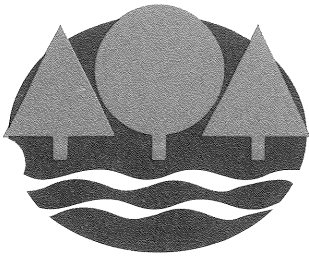


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Minnesota Pollution Control Agency

APR 17 1995

April 13 , 1995

Ms. Maryanne Hruby
Executive Director
Legislative Commission to Review
Administrative Rules
State Office Building, Room 55
100 Constitution Avenue
St. Paul, Minnesota 55155

RE: Statement of Need and Reasonableness for Proposed Rule Governing General
Conformity of Federal Actions to State or Federal Implementation Plans,
Minn. Rules Part 7009.9000

Dear Ms. Hruby:

Enclosed for your review is a copy of the Statement of Need and Reasonableness for the above proposed rule as required by Minn. Stat. § 14.115, subd. 8 (1994). If you have any questions, please call me at (612) 296-7712.

Sincerely,

Norma L. Coleman

Norma L. Coleman
Planning and Rule Coordinator
Program Development Section
Air Quality Division

NLC:cas

Enclosure

**STATE OF MINNESOTA
POLLUTION CONTROL AGENCY**

**In the Matter of the Proposed
Rule Governing General Conformity
of Federal Actions to State or Federal
Implementation Plans, Minn. Rules
Part 7009.9000**

**STATEMENT OF NEED
AND REASONABLENESS**

I. INTRODUCTION

The Minnesota Pollution Control Agency (MPCA) is proposing to adopt rules governing general conformity of federal actions to state or federal implementation plans. The U.S. Environmental Protection Agency (EPA) adopted regulations in the *Federal Register* on November 30, 1993, (58 Fed. Reg. 63214 - 63259), which require that all federal actions conform to an applicable implementation plan developed pursuant to section 110 and part D of the Clean Air Act. States are required through this rule to submit to EPA revisions to their implementation plans establishing conformity criteria and procedures consistent with EPA's rule. The proposed rule is being promulgated in response to a formal request by EPA received April 6, 1994, that Minnesota submit a State Implementation Plan (SIP) revision for general conformity by November 30, 1994.

EPA's final rule, published on November 30, 1993, establishes the criteria and procedures governing the determination of conformity for all federal actions, except federal highway and transit actions ("transportation conformity"). Transportation conformity requirements are established in a separate federal rulemaking action.

General conformity is intended to hold those with responsibility for a project accountable for the emissions that result from that project, with the ultimate goal of preventing actions that are in some way supported by the federal government from undermining efforts to achieve and maintain clean air in a cost-effective manner. If such steps to avoid pollution are not taken, the result will be degraded air quality, adverse public health consequences and an increased burden on regulatory agencies, and ultimately the public, to compensate for the additional air pollution by imposing more rigorous controls on another sector of society.

The federal rule adopts the approach of requiring an offset for emissions associated with the federal action. It is also possible to determine whether project-related emissions are included in an emissions budget for the area, or included in the SIP's attainment or maintenance demonstration for the area.

The federal general conformity rule applies only to criteria pollutants¹ (ozone, carbon monoxide, PM¹⁰, sulfur dioxide, nitrogen dioxide and lead) for which an area is designated as nonattainment or maintenance; with respect to maintenance areas, only those designated since adoption of the Clean Air Act Amendments of 1990 (1990 Amendments) are affected. The rule does not apply general conformity requirements to pollutants for which an area is in attainment. EPA's general conformity rule applies to both direct and indirect emissions resulting from a federal action.

II. STATEMENT OF MPCA'S STATUTORY AUTHORITY

The MPCA has statutory authority to undertake this rulemaking under Minn. Stat. § 116.07, subd. 4 (1994), which provides:

¹ Criteria pollutants are those pollutants for which EPA has established a National Ambient Air Quality Standard under section 109 of the Clean Air Act.

Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, ch. 1046, for the prevention, abatement, or control of air pollution. Any such rule or standard may be of general application throughout the state, or may be limited as to times, places, circumstances, or conditions in order to make due allowance for variations therein. Without limitation, rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement or control of air pollution.

