

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Proposed New Rules  
Governing Conditionally Insignificant  
And Conditionally Exempt Air Emissions  
(Minn. R. Chapter 7008); Amendments  
to Rules Governing: Permits and Offsets  
(7007); Air Quality Division Definitions  
and Abbreviations (7005); and Standards  
for Stationary Sources (7011)

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Beverly Jones Heydinger conducted a hearing on these rules beginning at 9:00 a.m. on November 13, 2002, at the Pollution Control Agency, 520 Lafayette Road, St. Paul. The hearing continued until everyone present had an opportunity to state their views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency may have made after the proposed rules were initially published do not result in them being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing, when a sufficient number of persons request one. The hearing is intended to allow the agency and the administrative law judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Anne E. Cohen, Assistant Attorney General, NCL Tower, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared as the attorney for the Pollution Control Agency ("MPCA" or "Agency"). Two MPCA employees, John Hensel and John Seltz, were available to provide the public with information about the proposed rules and to answer any questions. Approximately six members of the public attended the hearing and six people signed the hearing register. Representatives from the Women's Cancer Resource Center, the Environment Committee of the West Side Citizens Organization, and the Sierra Club Air Toxics Campaign spoke and submitted written comments at the hearing.<sup>2</sup>

After the hearing ended, the record remained open for twenty days, until December 3, 2002, to allow interested persons and the Agency an opportunity to submit written comments.<sup>3</sup> During this initial comment period the administrative law judge

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<sup>1</sup> Minn. Stat. §§ 14.131 through 14.20.

<sup>2</sup> The Sierra Club comments were accompanied by several attachments.

<sup>3</sup> Minn. Stat. § 14.15, subd. 1.

received three written comments.<sup>4</sup> Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Agency the opportunity to file a written response to the comments submitted. The deadline for responses to the comments was December 10, 2002. One responsive comment was received.<sup>5</sup> The hearing record closed for all purposes on December 10, 2002.

## NOTICE

The MPCA must make this Report available for review for at least five working days before the Agency takes any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request.

If the MPCA makes any changes to the rules as proposed, whether or not those changes have been approved or recommended by this Administrative Law Judge, it must resubmit the rules to the Chief Administrative Law Judge for a review of those changes.

After adopting the final version of the rules, the Agency should inform this Office. This Office will request certified copies of the rules from the Revisor and will file the rules 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 April 19, 1999, the MPCA published a Request for Comments on New Air Quality Rules Governing Gasoline Service Stations and Gasoline Distribution Operations at 23 State Register 2013.<sup>6</sup> The MPCA mailed the Request for Comments to those individuals on the Agency's rulemaking mailing list and to a separate mailing list of affected and interested parties specific to this rulemaking.<sup>7</sup> The Request for Comments indicated that an advisory work group would be assisting the MPCA in developing the rule and invited volunteers to contact the agency for possible selection as work group members.<sup>8</sup>

2. On February 26, 2001, the MPCA published a Request for Comments on New Rules Governing Air Emission Permits, *Minnesota Rules* Chapter 7008, and Amendments to Rules Governing Permits and Offsets, *Minnesota Rules* Chapter 7007,

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<sup>4</sup> The only commenter submitting new information was the Sierra Club Air Toxics Campaign, by letter dated November 29, 2002. The Women's Cancer Resource Center submitted another copy of the written comments submitted to the judge at the hearing; this second copy was signed by both contributors to the comments. On December 3, 2002, the MPCA submitted a letter stating that it had no additional comments.

<sup>5</sup> The one responsive comment received was from the MPCA, dated December 10, 2002, responding to the post-hearing comments submitted by the Sierra Club.

<sup>6</sup> Ex. 1.

<sup>7</sup> Exs. 3-4.

