

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

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

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on January 10, 11, and 12, 1995 in Rochester, St. Paul, and Detroit Lakes, respectively. Afternoon and evening sessions were conducted in Rochester and Detroit Lakes.

This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those proposed originally.

The Minnesota Pollution Control Agency (Agency, MPCA) was represented at the hearing by Dwight Wagenius, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127. Julie Ketchum, Program Development Unit Supervisor in the Agency's Solid Waste Division, and Kristine Leavitt and Karen Harrington, Principal Planners in the Unit.

Approximately 65 people attended the hearings at all sessions, 26 of whom attended in St. Paul. Six members of the public spoke at the hearings, two in each city.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The Commissioner of the Pollution Control Agency may then adopt final rules or modify or withdraw the proposed rules. If the Commissioner of the Pollution Control Agency makes changes in the rules other than those recommended in this report, he must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the Commissioner must submit them to the Revisor of Statutes for a review of the form of the rules. The Commissioner must also give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.

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

## FINDINGS OF FACT

### Procedural Requirements

1. On November 7, 1994, the Agency filed the following documents with the Office of Administrative Hearings:

- a) A copy of the proposed rules certified by the Revisor of Statutes.
- b) A proposed Order for Hearing.
- c) Proposed Notices of Hearing to be mailed and for publication in the State Register.
- d) The Statement of Need and Reasonableness.
- e) A statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- f) A statement indicating the Agency's intent to provide discretionary additional public notice of the proposed rules, and describing the extent of the discretionary additional notice to be given.

2. On November 23, 1994, the Agency mailed the Notice of Hearing and a copy of the proposed rules to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice, and to all persons described in the statement of the extent of discretionary additional notice.

3. On November 28, 1994, a Notice of Hearing was published at 19 S.R. 1180.

4. On December 13 and 14, 1994, the Agency filed the following documents with the Administrative Law Judge:

- a) The Notice of Hearing as mailed.
- b) The Agency's certification that its mailing list was accurate and complete.
- c) The Affidavit of Mailing the Notice to all persons on Agency's list.
- d) An Affidavit of additional discretionary notice given pursuant to Minn. Stat. § 14.14, subd. 1a.
- e) All materials received following a Notice of Solicitation of Outside Information or Opinions regarding the proposed rules, published pursuant to Minn. Stat. § 14.10 on August 29, 1994 at 19 S.R. 492, together with a photocopy of the pages of the State Register on which that Notice was published.

- f) The names of Agency personnel who would represent the MPCA at the hearing. No additional persons presented testimony for the Agency.
- g) A photocopy of the pages of the State Register on which the Notice of Hearing and proposed rules were published.

These documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comments and statements remained open through February 1, 1994, the period having been extended by order of the Administrative Law Judge to twenty calendar days following the final day of the hearing. The record closed on February 8, 1994, the fifth business day following the close of the comment period.

#### Statutory Authority and the Nature of the Proposed Rules

6. It is found that Minn. Laws 1994, Ch. 548, § 1, codified as Minn. Stat. § 115A.47, grants the Commissioner of the Pollution Control Agency (not the MPCA Board) statutory authority to adopt the proposed rules. Specifically, subdivision 4 of the statute reads:

“The commissioner shall adopt rules to implement this section”.

7. It is noted that Section 2 (uncodified) of Minn. Laws 1994, Ch. 548 specifies that the preceding section is “effective February 1, 1995, or when the rules adopted under section 1, subd. 4 are effective, whichever is sooner.” Although the rules under consideration here will not be adopted until sometime after February 1, 1995, the affected public should take note that they have been subject to the provisions of Minn. Stat. § 115.47 since February 1 of this year.

8. The authorizing statute is very detailed. The proposed rules serve to provide clarification and detail on the administrative requirements mandated in the legislation, particularly the requirement that persons arranging for the management of solid waste at a facility using a primary waste management method that is “environmentally inferior” to the primary waste management method chosen by the county where the waste is generated indemnify, hold harmless and defend solid waste generators for response costs incurred due to releases of hazardous substances, pollutants or contaminants under State and Federal Environmental Response and Liability (“Superfund”) legislation—specifically, Minn. Stat. Ch. 115B or U.S. Code, Title 42, §§ 9601-9675.

