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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Rule Amendments to the
Hazardous Waste Facility and
Generator Fee Rules, Minn. Rules
Ch. 7046.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on November 19, 1991, at 9:00 a.m. and resumed at 7:00 p.m. in the Board Meeting Room of the Minnesota Pollution Control Agency (MPCA), 520 Lafayette Road, 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 MPCA 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.

Kris L. Hulsebus, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the MPCA at all the hearings. The MPCA's hearing panel consisted of Edward Meyer, Supervisor of the Disclosures Unit in the Program Development Section of the MPCA; Shelly Siewert, Senior Staff Person of the Disclosures Unit; Bruce Brott, Supervisor of the Permits Unit in the Regulatory Compliance Section of the MPCA; Richard Baxter, Senior Staff Person of the Permits Unit; and Jeanne Eggleston, Senior Staff Person of the Rules Unit of the Program Development Section of the MPCA.

Twelve persons attended the morning hearing in St. Paul. Two persons signed the hearing register. When the hearing was reconvened in the evening, pursuant to the MPCA's Order for Hearing, no persons were present who wished to comment. The hearings were conducted until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for five business days following the date of the hearing, to November 26, 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 December 3, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received no written comments from interested persons during the comment period. The MPCA submitted written comments responding to matters raised in comments submitted prior to the hearing.

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 rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the MPCA makes changes in 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 agency must submit it 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 September 20, 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 Statement of Need and Reasonableness (SONAR);
 - (c) the proposed Order for Hearing;
 - (d) the Notice of Hearing proposed to be issued;
 - (e) an estimate of the number of persons who would attend the hearings; and,
 - (f) a statement that no additional notice will be provided.

2. On October 3, 1991, the MPCA filed the following documents with the Administrative Law Judge:
 - (a) the Order for Hearing;
 - (b) certification of the Agency's Authorizing Resolution;
 - (c) a revised copy of the proposed rules certified by the Revisor;
 - (d) a revised copy of the SONAR;
 - (e) an Affidavit of Notice to the Chairs of House Appropriations and Senate Finance Committees; and,
 - (f) a statement that additional discretionary notice will be provided to all permitted hazardous waste facilities and disclosed hazardous waste generators in Minnesota.

3. On October 11, 1991, the MPCA mailed the Notice of Hearing to all persons and associations who had registered their names with the MPCA for the purpose of receiving such notice and those persons to whom additional discretionary notice was given.

4. On October 14, 1991, a copy of the proposed rules and the notice of hearing were published at 16 State Register 950.

5. On October 15, 1991, the MPCA filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register containing the Notice of Hearing.
- (c) the Agency's certification that its mailing list was accurate and complete;
- (d) the Affidavit of Mailing the Notice to all persons on the MPCA's mailing list.
- (e) a copy of the Notice of Intent to Solicit Outside opinion with copies of all comments received from interested parties; and,
- (f) the Affidavit of Additional Discretionary Notice indicating that the Notice of Hearing was mailed to persons not on the Agency's mailing list.

Nature of the Proposed Rules and Statutory Authority.

6. The proposed rules amend the fees required of hazardous waste generators and facilities; alter permit reissuance fees; further define some terms and concepts used in the rules; and add a requirement that unlicensed generators pay a retroactive fee if those generators should have been licensed over the previous two or three years. The MPCA is required to set fees to cover the costs of "permitting, monitoring, inspection and enforcement expenses of the hazardous waste activities of the agency." Minn. Stat. § 116.12, subd. 1 (1990). The fees are to be required of each hazardous waste generator. Minn. Stat. § 116.12, subd. 2. Hazardous waste facility fees are required by Minn. Stat. § 116.12, subd. 3. The MPCA is required to set these fees by the process set forth in Minn. Stat. § 16A.128. Minn. Stat. § 116.12, subd. 1. The process contained in Minn. Stat. § 16A.128 is the general method of setting fees by rule. The Administrative Law Judge concludes that the MPCA has general 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. The proposed rules will affect those small businesses which generate hazardous waste by increasing the fees which these businesses must pay. The MPCA does not believe that any hazardous waste facilities meet the definition of "small business." SONAR, at 28. For very small quantity generators (VSQGs) producing less than 10 gallons (or 100 pounds) of hazardous waste the MPCA has retained an exemption from the proposed fees. VSQGs which do not meet that exemption must pay a flat fee but they are exempt from the additional volume fee. While this approach is based on the amount of hazardous waste generated, not the size of the business, the MPCA's treatment of VSQGs is reasonable. The adverse impact of hazardous waste does not change with the size of the business generating that waste. Many VSQGs are small businesses which will benefit from the preferential treatment established by the MPCA. The specific methods which Minn. Stat. § 14.115, subd. 2 requires the MPCA to consider were assessed by the agency. SONAR, at 27. The MPCA has met the requirements of Minn. Stat. § 14.115, subd. 2 to consider methods of reducing the impact of the rules on small businesses.

