

38941 Minnesota Department of Health Notice of Hearing (Initial Comment Period)

Closed Mar 08, 2023 · Discussion · 5 Participants · 1 Topics · 6 Answers · 0 Replies · 1 Votes

5

PARTICIPANTS

1

TOPICS

6

ANSWERS

0

REPLIES

1

VOTES

SUMMARY OF TOPICS

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 6 Answers · 0 Replies

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Jean Wagenius · Citizen · (Postal Code: unknown) · Mar 04, 2023 7:33 pm

 0 Votes

In the Matter of the Proposed Amendments to Rules Governing Health Risk Limits for Groundwater, Minnesota Rules, Chapter 4717, Part 7500, Part 7850, and Part 7860; Revisor's ID Number 4587

OAH Docket No. 5-9000-38941

I appreciate the opportunity to comment on the Minnesota Department of Health's (MDH) proposed rules cited above. Two issues must be addressed before the rules are adopted.

One, MDH did not include a needed update of the nitrate rule even though MDH says in its Statement of Need and Reasonableness (SONAR) that MDH ensures that its health risk limits (HRLs) reflect the most up-to-date toxicity information.

Two, MDH is promulgating rules that will have the force and effect of law but in the SONAR MDH says that it will not be enforcing the HRLs and that the HRLs are not binding on other state agencies or "risk managers."

NITRATE/NITROGEN:

MDH proposes to adopt new standards for 17 contaminants and to update 19 other existing standards. These standards are called health risk limits. See Minn. Stat. 144.0751 reproduced below. MDH defines an HRL as a "concentration of a groundwater contaminant, or a mixture of contaminants that is likely to pose little or no health risk to

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humans, including vulnerable populations, and has been adopted into rule." SONAR p. 6. "HRLs specify a minimum level of quality for water used for human consumption...."SONAR p. 6-7. "An HRL can be used to determine if groundwater is acceptable to drink." SONAR p. 1. HRLs are critical for the health of Minnesotans because "(g)roundwater provides about 75 percent of Minnesota's drinking water...." SONAR p. 1.

MDH cites the Groundwater Protection Act of 1989 as authority to adopt HRLs: "(i)f groundwater quality monitoring results show that there is a degradation of groundwater, the commissioner of health may promulgate health risk limits under subdivision 2." SONAR p. 2

The Department also cites Minn. Stat. 144.0751 which provides the criteria that an HRL must meet.

144.0751 HEALTH STANDARDS.

(a) Safe drinking water or air quality standards established or revised by the commissioner of health must:

(1) be based on scientifically acceptable, peer-reviewed information; and

(2) include a reasonable margin of safety to adequately protect the health of infants, children, and adults by taking into consideration risks to each of the following health outcomes: reproductive development and function, respiratory function, immunologic suppression or hypersensitization, development of the brain and nervous system, endocrine (hormonal) function, cancer, general infant and child development, and any other important health outcomes identified by the commissioner.

(b) For purposes of this section, "peer-reviewed" means a scientifically based review conducted by individuals with substantial knowledge and experience in toxicology, health risk assessment, or other related fields as determined by the commissioner.

MDH updates HRLs every two to four years "to ensure the HRL values reflect the most up-to-date toxicity information." SONAR p. 77. "MDH rejects the possibility of leaving the proposed chemicals in their outdated or HBV status." SONAR p. 78. "A failure to revise the rules would ignore legislative directives and leave an outdated set of standards in place, providing only limited options for protecting some segments of the population." SONAR p. 79.

Yet, the list of chemicals to be updated in this rule making does not include updating the nitrogen/nitrate standard. There are many reasons that it must be included:

1. State agencies are well aware that a large number of private wells and a smaller but significant number of municipal wells in Minnesota are contaminated with nitrogen. (1) Many private well owners are not aware that their well is contaminated; others are aware but don't have the resources to purchase the necessary filtering equipment. (2) MDH declines any responsibility for protecting private drinking water wells even though the groundwater that supplies the wells was likely contaminated by someone other than the owner of the well. (1) However, since there is a nitrate standard, MDH must update the current limit that was set in 1962 to guard against blue baby syndrome. (1) MDH's standard for nitrate must be up-to-date since it informs private well owners when their well water should not be used for drinking. Similarly public facility operators need the

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updated standard to know when their facility needs to be upgraded.

2. The Environmental Working Group reports that newer research indicates that drinking water with significantly lower levels of nitrate than the current standard are associated with higher risks of colorectal cancer and adverse birth outcomes. (1 p.6) Similarly the Minnesota Center for Environmental Advocacy cites recent health studies supporting a more protective standard and urges that MDH update the nitrate standard. (3 p. 3)

3. The maximum contaminant level (MCL) for nitrate was adopted by reference as a HRL in 2009. SONAR p. 4. MCLs are federal standards that “consider the costs required to reduce contaminant concentrations to a given level and the technological feasibility of reaching that level...most MCLs were developed using outdated methods based only on adult intakes and body weight.” SONAR p. 80. In contrast “HRL values are based strictly on human health.” SONAR p. 79. A MCL does not meet the health standards in Minn. Stat. 144.0751 that require “a reasonable margin of safety to adequately protect the health of infants, children....”

4. For this rule making, MDH is using “the most recent intake rates from the EPA Exposure Factors Handbook. Water intake values were updated in 2019.” SONAR p. 12. These current updated water intake rates were not used when the nitrate MCL, now the HRL in use, was created.

Each one of these four factors more than justifies an update of the nitrate HRL. Taken together, they require an update.

ENFORCEMENT OF HRLs

This MDH rule making process will, if completed, will establish rules that “shall have the force and effect of law.” Minn. Stat. 14.38.

