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STATE OF MINNESOTA  
POLLUTION CONTROL AGENCY

In the Matter of Proposed  
Rules Relating to Financial  
Assurance for Persons Who  
Manage Solid Waste in an  
Environmentally Inferior  
Manner, Minn. Rules Parts  
7038.0010 to 7038.0100.

STATEMENT OF NEED  
AND REASONABLENESS

I. INTRODUCTION

This Statement of Need and Reasonableness discusses proposed new rules that implement a law that requires persons who manage solid waste in an environmentally inferior manner to indemnify generators of the waste, establish and pay into a trust fund for response and defense costs, and pay an administration fee to the Minnesota Pollution Control Agency (MPCA) Commissioner. The law requiring these rules is in the Act of May 4, 1994, ch. 548, 1994 Minn. Laws 814, to be codified as Minn. Stat. § 115A.47 (1994).

A Notice to Solicit Outside Opinion and Information was published in the State Register on August 29, 1994. The Notice period expired on September 30, 1994. During the Notice period, the MPCA staff also solicited comments on draft proposed rules from the Solid Waste Management Advisory Council (SWMAC) and from a work group of persons from the solid waste and finance sectors. The SWMAC is composed of 20 representatives from the solid waste sector, including government officials, private facility owners, haulers, consultants, and citizens from around the state. Attachment 1 lists SWMAC members and work group members who were sent draft proposed rules for comment.

A work group meeting was held on September 22, 1994, to discuss comments on the draft proposed rules. A revised draft was distributed to work group members on September 27, 1994, to solicit additional comments prior to the close of the public Notice period. Attachment 2 lists persons who attended the work group meeting and who submitted comments on the draft proposed rules. The MPCA staff incorporated most of the changes suggested by work group members. No comments were received from SWMAC members.

II. STATEMENT OF STATUTORY AUTHORITY

The statutory authority to adopt the rules is set forth in Minn. Stat. § 115A.47, subd. 4, which provides: "The Commissioner shall adopt rules to implement this section."

Under this statute the MPCA Commissioner, not the MPCA, was given the statutory authority to adopt the proposed rules. Traditionally, the MPCA has been given the statutory authority to adopt rules. However, for this rulemaking the MPCA Citizens' Board will not take part in the rulemaking process. Therefore, any references in the SONAR to "MPCA" are replaced by "Commissioner."

### III. STATEMENT OF NEED

Minn. Stat. ch. 14 requires the Commissioner to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Commissioner must set forth the reasons for the proposal, and the reasons must not be arbitrary or capricious. More specifically, need has come to mean a problem exists that requires administrative attention, and reasonableness means that the solution proposed by the Commissioner is appropriate. The need for the rules is discussed below.

The proposed rules are needed in order to effectively implement a new law, Minn. Stat. § 115A.47. Although the law is quite specific, certain elements require additional clarification to ensure that persons subject to the law clearly understand how to comply with the law. Minn. Stat. § 115A.47, subd. 4. requires the Commissioner to adopt rules to implement the law.

One element requiring implementation by rule is establishing and certifying a trust fund. Entering into a trust fund requires a trust agreement, which states responsibilities of the parties subject to the trust fund and how the trust fund shall operate. Poorly worded trust agreements could jeopardize the security of the trust fund for its intended purpose: coverage of generators' response and defense costs. The proposed rules provide trust agreement language to ensure that an established trust fund will fulfill the purpose the legislature intended, and minimize administrative costs to the MPCA for review of trust agreement language.

The rules are also necessary to clarify timing requirements, such as when quarterly reports on fund status must be submitted. The rules clarify what waste methods and facility types are regarded as environmentally inferior and what conditions necessitate that a person is subject to the law.

### IV. STATEMENT OF REASONABLENESS

The Commissioner is required by Minn. Stat. ch. 14 to make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Reasonableness is the opposite of arbitrary or capriciousness. It means that there is a rational basis for the Commissioner's proposed action. The reasonableness of the proposed rules is discussed below.

#### A. Reasonableness of the Rules as a Whole

The proposed rules seek to provide clarification of the law only where needed. Because the law governing the proposed rules is quite specific, the rules focus on requirements of the trust fund. The trust fund language is modeled after existing financial assurance trust fund rules for municipal solid waste management land disposal facilities that have been in effect since November 15, 1988. The MPCA staff's experience in administering the financial assurance trust fund rules has proven successful. To our knowledge, no facility owners or operators has had difficulty in arranging for a trust fund or establishing a trust agreement that is worded in accordance with the rules. Financial institutions also find the trust agreement language clearly defines the roles and responsibilities of all parties to the agreement and provides adequate protection to the trustee from potential legal repercussions.

Report requirements and time requirements in the proposed rules were discussed with a variety of persons from the solid waste sector and banking sector and determined to provide adequate time for meeting rule requirements. The MPCA staff has involved persons with a wide range of expertise in the drafting of the proposed rule to help ensure reasonableness of the rules.

