

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Health Relating to the Rules on the Health Risk Limits for Groundwater, Minnesota Rules 4717.7500, 4717.7850, 4717.7860, and Proposed Addition to the Permanent Rules on Health Risk Limits, Part 4717.7865

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

The Minnesota Department of Health (Department) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26 (2014). On November 6, 2015, the Office of Administrative Hearings received the documents that must be filed by the Department under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2015). Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

IT IS HEREBY DETERMINED:

1. The Department has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2014), and Minnesota Rules, Chapter 1400 (2015).
3. The record demonstrates the rules are needed and reasonable.
4. The Department should consider making the technical changes set forth in the attached memorandum.

IT IS HEREBY ORDERED THAT:

The rules are **APPROVED**.

Dated: November 19, 2015

s/Jeanne M. Cochran

JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

The Department has submitted these rules to the Administrative Law Judge for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies that the Administrative Law Judge must approve or disapprove the rules as to their legality and form. In conducting the review, the Administrative Law Judge must consider the issue of whether the agency has the authority to adopt the rules; whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed. Based on a review of the written submissions and filings, the Administrative Law Judge concludes that the proposed rules comply with the applicable legal requirements. The Administrative Law Judge, however, recommends technical revisions to Minn. R. 4147.7865 and to the Commissioner's proposed order adopting the rules.

1. Suggested Revisions to Minn. R. 4148.7865

The Administrative Law Judge recommends that the Department make a language change to proposed rule 4147.7865, establishing health risk limits (HRLs) for triclosan. The change, set forth below, is intended to clarify the Department's authority to adopt the rule.

In the Statement of Need and Reasonableness (SONAR), the Department states that it is revising or adding HRLs for 14 groundwater contaminants.¹ These proposed HRLs are included as amendments to Minn. R. 4717.7860. In addition, the Department is proposing to adopt HRLs for triclosan in a new rule: Minn. R. 4147.7865.² That proposed rule is the first to contain HRLs for a surface water contaminant.³ The Department cites to Minn. Stat. § 144.12, subd. 1(5) (2014) and 2013 Minn. Laws, chapter 137, article 2, section 8, as providing the Department with authority to adopt the HRLs for triclosan in surface water.⁴

Minnesota Statutes Section 144.12, subd. 1(5) provides that the Department may adopt rules to "control ... the pollution of streams and other waters and the distribution of water by persons for drinking or domestic use." 2013 Minn. Laws, chapter 137, article 2, section 8 provides that \$2.3 million is appropriated "for addressing public health concerns related to contaminants found in Minnesota drinking water for which no health-based drinking water standards exist, including accelerating the development of health risk limits, including triclosan, and improving the capacity of the department's laboratory to analyze unregulated contaminants."⁵

While the Department cites 2013 Minn. Laws, chapter 137, article 2, section 8, as providing it with specific rulemaking authority for adopting HRLs for triclosan, the

¹ SONAR at 7.

² *Id.*

³ *Id.*

⁴ *Id.* at 10.

⁵ *Id.*

Administrative Law Judge does not read the law in the same manner. Instead, the Administrative Law Judge believes that the better interpretation of 2013 Minn. Laws, chapter 137, article 2, section 8 is that the language is intended to encourage and expedite the development of HRLs for triclosan (and other contaminants) under the Department's existing authority in Section 144.12 by appropriating funds for that purpose.⁶

For this reason, the Administrative Law Judge recommends amending subdivision 1 of proposed rule 4147.7865 by adding a reference to the authority in Minn. Stat. § 144.12 and deleting the reference to 2013 Minn. Laws, chapter 137, article 2, section 8. The current language of subdivision 1 of the rule proposed by the Department reads as follows:

4717.7865 HEALTH RISK LIMITS FOR TRICLOSAN.

Subpart 1. **Purpose.** Notwithstanding the purpose and scope of health risk limits described in part 4717.7810, and as authorized by Laws 2013, chapter 137, article 2, section 8, the following values are adopted as health risk limits for triclosan.

To clarify the Department's authority to adopt the rule, the Administrative Law Judge recommends amending the language to read as follows:

4717.7865 HEALTH RISK LIMIT FOR TRICLOSAN.

Subpart 1. **Purpose.** Notwithstanding the purpose and scope of health risk limits described in part 4717.7810, and as authorized by Minnesota Statutes Section 144.12, subdivision 1(5), ~~Laws 2013, chapter 137, article 2, section 8,~~ the following values are adopted as health risk limits for triclosan.

Finally, it should be noted that if 2013 Minn. Laws, chapter 137, article 2, section 8 was intended to give the Department specific authority to adopt a rule establishing HRLs for triclosan rather than simply accelerating the development of HRLs for triclosan, that authority has expired. Under Minn. Stat. § 14.125, the agency is required to publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of a post-1995 law authorizing rules to be adopted or the authority for the rules expires. Here, 2013 Minn. Laws, chapter 137, article 2, section 8 became effective on July 1, 2013 but the Notice of Intent to adopt these rules was not published until August 31, 2015, more than 18 months after the effective date of the law. Significantly, Minn. Stat. § 14.125 also provides that the "agency shall not use other law in existence at the time of the expiration of rulemaking authority under this section as authority to adopt, amend, or repeal those rules." Thus, if 2013 Minn. Laws, chapter 137, article 2, section 8 is read to provide specific authority to adopt the triclosan HRLs in rule, then the Department's authority to adopt the triclosan HRLs rule has expired under both Laws 2013, chapter 137, article 2, section 8 and under Section 144.12.

⁶ See 2013 Minn. Laws, chapter 137, article 2, section 8.

As noted above, the Administrative Law Judge does not read Laws 2013, chapter 137, article 2, section 8 as providing specific authority to adopt a rule setting HRLs for triclosan. Accordingly, the Administrative Law Judge concludes that the Department can use its existing authority under Section 144.12, which predates 1995, to adopt Minn. R. 4717.7865.⁷

2. Analysis Required by Minn. Stat. § 14.127, Subd. 1

The Administrative Law Judge recommends that the Commissioner include a section in his order adopting the rules stating that the Department has conducted the analysis required by Minn. Stat. § 14.127, subd. 1, to the best of its ability. Section 14.127 provides that the agency “must determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” In the SONAR, the Department initially stated that it “cannot determine small business or city costs incurred in complying with the proposed amendments because the regulations do not have any implementation, regulation or enforcement requirements.”⁸ The Department went on to explain that HRLs simply provide guidance and risk managers have flexibility in determining if and when to apply the HRL values. In addition, the Department noted that it is unaware of any small business or city that applies the health-based guidance. Based on these factors, the Department concluded that “there is no evidence that complying with the rules will exceed \$25,000 for any small business or city.”⁹ Thus, while the Department initially stated that it “cannot” make the determination required by Section 14.127, subdivision 1, the Department did in fact make the determination.

To clarify that the Department did in fact conduct the analysis required by Section 14.127, subdivision 1, the Administrative Law Judge recommends that the Commissioner add clarifying language in his order. Demonstrating compliance with this statutory requirement is particularly important in light of the Court of Appeals’ recent decision in *Builders Association of the Twin Cities v. Minnesota Dept. of Labor and Industry*, ___ N.W.2d ___, 2015 WL 5928014 at *9 (Minn. Ct. App. Oct. 13, 2015).

J. M. C.

⁷ This statutory language has been in existence since before 1995. See Minn. Stat. § 144.12 (1994).

⁸ SONAR at 53 (emphasis in the original).

⁹ See *id.*