

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

In the Matter of Proposed  
Permanent Rules Relating to  
Beneficial Use of Solid Waste  
Minnesota Rules Chapter 7001

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Beverly Jones Heydinger conducted a hearing on these rules beginning at 1 p.m. on August 12, 2003, at the Minnesota Pollution Control Agency, 520 Lafayette Road N., St. Paul. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>[1]</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in them being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing, when a sufficient number of persons request one. 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.

Ann E. Cohen, Assistant Attorney General, NCL Tower, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared as the attorney for the Pollution Control Agency ("MPCA" or "Agency"). Two MPCA employees, Scott Fox, hydrogeologist, and Pat Burford, soil scientist, were available to provide the public with information about the proposed rules and to answer any questions. Approximately 24 members of the public attended the hearing and signed the hearing register.

After the hearing ended, the record remained open for twenty days, until September 2, 2003, to allow interested persons and the Agency an opportunity to submit written comments.<sup>[2]</sup> During this initial comment period the Administrative Law Judge received six written comments. Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Agency the opportunity to file a written response to the comments submitted. The deadline for responses to the comments was September 9, 2003. One responsive comment was received.<sup>[3]</sup> The hearing record closed for all purposes on September 9, 2003.

**NOTICE**

The MPCA must make this Report available for review 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. During that time, this Report must be made available to interested persons upon request.

If the MPCA makes any changes to the rules as proposed, whether or not those changes have been approved or recommended by this Administrative Law Judge, it must resubmit the rules to the Chief Administrative Law Judge for a review of those changes.

After adopting the final version of the rules, the Agency should inform this Office. This Office will request certified copies of the rules from the Revisor and will file the rules 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 October 29, 2001, the MPCA published a Request for Comments on Plans to Amend Parts of Minnesota Rules, Chapters 7001 and 7035 Related to Solid Waste Management at 26 *State Register* 572.<sup>[4]</sup> The MPCA mailed the Request for Comments to those individuals on the Agency's rulemaking mailing list and to a separate mailing list of affected and interested parties specific to this rulemaking.<sup>[5]</sup> The Request for Comments informed interested persons that there would be four informational meetings held in different areas of the state in the next month designed to receive input from stakeholders. The Request for Comments also indicated that the MPCA was considering forming two advisory groups to provide detailed input on the proposed rule revision and requested volunteers to serve on the groups. One of the advisory groups would focus on the utilization of solid wastes.

2. On March 3, 2003, the MPCA published an Amended Request for Comments on Planned Rule Amendments to Minnesota Rules Chapters 7001 and 7035 Governing Solid Waste Management at 27 *State Register* 1395.<sup>[6]</sup> The MPCA mailed the Amended Request for Comments to those individuals on the Agency's rulemaking mailing list and to a separate mailing list of affected and interested parties specific to this rulemaking.<sup>[7]</sup>

3. On April 29, 2003, the MPCA requested approval of its Additional Notice Plan and asked that a hearing be scheduled in the event that 25 or more people requested one. Administrative Law Judge Beverly Jones Heydinger approved the MPCA's Dual Notice of Intent to Adopt Rules and Additional Notice Plan on May 5, 2003.<sup>[8]</sup>

4. On June 11, 2003, the MPCA mailed the Dual Notice to all persons and associations who had registered their names with the agency for the purpose of receiving such notice, and to the interested and affected parties mailing list for this rulemaking.<sup>[9]</sup>

5. On June 30, 2003, a Notice of Hearing was mailed to all persons who had requested a hearing.<sup>[10]</sup>

6. On the day of the hearing, the MPCA placed the following documents into the record:

- a. Request for Comments as published at 26 *State Register* 572 on October 29, 2001;<sup>[11]</sup>
- b. Amended Request for Comments as published at 27 *State Register* 1395 on March 3, 2003.<sup>[12]</sup>