Yet, in the SONAR, MDH says repeatedly that it will not enforce the new HRLs in the rules and that state agencies and others can use the HRLs as guidance but that they need not enforce them.

In effect, MDH used the health standards law to justify the need for a rule making, but by refusing to enforce the rules and telling others that they don't need to follow them, MDH makes the Health Standards law meaningless. The result: the Health Standards law for safe drinking water that requires a reasonable margin of safety to adequately protect the health of infants, children, and adults does not protect the health of infants, children, and adults.

MDH argues that it does not have to enforce HRLs because statutes don't tell it how HRLs should be used. “Except for the requirements for water resources protection (See Minn. Stat. § 103H.275, subd. 1(c)(2)), neither Minnesota statute nor current HRL rules specify how HRL values should be used.” SONAR p.7 “Because the HRL rules must establish limits for contaminants, rather than specify how to apply the health-protective numbers, MDH does not apply or enforce them.” SONAR p. 78

That argument ignores the statute setting out the commissioner of health's responsibilities.

144.05 GENERAL DUTIES OF COMMISSIONER; REPORTS.

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Subdivision 1. General duties. The state commissioner of health shall have general authority as the state's official health agency and shall be responsible for the development and maintenance of an organized system of programs and services for protecting, maintaining, and improving the health of the citizens. This authority shall include but not be limited to the following:

....

(3) establish and enforce health standards for the protection and the promotion of the public's health such as quality of health services, reporting of disease, regulation of health facilities, environmental health hazards and personnel;

Minn. Stat. 144.05 requires the commissioner to develop and maintain "an organized system of programs and services for protecting, maintaining, and improving the health of the citizens " and it directs the commissioner to "establish and enforce health standards for the protection and the promotion of the public's health...such as... environmental health hazards...." The statute further says the authority is not limited to the the specific list that the statute provides. The commissioner is obligated to enforce standards, HRL rules that have the force and effect of law; the manner is left up to the commissioner.

Yet, in the SONAR, MDH rejects this responsibility. In its own words:

"The amendments have no direct regulatory impact because the HRA Unit at MDH does not enforce or regulate the use of health-based guidance. MDH provides recommended values for use by risk assessors and risk managers in making decisions and evaluating health risks." SONAR p. 81.

"HRL values are but one of several sets of criteria that state groundwater, drinking water, and environmental protection programs may use to evaluate water contamination. Each program must determine whether to apply an HRL or whether site-specific characteristics justify deviation from HRL values." SONAR p. 8.

'HRL values are only one set of criteria that agency risk managers use to evaluate whether a contaminant's concentration in groundwater poses a risk to health. HRL values are not intended to be bright lines between 'acceptable' and 'unacceptable' concentrations." SONAR p.78.

"MDH cannot anticipate all the situations in which HRL values might provide meaningful guidance. Nor can MDH anticipate all the factors that its partners might weigh to determine whether applying an HRL value is appropriate. Each agency or program must decide whether to apply an HRL value or whether site-specific characteristics justify deviation from HRL values. SONAR p. 82.

"The proposed amendments allow risk managers and stakeholders flexibility in determining how best to protect the public from potentially harmful substances in our groundwater. HRL values provide a scientific and policy context within which the risks posed by a particular situation may be analyzed. Following the risk analysis, risk managers and stakeholders, including other regulatory agencies, may examine the options and make decisions on a course of action." SONAR p. 82.

"The amendments simply provide health-based levels for certain water contaminants. Other agencies might choose to implement and enforce these amendments." SONAR p. 76.

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“Other programs within MDH or other agencies may independently adopt these health-based values and incorporate them within enforceable requirements related to permitting or remediation activities.” SONAR p. 81-82.

MHD argues that no law tells it how to enforce HRL rules so it has no enforcement responsibility. But the law tells the commissioner to enforce standards. In this case, the standards the commissioner must enforce are HRLs that have been adopted into rule and new proposed HRLs once they have been adopted in this rulemaking. Minn. Stat. 144.0751 Health Standards does not provide for any exceptions that would give the commissioner discretion. Nor does the law give the commissioner the authority to tell other state agencies and others responsible for safe drinking water that they don't have to follow rules that have the force and effect of law.

The OAH must determine, whether, given MDH's stated intention to not enforce rules, this rulemaking should proceed.

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- (1) https://www.ewg.org/interactive-maps/2020_nitrate_in_minnesota_drinking_water_from_groundwater_sources/
- (2) <https://minnesotareformer.com/2023/01/17/agriculture-pollutes-underground-drinking-water-in-minnesota-well-owners-pay-the-price/>
- (3) <https://www.pca.state.mn.us/sites/default/files/wq-rule4-24c3.pdf>

Jean Wagenius · Citizen · (Postal Code: unknown) · Mar 06, 2023 7:35 pm

👍 0 Votes

The comments that I submitted on March 4 need a correction. With the obvious exception of MDH, state agencies and others referred to in the SONAR that are not providing drinking water are not required to use or enforce HRLs. Other state agencies may adopt HRLs by reference but are not required to.

Steve Risotto · Citizen · (Postal Code: unknown) · Mar 08, 2023 2:22 pm

👍 0 Votes

The comments of the American Chemistry Council on the proposed amendments to the rules governing health risk limits for groundwater are attached.

Barbara Losey · Citizen · (Postal Code: unknown) · Mar 08, 2023 2:25 pm

👍 0 Votes

The Alkylphenols & Ethoxylates Research Council opposes the subchronic and chronic noncancer Health Risk Limits (HRL) for p-Nonylphenol (pNP) currently proposed under Ch. 4717.7860 Subpart 13a for the reasons explained in the attached comments.