

STATE OF MINNESOTA

MINNESOTA POLLUTION

COUNTY OF RAMSEY

CONTROL AGENCY

In the Matter of the Proposed  
Rules of the Pollution Control  
Agency Governing the Procedures  
for Establishing a Permanent List  
of Releases and Threatened  
Releases of Hazardous Substances,  
Pollutants or Contaminants,  
7044.0100-7044.1200

STATEMENT OF NEED AND  
REASONABLENESS

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I. Introduction.

The subject of this proceeding is the establishment of State rules for determining priorities among releases and threatened releases of hazardous substances, pollutants or contaminants (7044.0100-7044.1200). Rulemaking on the proposed rules was mandated by Minnesota Statutes 1983, Section 115B.17.

When the Minnesota Pollution Control Agency (hereinafter "Agency" or "MPCA") authorized the initiation of rulemaking, it found the proposed rules non-controversial in nature and proceeded with rulemaking in accordance with statutory provisions governing the adoption of non-controversial rules, Minnesota Statutes 1982, Sections 14.21-14.28. Accordingly, the rulemaking proceedings of the proposed rules are governed by that statute and no hearing will be conducted on the adoption of the rules unless seven or more persons submit to the Agency a written request for such a hearing during the public notice period.

In accordance with the requirements of Minnesota Statutes 1982, Section 14.23 this Statement of Need and Reasonableness was prepared and completed prior to the date that the proposed adoption of the rules was noticed in the State Register. The Statement of Need and Reasonableness is divided into several parts. Part II. is an overview of the proposed rules. Part III. is a description of the historical background leading to the development of these rules. Part IV. contains the Agency's explanation of the need for the proposed rules. Part V. contains the Agency's explanation of the reasonableness of the proposed rules. Part VI. contains the small business consideration in

rulemaking required when proposing rules in Minnesota. Part VII. contains the statement on economic impact of the proposed rules. Part VIII. is the conclusion. Part IX. contains a list of the exhibits relied on by the Agency to support the proposed rules. The exhibits are available for review at the Agency's office at 1935 West County Road B-2, Roseville, Minnesota 55113.

## II. Overview of the Proposed Priority Assessment Criteria Rules.

The Agency is proposing the adoption of rules to fulfill the requirements set forth in the Minnesota Environmental Response and Liability Act (ERLA), Minnesota Statutes 1983, Section 115B.17. ERLA requires the Agency to establish State criteria for determining priorities among releases or threatened releases of hazardous substances, pollutants or contaminants by July 1, 1984. The proposed rules establish various classifications for sites with releases or threatened releases; describe the procedures for adding sites with releases or threatened releases to or deleting sites from a permanent priority list; provide for an annual review and update of the permanent list; establish the funding priority among classifications and the funding priority within classifications; create an annual project list; and specify a ranking system to be used in scoring sites. The rules will replace the temporary list of priorities adopted by the Agency in July, 1983, as required by Minnesota Statutes 1983, Section 115B.17.

Part 7044.0100 outlines the scope of the rule and 7044.0200 defines several terms used throughout the rule.

Part 7044.0300 establishes the four classifications a site or portion of a site could be assigned to based on the response action(s) necessary to abate or

prevent the dangers associated with releases or threatened releases of hazardous substances, pollutants or contaminants. These classifications are: a declared emergency by the Director; the operation and maintenance at a site that has undergone previous response actions; other response actions which may include the first year costs associated with the initial operation and maintenance expenditures at a site; and remedial investigations and feasibility studies (RI/FS).

Part 7044.0400 describes the procedures the Agency must follow to add a site with releases or threatened releases to the permanent list of priorities. The Agency must rate a site using the United States Environmental Protection Agency's (EPA's) hazard ranking system (HRS), evaluate a site for its eligibility for placement on the permanent list of priorities, assign a site to a response action class(es) based on the criteria in 7044.0300, and finally, add eligible sites to the permanent list of priorities during the next annual update.

Part 7044.0500 sets the conditions necessary for a site to be deleted from the permanent list of priorities or the conditions necessary for a site to be deleted from a response action class on the permanent list of priorities. A site is to be deleted from the permanent list of priorities at the next annual update following the completion of all response actions required at the site or if the Agency determines that the site no longer poses a threat to public health or welfare or the environment from a release or threat of release of a hazardous substance, pollutant or contaminant. A site is to be deleted from a response

action class on the permanent list of priorities at the next annual update following the completion of response actions for that class at the site or if the Agency determines that that portion of the site no longer poses a threat to public health or welfare or the environment from a release or threat of release of a hazardous substance, pollutant or contaminant.

Part 7044.0600 requires the Agency to publish in the State Register a notice of the annual update of the priority list and solicit public comment. The notice and the proposed list must be published in the State Register at least 30 days prior to Agency adoption of the updated list. The rule also allows for a site to be re-classified or re-scored based on information obtained during the 30-day comment period or based on information from a completed RI/FS if the Director determines that new or additional facts warrant a re-classification or re-scoring. The rule does not allow a site to be re-scored based on prior remedial, removal or response actions.