**B. Reasonableness of Individual Rules**

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

**Minn. Rules pt. 7038.0010 SCOPE.**

This part identifies who the rules apply to based on the law. The rules apply to persons who arrange for management of solid waste in an environmentally inferior manner. The term "arrange for management" is defined in subdivision 2 (b) of the statute to cover persons who know the destination of waste is lower on the list of preferred waste management methods under Minn. Stat. § 115A.02 than the waste management method chosen by a county, who have the ability to redirect and ensure the delivery of the waste to a facility that is equal to or higher on the list of preferred waste management methods than the method chosen by the county, but fail to do so. This part clarifies that the rules, consistent with the intent of the law (Minn. Stat. 115A.47), do not apply to persons who manage solid waste at demolition and industrial land disposal facilities. It is reasonable to define in the scope to whom the rules apply.

**Part 7038.0020 DEFINITIONS.**

Subpart 1, "scope," limits the application of specialized terms used in these rules to the proposed rules. Most specialized terms are previously defined in Minn. Stat. §§ 115A.03, 115B.02, and 115A.47 and Minn. Rules pt. 7035.0300. The reasonableness of specific definitions is discussed below. For the purposes of clarity, consistency, and ease of enforcement, it is reasonable to provide specific definitions.

Subpart 2 defines "defense costs" to mean legal actions under the federal Comprehensive Environmental Response, Compensation and Liability Act, United States Code, title 42 section 9601 to 9675. Although the term is not defined under the law, the definition that arises from the concept of providing for defense costs is central to the law at subdivision 1(7). The definition provided in the rules is derived directly from the law. To avoid confusion, it was deemed reasonable to define the term "defense costs" within the rules.

Subpart 3 defines "environmentally inferior" to mean a waste management method that is lower on the list of preferred waste management methods in Minn. Stat. § 115A.02 than the waste management method identified in: a) the county plan or county master plan and implemented through either a: 1. solid waste ordinance, 2. designation ordinance, 3. contract (hauler contract), or 4. other document (agreement, order, resolution, etc.); or b) mandated by any state law, including Minn. Stat. §§ 115A.415, 473.848, and 473.849. The environmentally inferior concept applies equally well to "waste management method" and "waste management facility."

The rule definition of "environmentally inferior" varies slightly from the definition within the law. The definition in the law limits the types of documents that a county may use to implement and specify their chosen waste management method. In practice, counties utilize contracts and other legal documents, as well as ordinances, to choose a solid waste management method. In this instance, the Commissioner believes it is best to adopt a definition of "environmentally inferior" that is consistent with both the intent of the law and the solid waste management practices of counties.

Subpart 4 defines "person" as an individual who fits the definition of Minn. Stat. § 116.06 and who arranges for management of solid waste in an environmentally inferior manner. This term is defined for ease of understanding what is meant by "person."

Subpart 5 defines "response" as having the meaning given in Minn. Stat. § 115B.02, subdivision 18, or United States Code, title 42, section 9601(25). The legislative findings in subdivision 1 of the law mentions what the Legislature intended by the term response and response costs. The definitions in the rules derive directly from the law in subdivision 3(a)(1). It is reasonable to define response and response costs in the rules for purpose of clarity.

Subdivision 6 defines "response costs" as the costs that may be assessed against a generator for response to a release from a municipal solid waste land disposal facility of a hazardous substance or pollutant or contaminant. Again, this definition is directly derived from subdivision 3(a)(1) of the law. It is reasonable to define this term for purposes of clarity.

#### **Part 7038.0030 TRUST FUND.**

This part defines who must establish a trust fund and then provides a list of trust fund conditions; items A to G. These requirements derive directly from the solid waste management financial assurance rules and the MPCA staff's experience in enforcing them. This part is reasonable because it clarifies what is required of a person who manages waste in an environmentally inferior manner and assures that trusts are established in a manner that guarantees their security and the availability of money when needed for response and defense costs.

Item A requires a person to send the Commissioner an originally signed duplicate of the trust agreement and a certificate of acknowledgment within 60 days after arranging for management of solid waste in an environmentally inferior manner. In the event that a person managed waste in an environmentally inferior manner prior to the effective date of these rules and after February 1, 1995, and established a trust agreement or certification of acknowledgment as required by law, but which is not in accordance with these rules, the person is required to send to the Commissioner an originally-signed duplicate of the trust agreement and a certificate of acknowledgment within 60 days after the effective date of these rules. Persons who manage waste in an environmentally inferior manner after February 1, 1995, regardless of whether the rules are adopted by this date, must establish a trust fund or are in violation of the law (Minn. Stat. § 115A. 47). The 60 day time requirement provides a person with reasonable notice of the need to establish a trust fund in accordance with the rules for

persons who currently, or in the future, will arrange for management of solid waste in an environmentally inferior manner.