<sup>8</sup> *Id.*

and Amendment to Rules Governing Air Quality Division Definitions and Abbreviations, *Minnesota Rules* Chapter 7005, at 25 State Register 1442.<sup>9</sup> The MPCA mailed the Request for Comments to those individuals on the Agency's rulemaking mailing list and to a separate mailing list of affected and interested parties specific to this rulemaking.<sup>10</sup> The MPCA also placed a copy of the Request for Comments on its Public Notice web page.<sup>11</sup>

3. On August 27, 2001, the MPCA published an Amended Request for Comments on New Rules Governing Conditionally Insignificant and Conditionally Exempt Air Emissions to be codified in *Minnesota Rules* Chapter 7008; Amendments to Rules Governing Permits and Offsets, Chapter 7007, Amendments to Rules Governing Air Quality Division Definitions and Abbreviations, Chapter 7005; and Amendments to Rules Governing Standards for Stationary Sources, Chapter 7011, at 26 State Register 271.<sup>12</sup> The MPCA mailed the Amended Request for Comments to those individuals on the Agency's rulemaking mailing list and to a separate mailing list of affected and interested parties specific to this rulemaking.<sup>13</sup> The MPCA also placed a copy of the Amended Request for Comments on its Public Notice web page.<sup>14</sup>

4. On September 13, 2002, the MPCA requested that a hearing be scheduled<sup>15</sup> and filed the following documents with the Chief Administrative Law Judge:

- a. The Notice of Hearing proposed to be published;
- b. A copy of the proposed rules, certified as to form by the Revisor's Office;<sup>16</sup>
- c. The Statement of Need and Reasonableness (SONAR);<sup>17</sup>
- d. A copy of the Notice of Intent to Adopt Rules Without a Public Hearing as published in the *State Register*;<sup>18</sup>
- e. A copy of the Notice Extending the Public Comment Period as published in the *State Register*;<sup>19</sup>
- f. A copy of the Public Meeting Notice as mailed;<sup>20</sup>
- g. A copy of the original petition for hearing submitted June 17, 2002;<sup>21</sup>
- h. A copy of the amended petition submitted June 19, 2002;<sup>22</sup>
- i. A copy of the further amended petition submitted June 19, 2002;<sup>23</sup> and
- j. A copy of the Sierra Club's letter and attached petition dated June 19, 2002.<sup>24</sup>

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<sup>9</sup> Ex. 5.

<sup>10</sup> Ex. 7.

<sup>11</sup> *Id.*

<sup>12</sup> Ex. 9.

<sup>13</sup> Ex. 11.

<sup>14</sup> *Id.*

<sup>15</sup> Ex. 28.

<sup>16</sup> Ex. 13.

<sup>17</sup> Ex. 14. By letter dated November 18, 2002, the MPCA supplemented the record with copies of the documents referenced on page 51 of the SONAR.

<sup>18</sup> Ex. 16.

<sup>19</sup> Ex. 20.

<sup>20</sup> Ex. 24.

<sup>21</sup> Ex. 27d.

<sup>22</sup> Ex. 27e.

<sup>23</sup> Ex. 27f.

<sup>24</sup> Ex. 27g.

5. Administrative Law Judge Beverly Jones Heydinger approved the MPCA's Notice of Hearing on September 19, 2002.<sup>25</sup>

6. On October 3, 2002, the MPCA mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice, to the interested and affected parties mailing list and to those addresses provided by persons requesting a hearing by petition.<sup>26</sup> The Agency also posted the Notice on the MPCA's Public Notice web page.<sup>27</sup>

