OAH Docket No. 8-2200-17794-1
Governor's Tracking Number AR 095

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Rules Relating to the Subsurface Sewage Treatment System Rules, Minnesota Rules Chapters 7080, 7081, 7082 and 7083.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

A hearing concerning the above rules was held by Administrative Law Judge Eric L. Lipman at 6:00 p.m. on Wednesday, April 18, 2007, and again at 9:00 a.m. on Friday, April 20, 2007, in the Offices of the Minnesota Pollution Control Agency ("MPCA" or "Agency") 520 Lafayette Road North, St. Paul, Minnesota 55155. Video conference links were established on both dates to MPCA Regional Offices at: 525 Lake Avenue South, Suite 400, Duluth, Minnesota 55802; 7678 College Road, Suite 105, Baxter, Minnesota, 56425; 1601 East Highway 12, Willmar, Minnesota 56201; 1420 East College Drive, Suite 900, Marshall, Minnesota 56258; 1230 South Victory Drive, Mankato, Minnesota 56001; 18 Wood Lake Drive Southeast, Rochester, Minnesota 55904; and 714 Lake Avenue, Suite 220, Detroit Lakes, Minnesota 56501.

Leah Hedman, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2131, appeared at the rule hearing on behalf of the MPCA. The members of the Agency's hearing panel were Gretchen V. Sabel, SSTS Coordinator; Mark S. Wespetal, Hydrologist; and Carol R. Nankivel, Principal Planner.

Approximately seventy-seven people attended the hearing and signed the hearing register. On each of the hearing days, the proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another twenty calendar days – until May 11, 2007 – to permit interested persons and the MPCA to submit written comments. Following the initial comment period, pursuant to Minnesota law,[1] the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments. The hearing record closed for all purposes on May 18, 2007.

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[1] Minn. Stat. § 14.15, subd. 1.

The public hearings and this Report are part of a larger series of processes under the Minnesota Administrative Procedure Act. These processes must be completed before an Agency – in this instance, the MPCA – is authorized to adopt rules.

Among the protections provided to the public under the Minnesota Administrative Procedure Act are the requirements that the Agency demonstrate that the proposed rules are necessary and reasonable, and that any changes the Agency may have made to the proposed rules after they were initially published are not substantially different than what the Agency originally proposed.[2] The rulemaking process also provides for public hearings, at which the public may review, discuss and critique the proposed rules.

NOTICE

The Board must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100, and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions that will correct the defects. If the Board elects to make any changes to the rule, it must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, if the Board does not elect to follow the suggested actions, it must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Board must give notice to all persons who requested that they be informed of the filing.

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[2] Minn. Stat. §§ 14.05, 14.131, 14.23, 14.24 (2006).

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable, with one exception at Finding 68.

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

FINDINGS OF FACT

I. Background on the Proposed Rules

1. This rulemaking proceeding involves a proposal by the Agency to revise, and segment into four distinct chapters, rules relating to Subsurface Sewage Treatment Systems (SSTS). The current body of rules on this subject is found in Minnesota Rules, Chapter 7080. These regulations – which govern the location, design, installation, use, maintenance and abandonment of SSTS – seek to prevent the discharge of inadequately treated sewage into surface and ground water, and thereby safeguard the public's health, safety and welfare.

2. Currently, sewage in Minnesota is treated through one of two methods; centralized wastewater treatment systems and decentralized wastewater treatment systems. Centralized systems collect and treat wastewater from cities and other densely developed areas and typically make discharges into surface water. Decentralized wastewater treatment systems are typically smaller systems that collect and treat wastewater from single family homes or businesses and generally discharge treated waste below the surface. Decentralized systems that discharge below the surface are known as subsurface wastewater treatment systems.

3. Under the current rule, SSTS that are designed to process 10,000 gallons or more of wastewater per day must be designed by a licensed professional engineer and are regulated by the MPCA in a manner that is similar to municipal wastewater treatment facilities.[3]

4. SSTS systems that are designed to process less than 10,000 gallons of wastewater per day must comply with Chapter 7080. These rules contain requirements on the design, installation, maintenance, pumping and inspection of these smaller systems. Chapter 7080 authorizes licensed individuals to install and maintain these smaller SSTS systems. Chapter 7080

[3] *See generally,* Minn. R. 7080.0600 (2)(B) (2005).

systems are currently permitted by local agencies; which, in most cases, are county officials.[4]

5. Minnesota's SSTS standards were originally issued by the Agency as advisory rules. In 1996, however, the legislature required the MPCA to establish a minimum SSTS code by rule.[5]

6. The current rulemaking process represents the first major revision of the originally-promulgated rules.[6]

7. Generally, since the SSTS rules were first promulgated, the MPCA has become aware of an increase in the number of large SSTS that have been installed in new housing developments and resorts where centralized wastewater treatment systems are not otherwise available.

8. In order to address these changing circumstances, and to provide for still greater regulatory flexibility in the future, MPCA proposes to subdivide the current Chapter 7080 into subject-specific Chapters 7081, 7082 and 7083. SSTS that process less than 2,500 gallons of wastewater per day would be governed by the proposed Chapter 7080. Larger systems would be governed by proposed Chapter 7081. Proposed Chapter 7082 would establish requirements for local regulatory programs. Proposed Chapter 7083 would focus upon the training of individuals who design, install and maintain SSTS.[7]

9. Additionally, the proposed rules include new product registration provisions that require manufacturers to certify that their products meet certain specified standards. The Agency intends that these new product certification standards will reduce the regulatory burdens on local units of government.[8]

II. Milestones in this Rulemaking Proceeding

10. The MPCA began developing revisions for the current rules in 1999. Among the outreach efforts undertaken by Agency staff were attendance at: national SSTS symposiums sponsored by the American Society of Agricultural Engineers in 2001 and 2004;[9] attendance at a trade show by the Minnesota Onsite Sewage Treatment Contractor's Association (MOSTCA); and

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[4] *See generally,* Minn. R. 7080.0305 and 7080.0310 (2005).

[5] Testimony of G. Sabel, Tr. 18-19.

[6] *Id.*

[7] *Id.* at 20.

[8] *Id* at 21.

[9] SONAR at 2.

obtaining guidance from the University of Wisconsin Small Scale Waste Management Project and the Wisconsin Department of Commerce.[10]

11. Further, the MPCA sought input from attendees at the University of Minnesota Onsite Sewage Treatment continuing education workshops in 2003, 2004 and 2005 and during an advanced design workshop in 2005. MPCA staff presented information to approximately 750 SSTS professionals in 10 Minnesota cities.[11] Following these presentations, surveys were distributed by the Agency to obtain stakeholder opinion as to current issues.

12. A formal Request for Comments on the proposed rules was mailed to persons on the rulemaking mailing list and was published in the State Register on January 5, 2004.[12]

13. A draft copy of the new rule chapters was posted on the MPCA's web site in the Spring of 2004.[13] Further, copies of the proposed chapters were e-mailed to each local unit of government that had a SSTS ordinance.[14]

14. Drafts of the proposed rules were discussed and reviewed over the course of several meetings. The professional associations involved in these discussions included the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design (Board), representatives of the Minnesota Onsite Wastewater Association, and the University of Minnesota Extension Service. The Agency also sought input from water quality engineers, hydrologists, sewage tank manufacturers, non-precast tank manufacturers, the Minnesota Professional Wastewater Recyclers Association, the National Onsite Wastewater Recyclers Association, the Minnesota Association of Professional Soil Scientists and other soil scientists, and the Minnesota chapter of the American Council of Engineering Companies.