Item B limits the choice of trustee to financial institutions that have the authority to administer trust agreements. This requirement is restated to limit persons from setting up trust agreements with financial companies that cannot legally administer trusts. It is reasonable to restate this basic requirement rather than refer to the law to avoid potential problems in persons establishing legally enforceable trust funds.

Item C requires a person to adopt wording identical to part 7038.0080 for their trust agreement and certification of acknowledgment. This requirement reasonably limits the kinds of trust arrangements persons can use thus avoiding administrative costs for all involved parties from drafting specialized trust and certification documents. It also helps ensure equitable treatment of all persons.

Item D requires a person to make monthly payments into the trust fund in the amount(s) specified under Minn. Stat. § 115A.47. The requirement that trust fund payments be made monthly is restated from the law. This condition is restated rather than reference to the law for ease of persons complying with the rules and to avoid confusion. The amount of a person's trust fund payment depends on whether the person manages waste at an inferior or a superior disposal facility. Minn. Stat. § 115A.47 requires a person who manages waste in an environmentally inferior manner to pay \$6.45 per cubic yard, or \$21.25 per ton of waste delivered to an inferior disposal facility, and \$1.38 per cubic yard, or \$4.60 per ton of waste delivered to a superior disposal facility.

The item also specifies the conditions for the first payment into a trust fund. The law is effective by its terms no later than February 1, 1995. The rule provides for the likely circumstances where persons who are subject to the law must set aside money required by the law but the mechanisms for payment have not been identified. The rules state that the first payment must cover waste managed in an environmentally inferior manner after February 1, 1995, or after the effective date of these rules, whichever date is sooner. In the event that the rules become effective after February 1, 1995, a person has 60 days after the effective date of the rules to transfer fund deposits made between February 1 and the effective date of the rules into a trust fund that complies with this part.

Regarding the payment schedule, the rules require that all subsequent payments be made by the 20th day of the month for waste managed in an environmentally inferior manner during the prior month. The law requires that trust fund payments be made monthly. Setting an amount of time allows parties to the trust agreement to know time frames in which payments should be made. Interest earned on trust fund reserves should accrue within the fund to offset inflation and to allow payment of the trustee's administrative costs. Revenues dedicated to response and defense costs are considered business expenses by both federal and state tax authorities.

If a person misses a scheduled trust fund payment, they shall notify the trustee and Commissioner by certified mail within 20 days following the prior month and report whether they are temporarily or permanently not making trust fund payments as a result of waste delivered to environmentally inferior facilities in any given month. In addition, the person shall transfer all trust reserves required under the law into the newly established trust fund.

Item E relates to missing or late trust fund payments and notices of interrupted payment. If a person misses a scheduled trust fund payment and does not send a notice of interrupted payment within the 20-day period, the

trustee has to notify both the person and the Commissioner by certified mail within ten days. This notice requirement is customary and used under the solid waste financial assurance rules that govern trust funds (Minn. Rules pt. 7035.2705, item K.). The certified mail requirement is needed to assure that a late payment notice is not lost within the mail. Representatives of trust companies have said they can easily comply with such reporting requirements.

Item F describes how money in the trust fund is to be used. The first part of this item specifies that money in the trust fund can only be used to reimburse a person for response and defense costs incurred. This means that money cannot be released as an advance for upcoming expenses. This provision is consistent with the administration of trust funds under the solid waste financial assurance rules, Minn. Rules pts. 7035.2705. In the course of adopting and drafting those rules, some reviewers said that this provision will make it difficult for facility owners and operators to find contractors to do the work needed. The MPCA determined that this criticism had little basis in fact. Contractors are not ordinarily paid in advance. They usually receive regular payments for orderly progress on a specified work schedule or they are paid after completion of work activities directly from the trust fund. The reason for reserving reimbursement until after the activity has occurred is to provide a powerful incentive for persons and contractors to do a good job and to help control costs of a project over the long run. This requirement may increase cost estimates by an amount that represents the short-term (90-day) opportunity cost incurred while the contractor, attorney, or person waits for reimbursement. This amount will not likely grow to any large fraction of total projected costs. The savings in reduced risk justify the nominal cost increases. Risk decreases because the trust funds withheld form a powerful incentive for persons and contractors to do a good job.

Advance payment would also add substantial risk of trust fund shortfalls if any project work is so poorly done that it either incurs added cost or has to be done over. This condition would mean that the portion of the trust fund advanced would be lost. The trust would then be underfunded and the shortfall would likely be permanent, leaving generators potentially unprotected from liability and defense costs. Reserving trust fund resources for reimbursement is a prudent and reasonable measure.

This item allows the Commissioner up to 90 days to approve the release of funds. This time is allowed so that the Commissioner can review the requests for reimbursement and conduct any confirmation work that may be needed. This 90-day review period is consistent with the review time allowed in the solid waste financial assurance rules (Minn. Rules pt. 7035.2705, item L.). The MPCA staff found the 90-day period necessary in some circumstances. However, in most instances the review period is shorter.

