

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the
Minnesota Pollution Control Agency
Governing Mercury Air Emissions
Reporting and Reduction, Minn. R. Parts
7005, 7007, 7011, and 7011

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

The Minnesota Pollution Control Agency (MPCA or Agency) sought review and approval of the above-entitled rules, which were adopted by the MPCA pursuant to Minn. Stat. § 14.26.

On July 16, 2014, the Office of Administrative Hearings (OAH) received the submissions that must be filed by the Agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the submissions and the rulemaking record and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED THAT:

The rules are **APPROVED**.

Dated: July 30, 2014



ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

Rules submitted to the Office of Administrative Hearings for review without a hearing are evaluated pursuant to Minn. Stat. § 14.26 and Minn. R. 1400.2100. According to Minn. Stat. § 14.26, subd. 3, the Administrative Law Judge shall approve or disapprove a rule based upon its "legality and form." This analysis includes determining whether the rule, if modified, is substantially different than originally

proposed; whether the agency has authority to adopt the rules; whether the agency has fulfilled all relevant procedural requirements of rule and law; and whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rule.¹

The rules applicable to administrative review require that the Administrative Law Judge evaluate a proposed rule on eight specific grounds, namely, whether the rule:

- (1) was adopted in compliance with the procedural requirements of Minn. R. Part 1400, Minn. Stat. ch. 14, and any other applicable law or rule;
- (2) is rationally related to the agency's objectives and whether the record demonstrates the need for and reasonableness of the rule;
- (3) is substantially different from the proposed rule, and whether the agency followed the procedures set forth in Minn. R. 1400.2110;
- (4) exceeds, conflicts with, does not comply with, or grants the agency discretion beyond that which is allowed by the enabling statute or other applicable law;
- (5) is unconstitutional or illegal;
- (6) improperly delegates the agency's power to another agency, person, or group;
- (7) is not a "rule" as defined by Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; and
- (8) was adopted without compliance with Minn. Stat. §§ 14.25, subd. 2 and 14.001(2), (4), and (5), related to withdrawal of requests for hearing.²

If a proposed rule meets each of these criteria, it shall be approved by the Administrative Law Judge. Each criterion is addressed below, although not necessarily in the order set forth in Rule 1400.2100.

I. REGULATORY BACKGROUND

The MPCA, acting under a delegation from the United States Environmental Protection Agency (EPA), administers federal regulations to maintain and improve water

¹ Minn. Stat. §§ 14.26, subd. 3 and 14.50 (2014). All references to Minnesota Statutes and Rules shall be to the 2014 versions of the same.

² Minn. R. 1400.2100.

quality.³ The Clean Water Act requires every state to evaluate its bodies of water and determine whether they meet water quality standards.⁴ Bodies of water that fail to meet water quality standards are deemed "impaired waters" and are added to the Impaired Waters List.⁵

To address impaired waters, states are required by the Clean Water Act to evaluate the sources of pollution, the reduction in the pollutant needed to meet water quality standards, and the allowable levels of future discharges.⁶ This evaluation, typically done for each body of water and watershed, is called the Total Maximum Daily Load (TMDL) study.⁷

One of the pollutants evaluated in a TMDL study is mercury.⁸ Mercury is a pollutant and a potent neurotoxin.⁹ The primary source of mercury in humans is from the consumption of fish.¹⁰ Eating fish contaminated with mercury can damage the central nervous system.¹¹ Children and fetuses are especially vulnerable because their nervous systems are still developing.¹²

In 2007, the MPCA completed a Minnesota Statewide Mercury Total Maximum Daily Load Study (TMDL Study or Study), as required by federal law. This Study was subsequently submitted to, and approved by, the EPA.¹³

The TMDL Study determined that 99 percent of the mercury that contaminates surface water is deposited into the water from the air.¹⁴ The Study further determined that the amount of human-caused, air-deposited mercury found in 1990 (the 1990 level) must be reduced by another 93 percent in order to comply with current federal water quality standards.¹⁵ Applying this to air emission sources in the state, the TMDL Study established a 789-pounds-per-year air emission goal for Minnesota.¹⁶

Because of the damage to Minnesota's lakes and streams from the deposits of air-borne mercury, the Study indicated that stricter controls upon mercury emissions

³ Statement of Need and Reasonableness (SONAR) at 5.

⁴ See 33 U.S.C. § 1313.

⁵ Minn. Stat. § 114D.15, subd. 5.

⁶ 33 U.S.C. § 1313(d)(C).

⁷ Total Maximum Daily Load (TMDL) is defined in Minn. Stat. § 114D.15, subd. 10, as:

[A] scientific study that contains a calculation of the maximum amount of a pollutant that may be introduced into a surface water and still ensure that applicable water quality standards for that water are restored and maintained....

⁸ SONAR at 5-8 and Attachment 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ SONAR at Attachment 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

were necessary in order to meet federal water quality standards.¹⁷ Therefore, the MPCA set out to determine how the mercury reduction goals could be accomplished and how those strategies could be implemented.

Federal law requires that once a TMDL study is approved by the EPA, a state is required to implement measures to achieve the goals established in the TMDL.¹⁸ To develop implementation strategies and create a final plan, the MPCA enlisted the assistance of stakeholders to recommend source-specific reduction targets, strategies to meet those targets, and timeframes for achieving the reductions.¹⁹ The stakeholders included representatives from the industries creating most of the state's mercury emissions, including the taconite industry, iron and steel smelters and shredders, and others.²⁰

The stakeholders met in two groups: the Strategy Work Group and the Partner Group.²¹ The stakeholder groups submitted their recommendations in a report called the "Strategy Framework for Implementing Minnesota's Statewide Mercury TMDL" (Strategy Framework).²² The Strategy Framework was utilized by the MPCA to develop the Implementation Plan for Minnesota's Statewide Mercury Total Maximum Daily Load (Implementation Plan or Plan).²³

In October 2009, the MPCA adopted the Implementation Plan.²⁴ This Plan set forth strategies to reduce air emissions in Minnesota to no more than 789 lb/yr by 2025, and adopted the Strategy Framework developed by the stakeholders.²⁵ The Plan set forth industry-specific mercury reduction goals, a timeframe for reductions (2025), and interim goals.²⁶

The Minnesota Pollution Control Agency (MPCA) is proposing a series of amendments to Minnesota Rules Chapters 7005, 7007, 7011 and 7019. The proposed rules incorporate federal rules regulating mercury emissions and air pollution; establish requirements for mercury air emissions sources that are not already subject to federal standards or are beyond that required by federal standards; and make mercury emission sources subject to compliance demonstrations, recordkeeping, and reporting.²⁷ Through the proposed amendments, the MPCA seeks to reduce mercury emissions in Minnesota consistent with the findings of the TMDL Study; implement the goals and strategies identified in the Implementation Plan; and reduce emissions of

¹⁷ *Id.*

¹⁸ SONAR at 6.

¹⁹ SONAR at Attachment 3 at 1.