7. The Notice of Hearing was published on October 7, 2002, at 27 State Register 489.<sup>28</sup>

8. On the day of the hearing, the MPCA placed the following documents<sup>29</sup> into the record:

- a. The Request for Comments as mailed on April 14, 1999;<sup>30</sup>
- b. The Request for Comments as mailed on February 22, 2001;<sup>31</sup>
- c. Certificate of Accuracy of the Mailing List (dated February 19, 2001);<sup>32</sup>
- d. The Amended Request for Comments as mailed on August 23, 2001;<sup>33</sup>
- e. Certificate of Accuracy of the Mailing List (dated August 20, 2001);<sup>34</sup>
- f. Certificate of mailing the Statement of Need and Reasonableness to the Legislative Reference Library (dated April 11, 2002);<sup>35</sup>
- g. The Notice of Intent to Adopt Rules Without a Public Hearing as mailed on April 11, 2002;<sup>36</sup>
- h. Certificate of Mailing the Notice of Intent to Adopt Rules Without a Public hearing and Giving Additional Notice (dated April 11, 2002);<sup>37</sup>
- i. Certificate of Accuracy of the Mailing List (dated April 10, 2002);<sup>38</sup>
- j. The Notice of Extending the Comment Period as mailed on May 16, 2002;<sup>39</sup>
- k. Certificate of Mailing the Notice of Extending the Comment Period and Giving Additional Notice (dated May 16, 2002);<sup>40</sup>
- l. Certificate of Accuracy of the Mailing List (dated May 14, 2002);<sup>41</sup>
- m. Certificate of Mailing the Public Meeting Notice (dated June 10, 2002);<sup>42</sup>
- n. Certificate of Accuracy of the Mailing List (dated June 5, 2002);<sup>43</sup>

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<sup>25</sup> Ex. 29.

<sup>26</sup> Ex. 32.

<sup>27</sup> Id.

<sup>28</sup> Ex. 30.

<sup>29</sup> The documents listed, in addition to those exhibits and submissions previously listed and identified *infra*, together form the agency's record in this proceeding.

<sup>30</sup> Ex. 2.

<sup>31</sup> Ex. 6.

<sup>32</sup> Ex. 8.

<sup>33</sup> Ex. 10.

<sup>34</sup> Ex. 12.

<sup>35</sup> Ex. 15.

<sup>36</sup> Ex. 17.

<sup>37</sup> Ex. 18.

<sup>38</sup> Ex. 19.

<sup>39</sup> Ex. 21.

<sup>40</sup> Ex. 22.

<sup>41</sup> Ex. 23.

<sup>42</sup> Ex. 25.

- o. All written materials received in response to the Notice of Intent to Adopt Rules Without a Public Hearing;<sup>44</sup>
- p. Notice of Hearing as mailed on October 3, 2002;<sup>45</sup>
- q. Certificate of Accuracy of the Mailing List (dated October 2, 2002);<sup>46</sup>
- r. Miscellaneous documents demonstrating compliance with statutes and regulations the agency must comply with in adopting rules;<sup>47</sup>
- s. Additional information regarding the proposed rule and responses to comments submitted prior to hearing;<sup>48</sup>
- t. Stage One Vapor Control Fact Sheet;<sup>49</sup>
- u. Pie chart entitled "Minnesota VOC Emissions (2000)",<sup>50</sup>
- v. Table entitled "Volatile Organic Compounds (ton/year)",<sup>51</sup>
- w. Diagram entitled "Stage I Vapor Recovery",<sup>52</sup>
- x. Diagram entitled "Stage II Vapor Recovery",<sup>53</sup>
- y. Air Quality in Minnesota: Problems and Approaches;<sup>54</sup>
- z. Excerpt from MPCA Staff Paper on Air Toxics (November 1999).<sup>55</sup>

9. The Administrative law Judge finds that the MPCA has met all of the procedural requirements under the applicable statutes and rules.

### **Background and Nature of the Proposed Rules**

10. This rulemaking proceeding involves the establishment of a new chapter in Minnesota Air Quality Rules (Chap. 7008) and amends existing rules chapters 7005, 7007, and 7011 concerning Permits and Offsets; Air Quality Division Definitions and Abbreviations; and Standards for Stationary Sources. The MPCA published several Requests for Comments in the State Register and ultimately combined all of the related rules noticed for comments into this one rule proceeding.

11. Minnesota Rules Chapter 7008 establishes two new regulatory classifications: "conditionally exempt stationary sources" and "conditionally insignificant activities." Chapter 7005 is amended to include definitions that are used in proposed Chapters 7007, 7008, and 7011. Chapter 7007 establishes which stationary sources must apply for and obtain an air emissions permit, and is amended to exempt those stationary sources that comply with Chapter 7008 from the requirement to obtain a permit. Chapter 7011 is amended to establish design and operation requirements for stage-one vapor recovery systems.

