

September 28, 2023

VIA EFILING ONLY

Josh Skaar
Attorney at Law
Minnesota Department of Health
PO Box 64882
Saint Paul, MN 55164
Josh.skaar@state.mn.us

Re: In the Matter of the Proposed Amendment to Rules Governing Explorers and Exploratory Borings, Minn. R. 4727, Revisor ID# R4755 OAH 22-9000-38393; Revisor R-4755

Dear Mr. Skaar:

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 Department of Health 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 the finalized rules from the Revisor's office following receipt of that order. Our office will then file 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 Department will then receive from the Revisor's office three copies of the Notice of Adoption of the rules.

The Department'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.

Josh Skaar
September 28, 2023
Page 2

If you have any questions regarding this matter, please contact William Moore at (651) 361-7893, william.t.moore@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,

A handwritten signature in black ink, appearing to read "Nichole Helmeuller". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

NICHOLE HELMEULLER
Legal Assistant

Enclosure

cc: Legislative Coordinating Commission
Revisor of Statutes

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendment
to Rules Governing Explorers and
Exploratory Borings, Minn. R. 4727,
Revisor ID# R4755

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

The Minnesota Department of Health (Department) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26 (2022). On September 18, 2023, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Department under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2023). 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 Department has the statutory authority to adopt the rules.
2. The rules were adopted in substantial compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2022), and Minnesota Rules, Chapter 1400 (2023).
3. The record demonstrates the rules are needed and reasonable.

IT IS HEREBY ORDERED THAT:

The rules are **APPROVED**.

Dated: September 28, 2023



Christa L. Moseng
Administrative Law Judge

MEMORANDUM

A rule must be disapproved if it was not adopted in compliance with procedural requirements of Minnesota Rules, Chapter 1400, unless a statute provides that the error must be disregarded.¹ An error or defect due to the failure to satisfy a procedural requirement must be disregarded if the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.²

A statement of need and reasonableness (SONAR) must include the date the statement is made available for public review.³ The SONAR must be prepared on or before the signature date on the agency's notice of intent to adopt rules.⁴

In its request for review of proposed amendments to Minnesota Rules, Chapter 4725, the Department submitted a SONAR dated "May 2023," with an undated signature block.⁵ The SONAR does not include the date that it was made available for public review. The State Register published the Department's Notice of Intent to Adopt Rules without a Public Hearing (Notice) on May 8, 2023.⁶ The signature block on the Notice of Intent to Adopt Rules without a Public Hearing (Notice), as published in the State Register, is dated April 17, 2023.⁷

Because the signature block on the SONAR lacks a date, it is not apparent from the face of the SONAR that it was prepared on or before the signature date of the Notice.⁸ The Department did submit an incomplete and unsigned draft SONAR on March 24, 2023, as part of its request for approval of its additional notice plan. The Department also posted the SONAR on its website on May 3, 2023, and included the SONAR (or links to the SONAR) in the notices that it mailed and emailed on May 3 and May 4.⁹

In this case, the failure to demonstrate that the SONAR was prepared on or before the signature date of the Notice did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. Even assuming that the SONAR was finalized after April 17, 2023, it was prepared by the time it was posted and provided to notice-recipients on May 3, 2023. Because the SONAR was available to every noticed individual and entity for the full public comment period,¹⁰ even if the SONAR was belatedly finalized between April 17 and May 3, no person was denied an opportunity to participate meaningfully in the rulemaking process.

¹ Minn. R. 1400.2100(A).

² Minn. Stat. § 14.26, subd. 3(d)(1).

³ Minn. R. 1400.2070, subp. 1(E).

⁴ Minn. R. 1400.2070, subp. 3.

⁵ Letter to Judge Moseng from Josh Skaar (September 18, 2023), attachment D (Statement of Need and Reasonableness In the Matter of Proposed Amendments of Minnesota Rules, Chapter 4727).

⁶ 47 S.R. 1082–1085 (May 8, 2023).

⁷ *Id.* at 1086.

⁸ The PDF of the SONAR on the Department's website indicates a creation date of April 13, 2023, and a modification date of April 20, 2023. SONAR *available at* <https://www.health.state.mn.us/communities/environment/water/docs/wells/pcsonar4727.pdf> (last visited September 20, 2023).

⁹ Letter to Judge Moseng from Josh Skaar (September 18, 2023), attachments E, G, H2, H3, and I.

¹⁰ Public comments were accepted for at least 30 days—from the date of publication in the State Register on May 8, 2023, until June 7, 2023.

Similarly, the failure to include in the SONAR the date that it was made available for public review did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The SONAR states that it “will be available during the public comment period[.]” The SONAR was posted and publicly available by May 3, 2023. Therefore, although it does not reflect the specific date of its availability, the SONAR does include accurate information about when it was made publicly available. The failure to include the specific availability date in the SONAR, by itself, did not affect anyone’s ability to participate.

The Department’s submissions otherwise satisfy the requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400. No procedural failure deprived a person or entity of the opportunity to meaningfully participate in the rulemaking process. Accordingly, the procedural errors discussed above must be disregarded and the rule is therefore **APPROVED**.

C. L. M.