3-2200-10229-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Repeal of Minn. Rules Ch. 7011, Concerning Odorous Emissions, and the Adoption of Minn. Rules Ch. 7029 in Its Place.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on April 29, 1996, at 8:00 a.m. at the Pollution Control Agency hearing room, 520 Lafayette Road, St. Paul, Minnesota 55155.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, determine whether the Minnesota Pollution Control Agency ("PCA" or "the Agency") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and assess whether or not modifications to the rules proposed by the Agency after initial publication are substantially different from the rules as originally proposed.

Lisa Tiegel, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department at the hearing. The Agency's hearing panel consisted of Todd J. Biewen, Supervisor, Compliance Determination, Air Quality Division, and Stuart Arkley, Compliance Determination, Air Quality Division.

Approximately 40 persons attended the hearing. Twenty-seven persons signed the hearing register. The Administrative Law Judge ("ALJ" or "the Judge") received 31 agency exhibits during the hearing. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until May 20, 1996, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on May 28, 1996, the rulemaking record closed for all purposes.

The Agency must wait at least five working days before it takes any final action on the rule; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Agency of actions which will correct the defects and the Agency may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Agency does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Agency elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Agency makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Agency files the rules with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules and Statutory Authority

1.The MPCA is proposing to repeal its existing rules governing odorous emissions, Minn. Rule 7011.0300 - 7011.0330, which are approximately 20 years old, and to replace those rules with new rules to be codified at Minn. Rules chapter 7029. The MPCA believes that the new rules are more technologically sound than the existing rules, provide a better system for coordinating the interest and the concerns of affected persons in governmental entities and makes better use of the MPCA's limited resources.

Repeal of Existing Odor Rule

2.The existing odor rule has not been enforced by the MPCA since 1992. The Agency determined that the rule is ineffective for regulating odorous emissions. The existing rule uses numerical standards which bear no relationship to a person's experience of objectionable odors. The odor test method upon which the rule standard is based has been withdrawn by the national standards agency that created or approved the testing method.

3.Another reason the Agency has decided to repeal the existing rule is that it does not have the resources to investigate odor complaints statewide. Even if the Agency had the resources, the MPCA believes that local officials are more qualified to conduct the investigations because they are more familiar with the local history and experience. The Agency believes that providing the technical advice to local officials as proposed in the new odor rule is a more effective and efficient use of its resources.

4.There appears to be a consensus of opinion in support of repeal of the existing odor rule.

Proposed New Odor Rule

5.The Agency announced in 1992 that it intended to repeal (without replacement) the existing odor rule. Because of comments received from local government and industry representatives familiar with odorous emissions, the Agency decided to propose a replacement odor rule. Some of the major features of the new or proposed odor rule include:

(1) odor complaints investigated by local government officials;

(2) introduction of the concept of "community annoyance";

(3) determination of a "community annoyance";

(4) odor reduction plan and test plan;

(5) MPCA involved in a secondary role as expert advisor; and

(6) participation by local public bodies in the new odorous emissions program is voluntary.

6.The MPCA noticed the replacement odor rule in December 1995. Opposition to the replacement odor rule was substantial. Local governments opposed the new odor rule because local officials would be required to investigate complaints in order to establish a "community annoyance". They objected to the MPCA transferring the Agency's previous investigatory responsibilities to local governments that, like the MPCA, also had a scarcity of resources. Industry representatives opposed the new odor rule because persons who were opposed to a manufacturing facility for some reason other than odor could use the community annoyance process for harassment purposes. In addition, a facility accused of

odorous emissions would have no opportunity for a hearing before it was identified as a "community annoyance".

7.Perceiving that the support that it thought existed for a new rule had diminished, the Agency published an amendment to its Notice of Hearing. The Amended Notice added (repeal of the existing odor rule without replacement) as a possible outcome of the rulemaking proceeding. The Amended Notice did not succeed at prompting additional support for the proposed new odor rule. Response to the Amended Notice was uniformly in opposition to a proposed new odor rule.

Statutory Authority

8.The MPCA argues that its statutory authority for repealing the existing odor rule and adopting the proposed replacement rule is included in the general statutory mandate the Agency has regarding air pollution. Minn. Stat. § 116.07, subd. 4 (1994). The term "air pollution" is defined in Minn. Stat. § 116.06, subd. 4 to include air contaminants that may interfere unreasonably with the enjoyment of life or property. Because odorous emissions are air contaminants that may interfere unreasonably with enjoyment of life or property, odorous emissions come within the definition of air pollution. Because the MPCA has authority to amend its rules regulating air pollution, it also has the authority to amend its rules relating to odorous emissions.

