OAH 80-9003-35384
Revisor RD4360

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Underground Storage Tanks, Minnesota Rules, Chapter 7150

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2018) and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby **CONCURS** with all disapprovals contained in the Report of the Administrative Law Judge dated December 20, 2018. Accordingly, the Chief Administrative Law Judge **CONCURS** that the following proposed rules are **DISAPPROVED:**

(1) Minn. R. 7150.0030, subp. 51a;

(2) Minn. R. 7150.0205, subp. 8; and

(3) Minn. R. 7150.0250, subp. 3A(1).

The changes or actions necessary for approval of the disapproved rules are as identified in the Administrative Law Judge's Report. If the Department elects not to correct the defects associated with the proposed rules, the Department must submit the proposed rules for review to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, pursuant to Minn. Stat. § 14.15, subd. 4 (2018).

Dated: December 24, 2018

TAMMY L. PUST
Chief Administrative Law Judge

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Underground Storage Tanks, Minnesota Rules, Chapter 7150

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge LauraSue Schlatter for a rulemaking hearing on October 25, 2018. The hearing was held at the Minnesota Pollution Control Agency, 520 Lafayette Road North, St. Paul, Minnesota. The Minnesota Pollution Control Agency (MPCA or Agency) proposes to amend Minn. R. 7150.0010, .0030, .0090, .0100, .0205, .0215, .0216, .0250, .0300, .0330, .0340, .0345, .0400, .0410, .0430, .0445, .0450, .0451, and .0500; and to repeal Minn. R. 7150.0010, subp.4, .0030, subps. 8, 23, 25a, 44a, 49, .0100, subps. 10 and 12, .0211, .0300, subps. 2, 7, .0330, subp. 2, .0410, subps. 2, 6, and .0420, all relating to the governing of underground storage tanks.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).[1] The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permitted Agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and any changes that might be appropriate. Further, the hearing process provided the general public an opportunity to review, discuss, and critique the proposed rules.

The Agency's panel at the public hearing included: Mike Schmidt, staff attorney with the MPCA; Nate Blasing, supervisor of the tanks compliance unit; Carey Mattison and Jake Mueller, inspectors with the tanks compliance unit; and Zachary Klaus with the rule development team.

Twenty-nine people submitted comments and requests for a hearing between October 1, 2018, and October 11, 2018.[2] Approximately 22 people attended the public hearing and signed the hearing register.[3] The hearing continued until all interested persons had an opportunity to be heard concerning the proposed rules. Three members of the public made statements or asked questions during the hearing.[4]

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[1] *See* Minn. Stat. §§ 14.001-.69 (2018).
[2] Exhibit (Ex.) I (written comments).
[3] Rule Hearing Register (Oct. 25, 2018). Twelve of the twenty-two who signed the hearing register identified themselves as affiliated with the MPCA.
[4] Hearing Transcript (Tr.) at 3 (Oct. 25, 2018).

One member of the public submitted a written comment at the public hearing.[5] The MPCA offered the following Exhibits, which the Administrative Law Judge received into the record at the hearing:

A. Request for Comments published in the State Register dated November 9, 2015.

B. Not Applicable.

C. Proposed Permanent Rules Relating to Underground Storage Tanks, including the Revisor's approval.

D. Statement of Need and Reasonableness (SONAR), as published with the State Register on August 27, 2018.

E. Transmittal letter showing the Agency sent a copy of the SONAR to the Legislative Reference Library in electronic form.

F. Dual Notice.

F.1. Dual Notice as signed by the Commissioner of the MPCA on August 9, 2018, and as mailed and posted to the MPCA Public Notice Webpage.

F.2. Dual Notice as published in the State Register on August 27, 2018.

G. Certifications.

G.1. Certificate of Mailing the Dual Notice to the Rulemaking Mailing List.

G.2. Certificate of Accuracy of the Mailing list.

H. Certificate of Giving Additional Notice, if given, or a copy of the transmittal letter.

H.1. The electronic notice with hyperlink to electronic copies of the Notice, SONAR, and proposed rule amendments to all parties who have registered under Minn. Stat. § 14.14, subd. 1a, with the bulletin detail report.

H.2. The notice emailed to the additional notice contacts list approved by the Office of Administrative Hearings on August 9, 2018, as part of the additional notice plan.

[5] *See* Ex. O.1 (Camie Pederson letter).

H.3. The notice emailed to tribal contacts as approved by the Office of Administrative Hearings on August 9, 2018.

H.4. Corrected email addresses.

H.5. The electronic notice with hyperlinks to electronic copies of the Dual Notice, SONAR and the proposed rule amendments to the Tank Compliance list and the UST Contractors list. This information is already provided under H.1.

H.6. A copy of the posting showing the Dual Notice, proposed rule amendments, and SONAR on the MPCA's public notice webpage.

H.7. A copy of the posting showing the UST rule webpage with a hyperlink to the Dual Notice, proposed rule amendments, and SONAR information on the MPCA's public notice webpage.

H.8. Copies of two letters sent via U.S. Mail for tribal representatives with no email address. The letters contain hyperlinks to the Dual Notice, proposed rule amendments, and SONAR information.

I. Written comments on the proposed rules received by the agency during the public notice comment period.

I.1. Submitted by Christopher J. Heinze on behalf of Angie Graupner, Timothy Gross, Mark Ogren, Rick Dehn, Frank Orton, Brian Schmeling, David Hutt, John Dericks, Lance Prouty, Daniel Kelly, Doug Mathees, Jay Cattoor, Brian Johnson, Pete Bartelt, Bret Wagner, Al Seckinger, Tyler Freyberg, Anne Leikam, Katie Kramer, Melissa Myron, Wade Carlson, Glenn Winter, Joyce Mamske, Robert Krogman, and Holly Werner.

I.2. Chrisoulla Rakowski, Environmental Compliance Management.

I.3. James T. Foldesi, Saint Louis County.

I.4. Holly Werner, Minnesota Petroleum Marketers Association.

I.5. Troy Batzel, Kwik Trip.

J. Not Applicable.

K. Any other document or evidence to show compliance with any other law or rule which the agency is required to follow in adopting these rules.

K.1. Notice to Legislators dated August 27, 2018, in compliance with Minn. Stat. § 14.116.

K.2. Notice to Commissioner of the Department of Agriculture dated July 23, 2018.

K.3. Evaluation letter from Management and Budget dated August 7, 2018, issued pursuant to Minn. Stat § 14.131.

K.4. Notice of Hearing to those who requested a Hearing.

K.5 Certificate of Mailing a Notice of Hearing to those who requested a Hearing.

K.6. Request for Comments. Certificate of Mailing the Request for Comments in Compliance with Minn. Stat. § 14.101.

K.7. Request for Comments. Copy of GovDelivery Notice sent to all persons on the UST Update Rule subscriber list, with copy of bulletin detail report.

K.8. Request for Comments as posted on the public notice webpage.

L. Agency Response to select Minnesota Petroleum Marketers Association comments dated October 16, 2018.

M. Changes made to the Underground Store Tank SONAR to correct minor errors.

N. Copy of Rule Hearing Presentation Slides.

O. Written comments submitted during the hearing.

O.1. Camie Pederson, Environmental Manager, Holiday Station Stores.

After the hearing closed, the rulemaking record remained open for another 20 calendar days, until Wednesday, November 14, 2018, to permit interested persons and the Agency to submit written comments. The Minnesota Petroleum Marketers Association (MPMA) and the Agency submitted comments during the initial post-hearing comment period (Exhibit P.1 and P.2, respectively). Following the initial comment period, the hearing record was open an additional five business days, until November 20, 2018, to permit interested persons and the Agency an opportunity to reply to earlier-submitted

comments.[6] The Agency submitted rebuttal comments during the rebuttal comment period (Exhibit Q).

The hearing record closed on Tuesday, November 20, 2018.

