

STATE OF MINNESOTA
DEPARTMENT OF AGRICULTURE

STATEMENT OF NEED AND REASONABLENESS

In the Matter of the Proposed Adoption of Rules Relating to
Agricultural Chemical Response Compensation Board

BACKGROUND

Chapter 326, Article 8, 1989 Laws of Minnesota created Minnesota Statutes Chapter 18E, cited as the Minnesota Agricultural Chemical Response and Reimbursement Law. The purpose of the law was to create and provide a means for compensation of costs incurred in taking corrective actions for agricultural chemical incidents. MS Chapter 18 E created the Agricultural Chemical Response Compensation Board to administer the Agricultural Chemical Response and Reimbursement Account (ACRRA) which will be the source of funds to pay the corrective action costs. The ACRRA is to be funded from surcharges assessed against pesticide and fertilizer manufacturers, distributors, licensed applicators and licensed dealers.

The law specifically limits the manner in which ACRRA funds may be used:

1. To pay for the Commissioner of Agriculture's responses to incidents under Chapters 18B, 18C, and 18D that are not eligible for payment under section 115B.21, subd. 2;
2. To pay for emergency responses that are otherwise unable to be funded; and,
3. To reimburse and pay corrective action costs under section 18E.04.

The primary ACRRA expenditure will be for reimbursement of eligible persons for corrective action costs. The basis upon which persons are eligible for reimbursement or payment, and the amount of reimbursement or payment, are specified in the law. Accordingly, a substantial amount of the more substantive provisions regarding administration of the ACRRA program are specified in the statute. However, the statute does mandate that rules be adopted regarding the ACRRA Board practices and procedures, the application form and procedures for determining eligibility for and the amount of reimbursement, and procedures for investigation of claims.

RULES

1512.0100 DEFINITIONS.

The definitions found in this part reference the applicable statutory definitions. The department and board have copies of Chapters 18B, 18C and 18D in booklet form for convenient distribution to interested parties. The two definitions found specifically in the rules are for "Corrective Action Design" and "Eligible Costs", and are defined for clarification of the corrective action process, as well as to delineate reimburseable or payable costs.

1512.0200 BOARD MEETINGS.

Subp. 1. **Regular Meetings.** This subpart establishes a framework for holding regular meetings of the board that will allow appropriate flexibility due to the somewhat unpredictable nature of the board's workload. It will be difficult to predict the number of applications for reimbursement or payment that will be received in any given time period and the rate of applications will likely be erratic. Therefore, setting a minimum number of yearly meetings and allowing cancellation of meetings due to insufficient business are practical and reasonable provisions.

Subp. 2. **Special Meetings.** The unpredictable and erratic workload described above also necessitates what is in any case a customary ability of boards to call special meetings, if such meetings are necessary to discharge the boards obligations.

1512.0300 BOARD CHAIR and VICE-CHAIR.

A board of this nature requires the designation of a chair and vice-chair. Provision must be made for the powers of the chair to be passed and assumed by the vice-chair in the event of the chair's absence so the board's business can be conducted. Since the three board members appointed by the Governor represent the various revenue sources and impacted clientele of the board's activities, it is reasonable and proper that they serve as board chair and vice-chair. Terms are for one year, and persons may be reelected for subsequent service as chair and vice-chair.

1512.0400 CONDUCT OF MEETINGS.

This section establishes the procedures which ensure that meetings are conducted in an orderly manner and that the business is dealt with in an orderly manner and that the proceedings are properly documented. Additionally, these necessary and reasonable procedures ensure a fair and impartial method of hearing requests from eligible persons.

1512.0500 CONFLICT OF INTEREST.

The composition of the board as set by statute increases the likelihood that a conflict of interest may arise. This section recognizes that possibility and ensures that the conflict will not taint a board decision and will not hamper the board during the course of a meeting. Board members and the public will know what is to be done when there is a conflict.

1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS.

Subp. 1. **General.** This subpart simply repeats the statutory provisions for reimbursement or payment.

Subp. 2. **Conditions.** This subpart reiterates the statutory standard for corrective actions for incidents. In order to avoid creating an opportunity for double recovery, this subpart also specifies that eligible persons who can receive reimbursement or payment from a source other than the board need to pursue and report such coverage to the board. This essentially will prohibit persons from "double-dipping" for corrective action costs. [Note: the Petrofund Board attempted to enforce such a provision through policy, and was subsequently unsuccessful when sued by an involved party. That board is intending, as a result of that lawsuit, to include direct language prohibiting such double recovery in their rules in the near future.] In order for the board to be assured that monies disbursed from the ACRRA to eligible persons are for reasonable and necessary actions, the board will require that such actions be included and be approved in a corrective action design submitted to the commissioner of agriculture.

