

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE EMERGENCY RESPONSE COMMISSION

In the Matter of the  
Proposed Rules of the  
JUDGE  
Emergency Response Commission  
Governing Emergency and  
Hazardous Chemical  
Inventory Fees, Minn. Rules  
7507.0100 to 7507.0700

REPORT OF THE  
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 31, 1990, at 9:00 a.m. in Conference Room D, Fifth Floor, Veterans Service Building, St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. 14.131 to 14.20, to hear public comment and to determine whether the Commission has fulfilled all relevant, substantive and procedural requirements of statute and rule in the adoption of the proposed rules.

Lee Tischler, Director, David Senjem, Chairman, and Tobey Lapakko, member, appeared for the Commission and testified in support of the proposed rules. Lee Paddock, Assistant Attorney General, appeared on behalf of the Commission. Katherine Burke Moore, Department of Public Safety Rules Coordinator, also appeared on behalf of the Commission.

Approximately six other persons attended the hearing, three of whom signed the hearing register. Two persons testified at the hearing: Craig Sallstrom, on behalf of the Minnesota Plant Food & Chemicals Association, and Stephen E. Guetter, on behalf of Rosen's Diversified, Inc. The hearing continued until all interested persons had had an opportunity to be heard concerning the adoption of the proposed rules.

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

Based upon the record herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural Requirements

1. On August 16, 1990, the Commission 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 statement that additional notice would be given to all parties who indicated an interest in the rules.

2. On September 4, 1990, the Notice of Hearing and a copy of the proposed rules were published at 15 State Register 566-568. Prior to submission of the Notice of Hearing to the State Register, the Commission sent a copy of the Notice and the proposed rule to the offices of the chairs of the House Appropriations Committee and the Senate Finance Committee.

3. On August 30, 1990, the Commission mailed the Notice of Hearing to all persons and associations who had registered their names with the Department of Public Safety for the purpose of receiving such notice. The Commission also mailed the Notice to all persons and associations that had expressed interest to the Commission in the rulemaking proceeding and to other persons and associations that might have an interest in the rulemaking proceeding.

4. The Notice of Hearing published in the State Register and mailed by the Commission was a "dual notice." The first part of the Notice gave notice that the Department intended to adopt the rules without a public hearing under the provisions of Minn. Stat. 14.22 to 14.28, but also provided that if twenty-five or more persons requested a hearing within thirty days, the public hearing would be held on Wednesday, October 31, 1990. The second part of the Notice gave notice of the hearing to be held October 31, 1990, and stated that the hearing would be canceled if fewer than twenty-five persons requested a hearing in response to the first part of the Notice. The technique of using a

"dual notice" provides a mechanism for agencies to adopt rules without unnecessarily delaying the process if twenty-five people request a hearing, while at the same time providing all required notice to affected and interested persons.

5. More than twenty-five persons requested a hearing on the rules. Therefore, on October 5, 1990, the Commission filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed together with the Department mailing list and the list of persons mailed the additional discretionary notice.

- (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 Department of Public Safety's mailing list and to all persons on the Commission's discretionary list.
- (d) An Affidavit stating that the Commission had mailed the Notice and Proposed Rules to the chairs of the House Appropriations Committee and Senate Finance Committee prior to submitting the Notice of Public Hearing to the State Register as required by Minn. Stat. 16A.128, subd. 2(a).
- (e) The names of Commission personnel who would represent the Agency at the hearing.
- (f) A copy of the State Register containing the Notice of Hearing and the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 14 State Register 1722 on January 2, 1990, and a copy of the Notice.
- (h) Minutes from a Commission meeting held to solicit additional information regarding the proposed rules and a photocopy of the meeting announcement published at 14 State Register 2434 on April 9, 1990.

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

6. No indication was made in the record that the Notice of Hearing was mailed to those persons who submitted a written request for the public hearing as required by Minn. Stat. 14.25. That requirement was recently added to the Administrative Procedure Act by Minn. Laws 1990, Ch. 422, 8, effective August 1, 1990. It has particular application in the situation where a notice of intent to adopt a rule without public hearing is published under Minn. Stat. 14.22 to 14.28. However, in the context of a "dual notice," the notice of the public hearing will have already have been provided to persons who request a hearing. This is so because they are requesting the public hearing in response to a notice of intent to adopt a rule without a public hearing published and mailed as part of a notice setting the hearing subject to cancellation. The persons requesting a hearing in this matter already knew when the hearing would be held at the time they requested it. Thus, all the notice required by the newly amended Minn. Stat. 14.25 has been provided and the requirements of that statute have been met.