15. As required by Minn. Stat. § 115.55, the Agency discussed these issues with MPCA's SSTS Advisory Committee, at meetings on August 11, 2004, November 17, 2004, December 15, 2004, January 12, 2005, February 16, 2005, and March 30, 2005. The Agency also sought comment at public meetings that were noticed in the summer 2004 edition of the MPCA publication, *SSTS Report*. These meetings were held in:

Duluth, August 17, 2004;
Brainerd, August 18, 2004;

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[10] *Id.*

[11] *Id.*

[12] SONAR at 4.

[13] SONAR at 4

[14] SONAR at 4.

Detroit Lakes, August 19, 2004;
Willmar, August 24, 2004;
Marshall, August 25, 2004;
Rochester, August 30, 2004'
Mankato, August 30, 2004; and
St. Paul, August 31, 2004.[15]

16. The Agency received over 550 letters and comments from individuals and local units of governments addressing various aspects of the proposed rules. A draft copy of the new rule chapters was posted on the MPCA's web site in the spring of 2004.

17. On February 12, 2007, a copy of the proposed rules and the Notice of Hearing were published in the State Register.[16] Approximately 1,000 comments were filed during the pre-hearing comment period. Many of these comments were received on the eve of the scheduled public hearings. Similarly, 150 written comments were received during the post-hearing comment period.

18. Due to the volume of pre-hearing and post-hearing comments, the Agency originally requested an extension of the post-hearing comment period beyond the 20-day and 5-day rebuttal period provided by Minn. Stat. § 14.15, subd. 1. Yet, because the statute does not authorize the Administrative Law Judge to extend the time period for submission of post-hearing comments, the ALJ denied this request.[17] Following that denial, the Agency filed some documents at the close of the 20 day period on May 11, 2007. By the close of the rebuttal period on May 18, 2007, the Agency had filed the following documents:

1. Statutory Considerations and Economic Analysis
2. Ongoing Administrative Costs for Local Units of Government
3. Excel Spreadsheet – pre-hearing and post-hearing comments
4. Index of Responses
5. Staff Post-Hearing Response to Public Comments

19. An Excel Spreadsheet cataloging the specifics of pre-hearing and post-hearing comments consists of 1,300 rows of data. In this spreadsheet, the MPCA describes each comment and its response to the comment. In a significant number of rows, the Agency indicates that it intends to further revise the language of the proposed rules in response to the commentary.

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[15] SONAR at 3.

[16] 31 State Register 1023 (Feb. 12, 2007).

[17] *See, Request for Extension of Deadline to Complete Report,* at 3 (June 8, 2007); Minn. Stat. §§ 14.15 (2006).

20. On May 25, 2007, following the close of the post-hearing comment period, the Governor signed into law a bill that amended Minn. Stat. § 115.56, subd. 2, as follows:

> (i) Until December 31, 2010, no other professional license is required to:
>
> (1) design, install, maintain, or inspect an individual sewage treatment system with a flow of 10,000 gallons of water per day or less if the system designer, installer, maintainer, or inspector is licensed under this subdivision and the local unit of government has not adopted additional requirements; and
>
> (2) operate an individual sewage treatment system with a flow of 10,000 gallons of water per day or less if the system operator is licensed as a system designer, installer, maintainer, or inspector under this subdivision and the local unit of government has not adopted additional requirements.
>
> **EFFECTIVE DATE.** This section is effective the day following final enactment.[18]

As part of the same legislation, the Legislature further directed the Agency to make a report to the legislature by February 15, 2008 on "issues relating to the licensing of individual sewage treatment systems." The Legislature provided:

> The commissioner of the Pollution Control Agency must report to the legislative committees with jurisdiction on environmental policy by February 15, 2008, after consulting with officials from the Minnesota Onsite Wastewater Association; the Minnesota Society of Professional Engineers; the American Council of Engineering Companies; the Minnesota Association of Professional Soil Scientists; the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design; the Geoscience Professional Organization; the University of Minnesota Water Resources Center; the Association of Minnesota Counties; the League of Minnesota Cities; the Coalition of Greater Minnesota Cities; the Minnesota Association of Small Cities; and the Minnesota Association of Townships, on further issues relating to the licensing of individual sewage treatment systems.[19]

As Administrative Law Judge Heydinger summarized in another proceeding, these provisions "clearly prohibits the Board from requiring a professional license other than the MPCA ISTS license to design, install, maintain, or inspect ISTS systems up to 10,000 gallons of water per day."[20]

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[18] *See,* 2007 Laws of Minnesota Chapter 131, Art. 1, § 73.

[19] *See,* 2007 Laws of Minnesota Chapter 131, Art. 1, § 95.

[20] *See, In the Matter of the Proposed Amendments to Rules Relating to Classes of Buildings, Minnesota Rules 1800*, OAH Docket No. 15-1006-17647 (1007).

21. On June 8, 2007, the Chief Administrative Law Judge extended the period for submitting a report to August 15, 2007.

22. The Agency's proposed revisions of the rules were filed with the Office of Administrative Hearings on Tuesday, July 17, 2007.

II. Rulemaking Legal Standards

23. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the Agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the Agency may rely upon materials developed for the hearing record,[21] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy,[22] and the Agency's interpretation of related statutes.[23]

24. A proposed rule is reasonable if the Agency can "explain on what evidence it is relying and how the evidence connects rationally with the Agency's choice of action to be taken."[24] By contrast, a proposed rule will be deemed arbitrary and capricious where the Agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[25]

25. An important corollary to these standards is that when proposing new rules an Agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the Agency is a rational one.[26] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the Agency's selection will be approved if it is one that a rational person could have made.[27]

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[21] *See, Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

[22] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[23] *See, Mammenga v. Board of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[24] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[25] *Compare, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

[26] *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

[27] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

26. Lastly, in these proceedings the Administrative Law Judge conducts a review of the Agency's compliance with the procedural requirements for promulgating new rules. Among the inquiries that are made are: Whether the Agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the MPCA has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[28]

27. The MPCA prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Agency 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 members of the Agency's Panel and supporting witnesses during the public hearings.

28. The MPCA has suggested changes to nearly every section of the proposed rules that drew stakeholder comment. Accordingly, because these later modifications follow the publication of the proposed rule language in the State Register, Minn. Stat. § 14.05, subd. 2 further requires that the Administrative Law Judge determine whether the new language is substantially different from that which was originally proposed.[29]

29. Additionally, Minn. Stat. § 14.05, subd. 2 instructs that a later 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 reaching a determination regarding 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."[30]

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[28] *See,* Minn. R. 1400.2100.

[29] *See* Minn. Stat. §§ 14.15, subd. 3, and 14.05, subd. 2.

[30] Minn. Stat. § 14.05, subd. 2.

III. Compliance with Procedural Rulemaking Requirements

30. On January 5, 2007, the Agency requested the scheduling of a hearing regarding the proposed rules and approval of the Additional Notice Plan. The MPCA filed the following documents with the Chief Administrative Law Judge at that time: A copy of the draft Notice of Hearing proposed to be issued; a copy of the proposed rules as certified by the Revisor of Statutes; and a draft of the SONAR.[31] On January 16, 2007, Administrative Law Judge Eric L. Lipman approved the Notice and Additional Notice Plan subject to four recommendations relating to the video conference links to the public hearing. On January 30, 2007, the Agency submitted a revised Notice Plan to include the Administrative Law Judge's recommendations. On February 7, 2007, the ALJ approved the modified Notice and Additional Notice Plan.[32]

31. On February 8, 2007, the Agency also mailed the Notice of Hearing and the text of the proposed rules to all persons who had registered to be on the Agency's rulemaking mailing list.[33]

32. On February 9, 2007, the Agency mailed a copy of the SONAR to the Legislative Reference Library as required by law,[34] and mailed copies of the Notice of Hearing, proposed rules, and SONAR to the chairs and ranking minority members of designated legislative committees.[35]

33. On February 12, 2007, a copy of the proposed rules and the Notice of Hearing were published in the State Register at 31 State Reg. 1023.[36]

34. During the prehearing comment period, approximately 150 persons filed letters regarding the proposed rules with the Office of Administrative Hearings. Most of the letters requested changes to the proposed rules.