9.The Judge finds that the MPCA has the statutory authority to repeal the existing odor rule. With respect to the new odor rule, the Judge notes that the Agency has not identified any specific authority for proposing the replacement odor rule. Cognizant of the fact that the existing rule has been in effect for over 20 years persuades the Judge to conclude that the general authority cited above confers on the Agency the statutory authority to adopt the proposed replacement rule.

Procedural Requirements

10.On August 28, 1995, the Agency published a Notice of Solicitation of Outside Opinion at 20 State Register 410 regarding its proposal to adopt rules governing odorous emissions.

11.On December 5, 1995, the Agency filed the following documents with the Chief Administrative Law Judge:

a. a copy of the proposed rules certified by the Revisor of Statutes;

b. the Order for Hearing;

c. the Dual Notice of Hearing proposed to be issued;

d. the Statement of Need and Reasonableness (“SONAR”);

e. a notice of discretionary additional public notice pursuant to Minn. Stat. § 14.14, subd. 1a.

1.On December 21, 1995, the Agency mailed the Dual Notice of Intent to Adopt Without a Public Hearing and Notice of Hearing and a copy of the proposed rule to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice, all persons who requested a hearing on these rules, and all persons to whom additional discretionary notice was given by the Agency.

2.On December 26, 1995, the Agency published the Dual Notice of Intent to Adopt Without a Public Hearing and Notice of Hearing and the proposed rules at 20 State Register 1795. The Notice scheduled a hearing for March 21, 1996 if at least 25 persons requested a hearing on the rule. Because MPCA received 25 requests for a hearing, a rule hearing was required on the rule.

3.The MPCA published in the State Register on March 11, 1996 (20 S.R. 2293) a Supplemental Notice of Intent to Adopt and Notice of Hearing. The Supplemental Notice amended the Dual Notice of Intent to Adopt Rule and Notice of Hearing previously published in the State Register at 20 S.R. 1795. The Supplemental Notice made two changes:

(a) established a new hearing date, April 29, 1996, and

(b) included as a possible outcome of the rule hearing the repeal of the current rule without the adoption of a replacement odor rule.

4.On February 28, the MPCA issued an Order for Hearing setting April 29 as the new date for the hearing on the rule. The Supplemental Notice of Intent to Adopt and Notice of Hearing was mailed on March 7, 1996 to all the persons and associations who have requested their names be placed on the Agency's rulemaking mailing list.

5.On April 5, 1996, the Agency filed the following documents with the Administrative Law Judge:

a. a photocopy of the pages of the State Register containing the Dual Notice of Hearing, the Supplemental Notice of Hearing and the proposed rules;

b. the Dual Notice of Hearing and the Supplemental Notice of Hearing as mailed;

c. the Agency's certification that its mailing list was accurate and complete as of December 21, 1995 and February 28, 1996, and the Affidavits of Mailing the Notice to all persons on the Agency's mailing list;

d. the Affidavits of Mailing the Notice to those persons to whom the Agency gave discretionary notice;

e. a copy of all materials received in response to the Notice of Solicitation of Outside Opinion published on June 27, 1994; and

f. the names of Agency personnel who will appear at the hearing.

Impact on Agricultural Land

1. Minn. Stat. § 14.11, subd. 2 imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84.

2. The proposed repeal of the existing odor rule will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2.

3. The MPCA also believes that the additional specified requirements do not apply to the proposed new odor rule because the Agency has specifically exempted agricultural odor sources. Because agricultural sources have been exempted, the Agency asserts that the overall effect of implementing the rule will be minimal for agricultural lands. The Judge finds that the proposed new odor rule will not have a direct and substantial adverse impact on agricultural land.

Fiscal Note

4. Minn. Stat. § 14.11, subd. 1, requires state agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rules.

5. Adoption of the proposed replacement odor rule by local government is voluntary; the rule does not mandate that local public bodies adopt the rule. The Agency explained that some cost increases are likely at the local level if a local public body chooses to act on all odor complaints. Because the rule is voluntary, the Judge finds that the Agency is not required to publish an estimate of total cost required by Minn. Stat. § 14.11, subd. 1.