7. The period for submission of written comment and statements remained open through October 7, 1990, the fifth working day following the hearing. The record closed on November 13, 1990, the third business day following the close of the comment period. Three comments were received during the comment period; one from the Commission, one from Rosen's Diversified, Inc., and one from the Midwest Circuit Association. One comment was received during the response period and that was from the Commission.

8. In its post-hearing comment, Rosen's Diversified, Inc. stated its

belief that very few of the 4,000 companies that will be affected by the proposed rules were aware of the current proposal. Ex. 7. They suggested that a letter be sent to each company affected informing them of the proposal and suggest that if that were done, there would be very significant opposition

to the proposed rules. The notice that was given meets the minimum requirements of Minn. Stat. 14.14, subd. 1(a) and more. Additional notice was given to persons, associations, agencies and business newspapers the Commission felt might be interested in the rules. Moreover, the makeup of the Commission itself consists of persons representing many diversified interests and viewpoints. Adequate and reasonable notice of the proposed rules was given.

#### Nature of- the Proposed Rules

9. The proposed rules establish fees and procedures relating to the payment of those fees by persons submitting emergency and hazardous chemical inventory reports to the Commission. Such reports are required by the federal Emergency Planning and Community Right to Know Act, 42 U.S.C. 11021 and 11022 (the Federal Act), and the Minnesota Emergency Planning & Community Right to Know Act, Minn. Stat. 299K.01 - 299K.10 (the Minnesota Act). The main provision of the rules establishes a processing fee schedule. A three-tier schedule is established based upon the number of chemicals reported. If a facility reports one to nine chemicals in its annual report, the fee is \$25.00; for ten to forty-nine chemicals, it is \$100.00; for fifty or more, it is \$1,000.00.

#### Statutory Authority

10. Minn. Stat. 299K.03, subd. 5, provides, in relevant part:

The commission shall carry out all requirements of a commission under the federal act and may adopt rules to do so.

11. Minn. Stat. 299K.09 provides:

#### RULES TO SET FEES.

Subdivision 1. Fees. The commission shall adopt rules setting the following fees:

(1) a material safety data sheet fee to be paid by a facility when it submits material safety data sheets in lieu of a hazardous chemical report form as required under section 11021 of the federal act;

(2) a fee to be paid by a facility when the owner or operator submits its emergency and hazardous chemical inventory form, required under section 11022 of the federal act, for calendar year 1990 and annually afterwards; and

(3) a late fee to be paid by a facility that fails to pay a fee under clause (1) or (2) in a timely manner, not to exceed 200 percent of the original fee.

Subd. 2. Fee structure. The fee established under subdivision I may not exceed, in the aggregate, the

amount necessary to cover the costs for all data management, including administration of fees, by the commission and regional review committees.

12. Minn. Stat. 14.115 requires agencies to consider the effect on small businesses when they adopt rules. In particular, Minn. Stat. 14.115, subd. 2 states, in part:

When an agency proposes a new rule, or an amendment to an existing rule, which may affect small businesses the agency shall consider each of the following methods for reducing the impact of the rule on small businesses:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards as required in the rule;

(e) the exemption of small businesses from any or all requirements of the rule.

13. In its Statement of Need and Reasonableness (SONAR), as updated at the hearing, the Commission stated:

These rules will require any facility that stores hazardous chemicals in excess of regulatory thresholds to pay fees. The amount of the processing fee will depend upon the number of chemicals subject to the reporting requirements. This graduated fee schedule reflects considerations for the costs to enter the data and the relative size of the facility. The Commission has estimated that 92 percent of all facilities would pay the lowest fee amount. In general, most small business falls in this category. Large businesses typically store the largest number of chemicals and would pay the highest fee amount. Nevertheless, the Commission has identified a number of agricultural chemical dealers that are considered small businesses but would pay a mid-range fee.

14. At the hearing, Mr. Sallstrom stated that the fee structure would impact unfairly on some small businesses because some of them would fall in the second tier and be required to pay the \$100,00 processing fee rather than the first tier fee of \$25.00. In its post-hearing comments, Ex. 9, the Commission responded as follows:

The commission reiterates that the requirement to consider the rule's impact on small business was one of the carefully deliberated considerations that lead to its decision to choose the fee schedule within the proposed rule. The great majority of small businesses will fall into the lowest tier which makes up 92% of the facilities reporting. Although a small percentage of small businesses impacted by the rule will pay the mid-range fee, considering the added administrative costs of alternative fee schedules resulting in added costs to be recovered by the commission, the present schedule is reasonable.

