MINNESOTA
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August 25, 2016

VIA E-FILING ONLY
Mary H. Lynn
Principal PlannerMary Lynn
Minnesota Pollution Control Agency
520 Lafayette Rd. N
Saint Paul, MN 55155
mary.lynn@state.mn.us

Re: In the Matter of the Proposed Amendments to Rules of the MN PCA Governing Air Quality
OAH 19-9003-33170; Revisor R-4097

Dear Ms. Lynn:

Enclosed herewith and served upon you is the **ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26** in the above-entitled matter. The Administrative Law Judge has determined there are no negative findings in these rules.

The Office of Administrative Hearings has closed this file and is returning the rule record so that the Minnesota Pollution Control Agency can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. Please ensure that the agency's signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor's office following receipt of that order. Our office will then file four copies of the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the agency for its rulemaking record. The Agency will then receive from the Revisor's office three copies of the Notice of Adoption of the rules.

The Agency's next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor's office should be submitted to the State Register for publication. A permanent rule without a hearing does not become effective until five working days after a Notice of Adoption is published in the State Register in accordance with Minn. Stat. § 14.27.

If you have any questions regarding this matter, please contact Katie Lin at (651) 361-7911 or katie.lin@state.mn.us.

Sincerely,

Jeffery Oxley
Administrative Law Judge

Enclosure
cc: Office of the Governor
Legislative Coordinating Commission (lcc@lcc.leg.mn)
Revisor of Statutes (paul.marinac@revisor.mn.gov)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

In the Matter of the Proposed Amendments to Rules of the MN PCA Governing Air Quality	OAH Docket No. 19-9003-33170 Revisor R-4097

Denyse Johnson certifies that on August 25, 2016, she served a true and correct copy of the attached ORDER ON REVIEW OF RULES UNDER MINN. STAT. 14.26; by placing it in the United States mail or by courier service with postage prepaid, addressed to the following individuals:

VIA E-FILING ONLY: Mary H. Lynn Principal Planner Minnesota Pollution Control Agency 520 Lafayette Rd. N Saint Paul, MN 55155 mary.lynn@state.mn.us	Elizabeth Dressel Policy Coordinator Office of Governor Mark Dayton 20 W Twelfth St Ste 116 St Paul, MN 55155
Legislative Coordinating Commission (lcc@lcc.leg.mn)	Paul Marinac Office of the Revisor of Statutes paul.marinac@revisor.mn.gov

OAH 19-9003-33170
Revisor R-4097

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules of the Minnesota Pollution Control Agency Governing Air Quality	**ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26**

The Minnesota Pollution Control Agency (Agency) is seeking review and approval of its proposed amendments to Minnesota Rules, chapters 7002, 7005, 7007, 7008, 7009, 7011, 7017, 7019, and 7030 under Minn. Stat. § 14.26 (2016). On August 11, 2016, the Office of Administrative Hearings received the documents that must be filed by the Agency under Minn. Stat. § 14.26, Minn. R. 1400.2310 (2015). Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

IT IS HEREBY DETERMINED:

1. The Agency has the statutory authority to adopt the rules.

2. The rules were adopted in compliance with the procedural requirements of Minnesota Statute, chapter 14 (2016), and Minnesota Rules, chapter 1400 (2015).

3. The record demonstrates that all of the proposed rule amendments are needed and reasonable.

4. The attached memorandum offers several suggestions intended to enhance the clarity or readability of a proposed rule amendment. The Memorandum also notes places where the proposed amendments fall short of achieving the consistency of usage the Agency describes as one of its goals for this rulemaking.

IT IS HEREBY ORDERED THAT:

The proposed rule amendments are **APPROVED.**

Dated: August 25, 2016

JEFFERY OXLEY
Administrative Law Judge

MEMORANDUM

The Agency is proposing to amend parts of its air quality rules that appear in Minnesota Rules, chapters 7002, 7005, 7007, 7008, 7009, 7011, 7017, 7019, and 7030. The Agency has submitted these rules to the Administrative Law Judge for review under Minn. Stat. § 14.26 (2016). Subdivision 3(1) of that statute specifies that the Administrative Law Judge must approve or disapprove the rules as to their legality and form. In reviewing the rules, the Administrative Law Judge must consider whether the agency has the authority to adopt the rules; whether the record demonstrates a rational basis for the need to and the reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.

