

STATE OF MINNESOTA  
POLLUTION CONTROL AGENCY

In the Matter of the Proposed Adoption  
of Minn. Rules Parts 7001.1400 -  
7001.1470, Section 401 Certification Rules,  
and Associated Amendments to Permit Rules,  
Minn. Rules Parts 7001.0010 and 7001.0020

STATEMENT OF NEED  
AND REASONABLENESS

I. INTRODUCTION

The subject of this proceeding is the proposed adoption by the Minnesota Pollution Control Agency ("Agency") of rules governing the processing by the Agency of certifications under Section 401 of the Clean Water Act, 33 U.S.C. §1341 (1983) ("Section 401") along with associated amendments to the Agency's permit rules. Section 401 requires that a 401 certification be obtained by any applicant for a federal license or permit for the conduct of any activity which may result in any discharge into the navigable waters. The certification is issued by the state in which the discharge originates.

The proposed rules and rule amendments will, if adopted, establish a procedure for issuing Section 401 certifications which is the same, with certain exceptions, as the procedure which the Agency uses to issue, reissue, and modify permits under Minn. Rules chapter 7001. The proposed amendments to Minn. Rules chapter 7001 make the requirements of that chapter applicable to Section 401 certifications, and the proposed Minn. Rules pts. 7001.1400 to 7001.1470 specify additional requirements or exceptions from that chapter that apply to Section 401 certifications.

This Statement of Need and Reasonableness is divided into

several parts. Part II sets forth the Agency's statutory authority to adopt the proposed rules and rule amendments. Part III contains the Agency's explanation of the need for the proposed rules and rule amendments. Part IV contains the Agency's explanation of the reasonableness of the proposed rules and rule amendments. Pursuant to the requirements of Minn. Stat. §14.115 (1984), Part V documents how the Agency has considered methods of reducing the impact of the proposed amendments on small businesses. Part VI contains a reference to the exhibits relied on by the Agency to support the proposed amendments. The exhibits are available for review at the Agency's office at 1935 West County Road B-2, Roseville, Minnesota 55113.

## II. STATEMENT OF THE AGENCY'S STATUTORY AUTHORITY

The proposed rules will establish both substantive provisions and procedural requirements for Section 401 certifications. The adoption of rules establishing substantive provisions for Section 401 certifications falls within the Agency's broad authority to adopt rules relating to water pollution. Minn. Stat. §115.03, subd. 1(e) (1984) provides:

The Agency is hereby given and charged with the following powers and duties:

. . .

(e) To adopt, issue, reissue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, regulations, schedules of compliance, and stipulation agreements under such conditions as it may prescribe, in order to prevent, control or abate water pollution, or for the

installation or operation of disposal systems or parts thereof, or for other equipment and facilities.

The authority to adopt rules governing the procedure to be followed by the Agency in issuing Section 401 certifications falls within Minn. Stat. §116.07, subd. 3 (1984), which provides:

Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend, and rescind rules governing its own administration and procedure and its staff and employees.

Pursuant to these statutes, the Agency has statutory authority to adopt the proposed rules and rule amendments.

### III. STATEMENT OF NEED

The need to adopt the proposed rules and rule amendments arises from Section 401 of the Clean Water Act. That statute, in addition to requiring that a Section 401 certification be obtained by any applicant for a federal license or permit for the conduct of any activity which may result in any discharge into the navigable waters, requires the state issuing the Section 401 certification to adopt procedures for public notice of all applications and, to the extent the state deems appropriate, procedures for public hearings in connection with specific applications. Section 401(a)(1) provides:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having

jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator [of the U. S. Environmental Protection Agency]. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(Emphasis supplied.)

As the State agency designated by the legislature in Minn. Stat. chs. 115 and 116 as responsible for the abatement and control of water pollution, the Agency is responsible for undertaking the obligations of the State of Minnesota under Section 401. However, to date, none of the Agency's rules apply to issuance of Section 401 certifications. Therefore there is a need to adopt procedural rules for these certifications.

