

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules of
the Pollution Control Agency Governing
Subsurface Sewage Treatment
Systems, Minnesota Rules Chapters
7080, 7081, 7082, and 7083

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Richard C. Luis conducted hearings concerning the above rules on the evening of August 2, 2010, and the morning of August 3, 2010, at the Minnesota Pollution Control Agency (MPCA or Agency), 520 Lafayette Road North, Saint Paul, Minnesota. Each session featured video conference links to MPCA regional offices in Brainerd, Duluth, Marshall, Rochester, Detroit Lakes, Willmar, and Mankato, Minnesota. The hearings continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the MPCA.

Lawrence Pry, Assistant Attorney General, appeared at this rule hearing on behalf of the MPCA. The members of the Agency's hearing panel were William Priebe, MPCA Engineer; Gretchen Sabel, MPCA SSTS Coordinator; Mark Wespetal, MPCA Staff Hydrologist; and Carol Nankivel, MPCA Rulemaking Coordinator. Over the course of the two hearings nine members of the public signed the hearing register in St. Paul, three in Brainerd, three in Duluth, one in Rochester, ten in Detroit Lakes, and one in Willmar. No members of the public appeared at the Marshall and Mankato locations.

¹ Minn. Stat. §§ 14.131 through 14.20 (2010).

Twelve interested persons spoke at the Monday evening hearing, and seven spoke at the Tuesday morning hearing.

The MPCA received many written comments on the proposed rules before the hearing. After the hearing ended, the record remained open until August 23, 2010, to allow interested persons and the MPCA an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the MPCA the opportunity to file a written response to the comments submitted. The OAH hearing record closed for all purposes on August 30, 2010. All of the comments received were read and considered.

SUMMARY OF CONCLUSIONS

The Agency has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are necessary and reasonable.

Based on the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking proceeding concerns proposed amendments to the rules governing Minnesota's subsurface sewage treatment systems (SSTS). Treatment of sewage through SSTS is very common in Minnesota. An estimated 500,000 Minnesota households rely on SSTS for sewage treatment and disposal. All 87 Minnesota counties and many other local units of government are involved in the implementation of the SSTS rules. Additionally, more than 3,000 individuals hold SSTS Certifications through the MPCA's programs.²

2. The SSTS rules govern the location, design, installation, use, maintenance, and abandonment of SSTS and seek to prevent the discharge of inadequately treated sewage into surface and groundwater, and thereby safeguard the public's health, safety and welfare. The rules are segmented into four subject-specific chapters: Minnesota Rules, Chapters 7080, 7081, 7082, and 7083. Chapter 7080 provides standards and criteria for the location, design, installation, use, maintenance, and closure of individual subsurface sewage treatment systems (ISTS). Chapter 7081 contains specifications for midsized subsurface sewage treatment systems (MSTS) which serve multiple dwellings. Chapter 7082 contains ordinance and administrative requirements for local units of government that administer SSTS programs. Chapter 7083 contains a licensing program for SSTS professionals and a technology review program.

3. The SSTS rules were originally promulgated in 1996, and underwent major revisions in a 2007 rulemaking process. In a Report dated August 15, 2007, Administrative Law Judge Eric Lipman approved the proposed amendments and those

² SONAR at 6.

rule revisions became effective February 4, 2008. These rules included a provision requiring counties to amend their ordinances to incorporate the new SSTS rules by February 4, 2010. This requirement mirrored the statutory requirement in Minn. Stat. § 115.55, subd. 2, which states that, “All counties must adopt ordinances that comply with revisions to the subsurface sewage treatment system rules within two years of the final adoption by the MPCA.”

4. During the months following February 4, 2008, the MPCA provided resources to assist counties and other local units of government in understanding the rule revisions and making the required changes to the SSTS ordinances. The MPCA scheduled a series of meetings with MPCA staff and local officials across the state where the content of the new rules was discussed in detail. Representatives of all 87 counties attended these meetings. In addition, the MPCA provided financial assistance through a grant to the Association of Minnesota Counties (AMC) to develop a model SSTS ordinance, and worked with volunteers from the statewide SSTS Advisory Committee to develop a set of recommendations for a model SSTS program.³

5. As the February 4, 2010, deadline for local ordinance amendment grew closer, the AMC approached the MPCA and requested that the counties be given more time to amend their ordinances. The MPCA explained that the deadline was set by statute and that only legislative action could extend the deadline. The AMC worked with the legislature and was successful in obtaining an extension of the deadline. Pursuant to 2010 Minn. Laws ch. 361 § 73, counties were permitted to wait until February 4, 2012, to adopt ordinances to comply with the February 4, 2008, revisions to the SSTS rules.⁴ The session law also required that the MPCA adopt the final amendments to the February 4, 2008, rules by April 4, 2011.⁵

6. The counties that have already adopted ordinances to comply with the 2008 rule amendments are governed under the deadline in Minn. Stat. § 155.55, subd. 2, and will have two years after the effective date of the changes made in this rulemaking to update their ordinances. This means their ordinance updates will be due in early 2013. The MPCA states that it will work with these counties to determine which part of their ordinances need to be modified as a result of these amendments.⁶

7. In this rulemaking proceeding, the MPCA is proposing what it considers to be minor adjustments to the comprehensive existing standards that currently apply to SSTS. Many of the current proposed amendments address comments or implement suggestions the MPCA received from the regulated community regarding problems or inconsistencies they found after the 2008 amendments were implemented.⁷

³ MPCA’s August 23, 2010, post-hearing response to comments at 2-3; Testimony of G. Sabel at 46-48 at rule hearing.

⁴ Id.

⁵ 2010 Minn. Laws ch. 361 § 73.

⁶ MPCA’s August 23, 2010, post-hearing response to comments at 3.

⁷ Id. at 2.

8. The MPCA sought input on the proposed rules from various organizations associated with the SSTS industry. These organizations included local zoning and planning groups, the University of Minnesota On-Site Sewage Treatment Program (OSTP), the Minnesota On-Site Wastewater Association (MOWA), which is an organization that represents the SSTS industry, the MPCA's SSTS Advisory Committee, and various industry representatives.

9. As required by Minn. Stat. § 115.55, the Agency discussed the proposed rule amendments and suggested rule changes with the MPCA's SSTS Advisory Committee, at meetings on March 13, 2008, October 30, 2008, January 15, 2009, March 12, 2009, June 11, 2009, April 20, 2009, and September 10, 2009.⁸

10. According to the Agency, the proposed amendments do not significantly change the requirements relating to the location, installation, use, closure or maintenance of SSTS, technology review, or the licensing of SSTS professionals.⁹

11. Many of the comments received concern issues with or objections to the 2008 rule amendments and as such are outside of the scope of review of the Administrative Law Judge in this rulemaking proceeding.¹⁰ The 2008 rule amendments were approved in 2007 and became effective February 4, 2008. Only the 2010 rule revisions proposed by the MPCA are at issue and the subject matter of this hearing and Report.

Rulemaking Legal Standards

12. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely upon legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely upon interpretation of a statute, or stated policy preferences.¹¹ The MPCA prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the MPCA primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by MPCA representatives at the public hearing and in written post-hearing submissions.

13. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.¹² Arbitrary or unreasonable agency action is action without

⁸ SONAR Exhibit 2.

⁹ Statement of Need and Reasonableness (SONAR) at 1.

¹⁰ See Ex. 9(D) and 9(OO).

¹¹ *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

¹² *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

consideration and in disregard of the facts and circumstances of the case.¹³ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.¹⁴

14. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹⁵ An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.¹⁶

15. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the MPCA has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.¹⁷

16. In this matter, the MPCA has proposed several revisions to the proposed rule language after the proposed rules were published in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.¹⁸

17. Minnesota Statutes § 14.05, subd. 2, instructs that a later modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."¹⁹

¹³ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹⁴ *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

¹⁵ *Manufactured Housing Institute*, 347 N.W.2d at 244.

¹⁶ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

¹⁷ Minn. R. 1400.2100.

¹⁸ Minn. Stat. § 14.15, subd. 3.

¹⁹ Minn. Stat. § 14.05, subd. 2.

Procedural Requirements of Chapter 14

18. On October 6, 2008, the Agency published a Request for Comments on the proposed rules. The Request for Comments was published at 33 S.R. 623.²⁰

19. By letter dated May 25, 2010, the Agency requested that the Office of Administrative Hearings schedule a hearing on the proposed rules and assign an Administrative Law Judge. Along with the letter, the Agency filed a proposed Dual Notice of Intent to Adopt Rules without a Public Hearing and Notice of Hearing if 25 or more Requests for Hearing are Received, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). The Agency also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.

20. Administrative Law Judge Richard C. Luis was assigned to the rule hearing.

21. In a letter dated June 3, 2010, Administrative Law Judge Richard Luis approved the Agency's Dual Notice and Additional Notice Plan.

22. On June 10, 2010, the Agency again revised its Dual Notice, and by letter dated June 10, 2010, Administrative Law Judge Richard Luis approved the amended Dual Notice.

23. On June 11, 2010, the MPCA published an article in the MPCA's SSTS trade publication (*SSTS Report*) that included information on how to comment and request a hearing on MPCA's proposed rule amendments.²¹

24. On June 18, 2010, the MPCA mailed a copy of the SONAR to the Legislative Reference Library as required by law²² and mailed copies of the Dual Notice, proposed rules, and SONAR to the Chairs and Ranking Minority Members of the Senate Environmental and Natural Resources Committee, the Senate Environment, Energy and Natural Resources Budget Committee, the House Environment Policy and Oversight Committee, and the House Environment and Natural Resources Finance Committee.²³

25. On June 18, 2010, the MPCA mailed a copy of the Dual Notice to all interested parties on its rulemaking mailing list.²⁴

26. On June 18, 2010, the MPCA electronically mailed a copy of the Dual Notice to all persons and associations who had registered their names with the Department for purpose of receiving such notice and to all persons identified in the Additional Notice Plan.²⁵

27. On June 21, 2010, a copy of the Dual Notice was published in the *State Register* at 34 S.R. 1789.²⁶

²⁰ Ex. 1.

²¹ Ex. 8.

²² Ex. 5.

²³ Ex. 11 (A and B). See Minn. Stat. § 14.116.

²⁴ Ex. 7.

²⁵ Ex. 8.

²⁶ Ex. 6.