In this rulemaking, the Agency describes its overall purpose for amending its air quality rules as "housekeeping." The Agency proposes to amend numerous existing chapters of its air quality rules to ensure consistency with applicable federal and state regulations, to remove repetitious language, to eliminate gaps or errors that have been identified in its rules, to resolve apparent conflicts between state and federal rules, and to update the incorporation by reference of federal rules.[1]

Minnesota Rules, part 1400.2700, subp. 1 (2015), states that "[i]f an agency is amending existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments." The Administrative Law Judge's review is accordingly limited to ascertaining whether the Agency has demonstrated the need for and reasonableness of the amendment. With certain exceptions subsequently cured by its proposed post-publication modifications,[2] the Agency has demonstrated the need for and reasonableness of the rule amendments it proposed to adopt and published in the *State Register* on December 14, 2015.

In response to public comments submitted following the publication of the draft rule amendments in the *State Register* and also based on further review of its proposed rules, the Agency proposed additional changes to its rules.[3] These additional changes have not received public comment, involve primarily corrections and clarifications, and that do not change the intent of the rules as originally proposed. The Administrative Law Judge finds that the amendments to the proposed rules suggested by the Agency which did not receive public comment are needed and reasonable and do not constitute prohibited substantial changes within the meaning of Minn. Stat. § 14.15, subd 3 (2016); Minn. R. 1400.2100, item C (2015). Therefore, they are not specifically discussed in this Report.

Accordingly, the Administrative Law Judge finds that the Agency has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule amendments it proposes. However, in reviewing the Agency's proposed amendments and considering the Agency's goals for the rulemaking, the Report makes comments addressing three categories of concerns.

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[1] SONAR, at 7.
[2] PROPOSED ORDER ADOPTING RULES
[3] *Id.*

"Shall" or "must" and "agency" or "commissioner"

The first category of concern involves instances where certain of the Agency's announced goals for the rulemaking would be further realized by making additional amendments to the rule part being amended. One example of this involves replacing "shall" with "must." The other example is replacing "agency" with "commissioner."

The Statement of Need and Reasonableness (SONAR) contains a Note that reads: "[a]s recommended by the Office of the Revisor, a number of existing languages [sic] changes have been made throughout the rule. The Office of the Revisor of Statutes "recommends using "must" not "shall" to impose duties."[4] The Agency proposes numerous amendments to implement the Revisor's guidance.[5] In its Proposed Order Adopting Rules,[6] the Agency explains that during the public comment period, it identified other instances where it has revised additional instances of "shall" to "must."

The Administrative Law Judge agrees with the Agency that "[t]hese modifications align with the change from "shall" to "must" that was made throughout other parts of the rule chapters being amended in this rulemaking without changing the applicability of the rule . . . ."[7] The Agency further explains that "[i]n some instances, it is appropriate to use "shall" which is why there are some parts where no change to "must" was made."[8] The Agency does not offer additional explanation for when it is appropriate to use "shall."

The Minnesota Drafting Manual published by the Office of the Revisor, recommends minimizing the use of "shall" by using "*shall* only when you are imposing a duty on a person or body." "Must" rather than shall should be used to talk about a thing rather than a person and to express requirements, as well as to impose duties.[9]

In this Report, the Administrative Law Judge comments on a number of instances in which "shall" has not been changed to "must," but arguably should be to comply with the Revisor's guidance. Failure to make such a change does not constitute a defect in the rule, but because the Agency's goal is to achieve consistency, instances where this change could be made without substantially modifying the proposed rule amendment are noted for the Agency's consideration.

As observed above, the Agency also replaces "agency" with "commissioner" in certain rule parts. In new provisions, the Agency consistently uses "commissioner" rather than "agency" with reference to a decision, action or determination discussed in the rule.

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[4] SONAR at 10. Minn. Stat. § 645.44, subd. 15a (2016), states that "[m]ust is mandatory" and subdivision 16 states that "[s]hall is mandatory." Subdivision 1 of this section states that these words as "used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears."

[5] Proposed Order Adopting Rules (citing to the Minnesota Drafting Manual which can be found at: https://www.revisor.mn.gov/revisor/pubs/arule_drafting_manual/Section3.htm#11).

