

STATE OF MINNESOTA

BEFORE THE PUBLIC UTILITIES COMMISSION

Katie Sieben	Chair
Joseph K. Sullivan	Vice Chair
Hwikwon Ham	Commissioner
Audrey Partridge	Commissioner
John Tuma	Commissioner

In the Matter of Possible Rulemaking to
Amend Minnesota Rules, Chapter 7825

DOCKET NO. E,G-999/R-26-81

**INITIAL COMMENTS OF THE OFFICE
OF THE ATTORNEY GENERAL—
RESIDENTIAL UTILITIES DIVISION**

The Office of the Attorney General—Residential Utilities Division (OAG) respectfully submits these initial comments in response to the Public Utilities Commission’s Notice of Comment Period issued on January 9, 2026. The notice requests comments on what action the Commission should take on Utility Reform Now’s (URN) petition for rulemaking to amend Minnesota Rules chapter 7825 to adopt several 1982 Policy Statements as rules. For the reasons below, the Commission should exercise its discretion in determining whether a rulemaking would be a desirable outcome. The 1982 Policy Statements are not, as URN intimates, unadopted (or unpromulgated)¹ rules that the Commission is enforcing or attempting to enforce. The Commission should not feel compelled to adopt them as such. Instead, the 1982 Policy Statements were specifically carved out from rulemaking requirements in 1995 amendments to the Minnesota

¹ While Minn. Stat. § 14.381 uses the term “unadopted” rules, the courts generally use the term “unpromulgated” rules to describe rulemaking that has not been through the procedures in the Minnesota Administrative Procedure Act. *See In re Shakopee Mdewakanton Sioux Community*, 988 N.W.2d 135, 141 n.5 (Minn. Ct. App. 2023). These comments will use the term “unadopted rules” to align with the statute.

Administrative Procedure Act (MAPA).² If the Commission desires to initiate a rulemaking on the issues addressed in the Policy Statements, however, it should provide more clear proposed rules than URN’s request to adopt the statements “word for word.”³

I. THE COMMISSION IS NOT COMPELLED TO INITIATE RULEMAKING DUE TO THE EXISTENCE OR CITATION OF THE POLICY STATEMENTS.

Although the Commission may choose to initiate a rulemaking, it is not required to do so. Despite intimations in URN’s petition that the statements are unadopted rules,⁴ to the OAG’s knowledge, URN has not filed an unadopted rulemaking petition at the Court of Administrative Hearings (CAH). And that is for a good reason, because the Commission has not enforced or attempted to enforce the Policy Statements as rules. URN’s petition is also not required to cure any defect with the Policy Statements, because these statements were exempted from rulemaking requirements in 1995.⁵ While the Commission may choose to initiate a rulemaking on the subjects included in the Policy Statements, it should not feel compelled to do so by claims that they would be considered unadopted rules.

A. Although the Petition Implies that the Policy Statements are Unadopted Rules, URN Did Not Follow the Process for Challenging Unadopted Rulemaking for Good Reason.

URN’s petition heavily indicates its apparent belief that the Policy Statements are unadopted rules.⁶ Yet, URN, to the OAG’s knowledge, has chosen to request the Commission adopt the Policy Statements as rules rather than following the process available in law to challenge

² See [1995 Minn. Laws ch. 233, sec. 8](#) (exempting the Commission from the requirement to adopt rules to “supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases”).

³ Utility Reform Now! Petition for Rulemaking at 2 (dated Jan. 3, 2026; received Jan. 7, 2026; and filed Jan. 8, 2026) (URN Petition).

⁴ See Minn. Stat. § 14.381 (2024).

⁵ See [1995 Minn. Laws ch. 233, sec. 8](#) (codified at Minn. Stat. § 14.06(b)).

⁶ See URN Petition at 3–5.

unadopted rules.⁷ There is a good reason for that. The Commission has not enforced or attempted to enforce any of the Policy Statements as if it were “a duly adopted rule.”⁸ This distinguishes this situation from the two CAH orders on which URN relies. The Commission should not feel compelled to initiate a rulemaking by unsupported claims that the Policy Statements are unadopted rules.

As URN notes in its petition, Minn. Stat. § 14.381 provides relief from enforcement or attempted enforcement of unadopted rules by petitioning CAH.⁹ The petition for unadopted rulemaking, however, must seek an order determining that “the agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.”¹⁰ The relief provided by an order following a successful petition is limited to “direct[ing] the agency to cease enforcement of the unadopted rule that is the subject of the petition.”¹¹

The Commission has neither enforced nor attempted to enforce the Policy Statements. Indeed, the Policy Statements themselves show that even the 1982 Commission had no intention of treating them as duly adopted rules. The statements uniformly include the below language:

The Commission recognizes that a policy statement does not have the force and effect of law. Instead, it is an expression of the Commission’s general intention which will be followed unless circumstances demonstrate the policy to be inappropriate. In each particular, case, the policy statement can be expected to form

⁷ See Minn. Stat. § 14.381 (2024).

⁸ Minn. Stat. § 14.381, subd. 1 (2024).

⁹ Minn. Stat. § 14.381 (2024). Notably, the statute provides that the costs of CAH’s review of the petition are born by the agency. But, if the Administrative Law Judge rules in favor of the agency, the agency may recover a portion of these costs from the petitioner, subject to exceptions, and may even request the petitioner post a bond if it believes recovering costs will be unsuccessful. *Id.*, subd. 3. This cost provision balances the interests of the public in ensuring that unadopted rules are not enforced, while discouraging unadopted rule petitions that are not well-founded.

¹⁰ *Id.*, subd. 1.

¹¹ *Id.*, subd. 2.

the starting point of the Commission’s decision, but the final decision will depend upon the facts of the case.¹²

While this language may show an intention by the 1982 Commission to process the information regarding the statements a particular manner, the Commission has not even gone that far in recent memory. URN’s petition itself does not suggest that the Commission treats the Policy Statements as rules, only that the statements “operate as rules” in Commission proceedings.¹³ Instead of citing to any Commission order relying on the Policy Statements, URN focuses on citations to statements from utilities.¹⁴ The OAG submits that parties treat the policy statements as they would any previous Commission order in a proceeding—as persuasive authority. As with all Commission orders, the Commission is able and willing to revisit its previous positions, practices, or treatment in future orders and the Policy Statements provide a clear intention that the Commission do just that. But the Commission does not and cannot dictate what persuasive material utilities or other parties may cite to. And citations or discussion from utilities or other parties certainly does not equate to the Commission “enforcing or attempting to enforce” the Policy Statements as “as though [they] were a duly adopted rule.”¹⁵

Last, URN’s petition states: “State agencies who apply informal memoranda (like the 1982 Statements) as if they were duly adopted rules of procedure, are frequently sued. And they lose.”¹⁶

¹² See URN Petition, Sched. 2.

¹³ *Id.* at 3.

¹⁴ See *id.*

¹⁵ See Minn. Stat. § 14.381.

¹⁶ URN Petition at 3.

To support this proposition, URN primarily relies on two orders from the Office of Administrative Hearings¹⁷ authored by then Administrative Law Judge (ALJ) Eric Lipman.¹⁸

The Commission's Policy Statements are distinguishable from these cases. In *American Crystal Sugar Company*, the company petitioned CAH for relief from what it claimed was enforcement of an unadopted rule by the Minnesota Pollution Control Agency (MPCA).¹⁹ The facts of the case involved discussions between MPCA and the company regarding reducing effluent toxicity. The ALJ ruled that correspondence from MPCA to the company that "acute WET mixing zones" were prohibited for a facility was an unadopted rule "[t]o the extent that the MPCA has a policy of not approving any acute WET mixing zones outside of the Lake Superior Basin."²⁰ The order declared that "the MPCA shall not categorically prohibit the use of mixing zones to demonstrate compliance with acute toxic unit standards in waters outside of the Lake Superior Basin."²¹ Here, URN has provided no evidence that the Commission has attempted to categorically apply the Policy Statements at all. And to the extent that the Commission is persuaded by utilities' or other parties' citation to the Policy Statements, this is a far cry from a categorical prohibition or requirement.

¹⁷ The Office of Administrative Hearings' name was changed to the Court of Administrative Hearings in 2025. *See* 2025 Minn. Laws ch. 39, secs. 17, 68.