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

III. STATEMENT OF NEED

Minn. Stat. ch. 14 (1994), requires the MPCA to make an affirmative presentation of facts establishing the need for and reasonableness of the rule as proposed. In general terms, this means that the MPCA must set forth the reasons for its proposal and the reasons must not be arbitrary or capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the MPCA is appropriate. The need for the rule is discussed below.

The MPCA is proposing to incorporate by reference the federal rules governing criteria and procedures for determining the conformity with the SIP of general federal actions. This rule will be submitted as a revision to the SIP for the control of criteria pollutants in nonattainment and maintenance areas. EPA cannot apply these rules in attainment areas because it did not propose to do so in its rulemaking.

These revisions are required by the 1990 Amendments and the subsequent

November 30, 1993, general conformity rulemaking by EPA. The federal rule requires that a SIP revision and an enforceable rule be adopted concerning general conformity no later than November 30, 1994.

The proposed rule is needed to implement procedures for determining the general conformity of federal actions in nonattainment areas with the SIP in force in those areas. The rule is necessary to allow EPA to make a finding that the general conformity SIP meets the requirements of the 1990 Amendments, and the final EPA rule on general conformity in the Code of Federal Regulations, Title 40, Part 51. The federal rule allows the state, or the state's designated agency (MPCA), to adopt a rule which is more stringent than the federal rule, if the state also applies the rule to all nonfederal (state agency) actions within the nonattainment areas. The MPCA chose not to pursue a more stringent general conformity rule at this time, although the MPCA reserves the right to increase the stringency with future rulemaking.

The proposed rule contains definitions specific to general conformity, the applicability of federal actions to the rule, exemptions of several federal actions from the rule, and the procedures for determining general conformity with the SIP. The procedures specify the requirements of the general conformity determinations, the analysis procedure, the reporting and public comment requirements, the frequency of conformity determinations, the criteria by which conformity is determined, and the process of emissions mitigation. The rule also contains a savings provision which specifies when a federal agency shall follow the federal rule and when a federal agency shall follow the state rule.

Under the provisions of general conformity, any federal agency that is considering an action in a nonattainment area which will cause the emissions of a criteria pollutant (or a precursor of that criteria pollutant) to increase above the *de minimis* level, will be required to

offset the emissions increase, show that the increase is consistent with growth margins established in the SIP, or show that air quality is maintained through dispersion modeling. The federal agency will also have to document the conformity analysis to demonstrate to the MPCA that the action conforms to the applicable SIP for nonattainment areas.

With the exception of the Federal Highways Administration and Federal Transit Authority transportation actions, this rule applies to all federal agencies that either directly, or have approval control, for actions within nonattainment or maintenance areas. Typical agencies and actions that will be affected by this rule include the Federal Aviation Administration, with airport actions, and the Department of Defense, with military installation closures and realignments.

Finally, incorporation by reference of the federal general conformity requirements is needed because it enables Minnesota to ensure that federal actions comport with Minnesota's plan to achieve air quality standards.

IV. STATEMENT OF REASONABLENESS

The MPCA is required by Minn. Stat. ch. 14 (1994), to make an affirmative presentation of facts establishing the reasonableness of the proposed rule. Reasonableness is the opposite of arbitrariness or capriciousness. It means that there is a rational basis for the MPCA's proposed action. The reasonableness of the proposed rule is discussed below.

In this proposed rule, the MPCA is incorporating into state air pollution control rules 40 CFR. part 51, subpart W, with the exception of section 51.851(a). Section 51.851(a) is the federal requirement for states to submit SIP revisions and is not appropriate to incorporate. The MPCA is not amending these federal requirements, but is simply incorporating them into the state air pollution control rules. This general approach is reasonable because the incorporation of

applicable federal requirements into Minnesota rules provides notice to Minnesota's regulated community of applicable federal requirements, without adding volumes to the Minnesota rules codification. While it is required to bring the applicable federal regulations into Minnesota rules, it is not necessary to completely duplicate the text of these rules, since the Code of Federal Regulations is a rules publication as readily available as Minnesota rules.

The proposed rule incorporates by reference any future amendments that EPA might make to the general conformity regulations adopted in this rule, to avoid any inconsistencies that future federal amendments to these regulations would cause between federal and state rules.

Simple incorporation by reference of applicable federal rules also avoids differences in language between federal and state rules, which can cause interpretive problems for regulated parties and state agency personnel in permitting and enforcement actions.

