

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

In the Matter of the Proposed  
Rules Governing the Acceptance  
THE  
of Waste at the Stabilization  
LAW JUDGE  
and Containment Facility Sited  
Under Minn. Stat. c 115A,  
Minn Rules ch. 7047.

REPORT OF  
CHIEF ADMINISTRATIVE

The above-entitled matter came on for review by the Chief  
Administrative  
Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subs. 3  
and 4,  
which provide:

Subd. 3. Findings of substantial change. If the  
[administrative law judge's] report contains a finding that a  
rule has been modified in a way which makes it substantially  
different from that which was originally proposed, or that the  
agency has not met the requirements of sections 14.131 to 14.18,  
it shall be submitted to the chief administrative law judge for  
approval. If the chief administrative law judge approves the  
finding of the administrative law judge, the chief  
administrative law judge shall advise the agency and the revisor  
of statutes of actions which will correct the defects. The  
agency shall not adopt the rule until the chief administrative  
law judge determines that the defects have been corrected.

Subd. 4. Need or reasonableness not established If the  
chief administrative law judge determines that the need for or  
reasonableness of the rule has not been established pursuant to  
section 14.14, subdivision 2, and if the agency does not elect  
to follow the suggested actions of the chief administrative law  
judge to correct that defect, then the agency shall submit the  
proposed rule to the legislative commission to review  
administrative rules for the commission's advice and comment.  
The agency shall not adopt the rule until it has received and  
considered the advice of the commission. However, the agency is  
not required to delay adoption longer than 30 days after the  
commission has received the agency's submission. Advice of the  
commission shall not be binding on the agency.

Based upon a review of the record in this proceeding, the Chief

Administrative Law Judge hereby approves the Report of the Administrative  
Law  
Judge in all respects.

In order to correct the defects enumerated by the Administrative Law Judge, the agency shall either take the action recommended by the Administrative Law Judge or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Administrative Law Judge, it shall submit to the Chief Administrative Law Judge a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial changes.

Should the agency make changes in the rules other than those recommended by the Administrative Law Judge, it shall also submit the complete record to the Chief Administrative Law Judge for a review on the issue of substantial change.

Dated: September 1989.

WILLIAM G. BROWN  
Chief Administrative Law Judge

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

In the Matter of the Proposed  
Rules Governing the Acceptance  
of Waste at the Stabilization  
and Containment Facility Sited  
Under Minn. Stat. sec. 115A,  
Minn. Rules ch. 7047.

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis, commencing at 6:30 P.M. on Tuesday, August 1, 1989 at the Red Lake Falls City Hall, Second Street, Red Lake Falls, Minnesota and 9:00 A.M. on Thursday, August 3, 1989 at the Minnesota Pollution Control Agency Board Room, 520 Lafayette Road, St. Paul, Minnesota, and continued until all interested persons present had an opportunity to participate by asking questions and presenting oral and written comments. Approximately 45 persons attended in Red Lake Falls and 15 in St. Paul. A total of 31 persons signed the hearing register. The hearing was held pursuant to an Order for Hearing dated June 16, 1989.

This is a rulemaking proceeding held to determine whether the Minnesota Pollution Control Agency (PCA or Agency) fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the rules are needed and reasonable, and whether any modifications of the rules proposed by the Agency after initial publication constitute impermissible, substantial changes.

Alan Mitchell and Ann Cohen, Special Assistant Attorneys General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Agency. The PCA's hearing panel consisted of Carol Nankivel and Sharon Meyer of the Agency's Hazardous Waste Division and Ken Stabler of the Office of Waste Management.

The PCA Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approve the adverse findings of this Report, he will advise the PCA Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need and reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the PCA Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

#### FINDINGS OF FACT

#### PROCEDURAL REQUIREMENTS

1. On June 23, 1989, the Agency filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.

(b) The Notice of Hearing proposed to be issued.

(c) The Statement of Need and Reasonableness.

(d) The Certificate of the Agency's Authorizing Resolution.

2. On June 30, 1989, the Agency filed the following documents with the Chief Administrative Law Judge:

(a) The Order for Hearing.

(b) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.

3. On June 26, 1989, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register pp. 3042-3047.

4. On June 23, 1989, the Agency mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice.

5. On July 6, 1989, 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 the Agency's list.
- (d) The names of Departmental personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules.

- (f) All materials received following a Notice of intent to Solicit Outside Opinion published at 13 State Register 310 on Monday, August 8, 1988 and a copy of the Notice.