Small Business Considerations in Rulemaking

6. Minn. Stat. § 14.115, subd. 2 requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses.

7. The Agency admits that it is likely some small businesses will be affected by the proposed new odor rule. The Agency believes that small businesses should

be as accountable as large businesses for their odorous emissions. However, in consideration of the special concerns of small businesses, the rules do allow for the MPCA to be cognizant of the size of the business and its resources, as well as the number and frequency of complaints, in reviewing the appropriate mitigation. The Agency states that the proposed new odor rule strikes the proper balance between, on the one hand, the public's interest in government regulation of conduct affecting the environment and, on the other hand, the public's interest in limiting regulation for small businesses.

8.The Judge finds that the Agency has complied with the requirement that it consider methods for reducing adverse impact on small businesses.

Consideration of Economic Factors

9.In exercising its powers, the MPCA is required by Minn. Stat. § 116.07, subd. 6, (1994) to give consideration to economic factors. The statute provides:

> In exercising all its powers, the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible and practical under the circumstances.

10.The MPCA anticipates that the proposed new odor rules will provide little or no change in the overall costs to Minnesota business when compared with the existing odor rules. Assuming that the old and new panel test requirements are of approximately equal cost, the requirements of an affected facility to test, mitigate and retest are similar to the approach under the existing rules, which was to test and retest if the first test exceeded the emission limits. The Judge finds that the Agency has taken into account economic considerations as required by section 116.07, subd. 6.

Need for and Reasonableness of the Proposed Rules

11.The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules have been established by the Agency by an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2. The general question of whether the rules are needed is often answered by the legislative mandate to adopt rules. Whether individual rules are needed usually focuses on whether a problem exists which calls for regulation. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocher Outdoor Advertising Company v. Minnesota Department of

Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach.

12.The Agency prepared a Statement of Need and Reasonableness ("SONAR") in support of adoption of the proposed rules. At the hearing, the Agency primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for each provision. The SONAR was supplemented by the comments made by the Agency at the public hearing and in its written post-hearing comments.

Existing Odor Rule

13.The existing odor rule has been in effect since 1972. Beginning in 1992, the Agency ceased all enforcement activity with respect to the existing odor rule. Since 1992, the MPCA has not responded to odor complaints but rather has referred odor complaints to local governmental units. Beginning in 1992, the Agency acknowledged that the existing rule had major deficiencies that rendered the rule ineffective and useless as a regulatory tool. One deficiency of the existing rule is the rule's use of numerical odor standards. The rule places odor limits on smoke stacks and at the property line of air emission facilities. The Agency has learned that numerical standards for odor bear no reasonable relationship to a person's actual experience of an odor problem. Because individuals have varying abilities to detect odors and have variable sensitivities to odors, it is unreasonable to say that a certain level of odor is too much or too little based on a numerical standard. The Agency currently believes that the use of a numerical standard is unreasonable.

14.Another deficiency in the existing odor rule is that the odor test method cited in the rule has been withdrawn. In 1986 the method was withdrawn as an acceptable method by the American Society of Testing and Materials, which is a national organization that develops and verifies the accuracy of testing methods. Because the testing method has been withdrawn, the Agency has no valid method for determining compliance with the numeric standards in the existing rules. The numeric standards bear no reasonable relationship to the degree of annoyance caused within the surrounding community.

15.The Department's proposal to repeal the existing rule has been supported by all the comments discussing this issue during this rulemaking proceeding. The Judge finds that the Agency's proposal to repeal the existing odor rule is reasonable

and the Agency has established by an affirmative presentation of facts that the existing odor rule is ineffective and needs to be repealed.

16.After careful review and consideration of the Agency's Statement of Need and Reasonableness and based upon the Agency's oral presentation at the hearing and comments submitted after the hearing, the Administrative Law Judge finds that the Agency has affirmatively established the need and reasonableness of the proposed repeal of the existing odor rule.

New Odor Rule

17.The Agency acknowledges that the overriding issue in this rule proceeding is whether the proposed new odor emission rules are needed. The MPCA initially believed that a new rule was needed based on comments received from local units of government and industry representatives during meetings in 1992 when the MPCA announced its intention to repeal the existing odorous emission rules. Responses at that time from industry and local government representatives indicated that a state level rule was needed to provide consistency of odor regulation across the state and because local units of government lacked the technical expertise to regulate odorous emissions. Thus, the entire basis for the need for the new odorous emissions rule arises from persons outside of the MPCA. After hearing this expression of desire for a replacement rule, the MPCA formed a task force to help draft proposed new odor rules.