35. On the day of the hearing,[37] the MPCA placed the following documents into the record:

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[31] Ex. H.

[32] Ex. H.

[33] Ex. G.

[34] Ex. E.

[35] The Agency sent materials to the leadership of the House Environment and Natural Resources Committee, House Environment and Natural Resources Finance Committee, Senate Environment and Natural Resources Committee, the Senate Environment, Energy and Natural Resources Budget Division Chair, and the Senate Agriculture, Veterans and Gaming Committee. *See,* Ex. 8.

[36] Ex. F.

[37] *See,* April 18, 2007 Hearing Transcript at 15-17.

(a) the Request for Comments as published in the State Register (Exhibit A);

(b) the Proposed Rules as approved by the Revisor of Statutes, dated July 16, 2007 (Ex. C);

(c) the SONAR (Ex. D);

(d) a copy of the Agency's February 8, 2007, letter mailing the SONAR to the Legislative Reference Library (Ex. E);

(e) the Notice of Hearing as published in the State Register (Ex. F);

(f) the Agency's Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List and its Certificate of Accuracy of the Mailing List (Ex. G);

(g) the Agency's transmittal letter identifying the additional Notice Plan (Ex. H);

(h) a copy of the MPCA's June 28, 2006, letter to the Chairs and Ranking Minority Members of the Senate Environmental and Natural Resources Committee and the Senate Environment, Energy and Natural Resources Budget Division and the Senate Agriculture, Veterans and Gaming Committee, and to House Environment and Natural Resources Committee (Ex. K – Item 1); and,

(I) a copy of the Agency's November 29, 2006, letter to the Department of Finance and the response from the Department of Finance, dated January 3, 2007 (Ex. K – Item 2).

36. The Administrative Law Judge concludes that the Agency has met all of the procedural requirements established by statute and rule.

IV. Statutory Authority

37. As statutory authority for the proposed rules, the MPCA cites Minn. Stat. § 115.03, subd. 1(e), which states that the MPCA may "adopt . . . rules in order to prevent, control or abate water pollution, or for the installation or operation of disposal systems or parts thereof, or for other equipment and facilities." Moreover, under Minn. Stat. § 115.55, the MPCA also has general statutory authority to adopt rules related to subsurface sewage treatment systems. This latter statute reads:

Subd. 3. Rules. (a) The Agency shall adopt rules containing minimum standards and criteria for the design, location, installation, use, and maintenance of individual sewage treatment systems. The rules must include:

(1) how the Agency will ensure compliance under subdivision 2;

(2) how local units of government shall enforce ordinances under subdivision 2, including requirements for permits and inspection programs;

(3) how the advisory committee will participate in review and implementation of the rules;

(4) provisions for alternative systems;

(5) provisions for handling and disposal of effluent;

(6) provisions for system abandonment; and

(7) procedures for variances, including the consideration of variances based on cost and variances that take into account proximity of a system to other systems.

(b) The Agency shall consult with the advisory committee before adopting rules under this subdivision.

(c) Notwithstanding the repeal of the Agency rule under which the commissioner has established a list of warrantied individual sewage treatment systems, the warranties for all systems so listed as of the effective date of the repeal shall continue to be valid for the remainder of the warranty period.

(d) The rules required in paragraph (a) must also address the following:

(1) a definition of redoximorphic features and other criteria that can be used by system designers and inspectors;

(2) direction on the interpretation of observed soil features that may be redoximorphic and their relation to zones of seasonal saturation; and

(3) procedures on how to resolve professional disagreements on seasonally saturated soils.

These rules must be in place by March 31, 2006.[38]

[38] A set of rules including revised definitions of the terms "redoximorphic features" and "seasonally saturated soil," was published by the MPCA on March 27, 2006. *See,* 30 State Register 1028 (March 27, 2006); 30 State Register 499 (Nov. 14, 2005).

38. The Administrative Law Judge finds that this statutory provision grants the Agency general authority to adopt the proposed rules.

V. Impact on Farming Operations

39. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an Agency provide a copy of any such changes to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rules in the State Register.

40. The MPCA has concluded that the adopting of SSTS standards will not have an impact on farming operations.[39]

41. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule changes will not affect farming operations in Minnesota and thus finds that no additional notice is required.

VI. Additional Notice Requirements

42. Minn. Stat. § 14.131 requires that an Agency include in its SONAR a description of the efforts it made to provide notification to persons, or classes of persons, who may be affected by the proposed rule; or alternatively, the Agency must detail why these notification efforts were not made. The MPCA made significant efforts to inform and involve interested parties in this rulemaking. The registered mailing list and additional notice list consist of nine hundred individuals and groups that received notice of the proposed rule amendments from the Agency. In addition, beginning in the spring of 2004, the Agency posted draft copies on the proposed rules on its Internet web page.[40]

43. The Administrative Law Judge finds that the Agency fulfilled its additional notice requirement.

VII. Statutory Requirements for the SONAR

A. Cost and Alternative Assessments in the SONAR

44. Minn. Stat. § 14.131 requires an Agency adopting rules to include in its SONAR:

a. a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear

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[39] SONAR , Section V.

[40] SONAR at 4.

the costs of the proposed rule and classes that will benefit from the proposed rule;

b. the probable costs to the Agency and to any other Department of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

c. a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

d. 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;

e. the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals;

f. the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals; and

g. an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

45. With respect to the first requirement, the MPCA indicated in the SONAR that a broad array of persons and entities will be affected by the proposed rule changes. These persons and entities are: current and future SSTS owners, in both residential and commercial property settings; local units of government with ordinances that regulate sewage treatment (counties, cities and townships); licensed SST businesses; the University of Minnesota's Onsite Sewage Treatment Program; manufactures of SSTS components; the MPCA itself; and all persons who drink or use Minnesota's water resources.[41]

46. The proposed rules have a potentially broad impact, in part, because of the extensive SSTS infrastructure in this state. For example, the MPCA estimates that there are 500,000 individual SSTS currently in use in Minnesota and that the total number of SSTS in use is increasing every year.

[41] SONAR at Section VI.

Further, the MPCA estimates that there are approximately 11,000 Mid-sized Sewage Treatment Systems (MSTS) currently in use and 180 new MSTS systems installed every year. All 87 counties operate programs to approve and inspect SSTS systems and approximately 100 municipalities and townships administer SSTS programs of their own.[42] Lastly, there are approximately 1,800 companies that install and maintain SSTS systems as part of their regular business operations.[43]

47. With respect to the second requirement, the MPCA estimated that the costs incurred by the MPCA in enforcing the proposed rules would be minimal and administrative in nature. Much of the MPCA's SSTS resources are currently spent providing technical assistance to local permitting authorities and SSTS professionals.[44] The Agency believes that, following some additional training, so as to improve local problem-solving capabilities, its staff costs will decrease over time.[45] The MPCA estimates that its proposed product registration program will require an additional 0.5 Full-Time Equivalent employee (FTE) during the first year and 0.25 FTE on an ongoing basis. Further the Agency's additional travel and meeting costs are estimated to be approximately $5,000 per year.[46]

48. Although the proposed rules will affect other state agencies that own and operate SSTS (including the Department of Natural Resources and the Department of Transportation), the MPCA does not project that the revised rules will result in significant staff cost increases.[47]

49. With respect to the third requirement, the MPCA asserts in the SONAR that these proposed rules are less intrusive and more adaptable than the current rules. In preparing the proposed rules, MPCA staff did meet with many stakeholders and industry representatives in order to develop less costly and less intrusive methods of achieving the Agency's regulatory objectives.[48]

50. With respect to the fourth requirement, the MPCA notes that it is obligated by Minnesota law to write rules concerning SSTS.[49] Because of the specific statutory instruction to promulgate administrative rules on this subject,

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[42] *Id.*

[43] *Id.* at 380.