When the Commissioner is satisfied that the reimbursement request is proper, the Commissioner will order the trustee to release the funds to the person. Requests for reimbursement and the record of work completed associated with the expense must be carefully reviewed to make sure that expenses are appropriate. The Commissioner will provide reasonable explanation for any withholding of reimbursements within the 90-day period. This provision reasonably gives persons timely and appropriate notice if they are to be refused reimbursement from the trust fund.

Item G describes the conditions under which the Commissioner must allow the trust agreement to end. The trust agreement may end when the fund is depleted or when the environmentally inferior facility(ies) for which the trust has been established has been certified closed for 30 years. This condition is restated from the law at subdivision 3(e). It is reasonable to restate the condition of trust agreement termination in the rules to avoid confusion.

**Part 7038.0040 RULE ENFORCEMENT.**

A person has 60 days after the date of a notice letter from the Commissioner to make up missed trust fund payments or administration fee payments. This period allows the person a reasonable time in which to correct any errors. The person may not deliver waste to an environmentally inferior facility during the period that begins when the trustee sends notice of nonpayment to the person and the Commissioner and ends when the 60-day grace period is over. This requirement gives the person an incentive to make up the missing payment. The orderly development of the trust fund is important enough to merit strong disincentives to breaking the pattern of regular payments.

If the person does not make the missing payment within the 60-day grace period, the MPCA may resort to enforcement actions provided for generally under Minn. Stat. chs. 115, 115A, 115B, and 116, and specifically under Minn. Stat. § 115A.47, subd. 6.

**Part 7038.0050 USE OF TRUST FUND FOR MULTIPLE FACILITIES.**

This part implements the provision of the law which allows persons who arrange for managing solid waste at more than one environmentally inferior facility to establish a single trust fund to cover all sites (Minn. Stat. § 115A.47, subd. 3(c)). The law requires separate accounting for each facility covered by the trust fund. The rules require the person to identify the environmentally inferior facilities covered by the trust and the extent of coverage based on the amount of waste going to each facility. This requirement limits the amount that the Commissioner may authorize for reimbursement to the amount that has been reserved for a particular site. Trust fund reserves for one facility may not be used for another facility.

**Part 7038.0060 RELEASE OF PERSON FROM TRUST FUND REQUIREMENTS.**

This part sets the conditions for the release from financial capability for a person who managed waste in an environmentally inferior manner. This part deals with the person's release from financial capability for response and defense costs. A person must provide proof that a facility has been certified closed in accordance with applicable state rule and permit requirements. The person must submit certification documents to the Commissioner. The certification must clearly establish responsibility for the work done.

The Commissioner has 90 days in which to send the persons a written release from the financial capability for response or defense costs associated with the facility. This 90-day period has the same function as the 90-day review period allowed for reimbursement approvals. The MPCA staff needs this time to make sure that the

certifications are accurate. This requirement provides the Commissioner with adequate time to make sure that the site has been properly closed.

The rules do not require the Commissioner to release the person from financial capability. If the Commissioner has reason to believe that the site has not been closed in accordance with applicable state or federal rules or permit conditions, the Commissioner can continue to require that the person provide financial capability for response.

#### **Part 7038.0070 INCAPACITY OF PERSONS, GUARANTORS, OR FINANCIAL INSTITUTIONS.**

This part describes the person's obligation if bankruptcy occurs. The MPCA, as regulator and beneficiary of the trust fund, will have important interests to maintain if either the person or one of its financial intermediaries fails.

Bankruptcies occur because business firms cannot pay their debts. Bankruptcy proceedings are usually referred to according to the chapter of the federal Bankruptcy Code under which they are initiated. Chapter 7 proceedings involve complete liquidation of a firm's assets. Creditors in these cases are reimbursed from the distribution of the bankrupt's property. Chapter 11 proceedings involve debt reorganization, in which the bankrupt presents creditors and the Court with a plan that will allow repayment of some or all of the debt out of future earnings.

The standing of State environmental agencies in bankruptcy proceedings varies according to the circumstances. The Bankruptcy Code is designed to give debtors a fresh start, while at the same time protecting the interest of creditors. This goal can conflict strongly with environmental protection goals. If a person begins bankruptcy proceedings, the MPCA should be notified so that the MPCA can take an active part.

Subpart 1. Notification of bankruptcy. The person must notify the Commissioner within ten days after bankruptcy proceedings have begun in which the person is the bankrupt. The notice has to be sent by certified mail. This provides the MPCA with reasonable notice of a legal proceeding.

Subpart 2. Incapacity of financial institutions. If the financial intermediary chosen by the person becomes bankrupt or loses authority to conduct business, the person is considered to be without financial capability. The person in such cases will have 60 days to find another intermediary and execute a trust fund in accordance with the rules. This provision reasonably ensures that response and defense coverage will not lapse. This provision is standard with rules governing solid waste financial assurance.