¹⁸ These cases are cited in a footnote to the petition. One citation includes a URL that does not function but the order is available on the CAH website. *See In re Petition of Am. Crystal Sugar Co.*, OAH 8-2200-37302, Order (July 22, 2021), available at https://mn.gov/oah/assets/2200-37302-american-crystal-sugar-company-pca-unadopted-rule-order_tcm19-491162.pdf. However, the CAH website does not maintain orders from before 2018. *See* Administrative Law Archives, <https://mn.gov/oah/media/opinion-archive.jsp>. For the Commission's and public's ease of reference, the OAG attaches copies of these orders to these comments. *See* Attachs. 1-2.

¹⁹ *See* Attach. 1 at 1.

²⁰ *Id.* at 6.

²¹ *Id.* at 10.

Similarly, in *Property Casualty Insurers Association of America, Inc.*, the conduct of the agency that the ALJ found problematic is distinguishable. In that case, an insurance company sought relief from a survey issued by the Department of Commerce seeking information regarding diversity of companies' boards of directors and suppliers.²² The ALJ found that statements in the survey that covered insurers "are required to 'respond to the survey' and that "[p]articipating Commissioners have the discretion to require any licensed insurer, even those that collect less than \$300 million in written national premiums, to complete the survey,' are "statements of general applicability."²³ The ALJ then found that the deadline that Commerce provided to respond to the survey was a "statement of future effect," and determined the survey was an unadopted rule.²⁴ Again, this situation is far different. The Commission has not indicated that failure to follow the Policy Statements will result in any type of penalty, and the very terms of the Policy Statements indicate the opposite. Instead, each Policy Statement provides that it "does not have the force or effect of law," and provides intentions to depart from the Policy Statements depending on "the facts of the case."²⁵

In sum, the Commission has not enforced or attempted to enforce the Policy Statements as duly adopted rules, and URN's cited orders are distinguishable. The Commission should not be swayed by URN's reference to Minn. Stat. §14.381 in its assessment of URN's request.

B. The Policy Statements Were Exempted from Rulemaking in 1995.

URN's primary premise in requesting the Commission initiate a rulemaking process appears to be its view that the Policy Statements are unadopted rules. But a review of provisions

²² Attach. 2 at 2–3.

²³ *Id.* at 7.

²⁴ *Id.*

²⁵ URN Petition, sched. 2.

of chapter 14 and the legislative history of Minnesota’s Administrative Procedure Act shows that the Policy Statements in question were exempted from the rulemaking requirement in 1995.

URN states that the “Commission is not exempted from adopting rules in the ordinary way” and cites to Minn. Stat. § 14.06(a). While it is true that the Commission as a whole is not exempted from rulemaking, URN’s petition only cites the first part of section 14.06. The full section is provided below for completeness:

14.06 REQUIRED RULES.

(a) Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.

(b) Upon the request of any person, and as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases. *This paragraph does not apply to the Public Utilities Commission.*²⁶

Part (b) was added in 1995 in a substantial rewrite of MAPA.²⁷ Other agencies were directed to review past proceedings and conduct rulemakings “to supersede those principles of law or policy lawfully declared by the agency as the basis for its decision in particular cases” if the agency intended to rely on them in the future.²⁸ The Commission, however, was specifically exempted from this requirement. But even for other agencies, the requirement to conduct this review was limited to principles of law and policy the agency “intends to rely on as precedents in future cases.”²⁹ To any extent that the Commission relies on these Policy Statements, the Commission was not and is not required to promulgate the Policy Statements as rules. It may

²⁶ Minn. Stat. § 14.06 (2024) (emphasis added).

²⁷ [1995 Minn. Laws ch. 233, sec. 8.](#)

²⁸ *Id.*

²⁹ Minn. Stat. § 14.06(b).

instead continue to allow them to be cited by parties and consider those citations with whatever persuasive weight a particular Commission may decide to give them.

II. IF THE COMMISSION CHOOSES TO INITIATE A RULEMAKING, SIGNIFICANTLY MORE GUIDANCE SHOULD BE PROVIDED BEYOND THE PETITION’S REQUEST THAT THE COMMISSION “IMPROVE UPON THE TEXT OF THE 1982 STATEMENTS.”

URN’s petition states its request that the Commission should “adopt the 1982 Policy Statements word for word as amendments to Part 7825.”³⁰ URN’s request would result in nonsensical rules due to the Policy Statements’ clear directives that they do not have the force and effect of law. If the Commission chooses to initiate a rulemaking, URN’s request for “word for word” amendments should not be followed. Instead, URN should follow the recommended format for petitions for rulemaking provided in Minn. R. 1400.2500 and state the proposed new language of the rules and that language’s proposed locations in chapter 7825.

The Minnesota Statutes provide that petitions for rulemaking “shall be specific as to what action is requested and the need for the action.”³¹ The Legislature also gave the chief administrative law judge the authority to “prescribe by rule the form for all petitions under this section and may prescribe further procedures for their submission, consideration, and disposition.”³² The Minnesota Rules now include these forms.³³ While using the forms is not mandatory,³⁴ the petition for rulemaking form recommends that petitioners provide the following:

For a new rule, state the proposed new language of the rule. For rule amendments, repeat the text of the rule, striking through deletions and underlining new language. If you cannot provide new rule language, then write a detailed description of the rule that you are requesting.³⁵

³⁰ URN Petition at 2.

³¹ Minn. Stat. § 14.09.

³² *Id.*

³³ *See* Minn. R. 1400.2500–.2570 (2025).

³⁴ *See* Minn. R. 1400.2040 (2025) (“Part 1400.2500 contains a recommended format for the petition.”).

³⁵ Minn. R. 1400.2500.

URN’s petition claims to accord with the form by requesting the Commission “adopt the 1982 Policy Statements word for word as amendments to part 7825.”³⁶ Yet, URN also states its expectation that significant amendments will be made to the Policy Statements.³⁷ The OAG agrees that proposed rules are often significantly improved by recommended changes by the public, interested parties, and the ALJs that oversee proceedings. But starting from a clear position in the notice of proposed rule is not only a good practice but may be required for the rules to have any staying power. The Minnesota Statutes provide that agencies can modify proposed rules but “an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.”³⁸ While there are limitations in law as to what is considered “substantially different,” starting from a sound position is not only good policy but a requirement for valid rulemaking.

Instead of simply saying that the Policy Statements should be adopted “word for word,” therefore, it would be helpful for URN to describe specific portions of the rules that it believes are desirable to be included as duly adopted rules, provide the location within chapter 7825 where those provisions should be included, and, to the extent any existing provisions of chapter 7825 would overlap with the Policy Statements, strike through deletions and underline new language in existing portions of chapter 7825. The Commission’s reply comment period provides a useful opportunity for URN to clarify what, if any, substance of the Policy Statements its membership desires to become duly adopted rules. Alternatively, if URN chooses not to provide a clarification of its substantive concerns with the Policy Statements, the Commission could dismiss the current

³⁶ URN Petition at 2.

³⁷ *Id.*

³⁸ Minn. Stat. § 14.05, subd. 2 (2024).

petition for rulemaking and URN may bring another, more specific petition for rulemaking in the future.

CONCLUSION

The Commission has the ability to and should exercise its discretion in determining whether a rulemaking would be a desirable outcome. The Commission should not, however, feel compelled to adopt the Policy Statements for fear of being “sued” for enforcing or attempting to enforce an unadopted rule.³⁹ The Commission has not enforced or attempted to enforce the Policy Statements as rules. Further, the Policy Statements were specifically carved out from the rulemaking requirement in 1995.

If the Commission, however, desires to initiate a rulemaking on the issues addressed in the Policy Statements, URN should provide more clear statements of its stated desire to include the Policy Statements as rules rather than simply urging their adoption “word for word.”⁴⁰ The Commission’s reply comment period is a useful opportunity for URN to provide this information. Alternatively, the Commission could dismiss the current petition for rulemaking and URN may bring another, more specific petition for rulemaking on topics included in the Policy Statements that URN’s membership desires to become duly adopted rules.

³⁹ See URN Petition at 3.

⁴⁰ *Id.* at 2.