Economic Impact.

8. In rulemaking, the MPCA is required to consider the impact of economic factors on the feasibility and practicality of the proposed rules. Minn. Stat. § 116.07, subd. 6. The MPCA determined that the proposed rules would have an economic impact on the regulated public. SONAR, at 29. The MPCA considered economic information obtained as a result of the existing hazardous waste fee rules. SONAR, at 29. The proposed rules distribute the costs progressively through a higher fee for more waste produced up to a level where the fee is sharply reduced. See Finding 16, below. The Agency's ability to shape its fee system is curtailed by statutory requirements which will be discussed below. The MPCA has met the requirements of Minn. Stat. § 116.07, subd. 6 by taking into consideration the economic impact of the proposed rules in its determination that the rules are feasible and prudent.

Fiscal Notice.

9. 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 expenditure of public funds in excess of \$100,000 in any one year. The requirements of Minn. Stat. § 14.11, subd. 1 do not apply to these proposed rules.

Impact on Agricultural Land.

10. 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 the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. Adverse impact is acquisition of farmland for a nonagricultural purpose, granting a permit for the nonagricultural use of farmland, leasing state-owned land for nonagricultural purposes, or granting or loaning state funds for uses incompatible with agriculture. The proposed rules do not have an adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Location of the Hearing on the Proposed Rules.

11. The proposed rules were noticed in the State Register (16 S.R. 950-957) as proceeding without a hearing unless 25 or more persons request a hearing. In response to the notice of proceeding without a hearing, a petition was filed containing the names of 25 citizens of Koochiching County, Minnesota, requesting a public hearing. The petition requested that a hearing be held in Big Falls, Minnesota. Apparently none of the persons who signed the petition have any specific concerns about any particular part of the rule. The petition was filed because the signatories believe that no rulemaking action should be taken by a Minnesota state agency without a public hearing.

After consultation with the Administrative Law Judge the MPCA decided not to hold a hearing in Big Falls in addition to the hearings scheduled in St. Paul. The MPCA reasoned that the proposed rule amendments will affect all

persons and entities in Minnesota equally and "there is no aspect of the proposed rule amendments which has any particular or unusual effect upon citizen of Koochiching County." Because signatories expressed no concerns or objections regarding any aspect of the proposed rules and expressed no interest in attending a hearing if one was held in Big Falls, the MPCA concluded that the costs of a hearing in Big Falls could not be justified.

The Administrative Law Judge finds that the public hearings scheduled for St. Paul were adequate and the MPCA's decision not to hold a hearing in Big Falls is reasonable and appropriate.

Reasonableness of the Proposed Rules.

12. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). In support of the adoption of the proposed rules, the MPCA has prepared a Statement of Need and Reasonableness (SONAR). The Agency has relied primarily on its SONAR as its affirmative presentation of need and reasonableness at the hearings. The Agency's comments made at the public hearings and in written comments following the hearing supplemented the Agency's presentation. This Report will not discuss each rule part. A part not commented on in this Report is hereby found to be needed and reasonable and does not exceed the statutory authority for the promulgation thereof. It is further found that on those parts not commented on, the MPCA has documented its need and reasonableness with an affirmative presentation of facts.

Proposed Rule 7046.0020 - Hazardous Waste Facility Fees.

13. Proposed rule part 7046.0020 establishes the variety of fees required of hazardous waste facilities. Subpart 1 increases the fees for storage, disposal and treatment of hazardous waste at such facilities by approximately 17.8%. SONAR, at 28. Other changes to subpart 1 include proration of the fee, and excluding a major modification fee where the modification is applied for concurrently with a permit reissuance application. No persons objected to this proposed subpart. Subpart 1 is needed and reasonable, as proposed.