28. On the day of the hearing the MPCA placed the following documents in the record:

- The Request for Comments on Possible Amendment to Rules Governing Subsurface Sewage Treatment Systems, published October 6, 2008, at 33 SR 623. (Ex. 1);
- A copy of the proposed rules with Revisor's approval dated May 26, 2010 (Ex. 3);
- A copy of the SONAR (Ex. 4);
- Certificate of Mailing the SONAR to the Legislative Reference Library, with cover letter dated June 18, 2010 (Ex. 5);
- A copy of the Dual Notice as published in 34 S.R. 1789 (Ex. 6);
- Certificate of Mailing the Dual Notice to the Rulemaking Mailing List on June 18, 2010, and Certificate of Accuracy of the Mailing List (Ex. 7);
- Certificate of Mailing the Dual Notice to the Additional Notice List on June 18, 2010 (Ex. 8);
- Certificate of Mailing the Dual Notice and the SONAR to Legislators on June 18, 2010 (Ex. 11);
- Written public comments received during the public comment period (Ex. 9);
- Certificate of Mailing Dual Notice to Those who Requested a Hearing (Ex. 11E);

29. Written comments received during the hearing (Exs. 12-20), the MPCA's responses (Exs. 21 and 22), and written comments received after the hearing (Exs. 23-35) were also marked and placed in the record.

Additional Notice

30. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules. The Agency submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated June 3, 2010. In addition to notifying those persons on the Agency's rulemaking mailing list for these proposed rules, the Agency represented that it would electronically mail the Dual Notice to members of its SSTS advisory committee, septic tank manufacturers, county zoning and planning offices, and all SSTS licensees.²⁷

31. A copy of the proposed rules, SONAR, and Dual Notice was also posted on the MPCA's webpage and published in the June 11, 2010, edition of the MPCA's SSTS newsletter, *SSTS Report*.²⁸

²⁷ SONAR at 108; Ex. 8.

²⁸ SONAR at 108; Ex. 8E.

32. The Administrative Law Judge finds that the Department fulfilled its additional notice requirement.

Statutory Authorization

33. Minn. Stat. § 115.03, subd. 1, gives the MPCA general authority to adopt rules and standards to prevent, control or abate water pollution.²⁹

34. In addition to its general rulemaking authority, the MPCA has specific statutory authority under Minn. Stat. § 115.55, subd. 3, to adopt rules containing minimum standards and criteria for the design, location, installation, use, maintenance, and closure of subsurface sewage treatment systems. Minn. Stat. § 115.55, subd. 3, provides, in relevant part:

Subd. 3. Rules.

(a) The agency shall adopt rules, containing minimum standards and criteria for the design, location, use, maintenance, and closure of subsurface sewage treatment systems. The rules must include:

- (1) how the agency will ensure compliance under subdivision 2;
- (2) how local units of government shall enforce ordinances under subdivision 2, including requirements for permits and inspection programs;
- (3) how the advisory committee will participate in review and implementation of the rules;
- (4) provisions for nonstandard systems and performance-based systems;
- (5) provisions for handling and disposal of effluent;
- (6) provisions for system abandonment; and
- (7) procedures for variances, including the consideration of variances based on cost and variances that take into account proximity of a system to other systems.

(b) The agency shall consult with the advisory committee before adopting rules under this subdivision.

(c) The rules required in paragraph (a) must also address the following:

- (1) a definition of redoximorphic features and other criteria that can be used by system designers and inspectors;
- (2) direction on the interpretation of observed soil features that may be redoximorphic and their relation to zones of periodic saturation; and
- (3) procedures on how to resolve professional disagreements on periodically saturated soils.

²⁹ Tr. at 17.

35. The Administrative Law Judge finds that the MPCA has the statutory authority to adopt rules. The issue whether the proposed rules are consistent with the statute is addressed in the part by part analysis below.

Regulatory Analysis in the SONAR

36. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The MPCA identifies the following as classes of persons who will be affected by, benefit from, and bear the costs of the proposed rule amendments: SSTS owners and future owners; local units of government with ordinances that regulate sewage treatment (counties, townships, and cities); SSTS licensed businesses; the University of Minnesota Onsite Sewage Treatment Program (OSTP); manufacturers of SSTS components; MPCA; and all persons who use Minnesota's water resources.³⁰

(a) SSTS owners and future owners (residential and commercial)

The existing rules affect a total of 500,000 system owners a year, but the MPCA does not believe that the proposed rule amendments will cause "an overall increase in the total cost of owning and operating a SSTS."³¹ The MPCA estimates that there are approximately 11,000 mid-sized subsurface sewage treatment systems (MSTS) currently in use in Minnesota and that an additional 180 will be installed each year, either for new establishments or as replacement systems. According to the MPCA, the amendments to the standards in Chapter 7081 will not represent a significant change in MSTS regulation or affect communities using MSTS.³²

(b) Local units of government with ordinances that regulate sewage treatment (counties, townships, and cities)

All 87 counties in Minnesota currently operate a program to approve and inspect SSTS systems. In addition, about 100 municipalities and townships administer SSTS programs. For municipalities and townships, operating a SSTS program is discretionary. If a city or township chooses not to have a SSTS program, the county must administer a SSTS program in that area as described in Minn. Stat. § 115.55, subd. 2.

³⁰ SONAR at 116.

³¹ SONAR at 116.

³² SONAR at 116.

(c) SSTS licensed businesses

The MPCA estimates that there are 1,800 companies that install and maintain SSTS systems. According to the MPCA, these businesses will benefit particularly from two proposed rule amendments. The proposed amendments to Minn. R. 7083.2040, subps. 1 and 2, will extend by one year the period in which licensed SSTS designers and inspectors may obtain an advanced level of certification and licensure. This will permit businesses to defer for one year the training costs associated with obtaining the advanced certification and licensure. In addition, the proposed amendments to Minn. R. 7083.1000 will provide SSTS businesses with the option of obtaining a joint bond to cover both plumbing and SSTS work.

(d) The University of Minnesota Onsite Sewage Treatment Program

The University of Minnesota Onsite Sewage Treatment Program (OSTP) provides outreach and education programs to SSTS installers and maintenance professionals. The MPCA states that proposed amendments to the rules will require the OSTP to modify and upgrade its training and educational materials. The MPCA notes, however, that it has provided the OSTP with a significant grant to assist them in developing these materials. In addition, the MPCA asserts that costs of the training programs are recovered through fees.

(e) Manufacturers of SSTS components

The MPCA states that the proposed rule amendments will not result in additional costs for SSTS manufacturers. Instead, the MPCA maintains that the proposed amendments will provide manufacturers with greater flexibility in registering their products for use in Minnesota.³³

(f) MPCA

The effect of the rule amendments on the MPCA are discussed in item 2 below.

(g) All persons who use Minnesota's water resources

The MPCA states that the increased costs that may result from the proposed rule amendments for Minnesota residents will be slight, relative to the value of their home or business. The MPCA insists, however, that the environmental improvements that will result from the better SSTS designs and more thorough inspections will be substantial and will include cleaner groundwater, less public health risks from surfacing sewage and reduced discharge of nutrients to Minnesota's waters.³⁴

³³ SONAR at 117.

³⁴ SONAR at 117.

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The MPCA does not anticipate that it will incur any increased costs as a result of the proposed rule amendments. According to the MPCA, the other state agencies that may be affected by the rules are the Department of Transportation (MnDOT) and the Department of Natural Resources. These agencies own and operate SSTS at parks, rest areas, and maintenance facilities. According to the MPCA, the proposed rule amendments “need to be taken into account by these agencies as they plan activities for the coming year, but should not result in significant staff or cost increases.”³⁵

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The MPCA states that the proposed rule amendments are the least costly and least intrusive means of correcting and refining the existing SSTS regulatory framework. According to the MPCA, the majority of the proposed amendments involve only minor adjustments or clarifications to the existing rules that have been in effect for years. While MPCA acknowledges that some of the amendments are adding new requirements or significantly changing existing requirements, it still believes the proposed amendments are the most reasonable and least costly method for regulating SSTS.³⁶

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The Minnesota Legislature directed the MPCA to draft rules governing minimum standards and criteria for the design, location, installation, use, maintenance, and closure of SSTS.³⁷ Given this explicit legislative mandate, the MPCA does not believe there are alternatives to the proposed rules for regulating SSTS and it did not consider any alternative methods for achieving the purpose of the proposed rule amendments.³⁸

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

In its SONAR, the MPCA states that the following proposed rule amendments will increase the cost of compliance with the SSTS rule:

³⁵ SONAR at 117.

³⁶ SONAR at 118.

³⁷ See Minn. Stat. § 115.55, subd. 3.

³⁸ SONAR at 118.

Requiring the assessment of additional waste characteristics of a proposed site at the time of system design (Minn. R. 7080.1710);

Requiring special design considerations for certain tank capacity determinations (Minn. R. 7081.1930);

Requiring pressurizing or other measures to ensure even flow to the soil absorption area in sandy soils (Minn. R. 7080.2210);

Requiring thorough inspections and evaluation of all system components for compliance (Minn. R. 7082.0700).

The MPCA asserts that most of the proposed amendments will not increase the cost of compliance and that some of the amendments will create savings by extending the operating life of SSTS. The MPCA acknowledges, however, that certain SSTS users and certain sectors of the SSTS manufacturing industry will incur increased costs as a result of the proposed rule amendments:

(a) ISTS Future Owners

Homeowners who install SSTS in the future may have increased costs due to the amendments that require the assessment of additional waste characteristics of a proposed site during system design and assurance of even distribution in the soil absorption area for systems in sandy soils. For example, for Type-I in-ground systems there will be 18 soil categories that will now require a percolation test to determine the sizing at an estimated additional cost to the site evaluation procedure of \$200. Likewise, for Type I mound systems, there will be 17 soil categories that will now require a percolation test to determine sizing adding an estimated \$200 to the cost of the site evaluation. Also, the proposed requirements regarding distributing effluent in sandy soils will add costs of between \$1,000 to \$3,000 for newly constructed systems depending on which of three options is chosen.³⁹ According to the MPCA, the proposed amendments may add as much as \$3,100 in additional costs per system.

The MPCA points out, however, that not all SSTS owners will incur these expenses. For example, there will be 18 soil categories for Type I in-ground systems that will have a reduction in system size that will result in an average cost reduction if approximately \$2,500 per system. Likewise, there will be 14 soil categories for Type I mound systems that will have a direct reduction in mound absorption area under the proposed rules with an average savings of approximately 50 percent per system. Moreover, future SSTS owners may see as much as \$500 in savings as a result of the amendment that clarifies that additional tank capacity is not needed for homes with only dishwashers and without garbage disposals.⁴⁰

(b) Current ISTS Owners

Homeowners may incur additional inspection fees if SSTS inspectors raise their rates to cover the proposed rule amendments' additional inspection requirements. According to the MPCA, the proposed additional inspection requirements could add as

³⁹ SONAR at 114. See, Minn. R. 7080.2210, subp. 4.