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<sup>43</sup> Ex. 26.

<sup>44</sup> Exs. 27a-g.

<sup>45</sup> Ex. 31.

<sup>46</sup> Ex. 33.

<sup>47</sup> Ex. 34.

<sup>48</sup> Ex. 35.

<sup>49</sup> Ex. 36.

<sup>50</sup> Ex. 37.

<sup>51</sup> Ex. 38.

<sup>52</sup> Ex. 39.

<sup>53</sup> Ex. 40.

<sup>54</sup> Ex. 41.

<sup>55</sup> Ex. 42.

## Statutory Authority

12. Minnesota Statutes, section 116.07, subds. 4 and 4a, provides the authority for MPCA to adopt and implement rules and standards relating to air pollution. It states, in relevant part, that:

Subd. 4. **Rules and standards.** Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1967, chapter 882, for the prevention, abatement, or control of air pollution. Any such rule or standard may be of general application throughout the state, or may be limited as to times, places, circumstances, or conditions in order to make due allowance for variations therein. Without limitation, rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement, or control of air pollution.

Subd. 4a. **Permits.** (a) The pollution control agency may issue, continue in effect or deny permits, under such conditions as it may prescribe for the prevention of pollution, for the emission of air contaminants, or for the installation or operation of any emission facility, air contaminant treatment facility, treatment facility, potential air contaminant storage facility, or storage facility, or any part thereof, or for the sources or emissions of noise pollution.

13. The Administrative Law Judge finds that the MPCA has the statutory authority to adopt the proposed rules.

## Rulemaking Legal Standards

14. Under Minnesota law,<sup>56</sup> one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>57</sup> The MPCA prepared a SONAR in support of its proposed rules. At the hearing, the MPCA primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by MPCA staff at the public hearing, and by the MPCA's written post-hearing comment and submissions.

15. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary based upon the rulemaking record. Minnesota case law has equated an unreasonable rule

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<sup>56</sup> Minn. Stat. § 14.14, subd. 2; Minn. R. part 1400.2100.

<sup>57</sup> Mammenga v. Comm'r of Human Services, 442 N.W.2d 786 (Minn. 1989); Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

with an arbitrary rule.<sup>58</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>59</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>60</sup> The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>61</sup> An agency is entitled to make choices between possible approaches so long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.<sup>62</sup>

16. In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>63</sup>

17. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State,<sup>64</sup> "unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different."<sup>65</sup>

18. The standards to determine whether changes create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

### **Additional Notice Requirements**

19. Minnesota Statutes, section 174.05 imposes an additional notice requirement when MPCA adopts, revises or repeals any rule concerning transportation.

<sup>58</sup> In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

<sup>59</sup> Greenhill v. Bailey, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>60</sup> Mammenga, 442 N.W.2d at 789-90; Broen Mem'l Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>61</sup> Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.

<sup>62</sup> Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).

<sup>63</sup> Minn. R. part 1400.2100.

<sup>64</sup> Minn. Stat. § 14.05, subd. 3.

<sup>65</sup> Minn. R. part 1400.2240, subp. 8.

Although gasoline service stations and other gasoline dispensing facilities are regulated by the proposed rules, the MPCA concluded that the proposed amendments would “not impact Department of Transportation activities or transportation concerns in Minnesota.” Nevertheless, the MPCA provided notice of the rulemaking and a copy of the draft rule amendments to the Department of Transportation by letter dated August 7, 2001.<sup>66</sup> The Department of Transportation did not submit any comments on the proposed amendments.

20. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of transportation. The Administrative Law Judge finds that the MPCA has complied with the notice requirement to the Department of Transportation.

21. Minnesota Statutes section 14.116 requires that, when an agency mails a notice of intent to adopt rules, it must send a copy of the notice and the SONAR to certain legislators.

