STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment of Agency Procedural Rules, Minn. Rules MPCA 1 - 4 and 6 - 13, to be Recodified as 6 MCAR §§4.3001 - 4.3016

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

Minn. Stat. chs. 115 and 116 establish the Minnesota Pollution Control Agency (Agency) and set forth its authority. Minn. Stat. §116.07, subd. 3 (1980) provides that the Agency "may adopt, amend, and rescind rules governing its own administration and procedure." Accordingly, Minn. Rules MPCA 1 - 13 were adopted in 1973 to prescribe the Agency's basic operating procedures.

Minn. Rules MPCA 1 - 13 set forth the procedures used by the Agency for such basic things as conducting Agency meetings, making Agency decisions, electing Agency officers, granting variances from Agency rules, ordering and holding hearings, and the participation of the public in Agency affairs. 1/

On March 26, 1982, notice was published in the State Register announcing the Agency's intent to amend the procedural rules and requesting that interested parties submit any information or

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1/ Minn. Rule MPCA 5 governs the general procedures for the issuance of all Agency permits. That rule, however, is not proposed to be revised at this time. The Agency is in the process of revising Minn. Rule MPCA 5 and its other rules dealing with the issuance of permits, and these revisions will be proposed at a later date. See Notice of Intent to Solicit Outside Opinion Concerning Proposed Rules Relating to Permits Issued by the Minnesota Pollution Control Agency, 6 S.R. 1699 (April 5, 1982).

comments they might have on the procedural rules. Notice was subsequently given and a public meeting of the Agency Board's Rules Committee was held on June 7, 1982, to discuss the proposed amendments. Various revisions have been made to the rules over the course of several months on the basis of comments and suggestions from the Agency staff, the Agency Board and the public. Upon the recommendation of the Rules Committee, the Agency Board on July 27, 1982, authorized the initiation of rulemaking proceedings, pursuant to Minn. Stat. §14.0412, subd. 4h (Supp. 1981) relating to the adoption of noncontroversial rules, for the adoption of amendments to the Agency's procedural rules.

II. GENERAL NEED FOR AMENDMENTS TO THE PROCEDURAL RULES

Minn. Rules MPCA 1 - 4 and 6 - 13 have not been revised since their adoption in 1973. Legislative changes and Agency experience with the rules, however, have created a need to update the rules. In addition, the need to change substantive portions of the rules is providing the Agency with an opportunity to make needed stylistic and clarifying changes to the rules.

Since the adoption of the original rules in 1973, the Minnesota legislature has substantially revised the Administrative Procedure Act, Minn. Stat. §§15.041 - 15.052. One of the major revisions was the creation of the Office of Administrative Hearings. It is now required that evidentiary hearings, both for rulemaking and for contested cases, be conducted by a Hearing Examiner from that office. The current procedural rules of the

Agency reflect the Agency's previous practice of appointing its own hearing officers to conduct its hearings. Since this practice is no longer permissible, the Agency's rules referring to the Agency-appointed hearing officers are obsolete. In addition, the Agency's procedural rules contain a number of specific provisions regarding the conduct of the hearing. Minn. Stat. §15.052, subd. 4 (Supp. 1981) requires the Chief Hearing Examiner to adopt rules governing the procedural conduct of all hearings, which rules are binding upon all agencies and supersede any other agency rules with which they conflict. Those rules, 9 MCAR §§2.101 et seq. and 2.201 et seq., are now in place. As a result, a number of the hearing procedures in the Agency's rules need to be revised to be consistent with the rules adopted by the Chief Hearing Examiner to govern the procedures of the Office of Administrative Hearings.

A second recent statutory change creating a need to amend the Agency's procedural rules is the 1982 amendments to Minn. Stat. §116.07, subd. 5 (Minn. Laws 1982, ch. 458 §2), which allows the Agency to grant variances from its rules. The old statute required that a public hearing precede the granting of all variances except variances from rules relating to feedlots. The amended statute deletes the requirement for a public hearing and instead requires "notice and opportunity for hearing." It also requires the Agency to follow the provisions of Minn. Stat. §15.0412, subd. 1a (Supp. 1981) in granting variances. That

statute requires the Agency to "adopt rules setting forth procedures and standards by which variances shall be granted and denied." The Agency's current procedural rules require a public hearing in accordance with the statute as it was prior to the 1982 amendments. Therefore the rules need to be revised to reflect the fact that a hearing is not required in every case.