⁴⁰ SONAR at 114 and 119.

much as \$500 to the cost of inspections. However, the MPCA points out that homeowners may save money as a result of the proposed rule amendment that would eliminate the requirement that homeowners remove their distribution systems once the system is closed or abandoned.⁴¹

(c) Current MSTs Owners

Like ISTS owners, MSTs owners will benefit from the elimination of the disposal requirement when systems are closed or abandoned. Moreover, the additional inspection costs noted above for current ISTS owners do not apply to current MSTs owners.⁴²

(d) Local Units of Government

The MPCA identified no additional costs for local units of government in complying with the proposed rules.⁴³ The MPCA received several comments, however, from County Environmental Services staff who asserted that counties will incur additional costs in administering and enforcing the proposed amendments' new requirements. These comments are addressed in the discussion of the proposed rule below.⁴⁴

(e) University of Minnesota

The University of Minnesota's OSTP will need to update their instructional materials to reflect the new rule language. The MPCA notes, however, that the OSTP's documents are maintained electronically and printed as needed. Therefore, the only additional costs will be the staff time used to update the materials.

(f) Manufacturers of SSTS Components

The MPCA states that the proposed rule amendments will not cause manufacturers of SSTS components to incur additional costs.⁴⁵

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The MPCA asserts that if the proposed rule amendments are not adopted, the benefits of improving the regulation of the location, design, installation, and maintenance of SSTS for more effective waste treatment will be lost. In addition, local units of government and SSTS owners, manufacturers, and licensed businesses will miss the benefit of such cost-saving measures as the elimination of the requirement to remove distribution systems at closure, the one-year extension to obtain advanced certifications, and the option to obtain a joint plumbing and SSTS bond.⁴⁶

⁴¹ SONAR at 115 and 119.

⁴² SONAR at 119.

⁴³ SONAR at 117.

⁴⁴ See Ex. 9(M), 9(X) and 26.

⁴⁵ SONAR at 119.

⁴⁶ SONAR at 119.

(7) An assessment of any differences between the proposed rules and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The MPCA states that there are no applicable federal regulations that address design, installation, operation or licensing of SSTS. Federal regulations do apply for any SSTS serving more than a single family unit or any SSTS serving an establishment that serves 20 or more persons a day. According to the MPCA, none of the proposed amendments result in a difference between the proposed rules and existing federal regulations.⁴⁷

The Administrative Law Judge finds that the MPCA has adequately considered the cost of its proposed amendments and it has adequately considered the other factors in the regulatory analysis required by Minn. Stat. § 14.131.

Performance Based Rules

37. The Administrative Procedure Act⁴⁸ also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁴⁹

38. The MPCA states that when the SSTS rules were revised in 1996, they addressed the need for regulatory flexibility by allowing local permitting authorities to adopt environmental performance ordinances that used standards other than the state standards to achieve specific environmental outcomes. This rule, Minn. R. 7080.0179, placed no hindrance on the technologies or designs that could be used to meet these outcomes. However, no counties have adopted performance based ordinances, most likely due to the fact that these types of systems are more expensive, require more maintenance, and require an assessment of local conditions to evaluate environmental sensitivity. In 2008, the MPCA adopted rule amendments that gave local units of government the authority to determine site specific sensitivities in a further effort to provide regulatory flexibility.

39. According to the MPCA, few of the amendments proposed in this rulemaking lend themselves to establishing performance based outcomes because most are simply corrections or revisions to existing requirements. However, the MPCA notes that three proposed amendments, Minn. R. 7080.1550, subp. 2 (high strength waste), 7080.1930, subp. 5 (septic tank capacity), and 7080.2440 (collection systems), provide the regulated party with options and do not identify specific, prescriptive design requirements.⁵⁰

40. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed

⁴⁷ SONAR at 120.

⁴⁸ Minn. Stat. § 14.131.

⁴⁹ Minn. Stat. § 14.002.

⁵⁰ SONAR at 108.

rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Consultation with the Commissioner of Finance

41. Under Minn. Stat. § 14.131, the Agency is also required to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

42. The MPCA consulted with the Office of Management and Budget, and in a response dated September 14, 2010, the Minnesota Management and Budget’s Executive Budget Officer Mary Robison concluded that the proposed rules “will have minimal fiscal impact on local units of government.”⁵¹

43. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. § 14.131.

Compliance Costs to Small Businesses and Cities

44. Under Minn. Stat. § 14.127, the MPCA must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁵² The MPCA must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵³

45. The MPCA has determined that the cost of complying with the proposed rule amendments will not exceed \$25,000 for any one small business or small city. Cities are not required to administer SSTS programs and may decline to adopt an ordinance or allow the responsibility for SSTS regulation to revert to the county. For the approximately 100 cities that do administer programs to regulate SSTS, the MPCA states that the proposed amendments to 7082 will affect how those SSTS programs are administered. However, the MPCA does not believe that any of the amendments will cause an increase in the cost of implementing the local SSTS ordinances. There may be some incidental training costs but the MPCA maintains that in many cases, the proposed amendments will simplify the responsibilities of local units of government and decrease the cost of implementing the SSTS programs.⁵⁴

46. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 with regard to proposed revisions to the SSTS rules.

⁵¹ September 14, 2010, letter from Mary Robinson to Commissioner Paul Eger; SONAR at 109.

⁵² Minn. Stat. § 14.127, subd. 1.

⁵³ Minn. Stat. § 14.127, subd. 2.

⁵⁴ SONAR at 109-110, 119-120.

Analysis of the Proposed Rules

General

47. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the MPCA's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rule

Part by Part Analysis

7080.1100 Definitions

48. The MPCA has proposed amending the definition of "Building" at subpart 11 as follows:

Subp. 11. **Building.** "Building" means any ~~structure used or intended for supporting or sheltering any use or occupancy~~ lot improvement with a foundation.

49. The MPCA has similarly proposed adding a definition of the word "structure" at subpart 80a:

Subp. 80a. **Structure.** "Structure" means a lot improvement that does not have a foundation but the location of which will interfere with the dispersal, treatment, operation or maintenance of an SSTS. Structure includes, but is not limited to, animal shelters, decks, paved areas, and sheds.

50. The current rule identifies three different types of "lot improvements": dwellings, other establishments, and structures. Setback restrictions between lot improvements and SSTS components vary depending on the type of lot improvement.

51. In its SONAR, the MPCA stated that the current definition of "building" caused confusion with respect to the required setbacks found at Minn. R. 7080.2150 Table VII. The MPCA asserts that its intent in amending the definition was to clarify that all inhabited lot improvements (i.e., dwellings and Other Establishments) and also those improvements with foundations (i.e., buildings) require a setback from SSTS components. No change in the application of the setback requirements is intended.⁵⁵

52. The MPCA received several comments regarding the definitions of "building" and "structure." The commentators stated that the definitions are not

⁵⁵ SONAR at 7.

descriptive enough, will create enforcement confusion, are too broad, and do not mirror the state building code definitions.

53. At the hearing, MPCA staff explained that the intent of the proposed amendment is to clarify that occupied structures need greater setbacks from the SSTS components, but that structures such as dog houses, sheds, gazebos or other structures that typically do not have foundations, are not required to have such setbacks.⁵⁶

54. At the hearing, Al Winterberger, of Winterberger Inspections, stated that he believes the proposed amended definition of “building” will cause greater confusion among SSTS installers and owners. Mr. Winterberger pointed out that defining “building” as any lot improvement with a foundation will include many buildings that are not occupied or used for shelter. For example, if an 8 x 8 garden shed has a foundation, installers will have to maintain the greater setback even though it is clearly not a structure intended to be occupied. According to Mr. Winterberger, the setback requirements are particularly critical on small lots. If installers are forced to abide by the greater setbacks simply because the structure has a foundation, it will be very difficult to install SSTS on small lots. Mr. Winterberger explained that under the former definition, if there was a detached garage on a small lot, SSTS installers could encroach on that garage and meet the setback requirements for the house. However, under the proposed amended definition, if the detached garage has a foundation, installers will have to maintain a 10 foot setback for the tank and 20 foot setback for the drain field.⁵⁷ Mr. Winterberger recommended that the MPCA replace the current definition with the 2007 definition of “building,” which was “all potentially occupied structures and any structure whose foundation could be damaged and structural integrity jeopardized by the seepage of sewage or sewage tank effluent.”⁵⁸

55. Several written comments received prior to the hearing expressed concerns similar to those of Mr. Winterberger about the unfeasibility of the proposed “building” definition. Chad Viland pointed out that many sizeable buildings in rural counties, including single wide trailer homes, are built without foundations.⁵⁹ Eric Buitenwerf, Environmental Services Officer for Hubbard County, expressed concern that the lack of a definition for the word “foundation” will result in significant variation in interpretation and application of the setback regulations and set-up unnecessary confrontations between local government units and contractors.⁶⁰ Terry Neff, Aitkin County Environmental Services Director, queried whether a garage built on a concrete slab would meet the new definition of “building.” Mr. Neff recommended that the MPCA not change the current definition of “building” and leave it to the local units of government to further define the word.⁶¹

⁵⁶ Tr. at 87-89.

⁵⁷ Tr. at 89-90.

⁵⁸ Minn. R. 7080.0020, subpart 7a (2007).

⁵⁹ Ex. 9 (B).

⁶⁰ Ex. 9 (X). See also Ex. 9 (OO).

⁶¹ Ex. 9 (D) at 2.

56. Ted Troolin, Director of St. Louis County Environmental Services Department, recommended in a written comment that the MPCA use different terms than “building” and “structure” since these can be easily confused. Mr. Troolin also stated that making a foundation the determinative factor of whether something is a building or structure only adds to the confusion. Mr. Troolin suggested that the MPCA use “dwelling” in place of “building” and define “dwelling” as an occupied building that typically has a foundation.⁶²

57. In its August 23rd response comments, the MPCA states that local units of government have the flexibility to further define terms to meet local conditions and concerns, and may apply state building code definitions if they so choose.⁶³

58. The Administrative Law Judge finds the MPCA’s proposed amendments to the definitions of “Building” and “Structure” are needed and, while not legally unreasonable, are confusing and may include and exclude buildings the MPCA did not intend to be governed by the definitions. The Administrative Law Judge does not find the proposed definitions to be defects. It is within the Agency’s policy-making discretion to adopt these rule amendments as written. However, given the comments received and the Agency’s own statement at the hearing that the proposed definitions may cause further confusion, the Administrative Law Judge recommends that the MPCA consider withdrawing the amendments or defining the words as follows:

Subp. 11. **Building.** “Building” means any lot improvement that has a foundation or is intended for human occupancy.

Subp. 80a. **Structure.** “Structure” means a lot improvement not intended for human occupancy that does not have a foundation but the location of which will interfere with the dispersal, treatment, operation or maintenance of an SSTS. Structure includes, but is not limited to, animal shelters, decks, paved areas, and sheds.

