

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

Proposed Permanent Amendments
to Rules Governing Hazardous
Waste Facility and Generator
Fees, Minn. Rules Chapter 7046

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for a public hearing before Administrative Law Judge Bruce D. Campbell, commencing at 9:00 a.m. on November 15, 1993, at the Agency's offices in St. Paul, Minnesota, and continued until all interested persons present had an opportunity to participate by asking questions and presenting oral or written comments.

This Report is part of a rulehearing procedure required by Minn. Stat. §§ 14.01 - 14.28 (1993) to determine whether the proposed rules governing hazardous waste facility and generator fees should be adopted by the Board of the Minnesota Pollution Control Agency. Keith Moheban, Assistant Attorney General, Office of the Attorney General, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Pollution Control Agency, as legal counsel. Members of the panel appearing at the hearing for the Agency included: Edward Meyer, Sharon Meyer and Jeanne Eggleston, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-4194. Also present in the audience to respond to public questions were the following persons from the Minnesota Pollution Control Agency: Richard Baxter, Bruce Brott and Raymond Bissonett. No witness was solicited by the Agency to appear on its behalf.

Four members of the public signed the hearing register at the hearing and no members of the public provided oral or written comments at the hearing. During the hearing, the Agency submitted Exhibits 1 through 13, inclusive. The Agency had received six public letters in response to their Notice of Intent to Solicit Outside Information, published in the State Register on August 2, 1993. Those letters are attached to the Agency's Statement of Need and Reasonableness, as Exhibit 4. Except for comments about the increase in the fee level, the common subject matter of the letters concerned situations in which a company was engaged in pretreatment or recovery of waste material. It was stated by the letter commentors that the rules, as proposed, would penalize and unfairly charge companies engaged in pretreatment of waste material. The Agency and the Administrative Law Judge did not receive any written comments on the proposed rules during the public comment period after the hearing. The record of this proceeding closed for all purposes on December 1, 1993, the date set by the Administrative Law Judge at the hearing for the receipt

of reply comments authorized by the Minnesota Administrative Procedure Act.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On October 6, 1993, 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 Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A copy of the Certificate of the Resolution authorizing proposal of the rules.

2. On October 11, 1993, a Notice of Hearing and a copy of the proposed rules were published at 18 State Register 1041-1048.

3. On October 8, 1993, 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. The Agency also mailed a copy of the Notice of Hearing to all nonmetropolitan area large and small quantity generators in the State of Minnesota.

4. On October 19, 1993, 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) An Affidavit of Additional Notice.
- (e) The names of Agency 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.

(f) A copy of the State Register containing the proposed rules.

(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 18 State Register 1041-1048, August 2, 1993, and a copy of the Notice.

(h) The Affidavit of Mailing the Notice of a proposed rulemaking affecting fees to be charged to the required legislative committee chairpersons.

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

5. The period for submission of initial written comment and statements remained open through November 22, 1993. The record closed on December 1, 1993, the fifth business day following the close of the comment period.

6. At the hearing herein, the Agency filed with the Administrative Law Judge, as Agency Ex. 11, revisions to the proposed rule amendments as published. The revisions were filed in response to the public letters received during the Agency's Solicitation of Outside Opinion about the manner in which pretreated wastes were charged under the proposed rules. All of the proposed amendments at the hearing related to a measure of fee relief under the proposed schedule for pretreated waste.

Nature of Proposed Rules

7. The Minnesota Pollution Control Agency is required by statute to adopt rules governing the payment of fees by owners and operators of hazardous waste treatment, storage and disposal facilities, and by generators of hazardous waste. The initial rules governing that subject matter, contained in Minn. Rules pt. 7046.0010 - 7046.0070 became effective on February 6, 1984. They were amended in April of 1985, in May of 1987, in January of 1989, March of 1990 and January of 1992. Minnesota Statutes and the Agency's appropriations bill require it to establish fees to collect funds to cover the cost of the Hazardous Waste Program. The Agency must review the fees each fiscal year. As a result of its most recent review of the fees, the Agency determined that fee revenues are estimated to be nearly equal to the fee target revenue set by the Legislature. In 1993, the Legislature also directed the Agency to base its fees on the quantities of hazardous waste generated with consideration given to reducing fees for generators using environmentally beneficial hazardous waste management methods such as recycling. This legislative directive required structural changes in the fee rules, specifically the amendment of the management method factor provisions for reducing quantity fees. A 1993 statutory change also authorized the Agency to adopt a fee formula in a rule allowing adjustments to facility and generator fees to be implemented annually, if necessary, without rulemaking. In this rulemaking proceeding, the Agency is proposing a fee formula.

Statutory Authority

8. The Agency's statutory authority to adopt the rules is set forth in Minn. Stat. § 116.12, subd. 1, subd. 2 and subd. 3 (1993). The Agency's obligation to review and, if necessary, to

adjust the amount of fees is contained in Minn. Stat. § 16A.128, subd. 1a (1993). Under these statutes, the Agency has the necessary statutory authority to adopt the proposed rules.