A third statutory change which has had an effect on the Agency's procedures is the adoption of the Minnesota Government Data Practices Act, Minn. Stat. 15.1611 - 15.1699 (Supp. 1981). This statute now governs the collection, security and dissemination of Agency records and data. The provisions of the procedural rules dealing with Agency records and data are in need of revision to acknowledge this Act and eliminate any inconsistencies.

There are also a number of changes which are proposed to the rules as a result of practical experience in dealing with them. Since 1973, the Agency has discovered that certain situations commonly arise which are not addressed by the current rules. At the same time, certain portions of the rules have been shown not be practical or necessary. Others do not conform to actual Agency practice.

In connection with the effort involved in making the substantive changes described above, the Agency is taking the opportunity to make a number of stylistic and clarifying changes

to the rules. These changes will not be discussed individually. They are as follows:

1. The rules have been renumbered and, in some cases, reordered, in accordance with the requirements of the Office of the Revisor of Statutes.
2. Capitalization of nouns has been changed in accordance with the requirements of the Office of the Revisor of Statutes.
3. The word "regulation" has been changed to "rule" in accordance with the terminology of the Administrative Procedure Act (see Minn. Stat. §15.0411, subd. 3 (Supp 1981)).
4. The rules have been made gender neutral (e.g., "chairman" has been changed to "chairperson").
5. Punctuation and grammar have been corrected where needed.
6. Changes have been made to clarify the meaning, but not change the sense, of some of the rules.

III. NEED FOR AND REASONABLENESS OF SPECIFIC AMENDMENTS TO THE PROCEDURAL RULES

The discussion below addresses the need for and reasonableness of the specific amendments of a substantive nature which are proposed to be made to the procedural rules.

Duty of Candor.

The rule relating to duty of candor, formerly codified as

Minn. Rule MPCA 1, no longer appears as the first of the Agency procedural rules. It has been reordered and is now codified as Section 4.3003. Proposed amendments to that rule are discussed later in this document.

Definition of "Hearing Examiner." Section 4.3001 F.

The original rule refers to "hearing officer," a person appointed by the Agency Board to conduct public hearings. However, Minn. Stat. §15.052, subd. 3 (1980) states: "All hearings of state agencies required to be conducted under this chapter shall be conducted by a hearing examiner assigned by the chief hearing examiner." The rule is proposed to be amended so that the definition reflects that requirement. This change is needed and reasonable because it conforms the rule to the statute.

Definition of "Order." Section 4.3001 G.

The original rule defines "order" to include orders issued by Agency-appointed hearing officers. Since hearing officers have been replaced by hearing examiners from the Office of Administrative Hearings, the language referring to hearing officers is no longer needed and is proposed to be stricken.

Definition of "Party." ~~(g)~~.

The definition of "party" is proposed to be stricken here and to be covered under Section 4.3010 C., which relates to contested case hearings. This change is reasonable because within the

context of administrative proceedings this term is relevant only with respect to contested case hearings.

Definition of "Permit." Section 4.3001 H.

This rule is proposed to be amended to clarify that the definition of "permit" does not include a certification. This is needed and reasonable because it is in accordance with the current Agency practice of considering certifications to be separate from permitting processes.

Use of Pronouns. ~~(j)~~.

The provision regarding the use of pronouns has been made unnecessary because of changes in the rule which make it gender-neutral. Therefore this provision is proposed to be stricken.

Definitions of "Service" and "Serve." Section 4.3001 L.

This rule is proposed to be amended to allow personal delivery of an item as an alternative to delivery by mail. In addition, service by mail has been more clearly defined as either First Class United States mail or Minnesota state interoffice mail, completed when the item served is actually placed in the mail. These changes are reasonable and conform to the rules of the Office of Administrative Hearings, 9 MCAR §2.202 D. They are also consistent with Rule 5.02 of the Minnesota Rules of Civil Procedure.