SUMMARY OF CONCLUSIONS

The Agency established that it has the statutory authority to adopt the proposed rules and, with 3 exceptions, that the proposed rules are needed and reasonable.

The Administrative Law Judge disapproves the following three proposed rules based on the standards at Minn. R. 1400.2100 (2017):

(1) Minn. R. 7150.0030, subp. 51a;

(2) Minn. R. 7150.0205, subp. 8; and

(3) Minn. R. 7150.0250, subp. 3A(1).

In addition, the Administrative Law Judge makes several recommendations for technical and clarifying changes. Finally, the Administrative Law Judge approves Agency's changes to the rules as published, as described in the Department's November 14, 2018, post-hearing comments and attachment, with the exception of Minn. R. 7150.0030, subp. 51a, which requires additional changes as discussed at paragraphs 131-134 of this Report.[7]

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

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Over the years, leaking underground storage tanks (USTs)[8] have led to groundwater contamination and significant clean-up costs in Minnesota. Often, Minnesota citizens have borne much of the clean-up costs because former UST owners who should have been responsible for the tanks were no longer in business or lacked the assets needed to pay for cleanup. In 1985, the Minnesota Legislature first authorized and directed the MPCA to adopt rules applicable to USTs as necessary to protect human health and the environment.[9]

2. The United States Environmental Protection Agency (EPA), which has regulated USTs since 1988, has delegated implementation of the federal UST regulation requirements in Minnesota to the state. According to the MPCA, Minnesota has "state

[6] *See* Minn. Stat. §14.15, subd. 1.
[7] Ex. P.2 at Attach. 2.
[8] USTs which contain petroleum or hazardous materials are subject to the MPCA's design and operating rules for USTs.
[9] Ex. D (SONAR) at 6; *see* 1985 Minn. Laws, 1st Spec. Sess. ch. 13, § 238, at 2232.

program approval" from the EPA, which means Minnesota's rules meet the federal requirements, and the MPCA, rather than the EPA, enforces state UST requirements.[10]

3. In 1991, the MPCA published final rules for USTs. The 1991 rules addressed standards for design of new (post-1991) petroleum and hazardous materials USTs and appurtenant piping, such as cathodic protection and secondary containment and requirements for upgrading existing (pre-1991) UST systems by December 22, 1998, the federal UST upgrade deadline. New and upgraded tanks are required to have cathodic protection, release detection, spill prevention equipment, and overfill protection equipment. The majority of existing UST systems were either upgraded to meet the new requirement or taken out of service by December 22, 1998. These upgrades reduced both the frequency and the quantity of UST environmental releases.

4. Nonetheless, despite the existence of the UST rules, leaks and spills from UST systems have continued to occur in Minnesota and around the nation. According to the MPCA, Minnesota's UST infrastructure is aging. Approximately 60% of the UST systems are over 20 years old.[11] The MPCA asserts that, while the industry standard for the life of a tank system is approximately 20-30 years before major repair or replacement is necessary, Minnesota lacks a sunset date for tank systems. Thus, according to the MPCA, there is a need to have clear regulations addressing maintenance, repairs, and replacement of the aging UST infrastructure to reduce or eliminate the risk of future releases from UST systems.[12]

5. In 2005, President Bush signed the Energy Policy Act of 2005. This Act required major changes in federal and state underground storage tank programs, aiming to reduce underground storage tank releases to the environment. The MPCA updated its UST rules in 2008 and 2009.[13]

6. On July 15, 2015, the EPA published final revisions to UST regulations in the Federal Register.[14] With the promulgation of the revised regulations in 2015, Minnesota's rules no longer meet all federal minimum requirements. Therefore, to maintain state-program approval status, the MPCA needs to modify state UST rules to comply with the federal minimum requirements. If the MPCA does not do so, the EPA will have jurisdiction to enforce the federal regulations.

7. The MPCA states that rule modification is necessary to maintain federal funding and continue the effective state-federal partnership in protecting human health and the environment. The MPCA has developed expertise in the areas of UST compliance, UST enforcement, and release prevention to ensure the protection of human health and the environment. The MPCA relies heavily on federal funding to operate and

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[10] Ex. D at 7; *see* Minnesota: Final Approval of State Underground Storage Tank Program, 66 Fed. Reg. 59,713 (Nov. 30, 2001).
[11] Ex. D at 6.
[12] *Id.*
[13] *Id.*
[14] Revising Underground Storage Tank Regulations-Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training, 80 Fed. Reg. 41,566 (July 15, 2015) (codified at 40 C.F.R. 280, 281).

maintain UST compliance, assistance, and enforcement programs. Federal funding, when combined with state funding, has been an important factor in Minnesota's UST regulatory oversight program for many years.[15]

8. The MPCA believes that complying with the new minimum federal regulations will reduce the number of environmental releases. However, experience gained during the last 27 years of program implementation also shows that there is an additional need for state-specific requirements to address certain problems. The MPCA discusses these state-specific requirements in the SONAR. Since the MPCA last revised its UST rules in 2009, industry standards have evolved and new technologies have become more prevalent in the industry. Thus, the MPCA is proposing amendments to its UST rules that incorporate and clarify appropriate use of these new technologies and industry standards to minimize the risk of releases from UST systems in Minnesota. In addition, the MPCA has identified a need to comprehensively review and address problems of redundancy, organization, and clarity of the rules, as identified in the SONAR.[16]

9. In this rulemaking proceeding, the MPCA must establish that the proposed rules are within its statutory authority, necessary and reasonable, follow from compliance with the required procedures, and that any modifications made by the MPCA after the proposed rules were initially published in the State Register are within the scope of the matter that was originally announced.[17]

II. Rulemaking Authority

10. Minn. Stat. § 116.49 (2018) confers specific authority on the MPCA to adopt rules "applicable to all owners and operators of underground storage tanks. The rules must establish the safeguards necessary to protect human health and the environment."

11. The MPCA has statutory authority to adopt the proposed rules.

III. Procedural Requirements of Chapter 14

A. Publications

12. On November 9, 2015, the MPCA published Requests for Comments in the State Register seeking comments on possible rules governing licensing of underwater storage tanks.[18]

13. On July 24, 2018, the MPCA requested review and approval of its Additional Notice Plan for its Dual Notice of Intent to Adopt Rules Without a Public Hearing Unless

[15] Ex. D at 6.
[16] *Id.*
[17] Minn. Stat. §§ 14.05, .23, .25, .50.
[18] Ex. A.

25 or More Persons Request a Hearing (Dual Notice) under Minn. R. 1400.2600, subp. 2B (2017).[19]

14. On July 31, 2018, Administrative Law Judge Cochran issued an Order approving the MPCA's Additional Notice Plan and Dual Notice.[20] However, the Judge also recommended that the MPCA consider making three clarifying changes to the Dual Notice.[21]

15. On August 2, 2018, the MPCA submitted a revised Dual Notice for review. Judge Cochran approved the revised Dual Notice.[22]

16. On August 27, 2018, the MPCA published the Dual Notice in the State Register stating its intent to adopt rules following the receipt of input from the public.[23] In the Dual Notice, the MPCA announced it would hold a hearing on October 25, 2018, at the MPCA St. Paul Office, 520 Lafayette Road North, Saint Paul, MN 55155, if 25 or more persons requested a hearing.[24] The MPCA further stated its intent to video conference the hearing to three additional locations in Duluth, Marshall, and Baxter, Minnesota.[25]

17. On August 27, 2018, the MPCA emailed a hyperlink to electronic copies of the Dual Notice, the SONAR, and the proposed rule amendments to all persons and associations who had registered their names with the MPCA for purposes of receiving such notice and to all persons and associations identified in its Additional Notice Plan.[26] To those individuals and associations who did not have an electronic mail address, the MPCA mailed a copy of the Dual Notice by depositing the copies in the United States mail with postage paid.[27]

18. The MPCA received more than 25 requests for a hearing.[28]

19. At the hearing on October 25, 2018, the MPCA filed copies of Exhibits A-O, and the Administrative Law Judge received them into evidence.[29]

B. Additional Notice Requirements

20. Minn. Stat. §§ 14.131, .23 require that an agency include in the SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

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[19] *See* Letter from Yolanda Letnes to Chief Administrative Law Judge Tammy Pust (July 24, 2018) (on file with the Minn. Office Admin. Hearings).
[20] Order on Review of Additional Notice Plan and Dual Notice (July 31, 2018).
[21] *Id.*
[22] Order on Review of Revised Dual Notice (Aug. 9, 2018).
[23] Ex. F.2; 43 Minn. Reg. 212 (Aug. 27, 2018).
[24] Ex. F.2.
[25] *Id.*
[26] Exs. G, H.
[27] Ex. H.
[28] Ex. I.
[29] *See* Minn. R. 1400.2220 (2017).