#### **Part 7038.0080 TRUST AGREEMENT.**

This part gives persons the language they must use for a trust fund. The MPCA has had representatives of various trustees review the form for consistency with the trade and acceptability within the market. This basic form has worked acceptably in the solid waste management market since 1988. The rule instructs persons to include appropriate language for descriptive terms (names, title, etc.) that are written between brackets in the model. This provision tells persons how to adapt the instrument to their individual needs. This part also states that a trust

agreement which includes a certification of acknowledgment can be obtained from the MPCA. This condition is included to reduce a person's compliance costs and to reduce administration costs for the MPCA by assuring that the form is consistent with the wording of this part.

The introductory section of the trust agreement provides basic information that is needed to make the contract enforceable. The instrument is dated and all parties to the contract are named and described. The person who will make deposits into the fund is referred to as the grantor; the person's chosen trustee is referred to as simply the trustee, and the MPCA or its successor is referred to as the beneficiary. The beneficiary is not a party to the agreement.

The introductory section also describes the conditions that have caused the grantor and the trustee to enter into the contract. These conditions are:

- a) the Commissioner's adoption of rules requiring the person to demonstrate the ability to meet response and defense costs;
- b) the person's choice of trustee; and
- c) the trustee's willingness to enter into the contract.

After the introduction, named sections describe the specific conditions of the contract.

Section 1. Definitions. This section describes the parties to the contract in the words they are referred to in the body of the agreement. The person is defined as grantor and the trustee is defined as trustee. The MPCA is also defined as beneficiary.

The parties named in a trust must be distinct. That is, a grantor cannot serve also as trustee and grantors and trustees cannot be beneficiaries. The grantor must receive surplus funds when the trust dissolves. This is a provision of the rules. However, the grantor cannot benefit from the trust fund while the trust fund is active.

The Agency's status as beneficiary has very specific constraints. The agency's control of funds extends only to approving requests to release funds for reimbursement. Normally, proper expenses incurred at the environmentally inferior facility will be reimbursed from the trust fund after the person satisfies the Commissioner that work at the site was done properly and the expenses were appropriate. The Agency will never receive any money from the trust fund for its own use.

The Agency's beneficiary status and, indeed, the trust fund mechanism itself are needed because persons may prove unable or unwilling to pay for required work. The designation of the Agency as beneficiary enables the Agency to accomplish the person's obligation under law in the event they fail to do so.

Section 2. Identification of Facilities. This section further defines the scope of the trust agreement. Detailed specification serves all interests because it clarifies the rights and duties of all parties. An attachment (Schedule A) requires that a contact person for the grantor and the beneficiary be listed, plus their mailing address, and phone number for the purpose of knowing who should receive quarterly reports or notices of missed payments. Schedule A also requires a detailed listing of the environmentally inferior or superior disposal facility or facilities covered by the agreement.

Section 3. Establishment of Trust Fund. This section describes how the trust fund is to be set up and developed. The person and the trustee agree that they do not want any third party to have access to the fund except as specified in the contract. This provision is written to provide protection for the fund in the event that either the person or the trustee fails. The wording of the grantor's and trustee's intent also provides persons with some of the protection that they indicate are needed. This phrase in the contract can be considered as a binding limitation on the Agency's use of reserved funds. Later parts of the contract specify the Agency's role in this agreement. The language on intent prohibits the Agency from using reserved funds unless the situation conforms to circumstances described in the contract.

An attachment required by this section (Schedule B) will describe in detail the initial financing and scheduled development of the trust fund. The fund is described as consisting of monthly cash deposits plus earnings and interest on earnings less any payments or distributions made by the trustee. This provision makes it clear to all parties how the fund's balances will be determined.

A final provision specifically relieves the trustee of duties which are properly exercised by the Agency. These duties consist of following the person's compliance with the rules, e.g., checking to see that fund balances are in accordance with the law and that payment rates are correct. These duties properly belong with the Agency, which has the data and experience needed to accomplish the tasks. It would be unreasonable to require trustees to do work that the Agency can and should do.

Section 4. Payment for Response and Defense Costs. This section describes the conditions under which the trustee can release funds to the person. The trustee will only release funds in response to a written order from the Commissioner. The uses of these released funds are limited to payment for response and defense costs. This language provides owners, operators, and the Agency with assurance that the funds will not be spent for purposes other than those specified in the law.

The Commissioner is required to specify who is to receive reimbursement. The grantor will always be the one to receive reimbursement from the trust fund.

Section 5. Payments Comprising the Trust Fund. This section restricts payments into the fund to cash as required by law.

Section 6. Trustee Management. The introduction to this section describes legal constraints usually referred to as the prudent man rule. This provision limits the investment strategies that trustees may use. The limitations favor conservative investments. Such constraints are proper and reasonable because neither growth nor income is an appropriate goal for these trust funds. Instead, the trustee's goal should derive from the facility owner's and operator's need to make sure that all the funds set aside for long-term care will be available when they are needed. This means the trustee should not invest funds held in trust on risky ventures. Conservative investments and management are more likely to maintain the integrity of reserved funds.