Definition of "Stipulation Agreement." Section 4.3001 M.

The definition of "stipulation agreement" is proposed to be broadened so as to include all types of settlements concerning noncompliance with applicable statutes and rules. This change is needed and reasonable because it conforms the definition with actual Agency practice.

Computation of Time. Section 4.3002.

The Agency proposes to adopt a new provision on computation of time which is identical to 9 MCAR §2.209 A. of the Office of Administrative Hearings. This provision is needed because several other portions of the rules require the counting of days (see, e.g., Section 4.3010 I.). It is reasonable because it is the standard method of computation used by the courts (see Rule 6.01 of the Minnesota Rules of Civil Procedure).

Sanctions for Violations of Duty of Candor. Section 4.3003.

The last sentence of this rule is proposed to be stricken. This is needed and reasonable because the provision referred to in this sentence is proposed to be deleted from the rules (see the explanation on page 26).

Agency Meetings and Officers, Sections 4.3004 and 4.3005.

Minn. Rule MPCA 3, entitled "Agency Meetings and Officers" is proposed to be divided into two separate rules: Section 4.3004,

"Officers, committees and duties," and Section 4.3005, "Agency meetings." This has required some restructuring of the original rules. The portions of the original rule relating to Agency meetings have been repealed and appear as new language; however, most of the provisions and language are identical to the original rule. The changes to the original rule as now contained in Section 4.3005 are noted and explained below.

Annual Meeting of the Agency. Section 4.3005 A.

The original rule specifies that the annual meeting of the Agency is to be held on the third Tuesday of July each year, except that the Agency may change the date upon 60 days notice. The rule is proposed to be changed to simply specify that the annual meeting shall be held during the month of July. In most cases, this will be the regular July meeting. The proposed changes to the rule are needed and reasonable because they conform the rule to the actual Agency practice over the years. Specifying that the annual meeting will be held in July provides needed scheduling flexibility to the Agency and, at the same time, sufficient certainty to the public.

Agency Notice of Meetings. Section 4.3005 C.

The requirement that seven days notice be given to all Board members before any change in the date of a meeting for reasons such as emergencies has proved itself to be impossible to

implement and is therefore proposed to be eliminated.

Public Notice of Agency Meetings. Section 4.3005 E.

The original rule, when combined with Section 4.3005 G., seems to require the Agency to give the public two separate notices announcing the time and place of regular and special meetings. However, in actual practice the Agency has always given notice of its meetings by sending a copy of the agenda to a large list of persons having an interest in Agency affairs and to any person directly affected by an agenda item. The agenda is also available for public inspection in the Agency offices. The rule is proposed to be amended to clarify that only one notice of the item and place of the meeting will be sent to the public. The amendments are reasonable because they conform the rule to actual Agency practice and because the past Agency practice has proved itself to be satisfactory to the public.

Agenda Preparation. Section 4.3005 F.

This rule is proposed to be amended to state that the agenda must be prepared at least ten days prior to the regular meetings of the Agency. This conforms the rule to actual Agency practice and as a practical matter is already required by the existing rule (now Section 4.3005 G.), since that rule requires the agenda to be mailed out ten days before the meeting.

In addition, the words "provided the Director is notified of

the item in time to place the item on the agenda" are proposed to be eliminated as superfluous.

Consideration of Items Not on the Agenda. Section 4.3005 K.

This rule is proposed to be amended to require the unanimous vote of the Board members present for the consideration at a regular meeting of an item not on the agenda. This change is reasonable because it ensures that items which are controversial (as evidenced by failure to receive such unanimous consent) are given full public notice before a final decision is made.

Voting. Section 4.3005 L.

Several changes are proposed to this rule. To be fully understood, they must be read in conjunction with newly proposed Section 4.3003 O., relating to the vote needed to rescind a decision. The changes are discussed below on a sentence-by-sentence basis.