59. The MPCA has proposed amending the definition of ISTS at subpart 41 of Rule 7080.1100 to read as follows:

Subp. 41. **Individual subsurface sewage treatment system or ISTS.** “Individual subsurface treatment system” or “ISTS” means ~~an individual a~~ subsurface sewage treatment system or part thereof, as set forth in Minnesota Statutes, sections 115.03 and 115.55, that employs sewage tanks or other treatment devices with final discharge into the soil below the natural soil elevation or elevated final grade that are designed to receive a sewage design flow of 5,000 gallons per day or less.

~~ISTS also includes the holding tanks and privies that serve these same facilities are designed to receive a sewage design flow of 5,000 gallons per day or less; sewage collection systems that discharge into ISTS treatment and dispersal components; and privies.~~ ISTS does not include

⁶² Ex. 9(W).

⁶³ MPCA Response to Comments at 10-11.

~~building sewers or other components regulated those components defined as plumbing under chapter 4715 or collection system.~~

60. The MPCA stated in its SONAR that the proposed amendments establishing the flow rate and separating holding tanks from privies are minor clarifications that do not change or affect the scope of what is considered to be an ISTS.⁶⁴

61. In a pre-hearing comment, staff with the Scott County Environmental Health Department, recommended that flow amounts to a holding tank from “other establishments” served only by holding tanks not be considered in determining the regulatory size of the SSTS. These commentators pointed out that to do so would negatively impact seasonal establishment venues such as ethnic, regional, or historical period festivals like the Renaissance Festival that rely on holding tanks.⁶⁵

62. In response to this comment, the MPCA has proposed increasing the sewage design flow from 5,000 gallons per day or less to 10,000 gallons per day or less. The proposed second paragraph of subpart 41 would read as follows:

ISTS also includes all the holding tanks and privies that serve these same facilities are designed to receive a sewage design flow of 10,000 5,000 gallons per day or less; sewage collection systems and associated tanks that discharge into ISTS treatment and dispersal components; and privies. ISTS does not include building sewers or other components regulated those components defined as plumbing under chapter 4715 or collection system.

63. The MPCA has also proposed adding “sewage collection systems” to the definition of ISTS to include those components that collect raw sewage or septic tank effluent from multiple dwellings and/or other establishments. The collection system components that are being included are piping, tanks, pumps, manholes and any other device whose purpose is to convey sewage or effluent to a common treatment component. The MPCA states that collection system components were previously excluded from regulation as part of an ISTS. However, because they are not clearly regulated as plumbing under Minn. R. ch. 4715, the MPCA states there was confusion about their relation to the definition of ISTS. The MPCA asserts that it is reasonable to specifically include collection systems to the definition of what is considered to be an ISTS. According to MPCA, the collection system is an integral component of the ISTS and should be regulated as part of the system. According to the MPCA, its proposed amendment to add collection systems to the definition of ISTS is necessary and reasonable.

64. The MPCA states further that it recognizes SSTS licensed designers have routinely designed collection components with no guidance available to assist them in the development of these designs. To address this problem, the MPCA states that it

⁶⁴ SONAR at 8.

⁶⁵ Ex. 9 (OO).

has developed guidelines for collection systems that may be found in the MPCA document: Prescriptive Designs and Design Guidance for Advanced Designers. These guidelines are part of the training requirement for certification as an SSTS Advanced Designer.⁶⁶

65. Mark Gamm, Environmental Services Director for Dodge County, objects to the inclusion of “sewage collection systems” in the definition of ISTS. Mr. Gamm states that including collection systems in the definition creates a new standard with increased regulatory burdens for counties. Mr. Gamm points out that collection systems do not “treat” sewage and he questions why these systems should be deemed part of ISTS simply because they are not clearly regulated under the plumbing code. Mr. Gamm suggests that the plumbing code be amended instead of MPCA’s mandating that counties regulate collection systems. Mr. Gamm also contends that an economic analysis should be completed on this proposed amendment to determine the potential increased costs to counties and ISTS owners to comply with this provision.⁶⁷

66. In its post-hearing response, the MPCA states that the collection system should be regulated as part of the SSTS because it must be properly designed, built and operated in order for the SSTS to function properly. It is the MPCA’s understanding that SSTS designers have designed collection systems in the past, albeit without design standards and guidance. The MPCA maintains that collection systems have reasonably been added to the components of SSTS regulated by these rules.

67. D. Millicent Carroll of the Portable Sanitation Association International (PSAI) also objects to proposed subpart 41 because she believes it is broad enough to cover portable restroom units. Ms. Carroll maintains that ISTS requirements are not applicable to portable toilets because such toilets are mobile “collection cans” that do not treat waste and are not subsurface systems.⁶⁸

68. In its August 23rd response comments, the MPCA agreed with Ms. Carroll’s comments. The MPCA stated that portable toilets are not covered by the ISTS requirements and are instead covered under the definition of toilet waste treatment device at Minn. R. 7080.1100, subp. 86 and 7081.0020, subp. 4.

69. The Administrative Law Judge finds that adding sewage collection system components to the definition of ISTS is needed and reasonable. The collection system components are integral to the proper functioning of the ISTS and it is reasonable to include them in the regulation.

70. The MPCA has proposed adding a definition of “Rock fragments” at subpart 66a and a definition of “Sand” at subpart 66b of Rule 7080.1100. The definitions would read as follows:

⁶⁶ SONAR at 9.

⁶⁷ Ex. 9 (M).

⁶⁸ Ex. 9 (EE).

Subpart 66a. **Rock fragments.** “Rock fragments” means pieces of rock two millimeters in diameter or larger that are strongly cemented and resistant to rupture. Rock fragments are commonly known as gravel, stones, cobbles, and boulders.

Subpart 66b. **Sand.** “Sand” means a sand soil texture, as described in the Field Book for Describing and Sampling Soils, which is incorporated by reference in subpart 36.

71. In its SONAR, the MPCA stated that a definition of “rock fragments” was needed to specify what is intended when this phrase is used at several points in this chapter. According to the MPCA, a “rock fragment” is the term used by the Natural Resource Conservation Service (NRCS) to describe the soil/geologic particles that have a diameter of greater than 2 mm. The 2 mm particle size is the largest particle size that has been tested to determine the effectiveness of sewage treatment. Soils can have a highly variable particle size ratio. The MPCA believes it is necessary to describe these particles to distinguish soils which may not adequately treat the sewage. Therefore, the term “rock fragments” is used throughout the rules to describe these larger particles. The MPCA also stated in its SONAR that it was necessary to add a new definition of the word “sand” because of its deletion of the term “medium sand” at subpart 48.

72. The MPCA received several comments pointing out that “rock fragments” are technically only those fragments “greater than 2mm” in diameter; not “2mm or greater” as proposed in the amendment. In addition, these commentators noted that “sand” is not defined in the Field Book for Describing and Sampling Soils and they suggested referring to the Soil Survey Manual for a definition of sand.

73. In response to these comments, the MPCA has proposed changing the definitions to read as follows:

Subpart 66a. **Rock fragments.** “Rock fragments” means pieces of rock greater than two millimeters in diameter ~~or larger~~ that are strongly cemented and resistant to rupture. Rock fragments are commonly known as gravel, stones, cobbles, and boulders.

Subpart 66b. **Sand.** “Sand” means a sand soil texture, as described in ~~the Field Book for Describing and Sampling Soils, which is incorporated by reference in subpart 36.~~ the Soil Survey Manual (1993) developed by the Natural Resource Conservation Service, U.S. Department of Agriculture Handbook 18. The manual is incorporated by reference, is not subject to frequent change, and is available through the Minitex interlibrary loan system.

74. Two post-hearing comments noted that the referenced documents cited in the proposed definition of “Sand” are subject to change and they questioned how a designer would know what volume to use. In response to these comments, the MPCA has proposed modifying the definition of “Sand” by deleting the publication year of the

manual and adding the phrase “as amended.”⁶⁹ The proposed amended definition of “Sand” would read as follows:

Subpart 66b. **Sand.** “Sand” means a sand soil texture, as described in ~~the Field Book for Describing and Sampling Soils, which is incorporated by reference in subpart 36. the Soil Survey Manual (1993 as amended) developed by the Natural Resource Conservation Service, U.S. Department of Agriculture Handbook 18. The manual is incorporated by reference, is not subject to frequent change, and is available through the Minitex interlibrary loan system.~~

75. The Administrative Law Judge finds that the definitions of “rock fragments” and “sand,” as modified by the MPCA are needed and reasonable and do not represent a substantial change from the rule proposed and published in the State Register.

76. The MPCA has proposed adding a definition of “uniform distribution” at subpart 89a. The definitions would read as follows:

Subpart 89a. **Uniform distribution.** “Uniform distribution” means a method that upon activation of the SSTS, reliably distributes effluent evenly over the entire absorption area.

77. In its SONAR, the MPCA stated that the definition was needed to address the changes being made to the rules regarding the distribution of effluent, specifically in Minn. R. 7080.2350, Table XI. In this table, the MPCA is classifying specific performance levels and methods of distribution based on texture groups. The MPCA believes the definition is reasonable to establish a more comprehensive term that covers all options available for achieving the distribution of effluent.

78. In a pre-hearing comment, Nick Haig, Program Coordinator for the University of Minnesota’s Onsite Sewage Treatment Program, suggested that the MPCA incorporate the definition used by the Consortium of Institutes for Decentralized Wastewater Treatment (CIDWT). Mr. Haig also recommended replacing the phrase “absorption area” with “infiltration area” to be consistent with the CIDWT’s definition.⁷⁰

79. In response to this comment, the MPCA has proposed changing its definition of “uniform distribution” to conform to the CIDWT’s definition. However, the MPCA chose to keep the proposed term “absorption area” instead of changing it to “infiltrative area” because the term is used throughout the rules. Thus, the MPCA has proposed to modify its originally published definition of “uniform distribution” to read as follows:

Subpart 89a. **Uniform distribution.** “Uniform distribution” means a method that ~~upon activation of the SSTS, reliably distributes effluent evenly over the entire absorption area~~ of a component over both time and space.

⁶⁹ MPCA’s August 30th 2010, Post-Hearing Response to Public Comments at 7.

⁷⁰ Ex. 9 (S).

80. The Administrative Law Judge finds the definition to be needed and reasonable as modified and not a substantial change from the rule as proposed.

7080.1500 Compliance Criteria

81. The MPCA has proposed amending the compliance criteria for existing systems at subpart 4, item D, as follows:

Subpart 4. **Compliance criteria for existing systems.** To be in compliance, an existing ISTS must meet the provisions of this subpart.

