

STATE OF MINNESOTA  
MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules  
Governing Administrative Procedures  
Under the Environmental Response and  
Liability Act, Minnesota Rules,  
Parts 7047.0001 through 7047.0007

STATEMENT OF NEED  
AND REASONABLENESS

I. INTRODUCTION

These rules, as proposed, contain procedures to be followed by the Minnesota Pollution Control Agency (Agency) and its Board in implementing certain provisions of the Minnesota Environmental Response and Liability Act (MERLA), Minnesota Statutes, chapter 115B. These procedures begin with the Commissioner's Notice Letter (notice letter), notifying the recipient that Agency staff intend to recommend that the Board issue a Request for Response Action (RFRA) to the recipient concerning the response actions necessary to address a release or threatened release of hazardous substances, or pollutants or contaminants. The notice letter also provides for a 30 day period within which the recipient may submit additional information for consideration by the Board in determining whether to issue the RFRA.

In addition, the notice letter requests that the recipient indicate his intentions concerning negotiation of a consent order. Depending upon the recipient's response to the notice letter, the RFRA may include a time frame during which Agency staff will attempt to negotiate a consent order. The final procedure is a Determination On Actions Requested (DOAR) which is issued by the Board if it determines that a responsible person will not take response actions in the manner and within the time requested in a RFRA. The proposed rules will make enforceable the administrative procedures currently used by the Agency.

The Agency believes that the proposed rules are necessary to ensure equitable and systematic adherence to statutory requirements, to protect the rights and interests of the affected parties, and to more clearly identify

notice letter recipient, responsible person, Commissioner, and Board responsibilities with regard to the Superfund administrative process. The Agency published a Notice of Intent to Solicit Outside Information regarding the proposed rules in the February 5, 1990, State Register. No data, views, statements, or comments, either oral or written, were received.

## II. AGENCY STATUTORY AUTHORITY

The Agency is provided authority to adopt the proposed rules under Minnesota Statutes, section 116.07, subdivision 3 (1990):

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.

The Agency is also provided authority to adopt the rules under Minnesota Statutes, section 14.06. Minnesota Statutes, chapter 14 (1990) requires the Agency to make an affirmative presentation of facts establishing the need for, and the reasonableness of, the rules as proposed. To the extent that need and reasonableness are separate, "need" is interpreted to mean that a problem exists which requires administrative attention. "Reasonableness" concerns the extent to which the solutions proposed by the Agency are appropriate and do not place undue burden on the regulated communities.

## III. NEED FOR THE PROPOSED RULES

Rules governing the Agency's administrative procedures under MERLA are needed in order to establish uniform and enforceable schedules and requirements for the decisions and actions of the Commissioner and the Board in implementing certain authorities under MERLA. The adoption of these rules will enable the

Board to deliberate in an orderly manner concerning issuance of RFRA's by assuring that data or information relevant to the deliberations are provided in advance of the date when the Board must decide the matter.

For example, specifying a time frame in the notice letter for submission of additional information enhances the Board's ability to determine in a timely manner whether to issue a RFRA, and to determine whether there will be a time frame for consent order negotiations after issuance of a RFRA. By setting procedural deadlines, the rule provides opportunity for the Agency staff and the Board to examine additional information before the date of the meeting at which the Board is scheduled to consider issuance of a RFRA. Currently, confusion sometimes occurs when new technical or other information is presented to the Board on or near the date of the Board meeting. In such cases, particularly when Agency staff have not had opportunity to examine the information sufficiently to address questions posed by the Board, the Board may find it necessary to delay its determination on issuance of the RFRA until a later meeting. This results in unnecessary delays in scheduling and implementing response actions necessary to protect public health and the environment.

Minnesota Statutes, section 115B.17, subdivision 1 authorizes the Agency "to take any removal or remedial action relating to the [release of a] hazardous substance, or pollutant or contaminant, which the agency deems necessary to protect the public health or welfare or the environment." Before taking such actions under this subdivision, the Agency must take the following steps:

- 1) request any known responsible person to take response actions (a "RFRA" under the proposed rules),
- 2) notify the owner of the property on which the release is located (if not a responsible person) that step 1 has been taken, and request the owner's cooperation, and
- 3) determine that the response actions requested by

the Agency of the responsible persons will not be taken in the manner and within the time requested (a "DOAR" under the proposed rules). (Minnesota Statutes, section 115B.17, subdivision 1(a)(1-3).) Minnesota Statutes, section 115B.18, subdivision 3 also requires the issuance of a RFRA before certain enforcement actions may be brought under 115B.18. These actions are taken by the Agency Board, except when the Commissioner determines that emergency actions are required.

