

Minnesota Pollution Control Agency

Environmental Analysis and Outcomes Division

ORDER ADOPTING TEMPORARY AMENDMENTS TO RULES

Adopted Temporary Exempt Rules Related to Air Quality Rules Governing Definitions and Abbreviations, Minn. R. ch. 7005 and Permits and Offsets, Minn. R. ch. 7007.

OAH Docket No. 11-2200-21731-1

Governor Tracking Number: AR543

WHEREAS:

1. The rulemaking provisions of Minnesota Statutes, chapter 14, are impracticable and contrary to the public interest when amending a rule to make changes to comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections [14.14](#) to [14.28](#).

2. The attached Findings and Statement of Supporting Reasons justify a **good cause** for the Minnesota Pollution Control Agency (MPCA) to adopt temporary rules that are exempt from the rulemaking provisions of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400, and are hereby incorporated by reference.

3. The MPCA has complied with all notice and procedural requirements in Minnesota Statutes § 14.388, Minnesota Rules, part 1400.2400, and other applicable laws.

4. As required by Minnesota Statutes § 14.386, paragraph (a), clause (1), and Minnesota Rules, part 1400.2400, the Revisor of Statutes has approved the form of the rule by certificate, a copy of which is attached.

5. The MPCA submitted the rulemaking on November 29, 2010, to the Office of Administrative Hearings (OAH) for review and approval. The MPCA adopts the OAH approval letter (OAH letter) dated December 13, 2010, from Judge Barbara L. Neilson which was signed for Judge Neilson by Judge Beverly Jones Heydinger.

6. The MPCA has made three of Judge Neilson's recommended changes. The modifications are set forth in the revised version of the rule attached to this Order and described below in sections 6.1, 6.2 and 6.3. The MPCA did not make one recommendation suggested by Judge Neilson. The MPCA's explanation is described in section 6.4 below.

6.1 **Part 7007.0150, subpart 1, item E** – Based on public comments and a phone conversation with the OAH, the MPCA agreed to correct an error in the proposed temporary rules by making the following correction: “By ~~January 2, 2011~~ July 1, 2011, an owner or operator holding any existing part 70 or state facility permit must calculate whether the facility's potential to emit greenhouse gases meets or exceeds the permit threshold for greenhouse gases in part 7007.0200, subpart 2.” This change is necessary because the rule as proposed misstated the federal

law. Accordingly, Judge Neilson approved this revision to the proposed rules in the attached OAH letter.

6.2 Part 7007.1130, subpart 3, item M – The ALJ recommends adding “as CO₂e” to part 7007.1130, subpart 3, item M, to maintain consistent terminology throughout the proposed temporary rules and to avoid confusion among regulated parties. The MPCA agrees with the ALJ’s recommendation and will make the change. The final rule reads as follows: “If the stationary source determined eligibility in the permit application, in whole or in part, by calculating actual emissions as CO₂e of hydrofluorocarbons, perfluorocarbons, nitrous oxide, and sulfur hexafluoride, purchased or used . . . , the owner or operator must” This change is not substantial. It is reasonable to maintain consistent terminology throughout the proposed rules to prevent confusion among regulated parties.

6.3 Effective Date – The ALJ recommends that the MPCA add language at the end of the proposed temporary rules regarding an effective date, as follows: “These proposed rules are effective for a period of two years from publication in the *State Register*.” The MPCA agrees with the ALJ’s recommendation and will add the proposed language to the rule. This change is not substantial. The MPCA is proposing these temporary rule amendments under clause 2 of the good cause exempt rulemaking provisions found in Minnesota Statutes § 14.388. Clause 2 allows an agency to utilize this exemption when it seeks to comply with a federal law in a manner that does not allow for compliance with the standard rulemaking sections 14.14 to 14.38. Rules adopted under clause 2 are effective for only a period of two years from the date they are published in the *State Register*.

6.4 Part 7007.0200, subpart 2, item B – The Minnesota Center for Environmental Advocacy (MCEA) by letter dated December 6, 2010, recommended a change to subpart 2, defining “major sources:” MCEA’s proposed change, underlined, is as follows:

A major stationary source of air pollutants, as defined in section 302 of the act. . . , that directly emits or has the potential to emit, 100 tons per year or more of any air pollutant other than greenhouse gas emissions (including any major sources of fugitive emissions or any such pollutant, as determined by rule by the administrator). . . .

The ALJ agreed with MCEA stating the change aligns the rule language with the MPCA’s objective of exempting greenhouse gas emitters who emit between 100 and 100,000 tons per year of greenhouse gases. The ALJ recommended that the MPCA make this change.

The MPCA does not agree with the ALJ and MCEA’s recommended change for part 7007.0200, subpart 2, item B. MCEA’s suggestion was to change the text to read “. . . 100 tons per year or more of any air pollutant other than greenhouse gas emissions.” The MPCA does not plan to make this change based on the following information.

The permit threshold of 100 tons per year is established by Title V of the Clean Air Act and applies to air pollutants under the Clean Air Act. Pollutants under the Clean Air Act now include greenhouse gases (GHGs). The Environmental Protection Agency’s (EPA’s) “tailoring” rule does not eliminate the Title V (also called Part 70) threshold on a mass basis for GHGs. The EPA’s “tailoring” rule adds a second threshold specifically for GHGs. The additional GHG threshold is 100,000 tons per year as carbon dioxide equivalent (CO₂e).

For a facility to be a major source of GHGs under the new federal regulations, its potential emissions for GHGs must exceed both the Title V/Part 70 mass threshold of 100 tons/year and the CO₂e threshold of 100,000 tons/year. The EPA explains the two-part threshold in the preamble to the “tailoring” rule (Federal Register Vol. 75, No. 6, June 3, 2010; for example, pages 31518 and 31522). The intention of the “tailoring” rule is to avoid permitting small emitters of GHGs as major sources solely because their potential to emit GHGs exceeds 100 tons per year on a mass basis.

To illustrate the two-part threshold for GHGs, assume a facility has a potential to emit (PTE) of 150 tons per year of methane as its only GHG. That is equal to a PTE of 3,150 tons per year in terms of CO₂e. Methane’s global warming potential is 21 times that of CO₂. To convert the mass of methane emitted to CO₂e, the emissions of methane of 150 tons per year on a mass basis are multiplied by 21. This facility would not be a major source of GHGs for air permitting purposes as the new GHG threshold for CO₂e is not met even though the PTE of methane exceeds the mass-based threshold.

On the other hand, if an industrial facility has boilers with a total capacity of 200 million BTU per hour burning natural gas, the PTE of CO₂ would be about 107,000 tons per year on both a mass basis and as CO₂e. This facility would be a major source of GHGs because both applicable thresholds are exceeded.

7. The rules are needed and reasonable.

IT IS ORDERED that the above-captioned rule, in the form certified by the Office of the Revisor, file number RD3956, dated December 20, 2010, is adopted pursuant to the authority vested in me by Minnesota Statutes §§ 116.07 and 14.388.

Date

Rebecca Flood, Acting Commissioner
Minnesota Pollution Control Agency

RF/NC:jab