

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Proposed Amendments  
to Rules Governing Open Burning,  
Minn. Rules Parts 7005.0705 to  
7005.0815.

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on April 16, 1991, at 9:00 a.m. in the Pollution Control Agency Board Room, Lower Level, 520 Lafayette Road North, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Pollution Control Agency (MPCA or Agency) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the MPCA after initial publication are impermissible substantial changes.

Ann E. Cohen, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the MPCA. The MPCA's hearing panel consisted of Patrick J. Mulloy, Planning and Rule Coordinator of the MPCA's Air Quality Division; Jacquelyn Deneen, Pollution Control Specialist, Air Quality Division; and Norma L. Florell, Senior Pollution Control Specialist, Air Quality Division.

Thirty-five persons attended the hearing. Twenty-eight persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

Several persons requested near the end of the comment period following the hearing that the hearing be reconvened in Lake of the Woods County in order for the Administrative Law Judge to view some of the open burning of peat which would be affected by the proposed rules. The Judge suggested that such requests be directed to the Commissioner of the MPCA, either for the Commissioner to cause MPCA staff personnel to view such burning before the comment period expired or to persuade the Commissioner to request a reconvening before the Administrative Law Judge. No site visit was conducted, and the Commissioner declined to request a reconvening of the hearing on the ground that the proffered evidence would not improve the record already before the Judge on the peat burning issue. The Administrative Law Judge, in an order issued May 3, 1991, declined to add an additional hearing date to the rulemaking proceeding on the grounds that the Agency was unwilling or unable to make the suggested site visit before the closure of the comment period, the Agency declined to request the Judge to reconvene the hearing to receive the proffered evidence, and the duly-noticed hearing on April 16, 1991 satisfied due process of law.

The record remained open for the submission of written comments for twenty calendar days following the date of the last hearing, to May 6, 1991. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. At the close of business on May 9, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The MPCA submitted written comments responding to matters discussed at the hearings and proposing changes in the proposed rules.

This Report must be made available for review to all affected individuals upon request for at least five working days before the Agency takes any further action on the rules. The Agency may then adopt a final rule or modify or withdraw its proposed rule. If the MPCA makes changes in the rule other than those recommended in this Report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the MPCA must submit it to the Revisor of Statutes for a review of the form of the rule. The Agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural Requirements

1. On February 19, 1991, the MPCA filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes;
- (b) A copy of the MPCA's Authorizing Resolution;
- (c) A copy of the MPCA's proposed Order for Hearing;
- (d) The Notice of Hearing proposed to be issued; and,
- (e) The Statement of Need and Reasonableness (SONAR).

2. On March 5, 1991, the MPCA mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and all persons to whom the Agency gave discretionary notice.

3. On October 29, 1990, a copy of the proposed rules were published at 15 State Register 993. A Notice of Hearing referencing the earlier publication of the rules was published on March 11, 1991, at 15 State Register 2035.

4. On March 18, 1991, the MPCA filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed;
- (b) A photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules.
- (c) a copy of the Notice of Solicitation of Outside Opinion together with all materials received in response to that notice.

- (d) The Agency's certification that its mailing list was accurate and complete and the Affidavit of Mailing the Notice to all persons on the MPCA's mailing list;
- (e) an Affidavit of Additional Discretionary Notice; and,
- (f) a copy of the letters requesting a rule hearing.

5. The MPCA Notice of Hearing was missing a sentence informing persons that written comments must be received by the Judge no later than 4:30 p.m. on the closing dates of the comment and response periods. To correct that omission, the MPCA published a Corrected Notice on March 25, 1991, at 15 State Register 2141. In addition, notice of the corrected language was mailed to the same persons who received mailed notice for the rulemaking. The record contains no evidence that any person was prejudiced by the Agency's failure to publish the information in the original Notice of Hearing. The same information added to the Notice was expressly stated by the Administrative Law Judge at the hearing. The omission from the Notice of Hearing does not constitute a procedural defect in this rulemaking proceeding substantial enough to require republication and a new rulemaking proceeding.

#### Nature of the Proposed Rules and Statutory Authority.

6. Through Minn. Stat. § 116.07, subd. 4 (1990), the Minnesota Legislature authorized the MPCA to promulgate rules to prevent, abate or control air pollution. This is a general rulemaking authority to establish controls on air pollution of all sorts. Rules governing open burning have been adopted by the MPCA as Minn. Rule parts 7005.0700 to 7005.0820. The proposed rules modify the existing rules to take into account statutory changes and to place additional restrictions on the burning practices which have occurred in Minnesota. The Administrative Law Judge concludes that the MPCA has statutory authority to adopt these rules.

#### Small Business Considerations in Rulemaking.

7. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. Pursuant to Minn. Stat. § 116.07, subd. 6, the MPCA is also required to give due consideration to the "establishment, maintenance, operation, and expansion of business, commerce ... and other economic factors and other material matters affecting the feasibility and practicality of any proposed action ...." The MPCA has stated in its SONAR and one of its Notices:

The proposed rules are not expected to have a significant impact on small businesses, including small farms. Open burning may be conducted for ground thawing for utility repair and construction, disposal of trees, brush, grass, and other vegetative matter in the development and maintenance of land, for the disposal of building material generated by construction, or for farm disposal of solid waste where regular pick up of solid waste is not available.