21. On August 27, 2018, the MPCA provided a copy of the Dual Notice to persons and groups detailed in its approved Additional Notice Plan.[30]

22. If the agency implements an approved additional notice plan, the order approving the additional notice plan is the final determination by the Office of Administrative Hearings that the additional notice plan is adequate.[31]

23. The Agency met the additional notice requirements of Minn. Stat. §§ 14.131, .23.

C. Notice Practice

i. Notice to Stakeholders

24. On August 27, 2018, the MPCA provided a copy of the Dual Notice to stakeholders identified in its Additional Notice Plan.[32]

25. On August 27, 2018, the MPCA provided a copy of the Dual Notice to persons listed on its official rulemaking list maintained under Minn. Stat. § 14.14.[33]

26. The comment period on the proposed rules expired at 4:30 p.m. on Thursday, October 11, 2018.[34]

27. The MPCA complied with Minn. R. 1400.2080, subp. 6 (2017), by mailing the Dual Notice "at least 33 days before the end of the comment period . . . ." to stakeholders identified in its Additional Notice Plan and to persons listed on its official rulemaking list under Minn. Stat. § 14.14.

ii. Notice to Legislators

28. Minn. Stat., § 14.116, requires an agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators when it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan as required by Minn. Stat. § 14.22.

29. On August 27, 2018, the MPCA sent a copy of the Dual Notice and SONAR to legislators via email.[35]

30. The MPCA provided the Dual Notice to the legislators at least 33 days before the end of the comment period.

[30] Exs. G, H.
[31] Minn. R. 1400.2060, subp. 4 (2017).
[32] Ex. H.
[33] Ex. G.
[34] Ex. F at 1500.
[35] Ex. K.1.

iii. Notice to the Legislative Reference Library

31. Minn. Stat. § 14.23 provides that an agency must send a copy of the SONAR to the Legislative Reference Library when the Dual Notice is mailed.

32. On August 27, 2018, the MPCA submitted a copy of the SONAR by email to the Legislative Reference Library.[36]

33. The MPCA submitted the SONAR as required by Minn. Stat. § 14.23.

D. Impact on Farming Operations

34. Additional notice requirements exist when proposed rules affect farming operations.[37] In that circumstance, an agency must provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

35. The proposed rules at issue here do not impose restrictions or have an impact on farming operations. The MPCA was not required to notify the Commissioner of Agriculture. Nonetheless, via letter dated July 23, 2018, and sent via interoffice mail, the MPCA provided the Commissioner of Agriculture, and seven additional officials within the Department of Agriculture, notice of the proposed rule, along with a copy of the draft rule and SONAR.[38]

E. Statutory Requirements for the SONAR

36. An agency adopting rules must address eight factors in its SONAR.[39] Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

[36] Ex. E.
[37] Minn. Stat. § 14.111.
[38] Ex. K.2.
[39] Minn. Stat. § 14.131.

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

i. The Agency's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

37. The MPCA states that the classes of persons who will potentially be affected by the proposed rule changes include owners and operators of the UST systems; manufacturers of UST systems; installers of UST systems; contractors and consultants who provide UST system-related maintenance and operational services; state and federal government agencies that regulate or are otherwise involved with UST systems; and Minnesota citizens.[40]

38. The MPCA contends that the proposed rules will primarily benefit human health and the environment.[41] For example, additional inspections, testing, soil sampling analysis, and clarification of actions required when an unusual operating condition presents itself will ensure tank systems are operating properly.[42] This, in turn, will result in protecting land and ground water resources and reducing the number and volume of releases and spills from tank systems.[43] As a result, the proposed revisions will reduce the state's liability for reimbursing owners and operators for costs associated with the cleanup of tank releases and spills. This reduction in clean-up costs borne by the state will result in reduced costs to its taxpaying citizens.[44]

[40] Ex. D at 62-63.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*

39. In addition, the MPCA contends that all classes of affected parties will benefit from the clarification of rule language, elimination of uncertainty and ambiguity, and more logical and readable organization of the requirements.[45]

40. According to the MPCA, owners and operators of UST systems who are responsible for the day-to-day operation and maintenance of UST systems will bear a majority of the costs for the proposed rules. However, the MPCA contends that these costs are minor for the Minnesota-only amendments. In addition, the owners and operators will benefit from the costs imposed because additional testing and inspections will help protect their long-term investments.[46]

41. The MPCA contends that affected entities will bear minimal administrative costs in learning about and complying with the new Minnesota-only requirements.[47]

42. Minnesota citizens are not expected to incur direct costs, but tank owners or operators may pass on costs through higher prices.[48]

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

43. The MPCA expects the proposed rule changes to impose costs only on state agencies that own or operate regulated UST systems.[49] The MPCA estimates that there are fewer than 50 regulated sites owned by state agencies that would be affected by the proposed changes.[50]

44. The MPCA expects its costs for implementation and enforcement of the proposed rule changes to be minimal and absorbed into the existing program.[51] In addition, the MPCA will develop technical guidance, communicate changes to the regulated community, and update agency databases, forms, and documents to reflect the new rules.[52]

45. The MPCA does not expect the proposed rule changes to have a negative impact on state revenues.[53] The MPCA does not collect fees to administer the program.[54] In fact, the proposed Minnesota-only revisions are expected to reduce the Petrofund expenditures for leak site clean-up projects over time, since there will be fewer releases from properly maintained and operated UST systems.[55]

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*at 63.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

46. The EPA revised the relevant federal rules on July 15, 2015.[56] The promulgation of those rules will affect all owners and operators of federally-regulated UST systems throughout Minnesota, regardless of whether the MPCA amends its rules.[57] If the MPCA does not amend the existing rules, the EPA will have jurisdiction to enforce the federal rules.[58]

47. The MPCA considered three alternative approaches when developing the proposed rules. First, the MPCA considered not pursuing any new rulemaking. However, this option would have made the state and federal rules inconsistent and confusing to owners and operators. Additionally, this option was not viable because the MPCA is currently authorized to administer the UST program, and, in doing so, its rules must be no less restrictive than the federal rules.[59] If the MPCA had failed to update its rules, its state-program approval would have been revoked, the MPCA would have been unable to implement its program, and owners and operators would have been subject to both state and federal rules.[60] Therefore, the second option was rejected.[61]

48. Next, the MPCA considered adopting the federal rule into its current state rules without changes, but this option would limit the MPCA's ability to clarify rule language and alter language for specific Minnesota-only requirements.[62] The MPCA believes it is reasonable to establish requirements that are stricter than EPA requirements for certain provisions.[63] Therefore, this option was rejected.[64]

49. The MPCA ultimately chose to pursue the option of adopting the federal rules with Minnesota-specific modifications.[65] After reviewing the EPA's final rules in July 2015, the MPCA decided that neither of the first two options sufficiently addressed concerns with the operations of USTs.[66] The MPCA believes that amendments beyond the federal changes are needed to clarify existing state rules, including notification requirements, required actions for unusual operating conditions, who can do repair testing and inspections of UST systems, what conditions necessitate repair, replacement, or removal, and to address new technologies not discussed in the federal rules.[67] The MPCA wanted to address these items to ensure clarity and consistency of the interpretation of

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[56] *Id*.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 64.
[64] *See id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

the proposed rules for regulated parties and state regulators.[68] The MPCA included additional amendments to address issues identified throughout the rulemaking process.[69]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

50. As noted above in (c), the MPCA considered three alternatives regarding the proposed rules.[70] The MPCA chose this option for the reasons previously discussed.