Part 7044.0700 establishes the order in which ERLA funds must be allocated to classes by the Agency. Declared emergencies by the Director (Class A) are funded first. A contingency fund is then to be established to fund declared emergencies which may arise between funding allocations. The operation and maintenance of sites that have undergone previous response actions (Class B) is to be funded next. ERLA funds are not to be spent for the operation and maintenance of municipal water supply systems with the exception of start-up operation and maintenance expenditures deemed necessary by the Agency during the first year such a system is in operation. Remaining ERLA funds are to be

allocated to other response actions (Class C), which may include the costs associated with the first-year operation and maintenance expenditures at a site, and RI/FS's (Class D). Finally, the Director may re-allocate any excess ERLA funds from one class of response action to another under specific criteria that are presented in 7044.0700 D.

Part 7044.0800 allows the Director to allocate ERLA funds to Class C and D sites which are within 10 HRS points of the highest rated site within each class. The Director's decision is to be based on the cost of the necessary response actions, the effect of the release or threatened release on public health, welfare or the environment, and the administrative capabilities of the Agency.

Part 7044.0900 directs the Agency to establish an annual project list based on the funds allocated and the estimated costs of projects that can be funded pursuant to 7044.0700-7044.0800. Class A sites not on the project list which develop or are brought to the attention of the Director are to be funded with Class A contingency funds. If excess funds become available, either through cost savings or assumption of responsibility by a party at specific sites, the Director may add sites from the permanent list of priorities to the project list following the procedures specified in Minnesota Statutes 1983, Section 115B.17. The rule retains funding for non-responsible party sites until the adoption of the next project list or until the response action for which the site was placed on the list is completed, whichever date is later.

Part 7044.1000 adopts the HRS by reference. The words "ground water" are substituted for the word "aquifer" whenever the word "aquifer" appears in the

HRS. Agency regulations require protection for all ground water, not just underground water currently in use for a potable water supply, agriculture, or industrial use. Also three figures from the Minnesota Hydrologic Guide were substituted for maps showing generalized hydrologic conditions for the continental United States.

Part 7044.1100 requires that claims by any private person for reimbursement of expenditures made before July 1, 1983 to provide alternative water supplies be submitted to the Agency within twelve months after the date the rule becomes effective. Reimbursement claims are limited to reasonable costs for actions of the type which would have been taken by the Agency to abate or prevent a release or a threatened release.

Part 7044.1200 is an exhibit which will be used to pre-screen potential hazardous waste sites for eligibility for inclusion on the permanent list of priorities. The questionnaire asks at least one question relating to the hazard potential of each of the five routes evaluated by the HRS. The purpose of this exhibit is to eliminate sites which neither pose a danger from fire, explosion, direct contact and inhalation because of adequate containment; nor have substances which are toxic, persistent, or reactive.

### III. The Legal and Historical Background to the Priority Assessment Criteria Rules.

Minnesota Statutes 1983, Section 115B.17, subdivision 13, required the Agency, by November 1, 1983, to establish a temporary list of priorities among releases or threatened releases for the purpose of taking remedial action and, to the



extent practicable consistent with the urgency of the action, for taking removal action. The temporary list adopted in July, 1983 remains in effect until the proposed permanent priority assessment criteria rules are adopted as required by ERLA. The permanent rules are to be adopted by July 1, 1984. After the proposed permanent rules are adopted, a permanent list of priorities will be established and will be modified from time to time, according to the criteria set forth in the priority assessment criteria rules. Before the list is established, the Agency must publish the proposed list in the State Register and allow the public 30 days to comment on the list.

The Agency developed the temporary list of priorities using a three step process. First, the Agency reviewed all known sites with releases or threatened releases to determine whether a responsible person(s) had assumed responsibility for remedial or removal action at the site. Sites with releases or threatened releases were included on the temporary list of priorities only if: a) no responsible person(s) existed or could be located; or b) the Agency determined that, based upon past and ongoing staff actions at the site at the time, the responsible person(s) had refused to assume responsibility for necessary remedial or removal actions at the site.

Second, the Agency assigned all sites which qualified under step one to the response action(s) necessary to abate or prevent a release or threatened release of a hazardous substance, pollutant or contaminant. The Agency established four response action classes and designated a funding order to control how ERLA funds should be spent among classes in the event that insufficient funds were available to fund all projects on the temporary list of priorities.

The third step in the process of developing a temporary list of priorities involved ordering sites within classes on the list using HRS scores provided by EPA. This ranking of sites within classes further specified how funds were to be spent. Those sites which were not rated by EPA under the HRS were included at the bottom of the list of sites within each response class and designated as "not ranked" under the HRS score column.

The temporary list of priorities identified the source of funding for each site as: 1) only State Superfund monies; 2) only federal Superfund monies; or 3) a combination of federal and State Superfund monies. The reason for determining the source of funding is that ERLA requires the Director or the Agency to determine the extent to which any costs expended under ERLA for remedial or removal actions may be recovered under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 et. seq. (CERCLA). Federally funded sites were included on the temporary list of priorities in order to provide a comprehensive picture of the status of the State's site cleanup program.

