

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules
Relating to the Agency's Responsibilities
for the Administration of the Water
Pollution Control Revolving Fund Program

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

In 1987, the Legislature created the water pollution control revolving fund to provide loans and other financial assistance, but not grants, to governmental units for the construction of publicly owned wastewater treatment facilities, Minn. Stat. § 446A.07 (Supp. 1987). The fund was established in accordance with the requirements of Title VI of the federal Water Pollution Control Act of 1987, 33 U.S.C. §§ 1381-1387. Under Title VI, federal capitalization grants will be awarded to states through federal Fiscal Year (FY) 1994 to fund eligible activities. The federal funds must be matched by a minimum of 20 percent state funds. All repayments will be deposited back into the state water pollution control revolving fund.

Under Minn. Stat. §§ 446A.01-446A.07 (Supp. 1987), the Minnesota Public Facilities Authority (Authority) was created and given joint responsibility with the Agency for administration of the water pollution control revolving fund program. The Authority is responsible for maintaining the fund, setting the terms and conditions of the loans and other financial assistance, making the awards, and making the loan payments and receiving the repayments. The Agency is responsible for preparing the annual intended use plan which lists the projects proposed to receive assistance and for reviewing and monitoring the administrative and technical aspects of the projects.

In drafting the proposed rules, the Agency sought and received input from the Technical Advisory Committee for wastewater treatment control, established

under Minn. Stat. § 115.54. This document contains the Agency's affirmative presentation of facts on the need for and reasonableness of the proposed rules. Section II identifies the Agency's statutory authority for rulemaking. Section III describes the need for the proposed rules. Section IV describes the Agency's reasons for the proposed rules.

II. STATEMENT OF AGENCY'S STATUTORY AUTHORITY

The Agency's statutory authority to adopt rules for the administration of the program is set forth in Minn. Stat. § 446A.07, subd 11 (Supp. 1987), which provides:

Subd. 11. The Agency shall adopt rules relating to the procedure for preparation of the annual intended use plan and other matters that the Agency considers necessary for proper loan administration.

Under this statute the Agency has the necessary statutory authority to adopt the proposed rules.

III. STATEMENT OF NEED

Minn. Stat. ch. 14 (1986) requires the Agency to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Agency must set forth the reasons for its proposal, and the reasons must not be arbitrary or capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the Agency is appropriate. The need for the rules is discussed below.

The need for adopting rules to administer the water pollution control revolving fund program arises from action by Congress to phase out the federal construction grants program and replace it with grants to states to establish state revolving fund programs under Title VI of the federal Water Pollution

Control Act of 1987. The Legislature established the water pollution control revolving fund under Minn. Stat. § 446A.07 (Supp. 1987) to provide financial assistance to municipalities for wastewater treatment facilities under the provisions of Title VI. In 1987, the Legislature also created the Authority and divided the responsibility for administering the water pollution control revolving fund program between the Agency and the Authority.

Because of the joint responsibility for the program, both the Agency and the Authority are developing rules for their parts of the program. Both sets of rules are on a schedule to be adopted in late 1988. It is expected that an application for the first federal capitalization grant will be submitted to the U.S. Environmental Protection Agency in Spring 1989 and the first loan to a municipality from the fund will be awarded in Summer 1989.

IV. STATEMENT OF REASONABLENESS

The Agency is required by Minn. Stat. ch. 14 to make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Rules are reasonable if they are not arbitrary or capricious. Reasonableness means that there is a rational basis for the Agency's proposed action. The reasonableness of the proposed rules is discussed below.

A. Reasonableness of the Rules as a Whole

These proposed rules establish a reasonable method for the Agency to accomplish its responsibilities under the program which are primarily to prepare the intended use plan and to insure the technical adequacy of the projects and the protection of the environment.

