

STATE OF MINNESOTA  
POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules Governing  
The Administration of the Corrective Action  
Grants Program for Municipal Wastewater  
Treatment Projects, Minnesota Rules  
Parts 7075.1005 to 7075.1090

STATEMENT OF NEED  
AND REASONABLENESS

I. INTRODUCTION

In 1987, the Legislature created a set-aside under the independent state grants program to provide grants to municipalities with wastewater treatment facilities funded under the Clean Water Act or the independent state grants program that are unable to meet performance standards for the purpose of correcting the performance failures.

By statute (Minn. Stat. §§ 446A.06, 446A.10, subd. 1.(a), 116.181, subd. 5 and 116.16 (Supp. 1987)), the program is jointly administered by the Minnesota Pollution Control Agency (Agency) and the Minnesota Public Facilities Authority (Authority). These administrative rules provide for the Agency's responsibilities in administering the program. The Authority is promulgating amendments to administrative rules codified as Minn. Rules ch. 7380 to provide for its responsibilities. The Agency is responsible for reviewing the application and the project documents for conformance with applicable statutes and rules. Upon approval, the Agency certifies the project to the Authority for grant award and subsequent payment.

In drafting the proposed rules, the Agency sought and received input from interested municipalities and the Technical Advisory Committee for wastewater treatment control, established under Minn. Stat. § 115.54 (1986). In addition, the Agency initially administered this program under emergency

rules, published at 12 S.R. 1144-1146 (30 November 1987). The administration of the program under emergency rules provided information for the development of the proposed permanent rules.

This document contains the Agency's affirmative presentation of facts on the need for and reasonableness of 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. § 116.181, subds. 2 and 6 (Supp. 1987), which provide:

Subd. 2. Set Aside. In any fiscal year, up to ten percent of the money available for independent state grants, up to a maximum of \$1,000,000, may be set aside for the award of grants to municipalities for corrective action.

Subd. 6. Rules of the Agency. The Agency shall promulgate permanent rules and may promulgate emergency rules for the administration of the corrective action grant program. The rules must contain at a minimum:

- (1) the method for determining the amount of the corrective action grant;
- (2) application requirements;
- (3) criteria for determining which municipalities will be awarded grants when there are more applicants than money;
- (4) conditions for use of the grant funds;
- (5) identification of eligible costs;
- (6) the amount that must be reimbursed to the authority in the event funds are recovered by the municipality from the responsible person; and
- (7) other matters that the Agency finds necessary for proper administration of the program.

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 Legislature, in enacting Minn. Stat. § 116.181 (Supp. 1987), required the Agency to develop rules to implement and administer the corrective action grants program. The program was conceived and designed to allow corrective action on failed projects to proceed without delay while responsibility for the project failure is determined and legal remedies are pursued. The rules are needed so that corrective action grant procedures are clearly spelled out for the public.

### 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 program for the administration of the corrective action grants program. The rules establish reasonable criteria for establishing eligibility and a reasonable method for distributing grant funds to eligible municipalities.

The proposed rules allow small municipalities that have built wastewater treatment projects with construction grant funds to request additional funds in a crisis situation. The funds can be made available at the time when the project failure occurs. The rules require complete and comprehensive analysis of the cause of the failure and the proposed solution. This may be time consuming but is essential before the Agency is prepared to contribute funds beyond its initial agreement with the municipality. In addition, the rules' emphasis on analysis of the project failure conforms to the recovery of cost provision included in the authorizing statute because the analysis may lead to the identification of the responsible parties.

Municipalities receiving a corrective action grant are required to consider liability for the project's failure to meet performance standards and to pursue recovery of costs associated with the corrective action from responsible persons, if appropriate. Recovery may occur through litigation or negotiated settlement. Written approval from the Commissioner is required for any negotiated settlement. Recovered costs must be returned to the Agency.

B. Reasonableness of Individual Rules

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

Part 7075.1005 Purpose.

This part identifies the general nature of the corrective action grants program and states that Minn. Rules pts. 7075.1005 to 7075.1090 pertain to the Agency's responsibilities for administration of the corrective action grants program. It is reasonable to describe the overall purpose of the rules at the beginning so that the reader understands what program is being addressed by the rules.

Part 7075.1010 Definitions.

The following terms used in the rules have a specific meaning. The terms and the reasonableness of the definitions are explained below.

Subpart 2. "Agency."

Since there are several references to the Minnesota Pollution Control Agency, it is reasonable to shorten this term by including it in definitions.