The proposed rules also apply substantive requirements to

holders of Section 401 certifications by requiring the establishment of certain conditions in the certificate itself. (See proposed Minn. Rules pt. 7001.1470.) Establishing such requirements is necessary because of the need for all discharges into navigable water to meet the State effluent limitations and water quality standards established in Minn. Rules chapter 7050. Presently, any person who discharges a pollutant from a point source (e.g., a pipe, ditch, channel) is required by Minn. Rules pt. 7001.1031 to obtain a National Pollutant Discharge Elimination System ("NPDES") permit, and any person who constructs or operates a disposal system is required by Minn. Stat. §115.07 (1984) to obtain a State Disposal System ("SDS") permit. The Agency enforces the State water quality standards with respect to these dischargers through the imposition of permit conditions. However, some discharges into the waters of the State do not meet the definition either of "discharge from a point source" or a "disposal system." For example, activities associated with the widening of a river channel result in a discharge of pollutants into the waters of the State without triggering any of the Agency's permit requirements. In these cases, the Agency may still enforce its water quality standards, but there is no administrative "handle" on the discharger other than putting conditions upon the Agency's issuance of its Section 401 certification. Therefore it is necessary to adopt rules which inform the regulated community what types of conditions the

Agency intends to impose upon the issuance of Section 401 certifications.

#### IV. STATEMENT OF REASONABLENESS

The general thrust of the proposed rules and rule amendments is to adopt a Section 401 certification procedure which is like the Agency's current permitting procedures and to impose on the proposed discharger conditions which are like those imposed in NPDES and SDS permits. This procedure involves the submission of an application by the proposed discharger, the review of the application by Agency staff, issuance of a preliminary determination and public notice by the Director of the Agency, a public comment period, during which time the discharger or the public may request a public informational meeting or a contested case hearing on the matter, the holding of a contested case hearing if necessary, and the final determination by the Agency on the application.

It is reasonable to apply the Agency's permitting procedures to the Section 401 certification program because the allowance of a discharge covered by a Section 401 certification raises water quality issues similar to those raised when the Agency receives a NPDES and/or SDS permit application. The NPDES/SDS permitting procedure has been used by the Agency for many years and has worked well in surfacing and addressing issues associated with water discharge projects; therefore it is reasonable to predict

that it will work well in the Section 401 certification program. This prediction is backed up with experience, since in the past, the Agency informally applied this same type of procedure in making decisions on Section 401 certifications, and this procedure has been satisfactory. It is reasonable to make the procedure officially applicable to Section 401 certifications in order to reduce any uncertainty which the public may have experienced in the past as a result of the Agency's informal application of the procedure.

The reasonableness of each of the provisions of the rules is discussed below.

Minn. Rules Pt. 7001.0010, subp. 3, Definitions

The Agency proposes to amend the definition of "permit" that is set forth in the Agency's permit rule, Minn. Rules pt. 7001.0010, subp. 3, to state that the exclusion of the term "certification" from the definition of "permit" does not in any way affect the applicability of the permit procedural rules to the processing of Section 401 certifications to the extent provided by the Section 401 certification rules, Minn. Rules pts. 7001.1400 to 7001.1470.

The need for this amendment arises from the decision to apply the requirements of the permit rules to the processing of Section 401 certifications. The Agency does not want to change the definition of "permit" to include the term "certification," because that would impose the permitting procedures on all types

of certifications that the Agency may issue, rather than on this one class of certifications. Also, the Agency does not consider a 401 Certification, which is a requirement of federal law, to constitute a State permit. Instead, the rule is drafted to clearly indicate that even though Section 401 certifications do not constitute permits, the permitting procedures are being applied to them. It is reasonable to clarify the effect of the definition of the term "permit" on the applicability of the permit rules to Section 401 certifications so that the public will understand that the Agency is subjecting one, but not all, type of certification to the requirements of the permit rules.