Under the program, the intended use plan is the document which lists the projects proposed to receive financial assistance each fiscal year and also includes additional information required by the Environmental Protection Agency (EPA) for award of the capitalization grant. Once a municipality is placed on the intended use plan, it will receive an application packet from the Authority

which explains the information required by both the Authority and the Agency. The Agency will review the application materials required by the Agency and when all required items are approved, the Agency will certify the application to the Authority. The Authority will review the application materials required by the Authority, and upon approval of those materials and receipt of a certification by the Agency, will make the financial assistance award. Following award, the Agency will monitor the progress of the project and the Authority will make payments as costs are incurred by the municipality. This is a reasonable approach for both complying with the procedures established by the Legislature and satisfying the requirements of the EPA.

B. Reasonableness of Individual Rules

The following discussion addresses the specific provisions of the proposed rules.

Part 7075.2505 Purpose. (Hereafter only the last four digits will be used to identify parts. The first four digits are identical in all cases.)

This part identifies that the Agency's responsibilities for administration of the water pollution control revolving fund program will be governed by these rules.

Part 2510 Definitions.

The following terms used in the rules have a specific meaning. The terms and the reasonableness of the definitions are explained below. Other terms used are defined in Minn. Rules 7075.0200 and have the same meanings as defined in that rule.

Subpart 2. "Act." Since there are several references to Title VI of the Federal Water Pollution Control Act, it is appropriate to shorten this and include it in the definitions.

Subpart 3. "Agency." Since there are several references to the Minnesota Pollution Control Agency, it is appropriate to shorten this and include it in the definitions.

Subpart 4. "Authority." Since there are several references to the Public Facilities Authority, it is appropriate to shorten this and include it in definitions.

Subpart 5. "Commissioner." It is appropriate to clarify that "Commissioner" is the Commissioner of the Minnesota Pollution Control Agency not an official of the Authority or a local government official.

Subpart 6. "Intended Use Plan." The definition describes that the intended use plan is the list of projects proposed to be funded in a particular federal fiscal year. The federal fiscal year is used because the intended use plan will be part of the application to the EPA for the federal capitalization grant each fiscal year.

Subpart 7. "Municipal Needs List." Being listed on the municipal needs list is a major eligibility requirement for a project to be placed on the intended use plan. The definition describes what the list is and references the rule which governs how the list is developed and maintained. In most cases, projects are listed on the municipal needs list by the name of the municipality. However, for larger municipalities, such as the Metropolitan Waste Control Commission, there may be more than one project in the municipality and each project is listed separately.

Subpart 8. "Municipality." The definition conforms with Minn. Stat. section 116.16 for consistency.

Part 2515 Intended use plan.

Subpart 1. Adoption of the intended use plan. To meet the federal requirements under Title IV, the Agency will adopt an annual intended use plan

that will be based upon the requests received under Subpart 3. If additional requests for placement on the intended use plan are received after the plan is adopted, the rule provides for the Agency to amend the intended use plan as necessary. This is a reasonable approach because the Agency and the Authority expect that there will be sufficient funds to accommodate all applicants. Therefore, it is not necessary to identify a particular time when the intended use plan will be adopted each year. The plan will be a fluid document which can expand as additional projects become ready to proceed.

Subpart 2. Eligibility. The only eligibility requirement for placement on the intended use plan for a project that has not begun construction is that the project be listed on the municipal needs list. This is reasonable because the state revolving fund concept was developed by Congress as a replacement for the federal construction grants program which has provided grants only to municipalities on the municipal needs list.

Under Minn. Stat. § 446A.07, Subdivision 8(1), the fund may also be used to refinance the debt obligation of a municipality for a treatment works project where the debt was incurred after March 7, 1985. Because projects are removed from the municipal needs list once construction is underway, the rule provides that the eligibility requirement is met as long as the project was on the municipal needs list prior to the beginning of construction and meets the statutory requirements.

Subpart 3. Requirements for placement on the intended use plan. There are two major requirements for placement.