[6] Finding 8 at 2.

[7] Proposed Order Adopting Rule Finding 8.

[8] Proposed Order Adopting Rule Finding 7.

[9] Minnesota Drafting Manual

Minnesota Statute, section 116.03, subd. 1 (c) (2016), provides that the "commissioner shall make all decisions on behalf of the agency." This Report notes several instances in the proposed amended rules where the substitution of "commissioner" for "agency" was not made in an existing rule part but where for purposes of consistency and precision, it appears that such a revision would be desirable. In the instances of this kind noted herein, if the Agency were to modify its proposed amendments as this Report suggests, those modifications would not constitute a substantial change to the proposed rule.

Potentially overbroad governmental discretion

A second category of concern noted in this Report consists of instances in which the existing rule grants the Agency or Commissioner significant discretionary authority. This Report notes several of these situations where the amendment does not alter the discretion previously granted by the rule, but where the range of discretion pre-existing in the rule part or subpart is so broad that it could potentially be challenged as permitting the government to act arbitrarily and capriciously. Because the Agency has no obligation to demonstrate the need for and reasonableness of the degree of discretion given to a state actor in pre-existing provisions, this Report only suggests where the Agency might wish to consider whether the discretion granted is impermissibly broad. This Report does not find any instances in which the amending language introduces impermissibly broad discretion.

Clarity and readability

The last category of concern discussed in this Report are recommendations the Administrative Law Judge proposes to clarify or improve the readability of a rule part. The amendments as proposed are not defective but the Agency is encouraged to consider the Report's suggested modifications.

Minnesota Rules, part 7007.0500

Finding 8 in the Agency's Proposed Order Adopting Rules identifies part 7007.0500, subpart 3, as a part modified by replacing "shall" with "must." Proposed subpart 1, item C, subitem (11) consistently reads: "A permit application for an amendment must include all calculations of emissions changes required under part 7007.1200." Similarly subitem (12) reads: "A permit application must explain the means by which the emissions information in subitems (1) to (11) is gathered, and provide the calculations on which they are based." In item K, subitem (5), the Agency also amended the language by changing "shall" to "must" in the following sentences: "The schedule must include a date specific schedule of compliance. . . The proposed schedule of compliance must begin at the time of permit application . . . ."

The Agency proposes multiple amendments to this rule part and specifically cites the revisions of "shall" to "must" that it proposes for subpart 3, but leaves numerous instances of "shall" unrevised. For example, the first sentence of each subpart uses "shall" rather than "must." The first and third sentences of item C (1) in subpart 2 contravene the Revisor's guidance that "shall" should not be used to impose obligations

on things, as do sentences in subitems (2) through (10). Although the Agency did change a "shall" to "must" in subpart 3, this rule part as a whole cannot be said to make minimal use of "shall" as the Revisor suggests.

Subpart 3 lists a number of rule parts with certification requirements. It is more convenient for persons unfamiliar with these parts if they are listed in numerical order, i.e. subparts 7007.0800 and 7007.1110 would begin the list and come before 7007.1150 instead of appearing at the end of the list.

Minnesota Rules, part 7007.0600

The third sentence of subpart 1 of this rule part contravenes the Revisor's guidance that "shall" not be used to impose obligations on things. The third sentence does this where it provides that an "application shall also contain a certification . . . ."

Minnesota Rules, part 7007.0650

Although the Revisor's guidance permits "shall" to be used to impose obligations on applicants and not things, the two instances of "shall" in subpart 1, could be changed to "must" to meet the objective of minimizing the use of "shall."

Subpart 1 requires that applicants submit two printed copies of their complete applications together with all supplemental information requested by the Commissioner. The copies are to be submitted "to the ~~information coordinator, Air Quality Division,~~ Minnesota Pollution Control Agency at 520 Lafayette Road North, Saint Paul, Minnesota 55155." However, the SONAR states the following:

> The outdated address for application submittal is deleted and replaced with "address specified by the Commissioner." It is necessary to explain where applications must be submitted to and reasonable to provide that the Commissioner specify the address the permit application should be sent to, as the address can them be easily updated as needed.[10]

If this amendment is made however, the address can only be changed in the future by a rulemaking which is not something that can be easily done as needed. The Administrative Law Judge suggests that to realize the result sought in the SONAR, the rule should not supply the current address of the Agency but rather require applicants to submit the copies as directed by the Agency.[11]

Subpart 2 allows applicants to submit applications in an electronic format specified by the Commissioner. Because Subpart 1 refers to the "complete application" and to "all supplemental information" it is unclear whether the supplemental information is also

[10] SONAR, at 17-18.