Specific prohibitions and authorizations are added to encourage fund conservation.

a. The trustee is not allowed to accept securities or notes from the grantor as payments into the fund. This would amount to accepting a liability rather than an asset. The fund would then have a promise from the grantor to pay the value of the note or security.

b. Trustees are allowed to place funds in checking accounts (demand deposits) and savings accounts (time deposits). Trustees may need to do this from time to time so that they can make business transactions. However, these deposits are limited to the amount insured by the Federal Deposit Insurance Corporation (FDIC). The FDIC insures deposits from a single depositor in a single bank up to \$100,000. This limit is consistent with other conservative restrictions placed on the trustee's management of funds.

c. Trustees are allowed to hold cash from the fund for short periods of time for the purpose of making investments or disbursements. Trustees are not liable for interest earnings in these circumstances. Thus, this provision is reasonable because it gives trustees enough discretion to carry out routine transactions with ease.

Section 7. Commingling and Investment. This section allows trustees to add assets developed by the grantor to assets from other trusts to form larger, collective trusts. Section 6 constrains the extent of activities within the limits of the prudent man rule. This section enables trustees to take advantage of scale economies in investment. Brokerage fees on investment transactions vary with the size of the transaction. Large purchases or sales incur smaller fees, not in total, but on a unit basis. These savings can reduce administrative charges, which will allow more earnings to be retained in the trust funds. There are enough trustees in the region to make it reasonably certain that no single trustee will be able to pocket such savings as windfall profits. Trustees can get other advantages from increasing their scale of operations. Larger trust funds enable trust managers to diversify investments in ways that minimize risk and maximize returns. The results of this optimization process improve as the size of the fund invested grows.

This section thus reasonably gives trustees the ability to better manage trust funds. The flexibility granted to trustees under this section helps to lower administrative costs, decrease risk and increase returns.

Section 8. Express Powers of the Trustee. This section provides further specification of the actions and judgments conferred on the trustee. This section does not limit any of the other provisions of this section that empower the trustee to make normal market transactions with the properties held in trust. This section also releases the grantor from any obligation to oversee the daily operations of the trust. This provision reasonably defines the responsibilities of the trustee with respect to routine financial management.

Section 9. Taxes and Expenses. This section makes provision for the ordinary expenses incurred through the information and operation of the trust fund. Taxes assessed to the trust fund are to be paid from the trust fund.

This provision also makes it clear that the trustee should recover all reasonable administrative costs from the fund, if not paid by the grantor. The Agency expects that trustees will be paid directly from the fund. The expenses described are properly assessed against the fund, since it is the fund that incurs the expense.

Section 10. Quarterly Valuation. This provision requires the trustee to make quarterly reports on the financial condition of the trust fund. The trustee will send these reports to the Grantor and beneficiary identified under Section 2 in the attached Schedule A to the Agreement, who will both need to know how the fund is doing to

see whether it will be large enough to meet the required response and defense costs. The trustee is required to use current market data in evaluating securities. This provision ensures that decisions made by the Agency and the person will be based on reasonably current data.

The grantor is given 90 days in which to contest the trustee's valuations. If the grantor does not send a written objection to the trustee within 90 days, it is understood that the trustee agrees with the evaluation. This provision makes the process of fund evaluation more manageable for both the person and the trustee. Both parties know what they must do and when they must do it.

Section 11. Advice of Counsel. This provision makes it clear that the trustee has an option to seek independent legal advice. This provision is made more for the information of the grantor than to protect any right of the trustee. The grantor is made aware that the trustee may seek outside advice on interpretations of the duties and responsibilities defined in the agreement.

If the trustee acts on independent legal advice, the trustee is protected to the fullest extent allowed under the law. This provision makes the trustee's legal rights explicit within the agreement.

Section 12. Trustee Compensation. This provision informs facility owners and operators that the trustee is entitled to payment for service. It also places a limit of reasonableness on compensation. This is another provision that makes explicit ordinary rights and duties. It helps to make sure that all parties know their commitment when entering into the agreement.

Section 13. Successor Trustee. This section describes how one trustee resigns in favor of another trustee. The process set up is deliberate and orderly. No transfer may occur until a successor trustee accepts the appointment. Transfers are required to include all currently-held funds.

There may be occasions in which a person will take no action when a trustee presents a resignation notice. The agreement makes explicit provision for such cases. The trustee is allowed under these circumstances to request that a court either assign a successor trustee or provide the current trustee with other instructions. This provision gives all parties reasonable assurance that this situation can be resolved and that funds will continue to be available for long-term care even if the current trustee wants to be released from the contract.

The Commissioner, the person, and the current trustee will receive certified notice of the date on which the successor trustee will assume responsibility for the trust. The successor trustee must send these notices at least ten days before the effective date. This provision ensures that there will be no gap in the coverage that the trust funds provide for qualified expenses.