22. MPCA mailed the notice and the SONAR to those legislators required by Minn. Stat. § 14.116 by letter dated April 11, 2002.<sup>67</sup> The Administrative Law Judge finds that the agency fulfilled its additional notice requirement with this letter.

### **Consideration of Economic Factors**

23. Minnesota Statutes section 116.07, subd. 6 states:

In exercising all its powers the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

The MPCA states that while the proposed rules will not result in actual savings to the agency, the creation of an exemption to permit requirements for most service stations will result in savings connected with avoiding the costs of applying for and obtaining a permit, including the annual fee of \$24.94/ton of chargeable pollutant emitted.<sup>68</sup> The Administrative Law Judge finds that the MPCA gave due consideration to economic factors when adopting its proposed rules.

### **Statutory Requirements for the SONAR**

#### ***Cost and Alternative Assessments in the SONAR:***

24. Minnesota Statutes, Section 14.131 requires an agency adopting rules to include in its SONAR:

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<sup>66</sup> Ex. 34a.

<sup>67</sup> Ex. 34b.

<sup>68</sup> Ex. 14 at 43-44.



- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for an reasonableness of each difference.

25. The SONAR includes a discussion of the analysis that was performed by the agency to meet the requirements of this statute.<sup>69</sup> Those who will bear the costs of the proposed rules are owners of very large gasoline service stations because they will be required to apply for and obtain an air emissions operating permit, just as under the current rules. The agency identifies several beneficiaries of the rules, including owners and operators of smaller gasoline service stations, many of whom will no longer be required to obtain a permit. Also, MPCA anticipates that the delivery of regulatory services by the agency will be improved by the elimination of regulatory requirements that have a low priority in the enforcement scheme. Finally, the MPCA identifies the environment as a beneficiary of these rules because the proposed rules would enable the agency to concentrate on enforcing meaningful permit obligations.<sup>70</sup>

26. The MPCA states that the proposed rules will not affect state revenues. The agency will incur some costs to issue permits to the small number of gasoline service stations in Minnesota that will be required to apply for and obtain an air emissions permit.<sup>71</sup>

27. In the SONAR, the agency identifies two other methods for achieving the end of limiting the emissions potential of gasoline service stations: issuing permits to all such facilities in Minnesota, or limiting the rate at which fuel can be dispensed. Both of these methods were rejected by the MPCA as significantly more costly and intrusive into the business of operating a service station than the proposed rules.<sup>72</sup>

28. The MPCA explains that it has made enforcement of the current rule's requirement that gasoline service stations apply for a permit a low priority. However, without a permit, a station owner is technically in violation of state rules. The purpose of the EPA Guidance Memorandum referenced in the SONAR was to limit the emissions potential of these facilities without issuing permits. By removing the permit requirement

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<sup>69</sup> Id. at 44-47.

<sup>70</sup> Id. at 44-45. See Finding 42 for a discussion of affected parties not identified.

<sup>71</sup> Id. at 45.

<sup>72</sup> See id.

for most stations, the proposed rules comply with the Guidance and remove the threat of litigation over the nonissuance of permits. The proposed rules governing conditionally insignificant activities will not result in any additional costs to owners and operators because the effect of the changes is to clarify the conditions under which an activity is insignificant; the requirements are unchanged. The MPCA does not identify a viable alternative for accomplishing these ends other than amending the rule.<sup>73</sup>

29. With regard to the fifth regulatory factor, the MPCA expects that the compliance costs connected to the proposed rules will be minimal. These costs are attributable to operators keeping fuel throughput records (already required for the assessment of gasoline taxes) and for very large station owners, providing notification to the MPCA.<sup>74</sup>

30. No federal regulations exist that are similar to the proposed rules. The rules proposed by the MPCA concerning conditionally exempt stationary sources are the direct result of the EPA Guidance Memorandum.<sup>75</sup>

#### ***Performance-Based Regulation:***

31. Minnesota Statutes, Section 14.131, requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

32. The MPCA states that the proposed rules are intended to assist regulated parties in complying with their statutory obligations by increasing flexibility and reducing costs. For example, Minn. R. Chap. 7008 establishes the "conditionally exempt stationary source" classification. Owners and operators of qualifying stationary sources may choose to operate under the exemption or obtain an air emissions permit. For most gasoline service stations, either method limits the stationary source's potential to emit, thereby fulfilling its statutory obligations.