Minn Rules Pt. 7001.0020, Applicability

The Agency proposes to amend Minn. Rules pt. 7001.0020 to add a new Subpart K to apply the requirements of the permit rules to the processing of Section 401 certifications. As previously discussed, it is reasonable to apply the Agency's permitting procedures to the Section 401 certification program because the allowance of a discharge covered by a Section 401 certification raises water quality issues similar to those raised when the Agency receives a NPDES and/or SDS permit application. Based on previous experience in informally applying the NPDES/SDS permitting procedure to Section 401 certifications, it is reasonable to predict that it will work well in the Section 401 certification program. It is reasonable to make the procedure

officially applicable to Section 401 certifications in order to reduce any uncertainty which the public may have experienced in the past as a result of the Agency's informal application of the procedure.

Minn. Rule Pt. 7001.1400, Applicability of Rules

Minn. Rule pt. 7001.1400 specifies that the Agency's permit rules, Minn. Rules pts. 7001.0010 to 7001.0210 and the newly proposed rules, Minn. Rules pts. 7001.1400 to 7001.1470 apply to the processing of Section 401 certifications and that the two sets of rules shall be construed to complement each other. It is reasonable to clarify what subject matter is covered by these rules and to cross reference other rules that apply to the subject because it is more convenient to the regulated community to have a listing in one place of the rules with which they must comply with respect to that subject matter.

The proposed rule also provides that in applying the Agency permit rules, Minn. Rules pts. 7001.0010 to 7001.0210, to Section 401 certifications, the term "Section 401 certification" should be substituted for the word "permit" and the term "certificate holder" should be substituted for the word term "permittee." This provisions is necessary because of the confusion which would otherwise result from the differences in terminology between a permit program and a Section 401 certification program. For example, without this provision, the Agency would be issuing certifications which would be required by Minn. Rules pt.

7001.0150, subp. 3 to contain conditions commencing with the phrase "The permittee shall . . ." or "The permit . . ." The provision requiring the substitution of the correct terms in the permit rules is reasonable because it will eliminate this confusion.

Minn. Rules Pt. 7001.1410, Definitions

This part states that the definitions in Minn. Stat. §115.01 apply to the terms found elsewhere in the rules unless they are defined in this part. Minn. Stat. §115.01 is a part of the Agency's enabling legislation and defines many terms which are relevant to the control of water pollution. It is reasonable to apply the definitions in the statute to these rules because it promotes consistency within the Agency's water pollution control program.

This part also defines three additional terms. "Director" is defined as the Director of the Agency. It is reasonable to define this term in order to clarify the person to whom this term refers. "Clean Water Act" is defined as the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251 et seq. It is reasonable to include this definition because this statute is the source of the requirement to obtain a Section 401 certification, and is used several times in the rules. "National Pollutant Discharge Elimination System" is defined in exactly the same manner as in Minn. Rule pt. 7001.1020, subp. 19, a portion of the Agency permit rules which is specifically applicable to

NPDES permits. This definition is reasonable because it promotes consistency among Agency programs.

Minn. Rules Pt. 7001.1420, Requirement to Apply for Certification

Minn. Rules pt. 7001.1420 provides that any person who is required by Section 401 to obtain a certification from the State of Minnesota shall make application to the Agency. This provision is reasonable because it directs a person seeking a federal permit to the appropriate Minnesota agency to obtain the needed Section 401 certification. The receipt of the application by the Agency alerts the Agency of the existence of the proposed project and allows the Agency to begin reviewing the information which is relevant to the decision it must make regarding a certification.

Minn. Rules Pt. 7001.1430, Application Deadlines

The Agency is proposing in this part to state that Minn. Rules pt. 7001.0040, subp. 1 and 2 apply to Section 401 certifications, with the exception that the time period referenced in subp. 1 of that rule shall be 90 days instead of 180 days. Minn. Rule 7001.0040, subp. 1 provides:

Subpart 1. Application for new permit. Except as otherwise required by parts 7001.0530 and 7001.1050, a permit application for a new facility or activity may be submitted at any time. However, it is recommended that the permit application be submitted at least 180 days before the planned date of the commencement of facility construction or of the activity.

