

STATE OF MINNESOTA  
WASTE MANAGEMENT BOARD

In the Matter of the Proposed )	
Adoption of Rules Relating to )	STATEMENT OF NEED
Supplementary Review )	AND REASONABLENESS
6 MCAR §§ 8.201-8.217 )	

INTRODUCTION

The subject of this rulemaking proceeding is a set of proposed rules governing supplementary review of certain solid and hazardous waste facilities. Pursuant to Minn. Stat. §§ 115A.32 to 115A.39, the Waste Management Board may, upon request, review the decision of a political subdivision which has refused to approve the establishment or operation of a facility if the required permits for the facility have been issued by the Pollution Control Agency.

The statute allows a maximum of 180 days for the review. Minn. Stat. § 115A.35. The review procedures require that a hearing be held but specify that the hearing is not to be considered a contested case hearing under Chapter 15 of the Minnesota Statutes. In addition, several factors which must be considered in the review are set out in the statute. Minn. Stat. § 115A.36.

Following the hearing, the Waste Management Board is required to either approve or disapprove of the proposed facility. Minn. Stat. § 115A.37, subd. 1. The Board is authorized to resolve conflicts in permit conditions and may require more stringent permit conditions at the proposed site. The Board's decision to approve a facility is final and supersedes and preempts

requirements of state agencies and political subdivisions. Minn. Stat. § subd. 2.

As required by Minn. Stat. § 115A.12, the Waste Management Board consulted with both the Hazardous Waste Management Planning Council and the Solid Waste Advisory Council on drafts of the proposed rules.

In addition, a draft of the proposed rules was distributed by mail to potentially interested parties, including professional and trade associations in the state and other government agencies concerned with waste management. No written comments were received as a result of this mailing.

Finally, the chairperson published in the State Register pursuant to Minn. Stat. § 15.0412, subd. 6, a Notice of Intent to Solicit Outside Opinion concerning this rule. (6 S.R. 543, September 28, 1981) No written comments were received in response to this notice.

Rules 6 MCAR §§ 8.201-8.217 specify the contents of a petition for review; establish procedures for identifying the issues to be reviewed; provide for a mediation process; set out hearing procedures for review under two separate circumstances; provide procedures and criteria for the Board's decision; and establish a mechanism for revocation of approval.

## II. NEED FOR THE PROPOSED RULES

The Waste Management Board is required by Minn. Stat. § 115A.32 to promulgate rules to govern its activities in

performing supplementary reviews. These rules are thus needed to fulfill this statutory obligation. In addition, the rules are needed to provide a coordinated and logical review procedure for conducting supplementary review. Further, the hearing procedures are needed because the supplementary review hearings are not contested case hearings and therefore, not subject to the contested case hearing procedures of the Office of Administrative Hearings.

### III. REASONABLENESS OF THE PROPOSED RULES

#### 6 MCAR 8.201. Purpose.

This section cites the statutory authority for the rules and indicates when the supplementary review process may be applicable.

#### 6 MCAR 8.202. Definitions.

The definitions in this section provide common terminology for terms used in the proposed rules.

#### 6 MCAR 8.203. Eligibility for Supplementary Review.

This section lists the persons eligible for review pursuant to sections 115A.32-115A.39. The statutory language is repeated in the rule to ensure that those persons reviewing the rules will know whether or not they qualify for supplementary review.

#### 6 MCAR 8.204. Review of Petition.

This rule describes the process by which a petition is accepted for review and the information that needs to be provided by the petitioner. In order to conduct a meaningful review of a

petition the Board must have a minimum level of information about the applicant and the proposed facility. This rule requires the submission of the required information. The specific justification for each type of information specified in 6 MCAR § 8.204B is as follows:

1. The name, address and phone number of the petitioner is necessary to allow the Board to identify and contact the petitioner.
2. It is necessary to specify each owner or operator of the proposed facility in order that the Board can make the determination that the petitioner is eligible for supplementary review.
3. The street address and legal description of the location of the proposed facility is necessary to meet the statutory requirement (115A.34) for appointment of temporary board members specified in 115A.34.
4. A description of the proposed facility is necessary to allow the Board to make the determination that the petitioner is eligible for supplementary review.
5. The supplementary review process follows the existing environmental review and permit process. A list of the existing permits and pending permit

applications is necessary to ensure prior processes have been completed, establishing eligibility for review.