The proposed rules are necessary to establish enforceable procedures by which the Agency will take the steps required in Minnesota Statutes, section 115B.17, subdivision 1(a)(1-3) and 115B.18, subdivision 3. In summary, adoption of the proposed rules would accomplish the following:

1. ensure systematic and equitable adherence to statutory requirements;
2. protect the rights and interests of the affected parties;
3. identify notice letter recipient, responsible person, Commissioner, and Board responsibilities in implementing Minnesota Statutes, sections 115B.17, subdivision 1(a) and 115B.18, subdivision 3;
4. provide and maintain a consistent time frame for implementing Minnesota Statutes, sections 115B.17, subdivision 1(a) and 115B.18, subdivision 3.

#### IV. REASONABLENESS OF THE PROPOSED RULES

##### A. Introduction.

The Agency is also required by Minnesota Statutes, chapter 14 to establish the reasonableness of the proposed rules. This involves explanation of why the requirements and standards imposed by the proposed rules are appropriate and do not place undue burden on the regulated communities.

The proposed rules are intended to strike an appropriate balance among the following Agency program goals: 1) to promote understanding of, and promote

adequate opportunities for meaningful participation in, the Superfund process by notice letter recipients and responsible persons, 2) expeditious and clearly articulated schedules for implementation of the process, and 3) to preserve the Agency's authorities to implement response actions in a timely manner. The rules as proposed provide reasonable opportunity for the notice letter recipient, Agency staff, the Commissioner, and the Board to submit and to evaluate data and information relevant to issuance of a RFRA. They provide notice to the public of the process used under MERLA for issuance of notice letters, RFRAs, and DOARs, and for negotiation of consent orders when RFRAs are issues.

B. Reasonableness of Individual Rules.

The following discussion addresses the specific provisions of the proposed rules and explains why they are reasonable.

Part 7047.0001 SCOPE.

Part 7047.0001 is reasonable because it describes the scope of the proposed rules.

Part 7047.0002 DEFINITIONS.

Part 7047.0002 is reasonable because it provides definitions for terms which might not be clearly understood on the basis of context alone.

Part 7047.0003 COMMISSIONER'S NOTICE LETTER.

Part 7047.0003 describes the general contents and purpose of the Commissioner's Notice Letter, which notifies a person of the Agency staff's intent to recommend that the Board issue a RFRA to the person.

Subparts 1, 2, and 3 require the Commissioner to notify a person that the Agency staff intends to recommend to the Board that it issue a RFRA to the person. The notice must be given at least 45 days in advance of the date upon

which the Board is to consider issuance of a RFRA to the person. If the Board requests that a responsible person take response actions to address a release or a threatened release of a hazardous substance or pollutant or contaminant, the responsible person must determine how to commit its resources (e.g., finances, personnel, etc.) to performing the response actions. Early notification of a person by the Commissioner is beneficial to both the person and the Agency, and is therefore reasonable. The Commissioner's Notice Letter provides time for the recipient to respond to the Agency with any additional information that is relevant to issuance of a RFRA, and to consider its course of action concerning the requested response actions. Early notification also encourages a notice letter recipient to consider a negotiated settlement, if the Board issues a RFRA. Negotiation can provide a responsible person greater participation in planning response actions than it might have under a RFRA.

When issuing a RFRA, the Agency must determine that the person to whom the RFRA is issued is a responsible person with respect to a release or a threatened release. Subpart 3.F. provides for a period of 30 days after receipt of the notice letter during which the recipient may provide Agency staff with additional information relevant to that person's status as a responsible person or other information relevant to issuance of a RFRA (e.g., information on the release). The 30 days within which such information is to be submitted is reasonable. A notice letter will follow a site identification and evaluation process carried out by the Agency which generally provides notice to a person that the Agency is considering the need for possible response actions at the site. The Agency may also have contacted the person concerning the site by issuing a Requirement to Provide Information to the person under Minnesota Statutes, section 115B.17, subdivision 3, by requesting access to the site for

investigation, or by listing the site on the Minnesota Permanent List of Priorities under Minnesota Rules, chapter 7047.

It is reasonable for the Agency to request a written statement regarding the notice letter recipient's interest in entering negotiation of a consent order, as provided in subpart 3.G. This notice of intent provides opportunity for Agency staff to recommend that the proposed RFRA include an appropriate period for consent order negotiation, and for both the Agency and the recipient to begin planning for negotiation.

Subpart 4 states that the Commissioner will review and transmit to the Board additional information received in response to a notice letter, as well as a response to the information. It is reasonable for the Commissioner to submit to the Board a response to the additional information, to aid the Board in effectively evaluating the bearing of the information on issuance of the RFRA.

Part 7047.0004 REQUESTS FOR RESPONSE ACTION (RFRA's).

Part 7047.0004 provides standards for when the Agency Board may accept additional information the notice letter recipient may wish to submit to the Board for consideration with regard to issuance of the RFRA which was not submitted within 30 days after receipt of the notice letter.