It is reasonable to change the recommended application time

period from 180 days to 90 days because, in the past, a large number of the projects needing Section 401 certifications have been routine in nature with minimal impacts on water quality and, consequently, the Agency has been able to act on these projects within 90 days. It is expected that this will be the case in the future.

Minn. Rules Pt. 7001.1440, Public Notice of Application and Preliminary Determination

This proposed rule has two subparts. Subpart 1 provides that the Director shall prepare and issue public notices of Section 401 certification applications in accordance with the requirements of Minn. Rules pt. 7001.0100, subp. 4, except that the public comment period, instead of being automatically 30 days, shall be established on a case-by-case basis after considering the scope, nature, and potential impacts on water quality of the project. The comment period established must be at least ten days.

It is reasonable to allow for a case-by-case determination of the public notice period because of the great variety of projects needing Section 401 certifications. Some of the projects will have minor water quality implications, and some of them may serve beneficial purposes, such as erosion protection. These types of projects do not tend to be controversial, and few, if any, comments are received regardless of the length of the public notice period. In these cases, a shorter public notice

period is reasonable. On the other hand, in cases of complex or highly controversial projects, it is reasonable for the Director to be able to provide more time for the public and the applicant to comment on the preliminary determination of the Director.

Subpart 2 of the proposed rule provides that the Director is not required to prepare and distribute a public notice if the Director finds that a federal agency or department has prepared and distributed or will prepare and distribute a public notice concerning the project in accordance with the public notice requirements applicable to the federal agency or department, so long as such notice is actually prepared and distributed. This provision is reasonable because it avoids duplication of effort by the State of notice already given by the federal government. The Agency has established a working relationship with those federal agencies or departments which are frequently involved with Section 401 certifications, specifically the United States Army Corps of Engineers, and have worked out arrangements so that federal notices include notice that the Agency is also receiving comments on the project. Therefore, the provisions of subpart 2 will not result in cutting off the Agency from receiving comment on the project.

Minn. Rules Pt. 7001.1450, Final Determination

Subpart 1 provides that the Agency has three choices in making a final determination on a Section 401 certification application. The first option is to issue, reissue, revoke and

reissue, or modify a Section 401 certification in accordance with Minn. Rules pt. 7001.0140, subp. 1 and upon making a finding that the discharge will comply with 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317. The finding concerning compliance with the federal statutes is necessary under Section 401(a)(1), 33 U.S.C. §1341(a)(1), which provides in relevant part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

(Emphasis supplied.) It is reasonable to require this finding so that the Agency's program will conform to the requirements of federal law.

The second option under subpart 1 is to deny or revoke a Section 401 certification upon making the findings set forth in Minn. Rules pt. 7001.0140, subp. 2 (the findings which the Agency must make in order to refuse to issue a new or modified permit, to refuse to permit reissuance, or to revoke a permit without reissuance) or the findings set forth in Minn. Rules 7001.1450, subps. 2 to 3. It is reasonable to provide for denial or revocation of a Section 401 certification if the discharge cannot meet the standards for issuance of the certification.

The third option under subpart 1 is to waive the Agency's authority to issue a Section 401 certification in accordance with Minn. Rules pt. 7001.1460. As quoted at page 4, supra, Section 401 gives the State the option to waive its authority to issue a Section 401 certification. It is reasonable to retain this option in the State program because it promotes consistency with the federal statutory program.

Subparts 2 and 3 provide additional findings which result in denial or revocation of a Section 401 certification. Subpart 2 requires denial or revocation if the Agency finds that the issuance of a Section 401 certification will result in a discharge of a radiological, chemical, or biological warfare agent. This finding is consistent with Section 301(f) of the Clean Water Act, 33 U.S.C. §1311(f), which makes it unlawful "to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters." It is reasonable to deny or revoke a certification on this basis because a discharge of this nature constitutes a direct violation of a federal statute.