SONAR, at 33; Notice of Intent to Adopt Rules Without a Public Hearing, at 2. The MPCA opined that "the limits placed on open burning are not onerous." SONAR, at 33. The Agency's stated reasons for not setting a lesser standard on small businesses are that the public would not understand the different treatment and that a less stringent standard might not meet the requirements

of the United States Environmental Protection Agency (EPA). The methods that the MPCA is required to consider to reduce the rules' impact on small businesses are set forth in the agency's SONAR. SONAR, at 33. The MPCA has considered these methods for reducing the impact on small business and thus has complied with Minn. Stat. § 14.115, subd. 2. The MPCA has also complied with the requirements of Minn. Stat. § 116.07, subd. 6 in considering the feasibility and practicality of the proposed rules. That statutory requirement will be discussed more fully at Finding 10, below. The burden imposed by the proposed rules will be discussed when the need and reasonableness of each part of the proposed rules is analyzed.

#### Fiscal Notice.

8. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules will not require expenditures by local governmental units or school districts in excess of \$100,000 in either of the two years immediately following adoption, and thus no notice is needed.

#### Impact on Agricultural Land.

9. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. Minn. Stat. § 17.81, subpart 2 defines "action which adversely affects" agricultural land as: 1) acquisition or lease of land for nonagricultural purposes; 2) issuing permits for nonagricultural purposes; or 3) funding activities not consistent with agricultural use. Another purpose served by the requirements of these statutory provisions is to ensure that the Department of Agriculture is informed of the effect of the proposed rules. The Department of Agriculture has participated in this rulemaking proceeding by filing written comments. The rules proposed by the MPCA do not fall within any of the statutory categories of adverse impact. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

#### Economic Impact.

10. Minn. Stat. § 116.07, subd. 6 (1988) requires the MPCA, in a rulemaking context, to consider the impact which economic factors may have on the feasibility and practicability of the proposed rules. The MPCA has taken the position that the proposed rules eliminate the need for persons to obtain a permit from the MPCA and do not restrict persons from conducting burning activities. However, many commentators objected to the proposed rules on the ground that the new prohibition against smoldering fires will make burning of peat lands (to render them suitable for farming) impossible. The economic impact of that portion of the rule will be discussed at Finding 26, below. In its SONAR, the MPCA states that it has considered the available information on the economic impacts of the proposed rule and the MPCA anticipates no significant economic impacts arising from the proposed rules. The MPCA has adequately considered the economic feasibility and practicability of implementation of the proposed rules as required by Minn. Stat. § 116.07, subd. 6.

Proposed Rule 7005.0705 - Definitions.

11. Proposed rule part 7005.0705, as modified by the MPCA after the hearing in this matter, is composed of eleven subparts, each defining a term used in the proposed rules. As with the remainder of this Report, only those items which received comment or require analysis will be expressly referred to in this Report. Every portion of the rule not referred to in this Report is found to be needed and reasonable.

12. Subpart 4 defines "delegated authority" for the purpose of issuing permits for nonexempt open burning. Towns (townships), home rule charter cities, and statutory cities are the only identified entities which can be a delegated authority. Carver County objected to the exclusion of counties from the definition as an infringement on the authority usually exercised by counties. The MPCA responded that counties are entitled to establish their own permitting process, but the MPCA had no objection to including counties in the definition. The delegation provision is intended to put the responsibility for issuing permits on the entity which will receive the most direct impact from open burning. Limiting the delegated authority to issue permits to towns, home rule charter cities, and statutory cities is needed and reasonable to carry out the purposes of the proposed rules. Changing the rule to include counties would also be needed and reasonable. Any town or city wishing to further restrict open burning may do so, through the ordinance power of those towns or cities. The addition of counties as permitting entities in the proposed rule is not a substantial change. It is suggested that the MPCA add counties as permitting entities for purposes of clarity.

13. Bruce E. Benson, Solid Waste Officer of Carlton County; the Minnesota Farm Bureau Federation; and Goodhue County proposed that the MPCA define "land used for farming" as that phrase appears in proposed rule 7005.0795. The MPCA agreed with the suggestion and added that definition as subpart 6, renumbering the following subparts accordingly. The definition proposed by the MPCA for "land used for farming" is to describe it as "land which is in agricultural use as defined in Minn. Stat. § 17.81." That statute contains definitions for both agricultural land and agricultural use. Minn. Stat. § 17.81, subs. 3 and 4. The proposed definition of "land used for farming" is needed and reasonable. The new language arose at the suggestion of a commentator and does not constitute a substantial change. The remaining definitions were not objected to and have been shown to be needed and reasonable.

Proposed Rule 7005.0715 - Open Burning Restrictions.

Subpart 1 - Open Burning Without a Permit.

14. Proposed rule part 7005.0715, subp. 1 sets the requirements for conducting open burning without a MPCA permit. This subpart is not found in prior rules and was proposed by the MPCA to conform to Minn. Stat. § 17.135 (1989), which prohibits state agencies, other than the Department of Natural Resources (DNR), from requiring a permit to dispose of solid waste produced through farming. The MPCA expanded on that legislative initiative to remove the permit requirement formerly imposed by Minn. Rule 7005.0750 on open burning for a variety of purposes. The MPCA based widening the scope of open burning for which no permit is required on the regulatory burden the permitting system imposed on the Agency's budget. Based on comments received

In this rulemaking, the MPCA changed the term "a permit" to "an agency permit" to clarify that other permit requirements may still apply. Subpart 1 is found to be needed and reasonable. The change in the rule language is found to be necessary and reasonable to clarify the scope of the subpart and does not constitute a substantial change.

#### Subpart 2 - Open Burning With a Permit.

15. Subpart 2 lists the types of open burning for which a permit is still required. This subpart compiles burning restrictions from throughout the existing rules. The types of open burning for which a permit is required are: 1) permanent tree and brush open burning sites; 2) firefighter instruction; 3) open burning on incorporated land or in a nonattainment area; and 4) open burning in forest areas. The only type of open burning not already subject to a rule requiring a permit is that which occurs on incorporated land or in a nonattainment area. The permit requirement for incorporated land is based on the need for local authorities to be aware of each instance of open burning in densely populated areas. Requiring a permit for open burning in nonattainment areas allows the MPCA to limit further emissions where the air quality is already substandard by federal EPA requirements. The Judge finds that the permit requirement for the types of open burning listed in subpart 2 is needed and reasonable.