Item A. The municipality must submit a written request which includes a brief description of the project, a cost estimate and a proposed project schedule. The project description is required so that the Agency can determine that the project is on the municipal needs list and is consistent with previous

planning or design work which has been performed. The cost estimate and proposed project schedule are required for planning purposes.

Requests for placement on the intended use plan may be submitted at any time. No deadline dates have been established due to the Agency's desire to make entry into the water pollution control revolving fund program as easy as possible. As discussed under Subpart 1, the intended use plan can be amended as additional requests are received.

Item B. Before a municipality will be placed on the intended use plan for a Step 3 construction project, it must first have an approved facilities plan. It is reasonable to require that the time consuming facilities planning work, such as analyzing existing facilities and needs, selecting the cost-effective treatment alternative and selecting an acceptable site, be completed before construction funds are committed for the project. Until a facilities plan is completed, it is difficult to accurately estimate project costs and schedules. Reasonably accurate estimates are needed for municipalities on the intended use plan so that the Authority can efficiently manage the monies in the fund.

Part 2520 Applications.

Subpart 1. Timing and form of application. A municipality on the intended use plan may submit a financial assistance application according to the municipality's schedule in its request for placement on the intended use plan. Allowing each municipality to determine its own schedule for application submittal is consistent with the Agency's desire to make entry into the program as easy as possible. Application forms will be provided by the Authority and, by statute, must be submitted to the executive director of the Authority.

Subpart 2. Step 1 financial assistance. To allow the Commissioner to make a determination of an applicant's conformance with the program requirements,

information needs to be submitted by the applicant. The application forms provided by the Authority will require information needed by the Authority to make its determination and will also require information detailed in items A through D, which are very similar to the requirements in part 7075.0419, subpart 3 for a Step 1 advance of allowance.

Item A. An applicant for Step 1 financial assistance must submit a plan of study outlining the scope of work. It is important for a municipality that is just beginning facilities planning to carefully plan out the scope of work so that its time and funds are not spent considering treatment alternatives that would not be feasible or approvable. By submitting a plan of study for review, the Agency can work with the municipality so that its limited resources are used as efficiently as possible.

Item B. The municipality must submit a schedule for completion of the facilities plan work so that the Agency and the Authority can make reasonable estimates as to when funds will be disbursed.

Item C. The municipality's consulting engineer must provide a certificate of adequate errors and omissions insurance. Because of the complex nature of wastewater treatment facilities and the large financial investment such facilities require from state and local governments, it is reasonable to require that the consulting engineer who develops the facilities plan for the project have adequate coverage under an errors and omissions insurance policy.

Item D. If two or more cities are going to develop a joint facilities plan, it is reasonable to require that they submit an agreement that describes how they will be working together so that the Commissioner can determine that all parties fully understand their responsibilities.

Subpart 3. Step 2 financial assistance. To allow the Commissioner to make a determination of an applicant's conformance with the program requirements,

information needs to be submitted by the applicant. The application forms provided by the Authority will require information needed by the Authority to make its determinations, and will also require information needed by the Agency and detailed in items A through D, which are very similar to the requirements in part 7075.0419, subpart 3 for a Step 2 advance of allowance.

Item A. The municipality must submit a schedule for completion of all Step 2 work for the same reasons stated above in subpart 2, Item B.

Item B. The municipality's consulting engineer must provide a certificate of adequate errors and omissions insurance. Because of the complex nature of wastewater treatment facilities and the large financial investment such facilities require from state and local governments, it is reasonable to require that the consulting engineer who prepares the plans and specifications for the project have adequate coverage under an errors and omissions insurance policy.

Item C. The municipality must submit a treatment agreement for each major contributing industry. The quantity and loading of the wastewater flow coming from major industries can greatly impact the design requirements of the treatment facility. Therefore, it is appropriate to require that these treatment agreements be entered into and submitted to the Agency for review with a Step 2 application.