The authorizing statute requires further that if the “environmentally inferior” facility chosen to manage the waste is a disposal facility, the person arranging for the management of the waste must establish a trust fund in accordance with the law. The statute also specifies certain reporting and record keeping requirements. The proposed rules spell out in detail the standards for establishment of trust funds for response and defense costs, specific language required for trust fund agreements under the statute and payment and reporting requirements.

9. John H. Turner, the Director of State Government Affairs at Browning-Ferris Industries (BFI) in Houston, Texas filed a lengthy written comment urging the MPCA Commissioner to withdraw the proposed rules because they are based on a statute which may be unconstitutional (for various reasons—violative of the U.S. Constitution’s contract clause, violative of the 14th Amendment’s substantive due process and equal protection clauses, or an

impermissible “taking” of property under the 14th Amendment) or in violation of Federal antitrust laws. In the alternative, BFI recommends deletion of “any reference to ‘designation ordinances’ or other documents or mandates that purport to require designation” from the definition of “environmentally inferior”.

10. Mr. Turner comments further that it is appropriate to delay adoption of the rules during the pendency of ongoing litigation considering the constitutionality of the designation provisions of Minn. Stat. § 115A.47. Minn. Stat. §115A.47, Subd. 2(g)(2) includes in the definition of the “waste management methods chosen by a county” facilities to which solid waste generated in a county is directed by a “designation ordinance” developed under Minn. Stat. §§ 115A.80 to 115A.893. The proposed rules implement this statute by defining as “environmentally inferior” a waste management method lower on the continuum of methods (ranked at Minn. Stat. § 115A.02) than that implemented through a “designation ordinance”. With respect to “designation ordinances”, the proposed rule paraphrases the authority laid out in statute, and any declaration by the Administrative Law Judge that the rule as written or applied in that regard is unconstitutional is tantamount to declaring that portion of the statute unconstitutional. An Administrative Law Judge acting under the Minnesota Administrative Procedure Act is without power to declare a statute unconstitutional, and unless the Commissioner withdraws the proposed rules (which he has not), the Administrative Law Judge is not persuaded there is any impediment to proceeding with his Report. It is noted that the Commissioner has 180 days from the issuance of the ALJ’s Report to adopt the rules, after which they are deemed to have been withdrawn. See Minn. Stat. § 14.19.

The referenced litigation, National Solid Waste Management Association, et. al. v. Charles W. Williams, Commissioner of the Minnesota Pollution Control Agency, filed as Case No. 4-94-826 in the United States District Court for the District of Minnesota, is still pending before United States District Judge David Doty at the time of issuance of this Report.

11. Susan Young, director of the division of Solid Waste and Recycling for the City of Minneapolis’s Department of Public Works, filed a comment similar to that of Mr. Turner’s. The argument is that the statute (§ 115A.47) places unreasonable legal and financial burdens on persons who dispose waste at environmentally sound, less expensive facilities located out-of-state that the statute declares to be “environmentally inferior”. Ms. Young urges the Administrative Law Judge to delay his Report until Judge Doty rules on the constitutionality of the underlying statute. For the reasons stated in the preceding finding, the Administrative Law Judge will not delay this Report.

#### Motion for Continuance

12. Timothy R. Thorton, counsel for the Plaintiffs in the litigation noted in the preceding Finding, filed a Request for a four-week Continuance of the rule hearing, until February 7-9, for several listed reasons. See Public Ex. 15. Most significantly, he anticipated that Judge Doty would rule on the constitutionality of the authorizing statute by that time (which has not happened), his clients faced dire economic consequences if the statute took effect as scheduled on February 1 (enforcement of the statute has not been enjoined as of the writing of this Report) and his clients (National Solid Waste Management Association, Sanifill, Inc., Randy’s Sanitation, Inc., Carver Transfer and Processing LLC and Waste Systems Corp.) did not receive timely notice of the hearing or of the substance of the proposed rules.

