

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Amendments to Rules Governing
Procedures Before the Minnesota
Pollution Control Agency,
Minn. Rules Chs. 7000 and 7001

SUPPLEMENT TO THE
STATEMENT OF NEED
AND REASONABLENESS
DATED MARCH 22, 1994

The Minnesota Pollution Control Agency (Agency) staff met with the Board's Environmental Policy and Procedures Committee (EPPC) to discuss the proposed rule amendments to Minn. Rules Chs. 7000 and 7001 on March 21, 1992. The EPPC recommended some changes to the proposed amendments. In this document, the staff explains the reasoning behind the recommended changes in the Statement of Need and Reasonableness.

MINN. RULES PT. 7000.0500 AGENCY MEETINGS.

Subp. 3a. Committee meetings

Staff is proposing to add the words "committee chair, on the" after the word "The" and before the word "commissioner." By adding these words to the proposed rule amendments, the committee chair is allowed to call a committee meeting. This omission was an oversight and is being corrected with this proposed change.

Also, in the same subpart, the words "two members" are being deleted and being replaced with the words "a member." Staff feels that requiring two members of the Agency committee to request for a committee meeting is too restrictive and contrary to the fundamental fairness in public participation in Agency meetings. Requiring "a member" of the committee ensures flexibility among the committee members. The proposed change removes that restriction and confusion.

MINN. RULES PT. 7000.0650 PUBLIC PARTICIPATION IN AGENCY MEETINGS.

Subp. 5. Oral presentations at Agency meetings.

Staff is proposing to delete the sentence requiring that oral presentations must be limited to the record for the matter before the Agency. Comments received suggested that in real life, the Board cannot tell people who have never heard of the comment period and now comes to the Board to make oral presentations to base their comments on the record during the comment period. Staff feels that the proposed deletions will allow these

persons to be heard. This is consistent with the current Board's practice of allowing those persons to be heard even if they did not know about the comment period.

Subp. 6. Written materials

Staff is proposing to delete the language requiring that written comments "must be limited to the record created during the comment period."

As stated above, comments received suggested that in real life, the Board cannot tell people not to turn in their written comments because they are not based on the records during the comment period. In many occasions, the Board have seen that there are people who are not aware of the comment period, but nonetheless have comments and would like to be heard. This proposed change assures that they can submit written comments not based on the record during the comment period.

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Amendments to Rules Governing
Procedures Before the Minnesota
Pollution Control Agency,
Minn. Rules Chs. 7000 and 7001

SECOND SUPPLEMENT TO
THE STATEMENT OF NEED
AND REASONABLENESS

The Minnesota Pollution Control Agency (Agency) staff have made several minor changes to the proposed rulemaking amending the Agency procedural rules. These changes are necessary to ensure consistency between the procedural rules and other Agency rules.

The SONAR for this rulemaking was distributed to interested members of the public and to the Agency Board prior to the Agency Board meeting of March 22, 1994. A Supplement to the SONAR was distributed at the Board meeting to reflect certain changes recommended by the Board Environmental Policy and Procedures Committee. Now this Second Supplement is being added to the SONAR to explain the conforming amendments made since the Agency Board meeting, pursuant to the Board's resolution dated March 22, 1994.

CHANGES TO CONFORM WITH CHAPTER 7007

MINN. RULES PARTS 7000.0650 AND 7000.1800.

Chapter 7001 is the Agency's general rule governing permits, and it includes additional procedural requirements for their issuance, including the establishment of a public comment period. It used to govern all permits issued by the Agency, but in 1993 chapter 7007 was adopted to establish special procedural requirements solely for air quality permits, as required by federal law. Chapter 7007 also establishes a public comment period for the permits it governs.

Where the proposed procedural rule amendments cite to the public comment period established under chapter 7001, they have been changed to also refer to the public comment period established under chapter 7007 [this is being added to part 7000.0650, subpart 4, item A, subpart 5, and subpart 6, item C, and to part 7000.1800, subpart 1, item A]. This is reasonable because it provides coordination and consistency among chapters 7000, 7001, and 7007, and continues to give the public the same rights to participate in agency procedures regarding air permits as are available for other permits.

MINN. RULES PART 7007.0850.

The Agency proposes minor changes to subpart 3 to keep this part consistent with proposed changes to the procedural rule and to chapter 7001. The word "request" is replaced with the word "petition" because the latter is the term used in the proposed amendment to chapter 7000. The Agency proposes to amend items A, B, and C so that the procedures to petition for public informational meetings, contested case hearings, and

placement on board agendas will remain consistent for all permits. This subpart is also being changed to clearly identify the criteria that will be used in determining whether petitions for public informational meetings or contested case hearings will be granted, and the requirements that will apply to the meetings or hearings. These changes are reasonable because the procedures and standards being incorporated are equally useful to the air permitting process, and because retaining the consistency among the chapters avoids confusion.

OTHER CONFORMING CHANGES

The following changes are proposed in response to the Revisor's computer search of other Agency rules, which found many cross-references to parts of chapter 7000 which the Agency is proposing to amend or repeal in this rulemaking.

MINN. RULES PTS. 7037.1100, SUBP.4; 7037.1300, SUBP. 4; 7047.0040, SUBP. 6; 7050.0216, SUBP. 1; 7050.0218, SUBPS. 2 AND 4; 7050.0222, SUBPS. 7 AND 8; AND 7100.0340, SUBP. 19.

In each of the above-listed places Agency rules tell readers that they may request contested case hearings under part 7000.1000. The Agency proposes to change those references to instead refer the reader to the proposed new contested case hearing request provisions at part 7000.1800. In the three cross references in chapter 7050, the Agency also proposes eliminating the reference to part 7001.0130, because the latter is being amended to simply refer readers back to chapter 7000. Eliminating this cross reference saves the reader a step in determining the applicable criteria for getting a contested case hearing.

MINN. RULES PT. 7015.0110, SUBP. 4.

Conforming amendments are proposed to be made to this part to refer readers to the appropriate parts of the amended procedural rule that will govern preparation of the board agenda and deciding whether to grant a contested case hearing.

MINN. RULES PTS. 7001.0500, 7001.1000, 7001.1400, 7001.3000, and 7023.9000.

The provisions listed above refer to the procedural rule by citing to the first and last parts of it (or to what would have been the last part of it when the cross-reference was drafted), such as "parts 7000.0100 to 7000.1600." Each of these references state that other parts of agency rules will be "construed to complement" the chapter 7000 provisions. These cross-references would no longer be as inclusive as they are now after chapter 7000 is amended and renumbered by this rulemaking. In order to maintain the inclusiveness of these cross-references, the Agency proposes changing each one to refer to "chapter 7000" in its entirety. Given that chapter 7000 already applies generally to all agency activities, this change will not change the meaning of the cross-references.

FREESE/BQ5

**STATE OF MINNESOTA
POLLUTION CONTROL AGENCY**

**In the Matter of the Proposed
Amendments to Rules Governing
Procedures Before the Minnesota
Pollution Control Agency, Minn.
Rules chs. 7000, 7001, and 7007**

**THIRD SUPPLEMENT TO
THE STATEMENT OF NEED
AND REASONABLENESS
DATED JULY 28, 1994**

The Minnesota Pollution Control Agency (Agency) staff is supplementing the Statement of Need and Reasonableness (SONAR) for the above-captioned rulemaking to more fully set forth the Agency's consideration of the impact of the procedural rule amendments on small businesses. On page 26 of the SONAR the Agency states that the amendments do not adversely affect small businesses. This Supplement describes how the Agency considered each of the five methods listed in Minn. Stat. § 14.115, subd. 2 (1992) to reduce the impact of the rule on small businesses. This Supplement is issued under the Commissioner's authority to make minor changes to the SONAR to correct errors, and to perform all acts incidental to the rulemaking process pursuant to the resolution adopted by the MPCA Board on March 22, 1994.

1. Establishment of less stringent compliance or reporting requirements for small businesses.

This rulemaking does not create any reporting requirements, but it does create compliance requirements to the extent that small businesses seeking to participate in the Agency's decision-making process must comply with the proposed amendments to do so. As a general matter, all of the amendments were drafted in recognition of the fact that many people who will need to comply with them are representatives of small businesses, or indeed, individual citizens with no organizational affiliation and perhaps no experience with Agency procedures. The proposed rules set forth more readable and "user-friendly" procedures for public participation in the Agency's process, helping all members of the public effectively participate. Since the amendments are designed to be easy for any member of the public to understand and comply with, there is no need to establish different requirements for small businesses.

2. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.