D. ISTS built after March 31, 1996, or in an SWF area as defined under part 7080.1100, subpart 84, shall must have at least a three-foot vertical separation or a vertical separation based on applicable requirements in compliance with part 7080.2350, subpart 2, Table XI. The local ordinance ~~must not~~ is allowed to provide for a reduced vertical separation in the following cases:

(1) Types I, II, and III systems; and

(2) Types IV and V systems that are designed with at least a three-foot separation distance.

The local ordinance must not allow more than a 15 percent reduction in the vertical separation distance. A 15 percent reduction is only allowed to account for settling of sand or soil, normal variation of measurements, and interpretations of the limiting layer conditions.

82. In a written comment, Mr. Haig states that the proposed amendment does not clarify MPCA's intent for local programs to have the option to reduce vertical separation requirements. Moreover, Mr. Haig notes that the proposed language does not specify whether the identification of a reduced separation is acceptable in terms of existing system compliance or in new system construction.⁷¹

83. In a joint post-hearing comment submitted by SSTS administrators for Marshall, Pennington and Red Lake Counties, the commentators stated that Subpart 4D needs to reference the alternative methods of compliance permitted by local ordinances.⁷²

84. In response to these comments, the MPCA has proposed modifying its proposed subpart 4D as follows:

D. ISTS built after March 31, 1996, or in an SWF area as defined under part 7080.1100, subpart 84, shall must have at least a three-foot vertical separation or a vertical separation based on applicable requirements in compliance with part 7080.2350, subpart 2, Table XI. The

⁷¹ Ex. 9 (S).

⁷² Ex. 26.

local ordinance must not is allowed to provide for a reduced vertical separation for existing systems in the following cases:

(1) Types I, II, and III systems; and

(2) Types IV and V systems that are were designed with at least a three-foot separation distance.

The local ordinance must not allow more than a 15 percent reduction in the vertical separation distance. A 15 percent reduction is only allowed to account for settling of sand or soil, normal variation of measurements, and interpretations of the limiting layer conditions.

85. The Administrative Law Judge finds the definition to be needed and reasonable as modified and not a substantial change from the rule as proposed.

7080.1550 Acceptable and Prohibited Discharges

86. The MPCA has proposed adding items B and C to subpart 2 System influent, to address the need for treatment of high strength wastes. The new proposed items would read as follows:

Subp. 2 System influent

B. An ISTS must be designed to provide additional treatment if:

(1) raw sewage exceeds 300 mg/1 BOD, 200 mg/1 TSS, or 50 mg/1 oil and grease; or

(2) sewage tank effluent applied to the soil from the sewage tank or other secondary treatment device is greater than the concentrations in part 7080.2150, subpart 3, item K.

Additional treatment must be designed by a Minnesota licensed professional engineer or according to the recommendations in the Prescriptive Designs and Design Guidance for Advanced Designers, which is incorporated by reference in item C, or must use a product registered under chapter 7083.

C. Prescriptive Designs and Design Guidance for Advanced Designers, Minnesota Pollution Control Agency (September 2009 and as subsequently amended), is incorporated by reference, is subject to frequent change, and is available at www.pca.state.mn.us/programs/ists/technical.html.

87. In its SONAR, the MPCA explains that subitems 1 and 2 in item B identify two types of high strength wastes. Subitem 1 addresses raw sewage and subitem 2 addresses concentrations found in effluent. The MPCA states that the limits and

concentrations proposed were derived from the Consortium Institutes for Decentralized Wastewater Treatment manual and are critical because currently the prescriptive designs for the first treatment component found at Minn. R. 7080.1900 are only applicable to domestic strength waste. The MPCA states further that if effluent in higher strengths than that identified in subitem 2 is discharged into a soil dispersal system, it would permanently clog the soil.⁷³

88. The MPCA believes it is reasonable to require additional treatment for high strength waste. However, because the nature of high strength waste can vary a great deal, in both composition and type, the MPCA is not able to specify how the additional treatment must be provided. Therefore, the MPCA is providing three options for addressing the need for special design. The first option is to have a licensed professional engineer design the system to address the high strength waste. The second option is to use of the MPCA's design guidance to design a system that will receive high strength waste. The third option is to use a product included in the list of MPCA registered products to specifically address treatment of high strength wastes.⁷⁴

89. Finally, the MPCA has proposed adding item C to incorporate by reference the Prescriptive Design Guidance, which provides technical background for design of complex systems or larger SSTS serving multiple dwellings. The MPCA believes that it would not be possible to develop rules to address all the design aspects relating to the wide variety of collection systems (gravity, pressure, septic tank, effluent pressure, septic tank effluent gravity) that are used in SSTS. According to the MPCA, it is more reasonable to incorporate the design guidance document to provide the most current information regarding SSTS system design.⁷⁵

90. In a written comment received before the hearing, Eric Buitenwerf objected to the MPCA's proposal for high strength waste assessment and treatment in subpart 2, item B. Mr. Buitenwerf states that there is no reasonable way a landowner, contractor, or local government unit will be able to know what the BOD, TSS, and/or FOG concentrations will be in the sewage discharged into the SSTS. Mr. Buitenwerf states that these concentrations can easily fluctuate over time depending on volume and the amount of water going into the SSTS. In addition, according to Mr. Buitenwerf, the concentrations can also vary significantly within a type of sewer structure use (such as a residential home) such that an approximate set of baseline concentrations cannot reasonably be set by the MPCA. Mr. Buitenwerf asserts that local units of government do not have the resources to enforce the regulation by requiring testing of samples to determine the concentrations of waste. Mr. Buitenwerf maintains that the proposed rule is unnecessary and unreasonable.⁷⁶

⁷³ SONAR at 17.

⁷⁴ SONAR at 17.

⁷⁵ SONAR at 18.

⁷⁶ Ex. 9 (X).

91. In a written comment, Jeff Pelowski, Roseau County Environmental Officer, questioned how often the waste should be tested, who should perform the testing, and how much will it cost to do the testing.⁷⁷

92. In its August 23rd response, the MPCA states that while a vast majority of dwellings do not need to be assessed for waste strength, it is prudent to account for high strength waste to prevent system malfunctions. The MPCA notes that the proposed amendment does not require the local unit of government to determine waste strength concentrations, but to agree on the method to be used to determine the waste strength for design purposes.⁷⁸

93. In a written comment, D. Millicent Carroll objected to proposed subpart 2B on the grounds that portable toilets, which collect raw sewage, will always exceed the recommended levels of BOD and TSS and will always require additional treatment. This will add an undue financial and operational burden on the portable restroom operator.⁷⁹

94. In response to this comment, the MPCA states that a portable toilet is covered in the rule as a “toilet waste treatment device” (7080.1100, subp. 86, and 7081.0020, subp. 4), and is not an ISTS and therefore no additional treatment of that waste is required.⁸⁰ In its final response to comments, however, the MPCA recognized Ms. Carroll’s general concern that the SSTS rules should either comprehensively address the regulatory status of portable sanitation devices, or clearly exclude them from regulation in the SSTS rules. The MPCA did not propose any rule changes addressing such a broad question and as a result it believes such changes would be outside the scope of this rulemaking. The MPCA states that it will consider the concerns raised by Ms. Carroll on behalf of the Portable Sanitation Association in future rulemaking proceedings.⁸¹

95. The MPCA also received many comments from people objecting to MPCA’s proposal to incorporate the Design Guidance by reference.

96. At the hearing and in its post-hearing comments, MPCA staff explained that the MPCA is required by Minnesota Statutes § 115.56, subd. 2, to provide design guidance for SSTS professionals. The legislature did not direct MPCA to promulgate additional rules on design guidance, so the MPCA is providing prescriptive standards in the form of design guidance. Designers have the option to follow the prescriptive designs or design guidance or to seek help from other licensed professionals. MPCA’s intent by incorporating the Design Guidance by reference was to clarify that the document could be used as an option and to retain the document’s flexibility while meeting the statutory requirement that it provide design guidance. The document is frequently modified with changes in technology and practice. Rather than adopt formal rules for design guidance, incorporating the document by reference keeps the current

⁷⁷ Ex. 9 (BB).

⁷⁸ August 23, 2010 Post-Hearing Response at 15.

⁷⁹ Ex. 9 (EE). Tr. at 123-130.

⁸⁰ MPCA’s August 23, 2010, post-hearing response to comments at 15.

⁸¹ Id at 2.

document effective as an option without having to go through a lengthy rulemaking process to update the guidelines.⁸²

97. The Administrative Law Judge finds the proposed amendments to Minn. R. 7080.1550, subpart 2, items B and C requiring that ISTS be designed to provide additional treatment for high strength wastes is needed and reasonable and rationally related to the end sought to be achieved by the governing statute.

7080.1930 Septic Tank Capacity

98. The MPCA proposed amending subparts 2 and 3 to remove dishwashers from being considered garbage disposals and recommending the use of both an effluent screen and extra tank capacity for soil dispersal systems to provide protection from excessive solids and premature soil clogging.

99. The MPCA received a number of comments from people stating that the requirement of both an effluent screen and extra tank capacity was excessive. Others commented that effluent screens are difficult to maintain and become easily clogged. Others asserted that the use of screens or filters is a consumer protection issue and not a water quality issue, since the screens or filters only keep solids from entering a drainfield and do not affect water quality or environmental protection. Finally, one person pointed out that pressure filters and effluent screens perform different functions and should not be used interchangeably.⁸³

100. In response to these comments, the MPCA has modified its proposed subparts 2 and 3 to read as follows:

Subpart 2. **Garbage disposals.** If a garbage disposal unit ~~or other appliance with garbage grinding capability~~ is anticipated or installed in a dwelling, the septic tank capacity must be at least 50 percent greater than that required in subpart 1 and must include either multiple compartments or multiple tanks. In addition, an effluent screening device is recommended ~~either an effluent screen with an alarm or a pressure filter must be employed~~.

Subpart 3. **Sewage pumping.** If sewage is pumped from a sewage ejector or grinder pump from a dwelling to a septic tank, the septic tank capacity must be at least 50 percent greater than that required in subpart 1 and must include either multiple compartments or multiple tanks. In addition, ~~either an effluent screen with an alarm or a pressure filter must be employed~~ screening device is recommended.

101. The Administrative Law Judge finds the amendments to subparts 2 and 3 are needed and reasonable and the modification does not render the rule substantially different from what was proposed.

⁸² Tr. at 51-55; MPCA's August 23, 2010 post-hearing response to comments at 4.

⁸³ Ex. 9 (D), (G), (S), (BB), (DD), (OO).

102. The MPCA proposed amending subpart 7 regarding septic tank capacity for other establishments and proposed adding a new subpart 8 to specifically address the use of grease interceptors.