A final provision specifies that the fund will pay for transaction costs incurred in transfers from one trustee to another. This provision is included to make sure that all parties understand that transfer costs are considered as ordinary costs reimbursable in the same way as taxes and other expenses.

Section 14. Instructions to the Trustee. This section limits the trustee's duties and responsibilities to those written either in the trust agreement or transmitted by the appropriate authority. This provision gives the trustee protection from expectations that the trustee respond to informal or unspecified instructions. The trustee's main responsibilities will be financial management and disbursement. These responsibilities are important enough that

there should be little or no room for error in the interpretation of instructions. This eliminates the errors that may arise in following verbal instructions.

Section 15. Notice of Nonpayment. This provision requires the trustee to notify the grantor and Commissioner if the grantor misses a scheduled payment and if a notice has not been sent from the grantor informing the Trustee and beneficiary of a delay in the payment schedule. The Commissioner will need the trustee's notice to determine whether the grantor is complying with the rule. If the grantor misses a payment, the MPCA may invoke enforcement measures as provided for under Minn. Stat. § 115A.47, subd. 6. Discussions with trust company officials indicate that they believe this is a reasonable requirement and will not impose a burden on trustees.

Section 16. Amendment of Agreement. This section makes provision for changes to be made in the agreement. All the affected parties must agree before changes can be made. Although the Commissioner does not sign the original agreement, the Commissioner must approve amendments to the agreement to ensure compliance with applicable law. This requirement reasonably protects the interests of all parties.

Section 17. Irrevocability and Termination. This provision requires that all affected parties must agree before the trust can be ended. There is a further provision that any surplus funds be distributed to the person or any successors or heirs of the person. This requirement reasonably protects the interests of all parties.

Section 18. Immunity and Indemnification. This section protects the trustee from liability arising from nonnegligent acts. This is further notice that the trustee's responsibilities do not extend beyond financial management and reporting. This gives protection to the trustee, whose proper role is limited to holding and protecting financial assets. This provision does not exempt the trustee from liability for negligent acts.

Section 19. Choice of Law. This provision requires that the trust agreement must be interpreted according to Minnesota law. The requirement reasonably provides all parties with a specific legal reference when needed to understand and manage the trust.

Section 20. Interpretation. This section places limits on the understanding of the language of the agreement. Singular and plural words included in the agreement include each other. This means, for example, that if there are two grantors to the trust, the provisions of the trust apply equally to both even though the agreement refers consistently to the grantor. This provision also makes it clear that section headings are not to be understood as substantive elements of the agreement. This section clarifies linguistic matters that could lead to confusion in the interpretation of the agreement.

Summary language, provision for appropriate signatures, and the certification of acknowledgment follow section 20 of the agreement. A reference to this rule is required as well as signatures of the parties to the agreement and completion of the certification of acknowledgment.

The proposed rules provide language required in the certification of acknowledgment that must accompany the copies of the trust agreement which the person sends to the Commissioner. This provision allows the MPCA to determine that the trust agreement is official and enforceable. This provision is standard for financial assurance trust funds (Minn. Rules pt 7035.2805, subp. 2.).

**Part 7038.0090 ADMINISTRATION FEE.**

A person required to make payments to a trust fund shall also pay a fee of \$0.30 per cubic yard or \$1.00 per ton of waste delivered to an environmentally inferior facility. The payment shall be addressed to the State of Minnesota and sent to the MPCA's Environmentally Inferior Facility Liaison. Proceeds of the fee will be deposited in the Minnesota Environmental Fund and annually appropriated by the legislature to the Commissioner for implementing the rules. This provision is restated from the law for the benefit of persons subject to the rules.

Fee payments are non refundable. This provision is standard for fee rules. Processing refund requests requires additional staff time which is already pressed to the limit. Since resources are limited and it is believed that reimbursements will not be needed, this provision is stated for the clarity and benefit of persons who must comply with this rule.

The timing of the administrative fee payments is consistent with the timing of trust fund deposits and consistent with coverage of the same amount of waste delivered to an environmentally inferior facility. Twenty days provides a reasonable amount of time for a person to identify the amount of waste they delivered to an environmentally inferior facility and to make appropriate trust fund and administration fee payments. This amount of time also allows the person to identify within their quarterly report the amount of fee payments that were made for the last month of the quarter.

The first administration fee payment for persons who manage waste in an environmentally inferior manner after February 1, 1995, and prior to the effective date of these rules (if the rules are adopted after February 1, 1995) must also cover the amount of waste delivered to an environmentally inferior facility between February 1, 1995, and the effective date of the rules. This provision allows persons adequate time to make their first administration fee payment.

**Part 7038.0100 QUARTERLY REPORT REQUIREMENT.**

This part identifies report requirements and their due dates for persons who arrange for managing waste at environmentally inferior facilities. This provision is primarily restated from the law governing the rules and is provided for the clarification and benefit of persons subject to the law.