33. The Administrative Law Judge concludes that the MPCA has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

34. This Report is limited to the discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion including those made prior to the hearing, has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the

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<sup>73</sup> *Id.* at 46.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 46-47.

proposed rules is unnecessary. The Administrative Law Judge finds that the MPCA has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

### **Conditionally Exempt Stationary Sources**

35. The rules propose that two types of stationary sources will be exempt from the permitting process, if certain conditions are met, as set forth in new provisions of Rule 7008. The two types of sources that will be conditionally exempt are gas stations (7008.2100) and concrete manufacturing plants (7008.2200). For each one, the Agency has proposed technical standards and record-keeping requirements. If met, the gas station or concrete manufacturer is not required to obtain a permit for that source. The two types of sources are included in this category because they have the potential to emit high levels of pollutants, but ordinarily have very low actual emissions. The U.S. Environmental Protection Agency (EPA) sets the permissible level of pollutants. It has encouraged states to exempt sources that "consistently and predictably" emit less than 50 percent of the federal permitting thresholds (referred to as "part 70 thresholds"). The Agency has determined that these two types of sources typically fall into this category and can be regulated as well by rule as by permit, and with less cost to the businesses and the Agency.

36. Concrete manufacturing plants are currently exempted from the permitting process when certain conditions are met.<sup>76</sup> The proposed rules revise these conditions to fit the new, broader category of "conditionally exempt stationary sources." There were no objections to the reorganization and changes to the technical standards.

### **Analysis of Proposed Rules Part by Part**

#### **7005.0100, subp. 4f, Definition of "Conditionally Exempt Stationary Source."**

37. The Agency has proposed a definition of "conditionally exempt stationary source." It is reasonable to do so. However the proposed definition erroneously limits the conditionally exempt category to those sources listed in 7008.2100. Section 7008.2100 includes only gas stations. The SONAR states: "The first industry group to be conditionally exempt from the requirement to obtain a permit has been concrete manufacturing plants under Minn. R. 7011.0860. The proposed amendments move this rule to Minn. R. ch. 7008." Since the Agency's apparent intent is to also treat concrete manufacturing plants as conditionally exempt, the Agency has failed to demonstrate the reasonableness of the definition of "conditionally exempt stationary source." If the agency's intent is not reflected in the language as proposed, the definition should be amended to include concrete manufacturing plants that meet the technical standards in proposed Minn. R. 7008.2200. This change would not render the rules significantly different from those proposed.

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<sup>76</sup> Minn. R. 7011.0860.

## 7008.2100 Gasoline Service Stations Technical Standards.

38. The Sierra Club and Women's Cancer Resource Center object to allowing a gas station to be conditionally exempt unless the station has a stage-one vapor recovery system. Such systems minimize the pollutants, including benzene, that escape into the air when gasoline is unloaded from one tank, such as a gasoline tank truck, to the receiving tank, such as a gas station's storage tanks. The term "stage-one vapor recovery system" is defined in proposed rule 7008.0100, subp. 4. See also proposed rule 7011.0870. The stage-one vapor recovery system is designed to trap the vapors and return them to the unloading tank, thus limiting the emissions into the air. The Sierra Club would exclude a gas station from the permit process only if it installed and operated a stage-one vapor recovery system, and would require all stations to install such a system by January 1, 2008.<sup>77</sup>

39. Benzene is a known carcinogen. It increases cancer in adults and exposure by either parent prior to conception may significantly increase the risk of childhood cancer. The MPCA and Department of Health have both acknowledged benzene's toxicity and carcinogenic effect.