First sentence: The words "[e]xcept as otherwise specifically provided" have been added to alert the reader to the fact that elsewhere in the rules there is an exception to the provision for a majority vote. That exception is found in Section 4.3005 O. This change is needed and reasonable because it avoids conflict between different voting provisions in the rules. The phrase "[t]he affirmative vote of a majority of all the members" is proposed to be changed to "a majority vote of the entire

agency." This change is needed and reasonable because the original rule could be read to suggest that only a "yes" vote could result in a decision, whereas a vote of "no" from five or more Agency members has in practice been regarded as a decision. Finally, the list of items included in the term "decision" is proposed to be deleted because it is unnecessary.

Second sentence: It is proposed that the word "chairman" be changed to "presiding officer." This is needed and reasonable to clarify that, pursuant to Section 4.3004 D., the vice chairperson could be acting in the chairperson's place at the meeting.

Third sentence: The original rule requires any matter which did not receive a majority vote to be placed on the agenda of the next regular monthly meeting or considered at a special meeting. This rule is proposed to be rewritten as follows:

> If the final vote taken on an agenda item does not result in a decision, but half or more of the voting members vote affirmatively, the matter must be placed on the agenda of the next regular monthly meeting or considered at a special meeting, unless the agenda item concerns rescission of a decision.

In the Agency's experience, it is not unusual for a matter to receive less than a majority vote when fewer than nine Board members are present at a meeting. It is reasonable to require that, for all decisions except a vote on a motion to rescind a previous decision, the matter be considered again at the next opportunity if half or more of the members voted affirmatively

because such a vote shows that the matter is likely to receive a majority vote of the full Agency. (It should be noted that this rule as rewritten does not preclude the Director, a Board member, or a member of the public from causing the matter to be placed on the Agenda at the next opportunity even if half or more of the members voted negatively; the matter simply does not receive automatic placement on the agenda.)

It is also reasonable to exclude from the operation of this provision votes on motions to rescind a previous Agency decision because, in the interest of finality of Agency decisions, such motions should be discouraged and used only in cases where most reasonable persons would agree that the previous decision needs to be rescinded. Thus if a motion to rescind fails for lack of a majority, it should not automatically be placed on the agenda of the next meeting.

Agency Decisions Made by Telephone Poll. Section 4.3005 M.

The following sentence is proposed to be eliminated as superfluous: "If, pursuant to the poll, a majority of all members of the agency cast an identical vote, the decision of the majority shall be an agency decision." This sentence is superfluous because it merely repeats that decisions are made by a majority vote, which is covered by Section 4.3005 L.

Reconsideration and Rescission. Sections 4.3005 N. and O.

Section 4.3005 Q. of the rules provides that questions of

parliamentary procedure which are not specifically covered in the rules themselves are to be governed by Roberts Rules of Order. Since the original rules do not contain specific provisions relating to reconsideration and rescission of decisions, the Agency has always turned to §§36 and 37 of Roberts Rules of Order when questions as to reconsideration and rescission have arisen.

The Agency proposes to add specific provisions relating to reconsideration and rescission of its decisions. The provision for reconsideration exactly follows the provisions of Roberts Rules of Order. This provision is needed and reasonable because it states for the public the specific procedures which the Agency has been following with respect to reconsideration of decisions. The provision for rescission, calling for a two-thirds vote, follows one of the options outlined in Roberts Rules. The two-thirds requirement is reasonable because, in the interest of finality of Agency decisions, there should be a greater burden in reversing that which has already been done when time has passed since the original vote and reliance may have been placed on the decision.

Variances. Section 4.3007.

As discussed previously at pages 3 - 4, a recent change in Minn. Stat. §116.07, subd. 5 creates a need to amend the Agency's procedural rule relating to variances. The original rules, in accordance with the former statute, require the holding of a

contested case hearing. However, in the past the Agency has held several hearings because of this requirement on variance applications that were in no way contested, resulting in the expenditure of time, effort and money for no real purpose except compliance with the statute and rules. Thus the Agency wishes to take advantage of the amendment to the statute, which now provides no mandatory hearing, and adopt a variance procedure which provides adequate notice to regulated parties and the public and opportunity for hearing, but which does not require a hearing if none is requested.