13. The Administrative Law Judge set aside time during the St. Paul hearing on January 11 for argument of the Request (Motion) described in the preceding paragraph. Oral notice of this proceeding was given to counsel for the parties (to Mr. Wagenius and Mr. Jack Perry, an attorney at Thornton's firm identified by telephone number on the first page as the "writer" of the Motion). No appearance was made at the hearing by or on behalf of the Movants, and they filed no further comments or responses on this record. Based upon the arguments made by the Commissioner's counsel on January 11 in St. Paul, and for the reasons given on the record by him the same day, the Administrative Law Judge denied the Request for Continuance orally at the close of the January 11, 1995 hearing.

14. Based upon the entire record before him, the Administrative Law Judge AFFIRMS his oral decision of January 11, 1995 regarding the Request (Motion) for Continuance filed on January 6, 1995. The Request for Continuance is DENIED.

15. The Administrative Law Judge has denied the Request (Motion) for Continuance for the following reasons:

- (1) The authority cited by counsel for a discretionary grant of a continuance by the Administrative Law Judge is not applicable—Minn. Rules 1400.7500 allows an Administrative Law Judge to grant continuances for "good cause", including "lack of proper notice", but that rule applies only to contested cases under the Administrative Procedure Act, not to rule hearings.
- (2) The ALJ is persuaded that the affected public has known of the pendency of these rules at least since publication of the Notice of Solicitation of Outside Information or Opinion in the State Register on August 29, 1994.
- (3) Mr. Bill Paul of Waste Systems Corp. is on the list of persons to whom the Notice of Hearing and a copy of the proposed rules were mailed on November 28, 1994.
- (4) Notice of the hearing and proposed rules were published as required in the State Register on November 28, 1994.
- (5) Since the United States District Court suit was brought in September of 1994, counsel for the Plaintiffs have known, or should have known, that rulemaking was authorized under the statute and, if rules were not adopted by February 1, 1995, the statute took effect on that date.
- (6) Counsel for the Plaintiffs informed the Administrative Law Judge in advance of the hearing that they had received both the Notice of Hearing and the SONAR.
- (7) The Plaintiffs and/or their counsel had twenty days from the close of the hearing (through February 1, 1995) to comment in writing on the proposed rules. Given the filing of this Motion on January 6, the minimum total for comment was 26 days. The ALJ is not persuaded that a 28-day extension of an opportunity to make oral comment is

sufficiently different from 26 days to make a written comment such that a four-week postponement of the entire process was warranted. It is noted that the Plaintiffs made no further comment during the time the record remained open beyond the text of their January 6 Request (Motion).

### Small Business Considerations

16. Minn. Stat. § 14.115, Subd. 2 relates to small business considerations in rulemaking. The statute requires an agency to consider methods for reducing the impact of its rules on small businesses when the agency is proposing rules that may have any effect on small businesses. The statute provides that agencies consider:

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

Subdivision 2 provides also that in its Statement of Need and Reasonableness, “the agency shall document how it has considered these methods and the results”.

In the SONAR, Agency Staff stated:

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

17. The Administrative Law Judge questioned whether the last paragraph in the preceding Finding was sufficient documentation of how the Agency considered the individual methods for reducing the impact of the rule on small businesses. The proposed rules are designed to implement a detailed, specific statute that provides indemnification for generators of waste through establishment of trust funds. The SONAR’s brief statement explaining why there are no methods proposed to reduce the impact of the proposals on small businesses essentially states that implementation of any such methods would circumvent the clear intent of the statute.

The ALJ agrees with the MPCA staff on this issue. Many of the compliance standards, reporting requirements and schedules or deadlines proposed in the rules are based on the statute. The “performance standards” consideration at subd. 2(d) of the Small Business Considerations statute does not apply to rules of this type, and it is found that any exemption would defeat the intent of the underlying statute.