- c. Proposed Permanent Rules Relating to Beneficial Use of Solid Waste (dated April 23, 2003);<sup>[13]</sup>
- d. Statement of Need and Reasonableness (dated April 22, 2003);<sup>[14]</sup>
- e. Certificate of Mailing the Statement of Need and Reasonableness to the Legislative Reference Library (letter dated June 11, 2003);<sup>[15]</sup>
- f. Dual Notice of Intent to Adopt Rules as published at 27 *State Register* 1810 on June 16, 2003;<sup>[16]</sup>
- g. Certificate of Mailing the Dual Notice to the Rulemaking Mailing List (June 11, 2003);<sup>[17]</sup>
- h. Certificate of Accuracy of the Mailing List (June 11, 2003);<sup>[18]</sup>
- i. Approval of Proposed Dual Notice and Additional Notice Plan by the Office of Administrative Hearings (dated May 5, 2003);<sup>[19]</sup>
- j. Index to all comments received following publication of the Dual Notice of Intent to Adopt Rules, and copies of the comments;<sup>[20]</sup>
- k. Notice of Hearing to Those Who Requested a Hearing;<sup>[21]</sup>
- l. Certificate of Mailing a Notice of Hearing to Those Who Requested a Hearing (June 30, 2003);<sup>[22]</sup>
- m. Index to Responses to Comments Received on Solid Waste Utilization Rules, and Agency Response to Comments and Proposed Changes (dated August 12, 2003).<sup>[23]</sup>

7. The Administrative Law Judge finds that the MPCA has met all of the procedural requirements under the applicable statutes and rules.

### **Background and Nature of the Proposed Rules**

8. Under Minn. Stat. § 115A.02, it is the policy of the State of Minnesota to protect the state's land, air, water and other natural resources and the public health by improving waste management in the State through: (1) reductions in the amount and toxicity of waste generated; (2) separation and recovery of materials and energy from waste; and (3) reduction in dependence on disposal of waste as a management option. Since 1970, the MPCA has regulated solid waste management activities. In recent years, the MPCA has had questions from persons generating wastes about possible projects to use materials that were traditionally disposed of as solid wastes.

9. As a result of these inquiries, the MPCA concluded that modifying the solid waste rules could conserve administrative and regulated community resources and promote reduction and recycling of wastes. The rule could assist persons generating wastes to identify uses for those wastes that are not subject to MPCA solid waste management regulation. The proposed amendments to the rules accomplish these aims by establishing:

- a. A procedure for persons to explore potential beneficial uses of solid waste through a limited demonstration/research project even if the proposed use is not allowed under present rules or permit conditions;
- b. A category of "standing" beneficial uses of waste that do not require any regulatory contact or approval;
- c. A procedure whereby a person proposing a use that is not among the "standing" uses can seek and obtain regulatory approval for that use;

- d. Methods for characterizing the solid waste and the proposed use such that information about the proposed use can be shared with regulators and interested persons;
- e. Standards for storage of solid waste prior to its beneficial use; and
- f. A point in time when the designation of a material as a solid waste is removed and the material is no longer subject to solid waste regulation.<sup>[24]</sup>

### **Statutory Authority**

10. Minnesota Statutes, section 116.07, subd. 4, provides the authority for MPCA to adopt and implement rules and standards relating to solid waste. It states, in relevant part, that:

Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, chapter 1046, for the collection, transportation, storage, processing, and disposal of solid waste and the prevention, abatement, or control of water, air, and land pollution which may be related thereto, and the deposit in or on land of any other material that may tend to cause pollution.

11. The Administrative Law Judge finds that the MPCA has the statutory authority to adopt the proposed rules.

### **Rulemaking Legal Standards**

12. Under Minnesota law,<sup>[25]</sup> one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>[26]</sup> The MPCA prepared a SONAR in support of its proposed rules. At the hearing, the MPCA primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by MPCA staff at the public hearing, and by the MPCA's written post-hearing comments and submissions.

13. A rule is reasonable if it has a rational basis and is not arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>[27]</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>[28]</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>[29]</sup> 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."<sup>[30]</sup> An agency is entitled to make choices between possible approaches so 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.<sup>[31]</sup>

14. In addition to need and reasonableness, the administrative law judge must assess whether: the rule adoption procedure was complied with; the rule grants undue discretion; an agency has statutory authority to adopt the rule; the rule is unconstitutional or illegal; the rule constitutes an undue delegation of authority to another entity; or the proposed language is not a rule.<sup>[32]</sup>

15. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State,<sup>[33]</sup> “unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different.”<sup>[34]</sup>

16. The standards to determine whether changes create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a 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 determining 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.”