(e) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

51. The MPCA identified six groups of individuals and businesses that will be affected by the proposed rules: (1) owners and operators of regulated UST systems; (2) manufacturers of UST systems; (3) installers of UST systems; (4) contractors and consultants who provide UST-related maintenance, operational testing, and services; (5) state and federal government agencies that regulate or are otherwise involved with UST systems; and (6) Minnesota citizens.[71] Their interests will be addressed in turn.

i. Owners and Operators of Regulated UST Systems

52. As to owners and operators of regulated UST systems, a majority of the proposed rule revisions where extra costs would be incurred relate to the revision of 40 C.F.R. 280 – Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks.[72] The EPA has conducted an assessment of the costs and benefits of the federal requirements, and the MPCA accepts this assessment.[73] It is noteworthy that many of the new federal requirements already exist in current Minnesota rules, such as secondary containment on newly installed UST systems, monthly sump inspections, and operator training.[74]

53. The MPCA has also added requirements that it states may add minimal costs to owners and operators for the topics listed below:

a. **Other Potentially Harmful Substances.** USTs that store other potentially harmful substances must be compatible to the substance being stored. No other requirements apply to USTs storing other potentially harmful substances, including calcium chloride,

[68] *Id.*
[69] *Id.*
[70] *Id.* at 63-64.
[71] *Id.* at 64-68.
[72] *Id.* at 64.
[73] *Id.*
[74] *Id.*

magnesium chloride, or diesel exhaust fluid. The costs associated with this requirement should be minimal to non-existent if stored in a compatible tank system.[75]

b. **Double-Poppet Shear Valves.** The rules will now require double-poppet shear valves for all newly installed shear valves. The approximate cost for this is an extra $30 per shear valve. This is a one-time cost at the time of installation and is only required upon replacement of the shear valves. A small facility might have 2-6 shear valves ($60-$180), a medium-sized facility might have 7-18 shear valves ($210-$540), and a large facility might have 18 or more shear valves ($540). Double-poppet shear valves are designed to increase safety by decreasing the hazards associated with collision or fire at the dispenser.[76]

c. **Retrofit Tank Systems.** Retrofit tank systems are a newer tank construction that is not specifically addressed in existing MPCA or federal rules. Retrofit tank systems are typically installed because the existing tank is no longer suitable to store the regulated product and complete removal and replacement is not feasible due to site constraints. Since a retrofit tank system is an alternative to a new tank system, it is subject to the same requirements as a new tank system (i.e., secondary containment and associated piping). Because retrofit tanks are an alternative to installing an entirely new tank system, it is an option the tank owner would likely select. The owner can choose the lower-cost option of an entirely new tank or a retrofit tank, so the retrofit option does not increase costs to the owner.[77]

d. **Underdispenser Containment.** In addition to requiring underdispenser containment when work is performed beneath the shear valve, as required by federal rules, the proposed MPCA rule also requires the underdispenser containment to be installed when concrete or base material beneath the dispenser is being replaced. The cost analysis for adding underdispenser containment to this work would be approximately $2,000 per dispenser, which would include the cost of the sump and the labor to install the sump. This cost does not include electrical, concrete, or labor for concrete costs since that was the original intent of the work. It is a one-time cost and only applicable for dispenser sumps that do not currently have underdispenser containment sumps. The MPCA expects this to affect few owners/operators because island replacements alone are not typical. More often, the piping is being replaced, or piping

[75] *Id.*
[76] *Id.* at 64-65.
[77] *Id.*

reconfigurations are occurring, which trigger the federal requirements and otherwise require underdispenser containment.[78]

e. **Emergency Stops.** Emergency stops are currently required at retail fueling facilities according to the Minnesota State Fire Code. This requirement will not add extra costs to owners and operators who comply with existing State Fire Code.[79]

f. **Corrosion Protection Testing and Repairs.** The proposed rule language regarding repairs to cathodic protection systems is for clarification purposes only, does not establish any new requirements, and therefore should not add any additional costs.[80]

g. **Agency-approved testers.** The MPCA has added language to clarify who can perform tank system testing to ensure that experienced and qualified technicians, consistent with industry standards and manufacturer's requirements, perform testing. Owners and operators may become agency-approved testers if they elect to become an MPCA-certified UST supervisor and contractor, and be certified by the equipment manufacturers. The current cost of becoming an MPCA-certified UST contractor is a one-time fee of $795 to attend a certified contractor course. The agency-approved tester would also incur a fee of $425 to attend recertification class every two years. Application fees of $50 would also be incurred upon initial certification and recertification.

The MPCA is aware of one owner and operator within the state with an interest in testing their own equipment to comply with the new testing requirements, and this particular owner is currently an MPCA-certified contractor who would bear minimal costs for manufacturer certification if such certifications are available. Costs for certified contractors are discussed below.

The MPCA anticipates many owners or operators will employ an independent testing laboratory or a certified contractor who currently meets agency-approved tester criteria to conduct compliance testing at their facilities. Increased costs to the independent testing laboratories or certified contractors would be passed on to owners and operators, but as discussed below, the MPCA anticipates these costs to be minimal. In addition, the incremental agency-approved tester costs would be distributed among the many owners and operators of tank systems.[81]

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[78] *Id.*
[79] *Id.*
[80] *Id.* at 66.
[81] *Id.*

h. **Unusual operating conditions, repair, replacement, and required permanent closure.** The MPCA has added language that describes and clarifies actions and steps to take when an unusual operating condition exists or a release to the environment has occurred or is imminent. The proposed clarifications do not add extra costs to the owner/operator as they have always been required to have compliant tank system equipment. This requirement simply clarifies situations where owners/operators must repair, replace, or permanently close non-compliant equipment.[82]

i. **Antisiphon Devices.** Antisiphon devices are now required on suction or pressurized piping where the piping is positioned beneath the top of the tank. In the event that one of these piping configurations leaks, the antisiphon device will minimize the risk of siphoning the tank. These piping configurations are most likely found with mounded systems and marinas where the tank is located uphill from the shoreline and piping runs downhill to the dispenser. A one-time cost of installing this device is approximately $1,000 for each piping run that is positioned beneath the top of the tank. Marinas will most likely have only one tank system ($1,000) that pumps premium non-oxygenated gasoline for boat motors. A medium-sized facility will have 2-4 tank systems ($2,000-$4,000). The MPCA is not aware of any existing facility that has over 4 tank systems that will need to retroactively install an anti-siphon device to meet this proposed rule. This cost varies based on the system configuration and electrical needs.[83]

j. **Line-leak detectors on card-lock facilities.** Line-leak detectors on card-lock facilities will now be required to shut down the flow of product if a release is detected. A card-lock facility is defined as a facility which is not attended during business hours (six hours a day excluding holidays and weekends). Those systems that do not have a line-leak detector that shuts down the flow of product when a leak is detected, or a sump sensor that shuts down the submersible pump if conducting interstitial monitoring, will incur an expense to install such systems. The installation of a line-leak detector that shuts down the flow of product will have a one-time cost of approximately $1,200 per product line. The one-time cost to install a sump sensor with positive shut off will cost approximately $500 per sump. The costs may change depending on system configurations and electrical needs. Many card-lock facilities in Minnesota already have systems that shut down the flow of product or are safe suction piping. Based on staff experience, the MPCA estimates there are approximately 200 card-lock facilities in the state and that less than 15% of existing