15. The Commission has considered the applicable specific methods for reducing the impact of its rules on small businesses as required by Minn. Stat. 14.115, subd. 2. The impact has been reduced on small businesses by establishing a tier structure under which the great majority of small businesses pay the smallest fee. Moreover, the Commission has designed the reporting and fee payment structure to make the process as simple as possible for the reporters, including small businesses, as well as for the Commission.

#### Fees imposed by the rules

16. The Commissioner of Finance has approved the fee schedule as required by Minn. Stat. 16A.128, subd. 1a. Copies of the Notice of Hearing and proposed rules were sent to the chairs of the House Appropriations and Senate Finance Committees as required by Minn. Stat. 16A.128, subd. 2a.

#### Public Expenditures

17. Adoption of these rules will require local public bodies that store chemicals in excess of the minimum reporting requirements to pay the scheduled fee. However, the total cost for all reporters is estimated at \$155,000 per year. Thus, the total cost to all local public bodies in the State to implement the rule will be far less than \$100,000.00 per year. Therefore, the requirement of Minn. Stat. 14.11, subd. 1, for an estimate of total cost to public bodies if it is expected to exceed \$100,000.00 per year does not apply in this proceeding.

#### Agricultural Land Impact

18. Minn. Stat. 14.11, subd. 2, is inapplicable because the proposed rules will not have any direct or substantial adverse impact on agricultural land in the state.

#### 75Q7.0100 Scope .0200 Definitions and .0300 Payment of Fees

19. These rules identify persons to whom the rules apply, refer to the definitions given in Minn. Stat. 299K.01, and state how checks submitted for payment of the fees should be made out (to the Department of Public Safety),

and where they should be submitted (to the Director of the Commission).

These

provisions are reasonable and necessary to explain the basic requirements and mechanics of the fees.

7507.0400 Material Safety Data Sheet Fee

20. This rule requires payment of a \$10.00 fee per material safety data sheet when such sheets are submitted in lieu of a hazardous chemical report form. This rule continues the interim fee established when the Minnesota Act was enacted. Minn. Laws 1989, Ch. 315, 13, which was not codified into Minnesota Statutes, provides:

Beginning on the effective date of this section and continuing until the effective date of rules adopted under section 9 [Minn. Stat. 299K.09] the fee under section 9, subdivision 1(1), is \$10 per material safety data sheet but does not apply to material safety data sheets requested by the Emergency Response Commission.

This fee was established to encourage the submittal of hazardous chemical report forms instead of material safety data sheets. The Commission incurs significantly larger costs to process and store material safety data sheets. The rule is reasonable and necessary as proposed.

7507.0500 Processing Fee

21. Subp. 1 of this rule requires the processing fee to be paid by March 1, each year beginning in 1991, by all owners or operators required to submit emergency and hazardous chemical inventory forms. It allows a person who periodically moves a hazardous chemical from one facility to another during the same calendar year as part of normal operations to pay the fee for only one facility. Subp. 2 establishes the processing fee schedule.

22. In its SONAR, as clarified at the hearing, the Commission presented the following rationale:

Subpart 2, Processing fee schedule, specifies the processing fees in subpart 1 that Minnesota Statutes, Section 299K.09, Subd. 1(2) authorizes the Emergency Response Commission to assess. The Commission considered the following factors before selecting the fee schedule.

Equity consideration may dictate establishing fees according to the ability to pay and according to the number and quantity of hazardous chemicals present in a facility.

Administrative costs to manage a fee program will increase program costs. In addition, a complex fee schedule that considers all equity factors will significantly increase administrative costs.

A complex fee schedule will make it difficult for the Commission to assess a facility's compliance with that schedule. In addition, enforcement could be a concern when fees create a disincentive for a facility to comply with reporting requirements.

The Commission also reviewed a sample of the emergency and hazardous chemical inventory forms submitted by facilities for calendar year 1988 and determined that approximately 92 percent of the facilities would pay \$25; 7 percent would pay \$100; and 1 percent would pay \$1000.