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. § 14,115, subd. 2 (1994), requires the MPCA, 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 for 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 business from any or all requirements of the rule.

The proposed rule will not affect small businesses, as defined in Minn. Stat. § 14.115 (1994). The main impact of the general conformity rule applies to only federal agencies in nonattainment and maintenance areas that either directly fund, or have approval control, for

actions within those areas. Agencies and actions that will be affected by this rule include the Federal Aviation Administration, with airport actions, and the Department of Defense, with military installation closures and realignments.

If these federal regulations apply to any entity that is a small business, the same requirement would apply to a similarly situated small business in every state of the nation, including Minnesota. Since the incorporation of the federal general conformity regulations into state rules does not change the federal regulations, this rulemaking does not impose any additional requirements on small businesses that are not already present as a matter of federal law.

VI. CONSIDERATION OF ECONOMIC FACTORS

In exercising its powers the MPCA is required by Minn. Stat. § 116.07, subd. 6 (1994) to give due consideration to economic factors. The statute provides:

In exercising all its powers, the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

In proposing this rule to incorporate the federal general conformity regulations into state rules, the MPCA has considered economic impacts the proposed rule would have. Since the MPCA is incorporating the federal general conformity regulations into state rules for purposes of compliance with the 1990 Amendments, the state rules proposed in this rulemaking do not impose any additional costs on Minnesota businesses that are not already imposed as a matter of federal law. This rule applies only to federal agencies that either directly or have approval

control for actions located within nonattainment and maintenance areas, therefore, this rule does not have any economic impact on its own.

VII. IMPACTS ON AGRICULTURAL LAND AND FARMING OPERATIONS

Minn. Stat. § 14.11, subd. 2 (1994), requires that if the agency proposing the adoption of a rule determines that the rule may have a direct and substantial adverse impact on agricultural land in the state, the agency shall comply with specified additional requirements. The MPCA, in adopting the federal general conformity regulations into state rules, is not proposing a rule which may have a direct and substantial adverse impact on agricultural lands in the state because these rules apply only to federal agencies that either directly or have approval control for actions located within nonattainment and maintenance areas, and therefore do not directly impact agricultural lands in the state.

Minn. Stat. § 116.07, subd. 4 (1994), requires that if a proposed rule affects farming operations, the MPCA must provide a copy of the proposed rule and a statement of the effect of the proposed rule on farming operations to the Commissioner of Agriculture for review and comment. The MPCA, in adopting the federal general conformity regulations into state rules, is not proposing a rule which would affect farming operations.

VIII. COST TO LOCAL PUBLIC BODIES

Minn. Stat. § 14.11, subd. 1 (1994), requires the MPCA to include a statement of the rules' estimated cost to local public bodies in the notice of intent to adopt rules if the rule would have a total cost of over \$100,000 to all local public bodies in the state in either of the two years immediately following adoption of the rule. This rule applies only to federal actions and would not result in costs to local public bodies.

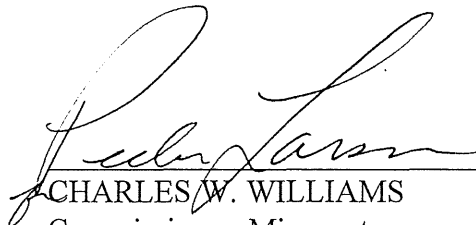
IX. REVIEW BY COMMISSIONER OF TRANSPORTATION

Minn. Stat. § 174.05 (1994), requires the MPCA to inform the Commissioner of Transportation of all rulemakings that concern transportation, and requires the Commissioner of Transportation to prepare a written review of the rules. The adoption of the federal general conformity rule into Minnesota rules do not concern state transportation. EPA's general conformity rule establishes the criteria and procedures governing determination of conformity for all federal actions, except federal highway and transit actions ("transportation conformity"). Transportation conformity requirements are established in a separate federal rulemaking action. The requirements of Minn. Stat. § 174.05 (1994), are therefore not applicable.

X. CONCLUSION

Based on the foregoing, the proposed rules to incorporate the federal general conformity regulations into the state air pollution control rules, attached to this Statement of Need and Reasonableness, are both needed and reasonable.

Dated: March 14, 1995



CHARLES W. WILLIAMS
Commissioner, Minnesota
Pollution Control Agency