

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Amendments to the Subsurface
Sewage Treatment System Rules,
Minnesota Rules Chapters 7080,
7081, 7082 and 7083.

**REQUEST FOR EXTENSION OF
DEADLINE TO COMPLETE
REPORT PURSUANT TO MINN.
STAT. 14.15, SUBD. 2.**

A hearing concerning the above-referenced proposed rules was held by Administrative Law Judge Eric L. Lipman at 6:00 p.m. on April 18, 2007 and again at 9:00 a.m. on April 20, 2007, in the Offices of the Minnesota Pollution Control Agency ("MPCA" or "Agency") 520 Lafayette Road North, St. Paul, Minnesota 55155. The hearing record closed for all purposes on May 18, 2007, at the conclusion of the post-hearing comment period.

Minn. Stat. § 14.15, subd. 2 authorizes the Chief Administrative Law Judge to extend the deadline for completing a rule report unless an extension would prohibit a rule from being adopted or becoming effective until after the date of adoption or effectiveness as required by statute.

The Agency has indicated that it intends to further modify the proposed rules in light of the comments it has received. Because the Agency has not yet filed a revised version of the proposed rules with this Office, the undersigned requests an extension of the deadline to complete the Final Report. The Agency anticipates filing a revised version of the proposed rules no later than Monday, July 16, 2007. Accordingly, the ALJ requests that the deadline for submitting the rule report be extended to Wednesday, August 15, 2007.

Background on the Proposed Rules and this Rulemaking Proceeding

This rulemaking proceeding involves a proposal by the Agency to revise, and segment into four distinct chapters, rules relating to Subsurface Sewage Treatment Systems (SSTS). The current body of rules on this subject is found in Minnesota Rules, Chapter 7080. These regulations – which govern the location, design, installation, use, maintenance and abandonment of SSTS – seek to

prevent the discharge of inadequately treated sewage into surface and ground water, and thereby safeguard the public's health, safety and welfare.

Generally, the MPCA has become aware of an increase in the number of large SST systems that have been installed in new housing developments and resorts where centralized wastewater treatment systems are not otherwise available.

In order to address these changing circumstances, MPCA proposes to subdivide the current Chapter 7080 into subject-specific Chapters 7081, 7082 and 7083. SST systems that process less than 2,500 gallons per day would be governed by the proposed Chapter 7080. Larger systems would be governed by proposed Chapter 7081. Proposed Chapter 7082 would establish requirements for local regulatory programs. Proposed Chapter 7083 would focus upon the training of individuals who design, install and maintain SST systems.

A formal Request for Comments on the proposed rules was mailed to persons on the rulemaking mailing list and was published in the State Register on January 5, 2004. The Agency received over 550 letters and comments from individuals and local units of governments addressing various aspects of the proposed rules. A draft copy of the new rule chapters was posted on the MPCA's web site in the spring of 2004.¹

On February 12, 2007, a copy of the proposed rules and the Notice of Hearing were published in the State Register.² Approximately 1,000 comments were filed during the pre-hearing comment period. Many of these comments were received on the eve of the hearing. Similarly, 150 written comments were received during the post-hearing comment period.

Because of the volume of pre-hearing and post-hearing comments, the Agency originally requested an extension of the post-hearing comment period beyond the 20-day and 5-day rebuttal period provided by Minn. Stat. § 14.15, subd. 1. Because the statute does not authorize the ALJ to extend the time period for submission of post-hearing comments, the ALJ denied the Agency's request. Following that denial, the Agency filed some documents at the close of the 20 day period on May 11, 2007. By the close of the rebuttal period on May 18, 2007, the Agency had filed the following documents:

1. Statutory Considerations and Economic Analysis
2. Ongoing Administrative Costs for Local Units of Government
3. Final Excel Spreadsheet – pre-hearing and post-hearing comments
4. Index of Responses
5. Staff Post-Hearing Response to Public Comments

¹ SONAR at 4.

² 31 State Register 1023 (Feb. 12, 2007).

The Final Excel Spreadsheet cataloging the specifics of pre-hearing and post-hearing comments consists of 1300 rows of data. In this spreadsheet, the MPCA describes each comment and its response to the comment. In a significant number of rows, the Agency indicates that it intends to further revise the language of the proposed rules in response to the commentary.

As of the date of this request, the Agency's proposed revisions of the rules have not been filed with the Office of Administrative Hearings. Minn. Stat. § 14.05 and Minn. R. Parts 1400.2100 and 1400.2110 require an administrative law judge to determine whether rules adopted by agency are substantially different from the proposed rules. Without access to the revised text of the proposed rules, however, the undersigned ALJ simply cannot make this determination. The Agency has indicated that it will file the revised text of the proposed rules on or before Monday, July 16, 2007.

An Extension of Time is Warranted in this Special Circumstance

As noted above, Minn. Stat. § 14.15, subd. 2 authorizes the Chief Administrative Law Judge to extend the deadline for completing a rule report unless an extension would prohibit a rule from being adopted or becoming effective as required by statute. The only statutory limitations upon the Chief Administrative Law Judge's power to extend the due date for the Report are not applicable in this case. The Legislature has not directed the Minnesota Pollution Control Agency to adopt the proposed rules by a particular date nor is the Agency's rulemaking authority due to expire.