The procedure which is proposed for consideration of variances includes submission of a variance application (which is required in the original rules) and review of the application by the Agency Director for completeness. If the Director finds any deficiency in the application, the applicant is so advised, and further processing is suspended until the application is found to be complete. After the variance application is complete, the Director makes a preliminary determination as to whether the variance should be issued or denied. Notice is then given to the public of the application and of the Director's preliminary determination. Any person may, within 30 days, submit comments on the variance application or may request that either a contested case hearing or a public informational meeting be held on the application. (The procedures for holding a contested case hearing

or public informational meeting are found in Sections 4.3010 and 4.3015.)

The variance rule as amended is reasonable because the procedure provided will ensure full public participation through a formal contested case hearing or public informational meeting, when such proceedings are requested and merited, yet will result in a significant savings to the state and regulated parties in cases of uncontested variance applications.

The specific amendments to the rule on variances which are not discussed above are discussed below.

Variance Applications. Section 3.007 B.

The provision requiring that a variance application be made under oath is proposed to be stricken as an unnecessary burden and not in accordance with actual Agency practice.

Notification. Section 4.3007 I.

The original rule requires the Agency to serve a copy of the Agency's decision on every person who entered an appearance at the public hearing. This rule is proposed to be amended to provide that a copy will be served upon all persons who have requested a copy. This is reasonable because under the amended rules it is possible that no public hearing will be held. In addition, it is not burdensome to require persons to make a request for a copy of a decision.

Hearings on Transfers of Variances. Section 4.3007 L.

The last sentence of this rule is proposed to be stricken. This is reasonable because a decision on the holding of a contested case hearing on transfer of a variance is covered adequately by Section 4.3010 and because the original rule is inconsistent with that rule in providing no criteria for the decision as to whether to hold a hearing.

Sanctions for Violations of Variance Provisions. Section 4.3007 M.

This rule is proposed to be added to make it clear that sanctions, including revocation or suspension of a variance, may result from violations of variance provisions. This rule is reasonable because it provides notice of the availability of such sanctions to regulated parties and to the public. The last sentence of the rule provides that sanctions will not be imposed before notice to the variance holder and opportunity for a contested case hearing. This is reasonable because it comports with the constitutional doctrine of due process of law.

Informal Complaints. Section 4.3009.

The Agency proposes to amend this rule to add new language at the end of the rule acknowledging the applicability of the Minnesota Government Data Practices Act, Minn. Stat. §15.1611 - 15.1699, to data and information obtained by the Agency through informal complaints. This is reasonable because it provides a

cross-reference which alerts the Agency and the public to the applicability of the Act.

Contested Case Hearings. Section 4.3010 and 4.3011.

As discussed previously at pages 2 - 3, significant changes to the Administrative Procedure Act and the adoption of rules by the Office of Administrative Hearings have made necessary significant revisions to the Agency's rules concerning public -- now called "contested case" -- hearings. As a part of this revision, the original Minn. Rule MPCA 9 is proposed to be divided into two separate parts: Section 4.3010, "Contested case hearings," and Section 4.3011, "Final decisions and orders." This has required some restructuring of the rule. The specific revisions to the rule are discussed below.

Agency Decision to Hold a Contested Case Hearing. Section 4.3010 C.

The original rules provide that the Agency may order a contested case in its discretion. They contain no criteria for the Agency to use in deciding whether to order a hearing and no criteria for the public to use in requesting one. The Agency proposes to amend the rule to provide such criteria. An affirmative decision to order a hearing would require that the Agency find all three of the following to be true: a) that there is a material issue of fact or of the application of fact to law related to the matter pending before the Agency, b) that the

Agency has jurisdiction to make determinations on that issue, and c) that there is a reasonable basis underlying that issue such that the holding of a contested case hearing would aid the Agency in making a final determination on the matter.