The temporary list of priorities allows for quarterly modification as additional information regarding responsible persons and necessary remedial or removal actions becomes available. Notice of any modification to the temporary list of priorities will be published in the State Register for the purpose of soliciting public comments. The temporary list of priorities has not been modified since its adoption.

A notice was published in the State Register on October 3, 1983 stating the Agency's intention to draft State criteria for determining priorities among

releases and threatened releases and soliciting public comments. Two responses were received during the comment period. One respondent reserved comments until the proposed rules are published in the State Register but did express a concern that "the rules be as objective as possible for the benefit of industry." The other respondent suggested the Agency use a grading system developed by the Occupational Health and Safety Administration and adopted by EPA to grade protective clothing.<sup>1</sup> While the protective clothing grading system may work for its intended purpose, the grading system has no mechanism for evaluating potential migration routes and prioritizing site situations as does the HRS.

IV. Need for the Proposed Priority Assessment Criteria Rules.

Minnesota Statutes 1982, Section 14.23 requires the Agency to make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rules. In general terms this means the Agency must set forth the reasons for its proposal and the reasons must not be arbitrary or capricious. However, to the extent need and reasonableness are separate, need has come to mean a problem exists which requires administrative attention and reasonableness means the solution proposed by the Agency is a proper one.

Need is a broad test not easily applied to an evaluation of each proposed rule. In this broad sense, the need for rules to determine priorities among releases and threatened releases is established by Minnesota Statutes 1983, Section 115B.17.

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<sup>1</sup>Occupational Health and Safety Administration Regulations, 29 CFR 1910, 1975.

A. ERLA Authorization Process.

The Agency is currently operating under the temporary list of priorities. The temporary list was developed in accordance with the mandate in Minnesota Statutes 1983, 115B.17, and is by definition intended as interim guidance for the expenditure of State Superfund monies until permanent rules are adopted.

B. Requirements of Minnesota Statutes 1983, Section 115B.17.

The Minnesota Legislature mandated the Agency to promulgate rules establishing State criteria for determining priorities among releases and threatened releases. After rules are adopted, a permanent priority list will be established, and may be modified from time to time, according to the criteria set forth in the rules. The proposed rules and the ensuing permanent priority list will replace the current temporary list of priorities.

ERLA requires the temporary and the permanent rules to be based on the relative risk or danger to public health or welfare or the environment, taking into account to the extent possible the population at risk, the hazardous potential of the hazardous substances at the facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the administrative and financial capabilities of the Agency, and other appropriate factors.

The proposed rules address each of the above factors. The HRS system evaluates each of the above factors in deriving the site score, except for the administrative and financial capabilities of the Agency. The classification system is designed to reflect the type of response action necessary to abate or

prevent a release or threatened release. The funding order of classes, particularly Classes C and D, consider the administrative and financial capabilities of the Agency. The proposed rules specifically address funding criteria to deal with future situations where funds may be insufficient to meet the financial needs of all four classes and decisions will have to be made as to which sites within specific classes will be funded. These decisions will be made taking into account, among other factors, the administrative and financial capabilities of the Agency.

V. Reasonableness of the Proposed Priority Assessment Criteria Rules.

A. Introduction.

The Agency is required to make an affirmative presentation of facts establishing the reasonableness of the proposed rules, Minnesota Statutes 1982, Section 14.23. Reasonableness is the opposite of arbitrariness and caprice and means there is a rational basis for the Agency's action.

The staff considered several alternatives in the development of final rules for determining the priority assessment criteria for releases or threatened releases as mandated by ERLA. The following discussion will address the major options considered, their positive and negative aspects, and the reasons for selecting the rules proposed.

B. Part 7044.0200: Definitions.

Part 7044.0200 adopts most of the definitions in ERLA. Only those definitions which do not pertain to the proposed rules were omitted. The terms defined in

ERLA are used in the same or similar context in the proposed rules. Since the terms have already been established by statute, adoption by reference seemed the most reasonable alternative. Terms not defined in ERLA but included in the proposed rules are required by Agency statutes or are essential elements in the rules.

The terms "advisory" and "emergency" are defined because both terms are pivotal in the assignment of sites to Class A making them eligible for immediate funding. An advisory may be issued by any of four State agencies when one or more of the agencies determines the public should be aware of the existence of a hazardous substance, pollutant or contaminant at or near a site. An advisory does not necessarily imply an emergency situation. However, the issuance of an advisory is necessary in two of the three cases identified as emergencies.

The primary reason for an advisory is to allow the designated agencies to advise the public of situations which the agencies determine are a potential threat to public health or welfare but may not be of sufficient magnitude, extent, or character to justify declaring an emergency. The determination by the designated agencies of when an advisory should be issued depends upon the circumstances encountered at or near a facility and a variety of environmental standards which may apply to the circumstances. Therefore, the definition is general in its nature.

The term "emergency" is strictly defined because declaring an emergency assigns a site to Class A according to 7044.0300 and the site receives immediate funding through 7044.0700. One or more of three conditions are necessary to qualify for an emergency designation as defined in 7044.0200.