[11] The same issue arises with the amendment to Rules part 7030.0010 replacing an old address for the Agency with its current address of 520 Lafayette Road North in St. Paul. The Administrative Law Judge notes that subpart 1 of part 7017.1120, which required submittals under this part to be sent to the Agency at its current address of 520 Lafayette Road, St. Paul, is proposed to be repealed.

permitted to be submitted electronically. The Agency should clarify which materials may be submitted electronically.

Subpart 2, item A, as proposed reads: "The commissioner may allow the applicant to submit fewer printed copies than required in subpart 1." Because only two printed copies are required in subpart 1, submitting "fewer printed copies" could be interpreted as "at least one printed copy must be submitted." If the Agency intends that every application submitted in electronic form must be accompanied by a printed copy, it could say so more clearly. If in certain circumstances the Commissioner might wish to have one printed copy of an application and one electronic copy, the proposed language could also be clarified to say that

Subpart 1 requires the applicant to submit "additional copies of the application directly to the administrator, affected states, and other governmental entities with the legal right to review the application, or submit additional copies to the agency to be forwarded to these parties." Because the first sentence of this subpart requires printed copies, an applicant could readily assume that "additional copies" must also be printed copies rather than electronic copies. It is not clear whether that is the Agency's intention because subpart 2 allows for applications in an electronic format. The Agency may wish to permit or perhaps even to require electronic copies to be sent by applicants in the format specified by the recipients. If that is the case, the rule could be amended to explicitly provide so.

Minnesota Rules, part 7007.0700

Although the Agency proposes amendments to items A, B, C, and D, it did not replace any of the seven instances of "shall" to "must."

Item B reads in part: "If the agency fails to make the completeness determination . . . ." As previously noted, Minn. Stat. § 116.03 (2016) provides that the Commissioner makes all of the decisions of the Agency. Thus the Commissioner and not the Agency would make the completeness determination. Item D similarly is inexact in providing that if "the agency determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing . . . ."

Item D provides that the Agency "may request" additional information that is necessary to evaluate or take final action from an applicant after the Agency has determined that the application is complete. The use "may" in item D raises the question of under what circumstances, if any, the Agency would not request additional information that is necessary for its evaluation.

Minnesota Rules, part 7007.0750

Subpart 2, item C, provides that the "agency" rather than the "commissioner" will take final action in a number of circumstances. Its use of "shall" rather than "must" in each sentence does not minimize the use of "shall." Item 7 subitem (3) (b), similarly

retains "shall." The Administrative Law Judge notes for the Agency's consideration that similar usage is present in other subparts which were not amended and therefore are not the subject of this review.

Minnesota Rules, part 7007.0800

Subpart 2, item B, is amended so that a permit "must" include certain items rather than "shall" and to appropriately replace "agency" with "commissioner" as the entity making a determination. The Administrative Law Judge notes that many other subparts of this part are not amended to be consistent with the Revisor's guidance, e.g. subp. 4 A: "The permit shall require . . ."

Minnesota Rules, part 7007.0801

Subparts 2 and 3 are appropriately amended to state what an air emissions permit for a waste combustor "must" rather than "shall" contain. Other subparts of this part which were not amended, do not comply with the Revisor's guidance, e.g. subpart 1: ". . . an air emission permit for a waste combustor shall contain . . . ."[12]

Minnesota Rules, part 7007.0950

Subpart 1, item A, amends the "agency shall" to the "commissioner must." Subpart 2, items A and B which are amended nonetheless persist in using the terms "agency" rather than "commissioner' and "shall" rather than "must."

Minnesota Rules, part 7007.1000

In subpart 1, the Agency rather than the Commissioner remains as the entity issuing permits.