This factor primarily applies to the proposed deadlines for triggering Agency action, such as deadlines for timely submittal of written information and petitions for contested case hearings. In proposing these deadlines the Agency is balancing the need to give members of the public adequate time to prepare and participate with the need to avoid undue delays in decision-making. The Agency believes that the deadlines it has proposed gives all members of the public, including small businesses, adequate time to effectively participate, and therefore does not propose separate deadlines for small businesses.

3. Consolidation or simplification of compliance or reporting requirements for small businesses.

One of the goals of these amendments is to make the Agency's procedures easy to follow and easy to comply with, by consolidating related topics into single sections and clarifying areas of ambiguity. Since the proposed amendments already reflect the Agency's efforts to consolidate and simplify the procedural rules, no additional consolidation or simplification specifically for small businesses is needed.

4. Establishment of performance standards for small businesses to replace design or operational standards required in the rule.

The proposed amendments do not establish any design, operational, or performance standards for small businesses. Therefore, this method of reducing the impact on small businesses does not apply.

5. Exemption of small businesses from any or all requirements of the rule.

This method of reducing the impact of a proposed rule on small businesses seems to assume that the rule in question is imposing new substantive requirements on small businesses. This rule does not do that, but rather amends the procedures that those who participate in Board decision-making must follow. One of the primary purposes of the rulemaking is to encourage participation by all members of the public, including small businesses. The Agency believes that the amended procedures will assist small businesses in this regard, and that there is no need to exempt them from any of the proposed requirements.

FREESE/BQ8

AUG 1 1994



M. H. L. STATE OF MINNESOTA
POLLUTION CONTROL AGENCY
LEAD

JUL 20 1994

The Legislative Commission to
Review Administrative Rules

STATEMENT OF
AND REASONABLENESS

In the Matter of the Proposed
Amendments to Rules Governing
Procedures before the
Minnesota Pollution Control Agency,
Minn. Rules chs. 7000 and 7001

I. INTRODUCTION

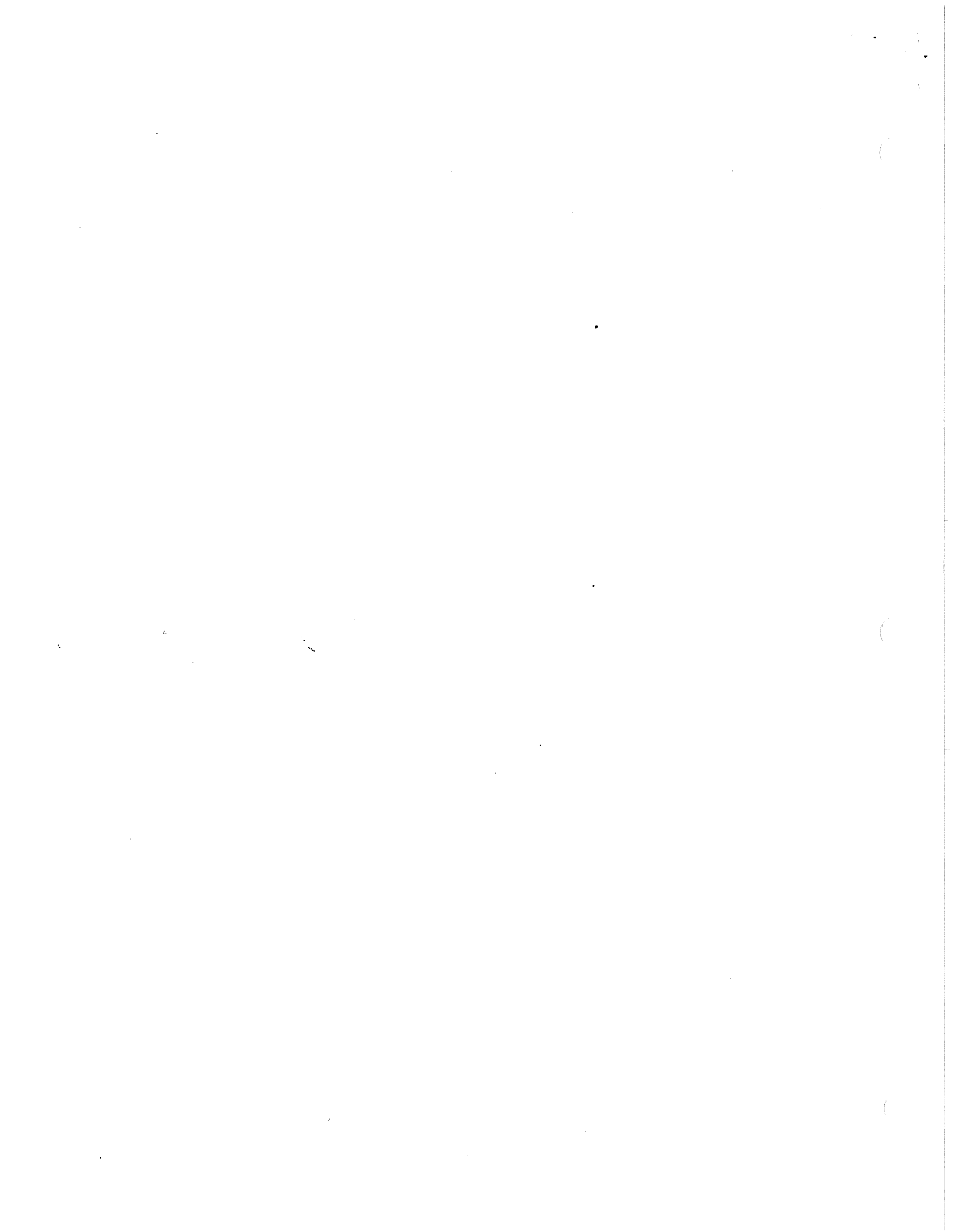
The Minnesota Pollution Control Agency (Agency) is proposing to amend rules governing its procedures. When an agency proposes to amend rules, it must present facts demonstrating that they are needed and reasonable. Minn. Stat. §§ 14.131 and 14.23 (1992). In this Statement of Need and Reasonableness, the Agency presents facts demonstrating the need for and reasonableness of the proposed amendments to rules governing how it makes decisions and how members of the public can involve themselves in agency decision-making.

The Agency's existing procedural rules are found principally in Minn. Stat. ch. 7000, which describe Agency procedures generally applicable to agency decisions. Parts of Minn. Stat. ch. 7001, which applies to agency permits, also include procedural requirements. The Agency is proposing to amend both these chapters.

To assist it in determining what changes to make to its procedural rules, the Agency asked one of its advisory committees, the Environmental Policies & Procedure Advisory Committee, to review and comment on the rules. The Agency has considered the views of the advisory committee, and other interested persons, in proposing these amendments to its procedural rules. The Agency thanks all members of the advisory committee and others for their many hours of reflection and input.

II. STATUTORY AUTHORITY OF THE AGENCY TO AMEND ITS RULES

The authority for the Agency to amend its procedural rules is the same as the authority for the Agency to have adopted the rules in the first place. That authority is found in Minn. Stat. § 116.07 (1992) and in Minn. Stat. § 14.06 (1992).



III. NEED FOR AMENDMENTS TO AGENCY'S PROCEDURAL RULES

Under the rulemaking requirements of Minn. Stat. ch. 14, the Agency must show that its proposed amendments are "needed." Generally, "need" means that there is a problem requiring administrative (agency) attention.

Since the last time its procedural rules were adopted or amended, the Agency has identified several problems requiring administrative attention. Among these are uncertainty about when and how members of the public can present oral or written comments to the Agency for consideration when it makes decision; when and how information about Agency meetings is distributed; and when and how the Agency will order a contested case hearing. Some of these problems were brought to the attention of the Agency by members of the public, some by Agency staff and some by the courts. The proposed amendments are needed to resolve the procedural uncertainties in the rules.

The Agency also has taken this opportunity to make its rules more readable. Some members of the public have commented that the rules could be organized so that they would be more user-friendly. The Agency was mindful of the need to improve the readability of its rules and has attempted to do so in its proposed amendments.

IV. REASONABLENESS OF AMENDMENTS TO MINN. RULES CH. 7000

Under the rulemaking requirements of Minn. Stat. ch. 14, the Agency must show the "reasonableness" of its proposed amendments. "Reasonableness" generally means that there is a rational basis for the Agency's proposed amendments. In the rulemaking context, "reasonableness" means that the proposed amendments appropriately resolve the problem they are intended to address. The reasonableness of the Agency's proposed amendments to Minn. Rules ch. 7000 are discussed below.

Minn. Stat. ch. 7000 is titled "Procedural Rules." It contains sixteen sections. The Agency is proposing to amend almost all of these sections, some by renumbering them to accommodate changes, and others more substantially. The Agency's reasons for proposing to amend ch. 7000 are as follows.