18. In response to a concern raised by the Administrative Law Judge that the SONAR may not have documented sufficiently the consideration given by the Commissioner to the

methods for reducing the impact of the proposed rules on small businesses, and the results of those considerations, the Agency panel detailed numerous subparts of the proposed rules that purport to take small businesses into consideration. See end of Side 1 and start of Side 2 of the tapes of the afternoon session in Rochester. The citations are to rule subparts that reflect reasonable, practical deadlines and other time standards involving trust fund provisions in areas over which the Commissioner has discretion.

19. It is found that the Agency has documented sufficiently in its SONAR how it considered methods to reduce the impact of the proposed rules on small businesses and the results of those considerations. The Agency's SONAR documents that consideration of the methods listed was made and that the Agency found the methods for reducing the impact of the statute on small businesses to be inconsistent with the authorizing statute. It is also found that the Agency has properly and appropriately considered methods for reducing the impact of its proposed rules on small businesses within the meaning of Minn. Stat. § 14.115, subd. 1.

#### Other Statutory Requirements

20. In exercising his powers, the Commissioner is required by Minn. Stat. § 116.07, subd. 6 to give due consideration to economic factors. The statute provides:

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

It is found that the Commissioner has given due consideration to available information as to any economic impacts the proposed rules would have. Since the underlying statute will be effective regardless of when rules are adopted, it is found that the economic impact of the rules is limited to the costs of establishing a trust fund, as argued in the SONAR. The costs to put in place a trust fund in accordance with the proposed rules is minor. It is found that the proposed rules will have no significant effect on the economic factors listed above.

21. Minn. Stat. § 14.11, subd. 2 requires that if an agency proposing adoption of a rule determines the rule may have a direct and substantial adverse impact on agricultural land in the state, the agency shall comply with certain additional requirements. It is found that the proposed rules will not have an impact on agricultural land in the state.

Minn. Stat. § 116.07, subd. 4 requires that if a proposed rule affects farming operations, the Commissioner must provide a copy of the proposed rule and a statement of the effect of the proposed rule on farming operations to the Commissioner of Agriculture for review and comment. It is found that the proposed rules do not have an impact on farming operations in Minnesota.

22. Minn. Stat. S 14.11, subd. 1 requires the Commissioner to include in the notice of intent to adopt rules a statement of the rule's estimated costs to local public bodies if the cost of complying with the rule exceeds \$100,000 for all local public bodies in the state in either of the

two years immediately following adoption of the rule. It is found that the proposed rules may have some financial impact on cities and townships that arrange for delivery of waste to environmentally inferior facilities. In the Statement of Need and Reasonableness, the MPCA staff argued that the financial impact on local public bodies is anticipated to be considerably less than \$100,000 during the two years after the effective date of the rules. There is no evidence in the record to the contrary. It is found that the Commissioner is not required by Minn. Stat. § 14.11, subd. 1 to include in the Notice of Hearing in this instance a written statement giving the Agency's reasonable estimate of the total cost to all public bodies in the state to implement the proposed rules for the two years immediately following adoption. It is so found because any estimate of such costs (payments into the required trust fund when a city or township arranges for delivery of waste to environmentally inferior facilities) would involve speculation on whether such local public bodies actually would engage in such arrangements. In the absence of evidence to the contrary, the Administrative Law Judge accepts the Agency staff's expertise in arriving at its expectation that such costs would be considerably less than \$100,000 during the two years after adoption of the proposed rules.

23. Minn. Stat. § 174.05 requires the MPCA to inform the Commissioner of Transportation of any rulemaking pursuant to Minn. Stat. § 116.07 if that rulemaking affects any standard or rule concerning transportation established pursuant to § 116.07. It is found that the proposed rules do not meet the statutory test outlined above. Even if they did, the MPCA staff argues in the SONAR that the proposed rules may indeed reduce long distance hauling of waste, which would reduce air emissions and gasoline usage. In addition, it is noted that the authorizing statute will be implemented even if the rules are not adopted so the rules, in and of themselves, place no additional burden on transportation in the state. It is found that a review by the Commissioner of Transportation pursuant to Minn. Stat. § 174.05 is not required in this instance.