#### Subpart 3 - Purposes for Burning.

16. Under subpart 3, as modified, open burning can only be performed for the purposes set out as items A through G. The MPCA modified item E to clarify what Minnesota Department of Agriculture practices were included in subpart 3. The new language clarifies that diseased shade trees, diseased or infested nursery stock, diseased bee hives, and dunnage may be burned, if the burning is done in accordance with the appropriate statute or rule. Item G has been modified by the MPCA to name explicitly some of the alternative disposal methods (recycling, reuse, or chipping) which must be performed if they are a practical alternative to open burning. The changes to items E and G are found to be necessary and reasonable and do not constitute substantial changes, since they only clarify the meaning of the proposed rules. The other items are all existing purposes for open burning under Minn. Rule 7005.0750, subp. 1. The Judge finds the purposes listed in subpart 3 to be needed and reasonable to restrict open burning to those purposes consistent with limiting excessive air emissions. That having been said, subpart 3 is not consistent with Minn. Stat. § 17.135 (allowing disposal of farm waste by open burning), and not consistent with allowing open burning for recreational fires. The omission of these two items from subpart 3 does not constitute a defect in the proposed rules, since they are impliedly included in subpart 3 by the express language of proposed rules 7005.0785 and 7005.0795. Nevertheless, these two purposes should be listed specifically in subpart 3 to ensure that the subpart states clearly that open burning for those purposes is allowed under these rules. Should the MPCA choose to make that change for clarity purposes, subpart 3 is found to remain needed and reasonable. The change would not constitute a substantial change.

The Minnesota Farm Bureau Federation suggested that some pesticide containers are appropriate for disposal by burning and that the rules be modified to expressly permit that practice. The MPCA declined to change the rule to include pesticide containers, on the grounds that while some

containers are already eligible to be burned as solid waste, other containers constitute hazardous waste and cannot be burned. The MPCA asserts that, until labelling standards are uniform, any provision discussing the open burning of pesticide containers will cause confusion and not aid the regulated public in adhering to all the regulations governing waste. In addition, a pesticide container return program is being instituted. Once this program is established, returning pesticide containers may become the exclusive method of disposal. The MPCA's refusal to reference pesticide containers for burning does not render the proposed rules unreasonable.

#### Subpart 4 - Conditions.

17. In order to perform open burning, the MPCA imposes conditions in subpart 4, items A through J, as modified. The conditions are almost identical to those found in Minn. Rule 7005.0750, subp. 2. Each item shall be discussed individually.

#### Item A - Prevailing Wind.

18. Item A, as originally proposed, required the prevailing wind be away from neighboring houses and must not exceed 15 miles per hour to conduct open burning. The MPCA deleted the wind speed requirement on the strength of a comment received from the DNR that the wind speed was not a factor in the start of wildfires. The DNR comment indicated that wind direction is the crucial factor in the start of such fires. Supplemental SONAR, at 8. The remainder of the rule is the same as the existing rule regarding the prevailing wind. Item A, as modified, is found to be needed and reasonable to prevent uncontrolled fires and property damage. The change removes unsupported language and does not constitute a substantial change.

#### Item B - Distance from Roads.

19. The MPCA published originally a specific distance standard (300 feet) at which fires must be kept away from roadways. The DNR suggested that the 300 foot limitation be removed to promote wildlife management and right-of-way management. The MPCA agreed that burning within 300 feet would not necessarily cause a traffic hazard and now recommends deletion of the 300 foot limitation. The item, as modified, requires the burning to be conducted as far away from roads as possible and controlled to prevent traffic hazards. Removal of the specific distance requirement is found to be needed and reasonable to permit better management of rights-of-way and wildlife areas where the burning within 300 feet of a roadway does not automatically create a hazard or nuisance. The modification was suggested by commentators and does not constitute a substantial change.

The modified language is identical to the existing rule, except for the use of "possible." The existing rule, Minn. Rule 7005.0750, subp. 2(B), uses "practical." The MPCA stated that it intends that "possible" be read as a synonym of "practical." "Possible" means "capable of happening." See American Heritage Dictionary at 967 (Second College Edition)(definition of "possible"). The usage note relating to the differences between "practical" and "possible" states "possible indicates that something is realizable . . . practical emphasizes the prudence, efficiency, or economy of an act, solution, or agent." Id. The Judge recommends, based on the nuance provided by each of those words, and the definition of "practical" being added by the MPCA to

these rules, that the MPCA use "practical" since the MPCA means "practical" in item B. Since "possible" is a synonym of "practical," however, the use of "possible" does not constitute a defect. The MPCA has shown that item B is needed and reasonable, as modified. The alteration does not constitute a substantial change.

#### Item C - Fire Code.

20. Item C, as modified, requires that open burning be conducted in accordance with the Minnesota Fire Code. The Judge suggested that the MPCA reference the Fire Code so that the regulated public might have notice of what requirements must be met. The MPCA has made that change, identifying both the article of the Code and the Minnesota Rule citation at which it appears. Since the proposed rule, as modified, refers to a Minnesota Rule, the statutory requirements for incorporating a document by reference do not apply. The original item included keeping the open burning at least 600 feet away from buildings, unless permission to burn closer is obtained from the occupants of those buildings. The DNR suggested that the 50 foot distance set in the Fire Code was more reasonable. The MPCA agreed with the DNR and deleted the distance requirement in favor of the Fire Code restrictions. The item is needed and reasonable to apprise persons conducting open burning of other applicable regulations. The proposed changes add citations and alter the substantive requirements of the item to conform with existing limitations. The proposed modifications are necessary and reasonable and are found not to constitute substantial changes.