²⁰ SONAR at Attachment 3, Appendix 1.

²¹ *Id.*

²² *Id.*

²³ SONAR at Attachment 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ SONAR at 5.

mercury into the air; the ultimate goal being to decrease the levels of mercury in Minnesota's waters and fish.²⁸

II. STATUTORY AUTHORITY

The statutory authority relied upon by the MPCA in promulgating these rules is Minn. Stat. § 116.07, subd. 4(a). This statute provides:

[T]he Pollution Control Agency may adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1967, chapter 882, *for the prevention, abatement, or control of air pollution*. Any such rule or standard may be of general application throughout the state, or may be limited as to times, places, circumstances, or conditions in order to make due allowance for variations therein. Without limitation, *rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement, or control of air pollution.*²⁹

The statute grants the MPCA broad authority to promulgate rules controlling air pollution and emissions – the very type of rules which are the subject matter of this proceeding.

Mesabi Nugget Delaware, LLC (Mesabi) argues that the MPCA is without legal authority to promulgate rules related to air emissions under the Clean Water Act.³⁰ Mesabi contends that the Clean Water Act governs point source wastewater discharges and not air emissions.³¹ Mesabi explains further it is already subject to air emission regulations under the federal Clean Air Act and federal rules, and that it is compliant with those standards.³² Mesabi asserts that because air emissions may not be regulated by the MPCA under the Clean Water Act, the Agency is without legal authority to promulgate the proposed rules.³³

The Administrative Law Judge disagrees. While the purpose of the proposed rules is to implement the strategies identified in the TMDL Study and Implementation Plan, the Clean Water Act itself is not the source of the MPCA's rulemaking authority in this proceeding. Rather, Minn. Stat. § 116.07 provides the requisite authority. Section 116.07, subd. 4(a) expressly grants the MPCA the authority to adopt administrative rules for the prevention, abatement, or control of air pollution. The Administrative Law Judge, therefore, concludes that the Agency has the requisite statutory authority to adopt the rules that are the subject of this proceeding.

²⁸ *Id.*

²⁹ Emphasis added.

³⁰ Comment Letter 7 at 1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

III. COMPLIANCE WITH PROCEDURAL REQUIREMENTS

There were only three requests for a public hearing submitted to the Agency in response to the Dual Notice of Intent to Adopt Rules. In accordance with the Dual Notice, the Agency timely and properly cancelled the hearing, and notified the parties who requested a hearing of the reason for the cancelation.

Additionally, the MPCA has complied with all procedural requirements for promulgating the rules in this case. The Agency:

- published a Request for Comments in the *State Register* soliciting comments from the public on the subject matter of the rule pursuant to Minn. Stat. § 14.101 and Minn. R. 1400.2050, at least 60 days prior to the publication of the Dual Notice of Intent to Adopt Rules;
- timely published in the *State Register* and served on interested parties a Dual Notice of its Intent to Adopt Rules pursuant to Minn. Stat. §§ 14.22, 14.225, and 14.25, and Minn. R. 1400.2080;
- timely published in the *State Register* and provided notice of the proposed rules, as well as made the proposed rule freely available to members of the public for review and comment;
- timely served its Dual Notice of Intent to Adopt Rules and SONAR on the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules, pursuant to Minn. Stat. § 14.116;
- consulted with the Commission of Management and Budget to evaluate the fiscal impact and benefits of the proposed rule on units of local government, pursuant to Minn. Stat. § 14.131;
- timely sent a copy of the SONAR to the Legislative Reference Library;
- complied with the requirements of Minn. Stat. § 14.002;
- evaluated the applicability of Minn. Stat. §§ 3.9223, subd. 4 (impact on Chicano/Latino people); 174.05 (notification to Commissioner of Transportation); and 14.111 (notification to Commissioner of Agriculture);
- made the determinations required by Minn. Stat. §§ 14.127 and 14.128;

- provided sufficient additional notice to persons or classes of person who may be affected by the proposed rules pursuant to Minn. Stat. § 14.22 and Minn. R. 1400.2060;
- allowed sufficient time and opportunity for public comment before and after publication of the Dual Notice of Intent to Adopt Rules;
- prepared and made available to the public the SONAR that included all of the requirements of Minn. Stat. §§ 14.131, 14.23, and 116.07, subd. 2(f), and Minn. R. 1400.2070;
- provided the public with notice and opportunity to request a public hearing, pursuant to Minn. Stat. § 14.25;
- timely served notice to the parties requesting a public hearing that the hearing was cancelled and not required under Minn. Stat. § 14.25 because less than 25 persons requested a public hearing;
- submitted to the Office of Administrative Hearings all documents required under Minn. R. 1400.2090 and 1400.2310; and
- completed the rulemaking process in the timeframe required by Minn. Stat. § 14.26, subd. 1.

Therefore, the Administrative Law Judge finds that the rules were adopted in compliance with the applicable procedural requirements of law and rule.

IV. DEMONSTRATION OF THE NEED AND REASONABLENESS OF THE PROPOSED RULES

Under Minn. Stat. § 14.26, subd. 3, and Minn. R. 1400.2100, an agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the rulemaking record,³⁴ “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),³⁵ and the agency’s interpretation of related statutes.³⁶

A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to

³⁴ See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

³⁵ Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

³⁶ See, *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

be taken.”³⁷—By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”³⁸

An important corollary to these standards is that when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.³⁹ Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁴⁰

The Agency received 14 comments from stakeholders in this matter. Comment letters were received from:

Comment Letter 1:	Ottertail Power Company (Ottertail)
Comment Letter 2:	U.S. Environmental Protection Agency, Region 5 (EPA)
Comment Letter 3:	Southern Minnesota Beet Sugar Cooperative (SMBSC)
Comment Letter 4:	Fond Du Lac Band Environmental Program (Fond Du Lac)
Comment Letter 5:	Virginia, Minnesota Department of Public Utilities (Virginia)
Comment Letter 6:	Xcel Energy (Xcel)
Comment Letter 7:	Mesabi Nugget Delaware, LLC (Mesabi)
Comment Letter 8:	Fibrominn, LLC (Fibrominn)
Comment Letter 9:	United States Steel Corporation (U.S. Steel)
Comment Letter 10:	Minnesota Chamber of Commerce (Minnesota Chamber)
Comment letter 11:	ArcelorMittal Minorca Mine, Inc., Cliffs Natural Resources, and U.S. Steel (collectively referred to herein as (the Taconite Group)
Comment Letter 12:	Minnesota Power
Comment Letter 13 :	Cliffs Natural Resources (Cliffs)
Comment Letter 14	Gerdau-St. Paul Steel Mill (Gerdau)

The comments received related to Rules 7005.0100, subps. 23a and 23b; 7005.0502; 7011.0561; 7011.1340, subps. 1 and 3; 7011.1355; 7011.1360; 7011.1365; 7019.3000, subp. 3; 7019.3050E; and 7019.3065.