The first condition is an imminent risk of fire or explosion. An imminent risk of fire or explosion means a situation exists which requires an immediate response to avert a pending catastrophe. In this case the issuance of an advisory and the declaration of an emergency would be warranted. The second condition where an emergency may be declared is the discovery of a contaminated drinking water supply. An emergency could be declared if the Agency or the Minnesota Department of Health has issued an advisory to the affected population and determines that the situation is severe enough to present a risk of either chronic or acute adverse health effects on the user population and therefore a temporary water supply is needed. Finally, an emergency could also be declared at a site where there is the possibility of immediate adverse health effects due to direct contact or inhalation of a hazardous substance, pollutant or contaminant and an advisory has been issued.

An advisory is meant to serve as an interim action which alerts the surrounding population of some danger posed by a hazardous substance, pollutant, or contaminant at or near a site. A declaration of an emergency indicates the Director has determined the situation warrants an immediate response action. The determination by the Director of when an emergency situation exists shall be based on facts known to the Director or a reliance upon the facts and conclusions drawn by other relevant departments or agencies.

"Ground water" is defined in the proposed rules because the words "ground water" or "underground water" are substituted for the word "aquifer" through the HRS. EPA's version of the HRS uses "aquifer," but "aquifer" implies a geologic

formation containing and capable of yielding a useable quantity of water for human consumption, agriculture, or industrial purposes. Agency rule 6 MCAR §4.8022 and ERLA require protection of waters in the environment regardless of quantity as well as those water resources directly used for human purposes. Therefore "ground water" more accurately represents the environmental resources eligible for protection in Minnesota and eligible for ERLA funding.

HRS clearly makes a distinction between ground water and ground water of concern. That distinction is determined by the potential population likely to use a specific ground water supply. Because HRS is designed to evaluate both ground water and ground water of concern, the HRS scores will adequately account for the effects on a useable water supply (referred to in the HRS as the "ground water of concern") and the environmental resource (referred to as "ground water").

The term "rater" is defined as a member of the Agency staff designated by the Director to evaluate releases or threatened releases. Since ERLA gives primary responsibility to the Agency for implementing the provisions of ERLA, it is reasonable to conclude that the Agency staff should have the ultimate responsibility to evaluate a site. This does not preclude others outside the Agency from rating a site, however, in the event a dispute arises between the rating of a site, the score of the designated Agency staff shall prevail.

The term "site" has the same meaning given to "facility" in ERLA. The term "facility" has a different meaning in other Agency hazardous waste rules



dealing with the generation of hazardous substances, the identification, the transportation and the management of hazardous wastes, specifically rules required by the Resource Conservation and Recovery Act (RCRA). The change in terms was made to avoid any confusion which may have arisen among the public and industry in understanding the Agency's intent in applying various RCRA related rules and the ERLA rules.

The term "target" is used throughout the HRS. The term target can refer to either an affected population or a sensitive environment exposed or threatened with exposure due to a release or threatened release. Both population and sensitive environment are classed under the general title of targets and are assigned a relative value in the HRS scoring system. It is reasonable to group human populations and sensitive environments under the same title because both may be adversely affected by the release of hazardous substances, pollutants or contaminants.

C. Part 7044.0300: Classification of Sites.

Part 7044.0300 establishes a classification system for assigning a site with a release or threatened release to a response action class. The temporary list of priorities assigned sites to four categories. The proposed rule uses an approach similar to the temporary list of priorities with slightly different response action categories. It is assumed that each site will have certain unique characteristics but the general response action could be reasonably assigned to one or more of the four classes of action designated in 7044.0300. While the four classes of the proposed rule are slightly different than those of

temporary list of priorities, the modifications are based on experience gained over the past year. The proposed classifications are designed to more adequately reflect the types of response actions taken in dealing with hazardous substances, pollutants or contaminants at a site.

D. Part 7044.0400: Addition of Sites with Releases or Threatened Releases to the Permanent List of Priorities.

Part 7044.0400 requires the Agency to score every site using HRS, evaluate the site for ERLA funding eligibility using Part 7044.1200, and assign the site to a specific classification for the necessary response actions. All eligible sites with an HRS score would be added to the permanent list during the next annual update. From a statutory perspective, alterations of the list would not pose a problem since ERLA states the Agency's "permanent priority list shall be established and may be modified from time to time, according to the criteria set forth in the rules." (Minnesota Statutes 1983, §115B.17)

Other options were proposed and rejected for various reasons. The rule was originally drafted so that only sites classified as an emergency (Class A) or sites with a Determination of Inadequate Response (DIR) assigned by the Board would qualify for State Superfund monies. Both triggers (or conditions) are required for funding according to ERLA, but not exactly in the form currently used by the Agency. Also, the question arose as to whether the permanent list of priorities should include only eligible sites scheduled for immediate funding or all known sites. The proposed rules contain two parts pertaining to the creation of lists. Part 7044.0400 creates a permanent list of priorities which

includes a list of all eligible sites. Part 7044.0900 requires the Agency to create a list of sites eligible for funding during the next year. A discussion of the second list will be addressed later in this document. Another option considered was to list all sites with HRS scores of 10 points or more. This arbitrary cutoff was suggested based on the fact that the EPA uses a cutoff of 28.5 HRS points for inclusion on the National Priorities List (NPL). The EPA cutoff was artificially mandated when Congress specifically directed EPA to create a list of 400 of the worst hazardous wastes sites in the United States. An HRS score of 28.5 just happened to be the cutoff number for the NPL. Since the Legislature did not restrict the number of sites we can consider, an arbitrary cutoff would be very difficult to justify. Future legislative appropriations will, in effect, determine a minimum HRS score.