#### Item D - Distance from Landing Strips.

21. Item D requires open burning that will take place within one mile of an airport or landing strip be preceded by notice to the operator of that facility. The rule does not set a specific length of time prior to the start of the open burning by which the notification must be performed. At the hearing, the MPCA stated that the operators of affected landing strips did not express any need for notice other than immediately prior to the burning. The smoke likely to arise from open burning within a mile of a landing strip could interfere with the facility's operation. Some prior notice is needed to prevent the sudden closure of landing strips due to problems with visibility. The MPCA has shown that prior notice to landing strips is needed and reasonable. Since the facility operators did not want any specific time of notice in the rule, failing to add such a limit does not constitute a defect.

#### Item E - Pollution Alerts.

22. Under item E, open burning is prohibited over the duration of any agency-declared pollution alert. The substance of the item is identical to Minn. Rule 7005.0750, subp. 2(C). However, the item, as originally proposed, was not grammatically correct. The MPCA altered item E after the hearing to correct the syntax error. Item E, as modified, is needed and reasonable and the modification does not constitute a substantial change.

#### Item F - Notice to Officials.

23. Item F incorporates into the new rule the requirement of Minn. Rule 7005.0750, subp. 2(E), that notice of open burning be given to the local DNR officer and the local entity responsible for fire safety. The MPCA had



always required, and was not clear regarding when that notice need not be originally proposed language which indicated that notice to the DNR was not given. The MPCA modified the rule to clearly require notice to the DNR only when under DNR jurisdiction. The rule is needed and reasonable to ensure oversight by the responsible state agency and knowledge of the burning to the most affected local entity. The modification clarifies the item and is found to be needed and reasonable, and does not constitute a substantial change.

#### Item G - Fire Starting Devices.

24. The use of clean burning propane or other gas-burning devices to start the fire for open burning is mandated by item G. The U.S. Department of the Interior requested the addition of "drip torches" to the item as permissible fire starters. The MPCA explained that those devices are considered appropriate. MPCA's Response to Comments, at 10. The item is intended to prohibit the use of waste oil or other contaminated accelerant as the fire starter to prevent excessive smoke. Drip torches qualify as "other gas-burning devices" so long as contaminated fuel is not used. See Finding 36, below. Item G found to be needed and reasonable to limit the emissions from devices used to start open burning.

#### Item H - Person in Attendance.

25. Item H requires that a person be in attendance while the open burning is being conducted. Bill Mouw and a number of other Northern Minnesota farmers objected to this provision as being unreasonable since many fires for clearing land last for months. The MPCA responded that the purpose of requiring a person to be present is to prevent the fire from smoldering (and thereby producing excessive smoke). The fires likely to last a month or more will be smoldering through much of that period. Additionally, the variance process is available for those persons who wish to avoid the attendance requirement. Given the tendency of peat fires, variance applications are likely to be made for a waiver of the smoldering prohibition. A request for having no attendant for the fire can be included with the variance application. The attendance requirement is found to be needed and reasonable.

#### Item I - Prohibition Against Smoldering.

#### Item J - Wildlife Management Fires.

26. Dick Fyten, Doran Horner, Stan Cornelius, and many other Northern Minnesota farmers strenuously objected to item I of the proposed rules. This item sets a new requirement for open burning. That requirement is that open burning be conducted so that flame is constantly present and no smoldering occurs. The two practices which are likely to violate this standard are the burning of peat land to clear it for agriculture and the burning of forest or prairies for wildlife management. The burning of peat is important to persons with farms, particularly in Northern Minnesota counties, because the peat is not of the quality or quantity to be sold profitably. Burning is the less expensive method of clearing, compared to hauling which is the only other alternative. Crops planted in peat do not mature as readily and weeds are more prevalent in peat than in mineral soil.

Fires set in peat do not burn rapidly and then extinguish as do prairie fires. Rather, peat fires smolder, often for three to six months, before consuming all the available fuel. When a peat fire in agricultural land goes

out, the farmer will disk plow the residual peat and ash into the soil and commence planting. Peat burns best under certain climatological conditions, that is when the weather is hot and dry. Despite this, peat will burn during the winter, even under a covering of deep snow. Peat fires have the potential for going out of control and requiring active firefighting to extinguish. See Public Exhibit 28. One peat fire has required over one million gallons of water to put out. Id. Two peat fires in 1976 cost over one million dollars each to extinguish. Tr. II, at 288.

The emissions from peat fires can have harmful consequences on local residents. The MPCA has documented numerous complaints stemming from the volume of smoke present in the vicinity of extensive peat burning. The complaints arose from persons with respiratory ailments or persons who, owing to their physical condition, are sensitive to poor air quality. A number of public comments have been received in this rulemaking attributing health problems to smoke from open burning, and particularly peat fires. Additionally, dense peat smoke was the direct cause of a number of traffic accidents where vehicle drivers could not detect oncoming vehicles. In other accidents, automobiles left the road due to poor visibility. Other commentators stressed that the nuisance caused by peat smoke has had an adverse economic impact on resort business in the area, especially near Lake of the Woods. Based on these adverse impacts arising from peat burning, the MPCA has shown that prohibiting open burning from smoldering is needed.