[44] *Id.* at 381.

[45] *Id.*

[46] *Id.* at 380.

[47] *Id.* at 382.

[48] *Id.*

[49] Minn. Stat. § 115.55 (3) (2006).

the MPCA did not pursue alternative methods of achieving its purposes; nor were non-rulemaking alternatives urged by any interested parties.[50]

51. With respect to the fifth requirement, the MPCA acknowledges that the probable costs of complying with the proposed rules will be different for different sets of regulated parties. While the Agency predicts that the costs of regulatory compliance will be about the same, or less, for smaller SSTS under the proposed rules, the regulatory requirements will intensify for larger SSTS. More specifically:

a. Current ISTS Owners: The Agency estimates that as a result of simplifying and relaxing certain compliance standards for existing systems, the average owner of ISTS will save approximately $940 under the proposed rules. Additionally, the MPCA estimates that fewer systems will be determined as non-compliant, when compared to the current practice.[51]

b. Future ISTS Owners: The Agency projects that the cost of installing new or replacement systems will increase under the proposed rules. The average ISTS system costs $6500. The Agency anticipates that the cost of installing a new system under proposed rules will increase by approximately $750, or eleven percent of the contract price. The MPCA asserts that while it projects that the proposed rules will add to the cost of a new ISTS system in the short run, improved designs will extend the life expectancy of such a system and reduce both the risk of failure and attendant costs over the longer term.[52] Likewise, the MPCA estimates an additional one time cost of $210 relating to maintenance, but that this expense will be offset by longer system life.[53]

c. Current MSTS Owners: The proposed rules will not require current MSTS owners to retrofit or replace their MSTS systems. Thus, a current MSTS system will face significantly higher costs only in the event of system failure which requires installation of a replacement system.[54]

d. Future MSTS Owners: The Agency estimates that the capital costs for a new residential cluster MSTS will increase by approximately $23,000 for each cluster under the proposed rules. The Agency

[50] SONAR at 5-6 and 382-383.

[51] *Id.* at 383-387.

[52] *Id.* at 383.

[53] *Id.*

[54] *Id.* at 384.

relies upon data from the United States Department of Agriculture's Rural Development Commission, which indicates that the average large cluster serves about 70 homes and costs about $767,119; or $10,959 per home. Thus, $23,000 in new costs would have a $328 per home impact on each home served.[55]

e. Local Units of Government with an SSTS Ordinance: The MPCA anticipates that Local Units of Government (LUGs) with SSTS ordinances will bear a higher cost in administering a revised permitting system. The Agency anticipates that an LUG will have increased ongoing costs of approximately $2,100 per year. These added costs are associated with checks of soil conditions, review monitoring plans and increased training for local inspectors.[56]

f. Current SSTS Licensed Businesses: Individuals with basic licenses will face new registration or licensing requirements costing $630. Additionally, businesses that are currently licensed to conduct SSTS activities will face increased costs if they seek to upgrade their licenses to authorize the installation of the larger MSTS systems. The MPCA estimates upgraded licensure will cost approximately $4,000 per business.[57]

g. Future SSTS Licensed Business: The MPCA anticipates that a new SSTS business will have to pay higher cost for education, training and mentorship than under the current rule.[58]

h. The University of Minnesota (U of M): The U of M Agricultural Extension Service provides SSTS-related training and technical assistance to SSTS professionals and homeowners. The Agency estimates that the U of M will incur costs in revising existing materials to reflect the new regulatory requirements. The Agency asserts that it will provide a "significant grant" to the U of M for the purpose of defraying some of these costs.

i. Manufacturers of SSTS Components: Manufacturers of SSTS and related components will face increased costs. Based upon information garnered from agencies in other states and the Province of Quebec, the Agency estimates that these compliance costs will range between $55,000 to $80,000 per treatment technology and $2,000 for engineer certification.[59]

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[55] *Id.* at 383.

[56] *Id.* at 384.

[57] *Id.* at 385.

[58] *Id.*

[59] *Id.*

52. With respect to the sixth requirement, the MPCA indicated in the SONAR that the probable costs of failing to adopt the proposed rules would be increased costs for future ISTS owners, higher administrative costs for the Agency and adverse environmental consequences for the general public.[60]

53. With respect to the seventh requirement of Minn. Stat. § 14.131, the MPCA asserts in the SONAR that there is no conflict between the proposed rules and federal regulations. As the Agency explains, there are no existing federal regulations relating to subjects encompassed by the proposed rules.[61]

B. Performance-Based Regulation

54. Minn. Stat. § 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." Minn. Stat. § 14.002 states further 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."[62]

55. The MPCA included its performance-based analysis in the "Rule by Rule Analysis" contained in the SONAR.

56. The Administrative Law Judge concludes that the MPCA has sufficiently assessed the performance impact of the proposed rules and has satisfied the requirements of Minn. Stat. § 14.131.

C. Consultation with Commissioner of Finance

57. Minn. Stat. § 14.131 requires that the Agency consult with the Commissioner of Finance when evaluating the fiscal impact and fiscal benefits of the proposed rules on local units of government. The Agency noted in its SONAR that prior to publishing the Notice of Intent to Adopt Rules, it sent to the Commissioner of Finance copies of the rulemaking documents that the Agency had earlier provided to the Governor's office for review and approval.[63] These rulemaking documents included the *Governor's Office Proposed Rule and SONAR Form*, a final draft of the proposed rules and a nearly-final version of the SONAR. The Department of Finance did not raise with the MPCA any concerns as to the impacts of the proposed rules on local units of government.[64]

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[60] *Id.* at 386-387.

[61] *Id.* at 387.

[62] Minn. Stat. § 14.002 (2006).

[63] SONAR at 374.

[64] *Id.*

58. The Administrative Law Judge concludes that the Agency has met the requirements (set forth in Minn. Stat. § 14.131) for consultation with the Commissioner of Finance regarding the fiscal impact and benefits of the proposed rules.

D. Compliance Costs to Small Businesses and Cities

59. Under Minn. Stat. § 14.127, subd. 1, agencies must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[65] Although this determination is not required to be included in the SONAR, the statute states that the Agency "must make [this] determination . . . before the close of the hearing record" and the Administrative Law Judge must review the determination and approve or disapprove it.[66]

60. In the SONAR, the MPCA stated that it has considered whether the cost of complying with the proposed rules in the first year after the rule takes effect will exceed $25,000 for any small business or small city and has determined that it will not. The MPCA's determination is based upon its assessment in the SONAR of the probable costs of complying with the proposed rules.[67] The Agency asserted that none of the members of the Advisory Committee, nor members of the public commenting on the rules, raised concerns as to the cost impact of the new rules on small businesses or small cities.[68]

61. While a number of counties did raise concerns as to the potential costs of complying with the proposed rules,[69] the costs to county governments are not included in the calculations required by Minn. Stat. § 14.127.

62. The Administrative Law Judge concludes that the Agency has met the requirements set forth in Minn. Stat. § 14.127 for determining whether the cost of complying with the proposed rules in the first year after the rules take effect, will exceed $25,000 for any small business or small city.