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

6. The record remained open for the submission of written comments for twenty (20) calendar days following the date of the hearing; that is, through Wednesday, August 23, 1989. After the expiration of the initial comment period, the record remained open for an additional three (3) working days -- through Monday, August 28, 1989 -- for the submission of responses to the comments filed earlier.

7. The Agency did not indicate in its Notice of Hearing that the adoption of the proposed rules would result in additional spending by local public bodies in excess of \$100,000 annually for the first two years following adoption. Minn. Stat. § 14.11 (1988) only requires an estimate of the cost to local public bodies if the estimated total cost exceeds \$100,000 in either of the two years following adoption. The Administrative Law Judge finds that adoption of these rules will not result in significant expenditures by local public bodies and, therefore, Minn. Stat. § 14.11 does not apply.

8. Under Minn. Stat. § 14.115, agencies must consider the impact of their rules on small businesses when they promulgate rules which may affect small businesses. The PCA stated in its Notice of Hearing that these rules would have a "limited effect" on small businesses. In the Agency's Statement of Need and Reasonableness (SONAR), the PCA asserted that the waste from small businesses should be treated identically to other generators of hazardous waste since the environmental effect of such waste is identical. Further, the PCA reasoned that since use of the facility is optional, small businesses are not required to meet the proposed rules. Of course, in that instance, the small business could not use the stabilization and containment facility for its waste. It is found that the Agency has met its burden with

regard to small business considerations under Minn. Stat. § 14.115, subd. 7(b) (1988).

9. in exercising its powers, the PCA is required by Minn. Stat. 116.07, subd. 6 (1988) to give due consideration to economic factors. The statute provides:

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

It is found that the PCA has given due consideration to available information on the economic impact of the proposed rules. The rules will have some economic impact on generators of hazardous waste seeking use of the facility for waste containment. The requirement that a proposer of a hazardous waste

for containment must prepare a delisting petition will involve a significant investment by proposers. Because of the number of factors that could affect the complexity and expense of the delisting petition, it is not possible to quantify the extent of this additional investment. However, the rule's requirement that hazardous waste be rendered nonhazardous is mandated by the statute, so the PCA's action in implementing that mandate is found to be "reasonable, feasible, and practical under the circumstances" within the meaning of Minn. Stat. § 116.07, subd. 6.

#### STATUTORY AUTHORITY

10. In its Notice of Hearing the PCA cited Minn. Stat. §§ 115A.175, subd. 5 and 116.07 as its authority to promulgate the rules proposed in this proceeding. Minn. Stat. § 116.07, subd. 4 delegates general rulemaking power to the Commissioner to adopt rules and standards governing the "collection, transportation storage, processing, and disposal of solid waste..." and "the management, identification, labeling, classification, storage, collection, treatment, transportation, processing and disposal of hazardous waste...". Minn. Stat. § 115A.175, subd. 5 authorizes the Commissioner to adopt rules "by which a person must demonstrate that a hazardous waste can be accepted by the facility...". The cited statutes generally authorize the rules proposed in this proceeding and, unless specifically noted to the contrary in this Report, the rules proposed by the Department are authorized under the statutes.

#### INTRODUCTION AND DEFINITIONS

11. A stabilization and containment facility for hazardous waste is to be sited and constructed by the Waste Management Board. Minn. Stat. §§ 115A.175 - 115A.301. The PCA must enact rules to govern the acceptance of waste at this facility. Minn. Stat. § 115A.175, subd. 5. The statute authorizing this rulemaking proceeding sets forth basic restrictions on the acceptance of waste at the facility. The only waste which may be accepted is:

- (a) Waste rendered nonhazardous;
- (b) Industrial waste [defined as solid waste resulting from an industrial, manufacturing, service, or commercial activity]

that is managed as a separate waste stream]; and  
(c) Waste that is not eligible for acceptance under clause (a) or  
(b),  
if the PCA determines that certain specified requirements are  
met.

Minn. Stat. § 115A.175, subd. 4. The PCA is now proposing permanent  
rules to  
implement the statutory mandate. Provisions which generated comment,  
require  
discussion, or were altered after publication of the proposed rule will  
be  
discussed below. Any provision that is not discussed is found to be  
needed  
and reasonable. Any change finally proposed by the Agency from the time  
of  
publication of the proposed rules in the State Register but not discussed  
below does not constitute a substantial change.