Bill Mouw, Doran Horner, and Stan Cornelius argued that prohibiting smoldering fires was unreasonable because the effect of such a ban would be to eliminate an accepted and economical method of clearing land for agricultural uses. Based on Mr. Fyten's testimony, hauling the peat off of his farm would cost approximately \$16,000. Tr. I, at 112-13 and 144. He has cleared much of his farm by moving the peat onto five to eight acres and forming five foot "windrows" with the peat. Moving the peat in this fashion removes the land containing the peat from production. Mr. Fyten testified that cleared land in that area is worth approximately \$150 per acre. Tr. I, at 110. He had anticipated being able to burn the peat once it had adequately dried. The MPCA responded that, even without a variance, the peat may still be burned, but not left to smolder.

The Judge finds the prohibition against smoldering is reasonable. The testimony from persons with farms indicates that a relatively small acreage is peat covered. Other methods, such as bulldozing, can further reduce the amount of acreage kept out of production. Once windrows are established, there is no prohibition against setting fire to the peat, so long as the burning is kept at a stage where the peat is actually producing flames. What farmers will not be able to do under these rules is set fire to the peat and ignore it until the fire either self-extinguishes or becomes a nuisance (either by going out of control or smoldering). No one has maintained that peat cannot be burned without smoldering. The benefits to resort owners and residents of the area near farms with peat outweigh the limited impact the proposed rule will have on farmers. The impact on farmers will be further reduced, and the impact on others correspondingly increased, if variances are granted to allow farmers to follow their traditional practices in burning peat.

The U.S. Department of the Interior and the Nature Conservancy expressed concern that fires of natural origin and fires set to manage forests and prairies would be in violation of the prohibition against smoldering. The

MPCA responded to those comments by altering item I and adding item J. Both changes exempt fires to manage forests, prairies, and wildlife habitats from the no smoldering requirement. The reason for the exemption is that none of the exempted fires will last for the duration of peat fires and the smoke produced is not expected to be as dense as peat smoke. Item J requires any wildlife management burn to have a plan approved by the agency managing the open burning. These changes are needed and reasonable to not extend the prohibition against smoldering to open burning which does not produce smoke of the volume or duration of peat burning. The modifications were inspired by comments received by the MPCA, are found to be needed and reasonable and do not constitute substantial changes.

Proposed Rule 7005.0725 - Open Burning Prohibitions.

27. Proposed Rule 7005.0725 consists of eight subparts which identify items which may not be burned, processes which cannot be carried on by open burning, and times at which open burning may not take place. Subpart 1 prohibits the burning of materials which would produce noxious smoke and gives examples of those materials. Subpart 2 prohibits the burning of hazardous waste. After initial publication of these rules, the MPCA added the proviso that hazardous waste could be burned if in accordance with the appropriate rule (Minn. Rule 7045.0542, subp. 9). Subpart 3 prohibits the open burning of solid waste generated in industrial or manufacturing processes and solid waste from service or commercial establishments. The MPCA justified including service and commercial establishments on the grounds that such businesses usually produce the sort of waste which cannot be burned without producing noxious fumes and waste hauling services are usually available to such businesses. Subparts 1, 2 and 3 of proposed rule 7005.0725 are found to be needed and reasonable to prevent the open burning of materials which are hazardous to the environment. The modification to subpart 2 merely references another rule part, is needed and reasonable for clarity purposes and does not constitute a substantial change.

28. Subpart 4 prohibits the burning of demolition debris from commercial or institutional structures. The MPCA asserts that the debris from such buildings contains the same items which are inappropriate for open burning and prohibited by other subparts in proposed rule 7005.0725. The Minnesota Farm Bureau Association requested clarification that farm buildings are not commercial structures. In response to that request, the MPCA added a sentence to subpart 4 stating that farm buildings are not commercial structures. The modification to exclude farm buildings from the commercial structure prohibition is needed and reasonable and not a substantial change. The MPCA may also wish to limit the effect of categorizing farm buildings as noncommercial structures to this rule part. Prefacing the added sentence with the phrase, "For the purposes of this subpart," will expressly limit and clarify this exemption to the open burning rules. Not adding that limitation does not constitute a defect, however. With or without the suggested language, subpart 4 is found to be needed and reasonable. The change, if adopted, would not constitute a substantial change.

Carver County requested that the MPCA prohibit the open burning of demolition debris not generated in the county where the burning takes place. The MPCA declined to make that modification, on the ground that it exceeded the authority of the agency. The MPCA also noted that the county could impose its own restrictions on open burning in excess of the MPCA's rules. Subpart 4 is found to be needed and reasonable, as modified.

29. Subparts 5, 6 and 7 prohibit open burning in salvage operations, to process junked motor vehicles, and to dispose of garbage. The prohibition against garbage burning is subject to the exception in proposed rule 7005.0795 (open burning on farms). Subpart 8 prohibits burning during a burning ban imposed by any responsible authority. The MPCA deleted a redundant phrase from subpart 6, and made no other changes in the proposed rules. No commentators objected to these provisions. The Judge finds that proposed subparts 5, 6, 7 and 8 are needed and reasonable. The modification to subpart 6 eliminates excess language and does not constitute a substantial change.

Proposed Rule 7005.0735 - Permits Required.

30. Proposed rule part 7005.0735, subp. 1 repeats the requirements imposed by proposed rule 7005.0715, subp. 2, discussed at Finding 15, above. Subpart 2 sets the conditions under which the Commissioner of the MPCA or a delegated authority may issue open burning permits. Those conditions consist of the open burning being for a proper purpose, meeting the requirements for open burning under these rules, and any other reasonable conditions which may be imposed that are necessary for the prevention of pollution or a nuisance. No commentators objected to the conditions set forth in subpart 2. However, if the MPCA intends that persons use the variance process set forth at Minn. Rule 7000.0700 when they do not qualify outright for a permit, it is suggested that subpart 2 state that, in the alternative, a permit may be issued pursuant to the variance process. While not including this language does not constitute a defect, adding a provision that explicitly incorporates variances would eliminate any ambiguity as to whether or not variances are acceptable in these rules. The proposed rules are needed and reasonable.