Small Business Considerations

9. Minn. Stat. § 14.115, subd. 2 (1993), requires the Agency, when proposing rules that may affect small businesses to consider stated methods for reducing the impact on such small businesses. The proposed rules may affect small businesses as defined in Minn. Stat. § 14.115 (1993). The Agency specifically considered the factors listed in Minn. Stat. § 14.15, subd. 2(a)-(e) (1993). It reasonably determined that it could not base a fee structure on the size of the business when the most important consideration in the regulation of hazardous waste is the quantity of hazardous waste generated, stored, treated or disposed of. Differentiations based on business size may or may not reflect the quantity of hazardous waste under regulation. The proposed fee structure does include an exemption for businesses which generate less than ten gallons or 100 pounds of hazardous waste in a year. This may, to some extent, correspond with small businesses who are very small quantity generators. In addition, generators producing less than 264 gallons or 2640 pounds of hazardous waste in a year are not assessed a quantity fee. Instead they will be charged a flat minimum fee. This greatly simplifies the annual reporting and the fee calculations for the businesses which will be of benefit to small businesses that come within that quantity of hazardous waste generated. The amendments also increased facility fees by ten percent. It is unlikely that any of the disposal, treatment or storage facilities qualify for small business status. The Administrative Law Judge finds that the Agency has appropriately accommodated the interests of small businesses as required by Minn. Stat. § 14.115, subd. 2 (1993).

Cost to Local Public Bodies

10. Minn. Stat. § 14.11, subd. 1 (1993) requires the Agency to include a statement of the rule's estimated cost to local public bodies in the Notice of Intent to Adopt Rules if the rule would have a total cost of over \$100,000 to all local bodies in the State in either of the two years immediately following adoption of the rule. Increased fee collections from local public bodies will be less than \$100,000. Hazardous waste facility and generator fees are primarily collected from private businesses. The Administrative Law Judge finds that the Agency has complied with Minn. Stat. § 14.11, subd. 1 (1993).

Commissioner of Finance Approval

11. Minn. Stat. § 16A.128, subd. 1 (1993), requires the approval of the Commissioner of Finance for fees proposed to be imposed by rulemaking. The Commissioner of Finance approval is attached as Exhibit 1 to the Statement of Need and Reasonableness. The Agency has complied with Minn. Stat. § 16A.128, subd. 1 (1993).

Consideration of Economic Factors

12. In exercising its powers, the Minnesota Pollution Control Agency is required by Minn. Stat. § 116.07, subd. 6 (1993) to give due consideration to economic factors. The Agency has assessed the information supplied by the regulated community. The Agency has given due consideration to the economic impact on economic factors of adopting the fee schedule. It has attempted in the proposed rule amendments to proportionately distribute the hazardous waste fees among all businesses within the requirement to do so established by Minn. Stat. § 116.12 (1993).

13. The proposed rule amendments, as stated in Minn. Rules pt. 7046.0010-7046.0070 are adequately supported as to need and reasonableness in the Agency's Statement of Need and Reasonableness contained in the record as Exhibit 3 and filed with the Administrative Law Judge. Except for public letters attached to the Statement of Need and Reasonableness as Exhibit 4, no oral or written public comment was received on the proposed rules. Therefore, the Administrative Law Judge finds that the Agency has established the need for and reasonableness of the proposed rules with an affirmative presentation of fact, with the amendments discussed in the following Finding.

14. At the hearing herein, the Agency proposed revisions to the rule amendments as published. Those revisions are contained in the record as Exhibit 11 and attached hereto as Appendix A. All of those amendments are incorporated verbatim into this Finding as if specifically restated here. The amendments were generated in response to the public comments received by the Agency after its solicitation of public comment and relate to the manner in which pretreated hazardous wastes are affected under the fee schedule. The public comments stated that pretreated hazardous waste was subject to an unfair fee levy. The amendments proposed by the Agency are in response to those comments. The Administrative Law Judge finds that the amendments proposed by the Agency in Exhibit 11 in the official record and Appendix A attached hereto are needed and reasonable to avoid an unfair treatment of pretreated hazardous waste under the fee schedule. The Administrative Law Judge further finds that the proposed amendments do not constitute a prohibited substantial change. The amendments to the rule as proposed do not go to a different subject matter, are totally responsive to public comment, will only have a future effect and will only marginally impact future fee levels, if at all.

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

CONCLUSIONS

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

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

3. That the Agency has documented 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. That the Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the 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, Minn. Rule 1400.1000, subp. 1 and 1400.1100.

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

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

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

RECOMMENDATION

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

Dated this ____ day of December, 1993.

s/ Bruce D. Campbell
BRUCE D. CAMPBELL
Administrative Law Judge

Reported: Tape Recorded; No Transcript Prepared.