Item D. If two or more municipalities are submitting a joint application, each of the application items must be provided for each municipality and an unexecuted intermunicipal agreement must also be submitted. These items are required so that the Agency can determine whether all required items and project related issues are being addressed by both municipalities.

Subpart 4. Step 3 financial assistance. To allow the Commissioner to make a determination of an applicant's conformance with the program requirements,

information needs to be provided by the applicant. The application forms provided by the Authority will require information needed by the Authority to make its determinations, and will also require information needed by the Agency and detailed in items A through N, which are very similar to the requirements in part 7075.0414, subpart 6 for a Step 3 grant application.

Item A. The municipality must submit the project plans and specifications as part of a Step 3 application. Under Minn. Stat. 115.03, subd. 1(f) (1986), the Agency has the authority to review and approve the plans and specifications before a project can proceed to construction. The primary purpose of the review is to provide reasonable assurance that the proposed facility is capable of reliably meeting effluent and water quality standards for the design life of the facility. It is reasonable that this review and approval come before the Commissioner certifies the application to the Authority so that any problems can be resolved before funds are committed for project construction.

Item B-D. The municipality must submit a sewer service charge system and a sewer use ordinance and must provide documentation of how the public has been informed of the proposed sewer service charge system. These items are required by the federal Water Pollution Control Act, 33 U.S.C. §§ 1381-1387.

Item E. The municipality must submit a schedule for completion of all Step 3 work for the same reasons stated above in subpart 2, Item B.

Item F. The municipality must submit a design certification statement signed by its consulting engineer that the proposed treatment works are capable of meeting the required effluent quality. It is appropriate that the person responsible for the design of a facility sign a certification that it will meet the required permit effluent limits and water quality standards.

Item G. The municipality's consulting engineer must provide a certificate of adequate errors and omissions insurance. Because of the complex nature of wastewater treatment facilities and the large financial investment, such facilities require from state and local governments, it is reasonable to require that the consulting engineer who is responsible for managing the construction for the project have adequate coverage under an errors and omissions insurance policy.

Item H. The municipality must submit a copy of its contract with its consulting engineer for all Step 3 work. The involvement of a municipality's engineer in managing the construction of the project and directing the start-up of the facility is important to the successful completion of the project. It is reasonable for the Agency to review the engineering contract to insure that all necessary work tasks are included.

Item I. The municipality must certify that its engineer will be on site during construction for the purposes of inspection and will provide inspection reports to the Agency. Providing on-site inspection is a critical service provided by the engineer to insure quality construction so that the project is capable of meeting water quality standards throughout its design life. It is important for the municipality to recognize the importance of this function and to verify that its engineer will provide sufficient inspection services for the project and provide the necessary progress reports to the Agency.

Item J. The municipality must certify that its engineer will provide the required start-up services during the first year after initiation of operation. It is important for the municipality to understand what start-up services are required and to verify that its engineer will perform these services so that the operation of the facility will provide the maximum protection to the environment.

Item K. The municipality must certify that, on the date one year after initiation of operation, it will meet the performance certification requirements. Performance certification is a requirement under the federal Water Pollution Control Act, 33 U.S.C. §§ 1381-1387. It is appropriate to inform the municipality of this requirement and to get the municipality's commitment to meet this requirement before Step 3 financial assistance is awarded.

Item L. The municipality must submit a treatment agreement for each major contributing industry. The quantity and loading of the wastewater flow coming from major industries can greatly impact a municipality's ability to meet applicable water quality standards and permit effluent limits. It is appropriate to require that these treatment agreements be entered into and submitted to the Agency for review with a Step 3 application. This item is a requirement under the Step 2 application requirements as well. It is possible that a municipality would seek Step 3 financial assistance without first having received Step 2 financial assistance, therefore it is necessary to repeat this requirement here.

Item M. The municipality must submit a cost breakdown for all project work. This is necessary for the Agency to make reasonable estimates as to when funds will be disbursed. These estimates are needed so that the Agency can determine if any amendments to the payment schedule provided to the U.S. Environmental Protection Agency are necessary.