The main advantage of listing all sites with HRS scores is that the Agency will establish, through the permanent list of priorities, a complete picture of the sites which may need attention throughout the State of Minnesota. Like the Construction Grants List in the Division of Water Quality, the Agency may never be able to get to everything on the list, but at least we will know the extent of the problem, and where the problems are. The Legislature, through additional appropriations, will have to decide the extent of the Agency's response to sites on the list.

E. Part 7044.0500: Deletion of Sites from the Permanent List of Priorities.

Part 7044.0500 identifies the conditions necessary for a site to be deleted from

the permanent list of priorities. ERLA does not specifically address whether a site should be deleted from the permanent list of priorities, but since ERLA gives the Agency the authority to modify the list from time to time, deletions and re-ranking should be possible under the same modification clause cited above.

The proposed rule describes two situations where a site or portion of a site may be deleted from the permanent list or from a particular class on the list. Sites would be dropped during the annual update when the Board makes a determination that all response actions are completed at a site; or that the response actions are completed at a site within a response action class. ERLA funding will be available only to sites listed on the permanent list of priorities. Therefore a site or a portion of a site must remain on the list until all response actions have been completed. When all the response actions are completed, the site or the completed portion of a site must be removed from the permanent list of priorities so that other sites can receive ERLA funding.

F. Part 7044.0600: Annual Update of the Permanent List of Priorities. Part 7044.0600 requires updating of the permanent list of priorities on an annual basis. An annual update is reasonable because most tasks require at least one year to complete, except for emergency actions. More frequent opportunities to delete have been suggested. The idea of monthly, quarterly or semi-annual updates was rejected because it would require excessive staff time and would add unduly to the already busy Board schedules. Also, ERLA requires

public notice in the State Register with a minimum of 30 days for public comment on any change to the permanent list of priorities. Therefore more frequent changes in the permanent list of priorities would require an almost constant process of formal revision. The staff is already extremely busy trying to resolve the current list of sites. More frequent modifications to the permanent list of priorities would only reduce the Agency's responsiveness and effectiveness in dealing with releases or threatened releases.

G. Part 7044.0700: Funding Priority of Classes.

Part 7044.0700 establishes the order in which ERLA funds must be allocated to classes by the Agency. The first draft of the permanent rule was written similarly to the temporary list of priorities, in which class determines the funding order. Then sites within the class are ranked by HRS scores to determine the funding order within a class. The temporary list of priorities requires the Agency to fund all Class A sites before funding any Class B sites. Then all Class B sites must be funded before funding any Class C sites and so forth. All Class A through Class C sites would have to be funded before any Class D (RI/FS) sites could be funded. This is the simplest solution but was considered to be inflexible and may result in an imbalance of sites within certain classes being done during future years. In this scenario, the Agency may not have sufficient staff to deal with all the fundable Class A-C projects, and the Agency will be best served by a mix of response action projects and studies each year so that the work load is evenly maintained given the staff available.

Another approach considered was for the Director to determine the order of funding, the dollar amount for each site each year, which sites to fund, develop the project list, and finally present the whole package to the Board for its approval. This approach gives the Director (and ultimately the Board) the greatest flexibility but provides little opportunity to the public for understanding or predicting where, when or how much State Superfund monies are likely to be spent on specific projects. Because of the weaknesses mentioned above, this approach was rejected.

The basic reason for having the Board allocate monies to response action classes is to involve the Board in the primary decision-making process and to emphasize the importance of funding a broad range of projects. Funding decisions are appropriately made by the Board because it represents the public at-large. The Board is given strict guidelines within which to operate. The guidelines are meant to insure appropriate and adequate response to emergency sites and to the operation and maintenance of sites that have undergone previous response actions. The guidelines provide a degree of predictability about when, where and how ERLA funds will be spent. The rule states that the Board must allocate funds to: Class A sites (emergency sites); Class A contingency fund; Class B sites; Class C and Class D sites. The Board is given some latitude in determining the amount of dollars allocated to each class. The Board will determine, based on the class allocations, how many sites in Class C or D are to be started or completed.

An advantage of this approach is that it recognizes that long-term operation and maintenance are as important as the initial remedial actions in

some cases. If the operation and maintenance of a site are to be provided through State Superfund, rather than as an Agency budget line item or as the responsibility of a local governmental jurisdiction, then the rule should allow sufficient funds to be made available for that purpose each year.

Dedicating funds for long-term operation and maintenance may decrease the Agency's ability to react to new higher priority sites and/or new sites of equal priority. However, the operation and maintenance of a hazardous waste site may be the most important phase of a complete remedy. Without the continued operation and maintenance of a site, the more immediate response action may prove to have been of little impact. Also, a particular site could deteriorate into an emergency situation.