Minnesota Rules, part 7007.1100

Subpart 1 is not amended to replace "agency" with "commissioner" nor to replace "shall" with "must." This subpart begins: "If the agency determines . . . ." Subpart 1 is amended to require that the "agency shall specify" in the notice how the general permit applies. However, new subparts 9 and 10 use "must" and it is not clear why subpart 1 was not similarly amended. Several subparts that were not amended use "shall" in connection to things rather than persons or bodies as the Revisor suggests, e.g. subp. 2: "The notice of the agency's intent . . . shall be published . . ." and "The notice issued by the agency shall identify . . . ." Also, unamended subparts 4 and 5 have the "agency" making determinations rather than the "commissioner."

In addition, subpart 1 provides that the "agency may issue a permit . . . in the form of a general permit applying to multiple sources" and the "agency may also issue general

[12] It is also unclear why "the commission" is the subject of the sentence rather than the "commissioner" in the second sentence of subpart 1.

permits . . . which apply only to specific portions of stationary sources." While certain conditions are required in each instance for issuance of the permit, the use of "may" gives the agency the discretion to not issue general permits for any or no reason. This discretion was not introduced or changed by the amendments to this subpart and it is not properly subject to review. It nonetheless may be a concern the Agency could address in this rulemaking.

Minnesota Rules, part 7007.1142

Subpart 1, item A, replaces "shall" with "must" but item B retains "shall." The Administrative Law Judge notes that in this part, the Commissioner is the entity issuing the permit. In other parts of this rule that have been amended, the agency is the entity issuing permits, e.g. 7007.1050, subpart 1 and 7007.1400, subpart 1, item F.

The Agency states that its amendment to subpart 1 "makes it clear that the rule is a recitation of preconditions to issuance and not a mandate to issue permits."[13] As amended, subpart 1, item A begins: "The following conditions must be satisfied for the commissioner to issue a capped permit . . . ." with the underlined language added. The concern to inform readers that these conditions are necessary but not sufficient for the Commissioner to issue a permit is better met if item A were revised to begin: "To be eligible to receive a capped permit the following conditions must be met . . . ."

Subpart 1, item C, provides that the "commissioner may revoke a capped permit" under certain conditions but allows the Commissioner the discretion not to revoke a permit even if those conditions are met. Again this element of discretion, while potentially concerning, was not introduced by amendments to this rule part and is not properly subject to review.

Minnesota Rules, part 7007.1150

Item C provides that a "written notice to the agency shall be sent" by a person requiring a permit amendment rather than "must be sent." Subitem C(3) is amended to state that a "permittee must submit the notice in a format specified by the commissioner." Subitem C(3) then continues to employ "shall" and "agency," rather than "must" and "commissioner," including a sentence which begins: "If the agency finds that . . . ."

In addition, the phrase in this subitem that reads "has an equivalent or better control efficiency of regulated pollutants previously controlled with the control equipment being replaced" lacks clarity. It is unclear if a comparison is being required between the quantities of regulated pollutants that were produced by the equipment being replaced when it was replaced or when it was operating normally.

Items D and E also have the Agency rather than the Commissioner issuing permits.

[13] SONAR, at 22.

Minnesota Rules, part 7007.1250

The second sentence of subpart 1 and the second sentence of item B(2) in subpart 1 use "shall" rather than "must" to set out requirements. This does not contribute to the goal of minimizing the use of "shall," but does not otherwise contravene the Revisor's guidance. Unamended subparts to this rule part also contain "shalls" which have not been changed to "musts," including several instances where "shall" obligates a thing rather than a person, e.g. the second and third sentences in subpart 4 both of which begin: "The notice shall . . . ."

Minnesota Rules, part 7007.1300

Subpart 1 provides that emissions be calculated from certain activities "if required by the agency" rather than if "required by the commissioner." Subpart 3 provides that "[t]he activities described in this subpart must be listed in a permit application, and calculation of emissions from these activities shall be provided if required by the agency . . . ." The Agency should consider the appropriateness of changing "shall" to "must" and "agency" to "commissioner" as it has done elsewhere.

Minnesota Rules, part 7007.1350

The third sentence of subpart 2 states that a "notice shall include a certification . . ." which contravenes the Revisor's guidance that in imposing obligations, "shall" be used only with persons and bodies. The last sentence of subpart 2 which was not amended has the "agency" rather than the "commissioner" making a finding.