³⁷ *Pettersen*, 347 N.W.2d at 244.

³⁸ See, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

³⁹ *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

⁴⁰ *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

A. Causal Link Between Taconite Plant Emissions and Elevated Mercury Levels in Minnesota Fish

The Taconite Group (Group) and Mesabi, individually, argue that the rules setting mercury reduction requirements are unnecessary because the MPCA has failed to establish a causal connection between taconite plant mercury emissions and elevated levels of mercury in the Minnesota fish populations.⁴¹ According to these stakeholders, Minnesota sources account for very little of the total mercury found in Minnesota air and water.⁴²

The Taconite Group notes that 90 percent of atmospheric mercury deposition in Minnesota is unrelated to Minnesota sources – but arises from global and regional emissions and natural sources.⁴³ Of the 10 percent of mercury emissions caused by Minnesota sources, the Taconite Group asserts that its facilities are only responsible for 21 percent of state emissions; resulting in only 2.1 percent of the total mercury found in Minnesota ambient air.⁴⁴ Mesabi maintains that:

Because the rules will do nothing to control mercury sources outside of Minnesota and because those outside sources amount for the vast majority of mercury in Minnesota waters, the proposed reductions by Minnesota sources will result in little or no change to Minnesota water quality.⁴⁵

These stakeholders maintain that without clear evidence that a reduction in mercury emissions in Minnesota will likewise reduce the levels of mercury in fish, the MPCA has failed to establish that the rules are rationally related to the Agency's objectives and are unnecessary.⁴⁶

In response, the MPCA asserts that increased mercury in Minnesota air necessarily increases the mercury deposition in Minnesota waters and, thus, in Minnesota fish.⁴⁷ The TMDL Study established that reductions in the concentration of mercury in fish tissue are expected to track linearly with reductions in air deposition

⁴¹ Comment Letters 7 and 11.

⁴² *Id.*

⁴³ Comment Letter 11 at 9.

⁴⁴ *Id.*

⁴⁵ Comment Letter 7 at 3.

⁴⁶ See generally, Comment Letters 7 and 11.

⁴⁷ Revised MPCA Response to Comments Received at 5-7.

watershed loads.⁴⁸ Put simply, reduction in the deposition of mercury in lakes and streams will proportionately result in the reduction of mercury in the fish that live in the water (referred to by the MPCA and the Taconite Group as the “proportionality principal”).⁴⁹ Therefore, all reductions in mercury sources will result in like reductions of mercury concentrations in Minnesota waters and fish.⁵⁰

In addition, the MPCA notes that Minnesota is not acting alone in its endeavor to reduce mercury emissions.⁵¹ The rules incorporate federal rules that impose mercury control requirements on all sources nationally.⁵² Between the federal and state mercury reductions, a reduction in mercury in Minnesota waters and fish will invariably result.⁵³

The rules implementing the Administrative Procedure Act require an agency to explain the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting that need.⁵⁴ There is no further direction as to how serious the need must be for rulemaking to be appropriate, or how direct the correlation must be between the need and the remedy presented in the rules. To establish necessity of a rule, an agency need only show that there is a need to be addressed and that the rule is rationally related to that need.⁵⁵ In this proceeding, the Agency has established a need to reduce mercury emissions in the state so that the mercury levels in the waters and fish are decreased, and the rules are rationally related to that goal.

While it is true that most of the mercury in Minnesota waters is from sources outside the state, the MPCA has established that mercury reduction from Minnesota sources is required in order for the state to meet the goals set forth in the TMDL Study and Implementation Plan. In addition, although meeting the mercury reduction goals in Minnesota may not eliminate the existence of mercury in Minnesota fish, the reduction of air-borne mercury will likely reduce the amount of mercury in state fish.

The MPCA has established the need to reduce mercury emissions in Minnesota. The mercury reduction goals and strategies set forth in the TMDL Study and Implementation Plan are in direct response to those needs. The rules implement the reductions identified in the Plan. As a result, the rules are rationally related to address the need because they set forth specific mercury reduction requirements and timelines. Therefore, the MPCA has established the need for the rules, as well as their rational relationship to the Agency’s stated objectives.

⁴⁸ SONAR at Attachment 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Revised MPCA Response to Comments Received at 5-7.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Minn. R. 1400.2070, subp. 1.

⁵⁵ Minn. R. 1400.2100B.

B. Feasibility of the Mercury Reduction Requirements for the Taconite Industry

When the 2007 TMDL Study showed that further mercury reductions were necessary to reduce the concentration of mercury in Minnesota waters, the taconite industry assisted in the MPCA's efforts to identify how those reductions should be made.⁵⁶ As part of this effort, the industry participated in a stakeholder group that submitted to the MPCA a Strategy Framework in 2008.⁵⁷ The Strategy Framework related to the taconite industry adopted a goal of 75 percent reduction in mercury emissions from 2010 levels by 2025.⁵⁸

The MPCA adopted the Strategy Framework in the 2009 Implementation Plan.⁵⁹ Consistent with that Strategy Framework and Implementation Plan, the rules require a 72 percent (as opposed to a 75 percent) reduction in mercury emissions for ferrous mining and processing facilities from 2008 or 2010 emissions (whichever year is greater).⁶⁰ Accordingly, the 72 percent reduction set forth in the rule is reasonable and results directly from the goals established through stakeholder involvement.

The Taconite Group argues that the rules are unreasonable because no technology has been identified that can accomplish the reduction in mercury emissions required by the rules for ferrous mining and processing plants.⁶¹ The Taconite Group argues, and the MPCA essentially agrees, that no emissions reduction technology has been identified by the industry that will reduce mercury emissions by 72 percent⁶² – the amount required by the rules.⁶³

To date, the technology tested (activated carbon injection or ACI) has only been able to reduce emissions by 25 to 61 percent.⁶⁴ The industry, therefore, requests that the MPCA delay the rulemaking until a different technology is identified and thoroughly tested that can meet the 72 percent reduction requirement.⁶⁵ In addition, the Taconite

⁵⁶ Comment Letter 11 at 4-5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* See also, SONAR at Attachment 3.

⁶⁰⁶⁰ The MPCA originally proposed using 2010 as the baseline year for applying the 72 percent reduction. See Proposed Rule 7007.0502, subp. 6A. However, as a result of comments received, the MPCA changed the baseline year to 2008 or 2010, whichever year had the greater emissions. See Adopted Rule 7007.0502, subp. 6A. In addition, the rule was modified to address facilities that were not fully operational in 2010 (i.e., the Mesabi facility). *Id.* For facilities operating at less than 75 percent capacity in 2010, the reduction shall be measured from the "mercury potential to emit included in the permit authorizing construction." *Id.* These changes are reasonable and address the concerns articulated by Mesabi, U.S. Steel, Minnesota Chamber, and Taconite Group. See Comment Letters 7, 9, 10, and 11.

⁶¹ Comment Letter 11.