The funding order of sites with releases or threatened releases is based on: the class assigned, the HRS score, and the amount of ERLA monies allocated to a class by the Board each year. The funding order for Class C and D sites allows for a degree of discretion by the Director as to which sites within 10 HRS points will be funded. Part 7044.0800 addresses funding within Class C and D and will be discussed later in this document.

It is reasonable to fund Class A sites before all others because of the immediate danger to the public or the environment posed by a release or threatened release classified as an emergency. The establishment of a Class A contingency fund is a reasonable method of insuring that funds are available to respond to emergency releases or threatened releases which may occur between funding requests.

It is reasonable to fund the operation and maintenance (O and M) at a site that has undergone previous response actions after emergencies because funds have already been spent at a site to mitigate or remove the release or threatened release. If an O and M site were not assured a high priority of continued funding, the original site may not qualify for federal funding under CERCLA. Furthermore, it is important to provide for O and M at a site so that the conditions which existed previously do not recur necessitating the expenditure of additional remedial action funds to once again temporarily stabilize the hazards posed by the site. Agency experience in dealing with site responses to releases or threatened releases has been that the expenses associated with remedial actions to cleanup a site are far more extensive than the annual O and M costs. Therefore, it is reasonable to try to fund sites at the O and M stage which should be a relatively small annual cost when compared to either remedial responses or an RI/FS.

It is reasonable to allow the Director to reallocate excess funds between funding allocations because ERLA specifically requires the proposed rules to consider "the administrative and financial capabilities of the Agency." The Director has the responsibility to run the Agency as efficiently as possible with the staff and monies available. Without this provision in the proposed rule it is possible that ERLA funds could go unused for extended periods until the Agency develops a new annual project list. If this situation were to occur, valuable time would be lost in cleaning up known hazardous waste sites in Minnesota.



Class A contingency funds can not be transferred to another class because an emergency situation can occur at any time in the funding cycle. The proposed rules consider emergencies as the highest priority and therefore it is reasonable to insure that an emergency fund is available at all times to handle any emergency which may arise.

It is reasonable to provide guidance on the order in which to fund sites to insure that ERLA funds are allocated to sites posing the greatest threat or potential threat to the public's health or welfare or to the environment. This guidance should limit funds from being allocated to classes for factors unrelated to their relative adverse environmental impacts.

H. Part 7044.0800: Funding Priority Within Classifications C and D.

Part 7044.0800 allows the Director to allocate ERLA funds to Class C and D sites which are within 10 HRS points of the highest rated sites within each class. The rule allows the Director the flexibility to allocate the staff in the most productive manner and to take into consideration the financial resources available. The rule also permits the Director to balance the staff's work load between remedial actions and studies so that the flow of work is maintained for the staff available. ERLA provides for this flexibility when it states that, "... the rules by this subdivision shall be based upon the relative risk or danger to public health or welfare or the environment, taking into account to the extent possible...the administrative and financial capabilities of the Agency, and other appropriate factors." (115B.17, subdivision 13.)

The scoring system used in HRS requires the rater to select the most appropriate whole number to represent specific conditions. In carrying through the

mathematical calculations necessary to arrive at a site score, the lowest possible level of significance is at two significant digits. In other words, the output, the route score, cannot contain more significant digits than the input, the data used. Therefore, HRS scores which are within 10 points of the highest rated site within a class may be of relatively the same importance.

It is reasonable to allow the Director a degree of discretion in determining the number of and which Class C and D sites within 10 HRS points to fund during the coming year because it is the responsibility of the Director to take into consideration the financial and administrative resources of the Agency. While the financial resources in ERLA are substantial, the Agency staff is limited and can effectively manage a limited number of sites during a year. Therefore, the discretion allows the Director to balance the staff's workload and maintain a balance of remedial action sites and RI/FS's. The RI/FS's are essential to developing a complete understanding of the site situation so that an accurate classification and HRS score can result.

I. Part 7044.0900: Annual Project List.

Part 7044.0900 directs the Agency to establish an annual project list based on the funds allocated and the estimated costs of projects that can be funded pursuant to 7044.0700-7044.0800. The primary reasons for this rule is to provide the Board and the public with a work plan for the coming year and to lock ERLA funding into specific projects. The rule allows the project list to be modified by the Director if additional funds become available and if another site is ready to proceed.

It is reasonable to develop an annual project list to provide the Agency with a degree of stability and flexibility in reacting to releases or threatened releases. The project list must be a subset of the permanent list of priorities so all the sites have gone through the public notice procedure in 7044.0600. The project list stabilizes funding for specific site projects for a one year period. The flexibility aspect lies in the ability of the Director to add projects to the list without a public notice period when additional funds become available.

The rule also allows the Agency to respond to new Class A sites discovered between the annual updates of the permanent list of priorities. It is reasonable to permit the Agency to respond to an emergency situation at the earliest possible date. Without this provision, the public's health or welfare or the environment might be placed in unreasonable danger.

J. Part 7044.1000: HRS Scoring System Adopted by Reference.

Part 7044.1000 adopts the HRS by reference. It is reasonable to use the HRS because all releases or threatened releases must be rated using HRS to determine a site's eligibility for federal Superfunds, a requirement of ERLA. The HRS has been criticized by reviewers and their concerns are addressed in the Federal Register (Vol. 47, No. 137, July 16, 1982). The staff concur with EPA that the HRS works reasonably well in evaluating hazardous waste sites. Furthermore, when the HRS is used in conjunction with the response action classification scheme and the pre-screening questionnaire its effectiveness is enhanced.