7047.0010 -- Scope and Applicability.

12. The purpose and applicability of the proposed rules are stated  
in  
this part. Subpart I states that the rules apply to the owner and  
operator  
of the stabilization and containment facility (S/C facility), as well as  
generators of hazardous waste and operators of other facilities which  
treat

hazardous waste proposed to be sent to the S/C facility. Subpart 2 limits the effect of compliance with the proposed rule. This subpart clarifies that the operating permit of the S/C facility and restrictions imposed by any other agency of the State authorized to regulate the S/C facility supersede any authority granted under these rules. Both subparts were changed by the PCA after the hearing in this matter, to replace "facility" with "S/C facility". This alteration was done throughout the proposed rules by the PCA. This change clarifies when the stabilization and containment facility is being referred to, in contrast to any facility which generates or stores waste. Also, the word "owner" was inserted in Subpart L. The changes were fully discussed at the hearing of this matter. The alterations do not constitute substantial changes for purposes of Minn. Rule pt. 1400.1100 (1987). These subparts are found to be needed and reasonable.

7047.0020 -- Definitions.

13. This part consists of 20 subparts establishing definitions of terms used in this rule. only those definitions which generated comment or were changed will be discussed. The remaining definitions are found to be needed and reasonable.

14. The definition of "Facility" was deleted by the Agency from the proposed rule, 7047.0020, subp. 6 for the reasons stated in paragraph 11, supra. This deletion is needed and reasonable to clarify the rule.

15. The PCA altered the definition of "Generator" as set forth in Subpart 6 to specify the rule parts to which the definition applies. Further, the PCA deleted the examples of those who are considered as generators, insofar as those examples could confuse the regulated public. The alterations in this subpart do not affect the application of the rule and are not substantial changes. The definition of generator is found to be needed and reasonable. It is suggested that the Agency insert the word "in" or "at" before "parts" in the first sentence of the subpart. Such a change is found to be clarifying and editorial in nature and not a substantial change.

16. Subpart 11, defining "Minimization" has been changed to replace

examples of minimization with the total spectrum of activities which constitute minimization. The PCA accomplished this result by changing "includes" to "is". The change clarifies the subpart and does not constitute a substantial change. Defining minimization is needed and reasonable to carry out the purposes of the proposed rule.

17. The PCA added Subpart 12, defining "Operator" as the person responsible for the overall operation of a facility. This addition was fully discussed at the hearing in this matter. The definition is not outside the normal usage of the word in common speech. The change is not a substantial change. The definition of operator is found to be needed and reasonable. if the Agency means to include operators of facilities other than the S/C facility in this definition, it is suggested that a separate clarifying definition of "facility" be added. If only the S/C facility is meant, the words "the S/C" should be inserted in place of "a". Either change is found to be clarifying in nature and not a substantial change.

18. The PCA added Subpart 12, defining "Owner" as the person who owns or is part owner of the S/C facility. Just as in paragraph 16, supra, this addition was fully discussed at the hearing in this matter. The definition is not outside the normal usage of the word in common speech. The change is not a substantial change. The definition of owner is needed and reasonable.

19. The definition of "Proposer" in Subpart 15 was altered by the Agency to delete examples of possible proposers. This change was discussed at the hearing and clarifies the rule. The change is not a substantial change and the proposed subpart is found to be needed and reasonable.

20. Subpart 16, defining "Recycling" was altered by the PCA to alter examples of the definition into the definition itself. See, paragraph 15, supra. This change will reduce confusion over what constitutes recycling, is not a substantial change and is found to be needed and reasonable.

21. The PCA added Subpart 18, defining "S/C Facility". to the proposed rule. This definition is, except for the title, identical to the definition of facility discussed at paragraph 13, supra. Defining what constitutes the stabilization and containment facility is needed and reasonable to carry out the proposed rules. This is not a substantial change.

22. Subpart 19, defining "Source Reduction", was altered by the PCA to omit examples of source reduction. This alteration clarifies the rule. The Administrative Law Judge finds that defining source reduction is needed and reasonable. This is not a substantial change.

#### SUBSTANTIVE PROVISIONS

7047.0030 -- Wastes That-May Be Accepted For Containment.

23. Subpart I requires the Commissioner to approve an industrial waste for containment at the S/C facility, if the waste is certified to be in compliance with the S/C facility's waste management plan and the rules regarding solid waste and animal feedlots. The PCA has altered Subpart 1 by

deleting the last sentence as redundant. The subpart as finally proposed is necessary and reasonable. The deletion clarifies the rule and does not constitute a substantial change.