Dated: January 21, 2026

Respectfully submitted,

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ATTORNEYS FOR MINNESOTA
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RESIDENTIAL UTILITIES DIVISION

OAH 8-2200-37302

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition of American
Crystal Sugar Company

ORDER

On January 15, 2021, the American Crystal Sugar Company filed a petition for relief under Minn. Stat. § 14.381 (2020). The petition seeks a determination that the Minnesota Pollution Control Agency is enforcing a ban on the use of “acute mixing zones” as though this prohibition was a duly adopted rule.

This matter came before Administrative Law Judge Eric L. Lipman for an oral argument on April 16, 2021. The hearing record on the petition closed on April 16, 2021.

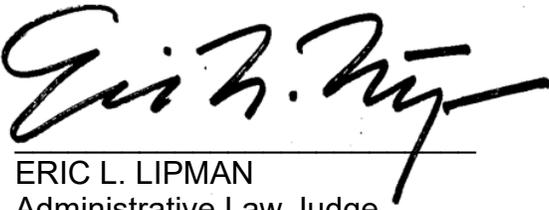
Jeremy P. Greenhouse, Environmental Law Group, Ltd., appeared on behalf of the Petitioner, American Crystal Sugar Company (ACSC or Petitioner). Peter J. Farrell, Assistant Attorney General, appeared on behalf of Minnesota Pollution Control Agency (MPCA or agency).

Based upon submissions of the parties and the hearing record, and for the reasons set out in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The Petition is **GRANTED**.
2. Until such time as the agency is authorized by a statute or rule to prohibit the use of acute mixing zones outside of the drainage basin of Lake Superior, the agency shall not prohibit the use of mixing zones to demonstrate compliance with acute toxic unit standards.
3. The agency shall publish this decision in the *State Register*.
4. The agency shall bear the costs of this proceeding.

Dated: July 22, 2021


ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381 (2020). It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44-.45 (2020).

MEMORANDUM

I. Factual and Regulatory Background

This matter involves the complex interplay between state and federal water quality standards that limit industrial discharges into the Red Lake River.

ACSC operates a large food processing facility in Crookston, Minnesota. The principal activity of this facility is the processing of sugar beets into refined sugar, molasses and dried beet pulp.¹ Because whole, unprocessed sugar beets contain large amounts of water when they arrive at the facility, ACSC's later pressing of these beets to obtain sugar and pulp, produces large quantities of surplus water.² Additionally, because the beets used by ACSC are washed prior to processing, "high-strength wastewater" that is loaded with dirt and debris is produced during the manufacturing process.³

The Crookston facility treats this surplus water through a network of treatment ponds that are designed to capture pollutants from the water – including fecal coliform, nitrogen-ammonia, phosphorus, mercury, and suspended solids.⁴ The wastewater treatment system at the facility includes three mud solid ponds, two wastewater holding ponds, two condenser cooling water ponds, a wastewater stabilization pond, and a primary clarifier.⁵

A. Features of the Discharge Permit

ACSC holds a National Pollution Discharge Elimination System / State Disposal System (NPDES/SDS) permit.⁶ Under the terms of this permit, before the facility can discharge treated wastewater into the Red Lake River, certain preconditions must be satisfied. Specifically, the permit requires the facility to conduct pre-discharge sampling of the treated wastewater to ensure that it does not exceed particular toxicity levels.⁷ The toxicity levels, also known as "effluent limitations," protect against impairments to

¹ Affidavit of Jeremy P. Greenhouse (Greenhouse Aff.), Exhibit (Ex.) 1 at 4.

² Greenhouse Aff. at ¶ 5.

³ Ex. 1 at 68.

⁴ *Id.* at 23, 31-33.

⁵ *Id.* at 4.

⁶ *Id.* at 2.

⁷ *Id.* at 15, 22, 35-36, 39.

the water, harm to species in the Red Lake River, or to other uses of the river.⁸ If the toxicity levels of the wastewater exceed these limitations, ACSC's permit requires the facility to conduct additional testing and analysis and, if the problems persist, to work with the MPCA on measures to reduce the toxicity of the wastewater.⁹

B. Measuring Whole Effluent Toxicity

ACSC's discharge permit requires it to test the "whole effluent toxicity" – or WET – of the wastewater and to report the results of these tests to the MPCA.¹⁰ WET is measured by exposing tiny aquatic species (such as the fathead minnow) to the effluent and measuring the impacts on those species.¹¹

There are two types of WET tests: Tests that measure "acute toxicity" – the impacts that occur within hours after exposure to the effluent – and those that measure "chronic toxicity" – the impacts that occur over longer-term exposure to the effluent. The definitions in Minn. R. 7050.0218 explain the differences in this way:

"Acute toxicity" means a stimulus severe enough to rapidly induce a response. In toxicity tests, a response is normally observed in 96 hours or less. Acute effects are often measured in terms of mortality or other debilitating effects, represented as LC50s [a Lethal Concentration to 50 percent of the organisms tested] or EC50s [an Effect Concentration to 50 percent of the organisms tested], and expressed as concentrations of mass per unit volume, percent effluent, or toxic units.¹²

"Chronic toxicity" means a stimulus that lingers or continues for a long period of time, often one-tenth the life span or more. A chronic effect can be mortality, reduced growth, reproduction impairment, harmful changes in behavior, and other nonlethal effects.¹³

⁸ See *generally* Minn. R. 7050.0150, subp. 3 (2019) ("For all class 2 waters ... the propagation or migration of aquatic biota normally present shall not be prevented or hindered by the discharge of any sewage, industrial waste, or other wastes to the waters"); Minn. R. 7050.0218, subp. 1 (2019) ("The methods in [Part 7050.0218] and part 7050.0219 ... provide the basis for developing human health-based numeric chronic standards and site-specific numeric criteria for aquatic toxicity, human health, and fish-eating wildlife").

⁹ Ex. 1 at 36.

¹⁰ *Id.*

¹¹ *Id.*; see also Minn. R. 7050.0218, subp. 3(AAA) (2019) ("'Whole effluent toxicity test' means the aggregate toxic effect of an effluent measured directly by a toxicity test. Effects on tested organisms are measured and expressed as toxic units or percent effluent for both acute and chronic whole effluent toxicity tests").

¹² Minn. R. 7050.0218, subp. 3(B) (2019); see also Minn. R. 7050.0218, subp. 3(W) (2019) ("'Effect concentration' or 'EC50' means the toxicant concentration that causes equilibrium loss, immobilization, mortality, or other debilitating effects in 50 percent of the exposed organisms during a specific time of observation"); Minn. R. 7050.0218, subp. 3(FF) (2019) ("'Lethal concentration' or 'LC50' means the toxicant concentration killing 50 percent of the exposed organisms in a specific time of observation").

¹³ Minn. R. 7050.0218, subp. 3(P) (2019).

The WET tests express the level of toxicity in “toxic units.” The level of acute toxicity is expressed in the amount of “TUa” whereas the level of chronic toxicity is expressed in the amount of “TUc.”¹⁴

C. Addressing High Acute Toxicity Levels

In May of 2010, the facility determined that its effluent exceeded the applicable toxicity limits and it reported this fact to the MPCA.¹⁵

In August 2010, ACSC’s consultant, Barr Engineering, prepared a work plan to identify the chemical components of the wastewater.¹⁶ The MPCA approved Barr Engineering’s plan for inquiries and analysis.¹⁷

In September of 2015, after years of testing and analysis, ACSC submitted to MPCA a report of its findings. The report suggested that ammonia-nitrogen levels, alongside potassium and the alkalinity of the effluent, were the likely causes of the high acute toxicity levels.¹⁸

The report outlined three possible approaches to reducing the ammonia-nitrogen levels in the wastewater so as to meet the toxicity standards before it was discharged into the Red Lake River. These technologies, and their costs in 2015, were:

1. Pond treatment of the effluent using a nitrifying filter (\$9 million);
2. Activated sludge treatment of condenser water (\$11.2 million); or
3. Anaerobic treatment of high-strength wastewater and activated sludge treatment of all wastewater (\$21.2 million).¹⁹

The report also posited that there was a much lower-cost solution to obtaining compliance with the applicable environmental standards. If ACSC was permitted to use a small area of the Red Lake River within which it could mix the effluent with passing river water, at the edge of the proposed “mixing zone” the toxicity levels of the resulting mix would be less than one-third of that of the effluent alone.²⁰ ACSC maintains that the

¹⁴ Minn. R. 7050.0218, subp. 3(WW) (2019) (“One acute toxic unit (TUa) is the reciprocal of the effluent concentration that causes 50 percent effect or mortality to organisms for acute exposures (100/[Lethal Concentration]50); one chronic toxic unit (TUc) is the reciprocal of the effluent concentration that causes no observable adverse effect level on test organisms for chronic exposures (100/[No observable adverse effect level])”); see also Minn. R. 7050.0218, subp. 3(FF) (2019) (“‘Lethal concentration’ or ‘LC50’ means the toxicant concentration killing 50 percent of the exposed organisms in a specific time of observation”); Minn. R. 7050.0218, subp. 3(NN) (2019) (“‘No observable adverse effect level’ or ‘NOAEL’ means the highest exposure level at which there is no statistically or biologically significant increase in the frequency or severity of adverse effects between the exposed population and its appropriate control group”).