[82] *Id.*
[83] *Id.*

card-lock facilities will be affected by this new requirement.[84]

k. **Record keeping requirements.** Owners and operators are now required to retain leak detection and system maintenance records for five years rather than the previous requirement of ten years. The MPCA expects that owners' and operators' record maintenance and storage expenses will decrease by approximately 50%.[85]

54. Overall, according to the MPCA, the most-likely estimated costs for the first year of compliance for owners and operators of regulated UST systems is $46 (small facility), $138 (medium facility), or $138 (large facility). The cost is based on 20% of the total costs listed in SONAR Attachment 6.[86]

55. The MPCA opines that the least-likely estimated costs for the first year of compliance for owners and operators associated with antisiphon devices and line leak detectors for card-lock facilities that must be immediately installed is estimated at $4,400 (small facility) and $11,200 (medium facility). The MPCA is not aware of any large facilities that will need to make these changes at this time. The MPCA believes that fewer than 5% of the sites (205 total sites based on approximately 4,100 federally regulated sites in Minnesota) will be affected by these requirements and potential costs.[87]

56. The MPCA states that there are some optional costs the owners and operators may incur the first year of regulation, including obtaining "agency-approved tester'" status or choosing to replace dispensing islands and therefore being required to install underdispenser containment. If owners and operators choose to pursue both scenarios described above, the estimated costs are $9,250 (small facility), $21,250 (medium facility), and $23,250 (large facility). It is reasonable to estimate that less than 5% of the sites (225 total sites based on approximately 4,100 federally regulated sites in Minnesota) will be affected by these requirements and potential costs.[88]

ii. Manufacturers of UST Systems

57. The MPCA does not anticipate costs for UST-system manufacturers other than minor administrative costs necessary to understand the new requirements.[89]

iii. Installers of UST Systems

58. The MPCA does not anticipate costs for UST-system installers other than minor administrative costs necessary to understand new requirements and procedures.[90]

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[84] *Id.* at 66-67.
[85] *Id.* at 67.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 67, Attach. 6.
[89] *Id.* at 67.
[90] *Id.* at 68.

iv. Contractors and Consultants

59. The MPCA contends that contractors and consultants who provide UST-related maintenance, operational testing, and services may incur minor administrative costs in adopting and offering new procedures for inspections, testing, and maintenance. There may be other associated costs to comply with the agency-approved tester requirements by completing manufacturer certifications for new testing equipment, and certifications of UST system equipment, as applicable. An MPCA review of manufacturer certification revealed little to no cost for obtaining these certifications, and the MPCA notes that any minor additional costs will be offset by the sale of services to help owners and operators comply with the new rules.[91]

60. The MPCA anticipates that there will be no added costs for comprehensive general liability insurance for agency-approved testers. The MPCA estimates that two groups of people may seek agency-approved tester status: Minnesota UST certified contractors and third-party testers.[92]

61. The first group seeking agency-approved tester status are Minnesota UST certified contractors who already perform installations and repair. The scope of work projects generally requires working with large vehicles, excavations, and other equipment that has the potential for catastrophic losses to property, physical injury, and releases to the environment. As such, insurance is already required to be a certified contractor and contractors would not incur additional insurance costs to be agency-approved testers. Contractors already carry liability insurance to protect their business assets, and the minimum coverage is usually no less than $1,000,000. While the proposed rules do not require insurance coverage for certified contractors, that coverage is already in place.[93]

62. The second group seeking agency-approved tester status are third-party independent testers. The MPCA expects that this group of people already carries the proposed liability coverage. The MPCA contacted a group representative and determined that the $1,000,000 insurance coverage was already carried as a matter of standard business practice. Thus, the MPCA is not adding additional costs by including an insurance requirement. Owners and operators of UST systems risk potential catastrophic losses with any onsite work. As such, they are not likely to allow contractors onsite without adequate insurance coverage. As discussed, the MPCA believes the $1,000,000 insurance coverage proposed under part 7150.0250, subp. 6, item A, subitem (3), unit (b) is reasonable because it reflects the industry-wide practice of minimum coverage amongst general contractors. Thus, the requirement adds no additional cost.[94]

v. State and Federal Agencies

63. The MPCA expects the proposed rule changes to impose costs only on state agencies that own or operate regulated UST systems. The MPCA estimates that

[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

there are fewer than 50 regulated sites owned by state agencies that would be affected by the proposed changes.[95]

64. The MPCA expects its costs for implementation and enforcement of the proposed rule changes to be minimal and absorbed into the existing program. The MPCA expects to develop technical guidance, communicate changes to the regulated community, and update agency databases, forms, and documents to reflect the new rules.[96]

vi. Minnesota Citizens

65. Costs to petroleum marketers and owners/operators of UST systems may be passed through to consumers in the form of higher gas prices at the pump or through goods and services offered by the owners/operators. According to the MPCA, these increases would be negligible and offset by less frequent imposition of the $0.02 per gallon distribution fee used to fund the state Petrofund due to lower release-site clean-up costs.[97]

vii. Comments

66. At the rule hearing, Chris Heinze, who represents the Minnesota Petroleum Marketers Association, commented on the MPCA's cost analysis. Specifically, Mr. Heinze stated that the MPCA failed to conduct an adequate cost analysis, in part, because there was no basis for the MPCA's estimate that it would cost $2,000 to install a dispenser pump when the concrete island is being replaced.[98]

67. First, the MPCA clarified that this proposed rule does not require the replacement of concrete islands. Rather, the proposed language indicates that if the owner or operator chooses to replace the concrete or base material around the dispenser (most commonly known as concrete island replacement), then a containment sump must be installed at that time. The estimated cost does not include the cost of labor to remove the dispenser, demolition of existing concrete or base material, new island forms, new concrete, or labor to remove and install the concrete; the only cost contemplated by this requirement is purchasing the containment sump and labor to install it.[99]

68. The MPCA's cost-analysis process consisted of contacting three UST contractors to get their estimated cost of purchasing one dispenser containment sump; soil excavation beneath the dispenser to install the sumps; cutting three product lines and installing one dispenser sump; cutting holes in the sump for lines and inserting boots; replacing disturbed piping; installing shear valves and supports for one dispenser sump; and miscellaneous parts and materials to do the work.[100]

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[95] *Id.* at 63.
[96] *Id.*
[97] *Id.* at 68.
[98] Tr. at 35-36.
[99] Ex. P.2 at 8.
[100] *Id.*

69. The calculated average of the mean estimate between the three contractors, who wished to remain anonymous for competitive reasons, was $1,816. The MPCA rounded up to $2,000.[101]

70. After Mr. Heinze's challenge to the cost estimate at the hearing, the MPCA conducted another analysis on October 31, 2018. This time, the MPCA included electrical work in the estimate. The calculated average of the mean estimate between the three contractors for the new cost analysis was $2,283. The MPCA attributes this increased cost to the included electrical costs. The updated estimate is not substantially different from the original estimate.[102]

71. The Administrative Law Judge finds the MPCA's cost analysis is reasonable.

72. In addition, Mr. Heinze opined at the hearing that the MPCA had failed to analyze how many businesses or underground storage tanks would be affected by the requirement to install a dispenser pump when replacing a concrete island.[103]

73. The MPCA conceded that it is not able to determine with absolute certainty how many facilities this requirement will affect. However, the MPCA made an estimate, based on its industry knowledge and experience, as detailed below:

a. Based on the MPCA's past inspections, approximately 50% of the 4,100 regulated facilities in Minnesota have secondary containment sumps already installed.

b. Although there is no standard timeline for replacement of concrete islands, the MPCA estimates that these replacements occur every 15-20 years in highly populated areas and in larger facilities due to increased traffic and salt use in the winter (increased salt use in the winter can cause the steel island forms to corrode at a faster rate).