The addition of the criteria to the rules is needed and reasonable because it provides certainty that hearing requests are granted when there are issues which the Agency has the jurisdiction to decide and which involve factual disputes which need the full examination that contested case hearing provide and, likewise, to preclude the holding of formal hearings when they cannot serve such a purpose. Where the Agency finds that the holding of a contested case hearing is not justified, it can order the holding of a public informational meeting (see Section 4.3015 B.) if the issue would still benefit from the additional discussion afforded by such a public meeting.

Hearing Officers and Hearing Notice. ~~(c)~~ and ~~(d)~~.

The provisions concerning hearing officers and hearing notice have been replaced by similar provisions of the rules of the Office of Administrative Hearings. Thus it is reasonable to repeal these rules.

Participation of the Agency Director as a Party in Contested Case Hearings. Section 4.3010 D.

The original rule states that the Agency itself is a party in all hearings concerning permits and variances. The Agency,

however, will make the final decision after the hearing is concluded and the Hearing Examiner has recommended a decision. Therefore, it is inappropriate for the Agency to act as a party in the hearing. In actual Agency practice over the years, the Director has intervened in the Agency's contested case hearings, providing technical expertise to ensure the completeness of the hearing record and taking a position as to the outcome. The revisions make it clear that the Director will act as a party in Agency contested case hearings without being required to submit a petition to intervene. This is reasonable because it conforms to the past and present practice of the Agency, which has been found to be beneficial to the hearing process.

Answer. ~~(f)~~.

The provision concerning the response to a complaint initiating a contested case hearing has been replaced by the provisions of the rules of the Office of Administrative Hearings. Therefore it is reasonable to repeal this rule.

Ex Parte Communication. Section 4.3010 E.

The Agency proposes to add a new provision to the rules requiring that any communication with Board members on a contested case matter be done either orally at an open meeting or in a writing that is sent to all other parties and Board members. This provision is reasonable because it promotes fairness by ensuring

that all parties have access to the decision makers on an equal basis. It also ensures that Agency decisions are made openly and fairly, without even the appearance of impropriety.

Conduct of Hearings. ~~(j)~~ - ~~(m)~~ and ~~(o)~~.

The provisions of the rules concerning the conduct of hearings has been replaced by similar provisions of the rules of the Office of Administrative Hearings. Therefore it is reasonable to repeal these provisions.

Appeal of Hearing Officer's Decision. ~~(p)~~.

The provision of the rules concerning appeal of a hearing officer's decision has been replaced by Section 4.3011 A. - C. Therefore it is reasonable to repeal this provision.

Final Decisions and Orders. ~~(q)~~

The provisions of the original rule concerning final decisions and orders have been reordered and recodified as Section 4.3011 (see discussion at pages 23 - 26).

Agency Right to Reconsider. ~~(r)(1)~~.

The provision of this rule concerning reconsideration of a decision made after public hearing has been replaced by newly proposed Sections 4.3005 N. and O. Therefore it is reasonable to repeal this rule.

Reopening of Contested Cases. Section 4.3010 I. - K.

The action of "rehearing" a contested case is proposed to be relabeled as "reopening and remanding to the hearing examiner." This change is reasonable because the new label is more appropriate.

Petition for Reopening of Hearing and Remand to Hearing Examiner. Section 4.3010 I.

The original rule provides that a rehearing could be requested up until the time the Agency loses its right to reconsider the matter. The provision regarding the right to reconsider a matter, as discussed above, is proposed to be repealed. The Agency proposes to amend the rule to delete the reference to the "right to reconsider" and to provide that such a petition must be filed within ten days after the Agency's final decision. This amendment provides a reasonable time for a party to prepare such a petition after the final decision is made.

Notice of Rehearing. ~~(3)~~.

The language which is proposed to be stricken is adequately covered in the paragraph which follows it. Therefore the repeal of this language is reasonable.

Severability. ~~(8)~~.

The provision regarding severability is proposed to be

repealed because the Agency has been advised that the Revisor of Statutes will be deleting severability clauses when it republishes all agency rules. Therefore it is reasonable to repeal this rule.

Final Decisions and Orders. Section 4.3011.

Due to the repositioning of the rule relating to final decisions and orders, Section 4.3011 appears in the proposed amendments as all new language. However, most of the provisions in this section are identical to the original rule. The changes in the original rule as now contained in Section 4.3011 are noted and explained below.