31. The application process is described in subpart 3. The only comment received by the MPCA on this portion of the rule was the suggestion that applications for firefighter training are likely to be made by other entities than fire departments, such as Northern States Power Company (NSP). The MPCA agreed with the comment and modified the subpart to include other entities. The modification sets a deadline of May 15 for the fire department or other entity to file the application. The MPCA also added some specific facts which must be included on the application, such as identifying the number of structures which must be burned for training. No fire department or other entity which trains firefighters objected to these changes. The additional information will be useful to the MPCA to determine how many fires will be set for this purpose and what amount of emissions are likely. Subpart 3, as modified, is needed and reasonable. The modification is found not to be a substantial change.

32. As originally proposed, subpart 4 authorizes any entity granting a permit to request additional information from a permit applicant to supplement the information contained in the permit application. This supplemental information is limited to that information which will help the permitting authority determine whether the applicant will conduct the burning in accordance with "all applicable rules." The Administrative Law Judge suggested that the subpart be modified to specifically list what rules were intended. The MPCA responded to this comment by replacing the quoted language with "this rule." The modification limits the scope of inquiry to compliance with the open burning rules. Subpart 4, as modified, is needed and reasonable

to give applicants the opportunity to supplement inadequate applications. This will reduce the number of applications rejected by the permitting authority. The modification specifies the meaning of the subpart and does not constitute a substantial change.

Proposed Rule 7005.0745 - Permit Denial.  
Proposed Rule 7005.0755 - Permit Revocation.

33. Proposed rule parts 7005.0745 and 7005.0755 establish the conditions under which permits may be denied or revoked by the commissioner. No commentators objected to the grounds specified in these rules. The Administrative Law Judge questioned language which appeared to be redundant in proposed rule 7005.0745, item A. The MPCA responded to the inquiry by deleting the language "or other method" from item A. The modification eliminates meaningless language and does not constitute a substantial change. The MPCA added one ground to the existing list for revocation of a permit. Nuisance conditions resulting from the burning were included by the MPCA as a ground to revoke a permit. The MPCA declined the suggestion that the term "nuisance" be defined for these rules. The Agency maintains that the normal and usual meaning of the term is adequate to give prior warning as to what conduct is prohibited. Proposed rule parts 7005.0745 and 7005.0755, as modified, are found to be needed and reasonable.

Proposed Rule 7005.0765 - Department of Natural Resources Jurisdiction.

34. Due to the MPCA's desire to conduct its operations efficiently and its interest in open burning shared with the DNR, the MPCA has entered into an agreement with the DNR to delegate to that department the MPCA's duty to issue open burning permits. MPCA Post-hearing Comment, at 15. This arrangement is expressly stated in proposed rule 7005.0765, as modified. This rule part authorizes designated DNR officers to issue permits on behalf of the MPCA. The modifications to the rule require that enforcing agents of the DNR be designated and the powers delegated include denial, enforcement, and revocation of permits. The only inquiry regarding the modified rule was whether the MPCA could delegate enforcement, denial, and revocation duties to another agency. The authority to conduct adverse action against a permit is inherent in the authority to issue a permit. As discussed in Finding 33, above, the proposed rules for denial and revocation are needed and reasonable. The MPCA can delegate the enforcement duties imposed by those rules as readily as the duties necessary to grant a permit. Proposed rule part 7005.0765 is found to be needed and reasonable to carry out efficiently the MPCA's responsibilities. The modification made the MPCA clarifies the rule and does not constitute a substantial change.

Proposed Rule 7005.0766 - Fire Training.

Subpart 1 - Structure Burn Training.

35. Subpart 1 of this proposed rule part incorporates the standards for firefighter training into the open burning rules. By this rule, the Agency would require that the standards and methods adopted for Minnesota vocational technical college firefighting programs be used in any open burning conducted for firefighter training. Glenn Lane, a senior technical instructor for NSP, indicated that the rule would require even persons training for specific industrial firefighting applications to use techniques without relevance to

the skills needed for a particular application. NSP also objected to the standard chosen by MPCA, and suggested that the National Fire Protection Agency (NFPA) standard (set in bulletin number 600) be used instead. Philip Mathiowetz of the Red Wing Fire Department suggested NFPA 1403 was a more uniform standard. In addition, the Judge suggested that the repeated reference to Minnesota vocational technical courses in the rule part be removed as redundant.

The MPCA responded to these comments by deleting the redundant language, exempting owners of industrial firefighting units conforming to other state or federal regulations from this part, and clarifying that the subpart only applies to structures. The MPCA declined to alter the incorporated standards to those espoused by the NFPA. The Agency pointed out that the NFPA document is referenced in the standard adopted by the Minnesota vocational technical college system. As modified, proposed rule 7005.0766 is found to be needed and reasonable to impose uniform standards on open burning conducted for firefighter training, while rendering otherwise regulated training eligible to obtain permits to conduct open burning. The changes respond to valid concerns raised in the hearing process and do not constitute substantial changes.

Subpart 2 - Restrictions.

Subpart 3 - Liquid Fuels Training.

36. Subparts 2 and 3 place a number of restrictions on use of liquid fuels in firefighter training. Among the restrictions originally proposed is the prohibition against using flammable liquids unless liquid fuel training is being conducted. Adam D. Piskura, Director of the Fire Information, Research and Education Center of Minnesota Technical Colleges supported changing these subparts to avoid impairing education in arson investigation techniques. Other commentators stated that the ignition of fires is ordinarily achieved through the use of liquid fuels. The MPCA responded to these comments by modifying subpart 2 to include arson investigation training as a permissible use of flammable liquids and exempt the use of uncontaminated diesel fuel or kerosene to ignite fires. The new rule language for igniting fires is almost identical to that found in NFPA 1403. Supplemental SONAR, Exhibit 1 (Minnesota Technical College System Comment). Subparts 2 and 3 are needed and reasonable to limit pollution caused by open burning and spills of flammable liquids. The two modifications bring the subparts into agreement with current firefighter training methods, are found to be needed and reasonable and do not constitute substantial changes.