Subpart 3. "Authority."

Since there are several references to the Public Facilities Authority, it is reasonable to shorten this term by including it in definitions.

Subpart 4. "Commissioner."

It is reasonable to clarify that "commissioner" is the commissioner of the Minnesota Pollution Control Agency and not an official of the Authority or a local government official.

Subpart 5. "Performance standards."

Performance standards are defined as the criteria established for a wastewater treatment facility under the existing federal and state programs. This limits a general phrase to a specific meaning and is reasonable because it allows the applicant for a grant to identify this element of the corrective action grants program.

Part 7075.1020 Eligibility for participation.

Five eligibility requirements are set forth in this part.

Item A provides that the municipality's failed wastewater treatment system must have been built under the state or federal construction grants programs. This is reasonable because Minn. Stat. § 116.181, subd. 1(b) defines "corrective action" as action taken to upgrade or correct failed wastewater treatment facilities funded under the state or federal construction grants program. Item A also provides that municipalities with failed systems funded under the individual on-site wastewater treatment systems grants program or the capital cost component grant program, set-asides of the independent state grants program, do not meet this eligibility requirement. These programs, enacted in 1987, offer a funding mechanism for systems that are primarily privately owned. Both programs are pilot-type programs and will be monitored for results by the Agency and the Legislature. It is reasonable to consider these two programs separately from the independent state grants program in order not to complicate these pilot programs by adding a corrective action grants element.

In addition, Item A provides that the original grant must have been awarded after December 29, 1981. It is reasonable to include a provision that limits the age of the project in order to limit program liability. December 29, 1981, is a reasonable cutoff date because the federal Clean Water Act amendments that establish the project performance standards provisions became effective on that date.

Item B limits eligibility to municipalities with a population of 1,500 or less. The program was conceived as an interim financing tool for municipalities that do not have the financial resources to fund needed corrective action while pursuing litigation against responsible parties to recover costs concurrently. Past experience in the grants program has illustrated that small communities have difficulty raising the additional local funds needed. Larger municipalities have a more diverse financial base. A population limit of 1,500 has been used in the program previously to delineate communities that are exempted from certain program requirements due to their size. For these reasons, it is reasonable to limit eligibility to municipalities with populations of 1,500 or less.

Item C states that the project failure must be specifically identified before the end of the one year certification period. The certification period is the facility's start-up period. After the facility initiates operation, it takes a period of time to identify problems and make the necessary adjustments that will result in the facility performing as required by the state and federal government. The state and federal programs under which the original facility was built require a one year certification period. (See 40 C.F.R. § 35.2218 and Minn. Stat. § 116.16, subp. 5(b).) At the end of that period, if the project meets performance standards, the grant is closed out. It is reasonable to tie eligibility to the identification of the problem prior to the end of the certification period because the certification period was established specifically to identify problems with performance of the completed wastewater treatment facility. In addition, it is desirable to spur prompt action against responsible parties so that municipalities maximize their chances of a prompt recovery from those responsible parties. The Agency

recognizes that a facility may experience failure beyond the one year certification period but because of the limited funding the program needs to limit eligibility.

Item D provides that municipalities with project failure due to the failure of innovative or alternative technology are not eligible. This eligibility limitation applies to projects originally funded under the federal grants program. The corrective action grants program is intended to be a program of last resort funding and also a program that requires the municipality to identify responsible parties in order to pursue recovery of costs. The federal program offers additional funding for projects that experience innovative or alternative technology failure. The federal program offers this additional funding because of the risk involved with these types of technology. The acknowledged risk often means that there is no party responsible for the failure since the municipality and the funding agency have acknowledged the inherent risk. Therefore, it is reasonable to exclude these types of failures from the corrective action grants program.

The independent state grants program gives no special consideration to innovative or alternative technology and offers no safety net funding if the project fails. A state project in this circumstance is eligible for this program.

To be ineligible, the failure of an innovative or alternative project must be due specifically to that technology. In other words, if an innovative or alternative project fails due to improper design or improper construction, and it is determined in the corrective action report that the facility would have performed if designed and constructed properly, then the project is eligible for this program.



Item E limits eligibility for a corrective action grant to one time only. This is reasonable because the Agency has limited funds for these grants, and it is fair to spread these funds to other communities once a municipality has already received a corrective action grant.

Part 7075.1030 Eligible and ineligible costs.

Subpart 1. Construction and land costs.