⁶² Rule 7007.0502, subp. 6 requires ferrous mining and processing plants to submit mercury reduction plans demonstrating that by January 1, 2025, mercury emissions will not exceed 28 percent of the mercury emitted in 2008 or 2010, whichever is greater. This equates to a reduction requirement of 72 percent from 2008 or 2010 levels.

⁶³ Comment Letter 11.

⁶⁴ *Id.*

⁶⁵ *Id.*

Group argues that because no technology is currently identified that will meet the reductions required by the rules, the rules, themselves, are unreasonable.⁶⁶

The Group further asserts that the rules undermine years of collaborative efforts by the taconite industry to identify mercury reduction technology that is not only technically effective but also economically feasible, does not reduce pellet quality and does not cause excessive corrosion.⁶⁷ According to the Taconite Group, these goals were specifically included in the Strategy Framework and adopted by the MPCA in the Implementation Plan.⁶⁸

The MPCA responded to the industry's concerns by amending the date by which ferrous mining or processing facilities must file their mercury reduction plans. Instead of requiring mercury emissions reduction plans to be filed by December 30, 2016 (as originally proposed), the MPCA agreed to change the date to December 30, 2018, giving the industry approximately four years from the date the rules are adopted to identify and test technology.⁶⁹ In addition, the MPCA notes that full compliance with the reductions is not required until January 1, 2025.⁷⁰

The MPCA acknowledges that the taconite industry has expended time and resources attempting to identify mercury reduction technology.⁷¹ The MPCA further asserts that effective emission-reducing technologies are available, but the industry has not availed itself to these options because of the associated cost.⁷²

According to the MPCA, in order to meet the reduction goals set forth in the TMDL Study and Implementation Plan, a definitive deadline is required for taconite companies to identify their mercury reduction plans.⁷³ Further, deadlines for reduction plans help to ensure that full compliance can be achieved by 2025.⁷⁴

The MPCA asserts that while technical issues remain, they appear to be resolvable within the time provided in the modified rule, especially in light of other types of emission reductions that the industry will need to address in coming years.⁷⁵ In addition, the MPCA points to flexibility in the rules, specifically Rule 7007.0502, subp. 5A(2), which provides that if emission controls are not technically achievable by the compliance date (January 1, 2025), a facility may submit a plan that proposes an alternative achievable reduction.⁷⁶ Therefore, the MPCA argues, the rules, as modified during the rulemaking process, are reasonable.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Rule 7007.0502, subp. 4B.

⁷⁰ Rule 7007.0502, subp. 5A(1)(f).

⁷¹ SONAR at 12.

⁷² See also, Revised MPCA Response to Comments Received at 2-5.

⁷³ SONAR at 20.

⁷⁴ *Id.*

⁷⁵ Revised MPCA Response to Comments Received at 1-5.

⁷⁶ *Id.*

A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁷⁷ The reasonableness of a rule is viewed toward the end sought to be achieved, and not in light of its application to a particular party.⁷⁸

An Administrative Law Judge’s role in reviewing a rule submitted without hearing is limited. The scope of review is restricted to a review of the rule on its face, not as applied.⁷⁹ The judge’s purpose is not to second-guess the policy decisions made by the agency in promulgating the rule, but rather, to determine whether the rule and its process of adoption meet the requirements for rulemaking under the law.

When the TMDL Study showed that further mercury reductions were necessary to reduce the concentration of mercury in Minnesota waters, the taconite industry assisted in the MPCA’s efforts to identify how those reductions should be made.⁸⁰ As part of this effort, the industry participated in stakeholder groups that submitted to the MPCA a Strategy Framework.⁸¹ The Strategy Framework adopted a goal of 75 percent reduction in mercury emissions from 2010 levels by 2025.⁸²

The MPCA adopted the Strategy Framework in the 2009 Implementation Plan.⁸³ Consistent with that Plan, the rules require a 72 percent (as opposed to a 75 percent) reduction in mercury emissions for ferrous mining and processing facilities from 2008 or 2010 emissions (whichever year is greater).⁸⁴ Accordingly, the 72 percent reduction set forth in the rule is reasonable and results directly from the goals established by the stakeholders themselves.

Since the adoption of the Implementation Plan, the taconite industry has participated in two phases of testing mercury reduction technology.⁸⁵ The industry focused its attention on activated carbon injection (ACI) technology, but has not fully explored other technology available.⁸⁶ The Taconite Group asserts that it is simply not

⁷⁷ *Pettersen*, 347 N.W.2d at 244.

⁷⁸ *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985).

⁷⁹ See e.g., *Mammenga*, 442 N.W. 2d at 789 (the mere fact that application of a rule may yield a harsh or undesirable result in a particular case does not make the rule invalid).

⁸⁰ Comment Letter 11 at 4-5.

⁸¹ *Id.*

⁸² SONAR at Attachment 3 at Appendix 1.

⁸³ *Id.*

⁸⁴⁸⁴ The MPCA originally proposed using 2010 as the baseline year for applying the 72 percent reduction. See Proposed Rule 7007.0502, subp. 6A. However, as a result of comments received, the MPCA changed the baseline year to 2008 or 2010, whichever year had the greater emissions. See Adopted Rule 7007.0502, subp. 6A. In addition, the rule was modified to address facilities that were not fully operational in 2010 (i.e., the Mesabi facility). *Id.* For facilities operating at less than 75 percent capacity in 2010, the reduction shall be measured from the “mercury potential to emit included in the permit authorizing construction.” *Id.* These changes are reasonable and address the concerns articulated by Mesabi, U.S. Steel, Minnesota Chamber, and Taconite Group. See Comment Letters 7, 9, 10, and 11.

⁸⁵ Comment Letter 11 at 4-8.

⁸⁶ *Id.*

possible at this time to meet the required reduction, yet they have not explored all reduction technology available to them.⁸⁷

The MPCA has established that there are technically feasible mercury controls available to the industry, including GORE technology, which can be tested and vetted by 2018. While these measures may well be more expensive to the industry, the MPCA has presented sufficient data to show that the extended reduction plan submission date (2018) is reasonable in light of the technology options available to the industry. In addition, if no technology is identified by 2018 that can reduce mercury emissions by 72 percent, the rules permit facilities to submit alternative plans proposing a different reduction requirement. Accordingly, the Agency has sufficiently established the reasonableness of the rule in relationship to the end sought to be achieved (i.e., the reduction of state-source mercury emissions by 2025).

C. Propriety of the Emissions Threshold (Rule 7005.0100, subpart 23b)

Rule 7005.0100, subp. 23B defines "mercury emission source" as:

[A] stationary source with actual mercury emissions of three pounds per year or more, after controls. For purpose of this subpart, "mercury emissions" do not include fugitive emissions of mercury.