Proposed Rule 7005.0767 - Delegated Authority.

37. The requirements for a town, city, or (depending on the MPCA's decision in this proceeding) county to obtain a delegation of authority from the MPCA to issue open burning permits are set out in subparts 1 and 2 of proposed rule 7005.0767. Subpart 3 sets out the grounds for revocation of the delegation of authority to issue permits. No commentator criticized this rule part. If the MPCA decides to add counties to proposed rule 7005.0705, subpart 4 to include counties as entities authorized to issue permits, counties should also be added to subparts 1 and 2 of this rule part. Such a change would internally conform the proposed rules, is needed and reasonable and would not constitute a substantial change. Rule 7005.0767 as proposed by the Agency is found to be needed and reasonable to establish standards by which the MPCA will conduct the delegation of its authority.

Proposed Rule 7005.0775 - Compliance with Other Laws.

38. Proposed rule part 7005.0775 establishes that the MPCA's open burning rules are intended to be the least restrictive regulation of open burning and these rules do not supersede any more restrictive law, rule, regulation, or ordinance. No commentator objected to this rule part. The express statement that these rules do not preempt other restrictions on open burning is needed and reasonable to clarify the MPCA's intent in adopting these rules.

Proposed Rule 7005.0785 - Recreational Fires.

39. Casual fires for recreational or religious purposes are expressly allowed without an MPCA permit by proposed rule part 7005.0785. The Agency set a limit of three feet in diameter and three feet high for the fire which caused some confusion among persons interested in the proposed rules. The rule does not indicate whether the three feet measure the fuel or the extent of the flames. The MPCA clarified the rule by changing the reference to the pile of material to be burned and limiting that pile to three feet in diameter and three feet high. Scott Anderson, Fire Chief of the City of Maple Grove, and other commentators supported the three foot limitation for the flames from the fire as being appropriate. The City of Inver Grove Heights suggested that the limit was too restrictive for such activities as high school rallies, where large bonfires are the norm. The MPCA standard of three feet by three feet for the fuel allows a fire which should be adequately large for many ceremonial functions and is clearly more than adequate for most social gatherings. Anyone wishing to build a larger fire may apply for a variance under Minn. Rule 7000.0700. If the MPCA wishes to avoid having the complex mechanism of the variance process invoked for every high school homecoming rally, the Agency may add a provision for requesting a permit to allow nonconforming recreational fires. Such a change would be needed and reasonable, and not a substantial change from the rules as originally proposed. Prior to the hearing, the MPCA added a restriction to this rule part that only unpainted and untreated wood may be burned. This addition is intended to prevent noxious fumes from being released by fires under this rule part. No commentators objected to the reasonableness of limiting the burning of paint or chemicals on wood. Proposed rule 7005.0785 is found to be needed and reasonable. The changes made by the MPCA prior to the hearing and during the comment period eliminate confusion and do not constitute substantial changes.

Proposed Rule 7005.0795 - Open Burning on Farms.

40. The MPCA's proposed rule on open burning on farms clarifies that no permit is required for such practices that meet the requirements of Minn. Stat. § 17.135. Proposed rule 7005.0795 also lists the various regulations that must still be met by those persons who conduct such burning. No commentator objected to this proposed rule part. The proposed rule is found to be needed and reasonable to advise persons who are not subject to a permit requirement what regulations still apply to their actions.

Proposed Rule 7005.0796 - Open Burning of Leaves.

41. Proposed rule 7005.0796 allows towns or cities to adopt an ordinance to "permit" the open burning of dried leaves within the boundaries of the town

or city, so long as that open burning is conducted in accordance with other listed rules. The MPCA does not make clear in the rule part whether it intends that the town or city issue permits or simply allow the open burning described in this rule part. At the hearing, the Agency maintained that "permit" is the statutory language relating to leaf burning. The statute, Minn. Stat. 116.082, does use the term "permit" but it uses that word in the sense of "allow." Since the MPCA does maintain that either the statute or rule requires the issuance of permits, it is unlikely that the Agency would take adverse action against a town or city without a permit system. The ambiguity does not rise to the level of a defect, since a town or city may choose, consistent with the proposed rule, to impose a permit system on persons who burn leaves. Nevertheless, the Administrative Law Judge suggests that the MPCA clarify the rule by using the word "allow" to describe the ordinance on leaf burning. Such a change is found to be needed and reasonable and not a substantial change. The proposed rule is found to be needed and reasonable to leave the responsibility for the air quality of each individual town or city to the persons most affected.

#### Proposed Rule 7005.0805 - Liability.

42. This proposed rule part states that the granting of a permit or allowing open burning without a permit does not relieve the responsible person from liability arising from the fire that person starts to conduct the burning. This rule part restates the existing rule 7005.0790. Through proposed rule 7005.0805 the public is advised that a permit to conduct open burning is not a guarantee by the state to pay for any damage caused by the fire. The proposed rule is found to be needed and reasonable.