c. The replacement of concrete islands may occur every 20-30 years in lower populated areas or in smaller facilities due to lower traffic and less salt use in the winter.

d. The MPCA has seen concrete islands installed in the 1980s that have never been replaced and are still in good condition. If the owner or operator does not choose to replace the islands, this rule would not apply.

e. For facilities that do not have dispenser containment sumps already installed, approximately 50% of those facilities that replace islands also replace and upgrade product piping, or reconfigure product piping beneath dispensers to accommodate more or fewer

[101] *Id.* at 9.
[102] *Id.*
[103] Tr. at 36.

dispensers. This would, by itself, require dispenser containment under existing state and federal rules. Many owners and operators have recognized the benefits of upgrading product piping or reconfiguring piping when the concrete islands are replaced.

f. Based on notification forms received by the MPCA every year, the MPCA conservatively estimates that approximately 100 facilities in Minnesota upgrade product piping every year, which would, by itself, trigger the requirement for under dispenser containment sumps under current state and federal rules.

g. The MPCA estimates that 100 facilities in Minnesota may elect to replace only the concrete islands every year. The MPCA also conservatively estimates that 25% of those 100 facilities already have secondary containment installed.

h. Based on the careful consideration of the items and calculations described above, the MPCA estimates the number of facilities this requirement might affect to be 75 per year, which is less than 2% of all regulated facilities in Minnesota.[104]

74. The SONAR states: "Based on the historical frequency of the island replacement . . . it is . . . reasonable to estimate that less than 5% of the sites in MN will be affected by these requirements and potential costs."[105] The above analysis shows that 5% was a conservative estimate, and the MPCA did carefully consider the number of facilities this rule might affect. The Administrative Law Judge concludes that the MPCA demonstrated its analysis is thorough and well-reasoned.

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

75. The MPCA states that if the rules are not adopted, owners and operators of regulated UST systems, state and federal government agencies which regulate or are otherwise involved with UST systems, and Minnesota citizens will be affected.[106] According to the MPCA, there would be no impact on manufacturers, installers, or contractors and consultants who provide UST related maintenance and operational services if the proposed rules are not adopted.[107]

76. First, tank owners and operators who do not conduct the additional inspections and testing as described in the proposed rule will be subject to an increased risk of equipment failure going unnoticed for potentially prolonged periods of time. This possibility increases the potential for releases or for releases to go uncontained. The

[104] Ex. P.2 at 9-10.
[105] Ex. D at Attach. 6.
[106] *Id.* at 69.
[107] *Id.*

owners and operators may bear an increased cost of remediation not covered by the Petrofund because releases may occur which could have been prevented or minimized if the malfunctioning equipment had been detected at an earlier time.[108]

77. Second, regarding state and federal government agencies which regulate or are otherwise involved with UST systems, more MPCA staff time may be spent on enforcement due to lack of repairs and maintenance activities to prevent releases from UST systems. If the rules are not adopted, the EPA will retain jurisdiction and enforcement authority over owners and operators in Minnesota. There will be continued uncertainty of interpretation and application of these rules because state and federal government agencies will have jurisdiction enforcing different rules. Furthermore, if the proposed rules are not adopted, the MPCA may lose federal funding from the EPA for its UST program, reducing its capacity to inspect sites and prevent releases.

78. Last, if the proposed rules are not adopted, human health and the environment may be negatively impacted due to malfunctioning equipment and increased releases. Further, the state may not have an EPA-authorized program. Decreased federal funding would affect citizens because additional state funding would be necessary to operate the current UST program in Minnesota. Also, gas costs at the pump could go up if increased Petrofund use is needed to cover remediation costs from additional tank system failures.[109]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

79. The MPCA assessed the differences between the proposed Minnesota rules and the existing federal regulations and explained its reasoning for each difference.[110] According to the MPCA, there is a need for state-specific requirements beyond the federal regulations. Since the MPCA last revised its UST rules in 2009, industry standards have evolved and new technologies have become more prevalent in the industry. Thus, MPCA is proposing amendments to UST rules that incorporate and clarify appropriate use of these new technologies and industry standards to minimize the risk of releases from UST systems in Minnesota.[111]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

80. Minn. Stat. § 14.131 defines “cumulative effect” as “the impact that results from incremental impact of the proposed rule in addition to the other rules, regardless of

[108] *Id.*
[109] *Id.*
[110] *Id.* at 69, Attach. 4.
[111] *Id.* at 6.

what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time."

81. Minnesota law requires the MPCA to "adopt rules applicable to all owners and operators of USTs to protect human health and the environment."[112]

82. EPA regulations set the minimum requirements for federally-regulated tanks throughout the United States. By adopting rules that meet the federal minimum and obtaining state program approval from the EPA for Minnesota's UST program, chapter 7150 becomes the governing set of rules for UST systems in Minnesota. This avoids duplication of regulation by the MPCA and the EPA.[113]

83. The Minnesota State Fire Code (MSFC) also has rules that pertain to UST systems in Minnesota. The standards in the fire code have stringent equipment and installation standards. The fire code regulations are incorporated by reference in chapter 7150. MSFC regulations do no conflict with federal rules.[114]

84. The MPCA is unaware of any other state or federal regulations governing UST systems in Minnesota. Local government units (LGUs) or local fire officials may impose more stringent requirements than chapter 7150, if they so choose. In fact, some LGUs have established requirements for temporary and permanent closure requirements that are more stringent than chapter 7150. Those requirements cannot be less stringent than the state requirements.[115]

85. Cumulatively, USTs have become increasingly regulated over the last 30 years to prevent major releases to the environment that lead to human health and environmental effects, as well as significant cleanup costs. The history of releases and subsequent clean-up efforts has led the federal and state government to recognize the benefits of preventative measures. According to the MPCA, the proposed rules maintain most of the existing requirements and impose a small number of improvements in UST systems to reduce the risk of environmental releases. The proposed rules avoid potentially greater cumulative effects that would result if the MPCA took no action to revise the rules. Such inaction would result in separate MPCA and EPA programs, which could lead to confusion over applicable standards. The proposed rules also incorporate the concurrent fire code rules to avoid duplication or increased regulatory burden.[116]

86. Overall, the proposed amendments to chapter 7150 meet the minimum equivalency requirements for continued federal program approval, comport with existing MSFC requirements, and comply with all applicable statutory requirements.[117]

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[112] Minn. Stat. § 116.49, subd. 1.
[113] Ex. D at 70.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

87. The Administrative Law Judge concludes the Agency has completed an appropriate assessment of the eight factors set forth in Minn. Stat. § 14.131, in the text of its SONAR.

ii. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

88. As required by Minn. Stat. § 14.131, the MPCA consulted with MMB to evaluate the fiscal impact and benefit of the proposed rules on local units of government.[118] MMB reviewed the proposed rule changes and the SONAR and consulted with agency staff to determine the local fiscal impact of the proposed changes.[119] At MMB's request, the MPCA provided additional information about cities with USTs.[120] The MPCA analyzed a number of cities with populations under 10,000 that had USTs, other than airport tanks. Based on its sampling, the Agency estimated that, of 641 cities with populations under 10,000 in Minnesota, 35, or 5.4 percent, have USTs.[121] A chart with the information regarding the MPCA's calculation of that number is attached to MMB's evaluation memorandum pursuant to Minn. Stat. § 14.131. MMB appeared to accept the MPCA's conclusion that the costs for those few small cities with a UST will be primarily for UST testing and are not expected to exceed $500 annually.[122]

89. In connection with MMB's consideration of the fiscal impact on local units of government, the Administrative Law Judge notes that St. Louis County (the County) urged the MPCA:

> It is important to allow a reasonable amount of time for UST system owners and operators to comply with the new rules. It is our understanding that many existing UST systems can be expected to require significant upgrades or full replacement to comply with the updated UST rules. St. Louis County is in the process of assessing our options for repair or replacement of our USTs, balancing the need to provide consistent service and environmental protection with the myriad of other budget needs facing the County. Our estimated cost to replace 19 tanks (all USTs except a UST recently replaced in downtown Duluth) is between $2,000,000 and $3,000,000 (not including potential remediation costs).[123]

90. The MPCA responded to the County's concern, acknowledging that there will be costs associated with the new regulations. However, the MPCA clarified that the proposed rules only require replacement of UST components that do not function properly. They do not require replacement of the entire UST. In addition, the MPCA noted that federal requirements alone are responsible for most of the cost associated with the proposed rules, and that the MPCA, through its delegation of authority from the federal

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[118] *See* Ex. K.3.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 2.
[122] *Id.*
[123] Ex. I.3 at 1.

agency, has provided two additional years, until October 13, 2020, for compliance with the new federal and state requirements. If not for the state-specific rule, according to the MPCA, the federal deadline of October 13, 2018, would have applied. Thus, the MPCA did not propose any changes to the rule based on the County's stated concerns regarding the compliance timeline and expense.[124]

91. There is no evidence in the record that MMB had an opportunity to consider the County's comments, which were submitted approximately two months after MMB provided its evaluation pursuant to Minn. Stat. § 14.131.[125] Nonetheless, the Administrative Law Judge concludes that, while the County raises genuine concerns, the MPCA's response, including the fact that most of the requirements arise from federal regulations, and that tank replacement is not required by the rules, adequately addresses the County's concerns.

iii. Performance-Based Regulation

92. The APA requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[126]

93. The MPCA notes that because the UST system is buried and cannot be seen, compliance requirements rely heavily on testing and inspection, which results in prescriptive requirements.[127] The proposed rules are primarily meant to meet the federal requirements. Thus, according to the MPCA, use of a performance-based approach does not readily apply.[128]

94. However, to the extent that the federal requirements allow flexibility, the proposed rules do as well. For example, owners/operators have options for how to measure for leaks to determine how to investigate and remedy unusual operating conditions, and the rules do not prescribe particular products or brands, so long as containment systems meet the rule standards.[129]

95. The proposed rules also contain the following Minnesota-only requirements:

a. **The introduction of the term "other potentially harmful substances" for USTs.** The MPCA rules team initially introduced the term "other regulated substances" to govern substances that may pollute state waters, excluding regulated substances defined under part 7150.0030, subp. 32a, items A and B. In working with the advisory committee, the MPCA determined that it was not necessary

[124] Ex. P.1 at 34.
[125] Exs. I.3, P.1.
[126] Minn. Stat. §§ 14.002, .131.
[127] Ex. D at 77.
[128] *Id.*
[129] *Id.*

to govern such substances to the same degree as a regulated substance as defined under part 7150.0030, subp. 40.

For example, the MPCA considered the nonpetroleum-substance magnesium chloride that does not meet the definition of a regulated substance under part 7150.0030, subp. 40. The storage of magnesium chloride would not require some standards for regulated substances (tank-leak detection, line-leak detection, cathodic protection, etc.), but it would require compatibility because the MPCA wants to ensure that all substances stored in USTs are compatible with the storage tank. The Agency agreed with the advisory committee that a more appropriate term was necessary to regulate substances that do not meet the part 7150.0030, subp. 40 definition.

As initially introduced, “other regulated substances” was a confusing term because regulating “other regulated substances” appeared to be a circular reference. As a result of feedback from the advisory committee, the term “other regulated substances” evolved to “other potentially harmful substances” to reflect the need for regulation focused on compatibility, rather than of a regulated substance. The proposed rule is more flexible for owners of USTs with other potentially harmful substances because fewer prescriptive requirements apply, while still protecting human health and the environment.

b. **Clarification of retrofit tank system requirements.** The term “retrofit tank” was added to the rules to help separate internal linings that were used for corrosion protection in the 1998 upgrade requirements from the double-walled linings that are considered a new UST when completed. The MPCA also clarified whether retrofit tanks were self-structural (stand-alone) or co-structural (needed the existing tank for support). The flexibility in the proposed requirement is that the proposed rule allows a retrofit tank to be considered a brand new tank, which decreases costs for owners and operators while being protective of human health and the environment; owners and operators must still ensure that the old tank is permanently closed and closure complies with part 7150.0250, subp. 4.

c. **Submersible pump sump requirements.** Submersible pump sump requirements have been in the MPCA's UST rule since the 2007 rulemaking update. The advisory committee discussed needed clarification to the rule; after considering the feedback, the MPCA clarified the requirements for sumps that were installed before and after December 22, 2007. Thus, tank systems with sumps installed before December 22, 2007, that do not conduct interstitial monitoring are exempt from conducting the sump testing required under the EPA rules. Tank systems with sumps installed after December 22, 2007, are required to conduct the sump testing. The flexibility in the

Agency's revision comes from the allowed exclusion to complying with EPA rules for tank systems with sumps installed before December 22, 2007, that do not conduct interstitial monitoring.

d. **Emergency stops.** The MPCA adopted the wording for emergency stops from the Minnesota State Fire Code. The benefit of the flexibility in the proposed requirement is that the rules are no more prescriptive than the Minnesota State Fire Code.

e. **Agency-approved tester requirements.** The factors the Agency considered, feedback the advisory committee provided, and the subsequent reevaluation with the concept of third-party testing is discussed in detail under the SONAR explanation of part 7150.0216, subp. 6, and applies to this discussion. The flexibility in the proposed requirement is that the proposed rule establishes an option for owners and operators to properly test their equipment or hire a third-party tester; owners and operators can test their own equipment provided that they are an agency-approved tester.

f. **Conditions where tank system replacement or permanent closure are required.** The Agency discussed various scenarios with the advisory committee to clarify the conditions under which tank system repair, replacement, or permanent closure are required. The advisory committee members agreed with the proposed amendments to address the scenarios discussed. Thus, the MPCA is proposing requirements to reflect three scenarios with tank systems: (1) conditions where repairs can be made; (2) conditions where replacement is required; and (3) conditions where permanent closure is required. The flexibility in the proposed requirements are that they address the concerns of industry for clarity, allow repairs at lower cost instead of replacement for some situations, and remain protective of human health and the environment.

g. **Retain alternative testing flexibility.** The proposed rules retain the ability for owners and operators to request alternative testing on approval of the Commissioner.[130]

96. According to the MPCA, the proposed rules allow for different monitoring methods and for owners and operators to investigate and address problems as they occur over time.[131]

iv. Summary

97. The MPCA has complied with Minn. Stat. § 14.131 in assessing the impact of the proposed rules, including consideration and implementation of the legislative

[130] *Id.* at 77-78.
[131] *Id.* at 78.

policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

98. Minn. Stat. §14.127 requires agencies to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[132]

99. The MPCA does not expect small businesses and cities to incur costs unless they are an owner or operator of a UST. The MPCA determined that the estimated cost of complying with the proposed rule will not exceed the $25,000 threshold for any business or city.[133]

100. According to the MPCA, the proposed amendments incorporate new federal requirements, make corrections to existing language for consistency with federal requirements, relocate existing requirements for ease of understanding, and remove obsolete requirements. Therefore, the MPCA excluded the costs for a small business or city to comply with existing regulations. Similarly, the MPCA excluded the costs for a small business or city to comply with the federal requirements because those requirements are federally mandated.[134]

101. The MPCA has made the determinations required by Minn. Stat. § 14.127 and the Administrative Law Judge approves those determinations.

G. Adoption or Amendment of Local Ordinances

102. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[135]

103. Minn. Stat. § 116.50 (2018), relating to USTs, preempts conflicting local ordinances, and LGUs are not required to update their local ordinances as a result of this rulemaking. The MPCA determined that the proposed amendments will not have any effect on local ordinances or regulations.[136]

104. The MPCA has made the determination required by Minn. Stat. § 14.128 and the Administrative Law Judge approves that determination.