103. The MPCA received a number of comments from people questioning the need for a grease interceptor and questioning how and who would determine when a grease interceptor is required. In response to these comments, the MPCA is proposing to delete subpart 8 and revise subpart 7 as follows:

Subpart 7. ~~Septic tank capacity for other establishments.~~ ~~Septic tank liquid capacity for other establishments shall be determined by part 7081.0240, subpart 2. Total septic tank liquid capacity for other establishments with domestic strength waste as described in part 7080.1550, subpart 2, item B, subitem (1), is determined by multiplying the design flow by 3.0 if receiving sewage under gravity flow, by multiplying the design flow by 4.0 if receiving sewage under pressure flow, or according to subpart 6. Additional design considerations, such as equalization tanks, additional capacity, grease interceptors, or secondary treatment, are required for influent concentrations that exceed the levels identified in part 7080.1550, subpart 2, item B, subitem (1).~~

Subpart 8. ~~Oil and grease interceptor.~~ ~~An exterior oil and grease interceptor must be employed if oil and grease exceed the amount identified in part 7080.1550, subpart 2, item B, subitem (1).~~

104. The MPCA revised subpart 7 by adding the phrase “grease interceptors” to the additional design consideration options. The MPCA believes it is reasonable to provide options for the treatment of high strength waste and not to specifically require a grease interceptor.

105. The Administrative Law Judge finds the amendment to subparts 7 and 8 are needed and reasonable and the modification does not render the rule substantially different from what was proposed. The Administrative Law Judge recommends, however, that the MPCA consider replacing the phrase “or according to subpart 6” in the last sentence of subpart 7, with “in accordance with subpart 6.”

7080.1970 Septic Tank Access

106. The MPCA has proposed amending item A as follows:

7080.1970 Septic Tank Access

A. Septic tanks shall ~~shall~~ must have a minimum of two maintenance holes with a minimum diameter of 20 inches (least dimension). ~~One Maintenance hole~~ holes ~~must be placed over the inlet baffle and the outlet device (baffle or screen). Another maintenance hole must be near the center of the tank, to facilitate pumping without interference. For a compartmented tank, this hole must be centered over the first~~

~~compartment. The tank must also have an inspection pipe with a minimum diameter of six inches over the inlet baffle. The maintenance holes must be large enough to allow pumping without interference. Enough maintenance holes must be provided so access can be gained within six feet of all walls for solids removal of each compartment. Inspection pipes of no less than six inches must be provided over any baffles that are not otherwise accessible through a maintenance hole.~~

107. The proposed amendment requires maintenance holes at the inlet and outlet of the septic tank. At the hearing, Art Alanen of Cloquet requested that the proposed amendment to item A be modified to permit the placement of a maintenance hole in the center of the tank. Mr. Alanen explained that the design of the systems he maintains requires accessing the lifting equipment through a center hole. Mr. Alanen stated that if item A is not modified, his business will have to invest a quarter-million dollars in new trucks with different lifting equipment, which would not be feasible for such a small company.⁸⁴

108. Another person commented that it was unnecessary to require two manhole openings in a pump tank.⁸⁵ In its response comments, the MPCA stated that one maintenance hole would be required to service the pump or other dosing device in a pump tank as long as the maintenance hole is not more than six feet from all walls in order to facilitate cleaning should excessive solids carryover from the septic tank.

109. In response to the comments, the MPCA has proposed modifying item A and adding an item B as follows:

7080.1970 Septic Sewage Tank Access

~~A. Septic tanks shall must have a minimum of two maintenance holes with a minimum diameter of 20 inches (least dimension). One Maintenance hole holes must be placed over the inlet baffle or the center of the tank, and the outlet device (baffle or screen). Another maintenance hole must be near the center of the tank, to facilitate pumping without interference. For a compartmented tank, this hole must be centered over the first compartment. The tank must also have an inspection pipe with a minimum diameter of six inches over the inlet baffle. The maintenance holes must be large enough to allow pumping without interference. Enough maintenance holes must be provided so access can be gained within six feet of all walls for solids removal of each compartment. Inspection pipes of no less than six inches must be provided over any baffles that are not otherwise accessible through a maintenance hole.~~

B. Pump tanks must have a minimum of one maintenance hole with a minimum diameter of 20 inches (least dimension). Enough

⁸⁴ Tr. at 72-80; Hearing Exs. 12-14.

⁸⁵ Ex. 9(O).

maintenance holes must be provided so access can be gained within six feet of all walls for solids removal.

110. There already exists an item B in the current Rule 7080.1970. That item B reads: "All maintenance hole risers must extend through the tank cover above final grade." If the MPCA does not intend delete the current item B, it must renumber the current item B as item C and renumber the current item C as item D.

111. In a post-hearing comment, Roland Mann, an Administrator with the Otter Tail Water Management District, suggested that a six-inch inspection pipe be required over the inlet baffle of the septic tank so that the homeowner or maintenance person could access the baffle without having to remove the heavy maintenance hole cover.⁸⁶

112. In its August 30, 2010, response to comments, the MPCA stated that its proposed revision to Rule 7080.1970 will allow a six-inch inspection pipe over the inlet baffle. The MPCA concedes that if a maintenance hole is placed over the inlet baffle, Mr. Mann's concern remains. The MPCA states, however, that if the local unit of government believes it is necessary to require an inspection pipe in the maintenance hole cover over the inlet baffle, it may address this concern through its ordinance.⁸⁷

113. If the MPCA conforms the rule to comply with Finding 110, the Administrative Law Judge finds the MPCA's proposed amendment to Minn. R. 7080.1970 to be needed and reasonable and the modification does not render the rule substantially different than proposed.

7080.2150 Final Treatment and Dispersal

114. The MPCA has proposed amending subpart 3, item C to clarify the restrictions on coarse texture soils. Subpart 3, item C would read as follows:

Subpart 3. **Other technical requirements for systems.** Items A to J M are required for specific designs in parts 7080.2200 to 7080.2400.

C. For acceptable treatment of septic tank effluent by soil, the soil treatment and dispersal systems must meet the requirements of subitems (1) and (2).

(1) A minimum three-foot vertical soil treatment and dispersal zone shall must be designed below the distribution media that meets the criteria in units (a) to (c):

...

(b) ~~any soil layers with a texture group of 1 to 4 in Table IX in item E that are sand or loamy sand texture with 35 to 50 percent rock fragments must not be credited at only one-half their thickness as part of the necessary three-foot treatment zone.~~ Soil layers,

⁸⁶ Ex. 27.

⁸⁷ MPCA's August 30, 2010, post-hearing response to comments at 4.

regardless of soil texture, with greater than 50 percent rock fragments must not be credited as part of the necessary treatment zone;

115. In its SONAR, the MPCA states that it proposed the amendment to clarify the existing restrictions on coarse textured soils. The existing rule had identified certain soil textural groups as being too coarse to provide any treatment of effluent. The amendment to this part deletes the previous references to “soil textural groups” because this manner of classifying soil is being removed in the changes to Table IX in Minn. R. 7080.2150. The amendment instead identifies two soil textures (sand or loamy sand), that when they contain 35 to 50 percent rock fragments, are only credited with a 50 percent treatment capacity. Unlike the existing rule, which did not acknowledge any treatment capacity in the coarse soils, the amendments recognize that some treatment does occur as effluent moves through these types of soil. Sands and loamy sands that have less than 35 percent rock fragments are allowed full credit for calculation of the treatment zone. Sands that have 35 to 50 percent rock fragments, and loamy sands that have from 35 to 50 percent rock fragments can be credited with half their thickness in the calculations required to achieve the necessary treatment zone as determined in Minn. R. 7080.2150, subp. 3 item C, or 7080.2350, subp. 2 Table XI. Any type of soil that has more than 50 percent rock fragments, including sands and loamy sands, is not considered to provide any treatment and cannot be counted in the determination of treatment zone.⁸⁸

116. The MPCA believes it is reasonable to amend unit (b) to clarify the effect of rock fragments on the treatment effectiveness of soils. According to the MPCA, this provision will ensure that adequate soil conditions exist to properly remove fecal organisms in the soil. The 50 percent maximum concentration limit for rock fragments will apply to all soil textures. The MPCA maintains, however, that since sand soils have less treatment ability than heavier textured soils, it is reasonable to set a different treatment standard when the soils contain considerable rock fragments. The rules are amended to count any sandy soil layer with 35 to 50 percent rock fragments as counting only ½ of its thickness as a treatment medium. The MPCA states that this is due to the fact that there is less surface area that is in contact with effluent and the shorter residence time in the soil to attenuate the fecal organisms for natural or accelerated die-off or predation by indigenous soil fauna.⁸⁹

117. Eric Buitenwerf of Hubbard County Environmental Services complained in a written comment that there was no scientific support for crediting certain soil with only a 50 percent treatment capacity. Mr. Buitenwerf asserts that soil types should be credited at their actual observed thickness for treatment capacity.⁹⁰

118. In its response comments, the MPCA states that it is using its best professional judgment to give some credit to soil materials that have reduced surface

⁸⁸ SONAR at 31.

⁸⁹ SONAR at 31.

⁹⁰ Ex. 9(X). See also, Ex. 9(A), (C) and (S).

area and residence times. The MPCA believes the one-half thickness credit is a more reasonable acknowledgment of this ambiguous situation.

119. The MPCA has proposed a minor change to unit (b) to clarify the language regarding which soil textures need special design considerations for treatment abilities. The modification would add the phrase “that are any of the USDA soil textures classified as a” before “sand or loamy sand” in the first sentence.

120. In a post-hearing comment, Michael Rutten, a Water Resources Specialist with Dakota County’s Water Resources Department, stated that subitem 1(b) should be rephrased to make it extremely clear that the required three feet of vertical separation does not need to be continuous, but that the cumulative three feet of required separation must be present within the upper seven feet of the soil profile. Mr. Rutten stated that any single rule standard referencing the need for a continuous three foot separation will call into question the other rule standards specifying a cumulative three foot separation meets the three foot vertical separation rule requirement.

121. In its August 30th response to this comment, the MPCA proposes amending unit (b) of subitem 1 as follows:

(b) any soil layers with a texture group of 1 to 4 in Table IX in item E that are any of the USDA soil textures classified as a sand or loamy sand texture with 35 to 50 percent rock fragments must not be credited at only one-half their thickness as part of the necessary three-foot treatment zone. Soil layers, regardless of soil texture, with greater than 50 percent rock fragments must not be credited as part of the necessary treatment zone; layers that are given full, partial or no credit shall, in any layering arrangement in the soil profile, be cumulatively added to determine the amount of soil treatment zone in accordance with other soil treatment zone provisions; and

122. The MPCA states that this modification will clarify that the three-foot separation can be calculated cumulatively.

123. The Administrative Law Judge finds the proposed amendment to Subpart 3, item C of Minn. R. 7080.2150 to be needed and reasonable, and within the policy-making discretion of the Agency. The post-hearing modification does not render the rule substantially different than initially proposed.