A. PROPOSED NEW PART: MINN. RULES PT. 7000.0050 (PURPOSE)

As they were first adopted, the underlying objective of the procedural rules was to describe the procedures and standards of conduct for Agency decision-making and to explain how members of the public may involve themselves in that decision-making. The rules were intended to provide an orderly and fair decision-making process for all persons appearing before the Agency, to preserve the integrity and independence of Agency decisions, and to promote public confidence in those decisions. The Agency continues to have these objectives in proposing to amend its procedural rules and, for the sake of clarity, proposes to add an introductory new part of the rules explaining their purpose.

B. MINN. RULES PT. 7000.0100 (DEFINITIONS)

The Agency is proposing to add three new definitions (contested case; interested person; and material issue of fact); to amend two definitions (agency and service); and, to move one definition so that it is placed alphabetically (administrative law judge). Each of these is discussed below in the order in which they appear in the proposed amended rule.

Subp. 1a. Administrative law judge. This definition now appears in the existing rule as subpart 6. The Agency does not propose to change the definition, just to move it so that it, as the other definitions, is listed alphabetically. This will make the definition easier to locate in the rule.

Subp. 2. Agency or agency members. The Agency is proposing minor changes to this subpart to identify more clearly who the Agency is and to simplify the definition.

Subp. 2b. Contested case. The Agency is proposing to add a definition of the term "contested case." This term is not defined in the Agency's existing rules, although it is used in the existing rule in parts 7000.1000 - 7000.1100. While the Agency does propose to amend its existing rules governing contested case hearings, it continues to use the term "contested case" in its proposed amendments. In the amendments, the Agency proposes to add a definition of contested case to assure that members of the public understand that the term contested case as used in the Agency's procedural rules has the same meaning as that term is given in Minn. Stat. § 14.02, subd. 3 (1992).

Subp. 5a. Interested person. The Agency is proposing to add a new definition of the term "interested person." The term is used throughout the procedural rules in reference to people who may wish to appear before the Agency or submit written or oral comments or petition. Its most significant use, however, is

probably in the proposed 7000.0650, subp. 2, which places requirements on the Agency to serve notice of Agency meetings.

A person is an "interested person" under the proposed definition if their name is placed on a list of interested persons developed by the Agency for a specific matter. Members of the public can ensure that their name appear on a list of interested persons for a specific matter by doing any one of four things: (1) making an oral presentation or statement on a specific Agency matter on the agenda for an Agency meeting and registering their names and addresses with the Agency during the Agency meeting; (2) submitting to the Commissioner a written statement in which they request to be treated as an interested person and in which they provide their names and addresses and identify the specific agency matter in which they are interested; (3) registering their names and addresses for the purpose of receiving notice of all agency rulemakings pursuant to Minnesota Statutes, section 14.14, subdivision 1a; or (4) being named as a party to a contested case hearing for a specific Agency matter.

The Agency encourages the public to participate in all its decisions. To do this, the public needs notice of Agency matters and needs to understand how to participate effectively. Because the Agency cannot send notice to all persons in the State on all matters that come before it, the Agency proposes to create a system for assuring people who wish to receive notice that they will do so. In fact, the Agency already operates this way in permit and other matters. The definition of interested persons the Agency now proposes would create a rule out of the Agency's current practice. The Agency's current practice has proven manageable and fair. The Agency therefore proposes to codify it as a rule.

Subp. 5b. Material issue of fact. The Agency is proposing to add a definition of the term "material issue of fact." This term is not defined in the Agency's existing rules, although it is used in the existing rule in parts 7000.1000 to describe one of the criteria the Agency will use in deciding whether to hold a contested case. The Agency proposes to amend its rules to clarify the circumstances in which it will hold a contested case. The Agency proposes to add a definition of "material issue of fact" to assure that members of the public understand the circumstances in which the Agency will order a contested case.

The proposed definition explains that a material issue of fact refers to a fact question, as distinguished from a policy question, whose resolution could have direct bearing on a final agency decision. An issue of fact is not an issue of law. The Agency does not hold contested case hearings to resolve legal questions, but rather holds contested case hearings to assist it in resolving disputed facts critical to an Agency decision. The proposed definition is reasonable because it focuses the

attention of the public and Agency on those matters central to contested case hearings.

Subp. 12. Service, serve. The term "service" or "serve" is used in the procedural rules when the agency is required to deliver materials to interested persons or when interested persons are required to deliver them to the agency. The Agency proposes to amend this definition to add facsimile service as an acceptable means of service, to clarify how personal service is accomplished, to add other delivery services as an acceptable means of service by mail, and to delete an obsolete service method (central mail through the Department of Administration). The proposed changes are reasonable because they clarify how different entities may be served and because they increase the ways service can be accomplished.

C. MINN. RULES PT. 7000.0200 (COMPUTATION OF TIME)

The procedural rules require persons to make service within a set number of days. The Agency proposes to clarify that the term day means weekdays, weekend days and holidays. The Agency always has counted these days when service is required within a set period of time. This method of counting may be different, however, from the manner in which other entities count days. It is reasonable for the Agency to codify its current practices in order to avoid confusion as to how to count time when service is required.

D. MINN. RULES PT. 7000.0300 (DUTY OF CANDOR)

The Agency proposes no change to this section. The Agency continues to expect all persons -- Agency members, staff and members of the public -- to act in good faith and with complete truthfulness, accuracy, and candor when they present information, data or comments to the Agency.

E. MINN. RULES PT. 7000.0400 (OFFICERS, COMMITTEES, AND DUTIES)

Minn. Rules pt. 7000.0400 now includes eight subparts concerning the officers, committees and duties of the Agency. The Agency proposes to make minor amendments to seven of them, and proposes no changes to the eighth section. The amendments change the term "chairperson" and "vice chairperson" to the more current term "chair" and "vice-chair." The amendments also improve grammar and sentence structure. These changes make the rules more understandable and therefore are reasonable.

F. MINN. RULES PT. 7000.0500 (AGENCY MEETINGS)

Minn. Rules pt. 7000.0500 now includes seventeen subparts concerning Agency meetings. Some of these subparts describe the meetings themselves; others describe the notice of and agenda for the meetings and public participation in those meetings. The Agency proposes to make no change to subpart 16 (record of meetings). The Agency proposes to amend or repeal the remaining subparts of the rule as follows.

The Agency proposes to repeal subparts 3, 4, 5, 6, 7, 11, 12, 14 and 15 and to replace the repealed subparts with proposed amendments to be codified at pt. 7000.0550, 7000.0650 and 7000.0750. The repeal of these subparts and their replacements are discussed in the Part IV.G. and Part IV.H. of the Statement of Need and Reasonableness.

The Agency proposes to amend subparts 1, 2, 8, 9, 10, 13 and 17. These subparts specifically concern Agency meetings. The Agency proposes to add subparts 3a, 3b and 18 to provide more information about the types and scheduling of Agency meetings. Each of the amendments and additions is discussed below.

Subpart 1 of existing Minn. Rules pt. 7000.0500 explains how many regularly-scheduled meetings the Agency holds and when the Agency holds its annual meeting. The rule also authorizes the chair to change a scheduled meeting. The Agency proposes to amend this subpart so that, instead of having the chair set the time and place of the regular meeting, the commissioner, after consultation with the chair, will set the time and place of each meeting. This change is reasonable because the commissioner is a full-time State official whose duties include managing the day-to-day work of the Agency. In contrast, the Agency is comprised of nine citizen members, many of whom hold other full-time jobs and are not available to perform daily management functions.

The Agency also proposes to amend subpart 1 to explain the circumstances under which the chair may change a scheduled meeting. The circumstances stated in the proposed amendment -- a state holiday, weather emergency or scheduling conflicts of agency members -- are ones likely to cause absences among the Agency or among interested persons. It is reasonable to allow the chair to reschedule a meeting when Agency members or interested persons are likely to find it difficult to attend. Further, it is reasonable to specify the circumstances for rescheduling to provide the chair with criteria for making a rescheduling decision and to provide the public with an understanding of when a meeting might be postponed or advanced.

Subpart 2 of existing Minn. Rules pt. 7000.0500 explains how and when the Agency will hold special meetings. For the same reason that it proposes to have the commissioner, after

consultation with the chair, schedule regular meetings, the Agency is proposing to have the commissioner, after consultation with the chair, schedule special meetings.