#### Proposed Rule 7005.0815 - Permanent Tree and Brush Open Burning Sites.

43. Proposed rule 7005.0815 is a redrafting of the existing rule 7005.0820. As originally drafted, the standards for such facilities were kept almost identical. One change from the existing rule is the deletion of an option for the MPCA, through the Director of Air Quality, to grant "approval" for permanent open burning sites which did not meet the conditions of the rules governing such sites. The City of Plymouth maintained that eliminating the alternative would remove needed discretion in applying the proposed rules. Without the capability to approve burning sites which do not meet the conditions set in proposed rule 7005.0815, the City of Plymouth would be required to close an open burning site which it has operated for 15 years. The MPCA has not suggested that the proposed rules are inflexible, however. The MPCA staff frequently suggested that particular situations would be dealt with on a case-by-case basis under the variance process. The conditions set out in this proposed rule are reasonable, and the City of Plymouth has not presented any facts to contest the MPCA's presentation. Deleting the reference to the Director of Air Quality is reasonable, since that portion of the existing rule appears to grant unbridled discretion in the application of the MPCA's rules. Such a grant of discretion would likely have constituted a defect, had it been present in these rules.

A commentator questioned why open burning sites were required to remain over 300 feet away from bodies of water when alternative means existed to prevent contamination from ash and unburned materials. The MPCA agreed with the commentator and altered subpart 4(D) to allow sites to be closer to bodies



of water when "berms or other measures are used to ensure that ash or organic material does not enter the water body." The MPCA bases the change on the ability to achieve the goal of preventing contamination of water either by distance or design. The MPCA also changed the language of the rule to eliminate unclear references to other regulations, clarify the procedures for proper disposal of ash and unconsumed vegetation, and update an obsolete term (sanitary landfill) to a modern reference (solid waste land disposal facility). The MPCA also changed subpart 5 to replace 24 hour notice of burning to simply "prior notice." The change was suggested by the DNR and had been the standard in the existing rules. According to the DNR, prior notice has been adequate in the past for conducting burning operations. The new standard set in this rule part prohibits smoldering. The need and reasonableness of the smoldering standard is discussed at Finding 26, above. Proposed rule 7005.0815 sets standards for permanent tree and brush open burning sites which are needed and reasonable to carry out burning with a minimum of pollution and adequate safety for neighboring property. The changes made to the proposed rule are in response to comments received about the rule and do not constitute substantial changes.

#### Variance.

44. Throughout the rulemaking proceeding, the MPCA responded to many objections regarding the impact of the proposed rules by pointing out that the variance process is available to relieve unfairness imposed by the rules as applied to a particular situation. Tr. I, at 136. However, there is no reference to the variance process at any point in the proposed rules. The Agency clearly reads this rule as a part of all its rules and has declined to make reference to the variance process in this chapter. Nevertheless, the MPCA has expressly referred to the variance process in other rules. See Minn. Rule 7040.0300. In this case, the pervasive use of possibility of variances to justify the need or reasonableness of the proposed rules suggests the MPCA should clearly reference who may request a variance and what process the variance procedure must follow. This is particularly true where, as here, a large number of those persons who will be applying for permits and possibly variances are not sophisticated in dealing with the Agency. Failing to reference the variance process does not render the proposed rules unreasonable, since most of the commentators appeared to know about the process, but the Agency may wish to consider how accurately cross-referencing a separate section of its rules will improve its dealings with the regulated public.

Should the MPCA choose to add the suggested reference, it might use the following language:

#### 7005.08\*\* VARIANCES.

Any person may apply for a variance from any requirement of this chapter. Variances shall be applied for and acted upon by the agency in accordance with Minnesota Statutes, section 116.07, subdivision 5 and Minnesota Rule Part 7000.0700.

The suggested language will notify all of the regulated public that the standards set for open burning are also subject to the variance process. The change proposed by this Finding merely references a statute and another rule part and does not add any substantive right to the proposed rules. The suggested modification is found to be needed and reasonable and would not constitute a substantial change if adopted.

45. Gary Lockner, Director of the Office of Environmental Services for Lake of the Woods County, objected to the MPCA's reliance upon its existing process for variance applications under the proposed rules. Mr. Lockner maintains that the process is overly complicated, slow, and very cumbersome. The Administrative Law Judge agrees with Mr. Lockner that the variance process is not designed to handle the relatively simple variance request which is likely to arise under the application of these proposed rules. However, the difficulties with the variance process do not rise to the level where those difficulties would render these proposed rules unreasonable. While incorporating the existing variance process is not a defect, the Administrative Law Judge suggests that the MPCA consider, in future rulemaking proceedings, developing a "two-tier" system of variances to better fit the scope of the variance with the level of process required to obtain the variance.

#### Practical.

46. To ensure that the use of some terms was not misconstrued, the MPCA added a definition of "practical" at the hearing and in its post-hearing comment. The MPCA comment did not clearly state whether "practical" would be located in the definition section of the proposed rules or included with the two rule parts (7005.0745 and 7005.0755) where the word is used. The definition incorporates the requirements of being technically feasible, locally available, and generally available at cost which is not excessive. The definition was not objected to by any commentator and is needed and reasonable, no matter where in the proposed rules the definition is included. The new definition comports with the general meaning of the word "practical" and does not constitute a substantial change.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Minnesota Pollution Control Agency (MPCA) gave proper notice of this rulemaking hearing.
2. The MPCA has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The MPCA has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. The MPCA has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. The additions and amendments to the proposed rules which were suggested by the MPCA after publication of the proposed rules in the State Register do not result in rules which are substantially different from the

proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

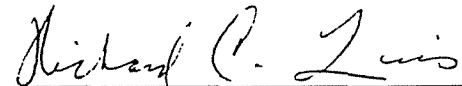
7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the MPCA from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 7<sup>th</sup> day of June, 1991.



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RICHARD C. LUIS  
Administrative Law Judge

Reported: Court Reporter Lori A. Case,  
Janet R. Shaddix and Associates  
Transcript Prepared