Development of a different system or modified HRS would mean that sites would have to be scored twice; once for federal monies and again to determine State status. Although some additional staff time may be needed, it was not expected to be a noticeable drain of staff time. The principle reason against having two completely different scoring systems is that a site with two different scores, one to qualify for federal grant monies and one to establish State eligibility, could cause confusion among the public, the Board and the Legislature.

The temporary list of priorities addressed the major concerns expressed by critics of the HRS during its development stage through the use of four categories grouped according to the response action necessary. Four response action categories are proposed for this rule also, but, the response action categories specifically address declared emergencies and the need for operation and maintenance (O and M). The new O and M category should resolve the staff concern of how to retain necessary funding once the initial capital costs are expended and monies are needed to operate and maintain a site. Also, as the rule is currently written, sites can be assigned to more than one class or to the same class several times if immediate response actions or long-term maintenance is needed for different aquifers and locations within the same site.

The only other ranking system currently in use which is substantially different from the HRS is Michigan's Site Assessment System (SAS). A test of HRS and SAS was conducted by the staff. Seven sites were evaluated using HRS. Agency press releases were the sole source of information and each site was ranked by two experienced staff members and one person inexperienced in the use of HRS. The

scores varied for each person rating the sites, but the relative position of the sites followed a similar pattern. A major problem with the test involved the experienced raters' familiarity with the sites. Their knowledge of the sites interfered with the test in that they sometimes filled in information missing from the press release, the result being that one experienced rater scored five of seven sites quite differently than the other two raters. We feel this difference does not reflect a flaw in the rating system but is a reflection of a different set of facts used to evaluate the sites. After completing the third site, one experienced rater used only the information provided, the result being that he and the unexperienced rater arrived at almost identical scores for the remaining four sites. The three raters felt the press releases did not contain sufficient information to fairly evaluate the sites and that a more detailed report on each site would have provided more similar scores by all.

The average time spent rating a site using HRS was 13.1 minutes, 13.4 minutes and 40.6 minutes with the inexperienced person taking the longest time per site.

Only one site was scored using SAS because of time constraints. All three raters lack experience with SAS. One person took 4 hours and 20 minutes to score one site. Two people more experienced in rating hazardous waste sites took 2 hours and 40 minutes, and 2 hours and 17 minutes to score the site using SAS. A site cannot be rated using SAS with the information provided in a press release. A considerable amount of additional data had to be added to the press release to achieve a meaningful score. The staff did not feel that the SAS was better than the HRS. Considering the extra staff time needed and the need for far more data to rank a site with the SAS, the HRS is the preferred system.

The words "ground water" are substituted for the word "aquifer" because Agency regulations (6 MCAR §4.8022) require "preventing any new pollution, and abating existing pollution" in the underground waters of the State. The term "aquifer" implies a source or supply of ground water in sufficient quantities to be useable for human consumption, agricultural uses, or industrial needs. "Ground water" is any water in any quantity contained below the surface of the earth in the saturated zone. Agency rules define underground water and specifically state in part of the definition that "the term ground water shall be synonymous with underground water." ERLA requires the proposed rules to "be based upon the relative risk or danger to public health or welfare or the environment" taking into account to the extent possible "the potential for destruction of sensitive ecosystems" as well as other human health related concerns. The Agency is required by regulation and by ERLA to protect the environment in addition to human health or welfare when considering releases or threatened releases to the ground water. It is reasonable to substitute "ground water" for "aquifer" because of the dual requirements necessitated by ERLA and Agency regulations to protect both human health and the environment.

The Minnesota maps are substituted for the United States hydrologic maps to provide the rater with a clearer picture of the site specific hydrologic events that can be expected at a site. The only difference between the two sets of maps is a scale change. It is reasonable to make the substitution of maps to increase the reliability of judging the hydrologic conditions at a site. Because the Agency will only rate sites in Minnesota, a majority of the information provided by the United States maps is extraneous.

K. Part 7044.1100: Reimbursement for Past Response Actions.

Part 7044.1100 requires claims by any private person for reimbursement of expenditures made before July 1, 1983 for provision of alternative water supplies to be submitted to the Agency within twelve months after the date these rules become effective. Reimbursement claims are limited to any reasonable costs for actions of the type which would have been taken by the Agency to respond to a release.

The intent of this rule is to provide a reasonable time for the public to submit any claims for reimbursement of expenditures and establish for the Agency a specific time frame within which ERLA funds may have to be allocated to meet reimbursement claims. One year from the date the rule becomes effective is a reasonable amount of time to allow the public to submit their claims. It would be unreasonable to expect the Agency to set aside for an indefinite time a portion of State Superfund monies to cover future claims which may or may not arise.