40. The MPCA has chosen to require stage-one vapor recovery systems only for high-volume gas stations, and the rule sets the volume levels that will trigger that requirement. The limits are lower for gas stations in ozone attainment than they are in non-attainment areas. For stations below the volume levels, the MPCA encourages voluntary installation of stage-one recovery systems. Its goal is to have such systems installed at stations selling 85 percent of the gasoline in the metro area by July 2003. It estimates that about 8 percent of the gas stations sell about 40 percent of the gasoline in the Twin Cities metro area. It has considered mandating vapor recovery systems for all gas stations, but has chosen to require them only for certain high-volume stations. It has selected the volume levels that it believes present a significant risk of exceeding the EPA threshold, and chosen to monitor the effectiveness of voluntary compliance at the lower volume stations. If the goal of voluntary compliance is not met, it will consider stricter measures.

41. The MPCA's decision to require stage-one vapor recovery systems only at the high-volume stations and encourage installation of vapor recovery systems at lower-volume stations is reasonable. It acknowledges the harmful effect of emissions from gasoline stations and the risks those emissions pose nearby. However, the level of emissions from most stations is very low and the MPCA has chosen to balance the risk they pose with the cost of installing a vapor recovery system.

42. Through its comments, the MPCA has adequately responded to the health concerns raised by the Sierra Club and Women's Cancer Resource Center and explained its rationale for setting a threshold for stage-one vapor recovery systems. However, the Sierra Club correctly points out that the Agency's SONAR should have addressed the consequences of its proposed rules on public health as well as on the regulated industry. Ultimately, the goal of regulation of emissions is to assure that pollution of Minnesota air, land and water does not adversely affect human health.

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<sup>77</sup> Comments from Sierra Club Air Toxics Campaign, November 13, 2002.

### **7008.4100 Conditionally Insignificant VOC Usage.**

43. The Agency has also added a category of "conditionally insignificant" activities. Under certain circumstances, these activities need not be included in the calculation of pollutants that trigger permitting requirements. See amendments to 7007.1115, subps. 1 and 2; 7007.1125, subps. 1, 2 and 3; and 7007.1130, subps. 1, 2 and 3.

44. The only "conditionally insignificant activity" included in the proposed rule is volatile organic compound (VOC) usage. The Agency anticipates that additional activities will be added to this category in the future.<sup>78</sup> There is no objection to the Agency treating VOC usage as a "conditionally insignificant activity."

### **7007.1120 Registration Permit Option B.**

45. Registration Permit Option B specifically addresses VOC emissions. The proposed amendments to this section are intended to clarify that conditionally insignificant activities need not be counted, unless the conditionally insignificant activity is VOC usage. These amendments as written are unnecessarily confusing because the rules contain no other conditionally insignificant activity except VOC usage. Thus, the rule requires that one count the only conditionally insignificant activity that there is, even though it states in general terms that one does not count conditionally insignificant activities. This is unreasonable because it is unnecessarily confusing. To correct this defect, subpart 1 B should not be amended. In the event that other conditionally insignificant activities are later added to chapter 7008, it may be appropriate to amend this rule part at that time. If this subpart is not amended as proposed, it will be clear that it applies to emissions from VOC-containing materials. Deleting the proposed language will not change the meaning and would not constitute a substantial change.

### **7007.1120, subp. 2 E, Application content.**

46. The Agency made a small change to the language in this item to clarify the method of calculating one year, but did not delete the word "basis" in the second line. This word should be deleted. This is a technical correction to the sentence and would not constitute a substantial change.

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

### **CONCLUSIONS**

1. The Minnesota Pollution Control Agency gave proper notice in this matter.
2. The MPCA has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
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

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<sup>78</sup> Ex. 14 at 9.

meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted at Findings 37 and 45.

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. 4; and 14.50 (iii).

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.


6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the MPCA from further modification of the proposed rules based upon this Report and an examination of the public comments, 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, except where otherwise noted.

Dated this 9th day of January 2003.

  
BEVERLY JONES HEYDINGER  
Administrative Law Judge