VIII. Analysis of the Proposed Rules

63. This Report is limited to the discussion of the portions of the proposed rules where commentators prompted a genuine dispute as to the

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[65] Minn. Stat. § 14.127 (1) (2006).

[66] Minn. Stat. § 14.127 (2) (2006)

[67] *See* SONAR at 6-7.

[68] SONAR at 10.

[69] *See, e.g.,* Exs. 1001, 1002, and 1037.

reasonableness of the Agency's proposed alternative or otherwise required close examination. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part.

64. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically discussed in this Report. Further, the Administrative Law Judge finds that all provisions not specifically discussed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

X. Rule by Rule Analysis

Minnesota Rules Part 7080.1100

Subp. 9 – Definition of "bedroom"

65. The agency proposes to revise the definition of "bedroom" by adding to the current text – "a room or unfinished area within a dwelling that might reasonably be used as a sleeping room" – the words *"as determined by the local unit of government."*[70]

66. The definition is an important one as the number of bedrooms is used as a proxy for the number of regular residents in the home, which is roughly related to the amount of sewage flow that will be processed by the sewage treatment system.[71] The agency notes that the definition problems in this area are longstanding because "modern homes contain rooms that may not initially be designed for sleeping (e.g. dens, sewing rooms, offices, craft rooms, workout rooms, etc.), but can be converted to sleeping rooms in the future as the need changes or if the dwelling changes ownership."[72] Further, while the agency suggests that additional guidance on this issue may be forthcoming in the future, in the interim it prefers a broadly-worded definition so as to permit local permitting officials "discretion and flexibility in making a bedroom determination."[73]

67. There are two difficulties presented in this section. The first is that the existing rule provides no prompting as to what types of spaces "might reasonably be used as a sleeping room;" a shortcoming that is no way improved

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[70] SONAR at 17; Attachment 1a at 5 (emphasis added).

[71] *Compare generally,* Proposed Regulation 7081.0120 (1), Attachment 1b at 12-13.

[72] *Id; compare also, In the Matter of the Proposed Rule Amendments Governing the Individual Sewage Treatment Systems Program,* Minn. Rules Chapter 7080, OAH Docket No. 3-2200-9846-1 (1995) (http://www.oah.state.mn.us/aljBase/22009846.rt.htm).

[73] SONAR at 17.

by the addition of the words "as determined by the local unit of government." The language in the rule is simply not sufficiently specific to provide fair warning of the type of situation which is encompassed.[74] Additionally, the standards that local officials might use in making this determination are neither stated, nor a part of common understanding, so as to make the intended meaning clear.[75] Lastly, as hinted at in the comments from Dakota County on this subject,[76] if the intention of the rule is to have a useful proxy for later demands on the SSTS, having a definition that does not vary over time – or from inspection official to inspection official – is needed.

68. The Administrative Law Judge finds that the proposed practice of counting rooms or areas within a home that, in the standardless judgment of various officials, might be considered "reasonable" for sleeping, is a defect in the rule. It should be noted that other jurisdictions have fashioned a definition of "bedroom" around the physical characteristics of the specific area in the home;[77] such that the inclusion of such specifics to this definition is both possible and would not be a substantial change to the rule.

Subp. 22 – Definition of "distribution box"

69. The agency proposes to revise the definition of "distribution box" by making clear that such a device is one that is "intended to distribute sewage tank effluent concurrently and equally" throughout the soil, but need not achieve precise distributive equality in order to qualify as a distribution box. As modified by the agency,[78] this definition is needed and reasonable, and does not represent a substantial change from the rule as originally proposed.

Subp. 25 – Definition of "dwelling"

70. The agency proposes to revise the definition of "dwelling" so as to harmonize it with the definition of dwelling that is found in the Department of

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[74] *Compare, In the Matter of the Proposed Adoption of Amendments to the Rules of the Department of Human Services Governing the Use of Aversive and Deprivation Procedures By Licensed Facilities Serving Persons with Mental Retardation or Related Conditions*, OAH Docket No. 1800-7471-1 (http://www.oah.state.mn.us/aljBase/18007471.93.htm) (quoting *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980)).

[75] *Compare, e.g., In the Matter of the Proposed Rules Governing the Licensure of Treatment Programs for Chemical Abuse and Dependency and Detoxification Programs, Minnesota Rules, Chapter 9530,* OAH Docket No. 3-1800-15509-1 (2004) ("The Administrative Law Judge finds the requirement that a program have a particular licensure, and 'any additional certifications required by the department,' to be impermissibly vague and a defect in the rule") (http://www.oah.state.mn.us/aljBase/180015509.rr.htm).

[76] *See,* Ex. 1156; *see also,* 1002, 1022 and 1160.

[77] *Compare, e.g.,* State of Connecticut, On-Site Sewage Disposal Program, *Determining Design Sewage Flow* (http://www.dph.state.ct.us/BRS/Sewage/sewage_flow.htm); Sonoma County Permit and Resource Management Department, Policy No. 1-4-1 (http://www.sonoma-county.org/prmd/docs/policies/1-4-1.pdf).

[78] *Compare,* Ex. 1151 with Attachment 1a at 7.

Health's Plumbing Code.[79] As modified by the agency,[80] this definition is needed and reasonable, and does not represent a substantial change from the rule as originally proposed.

Subp. 45 – Definition of "Individual Subsurface Sewage Treatment System"

71. The agency proposes to modify the definition of ISTS by inserting specific design flow standards into the definition. While the agency had originally proposed to define the individual systems as ones which had a design flow up to 2,500 gallons per day, as part of a larger series of changes to the regulatory dividing lines,[81] the agency now proposes to set the maximum threshold for individual systems at a design flow of up to 5,000 gallons per day. Because the agency's categorization of different systems is based upon a close review of stakeholder comments,[82] its own survey of existing infrastructure,[83] and assessment of the probable environmental impacts of these categorization decisions, the rule as modified by the agency is needed and reasonable. Additionally, the rule revisions do not represent a substantial change from the rule as originally proposed.

Subp. 67 – Definition of "seepage bed"

72. The agency proposes to revise the definition of "seepage bed" so as to eliminate any references to particular effluent distribution products or methods. As modified by the agency,[84] this functional definition is needed and reasonable, and does not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.1500

Subp. 4A

73. The agency proposes to add text to the existing role to the effect that ISTS should not present an "imminent threat to public health or safety."[85] The proposed rule makes clear that a single backup of the system will not result in a determination that the system presents an imminent threat to public health or safety. Additionally, the new text makes clearer which type of tank covers do not sufficiently protect public safety. As modified by the agency, the proposed rule is needed and reasonable, and does not represent a substantial change from the rule as originally proposed.[86]

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[79] *See,* Minn. R. 4715.0100 (43) (2007); Attachment 1a at 8.

[80] *Compare,* Ex. 447 with Attachment 1a at 8.

[81] *Compare,* Agency Post Hearing Comments, at 5 through 10 with SONAR at 28.

[82] *Compare,* Ex. 447 with Attachment 1a at 8.

[83] *Compare,* Agency Post Hearing Comments, at 5 through 10 with SONAR at 28.

[84] *Compare,* SONAR at 37-38 and Ex. 199 with Attachment 1a at 17.

[85] *See,* Minn. R. 7080.0060 (3)(A)(1) (2005).

[86] *Compare,* SONAR at 54 and Exs. 1002 and 1160 with Attachment 1a at 28.