¹⁵ Ex. 2 at 63.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 64.

²⁰ *Id.*

mixing of effluent and river water would result in a combination that could “easily meet” applicable water quality standards and do so “within a short distance” of where the effluent was first placed into the river.²¹

Under this proposal, a pipe would extend from the facility’s treatment ponds across a portion of the river floor. Discharges of effluent would be made into the river at high velocity through a series of evenly-spaced outlets in the pipe.²² The cost of implementing this proposal is a small fraction of the other treatment approaches: ACSC estimated that, in 2015 dollars, the cost of installing a diffuser system along the riverbed was \$500,000.²³

Federal law prohibits the establishment of new mixing zones in the drainage basin of Lake Superior,²⁴ but is silent on the development of such zones in other parts of Minnesota. It is not disputed that the Red Lake River is not part of the drainage basin of Lake Superior.

Following the MPCA’s receipt of the 2015 report, the parties have been working on approaches to reduce the toxicity levels of the effluent from the Crookston facility, but they sharply disagree as to what testing methods and remediation solutions are allowed under state law. Specifically, the parties disagree as to:

1. whether a ban on mixing zones follows from the plain meaning of the agency’s existing rules;
2. whether state law prohibits use of a mixing zone in the river to first dilute the effluent before conducting an effluent toxicity test from the edge of the mixing zone,²⁵ and
3. whether state law requires effluent toxicity tests for the Crookston facility to be conducted at the “end of the pipe” that discharges into Red Lake River.²⁶

²¹ Petition at 8.

²² See Ex. 2 at 133-36.

²³ *Id.* at 136.

²⁴ 40 C.F.R. § 132.2 (2019) (“Great Lakes System means all the streams, rivers, lakes and other bodies of water within the drainage basin of the Great Lakes within the United States”); 40 C.F.R. Appendix F to Part 132 (2019) (“There shall be no mixing zones available for new discharges of [Bioaccumulative Chemicals of Concern] to the Great Lakes System”).

²⁵ See e.g., Ex. 12 at 221 (“use of a river diffuser designed to meet 0.3 TUa at the edge of an approved mixing zone is not only consistent with and based upon EPA guidance for preventing toxicity to aquatic organisms, it is also consistent with MPCA water-quality and discharge requirements in Chapters 7050 and 7053 of the Minnesota Rules”); Ex. 13 at 228-29 (MPCA “has required acute WET testing for some facilities since 1989,” and “[f]rom the inception, MPCA determined that compliance for acute WET should be evaluated at end-of-pipe, without a mixing zone or dilution”).

²⁶ Ex. 12 at 218 (“As a legal matter, there is no statute or regulation requiring Minnesota dischargers to meet 0.999 TUa at end-of-pipe”); Ex. 13 at 228 (“Minnesota rules require that [final acute values] be met in the effluent, as measured ‘end-of-pipe.’ The rule does not allow for the dilution of effluent prior to measurement in a receiving water outside the Lake Superior Basin”).

II. Analysis

A. Is the Agency's Prohibition on Mixing Zones a "Rule"?

The Minnesota Administrative Procedure Act (MAPA) defines a "rule" as:

every 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.²⁷

Additionally, interpretations of existing rules which "make specific the law enforced or administered by the agency," and are not either long-standing positions of the agency or within the plain meaning of the statute, are deemed to be "interpretative rules."²⁸

With limited exceptions, that are not applicable in this case, an agency's interpretative rules are valid only if they are promulgated in accordance with MAPA.²⁹

In correspondence between the MPCA and ACSC, dated February 7, 2017, the agency made clear that it "does not allow acute WET mixing zones."³⁰ It reiterated this view on June 17, 2017, when it declared that "MPCA will not entertain establishing an acute mixing zone ... for this facility;" and again one month later, when MPCA stated flatly that it "has a policy of no acute WET mixing zones."³¹ This remains the position of the agency today.³²

To the extent that the MPCA has a policy of not approving any acute WET mixing zones outside of the Lake Superior Basin, that policy is a statement of "general applicability": There are no mixing zones allowed, regardless of the circumstances in any particular case. The "no mixing zone policy" is likewise is a statement of future effect: While mixing zones may have been approved and constructed in the past, the MPCA will not authorize the establishment of new mixing zones in state waters.³³

For these reasons, unless some exception to the requirement to promulgate an interpretative rule applies, the "no acute WET mixing zone" policy qualifies as an administrative rule.

²⁷ Minn. Stat. § 14.02, subd. 4 (2020).

²⁸ See, e.g., *Mapleton Community Home, Inc. v. Minnesota Dept. of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) ("[a]n agency interpretation that 'make[s] specific the law enforced or administered by the agency' is an interpretive rule that is valid only if promulgated in accordance with the [Minnesota Administrative Procedures Act]") (quoting *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979)).

²⁹ See Minn. Stat. § 14.03, subd. 3(b) (2020); *In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. Ct. App.), *review denied* (Minn. 1993) (citing *Mapleton Community Home*, and *Minnesota-Dakotas Retail Hardware Ass'n*, *supra*).

³⁰ Ex. 5 at 117.

³¹ Ex. 8 at 206; Ex. 9 at 209; Ex. 10 at 212; Ex. 11 at 215; Ex. 13 at 226.

³² See, e.g., MPCA's Response to ACSC's Unadopted Rule Petition (MPCA Response), at 17 (MPCA "does not permit mixing zones for acute WET outside of the Lake Superior basin").

³³ Ex. 5 at 117; Ex. 8 at 206; Ex. 9 at 209; Ex. 10 at 212; Ex. 11 at 215; Ex. 13 at 226.

B. Does the Agency’s Prohibition on Mixing Zones Follow Directly from the Plain Meaning of the Statute or Regulation?

It is important to note that when an agency’s interpretation of the law directly follows from the plain meaning of a statute, the agency is not deemed to have engaged in rulemaking.³⁴ And this makes sense. In such a circumstance, agency officials are not making a new law, but rather taking care that an existing law is faithfully executed.³⁵

In this case, however, the agency’s prohibition on the use of mixing zones does not follow from the plain reading of either a statute or an existing rule.

The phrase “mixing zone” does not appear in state statutes. It does appear several times in the MPCA’s administrative rules, but none of those references include a clear prohibition on the use of mixing zones to dilute industrial effluent. To the contrary, MPCA’s rules require it to make “reasonable allowance” for the establishment and maintenance of mixing zones, so that an individual permittee can demonstrate compliance with the state’s water quality standards.

Minn. R. 7050.0210, subp. 5 (2019), a regulation that provides “general standards for waters of the state,” includes the following detail:

Mixing zones. *Reasonable allowance will be made for dilution of the effluents*, which are in compliance with this chapter and chapter 7053, as applicable, *following discharge into waters of the state*. The agency, by allowing dilution, will consider the effect on all uses of the waters of the state into which the effluents are discharged. The extent of dilution allowed regarding any specific discharge as specified in part 7053.0205, subpart 7, shall not violate the applicable water quality standards in this chapter and chapter 7052, including the antidegradation requirements contained in those chapters. This subpart also applies in cases where a class 7 water is tributary to a class 2 water.