The Agency also proposes to amend subpart 2 to better explain the circumstances under which a special meeting will be called. The existing rule states that an existing rule can be called when it is "necessary or desirable." The proposed amendment states that a special meeting shall be called when the commissioner concludes it "would assist the agency in accomplishing its work or upon receiving a request for a special meeting from three agency members." In practice, these have been the circumstances when a special meeting has been called. It is reasonable to specify them clearly so the public understands why the agency might hold a special meeting.

Historically, the Agency has conducted special meetings in order to hold meetings in the community most affected by a proposed Agency decision, or when the Agency needs to give special attention to a matter, or when there is insufficient time for the Agency to provide the notice required for a regular meeting. Members of the public have expressed concern that, if possible, at least as much notice as is provided for regular meetings should be provided before all special meetings. In response to this concern, the Agency proposes to amend subpart 2 to require the commissioner to consider certain factors when scheduling a special meeting, including the extent to which time is of the essence and whether it would be unreasonable or unfair to interested persons for the agency to postpone consideration of the agenda to allow for as much notice as would be provided for a regular meeting of the Agency.

In recent years, the Agency has relied more and more on its committees to review staff proposals, give guidance and hear from interested members of the public. The establishment of Agency committees is authorized by existing Minn. Rules pt. 7000.0400, subp. 7. However, the procedural rules do not now describe when the Agency will use its committees. The Agency therefore proposes to add a new section, subpart 3a, to codify its current practices, and thereby make them clear to the public.

Similarly, the Agency holds informational meetings from time to time to assist it in accomplishing its work or when it is otherwise in the public interest. The Agency does not actually take a vote at an informational meeting, but may take testimony from staff and the public or consider concerns raised. Existing agency rules give the public an opportunity to request an informational meeting, but do not clearly explain when the Agency will hold an informational meeting. The Agency therefore proposes to add a new section, subpart 3b, to make the Agency's practices clear to the public.

Subpart 8 now provides that a majority of the entire Agency constitutes a quorum and that a quorum must be present for the transaction of business. The Agency proposes to amend subpart 8 to make a grammatical correction. In addition, the Agency proposes to amend subpart 8 to make it clear that a quorum need not be present for a committee meeting or an informational meeting. It is reasonable not to require a quorum at those meetings since the Agency does not make final decisions at those meetings.

Subpart 9 now describes who presides at Agency meetings. The rule provides that the chair presides and when the chair is absent the vice chair presides, and when the vice-chair is absent the Agency members who are present will select one among them to preside. The proposed amendments clarify that the alternates preside only until the chair or vice chair returns. This amendment is reasonable because it creates certainty as to who directs an Agency meeting once an absent chair or vice-chair returns.

Subpart 10 now explains that the first order of business at an Agency meeting is the adoption of the agenda. The Agency proposes to amend this subpart to clarify what happens after the Agency adopts its agenda. It is the current practice of the Agency to act on Agency matters on all controversial matters on its agenda at the times shown and not to act on matters that are not on its agenda. This practice ensures that the public will have advance notice of Agency action and an opportunity to provide comment in advance on the action. The Agency proposes to amend subpart 10 to codify its current practice. It is reasonable for the Agency to do so to provide the public with an explanation of how the Agency conducts itself at its meetings. The Agency also proposes to amend subpart 10 to allow it to group noncontroversial agenda items together for a single vote. This is also the current Agency practice. Combining noncontroversial items saves the Agency time at no disadvantage to members of the public. Moreover, grouping noncontroversial items (items in which the public has not expressed a concern) together for a single vote, the Agency can afford more time to conflict resolution and issues of public concern. It is therefore reasonable for the Agency to do business in this fashion and to amend its rules to make it clear to the public that this is how it operates.

Subpart 13 now states that all regular and special meetings of the Agency shall be open to the public, and all decisions shall be made at such meetings. However, there are circumstances when Minnesota law would allow the Agency to close a meeting. For instance, the Agency might wish to close a meeting in order to receive advice from counsel as to how to proceed in a particular litigation or whether to appeal a matter. The Agency proposes, therefore, to amend subpart 13 to clarify that all

meetings of the Agency shall be open to the public, except as provided by law. This change is consistent with the requirements of Minn. Stat. § 471.705, subd. 1 (1992), which allows the Agency to close certain meetings from public scrutiny. The Agency does so very rarely.

Under subpart 17, questions of parliamentary procedure that arise at an Agency meeting are resolved under Robert's Rules of Order. The Agency proposes to amend this subpart to make it clear that it intends to rely on the most recent edition of Robert's to govern its parliamentary procedure.

Lastly, the Agency proposes to add a new section to part 7000.0500 -- subpart 18. This new subpart is intended to clarify the current practice of the Agency for reconvening meetings. A recent court case involving the Agency, North American Water Office v. LTV Steel Mining Company and Minnesota Pollution Control Agency, C4-91-1552 (Minn. App. 1992) has caused the Agency to conclude that it needs to clarify its current practice concerning recessing and continuing meetings.

The Agency recesses or continues a meeting when the matter is sufficiently time consuming or complex that it wishes to deliberate further before making a final decision or finalizing its findings. The Agency wants to make it clear that, if it recesses a meeting or continues consideration of the agenda item to a later date, the public will not receive notice of the reconvened meeting as long as the Agency has announced its intentions to reconvene and has announced the time, date and place for reconvening. The Agency's practice is necessary to assure it an opportunity to prepare findings in support of its decisions or to allow full deliberations on a matter. It is reasonable for the Agency not to provide notice of the reconvening or additional opportunity for the public to comment when notice and opportunity to comment already has been given on an agenda item and the purpose of reconvening is to permit the Agency time to draft findings or further deliberate about a matter.

G. PROPOSED NEW PART: MINN. RULES PT. 7000.0550 (NOTICE OF AND AGENDA FOR AGENCY MEETINGS)

As noted in the prior section of this Statement of Need and Reasonableness, the Agency proposes to repeal subparts 3, 4, 6, 7 and 11 of Minn. Rules pt. 7000.0500 and replace the repealed subparts with proposed amendments to be codified at pt. 7000.0550.

Subparts 3, 4, 6, 7, and 11 of existing Minn. Rules pt. 7000.0500 all concern the preparation of agendas for Agency meetings and Agency notice of those meetings. The Agency

proposes to create a new part to address these issues. The new part incorporates most of the terms of the repealed subparts. The Agency believes that creating a separate part for notice of and agenda for agency meetings will make it easier for the public to understand how to participate in Agency meetings.

The Agency proposes to replace existing Minn. Rules pt. 7000.0500, subp. 11 with subpart 1 of Minn. Rules pt. 7000.0550. The only substantive change the Agency is making in this subpart is to delete the option for the Agency to consider a matter even when it has not been placed on the agenda and made available for public consideration in advance of the meeting. By deleting this option, the Agency is responding to the public's desire to be given advance notice of and an opportunity to participate in Agency decisionmaking.

The Agency proposes to replace existing Minn. Rules pt. 7000.0500, subp. 6 with subpart 2 of Minn. Rules pt. 7000.0550. The only substantive changes made in this subpart concern the amount of time an agenda must be available before an Agency meeting. The reasonableness of these time requirements is set out in the discussion of Minn. Rules pt. 7000.0650 below.

The Agency proposes to replace existing Minn. Rules pt. 7000.0500, subps. 3 and 4 and some of subp. 7 with subpart 3 of Minn. Rules pt. 7000.0050. The replaced subparts deal with the manner in which the commissioner gives the Agency notice of its meetings. Under the existing rules, the commissioner gives the Agency written notice at least 10 days before a regular meeting and at least 2 days before a special meeting.

Some members of the public have suggested that two days is too short a notice time. (Members of the public are given the same notice as the Agency. See proposed Minn. Rules pt. 7000.0650.) The Agency understands that the public would like to receive as much notice before a decision as possible. However, because the Agency consists of nine persons who reside throughout the State and hold other full-time jobs and commitments and because the Agency itself only meets infrequently to make decisions, there may be times when a minimum 10 day notice (the amount of notice given before a regular meeting) is not a reasonable option.

To assure the public a fair opportunity to participate in Agency actions, however, the Agency is proposing to provide a six day notice period for special meetings when service is by mail and a three day personal notice period when service is personal. Further, the Agency is proposing to require the commissioner, in setting the time and place of special meetings, to consider the extent to which time is of the essence and whether it would be unreasonable or unfair to interested persons for the agency to postpone consideration of the agenda to allow as much notice as

would be required for a regular meeting of the Agency. These changes reflect the difficulties the Agency has in scheduling matters before it and fairly balance the interest of the public in seeing that matters move forward at a reasonable pace and the competing interest of the public to receive advance notice of Agency decisions. These changes are therefore reasonable.