Subp. 4C

74. The agency originally proposed to include within the definition of system compliance, adherence to the provisions of the system's management plan.[87] In response to stakeholder comment, however, the agency agreed that mere non-adherence to one or another element of a system management plan would render many well-functioning systems in Minnesota technically non-compliant. Accordingly, this proposed addition was withdrawn. As modified by the agency, the proposed rule is needed and reasonable, and does not represent a substantial change from the rule as originally proposed.[88]

Subp. 4D

75. The agency proposes to revise the existing vertical separation standards for systems that are installed in a shoreland protection area or wellhead protection area. While the existing rule requires a three foot vertical separation distance in such areas,[89] the agency proposes to permit local units of governments to vary this standard, by ordinance, within a range of fifteen percent of the state standard. The permitted variations would allow regulatory responses to local topography and soil conditions that may be better known to local officials.[90] While one commenter urged a 15 percent variance from the vertical separation standard, without resort to an ordinance,[91] the proposed rule as modified by the agency is needed and reasonable. Additionally, the modified text does not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.1720 Subp. 4

76. The agency proposes to modify the current regulation on the number of soil observations to be conducted during a site evaluation. The current regulation leaves the number of soil observations to be conducted during a site evaluation to the "professional judgment" of the person conducting the evaluation so long as at least one observation is conducted in each "soil treatment area."[92] Originally, the agency proposed to modify the current regulation by requiring "[m]ultiple soil observations" and "at least one soil observation must be performed in the area anticipated to have the most limiting conditions."[93] Following the receipt of stakeholder comment, however, the agency proposes to further modify the rule so as to specify that a minimum of three soil observations must be conducted and that at least one observation

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[87] *Compare,* Minn. R. 7080.0060 (3)(A)(3) (2005) with SONAR at 55.

[88] *Compare,* SONAR at 55 and Ex. 941 with Attachment 1a at 29.

[89] *See,* Minn. R. 7080.0060 (3)(B)(1) (2005).

[90] *See,* SONAR at 55 and Attachment 1a at 29.

[91] *See,* Ex. 1031.

[92] *See,* Minn. R. 7080.0110 (4)(C) (2005).

[93] *See,* SONAR at 100.

occur "in the portion of the soil treatment area anticipated to have the most limiting conditions."[94]

77. While commentators were divided as to whether the overall minimum number of soil observations should be set at two or four,[95] the agency's selection of a minimum of three observations is needed and reasonable. Moreover, the modified text does not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.1920 A

78. The agency proposes to modify the current regulation (which now includes a minimum liquid depth for septic tanks[96]) to include a new provision which limits the liquid depths that may be considered as part of the calculation of the tank's capacity. As originally proposed, the agency sought to limit liquid depths that could be used as part of the calculation of a given tank's capacity to 78 inches.[97] Some commentators questioned the reasonableness of a maximum liquid depth in this context; expressing the concern that such a rule was overly prescriptive and might inhibit the development of new technologies.[98]

79. Following the receipt of stakeholder comment, the agency further proposes to extend the maximum depth that may be used by 6 inches – to a new maximum liquid depth of 84 inches – but insists that some limitation on the capacity calculation is needed. The agency asserts that the newly proposed maximum is consistent with rules on the placement of septic tanks, the known settling velocities of organic substances and the regulatory restrictions established in other states.[99] As modified by the agency, this restriction is needed and reasonable and does not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.1950 B

80. The agency proposes to modify the regulation so as to permit an unbaffled transfer hole in the compartment wall, of at least 50 square inches, to be located in the clarified liquid zone of a compartmentalized sewage tank.[100] The regulations currently in place oblige that such compartments are to be baffled in order to "obtain effective retention of scum and sludge."[101]

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[94] *See,* Attachment 1a at 58.

[95] *Compare,* Ex. 38 with Exs. 554 and1145.

[96] *See,* Minn. R. 7080.0110 (4)(C) (2005).

[97] *See,* SONAR at 111.

[98] *See,* Exs. 482, 906 and 1031.

[99] *Compare,* Agency Post Hearing Comments, at 40 with Attachment 1a at 70-71.

[100] *See,* SONAR at 115-116.

[101] *See,* Minn. R. 7080.0130 (2)(N)(3) (2005)..

81. One commentator questioned the reasonableness of the proposed practice, asserting that "this new passage way will not allow for proper settling of the solids between compartments," "effluent will easily carry more solids into the second compartment negating the benefit of the second compartment," and that "[a]ll consumers across the state ... are going to be negatively impacted" as a result of shorter drain field longevity.[102]

82. The agency disagrees and asserts that permitting such a transfer hole in the clarified liquid zone operates "just as effectively" at keeping settled solids and floating scum from passing through to next tank as baffled holes; is consistent with ASTM septic tank specification C-1227; and allows for the installation of new technologies.[103] The provisions, including the later-arriving amendment that baffled transfer holes be a minimum of 12 square inches, are needed and reasonable and do not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.1970
B

83. The agency proposes to modify the current regulation, which now sets certain minimum requirements for access to septic tanks,[104] so as to provide ready access to the tank for maintenance purposes.[105] As originally proposed, the agency sought to establish an access of at least 20 inches in diameter over "all baffles, screens, pumps, or other devices that may need inspection, maintenance or repair."[106] Several commentators urged the agency to modify the rule requirements so as to provide that tanks have a minimum of two maintenance holes of 20 inches in diameter, that one such maintenance hole be placed near the center of the tank and that another six-inch diameter hole be placed over the inlet baffle.[107]

84. Following the receipt of stakeholder comment, the agency further proposes to add these elements to the septic tank standards.[108] As modified by the agency, the requirements are needed and reasonable and do not represent a substantial change from the rule as originally proposed.

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[102] *See,* Ex. 195.

[103] *Compare,* SONAR, at 116.

[104] *See,* Minn. R. Minn. R. 7080.0110 (2)(M) (2005).

[105] *See,* SONAR at 118-119.

[106] *See, id.*

[107] *See,* Exs. 535, 710, 782, 783, 784, 785, 786, 1037, 1038 and 1040.

[108] *Compare,* Attachment 1a at 75-76.

C 1

85. The agency proposes to modify the current regulation, which now provides that maintenance covers be "secured,"[109] so as to provide for additional and more meaningful performance standards.[110] As originally proposed, the agency sought to require that maintenance holes be "secured by having sufficient weight, or bolted, locked, or secured by other methods approved by the local unit of government ... and be designed so the cover cannot be slid or flipped ...."[111]

86. Several commentators complained that the originally proposed additions did not sufficiently describe what was meant by "secured" against unauthorized access.[112] Additionally, one commenter expressed concern that without a single state standard, regulatory compliance with a myriad of locally-developed standards would be burdensome.[113]

87. Following the receipt of stakeholder comment, the agency further proposes to specify certain minimum maintenance cover weight standards and methods of securing against unauthorized access to underground tanks – particularly access to tanks by children.[114] As modified by the agency, the requirements are needed and reasonable and do not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.2000 C

88. Among the more contentious issues presented during this rulemaking was whether, and to what extent, the agency should establish a maximum burial depth for the top of a sewage tank. While the rule modification as originally proposed by the agency would have set the maximum burial depth for the top of the tank at some level between four and seven feet from the final grade of the new dwelling, this proposal drew vigorous comment and objections.[115] Principally, the commentators fell into one or more of the following groups: those who objected to the new standard as confusing and vague;[116] those who objected to state acquiescence to the placement of the top of sewage tanks at depths lower than four feet;[117] and those who believed that placement of

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[109] *See,* Minn. R. 7080.0110 (2)(M)(2) (2005).

[110] *See,* SONAR at 119.

[111] *See, id.*

[112] *See,* Exs. 35, 42, 197, 244, 492, 711, 741, 921, 939 and 1175; *see also,* Exs. 1027, 1031, 1041.