24. Subpart 2(A) sets forth the procedure for obtaining approval for stabilization and containment of hazardous waste rendered nonhazardous. For either a characteristic or "listed" hazardous waste, it must be demonstrated that the waste has been treated so as to render it nonhazardous. The demonstration is accomplished by the filing of a report in accordance with Minn. Rule 7045.0216. This reporting requirement is found to be necessary and reasonable.

25. Under Subpart 2(B), a listed hazardous waste may be approved for stabilization and containment at the S/C facility if the waste is "delisted". To delist a hazardous waste, it must meet the requirements of Minn. Rule 7045.0075, subp. 2. Additionally, PCA delisting must satisfy the requirements of CFR Title 40, section 260.22 or the Environmental Protection Agency (EPA) must approve the excluding of the waste from regulation as a hazardous waste. This subpart is found to be reasonable and necessary for proper stabilization and containment of delisted wastes sent to the S/C facility.

26. Proposed Subpart 2(C) requires hazardous waste rendered nonhazardous to be certified as being managed in accordance with Minn. Rules 7035.0300 - 7035.2875 governing solid waste management and disposal facilities and with the S/C facility's industrial waste management plan. The proposer (defined as a person seeking approval to contain the waste) must submit certification that the waste is being managed properly. The Statement of Need and Reasonableness (SONAR) indicates that the S/C facility can, in some circumstances, be a "proposer". Requiring proposers to certify that hazardous wastes rendered nonhazardous are properly managed is found to be necessary. Requiring that any waste contained at the S/C facility will be treated in accordance with the appropriate hazardous waste rules is found to be a reasonable way to meet this need.

27. Items B and C of Subpart 3 are contained in the authorizing statute for these proposed rules and are found to be needed and reasonable. Minn. Stat. § 115A.175, subd. 4(c)(1) and (2). Subpart 3(A) requires that an "acceptable attempt" be made to render the waste nonhazardous prior to the waste being approved for containment. The quoted language is not contained in the authorizing statute. The authorizing statute sets forth the following requirements for waste not otherwise acceptable for containment:

- (1) there is no feasible and prudent alternative to containment of the waste that would minimize adverse impact upon human health and the environment;
- (2) the waste has been treated using feasible and prudent technology that minimizes the possibility of migration of any hazardous constituents of the waste; and
- (3) the waste meets the standards adopted to protect human health and the environment under the authority of United States Code, title 42, section 6924(m), and any additional protective standards adopted by the agency under section 116.07, subdivision 4.

If no federal or state standards have been adopted for a waste as provided in clause (3), the waste may not be accepted for containment.

Minn. Stat. § 115A.175, subdivision 4(c).

28. Subdivision 4 of the statute requires documentation of an attempt to render the waste nonhazardous, and that such document be "in a form satisfactory to the agency". Subpart 3A refers to part 7047.0040 for specific standards of what will constitute an "acceptable" attempt to render waste nonhazardous. The legality, need for and reasonableness of those standards will be discussed in subsequent Findings. It is found that reference to part 7047.0040 for specific standards regarding an attempt to render waste nonhazardous is necessary and reasonable. However, it is suggested that the word "acceptable", as used to modify "attempt" in Parts 7047.0030 and 7047.0040 be deleted. The word is confusing and ambiguous. The authorizing statute and the title of Part 7047.0040 both refer to an "attempt", not an "acceptable attempt". The Judge stops short of finding that use of the word "acceptable" to modify "attempt" in these parts of the Rule violates substantive principles of law (such as vagueness or absence of standards to guide agency discretion) because Proposed Rule 7047.0040, subp. 4 specifically requires the Agency to determine that an "acceptable attempt" has been made if certain elements are found. It is found that deletion of "acceptable" as a modifier of "attempt" in these rule parts would be clarifying in nature and not a substantial change.

29. Subpart 3(D) requires adherence to specific rules regulating land disposal of waste. The authorizing statute requires that the Agency consider whether "...the waste meets the standards adopted to protect human health and the environment under the authority of United States Code, title 42, section 6924(m), and any additional protective standards adopted by the agency under section 116.07, subdivision 4." Minn. Stat. § 115A.175, subdivision 4(c)(3). This requirement is met by the reference to 40 CFR part 268 found in Subpart 3D, which was promulgated under authority of 42 USC § 6924(m). This Subpart is found to be needed and reasonable to direct the regulated public to the applicable State and Federal rules restricting land disposal of waste.