Subparts 2 and 3 identify the conditions under which such additional information will be accepted and considered by the Board. Subpart 2 explains the conditions under which the information will be accepted by the Board. Subpart 3 describes how the Board will proceed after accepting additional information.

The Board recognizes the rights of notice letter recipients and responsible persons to comment on actions taken by the Agency in fulfilling its statutory mandates. The Commissioner's notice letter augments this right by formally

providing an opportunity to supply additional information in advance of the meeting at which the Board is scheduled to consider the RFRA. The proposed rules provide a time frame within which notice letter recipients must submit additional information, and the conditions under which it will be accepted in order to encourage timely and orderly presentation and consideration of such information and to avoid delay in Board issuance of RFRAs needed to protect public health and the environment.

Subpart 4 explains requirements which must be met by Agency staff in submitting information not included or referenced in the notice letter to the Board for consideration in determining whether to issue a RFRA. Subpart 4 is reasonable because it requires that notice of staff submission of such information be provided to the notice letter recipient, and it provides opportunity for the recipient to respond to such information.

Subpart 5 briefly explains the scope of the RFRA. Subpart 6 states that RFRAs, including schedules for response actions, are effective upon issuance. These subparts are reasonable because they seek to promote understanding of the RFRA process.

Issuance of RFRAs under this part fulfills the requirements of Minnesota Statutes, sections 115B.17, subdivision 1(a)(3), and 115B.18, subdivision 3. It is reasonable to provide notice to the public and to responsible persons concerning the effect of the Agency Board's action in issuing a RFRA.

Part 7047.0005 CONSENT ORDERS.

Subpart 1 explains the conditions under which the Board will or will not provide a time frame for consent order negotiations in a RFRA. It also states that the Agency is not required to negotiate a consent order outside any such time frame. Subpart 2 establishes the scope of consent order negotiations.



Subpart 3 explains that a consent order executed after issuance of a RFRA will govern implementation of response actions by a responsible person, instead of the RFRA. Subparts 1, 2, and 3 are reasonable and necessary because they provide incentives to negotiate consent orders in good faith, while ensuring that response actions proceed expeditiously.

Part 7047.0006 DETERMINATIONS ON ACTIONS REQUESTED (DOARs).

Part 7047.0006, subpart 1, provides that the Commissioner will determine whether a responsible person has taken the response actions requested in the RFRA or whether it has made reasonable progress in completing the response actions. If the Commissioner determines that the responsible person will not take requested response actions in the manner and within the time specified in the RFRA, the Commissioner will request that the Board issue a DOAR to the responsible person. Minnesota Statutes, section 115B.17, subdivision 1(a)(3) requires that the Agency make such a determination, before it may take or compel performance of response actions which it deems reasonable and necessary to protect the public health or welfare or the environment. Issuance of DOARs to all known responsible persons fulfills the prerequisite of Minnesota Statutes, section 115B.17, subdivision 1(a)(3) for the Agency to take actions under Minnesota Statutes, section 115B.17, subdivision 1(a). In issuing a DOAR, the Board may also request, or authorize the Commissioner to request, the Attorney General to bring a legal action to compel performance of response actions requested in a RFRA or to impose civil penalties under Minnesota Statutes, section 115B.18.

Part 7047.0007 ATTORNEY GENERAL AUTHORITY NOT AFFECTED.

Part 7047.0007 provides that the proposed rules do not create any new requirements or prerequisites for the Attorney General to bring court action

against a responsible person under Minnesota Statutes, section 115B.18. Before the Attorney General may bring an action against a responsible person to compel performance or seek civil penalties under Minnesota Statutes, section 115B.18, subdivision 1 or 2, a RFRA must be issued as provided in section 115B.18, subdivision 3. Part 7047.0004, subpart 1 recognizes that a RFRA issued pursuant to part 7047.0003 constitutes this prerequisite to legal action. Part 7047.0007 makes clear that no other provisions of the proposed rules limit the authority of the Attorney General to bring legal actions under MERLA. For example, the Board will generally issue a DOAR and will request, or authorize the Commissioner to request, the Attorney General to bring legal actions under Minnesota Statutes, sections 115B.17, subdivision 6, and 115B.18, subdivisions 1 and 2, before such actions are brought. However, MERLA does not require the Board to take these steps before the Attorney General brings an action in court. In addition, issuance of a RFRA may not be required before the Attorney General may bring an action to recover expenses incurred by the Agency under Minnesota Statutes, section 115B.17, subdivision 6. Part 7047.0007 is reasonable because it provides notice to responsible persons that the exercise of authority by the Attorney General to bring legal actions under MERLA may not be limited by the procedural requirements imposed on the Agency by these rules.

#### V. CONSIDERATION OF POSSIBLE IMPACTS ON SMALL BUSINESSES

Minnesota Statutes, section 14.115, subdivision 2 (1990) 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.