7080.2210 Trenches and Seepage Beds

124. The MPCA has proposed amending subpart 4 regarding the design and construction of trenches and seepage beds by adding a new item F, which will read as follows:

Subpart 4. **Design and construction of trenches and seepage beds.**

F. Trenches and seepage beds in which the distribution media is in contact with soils that are sand, loamy sand, fine sand, or loamy fine sand

or soils with a percolation rate of 0.1 to 5 minutes per inch must employ one or more of the following measures:

(1) employ pressure distribution according to part 7080.2050, subpart 4;

(2) divide the total dispersal area into multiple units that employ serial distribution with each dispersal unit having no greater than 15 percent of the required bottom absorption area; or

(3) have a vertical separation distance of at least five feet.

125. In its SONAR, the MPCA explains that in its 2008 rulemaking it attempted to address the problem of poor distribution of effluent in sandy soils by requiring pressure distribution for all systems. By error, the rule language adopted in 2008 only required pressurizing for systems that have trenches at the same elevation and are in sand. In discussing with SSTS industry members how best to correct this problem, the MPCA found strong opposition to any proposal to broadly require pressure distribution. According to the MPCA, the industry's objections centered on the extra costs associated with pressure distribution, denial that poor distribution actually resulted in poor treatment, and issues concerning the method of determining the compliance status of existing, non-pressurized systems in sandy soils. The MPCA investigated these concerns and determined that additional methods other than pressurization could be employed to provide more even distribution and adequate treatment. These methods are: pressure distribution; dividing the system into short lengths (15 percent or less of the total length); or requiring at least five feet of separation to the limiting layer.

126. The MPCA asserts that by adding item F to subpart 4, it is providing designers, local government regulators, and homeowners with more options when developing SSTS for sandy soils.

127. The MPCA received comments questioning the scientific support for the belief that pressurization and the other proposed options will provide effective treatment for sandy soils. Others complained about the potential cost of installing a pressurized drainfield.⁹¹ One person commented that the proposed change in item F, subitem (2) will require any system installed in sand with three feet of separation to be broken into seven individual trenches.⁹²

128. In its SONAR the MPCA stated that it proposed item F only after meeting with SSTS industry stakeholders and conducting additional research into the effect of soil treatment and removal of fecal organisms in sandy soils. In its response comments, the MPCA reiterates that the proposed amendments to subpart 4 provide more options and flexibility to SSTS designers, installers and homeowners than were provided in the 2008 rule language. The MPCA insists that the additional options are at a minimum cost-neutral and may provide slight cost savings to owners of these types of systems.⁹³

⁹¹ Ex. 9 (X) and (BB).

⁹² Ex. 24 (post hearing written comment).

⁹³ SONAR at 46, Ex. 12.

129. In its August 23rd post-hearing response comments, the MPCA proposed a modification to clarify the language in the first sentence of item F as follows:

F. Trenches and seepage beds in which the distribution media is in contact with soils that are sand, loamy sand, fine sand, or loamy fine sand any of the USDA soil textures classified as a sand or loamy sand or soils with a percolation rate of 0.1 to 5 minutes per inch must employ one or more of the following measures:

130. In its August 30th response to comments, the MPCA disputed a post-hearing comment that claimed the proposed item F would require all sand systems with a three foot separation distance to be divided into smaller trench lengths. The MPCA states that pressure distribution may be employed under item F(1).

131. The Administrative Law Judge finds the proposed rule amendment to be needed and reasonable, and a rational policy choice to address the problem of poor distribution of effluent in sandy soil. The proposed modification does not render the rule amendment substantially different than initially proposed.

7081.0020 Definitions

132. The MPCA has proposed to amend the definition of midsized subsurface sewage treatment systems or MSTs at subpart 4 as follows:

Subpart 4. **Midsized subsurface sewage treatment system or MSTs.** “Midsized subsurface treatment system” or “MSTs” means an ~~individual~~ a subsurface sewage treatment system, or part thereof, as set forth in Minnesota Statutes, sections 115.03 and 115.55, that employs sewage tanks or other treatment devices with final discharge into the soil below the natural soil elevation or elevated final grade and that is designed to receive sewage from dwellings or other establishments with a design flow of greater than 5,000 gallons per day to 10,000 gallons per day.

~~Design flows must be determined by part 7081.0110. MSTs also includes on-lot septic tanks, holding tanks, and privies, that serve these same facilities but does not include any pump tanks used in a sewage collection system.~~ are designed to receive a sewage design flow of greater than 5,000 gallons per day to 10,000 gallons per day; on-lot sewage tanks discharging into a sewage collection system that discharges into MSTs treatment or dispersal components; and the sewage collection system that discharges into MSTs treatment or dispersal components. MSTs does not include those components defined as plumbing under chapter 4715 or sewage collection systems.

133. The MPCA proposed the language to clarify that flow to a holding tank should not be considered in system classifications (ISTS, MSTs or SDS permit.) As with the definition of ISTS at Minn. R. 7080.1100, subp. 41, the MPCA received a

comment that flow amounts from “other establishments” served only by holding tanks should not be considered in determining the regulatory size of the SSTS. The person commenting stated that this would negatively impact seasonal entertainment venues, such as ethnic, regional or historical period festivals like the Renaissance Festival, since they rely on holding tanks.⁹⁴

134. In response to this comment, the MPCA has proposed modifying the second paragraph of subpart 4 to read as follows:

~~Design flows must be determined by part 7081.0110. MSTs also includes on-lot septic tanks, holding tanks, and privies, that serve these same facilities but does not include any pump tanks used in a sewage collection system. are designed to receive a sewage design flow of greater than 5,000 gallons per day to 10,000 gallons per day; on-lot sewage tanks discharging into a sewage collection system that discharges into MSTs treatment or dispersal components; and the sewage collection system and associated tanks that discharges into MSTs treatment or dispersal components. MSTs does not include those components defined as plumbing under chapter 4715 or sewage collection systems.~~

135. The MPCA maintains that the modification is reasonable because, according to chapter 7080, holding tanks can be designed by a basic designer.

136. The Administrative Law Judge finds the proposed amendment to subpart 4 to be needed and reasonable. However, the word “that” in the second line of the second paragraph of subpart 4 should be deleted and either the article “a” should not be deleted before the phrase “sewage collection system” or this phrase should be written in the plural form.

7081.0270 Final Treatment and Dispersal

137. The MPCA has proposed amending subpart 8, item B as follows:

Subpart 8. Soil treatment zone.

B. For soil treatment and dispersal systems that receive treatment level A or B effluent as described in part 7083.4030, the soil treatment zone requirements must meet ~~or exceed the requirements of subitems (1) to (4):~~ part 7080.2150, subpart 3, item C, unless it is modified in Table XI of part 7080.2350, subpart 2, with a minimum vertical separation of two feet. The required vertical separation must be maintained during operation after accounting for groundwater mounding.

[subitems (1) to (4) are deleted.]

⁹⁴ Ex. 9 (OO).

138. In its SONAR, the MPCA explains that it deleted the existing requirements in subitems (1) to (4) and provided a reference to where those requirements, as amended, can be found in Minn. R. 7080.2150, subpart 3, item C.⁹⁵

139. The MPCA received several comments about this proposed amendment. Mr. Haig of the University of Minnesota's OSTP stated that the method for estimating and accounting for groundwater mounding should be included in the rule.⁹⁶ Mr. Pelowski of the Roseau County Environmental Office asked who will determine the accounting for the groundwater mounding and how much will such a determination cost?⁹⁷ Mr. Neff, Aitkin County Environmental Services Director, asked whether the amended subpart indicated that all MSTs must have 24 inches of unsaturated soil below the treatment bottom (vertical separation distance).⁹⁸

140. In its August 23rd response to comments, the MPCA stated that it cannot put groundwater mounding criteria into the rule because it has not yet developed such criteria. The MPCA recommends that this suggestion be considered for future rule revisions. The MPCA points out, however, that Chapter 7081 requires MSTs be monitored for groundwater mounding and requires an operating permit.⁹⁹ The MPCA anticipates that as information on groundwater mounding is generated and recorded, it will be used in the development of groundwater mounding criteria. The MPCA also notes that details of groundwater mounding measurements are currently provided in the design guidance. Finally, the MPCA states that it is important to consider ground water mounding because systems can fail if ground water mounding is not taken into account.¹⁰⁰

141. In response to the last comment regarding vertical separation distance, the MPCA states that the current 2008 rule requires two feet of vertical separation distance. The minimum two feet of vertical separation distance for pretreated effluent is only for systems regulated under chapter 7081 (5,001 to 10,000 gpd). Individual sewage treatment systems (ISTS) are still allowed to have a one-foot vertical separation distance.¹⁰¹

142. The Administrative Law Judge finds the proposed amendment to Minn. R. 7081.0270, Subpart 8 to be needed and reasonable. Although the phrase "after accounting for groundwater mounding" is vague, it and "monitoring for groundwater mounding" are used throughout Chapter 7081 in parts not proposed for change. The Administrative Law Judge encourages the Agency to develop specific criteria for future rulemaking.

⁹⁵ SONAR at 80.

⁹⁶ Ex. 9 (S).

⁹⁷ Ex. 9 (BB).

⁹⁸ Ex. 9 (D).

⁹⁹ See Minn. R. 7081.0210.

¹⁰⁰ MPCA's August 23, 2010, Post-hearing Response to Public Comments at 35-36.

¹⁰¹ Id.

7082.0040 Regulatory Administration Responsibility

143. In subpart 5, the MPCA has proposed changing the date that local units of government must submit their SSTS Annual Report from February 1 to January 10. The MPCA received many comments strongly opposing this change. These commentators stated that moving the due date up will be difficult to accomplish, will put an undue burden on local units of government, is unrealistic, cannot be done due to the length of the construction season, and will result in reduced compliance.¹⁰²

144. In its August 23rd response comments, the MPCA states that legislators begin requesting Annual Report data in early February, which leaves the MPCA little time to clarify and collect the data submitted. Since the legislature uses the data to track the progress of local programs and to make funding decisions, the MPCA maintains it is necessary to move the report due date up to January 10.

145. The Administrative Law Judge finds the proposed change is needed and reasonable, and within the Agency's discretion. Given the strong opposition expressed in the public comments, however, the ALJ recommends that the MPCA withdraw this amendment and allow the current due date of February 1st to remain in place. The need for changing the deadline may be outweighed by the difficulties and burdens the accelerated due date will place on local units of government.

