

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to
Rules Governing Animal Feedlots, Permits and
Certifications, and Permit Fees, Minnesota
Rules, Chapter 7020, 7001 and 7002

**CHIEF ADMINISTRATIVE LAW
JUDGE'S ORDER ON REVIEW OF
RULES UNDER MINN. STAT.
§ 14.16, SUBD. 2, AND MINN.
R. 1400.2240, SUBPS. 4 AND 5**

The Minnesota Pollution Control Agency (MPCA or Agency) proposes to adopt the above-entitled rules pursuant to Minn. Stat. § 14.16. Public hearings were held regarding the proposed rules on September 9, 2013. On November 18, 2013, Administrative Law Judge Ann O'Reilly issued a Report in which she determined that the proposed rules were defective in certain respects.

On December 2, 2013, the undersigned Chief Administrative Law Judge issued a Report approving Judge O'Reilly's Report and approving the deficiencies identified therein. The Chief Judge's Report included additional analysis, which was then incorporated into the Amended Report dated December 2, 2013. The Amended Report disapproved 12 of the proposed rules and approved the remainder of the rules. The disapproved rules included:

- Rule 7020.0405, subp. 1A [Joinder of NPDES and SDS Permits];
- Rule 7020.0405, subp. 1B [SDS Permit Based Upon Capacity];
- Rule 7020.0405, subp. 5 [Joinder of NPDES and SDS Permits];
- Rule 7020.0505, subp. 2A [Joinder of NPDES and SDS Permits];
- Rule 7020.0505, subp. 5 [Joinder of NPDES and SDS Permits];
- Rule 7020.0300, subp. 14a [Definition of Modification];
- Rule 7020.0300, subp. 17 [Definition of Owner];
- Rule 7020.0300, subp. 18B [Definition of Pasture];
- Rule 7020.0300, subp. 27 [Waters of the United States];
- Rule 7020.2003, subp. 1 [Prohibited Discharges and Conduits to Groundwater];
- Rule 7020.2003, subp. 2 [Prohibited Discharges and Joinder of NPDES and SDS Permits]; and
- Rule 7020.2100, subp. 1D [Limited Risk Liquid Manure Storage Areas].

In response to the disapproval of rules and the recommendations provided in the Amended Report, the MPCA modified the disapproved rules. On February 13, 2014, the MPCA requested that the Chief Administrative Law Judge review and approve its modifications to the proposed rules pursuant to Minn. Stat. § 14.16, subd. 2, and Minn.

R. 1400.2240, subps. 4 and 5. Because some of the modifications presented by the MPCA contained changes that were different than those expressly recommended by Judge O'Reilly and Chief Judge Pust, the MPCA filed: (1) a copy of the rules as initially proposed; (2) a proposed Order Adopting Rules; and (3) the rules as proposed for final adoption showing the MPCA's modifications.

Based upon a review of the modified proposed rules, the Chief Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The changes to Proposed Rule 7020.0205, including the addition of item L, are **APPROVED**.
2. The addition of and changes to Proposed Rule 7020.0300, subp. 14a, are **APPROVED**.
3. The addition of Proposed Rule 7020.0300, subp. 14b, is **APPROVED**.
4. The change to Proposed Rule 7020.0300, subp. 17, as recommended by the Judge in the Amended Order, is **APPROVED**.
5. The changes to Proposed Rule 7020.0300, subp. 18, as recommended by the Judge in the Amended Order, are **APPROVED**.
6. The change to Proposed Rule 7020.0300, subp. 27, as recommended by the Judge in the Amended Order, is **APPROVED**.
7. The change to Proposed Rule 7020.0405, subp. 1, is **DISAPPROVED**, as explained in the Memorandum below.
8. The change to Proposed Rule 7020.0405, subp. 1A, is **APPROVED**.
9. The change to Proposed Rule 7020.0405, subp. 1B(1), is **APPROVED**.
10. The change to Proposed Rule 7020.0405, subp. 4A, as addressed in the Amended Report, is **APPROVED**.
11. The changes to Proposed Rule 7020.0405, subp. 5A, are **APPROVED**.
12. The change to Proposed Rule 7020.0505, subp. 2A, is **APPROVED**.
13. The changes to Proposed Rule 7020.0505, subp. 5A, are **APPROVED**.