[113] *See,* Ex. 921.

[114] *Compare,* Attachment 1a at 75-76.

[115] *See,* SONAR at 123.

[116] *See, e.g.,* Exs. 43, 207, 246, 1001, 1027, 1030 and 1177.

[117] *See, e.g.,* Exs. 161, 222, 246, 1030, 1066 and 1177.

tanks at depths lower than four feet might be warranted – particularly where it was consistent with the tank manufacturer's design standards.[118]

89. Following the receipt of these comments, the agency further proposes to set a single maximum of burial depth of the top of a sewage tank at four feet, unless a local ordinance permits burial at a greater depth and the particular placement is consistent with the manufacturer's tank standards.[119] In blending the various competing alternatives, the agency both avails itself of the benefits of higher tank placement, in the main,[120] while permitting localized variations where special conditions exist. As modified by the agency, the requirements are clearly stated, needed and reasonable. Additionally, these modifications do not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.2010, Subp. 3 A

90. The agency proposes to modify the current regulation so as to assure that sewage tanks installed in Minnesota are watertight.[121] As originally proposed, the agency sought to require that "every 25th tank produced must be tested for watertightness" and that "[a]t least one tank per year, per model, must be tested for watertightness."[122] Several commentators objected to the requirement that every 25th tank produced be separately tested for watertightness as unduly burdensome, and in times of modern manufacturing techniques, without a sufficient factual basis.[123]

91. Following a close review of these comments, the agency further proposes to delete the requirement that every 25th tank produced be separately tested for watertightness, and instead rely upon the data that is drawn from the annual tests performed upon each model of tank.[124] As modified by the agency, the testing requirements are needed and reasonable. Additionally, the removal of these more restrictive requirements does not represent a substantial change from the rule as originally proposed.

Minnesota Rules Part 7080.2050

Subp. 2 C

92. The agency proposes to modify the current regulation so as to assure that sewage pipes used in pressure systems are sloped so as to be

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[118] *See, e.g.,* Exs. 727, 788, 790, 791, 792, 797 and 928.

[119] *Compare,* Attachment 1a at 75-76.

[120] *Compare,* Agency Post Hearing Comments, at 42.

[121] *See,* SONAR at 127-128.

[122] *See,* SONAR at 127.

[123] *See,* Exs. 46, 138, 937, 962, 1033 and 1136.

[124] *Compare,* Attachment 1a at 82 and Agency Post Hearing Comments, at 41.

capable of "quick drainback to the dosing chamber."[125] While agreeing with the agency's objectives in this regard, several commentators noted that stating the sloping requirement in this way was vague.[126]

93. Following receipt of these comments, the agency further proposes to set the minimum sloping requirements at "one percent for drainback or other frost protection measures" – a sloping designation that mirrors the earlier-stated requirement for gravity supply pipes systems.[127] As modified by the agency, the testing requirements are needed and reasonable. Additionally, the clarified text does not represent a substantial change from the rule as originally proposed.

Subp. 2 F

94. The Agency proposes to reduce the spacing of the laterals and perforations in distribution media from a standard of one perforation for every 25 square feet, which appears in the current rule,[128] to a standard that requires one perforation for every 9 square feet. While one commentator questioned whether the more restrictive standard was buttressed by accompanying science, the Agency's SONAR makes clear that smaller distances between perforations increase the amount of soil that contacts sewage, avoids overloading the soil that does process sewage and is a spacing regimen that is familiar within the SSTS industry.[129] Moreover, while the regulators themselves might have preferred a still smaller distance between perforations, the Agency carefully considered the costs and benefits of a still-more restrictive rule when settling upon the proposed changes.[130] As modified by the agency, the spacing requirements for distribution media are needed and reasonable.

Minnesota Rules Part 7080.2270, Subp. 1 C

95. The Agency proposes to require the installation of a flow measurement device (such as an event counter or a running time clock) to all systems in which "a pump is to be employed."[131] While one commentator questioned whether the requirement to add the measurement device should be obliged of all systems employing a pump, and not merely those that have "weeped" in the past,[132] the Agency asserts that when trouble-shooting a failed system "the most important piece of information is the quantity of flow to the

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[125] *See,* SONAR at 133-134.

[126] *See,* Exs. 46, 138, 937, 962, 1033 and 1136.

[127] *See,* SONAR at 133 and Attachment 1a at 85.

[128] *See,* Minn. R. Minn. R. 7080.0150 (3) (E) (2005).

[129] *See,* SONAR at 140.

[130] *Id.*

[131] *See,* SONAR at 154 and 177; Attachment 1a at 122.

[132] *See,* Ex. 1001.

system."[133] Moreover, while the Agency would prefer to have these flow measurements available on both gravity and pressure fed systems, its decision to require the installation of such devices only on the latter type of system properly balances the costs of such a requirement, the available range of installation expertise and the benefit of flow data in avoiding later hazards. The requirement that a flow measurement device be installed on every system in which a pump is also used, is needed and reasonable.

Part 7081
Minnesota Rules Part 7081.0080 Subp. 4D

96. The Agency proposes to revise the existing restrictions on the concentration of total nitrogen effluent plumes from SSTS. The current regulations authorize local units of government to enact such standards and to regulate nitrogen discharges "for local resource protection."[134] In the proposed rules, the Agency would set a statewide MSTS standard that forbids effluent discharges that "exceed a concentration of total nitrogen of greater than 10 mg/l (milligrams per liter) at the property boundary or nearest receptor, whichever is closest."[135]

97. A number of commentators urged the Agency restore the earlier, local options on nitrogen discharges. Among the critiques made of the proposed standards are that they are unnecessary to assure water quality,[136] inadequately buttressed by supporting science[137] and a burdensome mandate to local units of government.[138]

98. As the Agency makes clear in the SONAR, the larger MSTS and LSTS are capable of discharging sizeable amounts of soluble nitrates into groundwater, potentially compromising nearby aquifers of drinking water.[139] Moreover, the proposed restrictions apply only to these larger systems and have for its standard the same 10 mg/l threshold that appears in the both the National Primary Drinking Water Regulations and the State of Minnesota's "Table of Health Risk Limits."[140] Lastly, the costs of establishing compliance in this instance will not be borne by local units of government, as suggested by one commentator, but rather by the holder of the MSTS permit. The proposed nitrogen discharge restrictions are needed and reasonable.

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[133] SONAR at 154.

[134] *See,* Minn. R. Minn. R. 7080.0179 (2) (C) (2) (2005).

[135] *See,* SONAR at 251; Attachment 1b at 10.

[136] *See,* Exs. 572, 1163.

[137] *See, id.*

[138] *See,* Ex. 969.

[139] SONAR at 251.

[140] *See, e.g.,* Reply to Comment 159; Minn. R. 4717.7500 (68) (2007).

Minnesota Rules Part 7081.0140

99. The Agency proposes to establish an MSTS infiltration and inflow standard of "200 gallons of infiltration and inflow per inch of collection pipe diameter, per mile, per day …."[141] Two commentators questioned the proposed requirement, asserting respectively that it was inappropriately borrowed from standards relating to larger municipal systems[142] and was not warranted for pressurized systems without manholes.[143] As the Agency persuasively details, however, inflow and infiltration still occurs with the longer pipe length of MSTS and indeed even in some pressurized systems.[144] The proposed MSTS infiltration and inflow requirements are needed and reasonable.