Subp. 3. **Multiple Eligible Persons.** The law states that any eligible person who has incurred corrective action costs, and meets the statutory conditions for reimbursement or payment, is eligible to apply for reimbursement or payment. No specific provision is made in the law for handling situations in which there may be more than one eligible person for an incident. This subpart clarifies that in those circumstances each eligible person must apply separately, even though there is only one incident involved. This is necessary and reasonable for the board to be able to consider the different roles of and specific costs incurred by different eligible persons.

1512.0700 ELIGIBLE COSTS.

This section outlines the types and necessary documentation for costs incurred which are reimbursable or payable for corrective actions to agricultural chemical incidents under this chapter.

Subp.1. Reimbursable or Payable Corrective Actions. This subpart establishes five general categories (A-E) of eligible costs which coincide with the various phases typically involved in an incident response. Within each general category, some specific illustrative costs are listed. It is not feasible at this time to establish an exhaustive list of specific eligible costs. Instead, the general categories and illustrations establish the types of costs which will be eligible for reimbursement or payment. The categories and costs listed were developed in consultation and cooperation with the Minnesota Department of Agriculture, Incident Response Unit, and are based on the department's past experience as well as the experience, rules and regulations of the Minnesota Pollution Control Agency and the Minnesota Petroleum Tank Release Compensation Board in regard to environmental releases and clean-ups of petroleum products. The framework established in this subpart allows the board some flexibility while being specific enough to give potential applicants a clear idea of the types of costs which are reimbursable or payable.

In order for the board to be assured that clean-ups were performed in a reasonable manner, clean-up process oversight will be provided by the commissioner of agriculture, except in cases where emergency clean-ups were performed. In those instances the commissioner need only determine after the fact that the actions were reasonable and necessary, and the costs would be fully eligible.

Subp. 2. Documentation of Costs. The enacting legislation intended that the ACRRA would defray costs for persons who take responsible and appropriate actions in the event of an incident. The intent was not, however, to enable eligible persons, or their contractors, to profit from the ACRRA program. For that reason it is the responsibility of the person requesting reimbursement or payment to establish the reasonableness of the costs rather than the board having the responsibility to prove that a cost is unreasonable. If the burden were placed on the board, substantial additional board staffing and expenditure of funds would be necessary to ensure that the monies for corrective actions are not being inappropriately spent. Requiring the applicant to prove their case, and not the board, is a more financially prudent and judicious use of available funds, and carries out the purpose and intent of the legislation.

1512.0800 INELIGIBLE COSTS.

The purpose of this section is to allow reimbursements or payments only for actions that minimize, eliminate, or clean-up an incident. The board is directed by statute to reimburse, or pay, reasonable and necessary costs incurred by the eligible person in

taking corrective action. The purpose is also to rule out the use of ACRRA monies to accomplish tasks or pay for services not directly associated with the actual incident clean-up, for example, the costs of capital improvements at the incident site. The statute, and the rules, do not allow reimbursement or payment of costs that are not taken pursuant to a corrective action. As explained above, it is not feasible to enumerate each and every eligible cost. However, further clarification of eligible costs is accomplished in this section by identifying certain ineligible costs. The illustrations used in this section, and the previous section, will adequately put an applicant for reimbursement or payment on notice as to those items which the board considers clearly ineligible, or which should at least be considered potentially ineligible.

The board feels is reasonable and necessary to make an advance determination that it is not reasonable to reimburse or pay for work that is out of compliance with safety codes.

It is also clear the intent of MS Chapter 18E is to cover only incidents under MS Chapter 18B, 18C, and 18D. According to 18E, monies from the ACRRA may be used for commissioner of agriculture's responses to incidents under chapters 18B, 18C and 18D that are not covered under section 115B.20. Additionally, chapter 18E.04, subd.2 (4) states that reimbursement cannot occur unless the incident was reported as required in chapters 18B, 18C, and 18D. Therefore, it is reasonable to assume that the statutory intent of the ACRRA is to cover only incidents under 18B, 18C and 18D.