### **Additional Notice Requirements**

17. Minnesota Statutes section 174.05 imposes an additional notice requirement when MPCA adopts, revises or repeals any rule concerning transportation. The MPCA concluded that the proposed amendments would not impact Department of Transportation activities or transportation concerns. Therefore, the Department of Transportation was not notified of this rulemaking.

18. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of transportation. The Administrative Law Judge finds that the additional notice requirement in Minn. Stat. § 174.05 does not apply to this rulemaking.

19. Minnesota Statutes section 14.131 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made. The MPCA made significant efforts to inform and involve interested and affected parties in this rulemaking:

- a. An internal team comprised of MPCA, Minnesota Office of Environmental Assistance (MOEA), and Minnesota Department of Transportation (MNDOT) staff developed a draft policy for utilization of solid waste. This draft policy was used as a starting point for rule development and discussion with interested parties.
- b. The Request for Comments published on October 29, 2001 notified interested parties of the dates and times of public informational meetings

and a request for volunteers to serve on an advisory group that would work on technical issues related to the rule revisions.

- c. The Request for Comments was mailed to a list of interested and affected parties, including: permitted facilities, representatives of organizations interested in solid waste management, and county solid waste officers. It was also sent by email to all MPCA and MOEA staff. MOEA forwarded the information to an email distribution list that includes county personnel and environmental groups.
- d. A web site was developed to provide information about the rule revision. The site contained all information and minutes from advisory group meetings, drafts of initial rule concepts, a schedule for the rule revision, contact names, and provided the means to submit comments directly to MPCA rule revision staff.
- e. Informational meetings were held in Bemidji, St. Paul, Mankato and St. Cloud before any rule language was drafted.
- f. A solid waste utilization advisory group was formed and met six times to discuss concepts and comment on drafts of the rule. The advisory group consisted of representatives from solid waste generators, University of Minnesota county extension staff, consultants, Minnesota Technical Assistance program staff, and MOEA and MPCA staff.
- g. A second Request for Comments was published on March 3, 2003 requesting comments on areas of the solid waste rules that were proposed for revision. This information was also mailed to interested parties.<sup>[35]</sup>

20. The Administrative Law Judge finds that the MPCA fulfilled its additional notice requirement.

### **Consideration of Economic Factors**

21. Minnesota Statutes section 116.07, subd. 6 states:

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

The proposed rules focus on the beneficial uses of solid wastes and it is not anticipated that these uses will have any negative impact on the economy. MPCA acknowledges that it is possible that replacing raw materials with solid wastes could create competition for the same markets and states that it is difficult for MPCA to predict the economic impact this could have on the state. The Administrative Law Judge finds that the MPCA gave due consideration to economic factors when adopting its proposed rules.

## **Statutory Requirements for the SONAR**

### ***Cost and Alternative Assessments in the SONAR:***

22. Minnesota Statutes, Section 14.131 requires an agency adopting rules to include in its SONAR:

- (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;
- (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;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (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;
- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

23. Those who will primarily be affected by the proposed rule changes are generators of solid wastes and MPCA staff, supervisors and managers who work in the area of regulation of solid waste. Other classes of persons that will be affected include: local units of government; persons who use products that contain solid wastes, and MOEA staff.<sup>[36]</sup>

24. Those who will bear the costs of the proposed rules are those generators of solid waste who want to utilize the wastes as products. The costs primarily will be associated with development of the beneficial use proposals required for MPCA review. Because an evaluation of the costs, benefits and environmental impacts should be undertaken by generators prior to deciding whether to use or dispose of their solid wastes, MPCA argues that these costs should not be considered additional costs. Using the same reasoning, the Agency states that generators' costs should not increase significantly due to the proposed new rule requirements.

25. The MPCA identifies generators who produce solid wastes that are eligible for utilization as the primary beneficiaries of the proposed rules because the rules specify when wastes will be regulated and establish clear standards and procedures that will be applied to utilization projects. The MPCA will also benefit from the greater clarity and efficiency that the rules will provide to the process of solid waste regulation, as there will be less staff time required for standard utilization projects. The rule should benefit the state as a whole by encouraging the diversion of solid waste from disposal and decreasing reliance on raw materials.