Mixing zones must be established by the agency on an individual basis, with primary consideration being given to the following guidelines:

A. mixing zones in rivers shall permit an acceptable passageway for the movement of fish;

B. the total mixing zone or zones at any transect of the stream should contain no more than 25 percent of the cross sectional area and/or volume of flow of the stream,

³⁴ See, e.g., *Cable Communications Bd. v. Nor-West Cable Communications P’ship*, 356 N.W.2d 658, 667 (Minn. 1984) (“Generally, if the agency’s interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule”).

³⁵ See Minn. Const. Art. V, § 3.

and should not extend over more than 50 percent of the width;

C. mixing zone characteristics shall not be lethal to aquatic organisms;

D. for contaminants other than heat, the FAV, as defined in part 7050.0218, subpart 3, item Y, for toxic pollutants should not be exceeded as a one-day mean concentration at any point in the mixing zone;

E. mixing zones should be as small as possible, and not intersect spawning or nursery areas, migratory routes, water intakes, nor mouths of rivers; and

F. overlapping of mixing zones should be minimized and measures taken to prevent adverse synergistic effects.³⁶

A like rule, specifically addressing industrial discharges to waters of the state, is set forth at Minn. R. 7053.0205, subp. 5 (2010). It includes the same requirements and limits on mixing zones that are found in Minn. R. 7050.0210, subp. 5.

For its part, the MPCA argues that mixing zones cannot be approved for installation because the effluent that ACSC would mix with river water would be “lethal to aquatic organisms” at the moment it leaves the discharge pipe.³⁷ Thus, the agency contends that construction of a mixing zone would violate the protections for aquatic organisms that are found in the very rules that authorize those zones.³⁸ The MPCA’s reading of Minn. R. 7050.0210, subp. 5 and Minn. R. 7053.0205, subp. 5, is circular. A few points are worth special emphasis.

First, the provisions of both rules make clear that the agency must consider the use of a mixing zone if compliance with state water quality standards could be achieved after mixing modest amounts of river or lake water with industrial effluent. The phrase “following discharge into waters of the state” clearly connotes that compliance with the state’s standards would, in these circumstances, be measured after water from the mixing zone was combined with the effluent. MPCA’s contrary reading of the regulations thus suffers from a timing problem: By insisting that effluent toxicity be measured only “at the end of the discharge pipe,” before it enters state waters, it completely forecloses the alternative approach established in Minn. R. 7050.0210 and Minn. R. 7053.0205.

Indeed, it is difficult to conceive of a mixing zone that would ever be sought by a permit holder under the MPCA’s reading of the rules. If particular effluent meets state water quality standards when it is measured at the end of the discharge pipe, then the

³⁶ Minn. R. 7050.0210, subp. 5.

³⁷ MPCA Response at 1, 7, 10, 12-14.

³⁸ *Id.* at 10, 12.

addition of clean river water in a mixing zone is of no use at all. The mixing zone options authorized in Parts 7050 and 7053 become dead letters.

Second, MPCA's reading of the regulations requires some sleight-of-hand. Neither Minn. R. 7050.0210, subp. 5(C), nor Minn. R. 7053.0205, subp. 5(C)(3), say that *the effluent to be discharged* cannot be lethal to aquatic organisms; rather, the regulations state that *the mixing zone characteristics* must not be lethal to aquatic organisms. These are two different things. It is the difference between the characteristics that would be found at the end of the discharge pipe from those that would be found at a point in the middle of the Red Lake River.

Moreover, the regulations themselves account for these different circumstances: The regulations equate, from a water quality perspective, 1.0 TUa, when it is measured from the end of the discharge pipe, with .03 TUa, when it is measured from the edge of an approved mixing zone.³⁹ Wading into the river thus changes the lethality standard and the analysis.

Both Minn. R. 7050.0210 and Minn. R. 7053.0205 bind the MPCA to make "reasonable allowance" for the dilution of industrial effluents following discharges into waters of the state. Because MPCA's actual policy was not to "entertain" establishment of a mixing zone outside of the Lake Superior Basin,⁴⁰ it was enforcing an informal policy "as though it were a duly adopted rule."⁴¹

C. Does the Agency's Demand for Toxicity Measurements to Be Made at "the End of the Discharge Pipe" Follow Directly from the Plain Meaning of a Statute or Regulation?

The term "TUa" does not appear in state statutes. It does appear in MPCA's regulations, but not in a way that confirms the agency's assertion that no effluent which exceeds 0.999 TUa can be placed into state waters and mixed.⁴²

Both Minn. R. 7050.0210, subp. 1(A) (2019), and Minn. R. 7052.0240, subp. 1(A) (2019), make clear that there are two alternative approaches to measuring effluent toxicity – one that is derived from tests "directly to the discharge" as it leaves the discharge pipe, and a second option, when taken from within the water at "the edge of an approved acute mixing zone." The regulations state:

At the edge of an acute mixing zone approved under subpart 2 [of Part 7050.0210], acute aquatic life toxicity must not exceed the maximum standard or criterion, or 0.3 TUa for WET. If the discharger does not have an approved acute mixing zone demonstration, the agency must apply the [final acute value], or 1.0 TUa for WET, directly to the discharge.

³⁹ *Id.*

⁴⁰ Ex. 9 at 269.

⁴¹ Minn. Stat. § 14.381, subd. 1 (2020).

⁴² Compare e.g., Ex. 10 at 212 with Ex. 13 at 226.

....

The agency must evaluate and apply whole effluent toxicity (WET) as [water quality-based effluent limits] and permit conditions through the following procedures and conditions:

A. no effluent shall exceed 1.0 acute toxic unit (TUa) *unless a demonstration is provided under part 7052.0210, subpart 1, that 0.3 TUa can be met at the edge of an approved acute mixing zone*⁴³

In each of these regulations, compliance with a 0.3 TUa standard from within a mixing zone is an exception to the ordinary 1.0 TUa toxicity standard.⁴⁴ By reading Part 7050 so as to prohibit this second method of meeting the water quality standards, the MPCA has acted contrary to the provisions of its own regulations.

ACSC is entitled to a declaration that, until authorized by statute or rule, the MPCA shall not categorically prohibit the use of mixing zones to demonstrate compliance with acute toxic unit standards in waters outside of the Lake Superior Basin.

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⁴³ Minn. R. 7050.0210, subp. 1(A) (emphasis added); Minn. R. 7050.0240, subp. 1 (emphasis added).

⁴⁴ See *also* Minn. R. 7050.0255, subp. 11 (2019) (“For municipal sewage and industrial waste discharges, degradation is calculated at the edge of the mixing zone upon reasonable allowance for dilution of the discharge according to part 7053.0205, subparts 5 to 7”).

2016 WL 7462528 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

IN THE MATTER OF THE PETITION OF THE PROPERTY
CASUALTY INSURERS ASSOCIATION OF AMERICA, INC.

OAH 8-1000-33787

December 7, 2016

ORDER

*1 This matter came before Administrative Law Judge Eric L. Lipman on October 28, 2016, for an oral argument.

On September 2, 2016, the Property Casualty Insurers Association of America, Incorporated, petitioned the Office of Administrative Hearings for an Order under [Minn. Stat. § 14.381 \(2016\)](#). It asks the tribunal to determine that the Minnesota Department of Commerce is enforcing a requirement that certain large insurers disclose sensitive recruitment, hiring and vendor detail, as though it were a duly adopted rule.

Michael J. Ahern, Dorsey & Whitney LLP, appeared on behalf of the Petitioner, Property Casualty Insurers Association of America, Inc. (PCI). Sarah L. Krans, Assistant Attorney General, appeared on behalf of Minnesota Department of Commerce (Department).

Based upon submissions of the parties and the hearing record, and for the reasons set out in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. Until such time as the Department is authorized by a statute or a rule to collect and disclose recruitment and contracting data, the Department may not require Minnesota insurers to respond to the Multistate Insurance Diversity Survey.
2. The Department shall publish this decision in the *State Register*.
3. The Department shall bear the costs of this proceeding.

Dated: December 7, 2016

Eric L. Lipman
Administrative Law Judge

NOTICE

This decision is the final administrative decision under [Minn. Stat. § 14.381](#). It may be appealed to the Minnesota Court of Appeals under [Minn. Stat. §§ 14.44-.45](#).