1512.0900 APPLICATION PROCESS

Subp. 1. Request for Reimbursement. This subpart describes in detail the information necessary for the applicant requesting reimbursement to provide to the board. The application form will give the board the basic information needed to evaluate the request, while still recognizing that additional work, eligible costs, and later applications may be necessary. The application shall specify the eligible person(s), the incident site, a summary of corrective actions taken, the commissioner of agriculture's approval of those actions, and an itemization of expenses, and other needed information.

Subp. 2. Request for Payment. This subpart describes in detail the information necessary for the applicant requesting payment to provide to the board. The application form, and the information requested, closely resembles the form and information required in subpart 1., as detailed above. Additionally, and pursuant to provisions contained in Chapter 18E, the application form also requires the applicant to submit certain financial information documenting the eligible person's financial condition,

and evidence the eligible person has spent the statutory required \$1000.00 minimum amount on corrective action costs. Submission of tax returns and financial statements are generally accepted as a reasonable and necessary means for documentation of an individual's, or a company's, financial condition, particularly when a statute explicitly requires such a showing.

Both subpart 1. and 2. above require a complete application, whether for reimbursement or payment, be submitted in order for consideration by the board. This is reasonable and necessary in order for the board to have all necessary information available on which to base a decision, and to delay such decision until needed information is provided by the applicant. To do or allow otherwise would make for a disorderly, haphazard decision-making process.

Subp. 3. Time of Application. An orderly, manageable time process must be utilized in order for the board to conduct its business in a prompt manner. Eligible persons need for prompt consideration of requests for reimbursement or payment by the ACRRA Board is addressed. Additionally, reference is made to the need to prioritize requests based on reasonable criteria in regard to health, environmental, and workload.

Subp. 4. Subsequent Application. Eligible persons may request additional reimbursement or payment by making a subsequent application, if they meet certain criteria detailed in this part. This will lessen the burden of financing what may sometimes be an expensive clean-up. This part requires that evidence be offered to show that any payments have been applied to actual costs of corrective action work performed. This part also delineates that subsequent applications can be made only for previously reported incidents at the site. It also sets out a time period, depending on amount of additional costs incurred, when an eligible person can make a subsequent application. The board believes this reasonable due to the need to adequately limit the administrative workload on its available staff resources.

Subp. 6. Signatures. and, Subp. 7. Certification. The purpose of these two subparts are to ensure that an authorized person signs applications for reimbursement and payment, and takes responsibility for the information contained therein. Since incident response and clean-up actions may involve many contractors and subcontractors, as well as a variety of other persons employed by the eligible person, it is important to designate an authorized person for purposes of application. The certification language calls for a high degree of accountability on the part of the eligible person for the information submitted. Additionally, the certification gives the board assurances that any previous monies disbursed will actually be used for payment of costs incurred but unpaid.

Subp. 8. Report of the Commissioner of Agriculture. The eligible person is required in Chapters 18D and 18E to respond to requests or orders of the commissioner to minimize, eliminate or clean-up and incident. The board is dependent on the commissioner of agriculture to provide reports and other assurances that corrective actions taken have been reasonable, necessary, and approved by the commissioner. Additionally, since the board has statutory authority to give partial reimbursement under certain circumstances, the board is also reliant on the commissioner of agriculture for reports regarding the eligible persons compliance with applicable agricultural chemical regulations. This subpart sets the procedure for the submission of such information to the board, either orally or in writing.

1512.1000 REVIEW AND DETERMINATION.

Subp. 1. Review. and, **Subp. 2. Staff Recommendation.** The board will not convene each time an application is submitted, but will rather, except in extraordinary circumstances, meet at regularly scheduled times and review pending applications. Therefore it is reasonable and necessary to make sure than any applications submitted to the board be complete, in order to foster proper decision-making. Accordingly, it should be clear that the board's staff has the authority to make preliminary determinations regarding the completeness of each application and to request additional information if necessary prior to the board meeting, again to ensure that the applications to be reviewed by the board are as complete as possible at the time of the meeting. This subpart enables staff to assemble all information and documentation relevant to an application in order to provide board members with a complete application. Without this provision, the board members would continually face situations where information relevant to a claim is missing, making timely and proper reviews difficult or impossible.