H. PROPOSED NEW PART -- MINN. RULES PT. 7000.0650
(PUBLIC PARTICIPATION IN AGENCY MEETINGS)

As noted in an earlier section of this Statement of Need and Reasonableness, the Agency proposes to repeal subparts 5 and 7 of Minn. Rules pt. 7000.0500 and replace the repealed subparts with proposed amendments to be codified at pt. 7000.0650.

Subpart 5 and part of subp. 7 of existing Minn. Rules pt. 7000.0500 concern public participation in Agency meetings. Existing rule pt. 7000.1500 also concerns public notice of Agency meetings. The Agency proposes to create a new part to describe how the public can participate in Agency meetings. This proposed new part -- Minn. Rules pt. 7000.0650 --incorporates and amends the terms of Minn. Rules pts. 7000.0050, subps. 5 and 7 and Minn. Rules pt. 7000.1500, which the Agency proposes to repeal. The Agency believes that creating a new part incorporating all the ways in which the public can participate in Agency decisionmaking will make it easier for the public to understand how to participate in Agency meetings and will encourage more effective participation.

Subpart 1 of proposed Minn. Rules pt. 7000.0650 requires the agenda and related materials for an Agency meeting to be available for public inspection. This proposed rule replaces part of existing Minn. Rules pt. 7000.0500, subp 7. The time periods provided for public inspection are the same as those provided for Agency notice. See proposed Minn. Rules pt. 7000.0550, subp. 3. The time periods are reasonable for the same reasons stated above concerning that proposed rule. The proposed rule also incorporates the Agency's current practice of not copying parts of records that are very voluminous, but instead notifying the Agency that it should review the record materials at its offices.

Subpart 1.B. of proposed Minn. Rules pt. 7000.0650 establishes an exemption for emergencies addressed by the Agency or commissioner under part 7000.6000. This exemption is provided now in existing Minn. Rules pt. 7000.0500, subp. 7 and is reasonable for the same reasons that the existing rule provision was reasonable. In short, there may not be sufficient time for notice in the case of an emergency and the Agency must remain free to act swiftly to resolve the emergency to protect public health and welfare. (Note that the existing rule concerning

emergencies -- Minn. Rules pt. 7000.0600 -- is proposed to be renumbered to 7000.5000.

Subpart 2 of proposed Minn. Rules pt. 7000.0650 states that, before an Agency meeting, the commissioner will serve notice on interested persons in the same time frame and manner that the commissioner serves Agency members. By using the proposed new definition for interested persons (proposed Minn. Rules pt. 7000.0100, subp. 5a), this new subpart expands the notice requirements of existing Minn. Rules pt. 7000.0500, subp. 7. The reasonableness of the term "interested persons" and the reasonableness of the time frames for notifying the public in advance of a meeting are discussed in earlier sections to this Statement of Need and Reasonableness.

For many years now, the Agency has struggled with the time and expense involved in providing copies of agendas and related materials to the ever-increasing number of persons wishing to know about Agency matters. The Agency wishes to encourage public participation. However, it cannot ignore the costs of reproducing the numerous documents before it. The Agency therefore has included in its proposed amendments a provision that assures that the public will receive copies of agendas and agenda items providing notice of an agency decision and background information, but allows the commissioner not to copy all related written materials when those materials are very voluminous. When this is the case, the public will have an opportunity to review the materials at the agency or to request specifically that a copy be provided. The Agency believes this provision balances the desire to stay well-informed on Agency matters and the competing interest of the Agency and the public in not expending government resources on copying documents indiscriminately. Further, the proposed amendment clarifies that the Agency does not intend the notice and service requirements of the chapter to prevent it from seeking to recover reasonable copying and preparation costs. The Agency does not routinely seek reimbursement and does not intend to do so for agendas and agenda items. When appropriate, however, the Agency may wish to recover copying costs for related written materials as permitted by Minn. Stat. ch. 13.

Subpart 3 of proposed Minn. Rules pt. 7000.0650 describes how members of the public can place matters on an Agency agenda. This proposed subpart replaces a similar provision in existing Minn. Rules pt. 7000.0500, subp. 6. However, the time frames for requesting that a matter be placed on an Agency agenda are lengthened, and the request is now to be directed to the commissioner rather than the Agency. The time change is reasonable because it reflects more realistically the amount of time the Agency will need to react to a request to consider a matter. Requiring that the request be submitted, in the first instance, to the commissioner rather than the Agency is

reasonable because it is the commissioner who is responsible for proposing an Agency agenda. Directing the request initially to the commissioner is also reasonable because Agency members will know of the request to place an item on their agenda and can override the commissioner if they so choose. (See last sentence of proposed subpart 3 which requires that the Agency be notified if the commissioner decides not to place a requested item on an Agency agenda.)

Subpart 4 of proposed Minn. Rules pt. 7000.0650 states that persons can request that the agency hold a public informational meeting. This proposed subpart replaces a similar provision now found in existing Minn. Rules pt. 7000.1500, subp. 2. The new subpart differs from the subpart it replaces in that the request for an informational meeting is to be directed to the commissioner, in the first instance, rather than the Agency if it involves a permit for which a public notice has been issued or if it involves a matter that is not on an Agency agenda. It is reasonable for the commissioner to receive these requests because the commissioner is the day-to-day manager of Agency matters. Directing the request initially to the commissioner is also reasonable because Agency members can override the commissioner if the a request for a public informational meeting is denied. The new subpart also differs from the existing rule in that it clarifies that requests for an informational meeting on a permit matter must conform to the Agency's permit rules. This is reasonable since the permit rules have long established the procedures the Agency will follow in making permit decisions. Finally, the new subpart makes it clear that, when a matter is on an Agency agenda and does not involve a permit, the petition is to be directed to the Agency itself within the time frames established in subpart 6. Directing the petition to the Agency under these circumstances is reasonable because the matter is already scheduled to be considered by the Agency and therefore can be acted upon promptly.

Subpart 5 of proposed Minn. Rules pt. 7000.0650 describes opportunities for the public to make oral presentations at an Agency meeting. This proposed subpart replaces a similar provision now found in existing Minn. Rules pt. 7000.1500, subp. 1. The new subpart clarifies that oral comments must be limited to the record of a proceeding, whether that record is for a rulemaking, contested case or other proceeding. The new subpart also clarifies the authority of the chair to limit the time and scope of each speaker's presentation to assure an opportunity for full and fair consideration of all views, and to disallow further oral presentations upon reconvening a meeting. These clarifications codify current practice before the Agency and are reasonable because they advise the public as to how to prepare comments to assure full consideration. They also resolve some apparent confusion under the existing rules. See discussion

in this Statement of Need and Reasonableness concerning proposed part 7000.0500, subpart 18.

Subpart 6 of proposed Minn. Rules pt. 7000.0650 requires the Agency to give due consideration to written materials served on the commissioner in a timely fashion. This proposed subpart replaces a similar provision now found in existing Minn. Rules pt. 7000.1500. Subpart 6 also resolves confusion that may exist under the current rules as to when written comments may be submitted to the Agency when a matter is on an Agency agenda and what may be included in those comments.

Currently, some persons interested in an Agency matter do not submit comments to the Agency until the day of an Agency meeting. The lateness of these comments makes it less likely that the Agency can consider them fully. The Agency desires to encourage public participation. However, to assure that public participation is meaningful, the Agency needs to establish time frames to assure that it can fully review the comments.

Proposed subpart 6 establishes minimum time frames for submitting comments to the Agency, and gives the chair or the commissioner authority to establish a different schedule for submitting comments. By authorizing the chair or commissioner to establish a schedule specific to a matter, the Agency assures that persons interested in a particular matter will be able to provide comment sufficiently in advance of an Agency decision to allow the Agency to give it proper consideration. This provision is therefore reasonable. The time periods specified in subpart 6 are based on the notice requirements provided elsewhere in the procedural rules. The time periods reasonably balance the need for the Agency to have advance access to written comments, when possible, and the time periods the public may have to respond to an Agency notice.

Proposed subpart 6 also clarifies that the Agency does not create a new opportunity for submitting written comments simply by deciding to recess a matter on which comments already have been taken. This is reasonable because it provides certainty for the Agency and public alike as to what comments will be considered by the Agency in making its decision.

Finally, subpart 6 specifies that, for rulemaking, contested case matters and permit matters, the creation of a written record is governed by other rules. It is reasonable to remind interested persons that existing rules already establish time deadlines for submitting written comments in these matters. Additional comments to the Agency must be limited to the record already created for these matters.