14. The changes to Proposed Rule 7020.2003, subp. 1, are **APPROVED**.
15. The changes to Proposed Rule 7020.2003, subp. 2, are **APPROVED**.
16. The changes to Proposed Rule 7020.2100, subp. 1D are **APPROVED**. Additional changes are recommended in the Memorandum below to provide clarity.
17. The addition of Proposed Rule 7020.2100, subp. 1E, is **APPROVED**. Additional changes are recommended in the Memorandum below to provide clarity.
18. The change to Proposed Rule 7020.2100, subp. 2B(3)(c)(ii), is **APPROVED**.
19. The final proposed rules, including the recommended changes below, are not substantially different from those originally published by the MPCA in the *State Register* on July 22, 2013, and proposed at the public hearing. The changes are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice; the changes are a logical outgrowth of the contents of the notice of hearing and the comments received; and the notice of hearing provided fair warning that the outcome of the rulemaking proceeding could be in the rules in question.

Dated: February 24, 2014

s/Tammy L. Pust
TAMMY L. PUST
Chief Administrative Law Judge

MEMORANDUM

Part 7020.0405, subpart 1: Permit Applications

In the MPCA's modifications to proposed Rule 7020.0405, subp. 1, the MPCA makes the following change:

Subpart 1. **Permit required.** Four types of permits are issued under this chapter and chapter 7001: interim permits, construction short-form permits, SDS permits, and NPDES permits. ~~The owner~~ Any person who, at the time of the application, intends to be the owner following issuance of the permit shall apply for a permit as follow:

This change is made in response to the Administrative Law Judge's disapproval of the Agency's proposed definition of "owner," as set forth in Proposed Rule 7020.0300, subp. 17. In the initially proposed rule, the Agency sought to define owner as "all persons having or proposing to have possession, control, or title to an animal feed lot or manure storage area." The Judge determined that the phrase, "proposing to have," infused ambiguity into the rule, and rendered it impermissibly vague and defective.

The modification to Part 7020.0405, subp. 1, presents the same defect as was earlier identified. The phrase "Any person who ... intends to be the owner"¹ remains impermissibly vague. The legal concept of "intent" is difficult to determine, and most often requires an examination of subjective, factually-specific evidence related to motivation and effect. In its use of this phrase in the rule, it is not apparent whether the agency expects applications only from parties that have already entered into a purchase agreement or operating agreement with the owner, or also expects such from parties that are in preliminary negotiations which might lead to the formalization of such interests. It is similarly unclear whether a prospective operator might, in some circumstances, "intend" at some point to be an owner, such that application for a permit is required.

Based upon Agency comments, it appears that the MPCA is attempting to address situations in which a property owner applies for a permit and then transfers the property or the right to operate a feedlot on the property to a third party after the permit is issued. By its terms, this scenario involves the third party's attempt to avoid public scrutiny during the application process. If a party is attempting to avoid detection, it is unlikely that such party will voluntarily announce itself as having an "intent" to be an owner, and therefore the proposed language does not accomplish the agency's goals. Thus, this provision is of limited utility, is needlessly ambiguous, and is impermissibly difficult to enforce.

¹ The definition of "owner" is "all persons having possession, control, or title to an animal feedlot or manure storage area." Minn. R. 7020.0300, subp. 17.

The remedy for this problem appears to be requiring the applicant or owner to name all parties who intend to operate the feedlot in the permit application; not require parties with inchoate or potential interests in the property or operation to apply for a permit. It appears that the Agency has partially addressed this concern by the change made to Rule 7020.0405, subp. 4A. In that provision, the Agency requires that any changes to the “permittee” (the party named in a permit) be submitted to the Agency for review and permit modification. Through this authority, the Agency should be able to address the alleged “bait and switch” problem presented when one entity applies for a permit and another operates the facility once the permit is issued.

If the Agency decides to make a change to the rules in this respect, the Chief Administrative Law Judge will reconsider the rule consistent with the applicable standard of review.

