

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

In the Matter of the Amendments to the
Rules of the Pollution Control Agency
Governing Human Health-Based Methods
for Developing Water Quality Standards,
Minnesota Rules Chapters 7050 and 7052

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

The Minnesota Pollution Control Agency (MPCA) is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing pursuant to Minn. Stat. § 14.26 (2014). On January 14, 2015, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2013).

Based upon a review of the written submissions and filings, Minnesota Statutes, and Minnesota Rules,

IT IS HEREBY DETERMINED THAT:

1. The MPCA 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 (2013).
3. The record demonstrates the rules are needed and reasonable.
4. There are editorial revisions, described in the attached memorandum, which would contribute to the clarity and readability of the rule.

IT IS HEREBY ORDERED THAT:

1. The rules are **APPROVED**.
2. The MPCA should consider making the technical changes set forth in the attached memorandum.

Dated: January 23, 2015

s/Jeanne M. Cochran

JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

The MPCA 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 rules comply with the applicable legal requirements.

The Administrative Law Judge recommends, however, that the agency make a few language changes to clarify or improve readability of the proposed rules. These wordings changes are merely suggestions and do not denote defects in the proposed rules. The proposed changes are set forth below.

A. Minnesota Rules part 7050.0150, subpart 7, paragraph B – Impairment of waters relating to fish for human consumption

As proposed, Minnesota Rules part 7050.0150, subpart 7, paragraph B provides, in relevant part:

B. If CS_{ft} has not been established for a pollutant with chronic standards (CS) applicable in water (CS_{dfr} , CS_{dev} , or CS_{fr}), the residue levels in fish muscle tissue established by the Minnesota Department of Health must be used to identify surface waters supporting fish for which the Minnesota Department of Health recommends a reduced frequency of fish consumption for the protection of public health....

The proposed language refers to the following abbreviations: CS_{ft} , CS_{dfr} , CS_{dev} , and CS_{fr} . The first abbreviation, CS_{ft} , is defined in Subpart 7, paragraph A of Minnesota Rules part 7050.0150, but the other three abbreviations (CS_{dfr} , CS_{dev} , and CS_{fr}) are not defined in Minnesota Rules part 7050.0150. They are defined in other provisions of the rules—Minnesota Rules part 7050.0218, paragraph Q(2); Minnesota Rules part 7050.0219, subpart 13(B); and Minnesota Rules part 7050.0218, paragraph Q(3). To add clarity and ensure the reader is easily able to find the meaning of these three abbreviations, the Administrative Law Judge recommends that Minnesota Rules part 7050.0150, subpart 7, paragraph B be revised to include cross-references to the definitions of CS_{dfr} , CS_{dev} , and CS_{fr} . The recommended amended language would read as follows:

B. If CS_{ft} has not been established for a pollutant with chronic standards (CS) applicable in water (CS_{dfr} , CS_{dev} , or CS_{fr} as defined in parts 7050.0218(Q) and 7050.0219, subp.13(B)), the residue levels in fish muscle tissue established by the Minnesota Department of Health must be

used to identify surface waters supporting fish for which the Minnesota Department of Health recommends a reduced frequency of fish consumption for the protection of public health....

B. Minnesota Rules part 7050.0218, paragraph Q – Definitions of “chronic criterion” and “chronic standard”

As proposed, Minnesota Rules part 7050.0218, paragraph Q provides, in relevant part:

"Chronic criterion" or "CC" and "chronic standard" or "CS" mean the highest water concentration or fish tissue concentration of a toxicant or effluent to which aquatic life, humans, wildlife, or other organisms can be exposed indefinitely without causing chronic toxicity. CC represents a site-specific chronic criterion developed under this part and part 7050.0219 or part 7052.0110.

According to the Statement of Need and Reasonableness (SONAR), CC and CS are the “highest water concentration or fish tissue concentration of a toxicant or effluent to which organisms: aquatic life, humans or wildlife, can be exposed over a long-term duration without causing chronic toxicity.”¹ To be consistent with the intent expressed in the SONAR, the Administrative Law Judge recommends that the language “or other organisms” be deleted. The phrase “other organisms” is unnecessary and could cause confusion. The amended language would read as follows:

"Chronic criterion" or "CC" and "chronic standard" or "CS" mean the highest water concentration or fish tissue concentration of a toxicant or effluent to which aquatic life, humans, or wildlife, ~~or other organisms~~ can be exposed indefinitely without causing chronic toxicity. CC represents a site-specific chronic criterion developed under this part and part 7050.0219 or part 7052.0110.

C. Minnesota Rules part 7050.0218, paragraph YY – Definition of “Trophic level”

As proposed, Minnesota Rules part 7050.0218, paragraph YY provides:

"Trophic level" or "TL" means the food web level in an ecosystem that is occupied by an organism or group of organisms because of what they eat and how they are related to the rest of the food web. For example, trophic level 3 in an aquatic ecosystem consists of small fish such as bluegills, crappies, and smelt and trophic level 4 consists of larger carnivorous fish such as walleye, northern pike, and most trout species.

¹ SONAR, Human Health-based Water Quality Standards Technical Support Document, Appendix A-1 at 124.

The first sentence of paragraph YY sets forth a needed definition, and is a statement of general applicability and future effect.² The second sentence provides examples, which are not generally applicable or of future effect, and therefore do not qualify as a rule.³ The Administrative Law Judge recommends deleting the second sentence of paragraph YY because it is not a rule or necessary to define the term “Trophic level.”

J. M. C.

² See Minn. Stat. 14.02, subd. 4 (defining a “rule” as “every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”).

³ *Id.*