Minnesota Rules Part 7081.0180, Subp. 2

100. The Agency proposes to establish a new requirement obliging the designers of MSTS to "determine [the] feasibility of relocating the system outside the floodplain," when proposing to locate an MSTS with the "flood fringes."[145] Two commentators oppose the new assessment requirement on the grounds that MSTS should never be sited within a floodplain.[146]

101. As the Agency explains, however, not only is the placement of ISTS within the flood fringes a practice that is permitted by existing rule, the Agency has not noted significant environmental problems with such systems.[147] Additionally, if the commentators' suggestions were adopted, and the siting of MSTS within flood fringes was prohibited, the Agency predicts that several counties would face genuine difficulties in placing MSTS at all.[148] Because the proposed rule is based upon the current siting practice for ISTS, and reflects a reasonable balancing of the costs and benefits of permitting the placement of MSTS, the proposed assessment requirement is needed and reasonable.

Minnesota Rules Part 7081.0240, Subp. 4 B

102. The Agency proposes a new requirement that obliges common septic tanks in an MSTS to maintain "20 percent of the required liquid capacity" in "the space between the liquid surface and the top of the inlet and outlet baffles."[149] One commentator questioned the new capacity requirement on the

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[141] *See,* SONAR at 259; Attachment 1b at 20.

[142] *See,* Ex. 615.

[143] *See,* Ex. 1123.

[144] *See,* Reply to Comments 615 and 1123.

[145] *See,* SONAR at 269; Attachment 1b at 27.

[146] *See,* Exs. 262 and 1148.

[147] *See,* Reply to Comment 1148; Minn. R. 7080.0172 (1) (2005).

[148] *See,* Reply to Comment 1148.

[149] *See,* SONAR at 276; Attachment 1b at 34.

grounds that it was different from, and more rigorous than, capacity standards proposed for an ISTS.[150]

103. As the Agency persuasively explains, however, because the larger MSTS have more users, greater design flows, and less control of these flows when compared to the smaller ISTS, the added required capacity is needed to "protect the soil system from overflowing grease and scum."[151] The proposed capacity requirements are needed and reasonable.

Part 7082
Minnesota Rules Part 7082.0050, Subp. 5

104. The Agency proposes to revise the reporting requirements on local SSTS by obliging annual submissions of SSTS program details as well as the number and type of new SSTS installations.[152] Several commentators expressed concerns over the proposal, asserting that the proposed record-keeping was an expensive mandate to local units of government.[153]

105. As the Agency explains, however, the proposed record-keeping requirements closely track the reporting standards that have been a part of state regulations since 1999.[154] Moreover, the reported data is relied upon for tracking problem systems, decision-making as to impaired waters and basin planning efforts.[155] Because the proposed reporting requirements closely follows the provisions of existing rule,[156] and supports key environmental planning objectives of the Agency and others, the proposed requirements are needed and reasonable. Additionally, as modified by the Agency the proposed requirements do not represent a substantial change from the rules as originally proposed.

Minnesota Rules Part 7082.0500 Subp. 3

106. The Agency proposes to augment the current rule by requiring greater infield verification of soils and conditions, by local officials or their hired agents, for certain SSTS projects.[157]

107. The proposal sparked very negative reaction from some commentators in pre-hearing submissions. As these commentators argued,

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[150] *See,* Comment 93; *compare also,* Attachment 1a at 71.

[151] *See,* Reply to Comment 93.

[152] *See,* SONAR at 293-295; Attachment 1c at 5-6.

[153] *See,* Exs. 579 and 632.

[154] *See,* SONAR at 293.

[155] *Id.*

[156] *See,* Reply to Comment 579; *compare also,* Minn. R. 7080.0310 (5) (2005).

[157] *See,* SONAR at 313-315; Attachment 1c at 24-25.

requiring infield verification as part of the initial permitting process would amount to an expensive and unwieldy mandate for local units of government.[158]

108. In reply, the Agency, after the first public hearing but before the second public hearing, further clarified its proposal. In its April 19, 2007 submissions, the Agency made two key points about its proposal: (a) local permitting programs would be authorized to contract with licensed businesses to complete the soil verification, and (b) the soil verification work could "take place at any point during construction of the system, and does not necessarily need to occur prior to permit approval."[159]

109. More generally, the Agency argued that through greater use of infield verification, it hoped to avoid the problems associated with SSTS being installed in conditions that are otherwise inappropriate; a situation that obliges costly and difficult remedies if it is discovered after system construction has been completed.[160]

110. Because the proposed infield verification requirements will contribute to the avoidance of problems associated with inappropriate placement of SSTS, and are flexible enough so as to permit compliance through a variety of means before the completion of construction, the proposed verification requirements are needed and reasonable. Additionally, as modified by the Agency the proposed requirements do not represent a substantial change from the rules as originally proposed.

Part 7083
Minnesota Rules Part 7083.0760, Subp. 2 G

111. The Agency proposes to require all installation licensees to follow the "recommended standards and guidance documents for registered products" and to inspect the quality of the materials these licensees use.[161] The requirement is needed and reasonable. Additionally, as modified by the Agency the proposed requirements do not represent a substantial change from the rules as originally proposed. It is recommended, however, that the Agency insert the word "the" after the word "check" so that the resulting sentence is clearer.

Minnesota Rules Part 7083.1060, Subp. 1

112. The Agency proposes to increase the required number of hours of continuing education for SSTS designers or inspectors from the current

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[158] *See,* Exs. 1008, 1036 and 1160.

[159] *See, Explanation of Intent and Suggested Changes to Noticed Rule*, at 2 (April 19, 2007).

[160] *See,* SONAR at 315; *compare also,* supportive comments at Exs. 1027, 1158, 1179.

[161] *See,* SONAR at 341; Attachment 1d at 14.

requirement of 12 hours of continuing education every three years[162] to 18 hours of continuing education every three years. Additionally, within the increased hours, the Agency proposes that "a minimum of six of those hours [be] devoted to soils education with a field component."[163]

113. Several commentators questioned whether the new education requirements were needed or justified – particularly in light of the course-related expenses that are incurred by inspectors, designers and their respective employers.[164]

114. As the Agency explains, however, because of the importance of soils-related training the additional hours and new emphasis of the training is needed.[165] Likewise, the Agency declares that it will explore adding to the number of hours of course-study provided in each day of training so as to reduce both the cost and number of workdays needed to complete the triennial training.[166]

115. The proposed changes to the continuing education requirements are needed and reasonable. Additionally, as modified by the Agency the proposed requirements do not represent a substantial change from the rules as originally proposed.

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.

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 other portions of the proposed rules by an affirmative presentation of facts in

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[162] *See,* Minn. R. 7080.0820 (1) (2005).

[163] *See,* SONAR at 359; Attachment 1d at 32.

[164] *See,* Exs. 162, 1116 and 1031.

[165] *See,* SONAR at 359; *see also,* Ex. 1027.

[166] *See,* Ex. 172.

the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii), except as noted in Finding 68.

5. The additions and amendments to the proposed rules suggested by the MPCA after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

6. The Administrative Law Judge has suggested action to correct the defect cited in Conclusion 4 as noted in Finding 68.

7. Due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

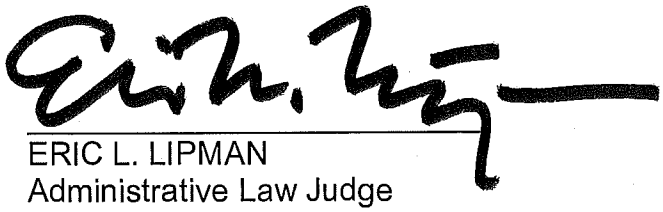
9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as 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 amended rules be adopted, except where noted otherwise.

Dated: August 15, 2007



ERIC L. LIPMAN
Administrative Law Judge

Transcript Prepared.