This fee schedule is reasonable because it does not establish a complex fee schedule that is costly to administer and that is difficult to verify, but it still covers the costs for all data management, including administration of fees, by the Commission and regional review committees as required by Minnesota Statutes, Section 299K.09.

23. The Commission estimates that the cost of data management for fiscal years 1991, 1992 and 1993 will be approximately \$163,000.00. The Commission also estimates that receipts from the fees as proposed by these rules will aggregate approximately \$155,000.00 per year.

24. Mr. Sallstrom and Mr. Guetter both objected to the tier structure and suggested that a fee per chemical, with some base amount, would be more equitable. Mr. Sallstrom, who represents the Minnesota Plant Food & Chemical Association, which is mostly fertilizer dealers, suggested that setting the first break point at ten chemicals may encourage under-reporting by those businesses that would normally report a few more than ten chemicals. Mr. Guetter, who represents Rosen's Diversified, Inc., a company with a high number of chemicals, suggested that the second break point of fifty chemicals was not equitable.

25. In its post-hearing comments, Ex. 9, the Commission responded to Mr. Sallstrom's and Mr. Guetter's concerns as follows:

Although at first glance the increments between ranges in the three-tiered schedule may appear substantial, when alternative methods are examined, it is evident that such methods would result in higher administrative costs which ultimately raises the amount that must be recouped by the commission. The commission researched and examined alternative methods, as is shown in Exhibits 4 and 5, but determined the additional costs for administration would result in higher fees overall. A specific concern of the commission was that the lowest proposed fee of \$25 would have to be raised, thus having an even greater adverse financial affect on 92% of facilities reporting who are mostly small businesses.

In addition the commission relied on information received in correspondence from the Minnesota Pollution Control Agency (MPCA). The memorandum has been enclosed and is offered by the commission as additional evidence that the three-tiered schedule proposed is reasonable. As stated in the introductory-paragraph and first comment of the MPCA memorandum, that agency had used a per chemical charge fee schedule for hazardous waste quantities



generated by a facility. After a number of revisions the agency has instead adopted a three-tiered schedule.

The commission will retain the fee schedule within the proposed rule. The alternative fee schedule laid out above would decrease the efficiency of processing the statements and simultaneously increase the costs of administration. As indicated in the memorandum from MPCA, when that agency used a per chemical charge, the reporting statement was both difficult to understand and lengthy. The time involved in processing a difficult and lengthy reporting statement would increase administrative costs.

If five additional minutes are needed to process per chemical charge statements, the time may seem insignificant. However, an additional five minutes per 4,000 statements is a total increase of 20,000 minutes processing time. Calculating that additional time into working hours results in just over eight weeks of full-time employment. The costs of that additional staff time would be significant. Obviously, if ten or fifteen additional minutes were required for each statement the cost of processing would be very substantial.

In addition a more complex per chemical charge has a greater potential for error by both the reporting facilities and the commission. Verification of accuracy is also more difficult and complicated because, with the alternative schedule above, each statement reporting over 12 chemicals would have to be verified. The fee schedule within the proposed rule necessitates verification only for those few reporters near the tier cut-offs. Again, added administrative costs would have to be recouped with higher fees overall. The proposed fee schedule is a reasonable method for both recovering and limiting the expenses incurred by the commission.

The commission realizes that this tiered schedule, like any tiered schedule, could encourage under-reporting. One way to decrease the amount of the increment between tiers is to increase the number of tiers within the schedule. Yet increasing the number of tiers only creates additional cut-offs, but may not substantially diminish the incentive to under-report. To have a multi-tiered schedule of more than three tiers would increase the administrative costs of the rule and thus require higher fees overall. An increase in overall fees would necessitate starting the lowest tier at a higher rate, further affecting small businesses.

In reviewing reports for 1989, few facilities have submitted reports which list chemicals near the cut-off. Of the 31 facilities reporting chemicals in numbers

placing them in the upper tier, only five were close to the cut-off. Of those five, one reported 50 chemicals while the other four reported 54 chemicals. The remaining 29 facilities or 84% of those in the upper tier reported 62 chemicals or more.

The commission has identified the number of chemicals reported by a facility as a good indicator of the size of the business and its ability to pay. Taking a facility's ability to pay into consideration is one method to use to arrive at an equitable fee schedule. The commission has reasonably done so, thus does not support the alternative fee schedule as proposed by Mr. Guetter.