26. The MPCA states that the proposed rules will not significantly affect state revenues.<sup>[37]</sup>

27. The Agency identifies one alternative to the proposed rules: continuing with the current system of regulation, under which MPCA staff use their administrative discretion or rely on informal and unpromulgated policies in determining the appropriate regulatory response to a

utilization proposal. Although this method avoids the cost of adopting this rule, it does not represent any savings for the regulated community.<sup>[38]</sup>

28. The only alternative to the proposed rule that was seriously considered was the continued use of policy and guidance rather than development and implementation of the proposed rule. Prior to the decision to modify the rule, the MPCA was attempting to coordinate the development of a policy that would assure a consistent approach to review of utilization proposals. This alternative was rejected because rules were needed to establish clear authority for the MPCA and to resolve some of the issues surrounding utilization of solid wastes.<sup>[39]</sup>

29. With regard to the fifth regulatory factor, the MPCA expects that the costs to generators will decrease under the proposed rule. To the extent that the proposed rule encourages the utilization of solid wastes by providing a regulatory safe harbor for such uses, the MPCA anticipates that solid waste generators will save money by utilizing wastes that otherwise would have been disposed of at a disposal facility. Utilizing solid wastes could save generators the costs associated with land disposal, incineration, long-term monitoring, management and closure of disposal facilities.<sup>[40]</sup> As mentioned earlier, there will be costs to generators associated with the development of beneficial use proposals for consideration by the Agency. But these costs are optional, as a generator of solid wastes could choose to continue to dispose of solid wastes as before.<sup>[41]</sup>

30. There likely will be environmental cost savings from this rule. By encouraging and clarifying the regulatory status of solid waste utilization, the Agency anticipates that there will be environmental benefits that result from substituting solid wastes for raw materials, i.e., reduced emissions to land, air, and water that occur when obtaining, processing and transporting raw materials.

31. No federal regulations address the utilization of solid wastes. The U.S. Environmental Protection Agency is currently developing rules for research, development and demonstration projects for solid waste management. The MPCA does not anticipate that these rules will conflict with federal rules. The Agency has tried to ensure the lack of conflict by using general language in the proposed rules, referencing federal rules, and not providing exemptions from permitting requirements when permits are required by the federal rules.<sup>[42]</sup>

### ***Performance-Based Regulation:***

32. Minnesota Statutes, Section 14.131, requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

33. The MPCA states that the rule as proposed is performance-based. The new standards require that utilization proposals show that the proposed use of the solid waste will be protective of human health and the environment. These are very broad environmental performance standards that could be achieved in a variety of ways. These standards provide opportunities for innovation and place the responsibility on the generator for the development of management practices that are protective of human health and the environment.

34. The Administrative Law Judge concludes that the MPCA has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

35. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

36. The Administrative Law Judge finds that the MPCA has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

### **Need and Reasonableness of this Rulemaking in General**

37. Leslie Davis, Earth Protectors, Inc.,<sup>[43]</sup> questioned the need for a new rule on several grounds. Mr. Davis believes that the current case-by-case approach is working, and new rules will not improve the environment. In his opinion, a simpler process, with written guidelines, would suffice.

38. The Agency responded that the current rules do not effectively or efficiently regulate beneficial uses of solid waste.<sup>[44]</sup> Due to a lack of specific criteria in the current rules, proposals for beneficial uses of solid wastes have not been uniformly evaluated. Because of the uncertainty surrounding the regulation of new uses, generators of solid waste have been unwilling to experiment with new possibilities for its use.