MEMORANDUM

Factual and Regulatory Background

In 2012, the California Legislature enacted new reporting requirements for insurers with written premiums of more than \$100 million within the State of California.¹ These larger insurance companies were directed by statute to make disclosures regarding the companies' efforts to seek out, certify and contract with vendors that are owned by minorities, women or disabled veterans.² The reporting detail from each of these companies would then be hosted on the website of the California Department of Insurance.³ The California law provided that if any covered company did not make the required reporting it could face a civil penalty. The statute authorized penalties of up to \$5,000 for negligent failures to report and penalties of up to \$10,000 for a willful failure to complete the reporting.⁴

Based upon the program's success, the California Department of Insurance was able to persuade insurance commissioners in four other states (Minnesota, New York, Oregon and Washington) and the District of Columbia, to work collaboratively on a still broader program of public disclosures.⁵ The broader program would have both a wider geographic reach, covering the new jurisdictions, and would include detail on a wider array of corporate hiring and purchasing practices.⁶

*2 On May 2, 2016, the Commissioner of the Minnesota Department of Commerce (Commissioner), Michael Rothman, jointly, with the Insurance Commissioners of the other collaborating jurisdictions, issued a letter relating to the new program. The program was denominated as the Multistate Insurance Diversity Survey (MIDS). The announcement letter instructed that all insurance companies with written national premiums of \$300 million or more, and that are licensed in one of the six participating jurisdictions, were required to submit responses to the 2016 MIDS by September 1, 2016.⁷ The reporting requirements were aimed at encouraging "increased procurement from the nation's diverse suppliers and greater diversity on insurer governing boards."⁸ As the announcement letter explained:

The survey questions are focused on two diversity issues: supplier diversity and governing board diversity. The survey questions seek information about each company's supplier diversity program, outreach efforts, and procurement data with diverse suppliers, and are intended to facilitate supplier relationships between insurers and the nation's diverse businesses. Diverse businesses include: Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs), Disabled Veteran Business Enterprises (DVBES), and LGBT Business Enterprises (LGBTBEs). The second part of the survey focuses on the demographics of each governing board, as well as the company's outreach efforts to diversify, in order to examine the state of leadership diversity within the insurance industry.⁹

Lastly, the announcement letter instructed that the replies to the survey's questions would be available (in some form) to the public on December 1, 2016.¹⁰

The survey questions cover a wide-range of operational matters, including:

- (a) the mission statements of the company's board of directors and board committees on increasing the diversity of the board of directors;
- (b) "all outreach and communication practices" to diversify the company's board of directors;
- (c) how diversity "strategies and practices have been successful in establishing relationships with diverse candidates for board positions";

(d) a timeline and “any other details available at this time” relating to a supplier diversity program and efforts to implement supplier diversity policy statements of the company;

(e) “all company ... outreach and communication strategies that are conducted specifically to diverse businesses”;

(f) “any outreach and communication strategies and practices about supplier diversity conducted internally to company ... employees”;

(g) explanation of the company's efforts to encourage and track the procurements of the company's primary suppliers to subcontract with diverse businesses; and,

(h) detailed descriptions of the company progress and best practices “with regards to supplier diversity”¹¹

*3 Moreover, the survey likewise sought detail as to the dollar amounts of contracts that were routed from each insurance company in favor of Women-owned Business Enterprises, Minority-owned Business Enterprises, Disabled Veteran-owned Business Enterprises and Lesbian, Gay, Bisexual, Transgender-owned Business Enterprises.¹² The disclosures as to the dollar amount of the contracting opportunities awarded to each category of vendors was to be further segmented into one of 14 different reporting classifications:

Advertising / Marketing	Information Technology	Real Estate
Financial Services	Office Supplies	Travel / Entertainment
Claims Services	Print Services	Legal Services
Facilities	Professional Services	Other ¹³
Human Resources	Telecommunications	

¹³ *Id.*

PCI has 359 members licensed to issue insurance in the State of Minnesota.¹⁴ PCI is a trade association of nearly 1,000 insurance companies and advocates for its members' policy positions in the legislatures of all 50 states and in Washington, D.C.¹⁵

PCI asserts that its members will be harmed if they are required to complete the survey and have the substance of those replies placed into the public domain. First, it maintains that the staff time, resources and effort necessary to assemble accurate replies to the survey questions is considerable.¹⁶ Second, it argues that the planned placement of these disclosures into the public domain makes valuable and confidential business information freely accessible to those who compete in the insurance market with its members.¹⁷

By way of a letter dated June 14, 2016, PCI and three other trade associations inquired as to the legal basis for insisting upon responses to the MIDS. In a letter dated August 10, 2016, the insurance commissioners from the six participating jurisdictions made a joint response. As to insurers licensed in Minnesota, the commissioners maintained that the statutory authority to “require insurers to respond to the survey” and for survey responses to be “shared among the participating states,” was found in *Minn. Stat. §§ 45.027, subd. 1a, 60A.03 (2016)*.¹⁸

Minn. Stat. § 45.027 (2016), reads in relevant part:

Subdivision 1. **General powers.** In connection with the duties and responsibilities entrusted to the commissioner, and Laws 1993, chapter 361, section 2, the commissioner of commerce may:

(1) make public or private investigations within or without this state as the commissioner considers necessary to determine whether any person has violated or is about to violate any law, rule, or order related to the duties and responsibilities entrusted to the commissioner;

(2) require or permit any person to file a statement in writing, under oath or otherwise as the commissioner determines, as to all the facts and circumstances concerning the matter being investigated;

(3) hold hearings, upon reasonable notice, in respect to any matter arising out of the duties and responsibilities entrusted to the commissioner;

*4 (4) conduct investigations and hold hearings for the purpose of compiling information related to the duties and responsibilities entrusted to the commissioner;

(5) examine the books, accounts, records, and files of every licensee, and of every person who is engaged in any activity regulated; the commissioner or a designated representative shall have free access during normal business hours to the offices and places of business of the person, and to all books, accounts, papers, records, files, safes, and vaults maintained in the place of business;

(6) publish information which is contained in any order issued by the commissioner;

(7) require any person subject to duties and responsibilities entrusted to the commissioner, to report all sales or transactions that are regulated. The reports must be made within ten days after the commissioner has ordered the report. The report is accessible only to the respondent and other governmental agencies unless otherwise ordered by a court of competent jurisdiction; and

(8) assess a natural person or entity subject to the jurisdiction of the commissioner the necessary expenses of the investigation performed by the department when an investigation is made by order of the commissioner. The cost of the investigation shall be determined by the commissioner and is based on the salary cost of investigators or assistants and at an average rate per day or fraction thereof so as to provide for the total cost of the investigation. All money collected must be deposited into the general fund. A natural person or entity licensed under chapter 60K, 82, or 82B shall not be charged costs of an investigation if the investigation results in no finding of a violation. This clause does not apply to a natural person or entity already subject to the assessment provisions of [sections 60A.03](#) and [60A.031](#).

Subd. 1a. **Response to department requests.** An applicant, registrant, certificate holder, licensee, or other person subject to the jurisdiction of the commissioner shall comply with requests for information, documents, or other requests from the department within the time specified in the request, or, if no time is specified, within 30 days of the mailing of the request by the department. Applicants, registrants, certificate holders, licensees, or other persons subject to the jurisdiction of the commissioner shall appear before the commissioner or the commissioner's representative when requested to do so and shall bring all documents or materials that the commissioner or the commissioner's representative has requested.

[Minn. Stat. § 60A.03](#) reads in relevant part:

Subd. 2. **Powers of commissioner.** The commissioner shall have and exercise the power to enforce all the laws of this state relating to insurance, and shall enforce all the provisions of the laws of this state relating to insurance in the manner provided by the laws defining the powers and duties of the commissioner of commerce, or, in the absence of any law prescribing the procedure, by any reasonable procedure the commissioner prescribes

*5

Subd. 9. **Confidentiality of information.** The commissioner may not be required to divulge any information obtained in the course of the supervision of insurance companies, or the examination of insurance companies, including examination related correspondence and work papers, until the examination report is finally accepted and issued by the commissioner, and then only in the form of the final public report of examinations. Nothing contained in this subdivision prevents or shall be construed as prohibiting the commissioner from disclosing the content of this information to the insurance department of another state, the National

Association of Insurance Commissioners, the National Association of Securities Dealers, or any national securities association registered under the Securities Exchange Act of 1934, if the recipient of the information agrees in writing to hold it as nonpublic data as defined in section 13.02, in a manner consistent with this subdivision. This subdivision does not apply to the extent the commissioner is required or permitted by law, or ordered by a court of law to testify or produce evidence in a civil or criminal proceeding. For purposes of this subdivision, a subpoena is not an order of a court of law.