"Stationary source" is defined in Rule 7005.0100, subp. 42c, which is not part of this rulemaking proceeding. A stationary source is:

[A]n assemblage of all emissions units and emission facilities that belong to the same industrial grouping, are located at one or more contiguous or adjacent properties and are under the control of the same person (or persons under common control). Emissions units or emission facilities must be considered as part of the same industrial grouping if they belong to the same "major group" (that is, which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (United States Government Printing Office Stock Numbers 4101 to 0066 and 003-005-00176-0, respectively).⁸⁸

Thus, under the proposed rule, all stationary sources (i.e., facilities) that emit three pounds of mercury or more in a year, must comply with the requirements of the rules, including the mercury emissions reduction plan, emissions limitations, performance testing, and emissions inventory.

The Taconite Group, Minnesota Chamber, and Cliffs Natural all assert that the threshold limit for mercury emissions regulation should be changed from three pounds per year or more to five pounds per year or more, and should be measured from each emissions unit, not each stationary source (which can contain several separate

⁸⁷ *Id.*

⁸⁸ Minn. R. 7005.0100, subp. 42c.

emission units).⁸⁹ According to Cliffs–Natural, if the threshold is measured from stationary sources, then all emission units within the stationary source, even if they each emit less than three pounds per year (but resulting in a total emission of more three-pounds or more), remain subject to the requirements under the rule.⁹⁰

In addition, the Chamber asserts that the definition of “mercury emission source” should read, “more than three pounds per year,” rather than “three pounds per year or more,” as several industries have relied on the three-pound threshold to mean emissions above and not equal to three pounds per year.⁹¹

The MPCA has presented evidence that 99 percent of the total mercury emissions in Minnesota come from approximately 35 sources emitting more than three pounds of mercury per year.⁹² Because nearly all mercury emitted in Minnesota comes from sources emitting more than three pounds per year, the three-pound threshold is a reasonable limit. As to whether the definition should read “three pounds or more” or “more than three pounds,” the Agency, in its expert discretion, has selected “three pounds or more,” and such decision is a reasonable one under the evidence presented – even if it is not the only reasonable option.

Likewise, the Agency’s decision to apply the threshold limit to stationary sources, rather than emission units, is a policy decision that may, indeed, impose requirements upon individual units that emit less than three pounds of mercury per year. The MPCA states that it considered measuring emissions from each unit, but chose stationary source because the existing emission inventory and permitting structure applies to the entire stationary source, not individual emissions units.⁹³ The MPCA’s rationale is a reasonable one. Because the MPCA has presented sufficient evidence that its selection of “stationary source” over emission unit is a reasonable option, it is hereby approved.

D. The Emission Limitation for Iron and Steel Melters (Rule 7007.0502, subpart 6B)

Proposed Rule 7007.0502, subp. 6B sets forth a mercury emission limitation for iron and steel melters of 35 milligrams per ton of iron or steel produced. Gerdau – St. Paul Steel Mill (Gerdau) is the only facility that will be affected by the rule.⁹⁴ The emissions standard of 35 mg/ton was chosen by the MPCA because: (1) it is the same standard used in the state of New Jersey; (2) Gerdau has a facility in New Jersey that is compliant with this standard; and (3) the standard will reduce emissions from Gerdau’s

⁸⁹ Comment Letters 10, 11, and 13.

⁹⁰ Comment Letter 13.

⁹¹ Comment Letter 10.

⁹² SONAR at 15 and 79.

⁹³ SONAR at 14 and Revised MPCA Response to Comments Received at 17.

⁹⁴ SONAR at 23.

Minnesota facility by up to 85 percent, consistent with the goals identified in the 2009 TMDL Study Implementation Plan.⁹⁵

Gerdau argues that the emission limitation, as applied to the electric arc furnaces (EAF) it uses in its St. Paul facility, is both unnecessary and unreasonable.⁹⁶ Gerdau contends that the emissions standard is unnecessary because the EPA has already established maximum achievable control technology (MACT) standards to address mercury emissions from the industry.⁹⁷ According to Gerdau, the MACT standards are currently under review and it is anticipated that the EPA will promulgate new MACT standards in the coming years.⁹⁸ Therefore, it is unnecessary for the MPCA to establish its own emission standards at this time.⁹⁹

Gerdau also asserts that the 35 mg/ton mercury emissions standard is arbitrary because it is based upon New Jersey's mercury emissions standard and the data from one of Gerdau's plants located in New Jersey – not its Minnesota facility.¹⁰⁰ According to Gerdau, the emission levels from the New Jersey facility may not be able to be replicated in its Minnesota facility due to different processes used in the two facilities.¹⁰¹ Gerdau argues that because the standard may not be achievable for its Minnesota plant, the rule is unreasonable.¹⁰² In addition, Gerdau argues that if its Minnesota facility is subject to more stringent standards, it will suffer a competitive disadvantage compared to steel manufacturers located in other states.¹⁰³

The MPCA acknowledges that the chosen emissions standard is “not yet typical of an electric arc furnace (EAF) in the United States and sufficient time must be provided to allow for evaluation, design, installation, and compliance demonstration of a mercury control system at the facility.”¹⁰⁴ However, the MPCA states that the standard is, nonetheless, based in fact and is technically achievable within four years.¹⁰⁵

The Agency relies solely on data from Gerdau's Sayerville, New Jersey, facility to assert that the standard can be met when ACI technology is implemented to reduce mercury emissions.¹⁰⁶ According to the MPRA, Gerdau's New Jersey plant has successfully met the 35 mg/ton limit since 2010 using ACI and baghouse technology.¹⁰⁷

⁹⁵ *Id.* Gerdau does not challenge the need for an 85 percent reduction in its mercury emissions. It only challenges the reasonableness of the standard as applied to its Minnesota facility.

⁹⁶ Comment Letter 14.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ SONAR at 23.

¹⁰⁵ Revised MPCA Response to Comments Received at 8-11.

¹⁰⁶ *Id.*; SONAR at 22-23.

¹⁰⁷ Revised MPCA Response to Comments Received at 9.

Therefore, Gerdau's St. Paul plan should be able to utilize the same technology to achieve similar results.¹⁰⁸

The MPCA acknowledges that the processes used at Gerdau's St. Paul facility are different from those used at the New Jersey plant, and that different engineering may be required for mercury removal at the St. Paul facility.¹⁰⁹ However, the MPCA asserts that the processing differences do not negate the fact that control technology is available to the Gerdau St. Paul facility which can achieve the strict emissions limitation.¹¹⁰

Lastly, the Agency contends that the emissions standard is reasonable because the compliance deadline of June 30, 2018, gives Gerdau four years to implement strategies to meet the limits.¹¹¹ In addition, if Gerdau establishes that such limitations cannot be achieved using existing technology, then the rules allow for Gerdau to propose an alternative emissions reduction plan, incorporating a different emissions limit.¹¹² Thus, if the EPA does, indeed, amend its MACT standards, Gerdau can propose that those standards apply in place of the standard set forth in the rule -- if technology cannot achieve the limitations set forth in the rule.