I. PROPOSED NEW PART: MINN. RULES PT. 7000.0750 (AGENCY RECORDS AND FINAL DECISION-MAKING)

As noted in an earlier section of this Statement of Need and Reasonableness, the Agency proposes to repeal subparts 11, 12, 13, 14 and 15 of Minn. Rules pt. 7000.0500 and replace the repealed subparts with proposed amendments to be codified at pt. 7000.0750.

Subparts 12, 14 and 15 of existing Minn. Rules pt. 7000.0500 and parts of subparts 11 and 13 of existing Minn. Rules pt. 7000.0500 concern Agency decision-making. The Agency proposes to create a new part to address Agency decisions, and to resolve a number of issues that have arisen as to how and when the Agency makes decisions.

Subpart 1 of proposed Minn. Rules pt. 7000.0750 states that final decisions of the Agency shall only be made at a regular or special meeting of the Agency and only if the matter has been placed on the agenda of the Agency meeting. These concepts can be found in existing Minn. Rules pt. 7000.0500, subps. 11 and 13. To assure that the public is able to participate fully in Agency decisions, it is reasonable to describe when the Agency can make decisions.

Subparts 2, 3 and 4 of proposed Minn. Rules pt. 7000.0750 describe what constitutes the record before the Agency at the time it makes its decision. This has been somewhat unclear in the past. To assure that the public, the Agency and a reviewing court know what constitutes the record upon which the Agency shall base its decision, it is reasonable to define that record by rule. The definitions provided in proposed subparts 2, 3 and 4 are reasonable because they reflect actual practice before the Agency and assure the public a full and reasonable opportunity to participate.

Subpart 5 of proposed Minn. Rules pt. 7000.0750 describes how many votes are required for a final agency decision. This proposed subpart is identical to existing Minn. Rules pt. 7000.0500, subp. 12, except that the new subpart adds a sentence clarifying that the Agency cannot make final decisions at committee meeting even if a quorum is present. It is reasonable to add this sentence to clarify for the public when the Agency may make a final decision.

Subpart 6 of proposed Minn. Rules pt. 7000.0750 clarifies the authority of the Agency to ask questions of staff, counsel or interested persons during an Agency meeting and requires that Agency findings be based on the record of the matter. This subpart is reasonable because it clarifies for the public how the Agency may conduct itself during deliberations and the basis upon which the Agency may make a decision.

Subpart 7 of proposed Minn. Rules pt. 7000.0750 describes reconsideration of Agency decisions and subpart 8 describes rescission of Agency decisions. These subparts are identical to existing Minn. Rules pts. 7000.0500, subp. 14 and 15, except that the proposed new subpart clarifies that the Agency may only rescind a decision when rescission would be consistent with applicable law. This clarification is reasonable because it puts persons on notice that, where due process considerations would dictate otherwise, rescission may not always be permissible. This is especially true when considerable time has passed between an Agency decision and a request for rescission.

Subpart 9 proposes to add a new part concerning stays of final agency decisions. In a recent case involving the Agency, the Court of Appeals indicated that persons should ask the Agency to stay its decisions before they seek a stay from the courts. See September 25, 1991 Order issued in *North American Water Office v. LTV Steel Mining Company and Minnesota Pollution Control Agency*, C4-91-1552 (Minn. App. 1992). The proposed amendments to the procedural rules explain how and when to seek a stay from the Agency. The procedures established are reasonable because they assure some finality to an agency decision but allow for staying of that decision when plainly warranted.

J. PROPOSED NEW PART: MINN. RULE PT. 7000.0850 (DELEGATION PROCEDURE)

The Agency is comprised of nine members who meet once or more a month to conduct its work. The work of the Agency is substantial. See Minn. Stat. chs. 115, 115A, 115B and 116 (1992). Over the years, the Agency has found that it can best serve the public by concentrating its efforts on controversial matters and by delegating to the commissioner authority to undertake matters of a relatively non-controversial nature.

In addition to the duties expressly provided to the commissioner by statute, the commissioner oversees the day-to-day business of the Agency. Because the Agency meets only part time and because some of its functions can be discharged by the commissioner as the agent for the Agency, the Agency has been delegating authority to the commissioner for many years. These delegations are made at public meetings at which all interested persons are invited to comment. However, the Agency's procedural rules do not now reflect this practice. To assure that the public is aware of the delegations and has an opportunity to comment on them, the Agency now proposes to add a new subpart to its procedural rules to explain how it makes delegations.

The proposed new subpart simply codifies the current practice of the Agency. The practice is reasonable because it

requires the Agency to review delegations on an annual basis, to establish conditions under which delegated authority can be exercised, and to revoke or modify delegations whenever it wishes. The delegation procedure helps the Agency accomplish its work in a timely manner while assuring oversight of delegated matters and an opportunity for public comment. For these reasons, the procedures are reasonable.

K. MINN. RULES PT. 7000.0900 (INFORMAL COMPLAINTS)

The Agency proposes to amend existing Minn. Rules pt. 7000.0900 to clarify that, in addition to complaints about pollution sources, persons may make informal complaints about environmental problems. This change is reasonable because it makes it clear that the Agency will consider all environmental concerns within its jurisdiction, not just those related to a particular source.

The Agency also proposes to amend existing Minn. Rules pt. 7000.0900 to clarify that, instead of the Agency, the commissioner will inform a pollution source of a complaint and that, instead of 20 days from the complaint, notice to the source will be within an appropriate period of time. The Agency has found that 20 days is not necessarily enough time to allow it to consider the problem fully. The amendment is reasonable because it reflects this reality and allows the Agency to consider enforcement options that may take time to investigate. Making it the responsibility of the commissioner rather than the Agency to notify the source is also reasonable because it is the commissioner, not the Agency, that has day-to-day responsibilities for carrying out the work of the Agency.

The Agency also proposes to make conforming changes to the rule to correct grammar and to cite the entire Data Practices Act rather than just sections of that Act. These changes are also reasonable because they improve the readability and clarity of the Agency's procedural rules.

**L. MINN. RULES PTS. 7000.1000 (CONTESTED CASE HEARINGS)
AND 7000.1100 (FINAL DECISIONS AND ORDERS IN CONTESTED
CASES)**

The Agency proposes to revise its current rules on contested case hearings as follows. First, it proposes to replace existing Minn. Rules pts. 7000.1000, with six new parts: Minn. Rules pts. 7000.1700 - .2200. The reasons for these changes are discussed below in Parts IV.P. - IV.U. of the Statement of Need and Reasonableness.

The Agency proposes to renumber Minn. Rules pts. 7000.1100 to a new part, Minn. Rules pt. 7000.2100 and proposes to make slight changes to its text. The reasons for these changes are discussed below in Part IV.R. of the Statement of Need and Reasonableness.

M. MINN. RULES PT. 7000.1400 (CONFLICT OF INTEREST)

The Agency proposes to renumber Minn. Rules pts. 7000.1400 to a new part, Minn. Rules pt. 7000.9000 and proposes to make changes to its text. The reasons for these changes are discussed below in Part IV.X. and IV.Y. of the Statement of Need and Reasonableness.

N. MINN. RULES PT. 7000.1500 (PUBLIC PARTICIPATION IN AGENCY MEETINGS)

The Agency proposes to repeal existing Minn. Rules pt. 7000.1500. In response to comments received from the public, the Agency proposes to move the procedural rules governing public participation in Agency decisions to earlier in the chapter. The Agency proposes to address the issues resolved in existing Minn. Rules pt. 7000.1500 in proposed Minn. Rules pt. 7000.0650. The reasonableness of the terms of proposed Minn. Rule pt. 7000.0650 is discussed earlier in this Statement of Need and Reasonableness.

O. MINN. RULES PT. 7000.1600 (PUBLIC PARTICIPATION IN COMMISSIONER'S ACTIVITIES)

The Agency proposes to repeal existing Minn. Rules pt. 7000.1600. As now drafted, the existing rule fails to distinguish between the numerous everyday activities of the commissioner and those activities that involve a final agency decision. The public has an interest in participating in conduct that may lead to a final agency decision. Proposed Minn. Rules pt. 7000.0650 ensures the public such an opportunity. The reasonableness of the terms of proposed Minn. Rule pt. 7000.0650 is discussed earlier in this Statement of Need and Reasonableness. It is reasonable for the agency to repeal Minn. Rules pt. 7000.1600 to avoid confusion as to how members of the public may participate meaningfully in agency decisionmaking.

P. PROPOSED NEW PART: MINN. RULES PT. 7000.1700 (CONTESTED CASE HEARINGS)

Existing Minn. Rules pt. 7000.1000 addresses contested case hearings before the Agency. Proposed Minn. Rules pt. 7000.1700 amends existing Minn. Rules pt. 7000.1000 as follows.

