contrary state rules are preempted).

²⁶ Order on Review of Rules at *9 (Oct. 31, 2017).

²⁷ *Id.*

²⁸ See Minn. Stat. § 115.03, subd. 5 (2016).

²⁹ MPCA’s Request for Review at *5 (Nov. 7, 2017).

³⁰ *Id.*

³¹ Comment by League of Minnesota Cities (Nov. 15, 2017).

³² *Id.* at *2.

constructing facilities can cost millions of dollars.³³ In similar comments, the Coalition of Greater Minnesota Cities urged approval of the proposed rule noting it would provide municipalities some relief from the financial burden of upgrading infrastructure.³⁴

Finally, ten members of the Minnesota House of Representatives' Environment and Natural Resources Policy and Finance Committee submitted comments in support of the Agency's proposed exempt rule.³⁵ These legislators maintain that the proposed rule is meant to guide the MPCA; they assert that the MPCA will be able to implement it in a manner that does not conflict with federal law.³⁶

Notwithstanding the assurances of the MPCA and other commenters that a conflict with federal law is unlikely, the Administrative Law Judge and Chief Judge are required to review the proposed rule for legality under Minn. R. 1400.2100, items A, D-G.³⁷ After reviewing the record, the Chief Judge agrees with the analysis of the Administrative Law Judge and finds that the proposed rule amendment conflicts with existing federal and state laws and regulations; it is thus illegal.³⁸ There is no narrowing construction that harmonizes both the proposed rule and federal law, and the Agency has pointed to none. Therefore, the proposed rule amendment must be disapproved under Minn. R. 1400.2100, items D, E.

III. Conclusion

The Chief Judge understands that the Agency has been put in a difficult position because it was directed by the Legislature to add the proposed language. The Chief Judge is also mindful of the serious economic challenges faced by municipalities when it comes to constructing wastewater treatment facilities. Nonetheless, the rule amendment cannot be approved when it conflicts with the requirements of the CWA. Therefore, for the above reasons, proposed Minn. R. 7001.0150, subp. 2(A) is **NOT APPROVED**.

T. L. P.

³³ *Id.*

³⁴ Comment by Coalition of Greater Minnesota Cities (Nov. 15, 2017).

³⁵ Comment by House Environment & Natural Resources Policy & Finance Committee (Nov. 15, 2017).

³⁶ *Id.*

³⁷ Minn. R. 1400.2400, subps. 3, 5.

³⁸ See U.S. Const., Art. VI, Clause 2, and Minn. Stat. § 115.03, subd. 5 (The MPCA cannot establish rules relating to its implementation of the NPDES permit process that are less stringent than the federal laws and regulations under the CWA).