Item N. If two or more municipalities are involved in the project, an executed intermunicipal agreement must be submitted in order that the commissioner can determine that all issues of project responsibility have been addressed and that a cost-sharing agreement has been worked out.

Part 2525 Application Certification.

Subpart 1. Step 1 projects. The commissioner does not have the statutory authority to award financial assistance under the program. Once an application has been reviewed and approved, the commissioner will certify to the Authority that the project meets the applicable federal and state requirements.

Subpart 2. Step 2 projects. The commissioner does not have the statutory authority to award financial assistance under the program. Once an application has been reviewed and approved, the commissioner will certify to the Authority that the project meets the applicable federal and state requirements.

Subpart 3. Step 3 projects. For Step 3 projects, two additional items must be completed in addition to the review and approval of the application before the commissioner can certify the project to the Authority.

Item A. The Minnesota environmental review process set forth in Minn. Stat. ch. 116D and Minn. Rules ch. 4410 must be complete for the proposed project. The federal Water Pollution Control Act, 33 U.S.C. §§ 1381-1387 requires that an environmental review be performed for all proposed projects.

Item B. The municipality must obtain a State Disposal System permit, and if applicable, a National Pollutant Discharge Elimination System permit as required under Minnesota Rules part 7001.0030 before construction can begin on a facility. It is reasonable to require that the permit be obtained before the commissioner certifies the project to the Authority so that when a project is certified by the Commissioner it is ready to proceed with construction.

Part 2530 Change Orders.

The proposed rules require that change orders that substantially alter the type or reliability of the treatment process be approved by the commissioner prior to implementing the change. Review of such change orders is necessary because these changes may affect the ability of the proposed facility to meet

its permit limits. A change order of this nature which is implemented without first receiving prior approval shall constitute grounds for the commissioner to request that the Authority terminate the loan agreement. This is reasonable because of the Agency's need to reasonably assure that the completed project is capable of achieving compliance with pollution control requirements.

Change orders that do not substantially alter the type or reliability of the treatment process do not need prior approval of the commissioner. However, the rules require that the change order be submitted as soon as possible for the purpose of keeping the Agency informed of the nature of the project changes.

Part 2535 Inspections.

The proposed rules provide that the commissioner may conduct inspections of the grantee's project pursuant to Minn. Stat. section 115.03, subd. 1(f). Inspections during construction of a facility allows the staff to monitor the progress of the project, insure that the approved project is being constructed and monitor interim treatment permit conditions.

Part 2540 Step 3 Reporting Requirements.

Subpart 1. Sixty days prior to completion of construction. Two items are required to be submitted at least 60 days prior to the scheduled contract date for completion of construction.

Item A. Provide evidence that a wastewater treatment works operator with a valid state certificate has been hired. It is reasonable that the operator of the facility be present to become familiar with the facility during the last stages of construction. If the operator does not have a valid state certificate when hired, there is no guarantee that the person will later be able to pass the test and meet the requirements to receive a state certificate.

Item B. Submit an operation and maintenance manual for the commissioner's approval. An adequate operation and maintenance manual is an

important reference source for the operator to insure that the facility is operated and maintained correctly. It is reasonable to require that the manual be submitted in advance of the completion of construction so that it can be approved and in place when initiation of operation occurs.

Subpart 2. Within 45 days following completion of construction. Three items are required no later than 45 days after completion of construction.

Item A. Submit a certification by the contractor that the project was built according to the approved plans and specifications and change orders. It is reasonable to require this certification be obtained from the contractor following completion of construction as a verification that the conditions of the contract were met.

Item B. Submit evidence that the Agency approved sewer use ordinance and sewer service charge system with updated cost revisions have been adopted. The sewer use ordinance and sewer service charge system are reviewed and approved based upon estimated project costs as part of the Step 3 application process. Some documentation is required following completion of construction to insure that the approved ordinance and the approved charge system with revisions based upon final costs were adopted.