1. Need for the Emission Limitation

With respect to the need for the limitations, Gerdau does not challenge the general necessity to reduce state mercury emissions to meet federal water quality standards. Rather, Gerdau argues that the MPCA should delay establishing an emissions limit for iron and steel melters until the EPA has completed revising the federal MACT standards under the National Emission Standards for Hazardous Air Pollutants (NESHAP) rules.¹¹³ Gerdau argues that it is already regulated by a federal MACT-based mercury emission standard that "has proven successful in removing substantial quantities of mercury from the scrap supply stream" and thus the environment.¹¹⁴ Therefore, Gerdau argues that the MPCA should simply wait and adopt the revised federal standards.

As set forth above, the MPCA has established that the rules are necessary to implement the mercury reduction needs and goals set forth in the TMDL Study and Implementation Plan. The MPCA has established that the current federal mercury emissions regulations had not been sufficient to meet the goals set forth in the state's 2009 Implementation Plan. Therefore, the federal MACT-based standards have been insufficient in protecting state waters. The fact that the EPA may be promulgating new MACT-based standards does not negate the need for the MPCA to establish its own

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8-9.

¹¹⁰ *Id.* at 8-11.

¹¹¹ *Id.* at 9.

¹¹² *Id.* See, Rule 7007.0506, subp. 5A(2).

¹¹³ Comment Letter 14

¹¹⁴ *Id.* at 5.

state emissions limitations to meet the goals adopted in the Implementation Plan. Accordingly, Gerdau's challenge based on-need is rejected.

2. Reasonableness of the Emission Limitation

Minnesota case law has equated unreasonableness in rulemaking to "arbitrary and capricious" acts of government officials.¹¹⁵ When applying the arbitrary and capricious test, deference must be given to the agency's expertise.¹¹⁶ Such deference restricts "judicial functions to a narrow area of responsibility."¹¹⁷

An administrative action is "arbitrary and capricious" when it is an exercise of that agency's will rather than its judgment; or if the action is based on whim or is devoid of articulated reasons.¹¹⁸ Where there is room for two opinions on the matter, an administrative agency's choice of one course of action is not arbitrary and capricious.¹¹⁹ Thus, even if a better or more reasonable option exists, so long as the action taken by the agency is based on articulable facts and reason, the rule must be upheld.

As set forth above, a proposed rule is considered reasonable (and thus not arbitrary) as long as the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹²⁰ The reasonableness standard in rulemaking is a low threshold. As long as there is some basis in fact for the agency's rule, and as long as the rule is rationally related to the outcome the agency seeks to achieve, the Administrative Law Judge must approve the rule as to reasonableness. This is true even if a different course of action may be more reasonable. The standard applied by the Administrative Law Judge is merely "reasonable" – not most reasonable or best.

Here, the evidence that the Agency relies upon is quite narrow. The MPCA concludes that because Gerdau's New Jersey facility was able to meet the emissions limit using ACI technology, that the Gerdau St. Paul facility should also be able to meet that limitation. As a back-up, the Agency argues that Gerdau can seek approval of an alternative reduction plan, if it finds that no technology can meet the emission standard.

While the factual basis for the Agency's rule is very limited, the Administrative Law Judge must defer to the expertise of the Agency that technology is available to Gerdau to meet this standard. Because the Agency has articulated facts upon which it

¹¹⁵ *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950); *City of Morton v. Minnesota Pollution Control Agency*, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 102-103 (Minn. Ct. App. 1991), *review denied* (Minn. July 24, 1991).

¹¹⁶ *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

¹¹⁷ *Id.*

¹¹⁸ *In the Matter of the Medical License of Harvey B. Friedenson*, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998); *Mammenga*, 442 N.W.2d 786 at 789.

¹¹⁹ *Friedenson*, 574 N.W.2d at 467, *citing Brown v. Wells*, 288 Minn. 468, 472, 181 N.W.2d 708, 711 (1970).

¹²⁰ *Petterson*, 247 N.W.2d at 244.

based its 35 mg/ton mercury emissions limit (the New Jersey standard and Gerdau's ability to comply with that limit in its New Jersey facility), the MPCA has established that the standard is not arbitrary or capricious.

In addition, because the Agency is giving Gerdau four years to test new technology, and because the rules include flexibility to allow industries that are unable to meet the emission standards using available technology to propose an alternative reduction plan, the standard is reasonable. It is based in fact and rationally related to the Agency's overall objectives of reducing air-borne mercury emissions. Accordingly, it is approved.

E. Costs of Compliance

Several stakeholders argue that MPCA's cost estimates for implementing the rules for certain industries or for specific facilities were inaccurate.¹²¹ These groups argue that the true costs for implementing the rules far exceed the estimates set forth in the SONAR and cause the rules to be unreasonable as applied.¹²²

The Taconite Group and U.S. Steel, individually, argue that the cost of implementing the regulations is actually five times more than estimated by the MPCA.¹²³ The fact that the taconite industry is a global "billion dollar industry" does not negate the costs and ignores the significant implications to individual facilities or business owners.¹²⁴

Gerdau, too, argues that the MPCA's estimated costs for its St. Paul facility were inaccurate.¹²⁵ According to Gerdau, the costs for flue dust landfilling is actually 20 times the MPCA estimate, the costs for ash disposal and transportation is higher than estimated, and the cost of carbon injection is two times more than the MPCA estimate, making the total cost of compliance far higher than estimated by the MPCA.¹²⁶ Both Gerdau and the Taconite Groups argue that the high costs to comply with the regulations render the rules economically unfeasible and, thus, unreasonable.

The MPCA does not dispute that the cost of compliance for the taconite industry may be larger than originally estimated, but argues that its estimate was made in good faith based upon information available to it at the time of the SONAR.¹²⁷ In addition, the MPCA asserts that the Taconite Group is over-stating the potential costs.¹²⁸ According

¹²¹ Comment Letters 9, 11 and 14. The SMSBC asserts that the MPCA should have included the cost of changes it has already made in its wastewater treatment plant when it calculated the annual compliance costs of the rules. See, Comment Letter 3. Because SMSBC did not argue that the costs rendered the rule reasonable, the comments are not addressed herein.

¹²² Comment Letters 9, 11, and 14.

¹²³ Comment Letters 9 and 11.

¹²⁴ *Id.*

¹²⁵ Comment Letter 14.

¹²⁶ *Id.*

¹²⁷ Revised MPCA Response to Comments Received at 11-15.

¹²⁸ *Id.*

to the MPCA, by the date of required compliance (2025), the industry will be required to comply with various other ambient air protection regulations, and mercury will be just a small component of the overall control measures required by federal law.¹²⁹ Accordingly, the MPCA argues that it is not appropriate to assign the entire cost of these measures to mercury control.¹³⁰

In addition, the MPCA agrees that the annual cost of compliance for Gerdau was estimated too low and revised its figures based upon the information provided by Gerdau.¹³¹ The recalculation resulted in an estimate of over double the annual cost for compliance (revised to \$1,156,242 in comparison with the original estimate of \$523,000).¹³² While the MPCA acknowledges that the costs to both the taconite industry and Gerdau may be more than originally estimated, it maintains that the costs continue to be reasonable in relation to the harm being abated and the size of the industries and facilities affected.¹³³

Minnesota Statutes section 14.131 requires that an agency include in the SONAR "the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals." The statute does not require that an agency be 100 percent accurate with its estimation of costs. Nor does the law make inaccurate cost estimates a basis for disapproving a rule.