#### Need and Reasonableness

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

25. One element requiring implementation by rule is the establishment and certification of a trust fund. Establishing a trust fund necessitates a trust agreement stating the responsibilities of the parties subject to the fund and how the fund shall operate. The proposed rules provide trust agreement language in an effort to ensure that an established trust fund will fulfill the purpose of the statute, and in an effort to avoid poorly worded trust agreements that could jeopardize the security of the trust fund and its ability to cover generators' response and defense costs. The proposed rules are necessary in order to clarify timing requirements and to specify which waste methods and facility types are regarded as environmentally inferior.

It is found that the MPCA has established the general need for the proposed rules.

26. The proposed rules seek to provide clarification of the law only where needed. Because the law governing the proposed rules is quite specific, the rule focuses on requirements of the trust fund. The language is modeled after existing financial assurance trust fund rules for municipal solid waste management land disposal facilities that have been in effect since

November 15, 1988. See Agency Ex. 17 and Minn. Rule 7035.2805. In the SONAR, the MPCA staff states that its experience in administering the financial assurance trust fund rules has proven successful. To the Agency's knowledge, no facility owners or operators have had difficulty in arranging for a trust fund or establishing a trust agreement that is worded in accordance with the rules. Financial institutions have found the trust agreement language to define clearly the roles and responsibilities of all parties to the agreement and agree that the financial assurance trust fund agreement has protected trustees adequately from potential legal repercussions. These representations in the SONAR have not been challenged by any evidence in the record.

The SONAR also notes that report and timing requirements in the proposed rules were discussed with a variety of persons from the solid waste sector and banking sector and were determined to provide adequate time for meeting rule requirements. It is noted that the staff has involved persons with a wide range of expertise in the drafting of the proposed rule to help insure reasonableness of the rules.

27. It is found that the Agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In all instances not discussed specifically below, it is found that the Statement Of Need And Reasonableness prepared by the MPCA staff establishes the need for and reasonableness of every part of the proposed rules.

#### Changes Proposed by the Agency

28. In response to concerns raised by the Administrative Law Judge and in the oral and written comments of the affected public, the MPCA staff proposes a number of changes, detailed below, from the proposed rules as published in the State Register. With regard to all other provisions of the proposed rule, it is found that the Agency has established the need for and reasonableness of the provisions by an affirmative presentation of the facts in its SONAR and by way of testimony at the rule hearings and final comments and response to comments by members of the public.

29. Proposed Minn. Rule 7080.0030, subp. F describes how money in the trust fund is to be used. In its final comments, the staff proposed to add the following language at the end of the subpart:

“The Commissioner shall provide reasonable explanation for withholding approval to reimburse any response or defense costs within the 90-day time period.”

This additional sentence provides clarity to those affected by the rules by specifying a notice requirement to persons who paid into the trusts of an adverse decision regarding reimbursement. It is found that the additional proposed language is necessary and reasonable and does not constitute a substantial change.

30. Regarding the same subpart F., the Administrative Law Judge suggests that the Agency specify the “applicable law(s)” under which the Commissioner shall determine whether proposed expenditures for reimbursement is sought are proper. The MPCA staff has declined to follow this suggestion, and the ALJ agrees it is reasonably clear to the affected public that “applicable” law would be statutes specifying what costs are appropriate for environmental response and legal defense. However, it is suggested that a specific citation, at least to

applicable language in Minn. Stat. § 115A.47, would clarify the rule further and it is found that such clarification is needed and reasonable and would not be a substantial change.

31. At various points in the proposed rules, reference is made to “inferior or superior disposal” facilities. It is noted that the statute defines the terms specifically, but the proposed rules do not. While that is not a defect, because both the statute and proposed rule classify an “inferior disposal facility” as defined in the statute as environmentally inferior, it is suggested that the Agency staff either reference the statutory definitions or include the statutory definitions in the rules. It is found necessary and reasonable to add the definitions to clarify the rules further. It is found that such a change would not be a substantial change. If the Agency adds definitions of inferior and/or superior disposal facilities to the rule different than those in the statute, it must return the record to the Chief Administrative Law Judge for a substantial change review.