39. Mr. Davis is also concerned that reusing solid waste in manufacturing may produce pollutants. The Agency responds that it will give priority to proposals that have the potential to prevent pollution.<sup>[45]</sup>

40. Mr. Davis and others<sup>[46]</sup> question the lack of financial assurances required from project proposers. They fear that waste stored for beneficial use could be abandoned and require clean-up at state expense. The MPCA responds that it is currently analyzing the need for financial assurances in a variety of solid waste storage and disposal situations.<sup>[47]</sup> The Agency is committed to including solid waste practices that result from this rulemaking in its financial assurance analysis. MPCA adds that although this rulemaking does not address the issue of financial assurance, it does provide storage standards for solid wastes that are stored prior to beneficial use; currently there are no standards for this storage.<sup>[48]</sup>

41. The question of financial assurance will become increasingly important as more products are stored for beneficial use. However, it is not unreasonable for the MPCA to address the financial assurances in a broader context of solid waste storage and disposal.

42. Finally, Mr. Davis questions whether the reuse of solid waste will actually reduce pollution. The Agency responds that it will give priority to demonstration/research projects that

have the potential to prevent pollution or that reduce or utilize solid waste that would otherwise have been disposed of in a landfill.<sup>[49]</sup>

43. Other commenters expressed their overall support for the proposed rules. Sam Lucido, Wenck Associates, believes that re-use of certain by-products is beneficial, will reduce demand for new resources, and reduce necessary landfill or other storage demands.<sup>[50]</sup> He stated that the current approval process is unpredictable and long, because of the current lack of standards. Mr. Lucido also read two letters of support from people unable to attend the hearing. The first was read on behalf of Richard Sanders, Polk County Engineer, describing two successful demonstration projects using municipal waste combustion ash in bituminous pavement, with resulting superior performance.<sup>[51]</sup> The second was from Gordon Bingham, Director of Power Production for Hibbing Public Utilities.<sup>[52]</sup> The letter talked about the benefits of reusing coal ash.

44. Other commenters supported the rules but would like to see more approved beneficial uses.<sup>[53]</sup>

45. Mike Robertson appeared on behalf of the Minnesota Chamber of Commerce Statewide Business Trade Association to lend its support to the rule amendments.<sup>[54]</sup> Wayne Gjerde, Minnesota Office of Environmental Systems, supported the MPCA's proposed rules, and some of the changes offered by the Agency at the hearing.<sup>[55]</sup>

## **Analysis of Proposed Rules Part by Part**

### **7035.0300 Definitions.**

46. Subpart 111b defines unadulterated wood as wood without contaminants, and gives examples of contaminants as follows: “[e]xamples of contaminants include, but are not limited to, paints, varnishes . . . .” The phrase “but not limited to” is not necessary because the sentence begins with the information that the list of examples is not all-inclusive. The phrase “not limited to” when attached to any list of items to be regulated, suggests unlimited discretion on the part of the Agency in adding other items to the list. In contrast, a list that provides examples (such as this sentence does by saying “examples . . . include”) provides notice to regulated parties of the types of items they can expect to be included, even if they are not specifically listed. At the same time, it acknowledges that, in some instances, it is not possible for an agency to create an all-inclusive list of like items to be regulated.

47. The Administrative Law Judge suggests that the agency delete the phrase “but is not limited to,” so that the definition would read in relevant part: “[e]xamples of contaminants include, ~~but are not limited to,~~ paints, varnishes . . . .” The resulting subpart would be needed and reasonable and the change does not make the rules substantially different than proposed.

### **7035.0450 Demonstration/Research Projects.**

48. Subpart 3, first sentence reads: “Upon completing review of the proposal, the agency shall accept or reject the proposal based on the projects potential to impact . . . .” The sentence should be amended to add an apostrophe to project, so that the sentence reads in relevant part: “accept or reject the proposal based on the project’s potential to impact . . . .” The resulting subpart would be needed and reasonable. This is a technical correction and would not constitute a substantial change.

49. Subpart 3B contains a very similar phrase to that in Part 7035.0300: “includes but is not limited to.” The same analysis as above applies here. The phrase is not necessary and should be deleted. This is a suggested technical correction and would not constitute a substantial change.