Item C. Submit two copies of the as-built plans and specifications on microfiche. It is important for the Agency to have a record of the facility that was actually built, not only as a check for the Agency to determine that the approved plans and specifications were followed, but also because as-built plans and specifications are used for reference and historical data for the future.

Part 2545 Performance Certification.

Subpart 1. Notification of initiation of operation. The rule provides that the municipality must notify the Commissioner in writing within 10 days of

the project's initiation of operation. The initiation of operation date is used as the beginning of the one year start-up period. Therefore, it is reasonable to require the municipality to notify the Commissioner of the specific date. Ten days is an adequate period of time to submit this notification.

Subpart 2. One year after initiation of operation. The rule provides for three items to be submitted one year after initiation of operation.

Item A. Federal statutes 33 U.S.C. §§ 1381-1387 require that the municipality certify whether the project meets its performance standards.

Item B. Federal statutes 33 U.S.C. §§ 1381-1387 require that the municipality's engineer prepare a start-up evaluation report for the facility and that a copy of the report be submitted with the performance certification.

Item C. A revised operation and maintenance manual. It is reasonable to require that the operation and maintenance manual submitted prior to completion of construction be revised based upon the experience gained during the one year start-up period so that it will be as accurate as possible and provide the maximum benefit to the facility operator.

Subpart 3. Corrective action report. Federal statutes 33 U.S.C. §§ 1381-1387 require that if the municipality or the Commissioner determines that the facility does not meet the project performance standards, a corrective action report which contains the items specified in A, B and C be submitted.

Part 2550 Request To Withhold Financial Assistance Payments.

The proposed rule provides that failure of a project to conform substantially to approved plans and specifications or failure of a municipality to comply with the project submittal requirements shall constitute grounds for the Commissioner to request that the Authority withhold payments. This is reasonable in that it sometimes is necessary to withhold funds in order for project deficiencies to be corrected. Once an agreement for correcting the

condition is reached between the commissioner and municipality, the commissioner will recommend that payments be released according to the provisions of the agreement.

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. §14.115, subd. 2 (1986) requires the Agency, when proposing rules which may affect small businesses, to consider the methods for reducing the impact on small businesses. Minn. Stat. §14.115, subd. 7(b) (1986) provides the Agency rules that do not affect small businesses directly are exempted from the small business consideration provision. These rules apply only to municipalities that voluntarily elect to participate in the program. Therefore, these rules fall under subd. 7(b) and are exempted from small business considerations. However, the Agency is satisfied that small businesses will not be adversely affected by the provisions of this program.

VI. CONSIDERATION OF ECONOMIC FACTORS

In exercising its powers, the Agency is required by Minn. Stat. §116.07, subd. 6 (1986) to give due consideration to economic factors. The statute provides:

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.

In proposing the rules governing the water pollution control revolving fund, the Agency has given due consideration to any economic impacts of the proposed rules. This is a voluntary program so the rules will not have any affect on municipalities that do not elect to participate.

VII. OTHER FACTORS

Pursuant to Minn. Stat §14.11, subd. 1 (1986), the Agency must provide an estimate of the public monies associated with implementing these rules if it is estimated that the total cost to all local public bodies exceeds \$100,000 in either of the first two years following adoption of the rules. When a program is voluntary it is not necessary to assess the costs to local public bodies that choose to participate. It is assumed that public body will make a cost/benefit assessment at the local level as part of its decision-making process prior to application. The local body is not required by statute or administrative rule to incur costs.

Minn. Stat. §17.83 (1986) requires the Agency to describe any direct and substantial adverse effects on agricultural land. The Agency has determined that these rules will have no such effects.

VIII. CONCLUSION

Based on the foregoing, the proposed Minn. Rules parts 7075.2505 through 7075.2550 are both needed and reasonable.

Dated: 8-12-, 1988



Gerald L. Willet
Commissioner