Minn. Rules Pt. 7001.1460, Waiver

Section 401(a)(1), quoted at page 4, supra, provides that the State waives its authority to issue a Section 401 certification if it fails to act on a request for certification within a "reasonable" period of time, which may not exceed one year. In the Agency's past administration of the Section 401 certification

program, the Agency has exercised its option to waive certification, not only by inaction but also expressly. The proposed Minn. Rule pt. 7001.1460 reflects past practice by providing that the Agency shall be deemed to have waived its authority to issue a Section 401 certification under the following circumstances:

- A. If the Agency notifies the applicant in writing that it is waiving its authority. If the waiver is conditional, the notification must specify the conditions which the applicant must meet; or
- B. If the Agency fails or refuses to make a final determination within one year after receipt of the application and the failure or refusal is not a result of the applicant's failure or refusal to cure a deficiency in the application.

It is reasonable to continue to provide for an express waiver because it provides certainty to the applicant and to the federal permitting agency involved and allows them to proceed with the federal permitting process. It is also reasonable to provide for waiver in the event of a failure or refusal to act within one year, if the delay is not caused by the applicant, because the express terms of Section 401 provide that failure of the State to act within a reasonable period of time, not to exceed one year, constitutes waiver.

Minn. Rules Pt. 7001.1470, Terms and Conditions of Section 401 Certifications

This part sets forth the terms and conditions which are to be included in a Section 401 certifications.

Subpart 1, item A provides that the certification must include the name and address of the certificate holder. This provision is reasonable because it makes the document identifiable.

Subpart 1, item B provides that the certification must include a statement that the Agency has examined the Section 401 certification application and any other information furnished by the applicant and bases its certification upon an evaluation of this information which is relevant to water quality considerations. This provision is reasonable because it informs the public and the certificate holder of information upon which the Agency has based its final determination to issue the certification.

Subpart 1, item C provides that the certification must include a statement that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards. This is reasonable because Section 401 specifically provides that this finding must be the basis for the issuance of a Section 401 certification.

Subpart 1, item D provides that the certification shall include the terms and conditions set forth in the Agency's permit

rules, Minn. Rules pt. 7001.0150, except that the provisions of subpart 1 of that rule do not apply to Section 401 certifications. Subpart 1 of Minn. Rules 7001.0150 states: "Unless specifically otherwise provided by statute or rule, an agency permit is issued for a term not to exceed five years." It is reasonable to exclude this rule from applying to Section 401 certifications because certifications are issued on a one-time basis, at the time the person applies for the federal permit. They are not on-going, and therefore the concept of "term" is not relevant to certifications.

In addition, item D states that two additional conditions, set forth in subparts 2 and 3, apply to certifications. Subpart 2 requires a Section 401 certification to contain the special conditions described in Minn. Rules pt. 1002.1080, subps. 2 to 9, which conditions must be established in the same manner as special conditions are established under Minn. Rules pt. 7001.1080 for NPDES permits. This is reasonable because the Agency's rules establishing the conditions of a NPDES permit were established in accordance with the requirements of 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317, which Section 401 lists as the statutes which the discharger must meet to obtain certification.

#### V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. §14.115, subd. 2 (1984) requires the Agency, when

proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

The proposed amendments may affect small businesses as defined in Minn. Stat. §14.115 (1984). As a result, the Agency has considered the above-listed methods for reducing the impact of the rule on small businesses. However, because obtaining a Section 401 certification is a federal requirement, the Agency is not free to exempt small businesses from the requirement to obtain a certification. The proposed rules are generally procedural in nature; the substantive requirements for the protection of water quality are already applicable to persons whose discharges are subject to Section 401 certification requirements. Based on the Agency's experience with using procedures similar to those embodied in the proposed rules when processing Section 401 certifications in the past, the Agency

does not believe that the procedures impose a hardship on either small businesses or any other entity. Consequently, the proposed rules do not provide for special consideration for small businesses.

VI. CONCLUSION

Based on the foregoing, the proposed amendments to Minn. Rules pts. 7001.0010 and 7001.0020 and the proposed Minn. Rules 7001.1400 to 7001.1470 are both needed and reasonable.

Dated: October 10, 1985



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THOMAS J. KALITOWSKI  
Executive Director