Subpart 1 provides that construction and land costs retain the same eligibility that they had under the applicable grant program at the time of the original award. It is reasonable to maintain the same cost eligibility categories since the corrective action is essentially a continuation of the original project. The rule is reasonable because it is consistent with Minn. Stat. § 116.181, subd. 3 (Supp. 1987), which provides: "construction costs that were not eligible under the original grant are not eligible under a corrective action grant."

Subpart 2. Construction and land costs incurred prior to award.

Subpart 2 provides that construction and land costs incurred before the Commissioner's approval of the corrective action report are not eligible. Costs incurred in the period between approval and grant award are eligible if the Commissioner authorizes proceeding with construction. This provision is reasonable because it allows the Agency to maintain control of program costs and project results by requiring approval of a complete and comprehensive report. At the same time, it allows the municipality to proceed with the corrective action without being required to wait for the grant award documents to be processed.

Subpart 3. Administrative, engineering and legal costs.

Subpart 3 limits eligibility of administrative, engineering and legal costs (collectively) to 25% of the eligible construction and land costs approved in the corrective action report and eligible under Subpart 1. This is reasonable because limited program funds makes it necessary to contain costs, especially in the volatile area of legal costs, which will vary widely. The 25% figure was chosen because the Agency's experience in the construction grants program has shown that engineering costs are generally 10%-20% and administrative costs are generally under 5% of the construction costs. Limiting the collective costs to a maximum of 25% allows the municipality to have most, if not all, of the costs incurred deemed eligible for reimbursement under the grant. The limitation is a strong incentive for the municipality to monitor the reasonableness of the costs.

Part 7075.1040 Requirements prior to application.

Part 7075.1040 requires that the three documents listed in items A through C of the rule be submitted before a municipality may submit a grant application. These documents demonstrate that the municipality is ready to proceed with the corrective action in an effective and timely manner.

Item A requires a corrective action report which includes: 1) an analysis of the causes of the facility's failure to meet performance standards; 2) a selected alternative for corrective action, including a preliminary design and cost estimates for all feasible alternatives; and 3) a schedule for undertaking the selected alternative. Requiring submission of this document is reasonable because a corrective action report is required and must be submitted under the conditions of the original grant when performance failure is experienced, regardless of participation in this program.

Item B requires submission of plans and specifications to implement the corrective action. This is reasonable because plans and specifications must be in final approved form before the corrective action can be undertaken. Some corrective actions do not require additional plans and specifications, but rather just the correct implementation of the original plans and specifications.

Item C requires the municipality to provide an assurance, including documentation, that it is pursuing available remedies to resolve the performance failure. Subitems 1 - 4 require the municipality to, at a minimum, pursue remedies available under warranties, performance bonds, and liability insurance and to pursue enforcement action against industrial dischargers. This requirement is reasonable because corrective action grants are intended to be a last resort; the Agency does not want to become involved until all available remedies have been pursued. If the available remedies work, it is to everyone's advantage to utilize them.

Part 7075.1050 Application.

This part requires the municipality to apply for a grant on a form provided by the authority. The application must include a plan for the recovery of the costs of the corrective action from responsible parties. Under Minn. Stat. § 116.16, subd. 9 (Supp. 1987), application is made to the authority. It is reasonable to require a recovery of costs plan because the municipality's pursuit of recovery of costs from responsible parties is a requirement of Minn. Stat. § 116.181, subp. 4 (Supp. 1987).

Part 7075.1060 Certification of Application for Award.

Subpart 1. Priority.

Subpart 1 provides that applications will be certified for award in the order that completed applications are received. This will continue until the funds are exhausted, at which time a municipality could wait to apply when the following year's appropriation becomes available. A first come, first served approach is reasonable for a small, specialized program such as the corrective action grants program because the pool of applicants is limited and known. The existing state and federal programs combined have funded approximately 30-40 projects annually in recent years. Since 1981, only 5 projects have failed to meet performance standards to the extent that they need this program. What that means is that where performance failure occurs, existing contract remedies most often resolve the failure. The major failures, the type that often result in litigation, are a very small proportion of the program.

Subpart 2. Amount of award.

This subpart provides that except as provided in Minn. Rules part 7075.1090, subp. 3 (relating to recovery from responsible persons before corrective action is taken) the amount of the grant will be 80 percent of the total corrective action costs, eligible and ineligible, or the amount of the eligible costs, whichever is less. The purpose of this provision is to ensure a minimum of 20% local participation. This is reasonable because local financial participation should ensure a local incentive to fully pursue the recovery of costs.

