OAH 5-9003-33267
Revisor R-4348

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

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| In the Matter of the Minnesota Pollution Control Agency's Proposed Expedited Amendment to Rules Governing Subsurface Sewage Treatment Systems in Campgrounds and Resorts | **ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.389 AND MINN. R. 1400.2410** |

On February 22, 2016, the Minnesota Pollution Control Agency (MPCA) filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. § 14.389 (2014) and Minn. R. 1400.2410 (2015).

Based upon a review of the written submissions by the MPCA, and the contents of the rulemaking record,

**IT IS HEREBY ORDERED THAT:**

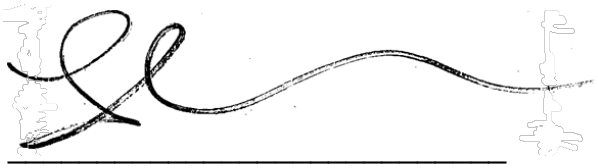
1. The proposed rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14 (2014), and Minnesota Rules, chapter 1400 (2015).

2. According to 2015 Minn. Laws 1st Spec. Sess., ch. 4, art. 4, § 144, the MPCA has the statutory authority to adopt these proposed rules using the expedited rulemaking process.

3. The following rule parts are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, item D: Minn. R. 7081.0040, subparts 1a (D)(4) and (5).

4. All other proposed rule parts are approved.

Dated: February 25, 2016



JIM MORTENSON
Administrative Law Judge

## NOTICE

Minn. Rule 1400.2410, subp. 8, provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by a Judge. The request must be made within five working days of receiving the Judge's decision. The Chief Administrative Judge must then review the agency's filing, and approve or disapprove the rule within 14 days of receiving it.

## MEMORANDUM

### Background

The MPCA requests approval of proposed expedited rules governing subsurface sewage treatment systems (SSTSs) for campgrounds and resorts. The legislature enacted a statute in 2015 requiring the commissioner of the MPCA to use the expedited rulemaking process to change an existing rule on SSTSs at "existing campgrounds and resorts that are open for 180 days or less per year[.]"[1] The statute requires the MPCA to remove the current provision for estimating wastewater flow rates to subsurface sewage treatment systems by using the average maximum seven-day measured flow, or the flow determined by combining the values of: 1) the design flow determination for existing dwellings; 2) the design flow determination for other establishments; and 3) infiltration.[2] The legislature provided specific instruction for replacing this burdensome calculation.

The MPCA published a *Notice of Intent to Adopt Expedited Rules* in the *State Register* on November 9, 2015, and submitted the proposed rules to the OAH for review as to their legality on February 22, 2016.

### Standard of Review

In expedited rulemaking, the legal review of the proposed rules is conducted according to the standards of Minn. R. 1400.2100, items A and C to H.[3] These standards state:

> 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);

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[1] 2015 Minn. Laws 1st Spec. Sess., ch. 4, art. 4, § 144(a).
[2] Minn. R. 7081.0040, subp. 1(D) (2015); *see also* Minn. R 7080.0110, .0120, .0130, .0140 (2015).
[3] *See* Minn. R. 1400.2410, subp. 3.

. . .

C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;

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; or

H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5).

**Analysis**

At issue here is the proposed rule language based on one paragraph of the statute:

> The measured flow rate must include the total of all treatment systems that are located on the resort or campground. If fewer than 25 percent of the systems are not measured, an average of the metered systems can be used to determine the flow from the unmetered systems.[4]

The MPCA has proposed the following language to implement this particular provision at Minn. R. 7081.0040, Subpart 1a (D)(4) and (5):

> <u>(4) Flow measurements must be divided by the percent occupancy expressed as a decimal percent.</u>
>
> <u>(5) Flow extrapolation from units not measured is allowed as follows:</u>
>
> <u>(a) flow may be extrapolated only if fewer than 25 percent of the campsites and units are not measured;</u>

[4] 2015 Minn. Laws 1st Spec. Sess., ch. 4, art. 4, § 144(c). The metering systems that can be used to measure the flow rate of SSTSs are also specified in the statute. That language is not at issue here because the MPCA adopted it verbatim from the statute.

(b) flow extrapolation is allowed between similar sewage-generating units within the campground and resort;

(c) flow extrapolation is not allowed between other campgrounds and resorts; and

(d) flow from future expansions may be extrapolated. Extrapolation must be in accordance with units (a) to (c). No more than 25 percent of the total flow after expansion may be extrapolated.