L. Part 7044.1200: Prescreening of Potential Hazardous Waste Sites.

Part 7044.1200 is a prescreening questionnaire used to determine the eligibility of releases or the threatened releases for inclusion on the permanent list of priorities. The HRS will generate a score for almost any site even though very minimal danger exists because the hazardous substances, pollutants or contaminants are considered non-toxic/persistent or non-reactive. While the HRS score for such a site would be extremely small, without this rule to screen sites, the permanent list of priorities might become unnecessarily

long. It is reasonable to limit the sites listed on the permanent list of priorities to only those sites which pose at least some danger to the public health, welfare or to the environment.

VI. Small Business Considerations in Rulemaking.

The Agency is required to address in this document the impact a proposed new rule may have on small businesses and to make an effort to reduce the impacts where possible (Minnesota Laws 1983, 14.115).

The proposed rules establish State criteria for determining priorities among releases or threatened releases as required by ERLA. The proposed rules' sole purpose is to direct the administration of the State Superfund program and therefore they do not have any direct or indirect economic impacts on small business.

VII. Economic Impact of the Proposed Priority Assessment Criteria Rules.

Minnesota Statutes, Section 116.07, subdivision 6 states as follows:

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

This statute has general applicability to all actions of the Agency. In the rulemaking context, this statute has been interpreted by the Agency to mean that, in determining whether to adopt proposed rules or amendments, the Agency



must consider, among other evidence, the impact which economic factors may have on the feasibility and the practicability of the proposed rules or amendments.<sup>2</sup>

As stated previously, the proposed rules' sole purpose is to direct the administration of the State Superfund program and therefore they do not have any direct or indirect economic impacts on the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic and other economic factors.

#### VIII. Conclusion.

The Agency staff has, in this document and its exhibits, made its presentation of facts establishing the need for and reasonableness of the proposed rules governing procedures for establishing a permanent list of releases or threatened releases of hazardous substances, pollutants or contaminants, Chapter 7044. This document constitutes the Agency's Statement of Need and Reasonableness for the proposed rules.

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<sup>2</sup>In Finding No. 4 of the Agency's Findings of Facts and Conclusions in the Matter of the Proposed Revision to Minnesota Rule APC 1, 6 MCAR §4.0001, Relating to Ambient Air Quality Standards, the Agency discussed the requirements of Minnesota Statutes, Section 116.07, subdivision 6 as follows:

...in order for the Agency to duly consider economic factors when it determines whether to adopt the amendments to Minnesota Rule APC 1, the record upon which the Agency will make its determination must include data on the economic impacts of those amendments. These economic impacts, however, need not be quantified with absolute certainty in order to be considered. Further, these economic impacts may include costs other than the cost of complying with a proposed rule. For instance, material losses, crop losses, health costs, and impacts on tourism are also economic factors that should be duly considered by the Agency in determining whether to adopt the amendments to Minnesota Rule APC 1.

IX. List of Exhibits.

The following documents were utilized by Agency staff in developing these rules and are relied on by the Agency as support for the reasonableness of Chapter 7044.

"Comments of FMC Corporation on Environmental Protection Agency's Proposed National Priorities List and the Listing of FMC's Fridley Facility," February 28, 1983, of Counsel William W. Warren, et.al.

Federal Register: 47 F.R. 10975-76, March 12, 1982; 47 F.R. 31187-31192, July 16, 1982; 47 F.R. 31219-31243, July 16, 1982.

"Hazardous Waste Management: A Survey of State Legislation 1982," by the National Conference of State Legislatures' Solid and Hazardous Waste Project, 1982.

Occupational Health and Safety Administration Regulations, 29 CFR 1910, 1975.

"Preliminary Risk Evaluation for Suspected Hazardous Waste Disposal Sites in Connecticut," Dennis Unities, et. al., U.S. Environmental Protection Agency National Conference on Management of Uncontrolled Hazardous Waste Sites Symposium Proceedings, October 15-17, 1980, Washington, D.C. pages 25-29.

"Rating the Hazardous Potential of Waste Disposal Facilities," Charles Kufs, et.al. U.S. Environmental Protection Agency National Conference on Management of Uncontrolled Hazardous Waste Sites Symposium Proceedings, October 15-17, 1980, Washington, D.C. pages 30-41.

State of Florida -- Water Quality Assurance Act of 1983.

State of Michigan -- "Site Assessment System (SAS) for the Michigan Priority Ranking System under the Michigan Environmental Response Act (Act 307, P.A. 1982)," (Draft), State of New York -- 27-0900 through 0923; 27-1301 through 1319, Environmental Conservation Law, May 1983.

State of Minnesota -- State Superfund Bill, May 2, 1983.

State of New Jersey -- N.J.A.C., 7: 26-1, 4, 7-12, Hazardous Waste Regulations  
N.J.A.C., 7: 14A-4, 6, 11, Hazardous Waste Regulations  
N.J.A.C., 7: 1E1.1 et seq.

"Survey of Investigative Procedures used by a Number of States When Examining a Possible Hazardous Waste Site, B.J. Battig, October 1983.

U.S. Department of Agriculture, Hydrology Guide for Minnesota, Soil Conservation Service, St. Paul, Minnesota, Circa 1976.

U.S. Environmental Protection Agency -- Uncontrolled Hazardous Waste Site Ranking System -- A User's Manual (Draft), June 10, 1982.