6. As part of the review, the Waste Management Board may adopt mitigative measures that will address the concerns of the community. The construction time will allow the Board to determine the timeframes for implementing any mitigative measures.
- 7-10. The information required in 7-10 will assist in reviewing the need for the facility which is one of the factors the Board must consider in any review.
11. A petition for supplementary review must demonstrate that a political subdivision has refused to approve the establishment or operation of the facility as required by 115A.33.
12. A review of the Solid Waste Management Plan will assist the Board in determining the need for solid waste facilities eligible for review by the Board.
13. The discussion of consistency of a hazardous waste facility with the Hazardous Waste Management Plan will assist the Board in determining the need for hazardous waste facilities.

6 MCAR 8.206. Procedure for Review.

The Waste Management Act specifies a six month period (from acceptance of a petition) within which the review must be

completed, and specifies certain procedures which must be completed in defined time periods. This particular section of the supplementary review rules specifies what will take place in each phase to assist in the understanding of the review process.

6 MCAR 8.207. Identification of Issues.

Each dispute resulting in supplementary review will be based on a set of issues unique to that dispute. In order to identify the issues unique to each case, it is necessary to meet with the parties involved or to get their response in written form. Forty days allows time for these meetings to take place and for the chairman to compile a list of the issues, prior to the public meeting.

The purpose of a public meeting in the issue identification process is to give members of the public a chance to react to and review the list of issues identified by the developer and the political subdivision and suggest additional issues which should be reviewed by the Board.

This section outlines the procedures that will be followed during the public meeting held to identify any additional issues which may need to be considered in the review. These procedures will give adequate public notice so that any interested member of the public may participate; allow the meeting to be held in an area convenient to those who live near the proposed facility; make material publicly available for response and provide an

opportunity for suggestion of any additional issues which might not have been previously considered. The procedure is designed to allow the public to suggest additional issues in an informal setting and to allow expeditious completion of the issue identification process.

6 MCAR 8.209. Mediation.

This section describes the use of mediation services in the review process. Mediation has been successful in resolving a wide variety of environmental disputes in recent years and offers a constructive method by which a prospective operator of a facility and the political subdivision can identify acceptable terms, in addition to those required by governmental regulations, for the siting, design, and operation of the facility. Mediation is a negotiation process conducted by an impartial and independent mediator or "third party." It is a method for channeling conflict into compromise. Mediation relieves the need for a party to discredit and defeat its adversaries as it must do in a formal review or courtroom. Instead, by its nature it brings the parties together face to face to collaborate, in effect, on designing a solution. Its rules are the ethics of good faith bargaining; its by-products tend to be a better understanding by all the parties of each other's concerns and a clearer definition of the issues. It is a highly flexible process and conducive to innovation. Board sponsored mediation may result in solutions to disputes



which, though they may be ultimately decided by the Board, will continue to be a source of conflict in the communities. Since the Board's function in supplementary review is, ultimately, to resolve disputes in a way that safeguards the local community and, at the same time promotes the general welfare of the state, mediation is another reasonable tool which can be utilized.

- A. Notice of Mediation. It is imperative that mediation start as soon as possible in the process. A ten day period is adequate for notification of the availability of mediation services.
- B. Conditions for Mediation. A mediated agreement is preferable to a state override. Consequently, mediation services are offered in every review. However, the parties cannot be required to negotiate or agree to any particular settlement of their differences. Unless they are willing to enter into the process with some intent to reach an accommodation of their differences, the mediation effort is likely to be unproductive. Twenty-five days allows the parties adequate time to make their decision on accepting mediation services. Twenty-five days is also a short enough time period so that, should mediation be accepted, the mediation process can occur within the time limits established by statute.
- C. Selection of Mediator. One of the basic criteria for selecting a mediator is acceptability to the parties who



must participate in finding the solution to a dispute. If the mediator is unacceptable to any party, he or she will not likely be able to serve effectively. A ten day period is adequate for selection of a mediator by the parties.

- D. Length of Mediation. In any dispute where negotiations occur, cooperation is necessary in order to find some mutually acceptable solution to the issues in the conflict. If a party can achieve its objective by delay, meaningful negotiations may not occur. Thus, the mediation period in supplementary review is limited to 30 days, unless the chairperson determines progress is being made which could result in a settlement if more time were allowed. The 30 day time limit also assures that the supplementary review process can be completed in the time permitted by statute.
- E. Termination of Mediation. If the parties feel that the mediation process is not productive, the process may be terminated without further delay and the alternative review course can be commenced.
- F. Compensation of Mediator. To encourage mediation, it is reasonable for the board to pay for these services.
- F. Decision. Any agreement must be referred to the Board for their decision. Referral to the Board will allow for the expeditious completion of the review.