### **7035.2855 Solid Waste Storage Standards.**

50. Ted Troolin, Director, St. Louis County Solid Waste Department, praised the MPCA’s process for soliciting input. He recommended a change to 7035.2855, subp. 1A to allow demolition waste to be sorted without applying strict storage requirements during the sorting process.<sup>[56]</sup> In response, the MPCA proposes to add an exemption to this part as follows:

7035.2855, subp. 1D. Owners and operators of facilities permitted for the processing of construction debris and demolition debris for the primary purpose of extracting recoverable portions of the waste stream for beneficial use and recycling must meet the storage standards contained in subps. 2, 6 and 7. These facilities are exempt from the standards contained in subps. 3, 4 and 5 provided that materials that cannot be accepted for disposal at a demolition debris land disposal facility, including but not limited to asbestos, caulk tubes, waste paint, waste solvents, glues, tars, adhesives and mixed municipal solid waste, are removed from the waste within 48 hours of its delivery to the facility.<sup>[57]</sup>

51. The Agency believes that this added exemption is reasonable because it extends the storage standards for beneficial use to the “dump and sort” activity used for the reuse of construction debris, provided that the facility at which it takes place is permitted. While the storage standards for beneficial use are less prescriptive, they are protective of the environment.<sup>[58]</sup>

52. In addition, a permitted facility is inspected and designed to manage waste. Permitting not only provides the MPCA with the opportunity for review, it also provides for public input on the proposed facility. The 48-hour time limit for removal of unacceptable materials is needed and reasonable because it is the same time limit that triggers the need to comply with the solid waste storage standards. This time limit also provides the MPCA with a clear, enforceable standard.<sup>[59]</sup>

53. The Administrative Law Judge suggests deletion of the phrase “but not limited to” and addition of the phrase “such as” from the proposed exemption so that the second sentence would read: “These facilities are exempt from the standards contained in subps. 3, 4 and 5 provided that materials that cannot be accepted for disposal at a demolition debris land disposal facility, including but not limited to such as asbestos, caulk tubes, waste paint, waste solvents, glues, tars, adhesives and mixed municipal solid waste, are removed from the waste within 48 hours of its delivery to the facility.” This revision will clarify that the list is illustrative.

### **7035.2860 Beneficial Use of Solid Waste.**

54. Subpart 1A. reads in relevant part: “Beneficial uses authorized to occur by an agency permit or legally binding document issued prior to the date these rules were promulgated are exempt from this part.” The term “promulgated” is not used in the Minnesota Administrative Procedure Act, and, unlike a reference to a rule’s effective date, does not provide

a readily ascertainable point in time by which to measure the exemption. The Administrative Law Judge suggests that the Agency consider changing this sentence to read: “Beneficial uses authorized to occur by an agency permit or legally binding document issued prior to the effective date of these rules, were promulgated are exempt from this part.” The suggested language, or language with a similar effect, would be a needed and reasonable clarification to this subpart and would not make the rules substantially different than originally proposed.

#### **7035.2860, subpart 1D.**

55. During the initial comment period, the MOEA submitted comments expressing concerns about the application of the proposed rules to composting regulations. The MOEA suggested an amendment that would create a standing beneficial use determination for compost used in accordance with federal and state rules.

56. In its September 9 response to comments, the MPCA proposed to create an exemption for compost similar to that created for recycling:

7035.2836, subp. 1D. Composts that are used in accordance with the standards contained in part 7035.2836 of this chapter are exempt from this part.

57. The Agency preferred the creation of an exemption because adding a standing beneficial use determination could lead regulated parties to believe that they are no longer subject to the treatment standards of part 7035.2836, which governs classifications and uses of compost.<sup>[60]</sup> The MPCA’s decision to create an exemption is a reasonable response to the issue raised by the MOEA.

#### **7035.2860, subpart 4. Standing beneficial use determinations.**

##### **Requests for expansion of standing beneficial use determinations.**

58. Several commenters urged the MPCA to broaden the standing beneficial uses for foundry sand.<sup>[61]</sup> Therese Benkowski, Metalcasters of Minnesota, urged expansion of the approved beneficial uses for sand used in metal casting and suggested additional beneficial uses for the sand. The suggested additional uses were: feed material in the manufacturing of Portland cement; aggregate in concrete, flowable fill, asphalt and road base; feed material in the manufacturing of mineral wool; and daily cover or internal structures at lined [sic].<sup>[62]</sup> Although one of these suggestions was added to the list of standing beneficial uses: “feed materials in the manufacturing of Portland cement,” the MPCA did not agree to add any others.