The purpose of the statute is simply to identify the groups that have an interest in the rules so that notice is provided, and to estimate the costs to those parties so that the rule can be evaluated for reasonableness. The estimated costs in the SONAR properly alerted the affected industries of the potential costs and allowed them to effectively submit comments in opposition to the rules describing their calculations of the additional costs of compliance. Although some of the costs estimates in the SONAR were erroneous, they nonetheless served their intended purpose of identifying the general scope of the costs of implementation and the effects on stakeholders.

More accurate cost estimates have now been provided by the industries and acknowledged by the MPCA. The MPCA has established that the revised cost estimates do not render the rules themselves unreasonable, given the large size and global reach of the industries affected and their contribution to the problem being addressed.

The fact that the application of a rule may yield a harsh or undesirable result in a particular case does not make the rule invalid.¹³⁴ While certain rules will invariably impact only certain groups of people or businesses, the impact on those groups must be

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 15.

¹³² *Id.*

¹³³ *Id.* at 11-15.

¹³⁴ *Mammenga*, 442 N.W.2d at 789, citing *Wickard v. Filburn*, 317 U.S. 111, 129-30, 63 S. Ct. 82, 91, 87 L.Ed. 122 (1942); and *Tepel v. Sima*, 213 Minn. 526, 536, 7 N.W.2d 532, 537 (1942).

evaluated in relation to the overall purpose of the regulations and the rational relationship between the objective of the rules and the cost imposed.

Here, the rules are intended to reduce mercury in the waters of the state and, in turn, help to decrease the amount of mercury in the state's fish populations. The industries bearing the cost of the regulations are the industries that produce the most mercury in the state and contribute to the mercury pollution in Minnesota waters. According to the MPCA, just 30 emissions sources in Minnesota account for 99 percent of the total estimated mercury emissions statewide.¹³⁵ These are the emissions sources targeted by the rules. Therefore, while the cost of compliance for these particular stakeholders is high, the rules themselves are not unreasonable.

F. Continuous Emission Monitoring Systems (Rule 7007.0502, subp. 5A(d))

Rule 7007.0502, subp. 5A(d) requires that all mercury emissions reduction plans contain an evaluation of the use of a continuous mercury emission monitoring system (CEM). The Taconite Group, the Chamber, Mesabi and Cliffs Natural argue that such requirement is both unnecessary and unreasonable.¹³⁶

The Minnesota Chamber asserts that CEMs are not necessary or reasonable because the requirements for annual testing and on-going monitoring already address the need. Cliffs Natural argues that the rules should provide for alternative methods of demonstrating compliance, not just CEMs; for example, periodic stack testing and parametric monitoring. The Taconite Group asserts that CEM is inappropriate for the taconite industry because there is no experience with using CEM on indurating furnaces; CEM has not proven to be sustainable for the industry; CEM only measures gaseous-phase mercury; and CEM may actually increase the emission of particulate mercury.

The MPCA responds that annual testing is insufficient to ensure compliance and that on-going monitoring is needed.¹³⁷ Because mercury emissions sources have highly variable emissions, one-time, static testifying is insufficient.¹³⁸ CEM measures emissions during all periods of operations and, thus, provides the most accurate data of all methods available to quantify emissions.¹³⁹ However, because CEM may not be technically feasible in every instance,¹⁴⁰ the rule is only requiring that an owner or operator assess the use of the technology, not employ it. Therefore, the MPCA contends, the rule is necessary and reasonable.

¹³⁵ SONAR at 15.

¹³⁶ Comment Letters 7, 10, 11, and 13.

¹³⁷ SONAR at 20.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

The MPCA has adequately articulated the need for including the requirement to evaluate the use of CEM technology in mercury reduction plans. In addition, because the use of CEM is not required – all that is required is that the owner or operator evaluate the use of CEM – such requirement is reasonable. The taconite industry and Gerdau have yet to identify the type of mercury control technology that they will be employing to achieve compliance. Therefore, the MPCA has established that the requirement to at least explore CEM is a reasonable, albeit, unpopular option.

G. Comments to Other Rules

The remaining comments to individual rules are not addressed herein because they: (1) were addressed by changes made to the proposed rules; (2) did not challenge the need or reasonableness of the rule; (3) recommended changes based solely upon the policy preferences of the commenter; or (4) did not assert a legal basis for objection.

The Administrative Law Judge has carefully considered each rule and subpart, the comments made on each rule, the MPCA's responses to the comments received, and the modifications made to the adopted rules. The Administrative Law Judge concludes that the MPCA has established the need and reasonableness of each rule and modification, and approves the rules for reasonableness and need.

V. CHANGES TO THE PROPOSED RULES FOLLOWING THE DUAL NOTICE

The Agency made changes to the following rules in response to public comments:

Part 7007

- 7007.0502, subp. 2
- 7007.0502, subp. 2C
- 7007.0502, subp. 3C
- 7007.0502, subp. 3E
- 7007.0502, subp. 4B
- 7007.0502, subp. 6A(1) and (2)
- 7007.0502, subp. 6C
- 7007.0502, subp. 6C(2)
- 7007.0502, subp. 6D
- 7007.0502, subp. 8

Part 7011

- 7011.0561, subp. 3
- 7011.0561, subp. 4A, B, and C
- 7011.0561, subp. 5B and B(1)
- 7011.0561, subp. 6C(2) and (5)
- 7011.0561, subp. 7D and E (both deleted)

7011.0561, subp. 8
7011.0561, subp. 9
7011.0561, subp. 9F
7011.1292, subp. 1
7011.1340, subp. 1
7011.1340, subp. 3C
7011.1355 (title)
7011.1355, subp. 2 (title)
7011.1355, subp. 2A(1)(b)
7011.1360, subp. 1
7011.1360, subp. 1A, B, D(3), E(3), F, G, H, I, J, K
7011.1360, subp. 3
7011.1360, subp. 4
7011.1365 (title)
7011.1365A

Part 7019

7019.3000, subp. 3
7019.3030A(3)
7019.3065

The proposed rule may be modified if the modifications are supported by the data and view submitted to the agency and do not result in a “substantially different” rule from the rule as originally proposed.¹⁴¹ A modification does not make a proposed rule substantially different if:

- (1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;
- (2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and
- (3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be in the rule in question.¹⁴²

In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of the rulemaking proceeding could be the rule in question, the following factors must be considered:

¹⁴¹ Minn. Stat. §§ 14.05, subd. 2(a) and 14.24. An agency may adopt a substantially different rule if it satisfies all requirements for the adoption of a substantially different rule set forth in Minn. R. 1400.2110.