32. The MPCA staff proposes to delete the words “specified rule” from the fourth line of proposed rule 7038.0040 and insert “of parts 7038.0010 to 7038.0100” between “requirements” and “or” in the same sentence. It is found that the proposed change is clarifying in nature, is necessary and reasonable and does not constitute a substantial change.

33. In the last sentence of proposed rule 7038.0050, the staff proposes to substitute the word “shall” for “may” in order to remove a potential ambiguity. The proposed change is found to be necessary and reasonable. Since it does not impose additional requirements on persons subject to the rules, it is found further that substituting “shall” for “may” in this instance does not constitute a substantial change.

34. With respect to releasing persons from trust fund requirements under part 7038.0060, the Agency proposed initially to allow the Commissioner to extend application of the trust fund (for response cost purposes, but not for defense costs) beyond the statutory time limit of 30 years from the closure of the facility. The Administrative Law Judge questioned the Commissioner’s statutory authority to make such an extension. In response, the Agency proposes to drop the distinction between response and defense costs, and proposes a single rule part that reads:

“Within 90 days after receiving notification from a person that 30 years have elapsed from an inferior or superior disposal facility’s certified closure, the commissioner shall notify the person in writing that the person is no longer required to maintain the trust fund.”

It is found that the proposed change specified in this Finding is necessary and reasonable to ensure that the post-closure time period set in the rules conforms to that required by law. It is found that the proposed change is not substantial because it conforms the rule to the law and clarifies language governing release from trust fund costs.

35. With respect to specific language in the proposed trust agreement (proposed Part 7038.0800), the Agency offers two additions designed to make persons potentially covered by the agreement an all-inclusive group. The first adds “or individual” to the list of potential Grantors and other adds the words “agent, or itself” after “officers” in the fourth paragraph in the text of the proposed agreement.

It is found that the above changes are needed and reasonable and do not constitute substantial changes. No additional burden is placed on persons covered by the rules.

36. In the last sentence of Section 13 of the proposed trust agreement, the MPCA proposes to insert the word “transaction” between “any” and “expenses” in order to clarify the types of expenses eligible for reimbursement of expense connected with the transfer from one trustee to another. It is found that this proposed change is necessary and reasonable and does not constitute a substantial change.

37. At the final sentence of Section 18 of the proposed trust language published in the State Register, the MPCA proposes to add the clause “made in good faith” after the word “capacity.” The Commissioner proposes further to add an additional sentence at the end of the paragraph reading “This provision does not exempt trustees from liabilities for negligent acts”. This language adds clarification to the rule regarding the potential liability of trustees. The “made in good faith” clause is consistent with the first sentence of the Section as proposed originally, and the intention not to exempt trustees for negligence was stated in the Statement of Need and Reasonableness. Therefore, the Administrative Law Judge finds the proposed changes to be necessary and reasonable and that they do not constitute substantial changes. They provide clarification to the Section as drafted originally.

38. Proposed rule 7038.0100 specifies requirements for the quarterly report required by Minn. Stat. § 115A.47, subd. 3(f). In addition to specific items to be reported on, the statute provides, at subd. 3(f)(4), that the report shall include “any other information necessary for the commissioner to adequately monitor and audit the trust fund or the need for payment from it.” In its final comments, the MPCA proposed to delete the words “at each facility” and add two clauses to subpart .0100 C. in order to clarify further what information is “necessary for the Commissioner” under the above-quoted statute. The intent of the proposed changes are to enable the Commissioner to identify the source of the waste. The proposed subpart reads:

C. “the names, addresses, and permit numbers of inferior or superior disposal facilities used for managing solid waste, the classification of the facility as an inferior or superior disposal facility, the county from which the waste was generated and the amount of waste per cubic yard or per ton from each county at ~~each facility~~, and the amount paid into the trust fund for the quarter;” (add the clauses underlined, delete the clause crossed out).