30. A minimization plan is required of any proposer seeking to send hazardous waste to the S/C facility under Subpart 3(E). Although the authority for this subpart is not found in Minn. Stat. § 115A.175, subdivision 4(c), this proposed subpart is needed and reasonable to carry out the mandate delegated to the PCA in Minn. Stat. § 115A.193 (b). As described in the Statement of Need and Reasonableness (SONAR), the rule will only apply to hazardous wastes being sent to the S/C facility. Further, Agency staff testified at the hearing that failure to abide by the minimization plan would not result in any penalty to the proposer. St. Paul Transcript, at 87-90. Since failure to follow the plan does not affect the acceptance of waste at the S/C facility, the rule does not exceed the PCA's statutory authority.

31. Ms. Velma Oakland of Oklee recommends that Subpart 3 require treatment of listed hazardous waste to a point that "eliminates the possibility of migration of any hazardous characteristics. It is found that the Agency has no statutory authority to adopt such a requirement. Minn. Stat. § 115A.175, subd. 4(c)(2) requires only that treatment be to a level that "minimizes" migration, and proposed Subpart 3C implements that statutory requirement.

32. Ms. Judy Gross of Northome recommends eliminating Subpart 3

altogether in order to prohibit the acceptance of waste that cannot be rendered nonhazardous. This proposal is found to be contrary to the enabling legislation, which recognizes the fact that some wastes will not be successfully rendered nonhazardous and directs the PCA to provide specific criteria for the acceptance of such waste.

33. Subpart 4 restates the prohibition against accepting a waste contained in the authorizing statute if no Federal or State standards have been adopted regarding the waste. In response to a suggestion by Michael Costello of Ecostar, the PCA altered the subpart by deleting some potentially confusing language. The rule is found to be reasonable and needed and the change is not a substantial change.

34. Proposed Subpart 5 prohibits the acceptance of characteristic hazardous waste at the S/C facility if it has not been rendered nonhazardous. This prohibition is not stated in the authorizing statute, Minn. Stat. § 115A.175. The PCA asserts that characteristic hazardous waste may be rendered nonhazardous easier than listed hazardous wastes. SONAR, at 16. The proposed rule is found to be needed and reasonable, given the assumption that all characteristic hazardous wastes can be rendered

nonhazardous. The assertion on page 16 of the SONAR is the only place in the record the Administrative Law Judge has found that supports the assumption.

It is noted that should a characteristic hazardous waste exist which cannot be rendered non-hazardous and it is submitted for acceptance at the S/C facility, the requirements of Minn. Stat. sec. 115A.175, subd. 4(c) would still apply. It is suggested that this subpart include an exception for characteristic hazardous wastes that meet the requirements of Minn. Stat. 115A.175, subd. 4(c) if the waste is one that cannot be rendered nonhazardous through a treatment technology. Such an addition to the subpart is found to be necessary and reasonable and not a substantial change. The proposed modifications made by the PCA staff in the language of this subpart merely clarify the rule and are not substantial changes.

35. If there are certain characteristic hazardous wastes that cannot be rendered nonhazardous in accordance with Subpart 2A, and the Agency fails to adopt an exception whereby it must consider whether the waste meets the requirements of Subd. 4(c) of Minn. Stat. § 115A.175, the proposed subpart is found to exceed statutory authority and cannot be adopted at this time. That defect can be cured by adopting an exception incorporating the requirements of Minn. Stat. § 115A.175, subd. 4(c).

36. It is suggested that the first sentence of proposed Subpart 5 be deleted, or that the words "which has not been rendered nonhazardous" be inserted between the words "waste" and "shall". Such a change would be clarifying in nature and not substantial. It is found that the change is necessary and reasonable in order to clarify the Agency's intent of excluding untreated characteristic hazardous waste.

37. Subpart 6 requires written notice of acceptance of waste to be provided to the proposer. It is suggested that the Agency add language requiring written notice to the proposer of rejection of any waste for containment. Such a change would not be substantial, and is found to be necessary and reasonable.

7047.0040 -- Demonstration of Attempt to Render a Listed Waste Nonhazardous.

38. The provisions of this part, with the exception of Subpart 4B

(discussed in Finding 39), are found to be necessary and reasonable to fulfill the statutory requirements of Minn. Stat. § 115A.175, subd. 4(c).