Minnesota Statutes, section 14.115, subdivision 3 directs an agency to "incorporate into the proposed rule or amendment any of the methods specified under subdivision 2 (above) that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis for the proposed rulemaking."

The proposed rules would not have particular impact on small businesses as defined in Minnesota Statutes, section 14.115, subdivision 1 (1990). The rules establish time frames for persons who may be responsible for a release under MERLA to provide information that they want the Agency Board to consider in determining whether to issue a RFRA. The rules do not require such persons to provide any information, but only to comply with time requirements if they elect to do so. The proposed rules are not complex and do not place an undue burden on the financial and personnel resources of small businesses. Establishing less stringent time standards on small businesses is not consistent with providing all persons similarly affected by MERLA an equal opportunity to provide information to the Agency.

Furthermore, exemption (item e) of small businesses from any or all requirements under the proposed rules would conflict with the objectives of Minnesota Statutes, chapter 115B (MERLA) which defines those parties who are responsible for releases of hazardous substances or pollutants or contaminants and imposes liability on those persons for the cost of cleaning up such releases. MERLA makes no distinction between small businesses and other parties who may be responsible for a release, and does not authorize the Agency to treat

small businesses differently in the administration of MERLA. In addition, any different treatment in the issuance of RFRAs or DOARs would complicate and delay the implementation of response actions needed to protect public health and the environment.

## VI. CONSIDERATION OF ECONOMIC FACTORS

In exercising its powers, the Agency is required by Minnesota Statutes, section 116.07, subdivision 6 (1990) to give due consideration to certain economic factors. The statute states that:

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.

The Agency has interpreted this requirement to mean that, in determining whether or not proposed rules or amendments are feasible or practicable, it must consider the economic impacts, if any, of the proposed rules.

Since the proposed rules formalize and make enforceable current procedures with which the business community is already familiar, it is expected that adoption of the rules will have no calculable economic impacts. Furthermore, these rules implement a statute which is intended to encourage or require persons responsible for releases of hazardous substances or pollutants or contaminants to take cleanup actions at their own expense and to use state funds for cleanup only if responsible persons do not take requested actions. The fundamental judgment concerning who should bear the costs and economic burden of cleaning up releases of hazardous waste has been made by the legislature in enacting MERLA. The proposed rules provide procedures to implement the statutory scheme.

VII. CONSIDERATION OF POSSIBLE IMPACTS ON AGRICULTURAL LANDS

The Agency is required by Minnesota Statutes, section 14.11, subdivision 2 (1990) to consider the impacts of proposed rules on agricultural lands:

If the Agency proposing the adoption of the rule determines that the rules may have a direct and substantial adverse impact on agricultural land in the state, the Agency shall comply with the requirements of sections 17.80 to 17.84.

The definition of adverse impact which applies in this case is:

"Action which adversely affects" means any of the following actions taken in respect to agricultural land which have or would have the effect of substantially restricting the agricultural use of the land: (1) acquisition for a nonagricultural use except acquisition for any unit of the outdoor recreation system described in section 86A.05, other than a trail described in subdivision 4 of that section; (2) granting of a permit, license, franchise or other official authorization for nonagricultural use; (3) lease of state-owned land for nonagricultural use except for mineral exploration or mining; or (4) granting or loaning of state funds for purposes which are not consistent with agricultural use.

Minnesota Statutes, section 17.81, subdivision 2 (1990).

The legislature has set agricultural land policies which guide administrative agencies' rulemaking efforts, and determination of adverse impact:

It is the policy of the state to preserve agricultural land and conserve its long-term use for the production of food and other agricultural products by:

- (a) Protection of agricultural land and certain parcels of open space land from conversion to other uses;
- (b) Conservation and enhancement of soil and water resources to ensure their long-term quality and productivity;
- (c) Encouragement of planned growth and development of urban and rural areas to ensure the most effective use of agricultural land, resources and capital; and
- (d) Fostering of ownership and operation of agricultural land by resident farmers.

Minnesota Statutes, section 17.80, subdivision 1 (1990).

As stated above, the proposed rules establish procedures for providing notice and information regarding certain actions by the Agency to implement MERLA. The proposed rules have no discernible adverse impacts on agricultural lands. Therefore, the provisions of Minnesota Statutes, sections 17.80 to 17.84 are not applicable.

VIII. CONCLUSIONS

In this document and its exhibits, the Agency presents information establishing the need for, and the reasonableness of, the proposed rules governing Superfund administrative procedures. This document constitutes the Agency's "Statement of Need and Reasonableness" for the proposed rules.

Based on the foregoing, the proposed Minnesota Rules, parts 7047.0001 to 7047.0007 are both necessary and reasonable.

Dated: 12-18-90

*Barbara Lindsey Sims*  
\_\_\_\_\_  
Gerald L. Willet  
Commissioner