The proposed language removes unnecessary language (“at each facility”), and that change is found to be necessary and reasonable and not a substantial change. The additions requiring county-specific information are proposed because they exemplify “any other information necessary for the commissioner to monitor and audit the trust fund or the need for payment from it”. It is found that making specific “other information necessary for the commissioner . . .” by way of a specific rule is not a substantial change because the affected public was on notice that the Commissioner was proposing to have the discretion to seek such information. The grant of discretion (Subpart .0100 F.) is taken directly from the above-quoted statute.

The Agency argues that the county-specific information is needed in order to help track properly waste considered initially as having been managed in an environmentally inferior manner that is later found to be exempt from state processing requirements. The staff notes in its

final comments that waste haulers had been contacted regarding their ability to identify quantities of waste by counties and it was found that the haulers could provide such information without additional undue burdens. No response to the Agency's comment proposing the change for the reasons given was received. The Administrative Law Judge's finds the Agency's proposed addition of requiring county-specific information in quarterly reports, as specified above, to be necessary and reasonable. The proposed additions to proposed Rule 7038.0100 F. do not constitute substantial changes.

39. Regarding quarterly reports, the Agency proposes to add a new second sentence to the first paragraph of subpart 7038.0100, which reads:

“The agency shall provide a quarterly report form at a person's request.”

It is found that adding this sentence to the subpart is necessary and reasonable. Provision of forms was intended by the MPCA, in any case, and specifying so in the rule provides clarification and is consistent with existing solid waste management rules that allow persons to receive annual report forms. The proposed language does not constitute a substantial change. In fact, it lessens the burden on the affected public.

#### Additional Public Comment

40. A letter to the Administrative Law Judge from Bill Henry, Director of the Tri-County (Le Sueur, Nicollet, Sibley) Solid Waste Office in St. Peter, does not comment on the proposed rules directly but asks rather for the consequences of the proposed rules in relation to his agency's applicable plans, solid waste management ordinances and contracts with NRG Energy, Inc. That analysis is outside the scope of this Report and outside the current jurisdiction of the Administrative Law Judge. Accordingly, Mr. Henry's letter and attachments (Public Ex. 13) are referred to Agency staff for reply.

41. Some of the written comments support or attack the rules in general terms without making specific suggestions. The proposed rules generally follow a specific statutory scheme that is in effect with or without the rules. General attacks on the proposals merit no further comment when they relate, as some did, to action already taken by the legislature, because an Administrative Law Judge in a rulemaking proceeding is without power or authority to undo a statute.

42. Much of the written and oral comment involved scenarios presented by commentators in the waste hauling or processing businesses or representing local public bodies asking for the staff's interpretation of whether, under the scenarios presented, facilities would be considered “environmentally inferior” such that persons using them would be required to set up and pay into trust funds. Their concerns were answered by panel members. In this connection, the ALJ held earlier in this Report that the proposed definition of “environmentally inferior” at proposed Rule 7038.0020 Subp. 3 is necessary and reasonable. That ruling, part of a general finding of need and reasonableness, is affirmed specifically here, as to the subpart 3 definition. The Administrative Law Judge finds the definition to be consistent with the statute and not outside the authority conferred in the legislative definition.

It is noted that the proposed rule allows for “implementation” of methods of waste management through “contract(s), or other documents” in addition to implementation by means of plans, statutes and ordinances listed as possible “methods chosen by the county” in the statute.

The distinction is that the statutory listing covers how a county may choose its waste management method but does not specify how the method chosen can be implemented.

Listing in the rule of “contracts, or other documents” as implementation tools is found to be within the authority of the statute. As noted in the SONAR, counties utilize such documents in practice, and the MPCA wants to recognize that business practice in the rule. Subpart 3.A. requires that such contracts or other documents implement the solid waste management method identified in the county plan or county master plan. It is found that, because the parameters of the “contracts, or other documents” are set by county plans or master plans (which are listed as ways to establish a “waste management method chosen by the county” under Minn. Stat. § 115A.47, subd. 2(g)), that the Commissioner has the authority to allow for implementation of those plans by contracts or other documents.