This subdivision of the statute requires that the proposer demonstrate that hazardous waste may be accepted at the S/C facility. This demonstration includes documenting any attempts made to render the waste nonhazardous.

In response to the concerns raised by the Administrative Law Judge, the Agency staff proposed a revision of this Part in its final comments. The revised part is found not to constitute a substantial change. Subpart 1, as finally proposed, requires a proposer to make a written request for the Board to determine whether an acceptable attempt has been made to exclude a waste from regulation as a hazardous waste. The finally proposed Subpart 2 specifies the information a proposer must submit to demonstrate that an acceptable attempt has been made. It is noted that the proposer is not required to have actually make a physical attempt to treat the waste, only to submit an assessment of the availability of treatment technologies. It is found that the finally proposed Subpart 2 fulfills the requirement of Minn.

Stat. sec. 115A.175, subd. 4 - that documentation of an attempt to render the waste nonhazardous is submitted "in a form satisfactory to the agency". Subpart 3 allows the Agency to consider information in addition to that submitted by the proposer in determining whether the proposer has made an acceptable attempt to render the waste nonhazardous.

39. Subpart 4, as finally proposed, provides that the Agency shall determine that an acceptable attempt has been made to render a listed hazardous waste nonhazardous if it finds:

A. that the characteristics of the constituents of the waste have been reasonably identified; and,

B. that it would be unreasonable to require treatment of the hazardous waste to render it nonhazardous.

Subpart 4 satisfies the first step of the requirement of Minn. Stat. 115A.175, subd. 4(c), which is that the characteristics of the waste be identified. Such a step is necessary to deciding the ultimate question of whether the waste's characteristics prevent it from being rendered nonhazardous. Subpart 4A, as finally proposed, is found to be reasonable and necessary.

Subpart 4B is found to exceed statutory authority because it uses the standard of reasonableness in determining whether a waste should be treated in order to attempt to render it nonhazardous, rather than the "feasible and prudent" approach taken in the authorizing statute. Minn. Stat. § 115A.175, subd. 4(c) requires that the proposer of waste for containment document the attempt to render the waste nonhazardous by means of a "documentation under clause (c)". Subd. 4(c) of the statute requires the proposer to show: "(1) there is no feasible and prudent alternative to containment of the waste...."; and "(2) the waste has been treated using feasible and prudent technology...". As an alternative to (2), the proposer is allowed to demonstrate that the waste has characteristics that prevent its treatment. If treatment technologies are required by statute to be "feasible and prudent", the same standard should govern whether treatment is required.

It is clear that the authorizing statute implies that a "feasible and

prudent" standard of review should be employed in determining whether the proposer's attempt to render a listed waste nonhazardous is adequate. If the legislature had intended the proposer show there are no "reasonable" alternatives to containment, or that the treatment of waste not be an "unreasonable" requirement on a case-by-case basis, it could have so stated. In setting a standard other than "feasible and prudent", the agency is, in effect, setting its own standard, which is broader and more vague than the legislature intended.

There is a qualitative difference between the standards of "reasonableness" and "feasible and prudent". To be reasonable is to be "just" or "proper", or to take an approach which is "fit and appropriate to the end sought." In analyzing a proposed rule under the Administrative Procedure Act, a rule is generally deemed "reasonable" if it has a rational basis or relation to the end sought by the authorizing statute. To be feasible and prudent is a more specific focus. "Feasible" has been defined

as "capable of being done, executed or affected", and "prudence" as "carefulness, precaution, attentiveness, and good judgment, as applied to action or conduct.- See Black's Law Dictionary, Revised 4th Ed. (1968) pp. 739, 1392, 1431. In many contexts, to be prudent is to exercise fiscal restraint.

The Agency's proposal for a rule requiring that a proposer prove that it would be "unreasonable" not to treat certain wastes to a level that renders them nonhazardous, rather than requiring a showing that treatment would not be "feasible and prudent" exceeds its statutory authority and cannot be adopted at this time. In order to cure this defect, it is suggested that the Agency adopt a rule deploying a "feasible and prudent" standard. For example, Subpart 4B could read:

B. that no feasible and prudent technology exists to render the hazardous waste nonhazardous.

This proposed language is found to reasonable, necessary and not a substantial change.