Subpart 3. Amendments to award.

Subpart 3 allows a grant award to be amended, but any grant amendments must be based on the actual costs of the completed procurement action and are dependent on the availability of funds. This is reasonable because the construction grants program's standard operating procedure is to amend grants to reflect completed procurement actions. This will continue under this set aside program based on the availability of funds.

Subpart 4. Certification to Authority.

Subpart 4 provides that upon review and approval of the documents required under parts 7075.1040 and 7075.1050, the Commissioner shall certify to the Authority that the project meets statutory requirements and the requirements of Minn. Rules Ch. 7075 and is eligible for an award. This is reasonable because it is the Authority, and not the Agency, who actually awards the grant assistance. By certifying the municipality's compliance, the Authority can proceed with the award without the need to duplicate the Agency's review.

Subpart 5. Report to Agency Board

This subpart provides that the Commissioner must report all certifications for award to the Agency Board. This is reasonable because the reporting mechanism offers an opportunity for the Board to evaluate the effectiveness of the program. It also offers a public forum for interested parties to monitor the program and to offer public comment.

Part 7075.1070 Change orders.

The proposed rules require that change orders that alter the type or reliability of the treatment process be approved by the Commissioner prior to implementing the change. Requiring review of such change orders is reasonable because such changes may affect the ability of the facility to meet its permit

limits over the 20 year design life of the facility. In order to permit the Commissioner to evaluate the impact of the change order, the rules require the municipality to submit whatever information to the Commissioner requests to determine the impact of the proposed change on the environment. This requirement is reasonable because it is the Commissioner's responsibility to only approve changes that would not result in damage to the environment. The rules provide that the review of the change order will be in the same manner as the plans and specifications were originally reviewed. This requirement is reasonable because a change order is a change to the plans and specifications and, therefore, application of the same technical criteria is appropriate.

The rule provides that a substantial change in the type or reliability of treatment process implemented without prior approval from the Commissioner constitutes grounds for the Commissioner to request that the authority terminate the grant. This is reasonable because a substantial change has the potential of negatively affecting the environment. The consequences for the grantee, possible termination of the grant, should be significant enough to reflect the potential seriousness of the infraction.

The rule states that change orders that do not alter the type or reliability of the treatment process do not need prior approval of the Commissioner. However, the rule requires submission of the change order to the Commissioner as soon as possible. Requiring the submission of these types of change orders is reasonable because it keeps the Agency informed of the nature of the project changes and it permits the Agency to review whether the changes that were made do not in fact alter the type or reliability of the treatment process.

Part 7075.1080 Payments.

Subpart 1. Request for payments.

This rule requires the municipality to make periodic payment requests for eligible costs as costs are incurred on a form provided by the Authority. This is reasonable because Minn. Stat. § 116.16 subd. 4 (Supp. 1987) requires disbursements to be made by the Authority. The payment request alerts the Agency that the grantee is awaiting payment. The rule also provides that the Commissioner will then certify to the Authority whether the municipality has met payment conditions set forth in subpart 2 of the rule. This is reasonable because payment should only be made if the project is proceeding according to the conditions under which the grant was offered and accepted.

Subpart 2. Payment conditions.

Under subpart 2, the Commissioner will request that the payments be withheld if the corrective action project is not proceeding in accordance with three major documents: the approved corrective action report, the approved plans and specifications, and the approved project schedule. It is reasonable to impose such conditions on payments in order to provide an incentive to the grantee to adhere to the grant agreement and to ensure that the corrective action will bring the wastewater treatment plant into compliance with performance standards.

Subpart 3. Retainage.

This rule provides that the final 10% of the grant will be withheld until the municipality has successfully completed the project in accordance with the approved corrective action report, has certified that the project meets performance standards, and has met the recovery of costs requirement.

Retainage is a standard contract method for assuring compliance with agreement conditions and is a reasonable provision for this program because it will provide an incentive to the grantee to meet all the program requirements.

Subpart 4. Release of withheld payments.

This provision allows the municipality to negotiate with the Agency to release withheld funds. It also provides that failure of the municipality to reach an agreement with the Commissioner within 30 days of receipt of written notification that payments are being withheld constitutes grounds for the Commissioner to request the Authority to commence action for termination of the grant and repayment of funds. This rule is reasonable because it allows the municipality adequate time to respond to the Commissioner's notice and commence negotiations. It is reasonable to require response and negotiation on project issues so that an amicable resolution to the problem can be reached.