¹⁴² Minn. Stat. § 14.05, subd. 2(b).

- (1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;
- (2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and
- (3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing.¹⁴³

The Administrative Law Judge has thoroughly reviewed each and every modification to the proposed rules and determined that they are all within the scope of the matter announced in the Dual Notice or are logical outgrowths of the contents of the Dual Notice. In addition, the Dual Notice provided fair warning that the outcome of the rulemaking proceeding could result in these types of rule changes.

Indeed, most of the changes are made in direct response to the comments or questions received from the stakeholders; while other changes are to provide needed clarification. None of the changes, however, result in rules substantially different from the proposed rules. As a result, the modifications to the proposed rules are approved and require no additional notice and comment.

VI. THE RULES ARE NOT UNCONSTITUTIONAL OR ILLEGAL

A thorough review of the rules does not indicate that any of the rules are unconstitutional or illegal, and no commentator has alleged such defects. Accordingly, there is no basis for disapproving the rules on this account.

VII. THE RULES ARE "RULES" AS DEFINED IN MINN. STAT. § 14.02, SUBD. 4, AND HAVE FORCE AND EFFECT OF LAW

A "rule" is defined in Minn. Stat. § 14.02, subd. 4 as:

[E]very 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.

The rules submitted herein are of general applicability and have future effect. Therefore, they meet the definition of a "rule" and are capable of having the force and effect of law.

¹⁴³ Minn. Stat. § 14.05, subd. 2(c).

VIII. INSUFFICIENT NUMBER OF REQUESTS FOR HEARING AND NO WITHDRAWAL OF REQUESTS

There were only three requests for a public hearing submitted to the Agency in response to the Dual Notice of Intent to Adopt Rules. Therefore, there were an insufficient number of requests to require that a public hearing be conducted. In addition, none of the requests for hearing were withdrawn. The Agency timely and properly cancelled the hearing, and timely notified the parties who requested a hearing of the reason for the cancellation of the hearing. Therefore, the Agency has fully complied with the requirements of Minn. Stat. § 14.25.

IX. RECOMMENDATIONS TO RULES FOR PURPOSES OF CLARITY

A. Rule 7007.0502, subpart 2

Rule 7007.0502, subpart 2 creates an exception for “existing mercury emission sources”¹⁴⁴ that fall below the threshold of three pounds per year of mercury emissions for more than three years. According to the rule, if the actual mercury emissions from an existing mercury emission source are less than three pounds per year for three consecutive years after the effective date of the rule, then the stationary source is no longer considered a mercury emission source. Under the revision to the rule, initial applicability is calculated starting with the year preceding the effective date of the subpart (i.e., 2013). The ambiguity presents itself with respect to the requirements to file a mercury emissions reduction plan under Rule 7007.0502, subp. 4, and an emission inventory report under Rule 7019.3000, subp. 3.

Under Rule 7007.0502, subp. 4A, existing mercury emission sources (other than ferrous mining or processing facilities) must submit a mercury emissions reduction plan by June 30, 2015. Thus, if an existing mercury emission source had annual mercury emissions below three pounds in 2013 and 2014, it would still not meet the exemption set forth in Subpart 2 (because three years had not elapsed) and would be required to submit a reduction plan in 2015.

In addition, under Rule 7019.3000, subpart 3, owners or operators of a “mercury emission source,” as defined in part 7005.0100, subp. 23b, must submit an annual emission inventory report. A “mercury emission source” is defined in part 7005.0100, subp. 23b, as a “stationary source with actual mercury emission of three pounds per year or more, after controls.” The annual emission inventory report must cover the first full calendar year following the effective date of the rule (i.e., 2015).

Again, if an existing mercury emission source has emissions under three pounds per year for 2013 and 2014, it would still be subject to the annual emission inventory report requirements in 2015 (the year following the effective date of the rule), because three years of emissions below three pounds per year have not yet been established.

¹⁴⁴ Rule 7007.0502, subp. 2 provides that “existing mercury emission source” means that the owners or operators have been issued an air emission permit by the agency as of the effective date of the rule.

Clarification appears to be necessary with respect to the exemption created in Rule 7007.0502, subp. 2. It is unclear to the Administrative Law Judge when the exemption applies to existing mercury emission sources. If the Administrative Law Judge is confused, it is likely that parties subject to the rule will similarly be confused. Therefore, it is respectfully recommended that the Agency carefully review Subpart 2 in relation to the other deadlines set forth in the proposed rules and determine if a change is necessary. Changes that simply clarify the exemption created by the rule would not be considered substantial changes and do not require further approval by the Administrative Law Judge.

B. Rule 7011.0561, subpart 3

Rule 7011.0561, subpart 3 sets forth an exemption for coal-fired electric generating units (EGUs). The requirements for meeting the exemption are unclear and difficult to read. The Administrative Law Judge suggests re-organizing the paragraph as follows:

Beginning one year after the effective date of this part, the owners or operators of a coal-fired EGU are not subject to this part if the coal-fired EGU does not:

- (1) emit five pounds of mercury per year or more as demonstrated in subpart 9; or
- (2) combust coal for more than ten percent of the average annual heat input during any three consecutive calendar years; or
- (3) combust coal for more than 15 percent of the annual heat input during any calendar year is not subject to this part.

It is also unclear why the exemption begins one year after the effective date of the part and not on the effective date of the part.

C. Rule 7011.0561, subpart 5B

Rule 7011.0561, subpart 5B includes a long and confusing sentence that may be better clarified with the following changes:

Owners or operators may conduct performance stack tests for mercury no less frequently than once every three years, but no longer than 37 months after the previous performance test, if: (1) the performance test for at least the immediate preceding three consecutive years show mercury reduction is greater than or equal to 85 percent; or (2) mercury emissions are at or below 1.2 pounds of mercury per Tbtu of heat input; and, in both cases, if there are no changes in the operation of the EGU or air pollution control equipment that could increase emissions....

D. Rule 7011.1215, subpart 2c

The Administrative Law Judge respectfully recommends replacing the word "and" for "but" in Rule 7011.1213, subp. 2c, to add clarity:

Subp. 2c. **Commercial and industrial solid waste incinerators.** A person who constructs, modifies, or reconstructs a waste combustor such that it becomes a commercial or industrial solid waste incinerator is not subject to parts 7011.1225 to 7011.1285 ~~and~~ but shall comply with parts 7011.1360 to 7011.1370.

E. Rule 7011.1340, subpart 3C.

The Administrative Law Judge suggests that subitem C of Rule 7011.1340, subpart 3 be revised to make it consistent with subitems B and D, as it relates to modifications and repairs. The suggested change is as follows:

C. shut down the incinerator if the modification or repairs cannot be completed within 72 hours or the exceedance; and....

The revisions to the rules suggested by the Administrative Law Judge do not affect the approval of the rules. The above-cited rules are approved. The suggestions made are solely for consideration of the Agency for readability or clarification.

The rules are hereby **APPROVED**.

A. C. O.