Subpart 1 of proposed Minn. Rules pt. 7000.1700 is the same as subpart 1 of existing Minn. Rules pt. 7000.1000, except that references to other rules are proposed to be updated.

Subpart 4 of proposed Minn. Rules pt. 7000.1700 is the same as subpart 4 of existing Minn. Rules pt. 7000.1000, which identifies who is a party to a contested case hearing. The Agency proposes to make minor clarifying amendments to this section to conform the language of the rule to other rules and actual practice of the Agency.

Similarly, proposed Minn. Rules pt. 7000.1700 is the same as existing Minn. Rules pt. 7000.1000, subp. 7, which provides when the Agency will consolidate two matters into a single hearing. The Agency proposes to make a clarifying change to this subpart to limit consolidation to circumstances when no party objects to the consolidation. This change is reasonable because it affords maximum protection to persons having an interest in the outcome of a matter.

The Agency proposes to delete existing subparts 2, 3, 5, 6, 8 and 9 of existing Minn. Rules pt. 7000.1000 because the Agency proposes to create new rules to address the issues raised in those subparts. See proposed Minn. Rules pt. 7000.1800 which replaces subpart 2 of existing Minn. Rules pt. 7000.1000; proposed Minn. Rules pt. 7000.1900 which replaces subpart 3 of existing Minn. Rules pt. 7000.1000; proposed Minn. Rules pts. 7000.9000 and 7000.9100, which replace subpart 5 of existing Minn. Rules pt. 7000.1000; subpart 7a of proposed Minn. Rules pt. 7000.2000, which replaces subpart 6 of existing Minn. Rules pt. 7000.1000; proposed Minn. Rules pt. 7000.2100, which replaces subpart 8 of existing Minn. Rules pt. 7000.1000; and proposed Minn. Rules pt. 7000.2200, which replaces subpart 9 of existing Minn. Rules pt. 7000.1000. The reasonableness of doing so is discussed in each of the proposed rules replacing the existing rules.

Q. PROPOSED NEW PART: MINN. RULES PT. 7000.1800 (PETITION FOR CONTESTED CASE HEARING)

One of the issues the Agency has struggled with over recent years is how to assure interested persons a reasonable opportunity to seek a contested case hearing while also providing some closure for the comment period for a matter. Some members

of the public now believe that they may seek a contested case hearing on any matter before the agency up until the very moment the agency makes a decision on that matter. However, allowing unrestrained requests for hearing creates confusion for the agency and uncertainty for proponents of an agency action. The agency never intended this to be the case.

To resolve the uncertainty and confusion, the agency proposes a new part, Minn. Rules pt. 7000.1800. This proposed new part would replace existing Minn. Rules pt. 7000.1000, subpart 2, the rule which currently creates much of the confusion around this issue.

The proposed new part gives finality to when a contested case request must be made. The proposed new part allows requests for a contested case hearing to be submitted within the comment period for a permit noticed under chapter 7001 and also allows the chair or commissioner to establish a time frame for submitting comments (this is consistent with the public participation requirements of proposed pt. 7000.0650, subp. 6). When, however, no schedule is established, persons may request a contested case hearing at any time before the final decision of the agency is made. These deadlines are reasonable because they assure the public an opportunity to make their requests while giving other interested persons and the Agency an opportunity to give due and orderly consideration to the requests, comments and interests of others.

Subpart 2 of proposed Minn. Rules pt. 7000.1800 sets out the contents of petition for a contested case hearing. These contents are reasonable because they require a petitioner to include the information that the agency will need to decide whether it will be useful to expend time and money on a contested case hearing. Some members of the public have suggested, however, that they should not be required to list every witness or publication on which they might rely if a hearing is held. The Agency would like requesters of contested case hearings to include this information so that it can fully evaluate the reasonableness of the request. To address the public's concern about their ability to list all witnesses, the Agency has included in its proposed rules a statement that persons may call other witnesses and submit other materials if the Agency does decide to order a contested case hearing.

Subpart 3 of proposed Minn. Rules pt. 7000.1800 gives interested persons an opportunity to submit written comments responding to a petition for a contested case hearing. It is reasonable to do so to allow the Agency to consider the views of all persons who may be affected by the Agency's decision to have a contested case hearing or to deny the request for a hearing. The time periods provided in proposed subpart 3 are reasonable

because for the same reasons the time frames proposed for subpart 1 are reasonable.

Subpart 4 of proposed Minn. Rules pt. 7000.1800 explains the consequences of failure to submit a timely request for a contested case hearing. A person who fails to submit a timely request for a hearing waives their right to seek a hearing, unless the person can show that newly discovered relevant facts have arisen. It is customary and reasonable for a decision-making body to require persons wishing to influence the decision to make their views known and their procedural requests heard before the final decision is scheduled to be made. Otherwise, the decision-making body will not have an opportunity to fairly and fully consider the views of all interested persons and persons affected by the decision may be confused as to how to influence the decision and best present their views. By including in its rule a clear statement of the consequences of failure to request a hearing in a timely manner, the Agency puts all potentially interested persons on notice that they must make their requests for a hearing within a specified period of time or they will lose the right to make the request. Requiring that petitions for contested case hearings be submitted in a timely manner is reasonable because it avoids time delays resulting from last minute hearing requests. When requests are timely, the Agency is able to give due consideration all interests before it and to balance those interests appropriately. Requiring that petitions for contested case hearings be submitted in a timely manner is therefore reasonable because it will assure fair and consistent treatment of all persons interested in an Agency decision. This clarification is reasonable, too, because it resolves confusion that may have existed after the Court of Appeals decision in North American Water Office v. LTV Steel Mining Company and Minnesota Pollution Control Agency, C4-91-1552 (Minn. App. 1992).

R. PROPOSED NEW PART: MINN. RULES PT. 7000.1900 (AGENCY CRITERIA TO HOLD CONTESTED CASE HEARING)

Proposed Minn. Rules pt. 7000.1900 replaces existing Minn. Rules pt. 7000.1000, subp. 3, which concerns the criteria the Agency will use to decide whether to hold a contested case hearing.

Subpart 1 of proposed Minn. Rules pt. 7000.1900 sets out the specific criteria the Agency will use. The Agency has not substantially amended the criteria in its proposed rule. The existing rule requires a showing of a "material issue of fact or of the application of fact to law." The second half of this rule is confusing to the public and, in any event, is sufficiently embraced by the first half of the showing as to be redundant. The Agency therefore proposes to change the first criteria so

that a petitioner must show only "that there is a material issue of fact in dispute concerning the matter pending before the Agency." This clarifying change is reasonable because it will assure a proper focus on the core issue to be resolved if a contested case hearing is ordered.

Subpart 2 of proposed Minn. Rules pt. 7000.1900 clarifies that the Agency can and will identify the scope of the hearing to assure that the parties focus appropriately on the matter of concern.

Subpart 3 of proposed Minn. Rules pt. 7000.1900 repeats with slight clarifications the last sentence of existing Minn. Rules pt. 7000.1000, subp. 3, which advises the public that the Agency may hold a public informational meeting if it decides not to have a contested case hearing.

S. PROPOSED NEW PART: MINN. RULES PT. 7000.2000 (FINAL DECISIONS AND ORDERS IN CONTESTED CASES)

Proposed Minn. Rules pt. 7000.2000 replaces existing Minn. Rules pt. 7000.1100.

The Agency proposes to change the first subpart of this rule by shortening the time periods for submitting exceptions to the agency and for the agency to make a final decision after a contested case hearing. The Agency believes that shortening these time frames properly balances the interests of the public in submitting comments to the Agency with the difficulties the Agency sometimes has in scheduling timely meetings.

The changes proposed to subparts 2, 3 and 5 are grammatical or minor clarifying amendments. No changes are proposed to subparts 4, 6, 7 or 8.

The Agency proposes to add subpart 7a, informal disposition, which was formerly found in existing Minn. Rules pt. 7000.1000, subp. 6. No change is proposed to the language of the subpart.

T. PROPOSED NEW PART: MINN. RULES PT. 7000.2100 (PETITION FOR STAY OR REOPENING OF AGENCY'S FINAL DECISION IN CONTESTED CASE HEARINGS)

The Agency proposes to add a new part, Minn. Rules pt. 7000.2100, on petitions for reopening a final decision. The issues addressed in this part were formerly resolved in existing Minn. Rules pt. 7000.1000, subp. 8.