On September 2, 2016, PCI petitioned for an order under [Minn. Stat. § 14.381](#). PCI asks this tribunal to direct the Department to cease enforcement of the requirement that the covered insurers complete the MIDS.¹⁹ PCI maintains that the requirement that these insurers complete the MIDS is not based upon any Minnesota statute or rule, and is beyond the Commissioner's authority under [Minn. Stat. §§ 45.027](#) and [60A.03](#). It insists that the directive to complete the survey amounts to an unpromulgated rule, in violation of the Minnesota Administrative Procedure Act.

On September 16, 2016, the Department filed a response to PCI's petition. The Department maintained that PCI did not have standing to request any relief under [Minn. Stat. § 14.381](#); the relief requested by PCI could not be granted; and the Commissioner's request for information about the hiring and contracting practices of Minnesota insurers was not a "rule," as that term is used in the Minnesota Administrative Procedure Act.²⁰ It requested dismissal of PCI's petition.²¹

On October 28, 2016, counsel for PCI and the Department participated in an oral argument on the claims made in the petition and the Department's response.²² During the argument, the Department maintained that while it was likely that there was a limit on the Commissioner's authority to demand information from Minnesota insurers, it could not identify any particular data that the Commissioner could not demand.²³

On November 21, 2016, by way of a letter from counsel, the Department asserted that it "will not take any enforcement action against insurers for not responding to the 2016 Multistate Insurance Diversity Survey."²⁴ Because the Department maintains that this declaration moots the dispute between the parties, it requested both that PCI withdraw its petition, and that the Administrative Law Judge refrain from acting upon PCI's claims until, at the earliest, PCI could submit a response to the November 21 letter. The Department also argued that to the extent that PCI did not voluntarily withdraw its petition, PCI's claims should be dismissed on the grounds of mootness.²⁵

*6 PCI asserts that, notwithstanding the November 21 declaration, it has active and viable claims for relief.²⁶

Analysis

1. Are PCI's Claims Moot?

PCI maintains that the Department's pledge to refrain from any enforcement action against insurers for not responding to the 2016 survey leaves unanswered the question of whether the Commissioner still claims the authority to require the disclosure of insurer hiring and vendor data and the power to penalize any future failure to make these disclosures. PCI argues that if the Department can insist upon dismissal of the petition at this stage of the proceedings, its claims are "capable of repetition, yet evade review."²⁷

The Administrative Law Judge agrees. In the case of *Kahn v. Griffin*,²⁸ the Minnesota Supreme Court detailed the legal standards for applying the mootness doctrine. As Justice Paul H. Anderson explained:

The [United States] Supreme Court has determined that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine is 'limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.' Additionally, we will not deem a case moot, and thus will retain jurisdiction, if the case is 'functionally justiciable' and is an important public issue "of statewide significance that should be decided immediately."²⁹

In the view of the Administrative Law Judge, all three factors cited by the *Kahn* court weigh in favor of resolving PCI claims. After development of the hearing record and the submission of detailed arguments, this case is "functionally justiciable." Further, given the multi-year nature of the survey program, and the express goal of the commissioners to "build upon" the successes obtained by California between 2012 and 2015, there is a reasonable expectation that the insurers would be subjected to similar actions in future years.³⁰ Lastly, the breadth of the commissioner's authority to demand detailed business information from insurers is an important public issue, of statewide significance, that should be decided immediately. PCI's claims for relief are not moot.

2. Does PCI Have Standing to Seek Relief?

Under *Minn. Stat. § 14.381, subd. 1(a)*, a person may petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that "an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule."³¹

The Department argues that PCI does not have the requisite legal standing to request a declaratory order, because the Commissioner has not sought any disclosures from PCI. PCI counters that on this, and other regulatory matters, its corporate purpose is to advocate on behalf of its member-companies.

*7 In the case of *Warth v. Seldin*,³² the U.S. Supreme Court addressed the circumstances in which an association may have standing in court to seek relief on behalf of its members. In that case, the Home Builders Association challenged a township's zoning practices on the grounds that those practices prevented their members from building lower-cost housing and earning additional profit. The township countered that the association did not suffer injury-in-fact from the zoning rules. As Justice Powell explained:

Even in the absence of injury to itself, an association may have standing solely as the representative of its members.... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

....

[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.³³

In this case, PCI has alleged that developing complete responses to the survey questions will require some of its member-insurance companies to incur substantial expenses and make public valuable business information that is now kept confidential.³⁴

Applying the factors from *Warth v. Seldin* in this case, it is clear that: PCI's member companies would have standing to sue in their own right; the regulatory and competitive interests that PCI seeks to protect are germane to the trade association's purpose; and, neither the claim that is asserted, nor the relief that is requested, requires the participation of any specific member covered by the disclosure requirements. PCI has standing to challenge the directive on behalf of its members.³⁵

3. Does the Commissioner's Disclosure Directive Qualify as a Rule?

The Minnesota Administrative Procedure Act (MAPA) defines a “rule” as: every 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.³⁶

*8 Further, interpretations of existing rules which “make specific the law enforced or administered by the agency,” and are not either long-standing positions of the agency or within the plain meaning of the statute, are deemed to be “interpretative rules.”³⁷

With limited exceptions, that are not applicable in this case, an agency's interpretative rules are valid only if they are promulgated in accordance with MAPA.³⁸

The Department's statement that the covered insurers are required to “respond to the survey” and that “[p]articipating Commissioners have the discretion to require any licensed insurer, even those that collect less than \$300 million in written national premiums, to complete the survey,” are “statements of general applicability.”³⁹ Moreover, as to insurers with \$300 million in written national premiums, the declaration makes clear that no policy will be developed later, on an individualized, case-by-case basis. Every Minnesota insurer that exceeds this sales threshold must make the disclosures.⁴⁰

The Department's May 2, 2016 directive that “[t]he deadline to submit the survey is September 1, 2016” was also a “statement of future effect.”⁴¹

For these reasons, unless some exception to the requirement to promulgate an interpretative rule applies, the disclosure directive is an administrative ““rule.”

4. Does the Agency's Pronouncement Follow Directly from the Plain Meaning of the Statute?

The Department does not point to any administrative rule obliging disclosure of data to the MIDS program. Instead, the Department asserts that the demand for data is part of the Commissioner's powers to conduct investigations under [Minn. Stat. §§ 45.027](#) and [60A.03](#).

It is important to note that when an agency's interpretation of the law directly follows from the plain meaning of a statute, the agency is not deemed to have engaged in rulemaking.⁴² Here, however, the Department's disclosure directive does not result from a plain reading of either statute.

It cannot be that the Commissioner is carrying out a statutory duty to make these inquiries, because none of the key words of the MIDS program appear in the underlying statutes. The terms “supplier,” “veteran,” “lesbian,” “gay,” “bisexual,” “transgender” or “minority” do not appear in either Chapters 45 or 60A (2016) of Minnesota Statutes. The word “procurement” does appear twice in Chapter 60A, but in a very different context - the unlawful sale of insurance;⁴³ not the kind of third-party vendor and subcontracting arrangements scrutinized by the survey.

In fact, to the extent that MIDS initiative obliges confidential business data to be disclosed to the public, it contravenes the protections in these same statutes. [Minn. Stat. § 45.027, subd. 9](#), makes clear that confidential business information collected by the Department is ordinarily disclosed only to an “appropriate person or agency” following a determination that the disclosures will “aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest.”⁴⁴ Even in those rare circumstances, the planned disclosure must be first approved by the Attorney General with a notice sent to the “chairs of the senate and house of representatives judiciary committees” describing “the disclosure and the basis for it.”⁴⁵

*9 Similarly, [Minn. Stat. § 60A.031](#) provides that the Commissioner's inquiries under Chapter 60A follow from a formal examination process that is “related to the enforcement of the insurance laws, or to ensure that companies are being operated in a safe and sound manner”⁴⁶ In those circumstances, the Commissioner issues a written order “stating the scope of the examination and designating the person responsible for conducting the examination”;⁴⁷ which culminates in the production of a formal report that is verified by the examiner;⁴⁸ and the adoption of written findings and conclusions by the Commissioner.⁴⁹ Moreover, the “working papers, recorded information, documents and copies thereof produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination,” are to be maintained as confidential records and shielded from public disclosure.⁵⁰ Yet, none of these statutory protections are afforded to Minnesota insurers under the MIDS initiative.