Minnesota Rules, part 7007.1400

Although the first sentence of subpart 1 was not amended, it presents two concerns that the Agency might consider. This subpart begins with "[t]]he agency may make the permit amendments described in this subpart through the administrative permit amendment process" when it should be the Commissioner who decides to amend a permit. And the issue of undue Agency discretion arises with the use of "may" in connection with permit amendments.[14]

Subpart 2 requires that a permittee "must submit an application for an administrative amendment in a format specified by the commissioner" and that the "application must be certified." However, it then reverts to the "permittee shall" and refers to the "agency" rather than the "commissioner." The fourth sentence has the agency rather than the commissioner making an administrative amendment to a permit. The fourth sentence and the last sentence of subpart 2, neither of which were amended,

[14] The Administrative Law Judge acknowledges that the usage here criticized may be intentional as the Agency does propose amending the second sentence of subpart 1 from "shall request" to "must request" and in item F of subpart 1 refers to the "agency" rather than to the "commissioner" as the issuer of permits.

provide that "the agency may" take certain actions, again raising the concern of potentially excessive agency/commissioner discretion.

Subpart 3 begins with an amended sentence that reads: "[t]he agency shall . . . take final action" rather than the preferred usage of "the commissioner must" because the subpart requires a decision to be made. Several other subparts of this Part which were not amended also have the agency rather than the commissioner rendering a decision, e.g. subparts 6 and 8.

Minnesota Rules, part 7007.1600

Subpart 1 commences with "[t]he agency shall reopen and amend a permit," presenting the "agency" rather than the "commissioner" as the decision-maker as well as employing "shall" rather than "must." Items C and D under subpart 1 similarly have the "agency" rather than the "commissioner" making determinations. Unamended subparts 2 and 3 also do not follow the Revisor's guidance with respect to "shall" versus "must" and "agency" versus "commissioner."

Minnesota Rules, part 7008.0100

In considering the relationship between subparts 1 and 5, the Administrative Law Judge queries whether "transfer efficiency" as defined in subpart 5 contemplates any other type of application other than "coating" because subpart 1 refers to the use of ink, adhesive and solvent which do not necessarily "coat" an object when applied. If so, subpart 5 could confuse a reader without further clarification.

Minnesota Rules, part 7009.0020

Although the Agency proposes amending this part to eliminate two "shalls," the first sentence could be changed from "[n]o person shall emit . . ." to "Persons must not emit . . . ." Because the rule is contemplating equipment rather than people as pollutant emissions sources, the amendment could further be clarified as "Owners and operators must not allow equipment to emit . . . ."

Minnesota Rules, part 7011.0080

The Agency proposes to change one "shall" to "must" in the first sentence of this part, but does not change two other uses of "shall:"

> The owner of a stationary source ~~shall~~ must comply with the monitoring and record keeping required for listed control equipment by the table in this part. The owner or operator *shall* maintain the records required by this part for a minimum of five years from the date the record was made. Unless a specific format is required, the records may be maintained in either electronic or paper format. For certified hoods, the owner or operator *shall* comply with part 7011.0072. (Italics added).

Minnesota Rules, parts 7011.0510, 7011.0515, 7011.0610, 7011.0710, 7011.0715, 7011.0905, and 7011.1115

While not incorrect, the Revisor's guidance suggests that the sentences of these parts worded as "no owner or operator shall" would preferably be reworded as "an owner or operator must not."

Minnesota Rules, part 7011.1105

In rule part 7011.1105, the Agency proposes changing "shall" to "must" in the first paragraph, but leaves several "shalls" in item A(1): "All paved roads and areas *shall* be cleaned to minimize the discharge to the atmosphere of fugitive particulate emissions. Such cleaning *shall* be accomplished in a manner which minimizes resuspension of particulate matter." (Italics added).

Minnesota Rules, part 7011.1265

Amended subpart 2, item A, subitem (2), second paragraph reads: "For each Code of Federal Regulations, title 40, part 60, Appendix A-3, Method 5, as amended, run, the emission rate must be determined using . . . ." Readability could be improved by revising this provision as follows: "For each sample run employing Method 5 as provided in Appendix A-3 of the Code of Federal Regulations, title 40 part 60 . . . ."

Minnesota Rules, part 7011.1270

The first sentence of this part and the first sentence of item A, as well as a sentence in subitem (5) of item A, all contain the phrase "shall conduct" or "shall require" rather than the preferred "must conduct" or "must require." Item B states that certain waste combustors "shall conduct" and because a combustor is a thing, it would be preferably written as "must conduct" and similarly in several places in subitem (3) of item B and in item C and its subitems.