In addition, the Agency proposes to add to this subpart a procedure for granting a stay. In a recent court case, the Court

of Appeals has indicated that persons should ask the Agency to stay its decisions before they seek a stay from the courts. See North American Water Office v. LTV Steel Mining Company and Minnesota Pollution Control Agency, C4-91-1552 (Minn. App. 1992). The proposed amendments to the procedural rules explain how and when to seek a stay from the Agency. By adding this subpart, the Agency does not intend to create or change the authority to seek stays provided by Minn. Stat. § 14.65. To the extent a right exists, however, the Agency believes it is reasonable to include procedures in its rules explaining how to seek the stay. The procedures proposed are reasonable because they assure some finality to an agency decision but allow the Agency to issue a stay or reopen the matter when warranted.

U. PROPOSED NEW PART: MINN. RULES PT. 7000.2200 (DECISION AFTER REOPENING AND REMAND)

The Agency proposes to add a new part, Minn. Rules pt. 7000.2200, on decisions after reopening and remand. This subpart is reasonable because it provides the public with a clear statement as to how the agency will conduct itself if it decides to reopen a matter and remand it to the administrative law judge.

V. PROPOSED NEW PART: MINN. RULES PT. 7000.5000 (DECLARATION OF EMERGENCY)

Proposed Minn. Rules pt. 7000.5000 replaces existing Minn. Rules pt. 7000.0600. The changes proposed to this rule are conforming changes only.

By moving the emergency rule to a later part of the procedural rules, the Agency can keep together all rules concerning how Agency meetings are conducted and how the public can participate in those meetings. Doing so improves the readability of the rules and, therefore, is reasonable.

W. PROPOSED NEW PART: MINN. RULES PT. 7000.7000 (VARIANCES)

Proposed Minn. Rules pt. 7000.7000 replaces existing Minn. Rules pt. 7000.0700. The changes proposed to this rule are largely conforming changes. In addition, the Agency proposes to clarify that, rather than a 30-day comment period, a notice of a variance must provide a minimum of a 30 day comment period. This change is reasonable because it resolves a small confusion created by the language of the existing rules.

By moving the variance rule to a later part of the procedural rules, the Agency can keep together all rules

concerning how Agency meetings are conducted and how the public can participate in those meetings. Doing so improves the readability of the rules and, therefore, is reasonable.

X. PROPOSED NEW PART: MINN. RULES PT. 7000.9000
(CONFLICT OF INTEREST)

Proposed Minn. Rules pt. 7000.9000 replaces existing Minn. Rules pt. 7000.1400. The Agency proposes to amend the existing rule by making two sections out of it (subparts 1 and 2 of the proposed rule) and by adding a new subpart 3. The proposed new subpart limits when former Agency members may appear before the Agency to represent an interested person. This new part is reasonable because it avoids the perception of undue influence and thus provides integrity for the decision-making process and fosters public confidence in that process.

Y. PROPOSED NEW PART: MINN. RULES PT. 7000.9100
(PROHIBITED EX PARTE COMMUNICATIONS)

Proposed Minn. Rules pt. 7000.9100 replaces and expands the limitations established in existing Minn. Rules pt. 7000.1000, subp. 5. Currently, ex parte contacts are prohibited only in matters for which a contested case hearing has been held. The prohibition is expanded in the proposed rule to rulemaking proceedings, too.

The proposed rule also explains how the Agency will conduct itself in the event a forbidden ex parte communication is made. Like the previous proposed new part, this proposed new part is reasonable because it provides integrity for the decision-making process and will foster public confidence in that process. Limitations on ex parte contacts with Agency members in formal decision-makings is considered an ordinary and important protection of public interests and an integral part of due process considerations. It is reasonable for the Agency to explain in its rules how it will preserve and protect those interests.

V. REASONABLENESS OF AMENDMENTS TO MINN. RULES CH. 7001

Under the rulemaking requirements of Minn. Stat. ch. 14, the Agency must show the "reasonableness" of its proposed amendments. "Reasonableness" generally means that there is a rational basis for the Agency's proposed amendments. In the rulemaking context, "reasonableness" means that the proposed amendments appropriately resolve the problem they are intended to address. The reasonableness of the Agency's proposed amendments to Minn. Rules ch. 7001 are discussed below.

A. MINN. RULES PT. 7001.0110 (PUBLIC COMMENTS)

The Agency proposes minor changes to existing Minn. Rules pt. 7001.0110. These changes clarify how the procedural rules in chapter 7000 affect public participation in permit matters. The clarifications are reasonable because they allow the public and the Agency to avoid difficulties arising from confusion about how ch. 7000 and ch. 7001 work together.

**B. PROPOSED NEW PART: MINN. RULES PT. 7001.0125
(MEETING WITH AND REPORT OF COMMISSIONER)**

The Agency proposes to add a new part, Minn. Rules pt. 7001.0125, as an intermediate step after a person has requested a contested case hearing on a permit matter and before the Agency considers the matter. The Agency hopes that this intermediate step will provide an opportunity for interested persons to discuss proposed solutions to the issues they have raised or to narrow the issues on which they seek a hearing. The Agency believes this approach is in the interest of the public, Agency staff and the Agency itself. Conceptually, the procedure is similar to a pre-trial conference in which the parties have an opportunity to define their concerns and refine the issues on appeal. The commissioner report to the agency also is reasonable because it will provide information that will assist the Agency in resolving the request for a contested case hearing on the permit.

The addition of this new part is reasonable because it will facilitate better communications among interested persons and the Agency and a better understanding of the issues. Further, a preliminary screening of issues through the meeting process will help the Agency focus its more limited time on the controversial issues of public concern.

C. MINN. RULES PT. 7001.0130 (CONTESTED CASE HEARING)

The Agency proposes to change subpart 1 of existing Minn. Rules pt. 7001.0130 to clarify that the procedural rules in chapter 7001 concerning contested case hearings are the same as those in chapter 7000. The clarification is reasonable because they allow the public and the Agency to avoid difficulties arising from confusion about how ch. 7000 and ch. 7001 work together.

D. MINN. RULES PT. 7001.0140 (FINAL DETERMINATION)

The Agency proposes to add a new subpart to existing Minn. Rules pt. 7001.0140. The new subpart -- subpart 4 -- ensures the

public it will have a minimum number of days to review an environmental impact statement before the Agency acts on the matter for which the environmental impact statement was prepared. This new subpart responds to concerns raised by environmental organizations that, in the past, they have not always had sufficient time to review environmental documents concerning a permit matter before the Agency acted. This rule responds to that concern by providing a 25 day waiting period. Although a waiting period between the adequacy decision on an environmental impact statement and a final permit decision may slow down the permitting process to some extent, it will assure the Agency and the public an opportunity to take full advantage of the analysis and conclusions of the environmental impact statements. Twenty-five days is a reasonable waiting period because it balances the public's interest in having sufficient review time against the permit applicant's interest in having a project move forward.

VI. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. § 14.155, subd. 2 (1992) requires the Agency, when proposing rules that may affect small businesses, to consider methods for reducing the impact on small businesses. The proposed amendments will not significantly effect small businesses. To the extent the existing procedural rules already create some burden on interested persons, including small businesses, to participate in Agency matters, the proposed amendments will not change this burden. Moreover, the burden flows from the authority of the Agency rather than from the procedural rules of the Agency. For these reasons, the Agency concludes that the proposed amendments to its procedural rules will not affect small businesses adversely.

VII. CONSIDERATION OF ECONOMIC FACTORS

In exercising its powers, the Agency is required by Minn. Stat. § 116.07, subd. 6 (1992) to give due consideration to economic factors. Specifically, the statute provides:

In exercising all its powers, the 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 actions, 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 these amendments, the Agency has given due consideration based on available information to the economic impacts the amendments may have. The Agency has concluded that the proposed amendments will have no adverse economic impact.

VIII. IMPACT ON AGRICULTURAL LANDS

Minn. Stat. § 14.11, subd. 2 (1992) requires the Agency to consider whether its proposed amendments will have an impact on agricultural land. The statute provides:

If the agency proposing the adoption of the rule determines that the rule 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 Agency has determined that adoption of the proposed amendments will not have an impact on agricultural land in any way different than required by existing rules, if at all.


IX. IMPACT ON LOCAL PUBLIC BODIES

Minn. Stat. § 14.11, subd. 1 (1992) requires that, if the adoption of a proposed rule will require the expenditure of public money by local public bodies, the agency must include a special notice of cost when it proposes to adopt the rule. The Agency has determined that adoption of the proposed amendments will not require the expenditure of public money by local public bodies in any way different than that required by existing rules, if at all.

X. CONCLUSION

The proposed amendments to the Agency's procedural rules are both needed and reasonable.

Dated: March 22, 1994



Charles W. Williams
Commissioner
Minnesota Pollution Control Agency