Review of data from facilities within the upper tier of the 1989 reporting statements reveals the following:

Percentage	Number of Facilities	Number of Chemicals Reported
16.1%	5	Under 60
48.4%	15	61 - 99
35.5%	11	100 or more

As the table shows, the majority of the facilities falling into the upper tier report large numbers of chemicals and have been identified by the Commission as large businesses.

26. In a post-hearing written comment, Ex. 8, the Midwest Circuit Association (MCA) opposed the proposed fee structure. MCA represents companies that manufacture printed circuit boards and suppliers to such companies. MCA stated that most of its members are already in the upper end of the ten to forty-nine chemicals range and that the proposed structure would act as an incentive for the Commission and the State to require additional compounds to be reported and to lower the threshold quantities required for reporting. That, they argue, would result in a majority of their members ending up in the third tier and paying the highest fee of \$1,000.00. MCA suggests that its members already have to report to other regional, state and federal agencies and it is unnecessary for another agency to develop and maintain its own data base. They suggest that the Commission develop access to the existing data bases and thereby avoid the additional costs the proposed fees are designed to recoup.

27. In response to MCA's comments, the Department stated, in its post-hearing response, Ex. 10, as follows:

Midwest Circuit has voiced concern that the adoption of the rule will be an incentive for the commission to declare as reportable new chemicals and lower thresholds. Due to the statutory language mandating the rule and the parameters of the fees within the rule, the



commission would have to amend the fee rule if significant changes are made regarding reporting requirements.

Midwest Circuit also suggests that the commission's collection of data is unnecessary because other agencies collect the same information. Although there are a number of chemical data bases, none of the existing bases contain the data mandated by this statute and the federal "Emergency Planning and Community Right to Know Act".

28. Minutes of meetings of the legislative sub-committee of the Commission, Ex. 4, and of the meetings of the Commission itself, Ex. 5, demonstrate that the Commission thoroughly analyzed all aspects of the various fee structures and honestly considered the views of all interested persons during the development of the proposed rules. In arriving at the proposed three-tier structure for the fees, it considered the factors of equity in terms of ability to pay and quantity of hazardous chemicals, reduction of administrative costs through simplification of the fee structure and ease of compliance and enforcement through a simplified fee structure. The resulting rule provides a fee structure that addresses relevant needs, balances conflicting interests and results from a reasoned determination. The Commission has therefore demonstrated that the proposed rule is reasonable and necessary. See, *Manufactured -Housing-institute\_y., Petterson*, 347 N.W.2d 238 (Minn. 1984).

#### 7507.0600 Notification of Error

29. This part outlines the procedure for reconciling errors in the payment of fees. The Commission reviews the fees paid for a specific facility and will notify the facility about incorrect payment. It is consistent with the late payment fee schedule to allow the facility 60 days to submit correct payment for underpayment. After that time period, a late payment fee will be assessed. Overpayments will be refunded. There was no comment on this rule and it is, on its face, necessary and reasonable.

#### 7507.0700-Late Payment Fee

30. This part establishes a late payment fee for the material safety data sheet fee and the processing fee. A person will not be assessed a late payment fee if payment is received within 60 days of the payment date. This allows the Commission time to process the large volume of reports and fees submitted on or about March 1. Payment received between 60 and 120 days is subject to a late payment fee of 100 percent of the payment due. This doubles the fee that a person must pay. Payment received after 120 days must pay a late payment fee of 200 percent of the payment due, the maximum allowed under Minn. Stat. 299K.09, Subd. 1(3). This triples the fee that a person must pay. It is reasonable to wait an additional 60 days before levying this additional 100 percent. These fees are within the range permitted by the statute and are assessed in a fair manner.

Based upon the foregoing Findings of Fact, the Administrative Law Judge

makes the following:

#### CONCLUSIONS

1. The Commission gave proper notice of the hearing in this matter.
2. The Commission has fulfilled the procedural requirements of Minn. Stat. 14.14, and all other procedural requirements of law and rule.
3. The Commission has documented its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law and rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. The Commission 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. Any findings that might properly be termed conclusions and any conclusions which might properly be termed findings are hereby adopted as such .
6. A finding or conclusion of need and reasonableness in regard to any particular rule does not preclude and should not discourage the Commission 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 rulehearing record.

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

#### RECOMMENDATION

It is hereby recommended that the Commission adopt the rules as proposed.

Dated this 19th day of November, 1990.

STEVE M. MIHALCHICK  
Administrative Law Judge