Subp. 3. Board Determination. The entire application process is intended to obtain all information pertaining to an agricultural chemical incident, and corrective actions subsequently taken in regard to that incident, in order to allow for a board determination of reimbursement or payment amount. Chapter 18E allows reimbursement or payment only for corrective action costs eligible, actually incurred and reasonable and necessary. The application should, if complete, document that costs were actually incurred. This subpart requires that the board's determination be based upon the written record since the application process determines and documents corrective actions proposed, approved, taken and actual costs of those actions. It also determines whether the costs were eligible. Because most of this information is technical in nature, it is not expected that applicants will have to often make oral

presentations, or submit additional information to the board; however, provision for doing so is included. Additionally, since the law allows the board to make determinations of partial reimbursement, eligible persons must have a mechanism for providing additional factual information for purposes of explanation or rebuttal. Nevertheless, the board, in order to provide a timely and manageable process, must have an ability to limit to a reasonable measure the time and opportunity for such input. The board would like to encourage as much as possible that submissions be in writing because most of the matters to be dealt with are technical in nature. Written submissions provide a means for the board and its staff to give a fair review prior to a meeting. Oral presentations may result in delays since the presentation may require board and staff to consider the information offered prior to making a determination. The board does feel it is important to make sure that no applicant is foreclosed from fully presenting their case to the board. While oral presentation is likely not the best or most efficient method for the applicant, it will be allowed. Finally, the board will notify all applicants of board determinations in a prompt and timely manner.

Subp. 4. **Appeal.** This right to appeal a board's determination on a request for reimbursement or payment is contained in Chapter 18E and is included here verbatim.

1512.1110 ENFORCEMENT.

The board, and the state, need to be able to recover monies if false statements or misrepresentations were made in an effort to obtain reimbursement or payment. Including this language in the rules may have a beneficial deterrence effect on potential abusers.

SMALL BUSINESS CONSIDERATION

MS Chapter 14.115 requires that the impact of the rules upon small businesses be considered in regard to any rulemaking procedure. In the present instance the rules have two functions: to determine how the board structurally is organized and operates; and to determine how the application process would affect small businesses. In regard to how the board is organized and operates, these rules would have no impact. The board considered the provisions of subpart 2 in regard to those small businesses and determined that because the nature of the rules was to assure that there was adequate documentation to show that small businesses incurred the costs in the manner the statute required, and met the statutory requirements for reimbursement or payment, there could be no distinction between small businesses and other businesses as to the level of proof required. To impose some lesser standard for

a small business in the present instance would defeat the purpose of the law of assuring that the funds are expended for the appropriate and correct reason.

In regard to subp. 2 (a): The establishment of less stringent compliance and reporting requirements for small businesses would not be applicable in this particular situation since the only reporting or compliance requirements pertain to filing an application. This is not a compliance or reporting requirement in the usual sense. All other compliance or reporting requirement would go to general state statutes regarding agricultural chemicals and incidents, and are not relevant here.

In regard to subp. 2 (b): Establishment of less stringent schedules or deadlines for compliance or reporting requirements is inapplicable. Since this is an application for reimbursement or payment, a small business might, if anything, want to speed up the process as much as possible to recover or obtain monies. The rules do provide for time period waivers.

In regard to subp. 2 (c): Consolidation or simplification of compliance or reporting requirements for small businesses again is inapplicable. In fact, it would be inappropriate to allow small businesses to produce less documentation for reimbursement or payment than large businesses. The purpose of the board in the administration of ACRRA is to assure that the funds are expended for the appropriate reasons and that there is an adequate showing that this has occurred. There can and should be no lower standard for small businesses.

In regard to subp. 2 (d): As to the establishment of performance standards to replace design or operational standards, there are no such standards in the rule, and this provision is inapplicable.

In regard to subp. 2 (e): Exemption of small businesses would not be appropriate because the entire procedure for reimbursement or payment is set up to make sure that expenses are incurred for an appropriate purpose, and are properly reimbursable or paid. The level of documentation is the same for all. It is difficult to see why small businesses could be exempted from these provisions since these provisions ensure that statutory requirements are being met, and that funds are being appropriately used.

This law, Chapter 18E, was created, at least partially, to benefit small agricultural chemical businesses which, in the absence of the "insurance" that ACRRA will provide, would likely go broke attempting to finance an agricultural chemical incident clean-up. It is presumed that many, if not most, of the applicants will be small businesses. When the rules were drafted one of the con-

siderations was not creating so many requirements and documentation demands as to overload an individual or small business, while still ensuring adequate documentation to allow for proper board determinations.