14. The MPCA includes all of the specific items which make up "project estimated costs" in proposed subpart 4. The MPCA chose to define this term in the body of the rules, rather than in the definitions (proposed rule part 7046.0010) since the term "project estimated costs" is only used in subpart 4. SONAR, at 11. The different location does not change the meaning of the term. No one commented upon proposed subpart 4. The MPCA has shown that moving the definition is needed and reasonable.

Proposed Rule 7046.0031 - Nonmetropolitan Area Generator Fees.

15. Generator fees may only be charged to generators who are not subject to metropolitan county fees. Minn. Stat. § 116.12, subd. 2. At present, each metropolitan county charges a hazardous waste generator fee. The MPCA's jurisdiction for such fees is, for that reason, limited to nonmetropolitan counties. The only exception to this limitation is a surcharge to cover statewide activities. That surcharge is collected by the metropolitan counties and remitted to the MPCA.

The amount the MPCA may collect in generator fees is also limited by Minn. Stat. § 116.12, subd. 2. The MPCA may not charge fees in excess of the fees charged by the metropolitan counties. This statutory limit creates a cap on the fees which may be charged by the MPCA and, owing to other requirements, limits the flexibility of the MPCA in charging particular segments of the regulated public.

Subpart 2 exempts nonmetropolitan area generators from annual fees under proposed rule 7046.0031 if it generates no more than 10 gallons or 100 pounds of hazardous waste. Under proposed subpart 2a, VSQGs must have their fee amounts adjusted if the generator no longer qualifies as a VSQG.

16. Annual fees are set forth in proposed subpart 4, which is composed of two items. Item A establishes the volume fee. That fee is only altered by increasing the per gallon amount. That total is then multiplied by the management method multiplier to arrive at the volume fee. Dart Poach of the Minnesota Fabricare Institute objected to the increases in the per gallon amounts. For each gallon produced under 2,640 (or pound under 26,400) the cost has increased from \$0.09 per gallon to \$0.18 per gallon. For amounts at or exceeding those limits, the per gallon or pound cost is \$0.005.

Mr. Poach objected to the distribution of the fee burden between VSQGs and those which produce higher quantities of hazardous waste. The proposed fee system (as well as the existing fee system) does place a proportionally higher cost on the first 2,640 gallons (or 26,400 pounds) generated compared to all further amounts. The unit difference, \$0.18 to \$0.005, is substantial. Mr. Poach suggested that larger generators should shoulder more of the fee burden, since those generators are in a better financial position to pay the fee and the relative impact of fees are less on larger businesses.

The MPCA maintains that its fee system is the best that can be achieved under the competing goals of reducing the impact on smaller generators, tailoring the fee to amount of time spent in regulation of the type of generator, and complying with the fee cap required by statute. The MPCA anticipates that there will be 118 large quantity generators (LQGs), 699 small quantity generators (SQGs), and 5,008 very small quantity generators (VSQGs) in 1992. SONAR, at 18. The MPCA estimates that 25 percent of its staff time is spent regulating LQGs, 26 percent is spent regulating SQGs, and 49 percent is spent regulating VSQGs. *Id.* Extrapolating from the MPCA's figures, 2 percent of the generators (LQGs) require 25 percent of the regulatory time; 12 percent of the generators (SQGs) occupy 26 percent of the regulatory time; and 86 percent of the generators (VSQGs) require 49 percent of the regulatory time.

The foregoing figures support Mr. Poach's contention that more fees should be charged to LQGs and SQGs relative to the fees charged VSQGs. However, the MPCA maintains that the fee cap set by Minn. Stat. § 116.12, subd. 2 prevents shifting more of the fee burden to the LQGs and SQGs. The bar graphs attached to the SONAR show how the old fees, new fees, and fee ceilings interact at varying levels of hazardous waste generation. The fees for so-called "high end" LQGs (100,000 gallons of waste and up) closely approach the maximum allowable by statute. SONAR, Exhibit 1, Graph 8. "Low end" LQGs (below 100,000 gallons) would be charged fees substantially below the ceiling (by about 50 percent or \$3,000), but only for LQGs producing between 2,640 and 50,000 gallons. SONAR, Exhibit 1, Graph 7. SQG fees have a similar gap between the proposed fee and the ceiling, but only for generators at or below 1,000 gallons per year. SONAR, Exhibit 1, Graph 6. The largest percentage gap between the new fees charged by the MPCA and the statutory ceiling is for VSQGs. The new, increased fees for VSQGs are approximately 20 percent of the maximum which could be charged under Minn. Stat. § 116.12, subd. 2. The fee system reasonably conforms to the statutory ceilings, meets the requirement that the fees recover the special fund allocation, and provides the most fee relief to VSQGs. The volume fees established by the MPCA in proposed subpart 4, item A are needed and reasonable.