40. It is suggested that the standard of review under Subpart 4B be made more specific by adding a definition of "feasible and prudent technology". Adding such a definition is found to be needed and reasonable and does not constitute a substantial change. Defining "feasible and prudent technology" would make specific how the "feasible and prudent" test required by the statute may be met. Addition of the following definition is suggested:

"Feasible and prudent technology" is defined as an established system of treatment that reduces the concentration of hazardous waste; does not generate more waste by volume than the initial waste treated; does not cost more than twice the anticipated long-term cost for containment of the waste; and will result in a waste which meets the applicable land disposal restrictions provided in chapter

7045 and Code of Federal Regulations, title 40, section 268.

The criteria set forth in the proposed definition provide a bright-line standard for assessing each technology presently available to proposers. By requiring an "established system," pilot projects, research projects and proprietary processes not publicly available are excluded. Reduction of the concentration of hazardous waste results in less waste to contain. Requiring less volume prevents "diluting" from being accepted as a treatment technology. The cost restriction is directed toward the "prudent" portion of the statutory standard and recognizes the benefit of having waste treated rather than contained. The Agency may alter the cost ratio without the change being a substantial change. The last part of the definition recognizes that the waste must still meet the applicable land disposal requirements prior to admission to the S/C facility.

41. It is noted that the Agency has proposed a test for demonstrating whether a listed hazardous waste was treated using "feasible and prudent technology" for the purpose of minimizing migration of hazardous constituents of the waste as a subpart of proposed Part 7047.0050. The legality, need for and reasonableness of that proposal will be discussed subsequently. The definition suggested for "feasible and prudent technology" in the preceding

Finding is limited to defining that concept for purposes of treating a hazardous waste within the context of Part 7047.0040 (attempting to render a listed hazardous waste nonhazardous).

7047.0050 -- Demonstration of Compliance with Land Disposal Restrictions, Feasible and Prudent Treatment.-and No Feasible and Prudent Alternative to Containment.

42. Subpart I sets forth what constitutes documenting compliance with the land disposal requirements. This subpart is found to be needed and reasonable to assist the proposer in meeting the burden of showing that the waste is appropriate for entry into the S/C facility.

43. In Subpart 2, the requirements to demonstrate treatment of a listed hazardous waste to minimize migration are set forth. The PCA relies upon the treatment requirement of the certification process for land disposal and a further requirement that residual wastes be treated further, coupled with a requirement that the waste be stabilized using the stabilization process permitted for use at the S/C facility, to meet the duty imposed by the authorizing statute to determine that "the waste has been treated using feasible and prudent technology that minimizes the possibility of migration of any hazardous constituents of the waste". Minn. Stat. § 115A.175, subd. 4(c)(2). Subpart 2 of 7047.0050 is found to be necessary and reasonable.

44. It is noted that feasible and prudent technology" is not defined for purposes of the subparts relating to treatment for minimizing migration of the waste. A similar standard is being established by the Environmental Protection Agency for "best demonstrated available technology." See, Exhibit 5, pp. 40588-40590. Defining feasible and prudent technology for purposes of this Subpart would not deny any interested party input into what should constitute "feasible and prudent technology" since the authorizing statute contains these exact terms. Adding such a definition would not be a substantial change. It is suggested that the Agency consider separately defining "feasible and prudent technology" for the purposes of Subparts 1 and 2.

45. Proposed Subpart 3 provides that meeting the migration minimization standard, meeting the land disposal requirements, and making an acceptable attempt to render the waste nonhazardous will, collectively, be deemed to meet the "no feasible and prudent alternative to containment" standard found at Minn. Stat. § 115A.175, subd. 4(c)(1). This subpart is found to be reasonable and necessary.

It is noted that this report, at Finding 39, requires that an "acceptable attempt" be reviewed using a "feasible and prudent" standard. Adoption of that standard at Part 7047.0040, subp. 2 will provide more consistency to Subpart 3, which is entitled "No feasible and prudent alternative to containment", and is designed to provide how a proposer demonstrates there is no feasible and prudent alternative to containment.

7047.0060 Waste Minimization Plan.

46. This part sets forth the requirements for the waste minimization plan required of generators seeking to use the S/C facility. As discussed earlier, this requirement is not in the authorizing statute but is consistent with the Agency's mandate to reduce the amount of waste produced. Mr. Costello testified at the hearing that the S/C facility, although defined as a generator, should not be required to comply with this portion of the rules. St. Paul Transcript, at 65. Since the S/C facility will have already prepared an industrial waste management plan, requiring a waste minimization plan from it is redundant. St. Paul Transcript, at 66. The PCA agreed with this argument and added language exempting the S/C facility from preparing a waste minimization plan. The changes implementing the exception at Subparts 1 and 3 are not substantial changes and the part as finally proposed is found to be needed and reasonable.