Written and Oral Comments on Hearing Examiner's Report. Section 4.3011 A. - C.

Parts A. and B. of the rule as amended essentially replace the original paragraph (p) of Minn. Rule MPCA 9 and detail, in terms consistent with the Administrative Procedure Act, the procedure for submitting comments on and exceptions to a Hearing Examiner's Report. A period of at least 10 days following the issuance of the report is provided for the making of such comments and exceptions. In the interest of fairness, copies of the comments and exceptions must be served upon all parties to the contested case and upon each of the Agency members. Comments must be based on the hearing record. In addition, part C. allows all parties to present oral comments to the Agency in person, again limited to the evidence in the record, at the Agency meeting at

which the matter is to be decided.

These rules are reasonable because they provide fair and equal access to the decisionmakers by all parties to the contested case hearing.

Proposed Agency Decision. Section 4.3011 F.

The following sentence in the original Minn. Rule MPCA 9 (q)(3) is proposed to be eliminated:

> If the Agency has reached a Proposed Decision prior to the Agency meeting, it shall make such Proposed Decision available to all parties at least ten (10) days prior to the Agency meeting at which it intends to announce its decision or order.

It is reasonable to delete this provision because the Agency in practice has never issued Proposed Decisions.

Notice of Final Agency Decision. Section 4.3011 H.

The provision in the original rules for serving notice of the Agency's final decision in a matter for which a contested case hearing has been held is proposed to be amended to require that a copy of the decision be served upon all persons who have requested to be so notified. (Service upon all the parties is also required in the original rule, and this provision is not proposed to be amended.) This is reasonable because it ensures that notice of the decision reaches those who actually want it, and reflects actual Agency practice over the years.

Inspection of Public Records and Confidential Information. Sections 4.3012 and 4.3013.

The original Minn. Rule MPCA 10 is proposed to be divided into two rules: Section 4.3012, entitled "Inspection of public records," and Section 4.3013, entitled "Confidential information." These rules are proposed to be amended to add cross references to Minn. Stat. §§15.1611 - 1699 and 116.075, the statutes relating to government data and the public nature of Agency documents. This is reasonable because it notifies the Agency and the public of the need to comply with statutes applicable to the handling of Agency documents and data. Other changes to the original rule are discussed below.

Notice of Release of Certain Records. Section 4.3013 A. and F.

The number of days notice that must be given before making public any records which are 1) requested to be certified as confidential or 2) certified as confidential but required to be released by federal law has been extended from three to seven. This is reasonable because it allows more time for the submitter of the information to withdraw it.

Use of Confidential Information in Contested Case Hearings. Section 4.3013 G.

The Agency proposes to amend this rule so that it applies only to confidential information which has been made a part of the record in the contested case hearing. This is a reasonable

clarifying amendment because the original rule could be read to suggest that the Agency can consider any confidential information which is relevant to the matter, whereas it is limited by Minn. Stat. §15.0422 (1980) to consider only information in the record.

Sanctions. ~~Minn. Rule MPCA 11.~~

Minn. Rule MPCA 11 regarding sanctions is proposed to be repealed. This is reasonable because the rule does nothing more than state that the Agency may impose appropriate sanctions or seek judicial relief for the violation of its rules, permits and orders. This rule repeats provisions found in other Agency rules and adds nothing to the language of Minn. Stat. §115.071, subd. 1 (1980), which provides:

> The provisions of Chapters 115 and 116 and all regulations, standards, orders, stipulation agreement, schedules of compliance, and permits adopted or issued by the agency . . . may be enforced by any one or any combination of the following: criminal prosecution; action to recover civil penalties; injunction; action to compel performance; or other appropriate action, in accordance with the provisions of said chapters and this section.

Therefore it is reasonable to repeal this rule as unnecessary.

Participation of the Public in Agency Affairs. Sections 4.3015 and 4.3016.