18.Under the proposed new odorous emission rules, local government officials would be the primary investigators and regulators of odorous emissions. Consistent with its view that odorous emissions are a local "community" problem, the MPCA would have only a secondary role in the enforcement of the rules.

19.However, after the new odorous emissions rule was proposed in December 1995, almost all of the comments from both industry and local government were opposed to a statewide odorous emissions rule. On review of this entire record, only two comments, one written and one orally made at the hearing, suggest that there is a need for the new odorous emissions rules. In contrast, the Agency received approximately 60 requests for a hearing from persons expressing concerns about the new odorous emissions statewide rule. In addition, two petitions signed by approximately 46 persons representing organizations and businesses in the Mankato, Minnesota area requesting a hearing on the rule was filed with the Agency. Ironically, some of the strongest opposition to the rule came from representatives of local public bodies who were to receive technical assistance from the rule. For example, the Minnesota Association of Townships stated, in part, as follows:

> We strongly object to the approach the MPCA is taking in these rules with respect to local units of government. This supposedly discretionary program totally relies on local government involvement. Additionally, it forces local

> governments directly into the middle of this very controversial issue by making them the only place to which odor complaints may be brought.
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> . . .
>
> We believe it is bad policy for the MPCA to subject all local officials to the severe pressure that could be brought to take action on odor complaints. It is one thing if the local unit of government voluntarily assumes administration of a program that is otherwise administered by the MPCA, it is quite another to force local officials into a position of being confronted with persons making complaints and those wishing to avoid application of the program.
>
> . . .

20. The MPCA has acknowledged the lack of support for a statewide odorous emissions rule. In the Agency's Initial Post-Hearing Comments at 2, the Agency states, in part, as follows:

> From comments in the record, it is apparent that there is no longer the support for state regulation of odors. Both industry and local units of government have argued against the need for (and reasonableness of) this rule, and it now appears that the concerns expressed in 1992 were not representative of industry and local government as a whole or that attitudes have changed in the last four years. . . . In any event, of the written and oral comments made, only a small fraction were in support of the need for the proposed new state board of rules. (Emphasis added.)

21. Upon review of the rulemaking record, the Judge finds that the expressions of concern that prompted the MPCA to replace the repealed odor rule with a new odor rule are not manifest in this rulemaking record. The Judge also finds that there is no legislative mandate requiring the Agency to replace the repealed odor rule. Because of the absence of a legislative mandate and the absence of a problem that requires attention, there is no need for a new odor rule.

22. After careful review and consideration of the Agency's Statement of Need and Reasonableness and based upon the Agency's oral presentation at the hearing and comments submitted after the hearing, the Administrative Law Judge finds that the Agency has failed to affirmatively establish by presentation of facts the need for the proposed new odor rule as required by Minn. Stat. § 14.14, subd. 2 (1994). Therefore the proposed new odor rule must not be adopted.

23.For a number of reasons, it is appropriate to withdraw the proposed new odor rule. First, the Agency has already informed affected persons that one possible outcome of this rulemaking proceeding may be no replacement of the repealed odor rule. Withdrawal of the rule satisfies the concerns of both the Agency and the commentators: the Agency's concern about utilization of its limited resources on a statewide rule is resolved. The Agency will have no odor rule to enforce and, therefore, may utilize its scarce resources in the limited role of an expert advisor on odor problems. The commentators, local public bodies, for example, will not have "imposed" on them an investigation process for establishing a "community annoyance"; and manufacturing facilities will not be exposed to a process that denies them due process or subjects them to abuse by persons intending to cause mischief.

24.The Agency has indicated in its SONAR (and personally to the Judge) that it does not intend to pursue the proposed new odor rule if the record establishes that there is no need for the rule. Because this record establishes that there is no need for a replacement of the repealed odor rule it is the understanding of the Judge that the new odor rule will not be pursued. For this reason the Judge will not discuss and analyze specific provisions of the proposed new odor rule.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

25.That the Minnesota Pollution Control Agency gave proper notice of the hearing in this matter.

26.That the Agency has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule, except as noted at Findings 33-39.

27.That the Agency has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii.

28.That the Agency has not documented the need for and reasonableness of its proposed new odor rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), as noted at Findings 33-39.

29.That the Agency has documented the need for and reasonableness of its proposed repeal of the existing odor rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

30.That due to Conclusions 2 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

31.That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 28th of June, 1996.

/s/
ALLEN E. GILES
Administrative Law Judge

Reported: Court Reporter:
Brennan & Associates
by Darla K. Quinell