59. The MPCA has decided not to expand the approved uses at this time because the agency does not have the necessary information or history with the proposed uses to determine that the standards for beneficial use would be met. For instance, the MPCA does not have adequate evidence that the characteristics of foundry sands and slags of the same foundry type are consistent between foundries.

60. In addition, the MPCA does not have a history with beneficial uses of foundry sand and slags that justify placing them on the standing beneficial use list at this time. The MPCA has encountered problems with the use of foundry sands and slags in Minnesota. In one instance, the Agency discovered that slag from a ferrous foundry contained molybdenum at concentrations that resulted in the contamination of ground water.

61. The MPCA believes that the process for obtaining a case-specific beneficial use determination provides a mechanism for use of these materials without placing an undue burden on foundries. The MPCA is willing to work with groups of foundry industries or individual foundries to develop applications for case-specific beneficial use determinations. Once the MPCA has the necessary information for making a determination that a specific use meets the beneficial use criteria, the Agency will consider amending the rule to include additional standing beneficial uses.

62. The MPCA's decision to designate only those beneficial uses of which it has knowledge and/or with which it has experience, is reasonable. If the Agency does not have sufficient information about foundry sands and slags and their potential to affect the environment in different concentrations, it is necessary and reasonable to review those uses on a case-by-case basis until such information is available.

#### **Subp. 4P. Recyclable materials.**

63. Several commenters who submitted comments prior to the hearing pointed out that item P of this subpart: "Recyclable materials that are used in the secondary materials market" was a vague description which could encompass any number of recyclable materials, not all of which could have been fully explored by the MPCA to determine their suitability as standing beneficial uses.<sup>[63]</sup>

64. The MPCA agreed that item P did not fit the format of the other items listed as standing beneficial uses and that regulation of recyclable materials under current rules and statutes could be confused by the item as proposed.<sup>[64]</sup> To correct this problem, the MPCA proposed to remove item P as a standing beneficial use and address the intent of the item through an exemption under 7035.2860, subp. 1 instead. As amended, subpart 1 reads in relevant part:

The following exemptions are provided:

- A. . . . .
- B. Recyclable materials recycled in accordance with Minn. Stat. § 115A.03, subdivision 25b and 7035.2845 of this chapter are exempt from this part.
- C. Recyclable materials that are not exempt under item B are exempt from the requirement to obtain a case-specific beneficial use determination under subpart 5 when they are incorporated into a manufactured product as defined by 7035.0300 subpart [ ].<sup>[65]</sup>

65. This change is reasonable because it better meets the intent of the proposed rule. It also provides the necessary clarification that items B and C are separate types of recyclable materials and have different regulatory requirements that must be met. The change does not result in rules that are substantially different from those originally proposed.

#### **Coal combustion fly ash or gas scrubbing by-products.**

66. In its August 12 response to comments submitted prior to hearing, the MPCA proposed to add the following standing beneficial use determination to the list in subpart 4: "Coal combustion fly ash or gas scrubbing by-products when used as an ingredient for production of lightweight aggregate that will be used in cement or concrete products."<sup>[66]</sup> MPCA

explained that this standing beneficial use was included in earlier drafts of the rule but was deleted because it was intended to form part of item P, discussed above.

67. With the deletion of item P, and because this use does not fit the definition of a manufactured product, MPCA proposed to include this item in the list of standing beneficial use determinations.

68. In its August 28 comments, MPCA agreed to delete the term “lightweight” from the proposed language after a determination that the term could be removed without changing the intent. The item was proposed for further amendment in the September 9 MPCA responses, after receipt of information from the Minnesota Department of Transportation that aggregate is not used to make cement.<sup>[67]</sup> As a result of this information, the proposed item concerning coal combustion fly ash citing the use of aggregate in cement was incorrect. In addition, the MPCA did not intend that this standing beneficial use include use in flowable fill. In response to the comments, the MPCA proposed the following language:

7035.2860, subp. 4. Item [ ]. Coal combustion fly ash or coal combustion gas scrubbing by-products when used as an ingredient for production of aggregate that will be used in concrete or concrete products. This does not include use in flowable fill.