Minnesota Rules, part 7011.1280

The first sentence in amended subpart 5 is altered to change the "commissioner shall" to the "commissioner must." In contrast, the first sentence in amended subpart 7 item A remains as an "individual shall" and the first sentence of amended subpart 11 remains an "owner or operator shall." A review of the entire part finds over 20 instances in subparts which were not amended where "shall" has not been changed to "must."

The last sentence in subpart 7, item A reads: "An individual whose certificate has expired must comply with item B or C." This sentence could be clarified as follows: "An individual whose certificate has expired must comply with items B or C to renew the certificate."

Although subpart 7, item B contains amendments, the first sentence was not amended. Item B provides:

> If an individual applies for certificate renewal within one year following the expiration of the certificate, the commissioner may renew the certificate without examination. To be recertified without an examination, the individual must meet the training requirements of item A at the time of application before the certificate will be renewed. If the individual does not have training to meet the requirements of item A. the individual must comply with subpart 3.

The permissive "may" renders the Commissioner's renewal decision largely discretionary. The succeeding provisions place requirements on applicants for renewal, but the Commissioner retains the ability to deny renewals for applicants who meet the requirements. Because the first sentence was not amended and the amendment itself consisted of striking the remaining three sentences of item B while making no additions, this provision, while possibly concerning, is not subject to review.

Subpart 7, item B could also be written more clearly while eliminating undue discretion in the renewal decision as follows:

> If an individual applies for certificate renewal within one year following the expiration of the certificate, ~~the commissioner may renew the certificate without examination. To be recertified without an examination,~~ the individual must meet the training requirements of item A or subpart 3 at the time of application for renewal before the certificate will be renewed without an examination.

It is not clear however, that the Agency intends that renewal without examination is automatic if the requirements of A or subpart 3 are met. If that is not the case, the Agency should specify the additional requirements.

Minnesota Rules, part 7011.1282

The proposed amendment removes the first three sentences of subpart 2. The remaining sentence provides that after certain conditions are met, the commission "shall schedule an oral examination of the applicant." The subparts of this part which were not amended contain a number of "shalls" that impose duties including one instance where the obligation applies to a thing in subpart 3, item B: "The examination for certified municipal waste combustor examiner shall . . . ."

Minnesota Rules, part 7011.1305, 7011.1310, 7011.1405, 7011.1410, 7011.1905, 7011.2005, 7011.2300

These rule parts set performance standards. They each were amended in several places to change prohibitions from "no owner or operator . . . shall cause" to "no owner

or operator . . . shall allow." The Agency could use the opportunity of this rulemaking to rework these provisions to use "must not allow" to adhere more closely to the Revisor's guidance.

Minnesota Rules, part 7017.1170

Subpart 4a, item A, requires the owner or operator to submit notification of any exceptions to the CGA frequency that it used during the reporting period. Proposed to be repealed subpart 1 required that all submittals under this rule part be sent to the Continuous Emissions Monitoring System Specialist at the MPCA's current address in St. Paul. Although it can be fairly inferred from subpart 2 that notifications of exceptions must be sent to the Agency, any doubt could be removed by revising subpart 2 to read: "All submittals under this part must be sent to the commissioner who will accept paper, hard copy submittals." Or, to use the language of 7007.0500, replace "paper, hard copy" with "printed copies."

Minnesota Rules, part 7017.2025

Subpart 3a provides that "[i]f a new operating limit is imposed pursuant to subpart 3, it shall be implemented according to items A to C, unless otherwise defined in an applicable requirement or compliance document." Item C of subpart 3 is amended to replace "shall" with "must" but other subparts retain "shall," e.g. subparts 4, 5, and 6.

Subpart 4, item B, is amended to read: "The owner or operator may receive an extension to the schedule in item A if the owner or operator demonstrates in writing to the commissioner that one of the following special circumstances applies . . . ." This is concerning in that despite a demonstration that special circumstances apply, an extension may be denied for any reason or no reason at all. However, the proposed amendment did not affect the discretion allowed under the existing rule and therefore is not subject to review in this rulemaking.

J. J. O.