17. Item B sets the base fee for the various generator types. The base fee for LQGs is \$350 under the proposed item. This fee is unchanged from the existing rules. The base fee for SQGs increases from \$105 to \$130 under the MPCA's proposed rule. For VSQGs, the base fee increases from \$35 to \$62. The MPCA has chosen these fee levels to meet the "relative amount of administrative effort involved in various aspects of the regulation of hazardous waste." SONAR, at 16. The base fees, taken in conjunction with the volume fees, conform the total fees collected to the distribution of agency time anticipated by the MPCA. Item B is needed and reasonable as proposed.

18. Proposed subpart 7 amends the existing procedures for late fee payments. The new language merely clarifies the distinctions between LQGs and SQGs, which are treated as one class, and the VSQGs, which are treated differently. The actual late fee process remains unchanged in the subpart. Proposed subpart 7 is found to be needed and reasonable.

Proposed Rule 7046.0040 - Generator Statewide Program Fee.

19. A statewide program fee is imposed by proposed rule 7046.0040. The program fee is required of all generators (whether metropolitan or nonmetropolitan) and is calculated as a percentage of the base fee and volume fee paid by generators under these rules, or the county fees paid by metropolitan generators. The change in the fee is a reduction from 68 percent to 52 percent. The Agency's reason for the reduction is that the cost of metropolitan hazardous waste services is 52 percent of the total costs of hazardous waste services provided by the MPCA. The Agency's calculations are contained in its SONAR. SONAR, at 20-1. No commentators objected to the proposed reduction in the statewide program fee. The reduction of the statewide program fee from 68 percent to 52 percent of the annual fees paid by generators is needed and reasonable.

Proposed Rule 7046.0045 - Retroactive Fee.

20. The MPCA avoids granting a benefit to generators who have not obtained a license, and thus not paid a fee, through the device of imposing a retroactive fee. That retroactive fee is already established in Minn. Rule 7046.0031, subp. 3. Proposed rule 7046.0045 restates, but does not meaningfully change, the method by which the Agency determines that a retroactive fee is appropriate. The number of years for which retroactive fees may be collected has been increased from two to three. This change is in keeping with the expansion of the MPCA's statute of limitation for enforcement actions to three years. SONAR, at 23. Collecting retroactive fees discourages nonreporting by generators by removing the only incentive for avoiding reporting, that is payment of fees. Since the fees are recoverable for three years, generators do not gain any financial benefit by not reporting. Imposing a retroactive fee renders the cost-sharing between generators more equitable. No commentator objected to the proposed rule part. Proposed rule 7046.0045 is needed and reasonable.

Proposed Rule 7046.0050 - Generator Fee Exemptions.

21. Subpart 3 of proposed rule 7046.0050 exempts wastes generated as a result of a "response action" from generator fees. To clarify what constitutes a response action, the MPCA has added a definition. The definition incorporates actions taken under Minn. Stat. § 115B.01-.024 or P.L. 96-510 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980). The new language clarifies what was originally intended to be exempt. Proposed subpart 3 is needed and reasonable.

22. Proper fee treatment of wastes gathered as part of VSQG hazardous waste collection program is set forth in proposed subpart 6. Under that subpart, an operator is exempt from fees for wastes collected under the program. This exemption does not extend to generators who participate in the program. The generator is also not exempted from fees for any waste generated itself (as opposed to collected from others). No commentator objected to this provision. Proposed subpart 6 is needed and reasonable.

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 MPCA made no additions or amendments to the proposed rules after publication of the proposed rules in the State Register and therefore the rules are not 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.

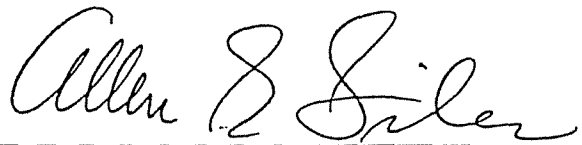
7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the MPCA from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the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

Dated this 10th day of December, 1991.



ALLEN E. GILES
Administrative Law Judge

Reported: Taped