7047.0070 Prohibitions.

47. This part makes explicit the prohibition against accepting waste at the S/C facility without prior approval from the PCA. Further, the knowing submittal of false information is explicitly prohibited. No sanctions are mentioned in this part for violations of the rule. Agency staff and counsel noted at the hearing that the PCA would use other statutes for pursuing violators of this rule. Red Lake Falls Transcript, at 60. The rule is found to be needed and reasonable as proposed.

It is noted that persons who violate any adopted PCA rules can be held civilly and criminally liable under Minn. Stat. §§ 115A.071 and 609.671. It is suggested that citation of this potential liability be added to Subpart 2. Such an addition is found to be necessary and reasonable and not a substantial change.

Other Matters.

48. Craig Holmgren, a citizen of Red Lake County, testified at the hearing in this matter. Mr. Holmgren suggested additions to the rule as follows:

(a) requiring tests to be performed without charge on wells in the area of the S/C facility at the landowner's request;

(b) should contamination of local air or water be found, the landowner may opt for the State purchasing that land;

(c) farmland would be appraised at the rate per acre for fertile land in southern Minnesota and residences would be appraised at metropolitan Minneapolis/St. Paul rates;

(d) relocation and retraining of residents owing to contamination would be at State expense and lost wages would be paid by the State until adequate jobs are found in the new location; and,

(e) hospital, clinic or nursing care would be paid by the State for residents who suffer health problems as a result of water or air contamination.

Red Lake Falls Transcript, at 41-42

These suggestions show a sensitivity to the possibility of hazardous waste migration and the deleterious effects that such migration would have on

health, property and the local economy in the vicinity of the S/C facility.  
Minn. Stat. sec. 115A authorizes the PCA to establish rules to govern the acceptance of waste at the S/C facility, not compensate area residents in the event that waste leaves the S/C facility. As such, the PCA cannot adopt the suggested compensation system in connection with this Rules package, since that is beyond the Agency's statutory authority. However, the State, as owner of the S/C facility, should consider Mr. Holmgren's suggestion carefully. Following some of these suggestions could ease concerns of the residents in the vicinity of the S/C facility. Further, instituting some of these suggestions would ensure that the fees charged for containment of waste incorporated long-term costs and insured against long-term fiscal shortfall.

49. The rules not otherwise specifically discussed in this Report were shown to be necessary and reasonable with an affirmative presentation of fact. Likewise, rule amendments not specifically discussed were shown to be authorized and not to involve prohibited substantial changes.

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

#### CONCLUSIONS

1. That the Minnesota Pollution Control Agency gave proper notice of the hearing in this matter.

2. That the Agency has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Agency 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)(ii), except as noted at Findings 35 and 39.

4. That the Agency has documented the need for and reasonableness of its

proposed rules with 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 amendments and additions to the proposed rules which were suggested by the Agency 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, and Minn. Rule 1400.1000, Subp. I and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Findings 35 and 39.

7. That due to Conclusions 3, and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed 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 except where specifically otherwise noted above.

Dated: September 27, 1989.

RICHARD C. LUIS  
Administrative Law Judge

Reported: Laurie Garrison  
Kirby A. Kennedy and Associates

#### MEMORANDUM

As a part of this rulemaking proceeding, the Administrative Law Judge was informed of a petition signed by approximately 2,000 persons from the Red Lake County area. The petition opposed the siting of the S/C facility in Red Lake County. There are approximately 2,700 registered voters in Red Lake County, which had a 1980 population of 5,471. Clearly there is strong

opposition to the siting of the S/C facility in that County. Whether the siting of the S/C facility is welcomed or opposed, however, is immaterial to the need for, reasonableness of and authority for the PCA's proposed rules. No matter where the S/C facility is finally located, Minn. Stat. § 115A.175 requires the PCA to establish rules to govern the acceptance of waste. The eventual siting of this facility is governed by a different statute and a different agency. The Administrative Law Judge is cognizant of the sentiments of the citizens of Red Lake County. However, the rules must be evaluated without regard to the eventual location of the S/C facility.

R.C.L.