The MPCA staff selected quarters that correspond to calendar quarters. This approach was believed to be most reasonable and easy to comply with by MPCA staff and work group members.

Reports are due to the Commissioner on the last day of the month following each calendar quarter. For example, the report covering the months of January, February, and March would be due by April 30. A month was considered a reasonable amount of time to compile report requirements for an entire quarter.

The content of the report is limited to information specified by law and any additional information that may be necessary for the Commissioner to monitor and credit the trust fund or need for payment from it.

## **V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING**

Minn. Stat. § section 14.115, subd. 2, requires the Commissioner, when proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

The proposed rules will affect small businesses. The Commissioner has considered the above-listed methods for reducing the impacts of the rule on small businesses and has determined that in order to protect the liability of generators and comply with the law no exemptions will be made for small businesses.

## **VI. CONSIDERATION OF ECONOMIC FACTORS**

In exercising its powers, the Commissioner is required by Minn. Stat. § 116.07, subdivision 6, 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 these rules, the Commissioner has given due consideration to available information as to any economic impacts the proposed rules would have. Since the law will be effective regardless of when the rules are adopted, the Commissioner has determined that the economic impact of the rules is limited to the costs of establishing a trust fund. The costs to put in place a trust fund in accordance with the proposed rules is negligible. The proposed rules will have no significant effect on the economic factors listed in Minn. Stat. § 116.07, subd. 6.

## **VII. IMPACT ON AGRICULTURAL LANDS AND FARMING OPERATIONS**

Minn. Stat. § 14.11, subd. 2, requires that if the agency proposing 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 proposed rules will not have an impact on agricultural land in the state.

Minn. Stat. § 116.07, subd. 4, requires that if a proposed rule affects farming operations, the Commissioner 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 proposed rules do not have an impact on farming operations in Minnesota.

#### VIII. COST TO LOCAL PUBLIC BODIES

Minn. Stat. § 14.11, subd. 1, requires the Commissioner to include in the notice of intent to adopt rules, a statement of the rule's estimated costs to local public bodies if the total cost of complying with the rule exceeds \$100,000 for all local public bodies in the state in either of the two years immediately following adoption of the rule. The proposed rules may have some financial impact on cities and townships that arrange for delivery of waste to environmentally inferior facilities. However, the financial impact is expected to be considerably less than \$100,000 during the two years after the effective date of the rules.

#### IX. REVIEW BY COMMISSIONER OF TRANSPORTATION

Minn. Stat. § 174.05 requires the MPCA to inform the Commissioner of Transportation of all rulemakings pursuant to Minn. Stat. § 116.07 that concern transportation, and requires the Commissioner of Transportation to prepare a written review of the rules. The proposed rules do not rely on section 116.07. Even if they did, the proposed rules may reduce long distance hauling of waste, which would reduce air emissions and gasoline usage. However, this is purely speculation and cannot be quantified or confirmed. Furthermore, the law will be implemented even without the rules; therefore, the rules place no additional burden on transportation in the state. For all practical purposes, the MPCA staff believes the law and rules will not impact transportation in Minnesota.

#### X. LIST OF WITNESSES AND ATTACHMENTS

##### A. Witnesses

In support of the need for and reasonableness of the proposed rules, the following witnesses will testify at the rulemaking hearing:

1. Ms. Cristine Leavitt will testify on the general need for and reasonableness of the proposed rules.
2. Ms. Julie Ketchum will testify on some portions of the need for and reasonableness of the rules and on the history of the legislation, if necessary.
3. Ms. Cathy Berg Moeger will testify on issues regarding the background of the law, if needed.

B. Attachments

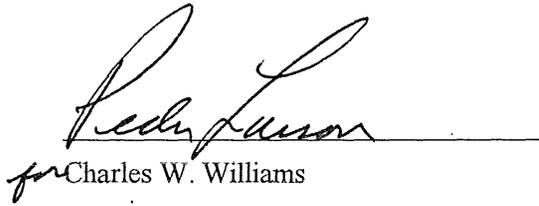
In support of the need for and reasonableness of the proposed rules, the following attachments will be entered into the hearing record by the Agency:

<u>Attachment No.</u>	<u>Document</u>
1.	Minn. Stat. section 115A.47
2.	Listing of SWMAC members and Work Group Invitees
3.	Listing of Persons Outside of the MPCA who attended Rule Work Group Meeting and Persons Who Commented on Draft Proposed Rules

**XI. CONCLUSION**

Based on the foregoing, the proposed rules Minnesota Rules parts 7038.0010 to 7038.0100 are both needed and reasonable.

Dated: November 4, 1994

  
for Charles W. Williams  
Commissioner

This statement of need and reasonableness can be made available in other formats, including Braille, large print and audio tape. TDD: (612) 297-5353 or 1-800-627-3529.