For several reasons, this is an appropriate case for exercise of the Chief Administrative Law Judge's extension power. First, this is the rare circumstance where both the breadth of the proposed changes initially proposed for revision and the sheer volume of later-arriving stakeholder comments have combined to make completion of all of the agency's duties within the 20-day comment period, impracticable. While, as noted above, this Office may not extend the comment period to permit the agency to submit additional rationales or support for its proposed rules, rule drafting is not so constrained. Indeed, the agency retains the power to draft the text of administrative rules outside of the 20-day period referenced in Minn. Stat. § 14.15 and Minn. R. 1400.2230 – it being commonplace for textual revisions to proposed rules to occur before and after the completion of the ALJ's report.

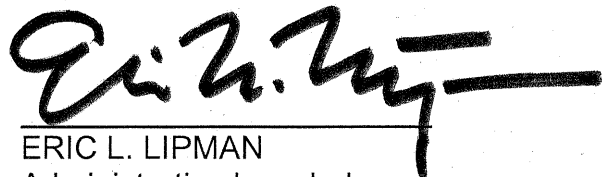
Likewise important, an extension of time will permit the agency to strengthen the draftsmanship of the revised rules. In over one hundred different instances, the agency's comments suggest that it plans to use the words "may" or "should" so as to render one or another regulatory standards permissive. As this Office's earlier rule reports make clear, the use of the word "may" in place of the clearer directive "shall," can invite standard-less applications of discretion and

differing treatment to regulated parties that are otherwise similarly situated. So as to permit the agency a meaningful opportunity to examine and eliminate these potential defects, the grant of additional time is warranted.³

Lastly, it bears mentioning that if the requested extension is granted, it is the undersigned ALJ's intention to serve a copy of any extension Order upon all of those who earlier requested notice of the ALJ's Report; thereby apprising interested persons of any adjustments in the reporting schedule.

Within the limits of the authority conferred by the Legislature, the requested extension is thus the best response to the MPCA's current circumstances.

Dated this 8th day of June, 2007


ERIC L. LIPMAN
Administrative Law Judge

³ See e.g., *In the Matter of the Proposed Amendments to Rules Governing Newborn Screening*, Minnesota Rules, Chapter 4615, OAH Docket No. 11-0900-17586-1(2007), (<http://www.oah.state.mn.us/aljBase/090017586.rr.htm>); *In the Matter of Proposed Rules Relating to the Release of Genetically Engineered Agriculturally Related Organisms*, 7-0400-9285-1 (1995) (finding that the use of the term "may" in the proposed rule was defective because the rule "allowed the Commissioner to require termination and disposal of GEOs or not to so require, without a standard for decision") (<http://www.oah.state.mn.us/aljBase/04009285.rt.htm>); *In the Matter of the Proposed Permanent Rules of the Minnesota Department of Health Relating to Pools*, 9-0900-9007-1 (1994) (finding rule language that the Commissioner "may" require trained operators to obtain a certificate of competency, without further suggesting what standards are to be applied, was defective) (<http://www.oah.state.mn.us/aljBase/09009007.rt.htm>); *In the Matter of the Proposed Permanent Rules Relating to Workers' Compensation*, 11-1900-8006-1 (1993) (a proposed rule stating that a party's request to change primary providers "may not [be] approved" where certain factors were present, was found to be defective, because use of the phrase "may not" conferred unfettered discretion) (<http://www.oah.state.mn.us/aljBase/19008006.93.htm>).

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**CHIEF ADMINISTRATIVE LAW
JUDGE'S ORDER EXTENDING
DEADLINE TO COMPLETE RULE
REPORT PURSUANT TO MINN.
STAT. § 14.15, SUBD. 2.**

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The Agency has indicated that it intends to further modify the proposed rules in light of the comments it has received. Because the Agency has not yet filed with this Office a revised version of the proposed rules, Administrative Law Judge Eric L. Lipman has requested that the deadline to complete the Final Report be extended. The Agency anticipates filing a revised version of the proposed rules no later than Monday, July 16, 2007. Accordingly, the ALJ requests that the deadline for completing the rule report be extended to Wednesday, August 15, 2007.

Minn. Stat. § 14.15, subd. 2 authorizes the Chief Administrative Law Judge to extend the deadline for completing a rule report unless an extension would prohibit a rule from being adopted or becoming effective until after the date of adoption or effectiveness that is required by statute.

Based upon a review of Administrative Law Judge Eric L. Lipman's written request for an extension, Minnesota Statutes and Minnesota Rules,

IT IS HEREBY ORDERED THAT:

- (1) the due date for completion of the rule report shall be extended to Wednesday, August 15, 2007; and,
- (2) a copy of the ALJ's Extension Request and this Order shall be sent by first class mail to those persons who earlier requested notice of the ALJ's Report; and,
- (3) a copy of the ALJ's Extension Request and this Order shall be posted to the MPCA Subsurface Sewage Treatment Rule page of the Office's internet website.¹

Dated this 8th day of June, 2007



RAYMOND R. KRAUSE
Chief Administrative Law Judge

¹ <http://www.oah.state.mn.us/cases/PCA7080/index.html>