Part 7020.0300, subparts 13d, 14a, and 14b: Modification

Under the Proposed Rules, the MPCA seeks to require feedlots and manure storage areas that undergo modifications to be subject to re-permitting or review. Presumably, the MPCA is primarily concerned about modifications to facilities or operational practices that result in an actual or potential increase in the emission or discharge of a pollutant into the environment, such being a proper subject of agency regulation.

The MPCA rejected the Administrative Law Judge’s recommendation to include this limitation into the definition of major and minor modification. Instead, the MPCA chose to delineate specific operational and facility changes that it would consider are “not modifications.”

To better provide guidance to the stakeholders who need direction as to what operational or facility modifications will subject them to permit review, it is respectfully recommended that the MPCA make the following additional modifications to the definitions:

Subp. 13d. **Major modification.** “Major modification” means a modification that allows an expansion of animal units or manure storage area capacity, or changes the method of manure storage ~~or~~ and does not meet the criteria of part 7001.0190, subpart 3.

Subp. 14b. **Modification.** “Modification” means a change to a facility component or operational practice described, required, or authorized by a permit issued under this chapter, including an expansion, which results in an actual or potential increase in the emission or discharge of a pollutant into the environment. Major and minor modifications are as defined in this part. Part 7020.0405, subpart 5, and chapter 7001 govern public notice of changes to permits under this chapter. A change to a facility component or operational practice that is not described, required, or authorized by a

permit and that does not result in an actual or potential increase in the emission or discharge of a pollutant into the environment, is not a modification, including changes to: [...]

This recommendation will assist owners or operators of feedlots and manure storage areas determine whether changes to their facilities or practice are “modifications” for purposes of permitting, or whether such changes are “not modifications.”

The Agency should note that this is a recommendation only; the Agency’s choice of whether or not to act on the recommendation will not impact the overall approval of the rule.

Part 7020.2100, subpart 1, items D and E: Limited Risk LMSAs

In the Amended Report, the Administrative Law Judge disapproved the Agency’s Proposed Rule 7020.2100, item D, explaining that the MPCA did not adequately identify the criteria for determining what constitutes a “limited risk” Liquid Manure Storage Area (LMSA). The Administrative Law Judge found that the proposed exemption for limited risk LMSAs was defective because it was unreasonably vague and granted the MPCA unfettered discretion to determine which LMSAs qualified for the exemption. The Administrative Law Judge recommended that the MPCA cure the defect by modifying item D to provide minimum design and operational standards to: (1) ensure that these facilities do not pose a threat to water quality; and (2) provide consistency in applying the exemption.

The Agency responded by providing such standards and criteria. The modifications, though more extensive than originally proposed, are within the scope of the subject matter announced in the notice of hearing and are in character with the issues raised in the notice. The modifications are also a logical outgrowth of the contents of the notice of hearing and the comments submitted in response to the notice. The notice of hearing provided fair warning that the outcome of the rulemaking proceeding could result in changes to the proposed rule, such as the changes herein proposed. Therefore, the Administrative Law Judge finds that the modifications to Rule 7020.2100, subp. 1, items D and E, do not render the rule substantially different from the proposed rule.

However, for purposes of improving clarity the Chief Judge recommends the following minor changes to those items:

D. Liquid manure storage areas described in subitems (1) and (2); ~~which provide temporary storage or processing,~~ are exempt from all provisions of this part 7020.2100, except for subparts 3, items C and D; subpart 5, item A; and subpart 7. In addition, ~~the~~ owner must submit design plans and specifications for review and approval prior to construction of a liquid manure storage area described in subitem (1) or (2), and such plans and

specifications shall ~~that~~ include the information listed in subpart 4, items F, I, J, and N.

- (1) a liquid manure storage area that provides temporary storage or processing, is constructed of concrete, and has ~~with~~ a maximum volume of 5,000 gallons; and
- (2) a liquid manure storage area that provides temporary storage or processing, is constructed of concrete, and has ~~with~~ a maximum volume of 20,000 gallons, if it: [...]

E. A liquid manure storage area described in this item is exempt from all provisions of ~~this~~ part 7020.2100, except for subparts 5, item A; and subpart 7. [...]

These recommended changes do not affect the approval of the proposed rules, but are presented to the Agency for its review and consideration. The intent of these recommendations is to bring additional clarity to the rules, and to prevent conflicting interpretations or applications of the rules.

T. L. P.