6 MCAR 8.210. Recommended Statement of Issues.

The recommended statement of issues will provide some direction to the Board in establishing the scope of review based on discussions with the parties and the public. Issuing the recommended statement ten days prior to the Board meeting commencing the review will allow parties or members of the public to attend the Board meeting to urge that the scope of the review address more or fewer issues.

6 MCAR 8.211. Establishing Scope and Procedures for the  
Second Phase of the Review.

- A. Scope (Statement of Issues). A statement of issues for review represents the underlying concerns of the parties involved. By adopting a statement of issues, the WMB will establish a basis for deciding on a mediated agreement. A statement of issue could also serve as a framework for a contested or informal hearing. This scope (statement of issues) consists of issues related to the dispute, including those identified by the local community as being of concern and those issues that are in dispute between the political subdivision and the developer.
- B. Procedures.
  - 1. Where no mediated agreement has been reached, it is likely that a series of issues of fact and/or credibility will arise which will require a hearing to

be resolved. As a result, procedures similar to those utilized in contested case procedures are necessary to ensure that the Board will have before it the information necessary to make its decision.

2. Where a mediated agreement has been reached, the primary focus will be on the public reaction to the agreement and on the conditions the Board will be required to impose to effectuate the agreement. Under these circumstances, a less formal public hearing should provide the Board with the information necessary to make its decision.

3. If an agreement has been reached which does not require the Board to impose additional permit conditions and which addressed all those issues identified by the board (based in part on the public meeting to identify issues) no dispute remains for the Board to resolve. As a result, the petition should be dismissed as soon as the agreement is actually carried out.

6 MCAR 8.212. Hearing Procedures Following Mediated Agreement

A. & B. Timing and Notice of Hearing. The statute (Minn. Stat. § 115A.35) specifies that notice of the hearing be published in a newspaper(s) of general circulation in the area for two successive weeks

ending at least 15 days before the date of the meeting. Forty-five days allows the WMB to meet this requirement. The statute also requires that this notice contain a description of the propose facility, its location, the permits and the Board's scope and procedure for review. This section complies with statutory requirements and also provides a contact person for ease of communication.

- C. Location. Holding the hearing as near as practical to the proposed facility will make it easier for interested parties to attend.
- D. Procedures. This section specifies the hearing procedures for supplementary review as required by statute. The procedures are designed to provide full opportunity for the public to comment on the agreement in an informal, non-threatening setting. The procedures permit questioning which may be necessary before members of the public can present their testimony.

6 MCAR 8.213. Contested Hearing.

Since the setting and justification of a contested review hearing closely parallels the setting and reasons for holding a contested case hearing under Minn. Stat. Ch. 15, the hearing procedures proposed in the rules have been drawn from the Rules of the Office of Administrative Hearings for Contested Cases. 9 MCAR § 2.201-2.299. Some changes from the rules have been made to

accommodate the short review period required by statute and the limited role of the hearing examiner in Supplementary Review Hearings.

- A. Notice. Nature and timing of notice is specified in statute (Minn. Stat. § 115A.35).
- B. Location. The location will make it easy for interested parties to attend.
- C. Party is defined for purposes of providing common terminology and meaning for this term when used in discussing and understanding the provisions of the proposed rule.
- D. Most of the duties of the hearing examiner specified in 9 MCAR § 2.203C. are repeated in this subsection. Some duties which are not appropriate to the supplementary review hearing context have been deleted.
- E. Disqualification provides a method to allow the hearing examiner to disqualify himself or herself from the proceedings when there is a potential conflict of interest. This provision is the same as 9 MCAR § 2.212.
- F. The statute specifies that a majority of permanent board members will be present at the hearing. Questions directed to witnesses by board members will serve to establish a clear record and provide the pertinent information necessary for the review decision.

- G. Right to Counsel. This provision affords the opportunity to be represented by legal counsel or other persons. Views of the parties may be communicated better by counsel. The provision is the same as 9 MCAR § 2.206.
- H. Intervention. Intervention is needed in order to provide interested people with a procedure which allows them to participate as a party, if it is determined that the petitioner's interest is not adequately represented by either of the parties participating in the case. The provision is similar to 9 MCAR § 2.210.
- I. Default. Should a party fail to make the required appearance at the hearing, or fail to comply with requirements, this provision would allow the review to be completed. This provision is the same as 9 MCAR § 2.208.
- J. Participation by Public. This section provides that persons having information concerning a particular issue or having a particular interest in an issue will have an opportunity to be heard at the hearing. The provision is similar to 9 MCAR § 2.210E.
- K. Prefiled Testimony. Prefiled testimony is necessary so that hearing procedures are carried out as expeditiously as possible, which is especially important given the short review period provided by statute.