69. The MPCA has shown that the above item concerning coal combustion fly ash is needed and reasonable in its final proposed form. The change is not a substantial one; it is the type of change (one resulting from comments) that is anticipated and encouraged during the rulemaking process.

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

### **CONCLUSIONS**

1. The Minnesota Pollution Control Agency gave proper notice in this matter.
2. The MPCA has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The MPCA has demonstrated its 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. The MPCA 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. 4; 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.
6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the MPCA from further modification of the proposed rules based upon this Report and an examination of the public

comments, 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.

Dated this 7th day of October 2003.

/s/ Beverly Jones Heydinger  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

<sup>[1]</sup> Minn. Stat. §§ 14.131 through 14.20.

<sup>[2]</sup> Minn. Stat. § 14.15, subd. 1.

<sup>[3]</sup> The one responsive comment received was from the MPCA.

<sup>[4]</sup> Ex. 1.

<sup>[5]</sup> Ex. 4 at 4.

<sup>[6]</sup> Ex. 2.

<sup>[7]</sup> Ex. 4 at 5.

<sup>[8]</sup> Ex. 9.

<sup>[9]</sup> Ex. 7.

<sup>[10]</sup> Ex. 12.

<sup>[11]</sup> Ex. 1.

<sup>[12]</sup> Ex. 2.

<sup>[13]</sup> Ex. 3.

<sup>[14]</sup> Ex. 4.

<sup>[15]</sup> Ex. 5.

<sup>[16]</sup> Ex. 6.

<sup>[17]</sup> Ex. 7.

<sup>[18]</sup> Ex. 8.

<sup>[19]</sup> Ex. 9.

<sup>[20]</sup> Ex. 10.

<sup>[21]</sup> Ex. 11.

<sup>[22]</sup> Ex. 12.

<sup>[23]</sup> Ex. 13.

<sup>[24]</sup> Ex. 4 at 3.

<sup>[25]</sup> Minn. Stat. § 14.14, subd. 2; Minn. R. part 1400.2100.

<sup>[26]</sup> Mammenga v. Comm'r of Human Services, 442 N.W.2d 786 (Minn. 1989); Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

<sup>[27]</sup> In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

<sup>[28]</sup> Greenhill v. Bailey, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>[29]</sup> Mammenga, 442 N.W.2d at 789-90; Broen Mem'l Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>[30]</sup> Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.

<sup>[31]</sup> Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).

<sup>[32]</sup> Minn. R. part 1400.2100.

- [33] Minn. Stat. § 14.05, subd. 3.
- [34] Minn. R. part 1400.2240, subp. 8.
- [35] Ex. 4 at 4-5.
- [36] Id. at 7.
- [37] Id.
- [38] Id. at 8.
- [39] Id.
- [40] Id. at 8-9.
- [41] Id. at 9.
- [42] Ex. 4 at 10; Ex. 10, item N.
- [43] Ex. 10, item A; Transcript (“T.”) at 24-35.
- [44] Ex. 13 at 1.
- [45] MPCA 8/12 comments at 4.
- [46] See, e.g., SKB Environmental, Ex. 10, item H, p. 2.
- [47] MPCA 8/12 comments at 7.
- [48] Id. at 8.
- [49] Ex. 13 at 4.
- [50] T. at 36-39.
- [51] T. at 39-41.
- [52] T. at 41-42.
- [53] This issue is discussed in the analysis of Part 7035.2860, subp. 4 infra.
- [54] T. at 56-57.
- [55] T. at 54-55.
- [56] T. at 45.
- [57] MPCA 8/28 comments at 6.
- [58] Id.
- [59] Id.
- [60] MPCA 9/9 comments at 1.
- [61] See, e.g., Carter DeLaittre, Peter Ryan, Dan Scheele, Mike Bensing, testifying at the rule hearing (T. at 49-52; 53-54; 55-56).
- [62] Ex. 10, item J.
- [63] See, e.g., ex. 10, item D.2.
- [64] MPCA 8/12 comments at 13-14.
- [65] Id. at 13.
- [66] Id. at 14.
- [67] MPCA 9/9 comments at 2.