In this connection, the Statement of Need and Reasonableness, in the first paragraph on page 4, identifies “contracts and other legal documents” as means utilized by counties to “choose” solid waste management methods. It is found that that statement cannot stand to support the proposed inclusion of “contracts, and other documents” as implementation tools. In fact, “choosing” by way of a contract or other documents alone is outside the authority of the statute, which mandates choice by way of particular statutes, ordinances or specified plans. That problem does not exist in the text of the rule, however, which requires the “contracts, or other documents” to conform to the methodology chosen in county plans or county master plans.

43. It is suggested that the Agency include in its definition of “environmentally inferior” a specific reference to “the county solid waste management plan developed, adopted, and approved under Minnesota Statutes, section 115A.46 or Minnesota Statutes, Section 458D.05 or the solid waste management master plan developed, adopted, and approved under Minnesota Statutes, section 473.803” to clarify what is meant by “county plan” or “county master plan” at proposed Rule 7038.0020, subp. 3A. Such a change is found to be necessary and reasonable, and not a substantial change because it is clarifying in nature.

44. Post-hearing comment was filed by Carolyn Oakley and Douglas Sell of B.A. Leisch and Associates on behalf of the East Central Solid Waste Commission, by Lawrence F. Foote, Ph.D., for the Minnesota Department of Transportation, by Barry Schade of the Dakota County Environmental Management Department and by Susan R. Young (noted in a preceding Finding). In its final response, the Agency responded to each comment and declined to recommend any further changes to its proposals.

In response to the East Central Solid Waste Commission, the staff reasoned that the solution to one problem noted was within the power of the counties and should not be handled by state rule, that no prohibition existed to waste exchanges and declined to extend the February 1, 1995 effective date for requiring payments to trust funds (which is mandated by statute).

45. Regarding Dr. Foote’s concerns (whether an example he gave denoted an “environmentally inferior” facility, why the rules distinguish between inferior and superior disposal facilities, whether the trust fund life could be extended beyond thirty years and whether the rules are designed in part to designate certain landfills as Superfund sites) the Agency responded in turn to each of them. The response included a declaration that the proposed rules do not intend to effect the designation of Superfund sites, but were limited in their scope to providing a fund that may be used to pay for defense and response costs incurred as part of State

or Federal Superfund processes. The Agency also responded that the rules follow the statute in distinguishing between inferior and superior disposal facilities—that is, whether the facility meets the standards for a new facility under 40 C.F.R. Chapters 257 and 258 (identified by the staff as “Federal Subtitle D. Regulations”). As noted above, the Administrative Law Judge has suggested that inferior and superior disposal facilities be defined specifically in the rules finally adopted.

46. In response to Mr. Schade, the staff stated that it did not intend to refund trust money except for approved response and defense costs and at termination of the trust thirty years after closure of the facility for which the trust fund was set up. Mr. Schade’s concern arises because waste managed in a way environmentally inferior to that chosen by the county, but subsequently certified as “unprocessible” under Minn. Stat. § 473.848, would have served already as the basis for trust fund payments. He asks whether those payments can be reimbursed. The MPCA’s response answered that question in the negative, noting that the solution lies with obtaining certification that waste is “unprocessible” pursuant to Minn. Stat. § 473.848 before actual landfilling is done.

Finally, Mr. Schade was concerned about conflicting implementation documents that reflect the waste management method(s) chosen by a county. The staff responded that such documents generally do not conflict, and that it would respond to any problems in that connection on a case-by-case basis.

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

### CONCLUSIONS

1. That the Commissioner gave proper notice of the hearing in this matter.
2. That the Commissioner has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. That the Commissioner has documented his statutory authority to adopt the proposed rules, 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. That the Commissioner has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Commissioner after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, or Minn. Rules 1400.1000, Subp. 1 and 1400.1100.

6. That any Findings which might properly be termed Conclusions are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commissioner from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this \_\_\_\_ day of March, 1995

---

RICHARD C. LUIS  
Administrative Law Judge

Reported: Taped