The Agency proposes to amend the original Minn. Rule MPCA 13 to make it clear that the public has the right to participate in activities of both the Agency and the Director. The rule has been restructured and divided into two rules. The manner that the

public may participate in Agency meetings is set forth in Section 4.3015. The manner that the public may participate in the activities of the Director is set forth in Section 4.3016. Specific provisions are explained below.

Statements on Agenda Items for Which No Contested Case or Rulemaking Hearing Has Been Held. Section 4.3015 A.

While the provision in the rule regarding the making of statements to the Board on agenda items for which no contested case or rulemaking hearing has been held has been repositioned and thus appears as new language, most of the language actually is identical to the original rule. However, the rule is proposed to be amended with respect to the procedure for submitting written statements. Written statements are permitted, but a copy must be served upon the Director at least ten days prior to the meeting. The Director will then mail copies of the statement to each Board member. The ten-day requirement is reasonable because it provides adequate time for the Director to review the statement and, if necessary, to prepare to respond to the statement. The requirement that the Director provide copies of the statement to the Board members is reasonable because it aids the public, who may not be familiar with the names and addresses of the citizen Board members.

Request for Informational Meeting. Section 4.3015 B.

The Agency proposes to add a new provision to the rules

setting forth the manner in which the public may request a public informational meeting on a matter. The rule is reasonable because it conforms to the Agency's past and present practice concerning public informational meetings, and the Agency has found the procedure set forth in the rule to be quite manageable and sufficiently convenient to the public.

Statements on Agency Items for Which a Contested Case Hearing Has Been Held. Section 4.3015 C.

The Agency proposes to amend this rule to indicate that the manner in which the statements are to be made on agenda items for which a contested case hearing has been held is governed by Sections 4.3010 and 4.3011. This is reasonable because it is desirable to have all procedures relating to contested cases gathered together in one rule, to the extent possible.

Statements on Agenda Items for Which a Rulemaking Hearing Has Been Held. Section 4.3015 D.

The Agency proposes to amend the rules to add a provision which sets forth the manner in which members of the public may comment on agenda items for which a rulemaking hearing was held. The procedure set forth in 4.3015 D. is the same procedure set forth in Section 4.3011 regarding agenda items for which a contested case hearing was held. This new provision of the rule is needed and reasonable because it provides an adequate and fair opportunity to the public to comment on the report of the Hearing

Examiner and on the record of the hearing prior to any final Agency decision on the matter.

Public Participation in the Director's Activities. Section 4.3016.

Most of the language of this rule comes from original Minn. Rule MPCA 13(a). There are, however, two changes which are proposed to be made to the existing language. The Agency proposes to add language regarding the holding of meetings which involve information which is, pursuant to the Minnesota Government Data Practices Act, not public (see Minn. Stat. §15.162, subds. 2a (confidential data on individuals), 5a (private data on individuals), and 5c (protected non-public data)). The amended rule allows the Director to hold a closed meeting to discuss this type of information.

The Agency is required by law to protect government data which is classified by the Act as not public. Minn. Stat. §15.166 (1980) makes any state agency which violates the act liable for damages resulting from the violation and, in the case of a willful violation, for exemplary damages. Therefore this provision is needed and reasonable in order for the Agency to be able to comply with the Act and to prevent its own exposure to liability for compensatory and exemplary damages.

Second, the paragraph regarding responses to statements and recommendations made to the Agency is proposed to be eliminated as unnecessary, since there are provisions in other portions of the

rules providing for such responses.

Intervention. ~~(b)~~.

The rule relating to intervention, Minn. Rule MPCA 13(b) has been replaced by similar provisions of the rules of the Office of Administrative Hearings. Therefore it is reasonable to repeal this rule.

Repealer.

The provisions of the original rules which are covered by the repealer at the end of the new rules have been discussed in the order that they appeared in the original rules. As shown by the previous discussion of these rules, the repeal of these rules is needed and reasonable.

IV. CONCLUSION

Based on the foregoing, the proposed amendments to Minn. Rules MPCA 1 - 4 and 6 - 13, to be recodified as 6 MCAR §§4.3001 - 4.3016, are both needed and reasonable.

for Jay M. Heffern
LOUIS J. BREIMHURST

Dated: September 13, 1982