For these reasons, the disclosures sought by the Commissioner do not implement a particular statutory directive.

5. Does the Directive to Disclose Exceed the Commissioner's Authority Under [Minn. Stat. § 45.027, subd. 1a](#)?

[Minn. Stat. § 45.027, subd. 1\(1\)](#), provides that “in connection with the duties and responsibilities entrusted to the commissioner,” the Commissioner of Commerce may:

make public or private investigations within or without this state as the commissioner considers necessary to determine whether any person has violated or is about to violate any law, rule, or order related to the duties and responsibilities entrusted to the commissioner;

....

examine the books, accounts, records, and files of every licensee, and of every person who is engaged in any activity regulated; the commissioner or a designated representative shall have free access during normal business hours to the offices and places of business of the person, and to all books, accounts, papers, records, files, safes, and vaults maintained in the place of business⁵¹

Further, [Minn. Stat. § 45.027, subd. 2](#), provides:

For the purpose of any investigation, hearing, proceeding, or inquiry related to the duties and responsibilities entrusted to the commissioner, the commissioner or a designated representative may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records that the commissioner considers relevant or material to the inquiry.⁵²

The dispute in this case centers on the meaning of the phrase “related to the duties and responsibilities entrusted to the commissioner” - which is repeated three times in the statutes above. PCI argues that the recruiting and vendor selection practices of its members have nothing to do with the sale of insurance products in Minnesota. It maintains that the Commissioner's inquiries are not “related to the duties and responsibilities entrusted to the commissioner.” The Department disagrees. It asserts that to the extent a company holds an insurance license, any activity that the company later engages in is “related to the duties and responsibilities entrusted to the commissioner.”

***10** In the view of the Administrative Law Judge, the suggestion that an insurance company does not undertake any activity that is beyond the reach of the Commissioner to inquire upon, as much as the Commissioner wishes, and as often as he wishes, is very troubling. It inverts the entire statutory scheme. Particular *duties* are entrusted to the Commissioner; not particular companies.

Moreover, to the extent that any connection is drawn between Minnesota's regulatory standards for insurance sales, and the requested data, that connection is disclaimed by the commissioners themselves. They wrote: “In response to your concern about ‘financial data,’ we would like to clarify - *we are not collecting data that is central to an insurer's level of solvency*; instead the survey looks only at data that reflects the procurement practices of the insurer as it relates to supplier diversity.”⁵³

Without a clear linkage to either a duty or a responsibility that has been entrusted to the Commissioner, by a law, the Commissioner's demand for survey responses exceeds his authority under [Minn. Stat. § 45.027](#).

6. Does the Directive to Disclose Exceed the Commissioner's Authority Under [Minn. Stat. § 60A.03](#)?

[Minn. Stat. § 60A.03, subd. 2](#), provides that the Commissioner of Commerce:

shall have and exercise the power to enforce all the laws of this state relating to insurance, and shall enforce all the provisions of the laws of this state relating to insurance in the manner provided by the laws defining the powers and duties of the commissioner of commerce⁵⁴

As it was with [section 45.027](#), cited above, to say that the Commissioner has the power to enforce all state laws relating to insurance, does not permit the Commissioner to make any demand he wishes from those who sell insurance. The authority to act, under [Minn. Stat. § 60A.03](#), comes first from some other required standard for insurers.

Yet, the Department does not point to any requirement in state law requiring insurers to pursue particular diversity or contracting goals. Undertaking such programs, or reporting on their progress, is not required by “the laws of this state relating to insurance”⁵⁵ Without a clear linkage to the enforcement of a law “relating to insurance,” the Commissioner's demand for survey responses exceeds his authority under [Minn. Stat. § 60A.03](#).

For all of these reasons, PCI is entitled to a determination that the Department is unlawfully enforcing, or attempting to enforce a policy or similar pronouncement as though it were a duly adopted rule.

E. L. L.

1 *See* Cal. Ins. Code § 972.2 (2012).

2 Cal. Ins. Code § 972.2(a) (2016).

3 Cal. Ins. Code § 972.2(f) (2016).

4 Cal. Ins. Code § 972.2(d) (2016).

5 *See* Petition (Pet.), Exhibit (Ex.) Exhibit A.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 Pet., Ex. A, 2016 Multistate Insurance Diversity Survey.

12 *Id.*

14 Affidavit (Aff.) of Paul C. Blume at ¶ 4 (Sept. 1, 2016).

15 *Id.* at ¶ 3.

16 *Id.* at ¶¶ 17-18.

17 *See id.* at ¶¶ 9, 17.

18 Pet., Ex. C at 3.

19 Pet. at 1-2; [Minn. Stat. § 14.381, subd. 1\(a\)](#).

20 Department's Response at 1 (Sept. 16, 2016).

21 *Id.* at 3.

22 *See* Second Prehearing Order (Sept. 27, 2016).

23 Digital Recording (Sept. 16, 2016) (on file with the Minn. Office Admin. Hearings).

24 Letter from Counsel (Nov. 21, 2016).

25 *Id.*

26 Letter from Counsel (Nov. 23, 2016).

27 *Id.* at 2-3.

28 [Kahn v. Griffin](#), 701 N.W.2d 815 (Minn. 2005).

- 29 *Kahn*, 701 N.W.2d at 821-22 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) and *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn.2000)).
- 30 Pet., Ex. A at 1.
- 31 Minn. Stat. § 14.381, subd. 1(a).
- 32 *Warth v. Seldin*, 422 U.S. 490 (1975).
- 33 *Warth*, 422 U.S. at 511, 515 (citations omitted); *see also*, *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012).
- 34 *See* Blume Aff. at ¶¶ 17-18.
- 35 *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977); *accord*, *Builders Ass'n of Minnesota v. City of St. Paul*, 819 N.W.2d 172, 176-77 (Minn. Ct. App. 2012); *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532-33 (Minn. Ct. App. 2004).
- 36 Minn. Stat. § 14.02, subd. 4 (2016).
- 37 *See, e.g., Mapleton Community Home, Inc. v. Minnesota Dep't of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) (“[a]n agency interpretation that “make[s] specific the law enforced or administered by the agency’ is an interpretive rule that is valid only if promulgated in accordance with the [[Minnesota Administrative Procedures Act]”) (quoting *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979)).
- 38 *See* Minn. Stat. § 14.03, subd. 3(b) (2016); *In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. Ct. App.), *review denied* (Minn. 1993) (citing *Mapleton Community Home*, and *Minnesota-Dakotas Retail Hardware Ass'n, supra*).
- 39 Pet., Ex. C. at 3.
- 40 *Compare Reserve Life Insurance Co. v. Commissioner of Commerce*, 402 N.W.2d 631 (Minn. Ct. App.) *review denied* (Minn. 1987) (it was reasonable for the Commissioner to assess the validity of insurance policy provisions on a case-by-case basis where it would be “nearly impossible” to state in advance all of the possible applications of the statutory terms “unfair, inequitable, misleading (and) deceptive”).
- 41 Pet., Ex. A at 1.
- 42 *See, e.g., Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) (“Generally, if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule”).
- 43 *See* Minn. Stat. § 60A.209, subds. 2, 6.
- 44 Minn. Stat. § 45.027, subd. 7(b)(f).
- 45 *Id.*
- 46 Minn. Stat. § 60A.031, subd. 1.
- 47 Minn. Stat. § 60A.031, subd. 2a.
- 48 Minn. Stat. § 60A.031, subd. 4(a).

- 49 Minn. Stat. § 60A.031, subd. 4(d)(1).
- 50 Minn. Stat. § 60A.031, subd. 4(f); *see also*, Minn. Stat. § 60A.03, subd. 9.
- 51 Minn. Stat. § 45.027, subd. 1(1), (5).
- 52 Minn. Stat. § 45.027, subd. 2.
- 53 Pet., Ex. C at 2 (emphasis added).
- 54 Minn. Stat. § 60A.03, subd. 2.
- 55 *Id.*

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