**Defects and Recommended Corrections**

Subpart (D)(4) of the proposed rule is based, according to the MPCA, on the first sentence of the statutory paragraph in question.[5] The regulatory language does not reflect the statutory language. The MPCA refers to "the law provision requiring that occupancy rate must be recorded along with the flow[.]"[6] However, the enabling statute includes no such provision. The statute refers to making a calculation based on all of the SSTSs located on the resort or campground. It does not refer to the occupancy of the resort or campground. While the occupancy of the property and the total flow rate of sewage may be related, the legislature has required that the measurement of the total flow rate be based on measurements from the SSTSs. The flow from each of the systems is permitted to be measured by: 1) a sewage lift station pump with runtime meter and counter; 2) a sewage flow meter; 3) flow meters on wells; or 4) a water softener system with flow measurement when the measurement includes all flow to the SSTS, including backwash.[7] Because the rule fails to require that the flow rate for the property be based on all SSTSs, and instead reduces the measurements by dividing by the percentage of occupancy, it does not comply with the enabling statute.

One way to remedy this defect is to simply adopt the specific language the legislature used. The statute is clear and unambiguous.

The statute permits averaging in certain circumstances in order to calculate the flow rate for all the SSTSs on the campground or resort property. Paragraph 5 of the proposed rule begins with a sentence with an undefined term: "units." Context leads the reader to believe that the term "units" pertains to campsites, rooms, or buildings on the property. The statute does not refer to measuring such "units." The statute refers to measuring SSTSs. The rule does not comply with the enabling statute's requirement to measure the flow from SSTSs, including the permitted averaging.

One way to correct this defect is to define "unit" as referring to an SSTS. Another way to correct this defect is to replace the term "units" with "SSTSs."

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[5] Exhibit (Ex.) K at 3.
[6] *Id.*
[7] 2015 Minn. Laws 1st Spec. Sess., ch. 4, art. 4, § 144(b).

Subpart 5(a) refers to extrapolating based on a percentage of campsites and "units" which are not measured. The statute requires measurement of the flow rate, and permissible averaging, from SSTSs; not campsites, structures, or other possible waste collection locations. By changing the legislative requirement from averaging the flow rate for SSTSs not measured, to "campsites and units" that are not measured, the MPCA exceeds its authority. The rule does not comply with the enabling statute.

One way to remedy this defect is to change the language thus: "flow may be extrapolated only if fewer than 25 percent of the subsurface sewage treatment systems located on the resort or campground are not measured."

Subpart 5(b) refers to extrapolating from "similar sewage-generating units within the campground and resort[.]" The MPCA uses "RV sites" as an example of a unit.[8] While the goal of this portion of the rule is within the MPCA's discretion – ensuring an apples to apples comparison for averaging – the proposed rule again fails to adhere to the statutory requirement that SSTSs be the focus of measurement or averaging. Thus, the rule does not comply with the enabling statute.

One way to correct this defect is to revise the rule to refer to define "unit" as an "SSTS." Alternatively the MPCA could simply change the language in question to "similar subsurface sewage treatment systems" in place of "units" or other undefined terms.

There is no defect in subpart 5(c) of the proposed rule. This provision provides that comparisons must be made within the same campground or resort. The statute provides that measurements, and any averages, be based on the SSTSs "located on the resort or campground."

Finally, subpart 5(d) adds language addressing with extrapolating "flow from future expansions[.]" There is nothing in the enabling statute about future expansions. The statute specifies that the rules are to be about establishing "flow monitoring and recording for subsurface sewage treatment systems. . . ."[9] The purpose of permitting averaging is to ensure a measurement of the total flow rate for the campground or resort is collected. Averaging is specifically limited to situations when "fewer than 25 percent of the systems are not measured" by one of the specified measurement systems.

Further, the MPCA explains that the extrapolation is permitted when a "facility is to expand with new sites" and that "the owner is allowed to conduct flow extrapolation on the new sites[.]" Again, the statute's focus is on measuring flow from SSTSs, not specific sites.

The proposed language also refers to extrapolation being "in accordance with units (a) to (c)." This appears to be a typo, and it is assumed, however, the MPCA meant to say "in accordance with items (a) to (c)." This correction would not rescue item (d).

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[8] Ex. K at 3.
[9] 2015 Minn. Laws 1st Spec. Sess., ch. 4, art. 4, § 144(a).

The last sentence refers to averaging “[n]o more than 25 percent of the total flow. . . .” The statute is clear that averaging is a means to calculate total flow, which is permissible only when “fewer than 25 percent of the systems are not measured[.]” Those unmeasured systems require data points to add to the sum of the flows of the measured SSTSs. There is no reference in the statute to averaging based on a percentage of the total flow.

Because subpart 5(d) exceeds what is permitted by the enabling statute, the only cure is to remove it.

**Conclusion**

Because of the defects in subparts 4 and 5, the rule must be disapproved. The suggested corrections will cure the defects noted here. They will bring the proposed rule into conformity with the enabling statute.

**J. R. M.**