Part 7075.1090 Recovery of Costs.

Subpart 1. Generally.

This rule requires the municipality to pursue recovery of costs from any person who is responsible for the failure of the facility to perform. This is reasonable because it is consistent with Minn. Stat. § 116.181, subd. 4 (1986).

Subpart 2. Recovery after corrective action taken.

This rule provides that in the event that the municipality recovers an amount of money from responsible persons after the corrective action and state corrective action grant fund spent, the municipality must repay to the State a portion of the money recovered. The portion of the recovery to be paid to the State shall be proportional to the State's monetary participation in the



corrective action project. The amount of repayment is not to exceed the amount of the corrective action grant. This rule is reasonable because it is consistent with Minn. Stat. § 116.181, subd. 4 (Supp. 1987) requiring repayment in the event funds are recovered from responsible persons.

The operation of the rule is shown by the following example:

A municipality's corrective action has a total cost, including all associated legal, engineering and administrative costs, of \$400,000. Due to limits on the eligibility of the associated costs and the inclusion of some ineligible construction items, the eligible costs are \$300,000. The grant formula in Part 7075.1060, subp. 2 allows for 80% of \$400,000 (\$320,000) or \$300,000, whichever is less. The municipality receives a \$300,000 grant which equals 75% of the total cost. The municipality recovers \$200,000 from the responsible persons through a court settlement. The state has a claim on 75% of the recovered funds equaling \$150,000. The municipality retains \$50,000 to apply toward its local costs.

Subpart 3. Recovery before corrective action taken.

This rule provides that in the event that the municipality recovers an amount of money from the responsible persons before the corrective action is taken, the amount of the grant to be awarded shall be determined by allowing the municipality to keep the entire payment from responsible persons. This is reasonable because the State has not paid out any funds at this point, so the municipality has first claim on the recovered funds. The corrective action grant funds can then be used to supplement the amount recovered. This is

reasonable because use of the corrective action grant to supplement the recovered funds enhances the probability of a resolution to the project failure. The rule is sufficiently protective of the State's interest in the event of a negotiated settlement.

The operation of the rule is shown by the following example:

A municipality's corrective action has a total cost, including all associated legal, engineering and administrative costs, of \$400,000. It receives an 80% grant of \$320,000. Before any costs are incurred, the municipality with the Commissioner's approval reaches an agreement with the consulting engineering firm that the firm will pay \$200,000 of the cost of the corrective action. The municipality cannot finance the remaining \$200,000 without the Agency's financial assistance. At the same time the Agency and the city, after consulting with their legal counsel, have determined that proceeding to litigation would most probably not produce a more equitable settlement. The Agency agrees to pay the remaining construction costs (\$100,000) and the city agrees to pay the legal, engineering and administrative costs of \$100,000.

The above situation only represents an example of how the rule could work but illustrates the reasonableness of allowing the flexibility that this rule provides.

Subpart 4. Approval of negotiated settlement.

This rule provides that for a negotiated settlement, the municipality must secure the Commissioner's written approval before entering into the settlement. This is reasonable because, since the Agency is involved in the financing of the corrective action, the Agency has an interest in the resolution of the dispute between the municipality and the responsible

persons. This part also provides that execution of a negotiated settlement without the Commissioner's approval constitutes grounds for the Commissioner to recommend denial of a corrective action grant or to request the authority to commence action to terminate the grant and seek repayment of the funds. This provision is reasonable because it provides an incentive for the municipality to comply with the approval requirement and provides a remedy to the Commissioner if the rule is violated.

Subpart 5. Failure to seek recovery.

This subpart provides the remedies available to the state if the grantee fails to seek recovery from responsible persons. The rule provides that failure of the municipality to pursue recovery of costs constitutes grounds for the Commissioner to request that the authority withhold payments to the municipality. This is reasonable because Minn. Stat. § 116.181 requires a recipient of a corrective action grant to pursue recovery of costs from responsible persons, and it is a standard remedy to withhold payments for the purpose of enforcement.

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 that 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 corrective action grants program, 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. The program provides financial assistance to municipalities specifically to relieve the burden imposed by the need for an unexpected corrective action on their wastewater treatment facility. The Agency in considering the economic factors concludes that the program has a positive economic impact on participating municipalities.

## 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 the 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 Minnesota Rules pts. 7075.1005 to 7075.1090 are both needed and reasonable.

Date: October 14, 1985

*for* *Gerald L. Willet*  
Gerald L. Willet  
Commissioner