7082.0050 General Requirements for Local Ordinances

146. In response to a comment received after the hearing regarding the responsibilities of counties that adopt alternative local standards in lieu of state standards,¹⁰³ the MPCA has proposed amending Minn. R. 7082.0050, subpart 5 by adding a new item F. This item would read as follows:

Subpart 5 Requirements for Alternative Local Standards

F. When a county has completed the applicable steps in subpart 5, an ordinance containing alternative local standards may be adopted. The county is responsible for developing the processes and procedures necessary to administer the conventional program in addition to the alternative local standards. Processes and procedures must include providing maps to SSTS professionals depicting the areal extent of the alternative local standards, developing inspection procedures to be used to verify compliance with the alternative local standards for both new and existing systems, and developing an addendum to the state's Existing System Inspection form that reflects the altered compliance standards for the alternative local standards systems in the county if applicable.

¹⁰² Ex. 9 (E), (L), (S), (X), (BB), (DD), and (OO).

¹⁰³ Ex. 26 (joint comment dated August 19, 2010, from SSTS Administrators for Marshall, Pennington and Red Lake Counties).

147. In its August 30th comments, the MPCA states that this amendment will clarify that counties are responsible for the administration of alternative local standards if they choose to adopt such standards in lieu of state standards.¹⁰⁴

148. The Administrative Law Judge finds this proposed amendment to Minn. R. 7082.0050 to be needed and reasonable and does not render the rule substantially different. The proposed amendment is a logical outgrowth of the notice and comments submitted in response to the notice.

7082.0600 System Management

149. The MPCA proposed minor clerical changes to subpart 1 Management plans. The MPCA received a number of comments regarding fundamental issues with the requirements of management plans and operating permits. Commentators stated that operating permits are extremely time consuming for staff, difficult to enforce, and should only be used for old performance systems. The commentators also asserted that management plans are unnecessary and unenforceable.

150. The MPCA maintains that the existing requirements for management plans and operating permits that were approved in 2008 are reasonable and necessary. The MPCA states that onsite systems need to be properly operated and maintained. It is the responsibility of the system owners to ensure their systems are maintained. The MPCA states that local units of government are not required to actively enforce management plans to ensure system owners are following the septic system “owner’s guide.” Rather they are required to ensure that management plans are developed for systems. The MPCA points out that the University of Minnesota’s OSTP has developed 18 different management plans for different types of systems, in consultation with the SSTS Technical Advisory Panel (TAP) and other practitioners. These management plans are currently posted on the University’s website and are used in their training workshops.

151. The MPCA maintains further that more complex systems that pose potential risks to public health or the environment need a higher level of maintenance and oversight. The MPCA contends that operating permits can be an effective tool in providing this needed oversight and it maintains that the U.S. Environmental Protection Agency supports this belief. To assist local units of government, the MPCA has developed an operating permit template, in consultation with the SSTS-TAP. Fourteen sample operating permits have been developed for different products and are posted on the MPCA’s SSTS product registration web page. The MPCA plans on providing additional operating permit examples on its web site as part of the product registration process.

152. The MPCA is proposing, however, to eliminate the operating permit requirement for holding tanks. After reviewing comments on this issue, the MPCA agrees that it should be left to the local permitting authority whether holding tanks

¹⁰⁴ MPCA’s August 30, 2010, post-hearing response to comments at 3.

should be required to have an operating permit. Therefore, the MPCA has proposed amending subpart 2 of Minn. R. 7082.0600 to read as follows:

Subpart 2. SSTS operating permits

A. Local units of government must issue and enforce an operating permit for SSTS specified in parts 7080.2290, 7080.2350 and 7080.2400, and chapter 7081 and any other system deemed to require operational oversight as determined by the local unit of government. An operating permit is recommended for holding tanks.

153. The Administrative Law Judge finds this proposed amendment to subpart 2 to be needed and reasonable and does not render the rule substantially different from what was proposed. The amendment is within the scope of the matter announced in the notice and is a logical outgrowth of the comments received in response to the notice.

7082.0700 Inspection Program for Subsurface Sewage Treatment Systems

154. The MPCA has proposed amending subpart 4, item B, subitem 1 to require that all components of a SSTS be evaluated (water tight tanks, drainfield vertical separation distance, surfacing/discharging to a drainage tile). The proposed amended subpart 4, item B, subitem 1 reads as follows:

Subpart 4. ~~Certificate of Compliance; notice of noncompliance inspection; existing systems~~

...

B. ~~An inspection~~ The agency's inspection report form for existing SSTS must verify the conditions, supplemented with any necessary or locally required supporting documentation, must be used for the existing system compliance inspections in subitems (1) to (3). Allowable supporting documentation includes tank integrity assessments made within the past three years and prior soil assessments.

(1) ~~Sewage tanks must be assessed for leakage below the operating depth. A leakage report~~ A tank integrity and safety compliance assessment must be completed that includes the method or methods used to make the assessment. The assessment must be made by either a licensed SSTS inspection, maintenance, installation, or service provider business, except a design business, or a qualified employee with an SSTS certification, except as a designer inspector with jurisdiction. A passing report An existing compliant tank integrity and safety compliance assessment is valid for three years unless the certified individual has reason to believe that a new inspection is to be conducted and the tank is found not to be watertight a new evaluation is requested by the owner or owner's agent or is required according to local regulations.

155. In its SONAR, the MPCA stated that the amendments are meant to clarify that the report to be filed is the tank integrity and safety compliance assessment report. The amendments also clarify who can conduct the compliance inspection. The amendment does not change who is qualified to conduct the tank assessment; it only restates the existing requirements to clearly identify who may conduct the assessment. Finally, the MPCA states that the amendments clarify that an owner may always request a compliance assessment and a local unit of government has always been allowed to require inspections more frequently than every three years.¹⁰⁵

156. The MPCA also states that in the existing rule inspectors could end their inspection when they discovered one failed component. According to MPCA, this could result in a situation where a homeowner finds out their drainfield does not meet the required vertical separation, but does not find out until another inspection that their tank is also leaking and needs to be replaced. The MPCA is changing the rule to make it clear that it is the inspector's job to assess compliance and report on all system components for each inspection. The MPCA contends that having a complete inspection done at one time may represent a savings in time and expense for the homeowner. However, the MPCA concedes that inspectors will most likely raise their fees to cover the added time and work involved in conducting a complete inspection. The MPCA anticipates that the requirement of a complete inspection could add as much as \$500 to the cost of an inspection.¹⁰⁶

157. The MPCA received several comments regarding the proposed amendments to subpart 4, item B, subitem 1. Bernie Miller, of Miller's Sewage Treatment Solutions, stated that requiring all components of a SSTS to be evaluated is unnecessary and will be place a financial burden on local units of government by necessitating the hiring of compliance inspectors to conduct the compliance assessments. According to Mr. Miller, the goal of a compliance inspection is to assess whether the system is working properly and not posing a danger to public health, safety or the environment. With this in mind, he asks: if a bottomless tank is found and the system has failed, why require that homeowners and local units of government to incur additional costs by assessing the system's other components? Once an imminent health risk has been identified, there is no additional value in knowing if the other components are in compliance. Mr. Miller also noted that the SSTS Advisory Committee voted against this proposed amendment and interpretation of the rule.¹⁰⁷

158. Similarly, in an August 20th comment, Mr. Haig reiterated OSTP's opposition to MPCA's proposal to require that all SSTS components be evaluated during the course of all existing SSTS inspections. The OSTP contends that requiring an additional assessment of components of a system that has already been identified as non-compliant is not cost-effective and introduces unnecessary liability for the inspector and confusion for the local unit of government.¹⁰⁸

¹⁰⁵ SONAR at 92.

¹⁰⁶ SONAR at 115.

¹⁰⁷ Ex. 9 (L)

¹⁰⁸ Ex. 28.

159. In its August 23rd response, the MPCA states that it consulted with staff of the Attorney General's office and was advised that Minn. Stat. § 115.55 permits the Agency to require that all components be checked.¹⁰⁹

160. The Administrative Law Judge finds the proposed amendment to be needed and reasonable and within MPCA's statutory and policy-making authority.

7083.2040 Transitioning Existing Registrations and Licenses

161. The MPCA has proposed modifying subparts 1 and 2 to extend the deadline for obtaining Advance Design and Inspection licenses from the current February 4, 2011 deadline to February 4, 2012. This will give SSTS designers and inspectors an additional year to achieve the advanced certifications.

162. The 2008 rules introduced three new license categories: Service Provider, Advanced Designer and Advanced Inspector. The MPCA received several comments on the requirements in the 2008 rules¹¹⁰ that provide that only Advanced Designers and Inspectors will be permitted to design and inspect Type IV systems for single-family homes as of February 4, 2011. These commentators requested modification of Minn. R. 7083.0740 and 7083.0750 to allow Basic Designers and Inspectors to design and inspect a Type IV system for single family homes. The MPCA discussed this matter internally and with the SSTS Advisory Committee. The Advisory Committee voted in a split decision to recommend to the MPCA that the duties of the Basic Designer and Inspector be amended in this rulemaking to allow Basic Designers and Inspectors to design and inspect Type IV systems for single-family homes. The Advisory Committee noted that Type IV systems use registered products with detailed instructions that are reviewed by the MPCA, and that requiring Advanced Designers and Inspectors will increase the costs of system design and inspection.¹¹¹

163. The MPCA considered the recommendation but chose instead to propose only that the deadline for obtaining Advanced Design and Inspection licenses be extended from the current February 4, 2011 deadline to February 4, 2012. This will give SSTS designers and inspectors an additional year to achieve the advanced certifications. The MPCA continues to maintain that it is important and necessary that Designers and Inspectors receive additional training on the more complex elements of design, such as the impact of high BOD₅ loading to trenches, in order to work on Type IV systems. Initial plans for the 2008 rulemaking were to require all designers and inspectors to attend more training. In the end, the MPCA decided to allow Basic Designers and Inspectors to work on Type I, II and III systems with flows under 2500 gpd to reduce the regulatory burden on this segment of the industry.

164. The Administrative Law Judge finds the proposed amendments to Subparts 1 and 2 extending the deadline for obtaining advanced licenses to be needed and reasonable.

¹⁰⁹ MPCA's August 23, 2010, post-hearing response to comments at 43.

¹¹⁰ Minn. R. 7083.0740 (Design License) and 7083.0750 (Inspection License).

¹¹¹ MPCA's August 23, 2010, post-hearing response to comments at 44-45. Ex. 9 (D) and (E).

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The MPCA gave proper notice of the hearing in this matter.
2. The MPCA has fulfilled the procedural requirements of Minnesota Statutes § 14.14 and all other procedural requirements of law or rule.
3. The MPCA has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).
4. The MPCA has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).
5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated: September 29, 2010

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Transcript Prepared.

NOTICE

The Agency must make this Report available for review by anyone who wishes to review it for at least five working days before the Agency takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Agency makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Agency must give notice to all persons who requested that they be informed of the filing.