- L. Rights of Parties. This provision assures that all evidence that should be admitted will be considered and adequately examined. The provision is the same as 9 MCAR § 2.217.
- M. Witnesses. This provision assures parties that they may present witnesses on their behalf. The Board is also authorized to call its own witnesses to assure that all necessary evidence to make a proper decision is before the Board.
- N. The prehearing procedures permit the resolution of minor issues prior to the hearing. This process expedites the completion of the hearing itself. The provision is similar to 9 MCAR § 2.213.
- O. Discovery is allowed to ensure that the parties are able to obtain the information necessary to present their case. While a substantial range of discovery procedures are authorized, more lengthy discovery procedures are eliminated because of the limited time in which supplementary review must be completed. The provision is based on 9 MCAR § 2.214
- P. Depositions to preserve testimony are authorized to ensure information necessary to the Board's decision will be available. The provision is the same as 9 MCAR § 2.215.



- Q. Subpoenas issued through the Office of Administrative Hearings are provided to ensure that necessary witnesses and documents will be available for Supplementary Review Hearings. The provision is the same as 9 MCAR § 2.216.
- R. Rules of Evidence. The rules of evidence are the same as those in 9 MCAR § 2.217C. The hearing examiners are familiar with these rules of evidence which should facilitate contested review hearings.
- S. The Record. The decision in this matter rests with the Board and all materials from the hearing must be available to the Board. The decision must be made on the hearing record. This provision specifies what must be in the record and requires the Board to maintain that record which may be the subject of later judicial review. The provision is based on 9 MCAR § 2.217D.
- T. Conduct of Hearing. These provisions allow for order and procedures in completing the hearing. The provisions are based on 9 MCAR § 2.217G.
- U. This provision is necessary so that the hearing can be completed within the time constraints required by statute.

6 MCAR 8.214

Reconciliation procedures are set out in Minn. Stat.

§ 115A.38. This section simply requires the Board to make a

decision on whether to utilize the reconciliation procedures within the time permitted by statute.

6 MCAR 8.215. Decision of Waste Management Board.

- A. The Record. This provision makes it clear that only evidence offered during the hearing may be considered. The limitation ensures all persons a fair opportunity to make their case before the Board. The provision is similar to 9 MCAR § 2.218A.1.
- B. Administrative Notice. This provision allows the Board to draw upon relevant background information in making its decision. The provision is similar to 9 MCAR § 2.218A.2.
- C. Participation in Decision. Since evidence which is not in the record may not be considered, a Board member will be able to have the complete information necessary to make a decision by reviewing the record without having been present at the hearing. Thus, upon a review of the record, absent Board members should be able to participate in the decision.
- D. Recommended Disposition.
  - 1. Utilizing the mediated agreement as the recommended disposition will simplify the review process and represents the best interests of parties involved.
  - 2. The ten day period before the Board decision provides the public a reasonable opportunity to review the recommendations prior to the final decision.

- E. Basis of Decision. The factors include the statutory requirements (Minn. Stat. § 115A.36) that the WMB must consider in making its final determination. The provision also allows for any other factors relevant to the review within the established scope to be considered.
- F. Final Decision. This section provides for the acceptance of the mediated agreement unless it is inappropriate. Accepting the agreement will likely lead to the long-term solution of the dispute. However, if the factors for decision indicate the agreement is unacceptable, the agreement must be rejected to comply with the Board's statutory directive.
- G. Ex Parte Communication. To ensure a fair procedure all parties to a proceeding should be aware of and be able to respond to arguments and facts presented by an other party. Limiting ex parte communications assures all parties will have an opportunity to respond.

6 MCAR 8.216. Terms, Conditions, and Requirements of  
Permitting Agencies

Minn. Stat. § 115A.37 authorizes the Board to require additional permit conditions and to resolve conflicts in permit conditions. This section provides a method for determining when to impose more stringent conditions. It also provides for notice to permitting agencies that additional more stringent permit

conditions will be required.

6 MCAR 8.217. Revocation of Approval.

The Board does not have the capability to investigate the accuracy of all statements made by a petitioner. Thus, unless they are challenged in the hearing, the Board must rely on the statements made by a petitioner. To help in assuring statements are accurate a procedure, which involves a full contested case hearing is established to revoke approvals made by the Board where the petitioner has knowingly made material false statements in information presented to the Board.

6 MCAR 8.218. Computation of Time.

This provision provides a way to measure time periods consistently.

Based on the foregoing, proposed rules 6 MCAR 8.201-218 are both needed and reasonable.

Dated: May 19, 1982

STATE OF MINNESOTA  
WASTE MANAGEMENT BOARD

  
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Bob Dunn, Chairman