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[132] Minn. Stat. § 14.127, subds. 1-2.
[133] Ex. D at 82, Attach. 6.
[134] *Id.* at 82.
[135] Minn. Stat. § 14.128, subd. 1.
[136] Ex. D at 81.

IV. Rulemaking Legal Standards

105. A rulemaking proceeding under the APA must include the following inquiries: whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[137]

106. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[138] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[139] and the agency's interpretation of related statutes.[140]

107. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[141]

108. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim or devoid of articulated reasons, or if it "represents its will and not its judgment."[142]

109. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[143]

110. In its October 16, 2018, response to pre-hearing comments[144], and its November 14, 2018, post-hearing response to comments, the MPCA set forth proposed changes to five rule subparts, in response to public feedback. These proposed changes are discussed in detail at Section VII, below.

111. Because the Agency proposed changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary to address

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[137] *See* Minn. R. 1400.2100.
[138] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[139] *See United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[140] *See Mammenga v. Agency of Human Servs.*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[141] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[142] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[143] *Minn. Chamber of Commerce*, 469 N.W.2d at 103; *see also Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[144] Ex. L at 2.

whether this new language is substantially different from the language as originally proposed.

112. Minn. Stat., § 14.05, subd. 2(b), details the standards used to determine whether any changes to proposed rules create a substantially different rule. A modification does not make a proposed rule substantially different if:

> (1) the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;
>
> (2) the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and
>
> (3) the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."[145]

113. When determining whether modifications result in a rule that is substantially different, the Administrative Law Judge must consider whether:

> (1) persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;
>
> (2) subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing; and
>
> (3) the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.[146]

V. Rule by Rule Analysis

114. The role of the Administrative Law Judge during a legal review of rules is to determine whether the agency has made a reasonable selection among the regulatory options that it has available. A judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. The delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the APA begins with this important premise.[147]

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[145] Minn. Stat. § 14.05, subd. 2(b).
[146] *See id.*, subd. 2(c).
[147] *See Manufactured Hous. Inst.,* 347 N.W.2d at 244 (instructing the state courts to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); *see also In re the Proposed Rules of the Minn. Pollution Control Agency Governing Permits for Greenhouse Gas Emissions,* No. 8-2200-22910-1, REPORT OF THE ADMINISTRATIVE LAW JUDGE at 20 (Minn. Office Admin. Hearings Nov. 9, 2012).

115. The MPCA received a number of comments objecting to the rules generally, or objecting to rules or rule parts which are explicitly authorized or required by federal law. For the most part, these rules or rule parts are not addressed in this Report.

116. This Report does address the portions of the proposed rules that prompted genuine dispute by commenters as to the reasonableness of the MPCA's regulatory choice or issues raised in this proceeding that otherwise require closer examination.

117. As to any proposed rule that is not specifically addressed and analyzed in this Report, the Administrative Law Judge finds that the MPCA has demonstrated by an affirmative presentation of facts the need for and reasonableness of all such rule provisions.

118. The Administrative Law Judge further finds that all proposed rule provisions not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

VI. Rules With Defects

119. The rules discussed in this section fail to meet the standards set forth at Minn. R. 1400.2100 or other applicable rulemaking standards. These rules, as proposed by the MPCA, are not approved, for the reasons discussed below. However, all of the disapproved rules may be corrected and approved if the MPCA adopts the Administrative Law Judge's recommended changes to the proposed rules, or language which is substantially similar to the recommended language.

A. Parts 7150.0030, subp. 51a and .0250, subp. 1: Unusual operating condition[148]

120. Several commenters raised concerns about the MPCA's definition of "unusual operating condition" as proposed at Minn. R. 7150.0030, subp. 51a. The language, as originally proposed, defined "unusual operating condition" as:

> A. a condition, equipment deficiency, or occurrence that:
>
> (1) results in a release of a regulated substance;
>
> (2) indicates the possibility of a leak from a UST system;
>
> (3) creates a reasonable expectation that a leak from a UST system is probable; or
>
> (4) may cause an undetected leak;
>
> B. an unexplained presence of water in the tank; or
>
> C. liquid in the interstitial space of secondary-containment systems.

[148] Ex. C at 14.23-15.7, 49.16-49.17.

121. The MPCA proposed related language at Minn. R. 7150.0250, subp. 1, requiring owners and operators to "investigate and remedy all unusual operating conditions in a UST system."[149] The UST must be taken out of service unless:

> (1) the unusual operating condition is investigated and resolved in accordance with [chapter 7150];
>
> (2) any defective components are isolated from the UST system to prevent a leak; or
>
> (3) any defective components or equipment are repaired by a person certified under chapter 7105.[150]

122. The proposed rule language further requires the owner or operator to report "unresolved operating conditions that may have resulted in a leak or that indicate a release has occurred . . . ."[151]

123. The MPMA commented that the MPCA's proposed definition, along with the proposed language at part 7150.0250, subp. 1, requiring an owner or operator to "report unresolved unusual operating conditions that may have resulted in a leak or that indicate that a release has occurred . . ." created requirements so ambiguous and vague that regulated parties would be unable to comply with them.[152] The MPMA recommended that the MPCA reiterate the federal rules, which, the MPMA stated, are "without ambiguity."[153]

124. The Agency asserted in the SONAR that it chose not to rely on examples for its definition of "unusual operating conditions," as the federal regulations do, "because the examples may not be comprehensive." Instead, according to the SONAR, the Agency intended for its definition to ensure that owners and operators would understand what an unusual operating condition is, and how to address such a condition.[154]

125. The Agency's approach, according to the MPMA, is inconsistent with the Agency's stated plan to remove ambiguous language from the definition of "unusual operating condition."[155]

126. The MPCA agreed that its initial proposed definition of "unusual operating condition" should be revised. The MPCA asserted its proposed change is reasonable to provide clarity and that the

> change increases clarity because it eliminates the need to assess the probability of a future leak in two ways: whether a future leak is "probable" and what "may" cause an undetected leak. The MPCA is also proposing to

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[149] *Id.* at 49.16-49.17.
[150] Minn. R. 7150.0250, subp. 1A (1)-(3) (2017); Ex. C at 49.19-49.24.
[151] Minn. R. 7150.0250, subp. 1B (2017); Ex. C at 50.1-50.2.
[152] Ex. I.4 at 1.
[153] *Id.* at 2; *see* Ex. P.1 at 5-6.
[154] Ex. D at 25.
[155] Tr. at 38.

add items D and E as shown below for consistency with 40 CFR section 280.50. The MPCA believes the changes are reasonable to provide clarity and consistency with federal requirements.[156]

Therefore, the MPCA is proposing to amend the definition as follows:

A. a condition, equipment deficiency, or occurrence that:

(1) results in a release of a regulated substance; or

(2) indicates the possibility of a leak from a UST system;

(3) ~~creates a reasonable expectation that a leak from a UST system is probable; or~~

(4) ~~may cause an undetected leak;~~

B. an unexplained presence of water in the tank; ~~or~~

C. liquid in the interstitial space of secondary-containment systems~~.~~;

D. erratic behavior of product dispensing equipment; or

E. a sudden loss of product from the UST system.[157]

127. Even in light of the Agency's proposed amendments, the MPMA asserted the language in the definition of "unusual operating condition" at Minn. R. 7150.0030, subp. 51a A (2) (2017), which defines unusual operating condition to include a condition, equipment deficiency, or occurrence that "indicates the possibility of a leak from a UST system" is ambiguous, and should be modified to read "indicates to the owner or operator the possibility of a leak from a UST system."[158]

128. The MPCA responded that it believes its language is not more ambiguous than the federal standard, which requires reporting when an unusual operating condition "indicates a release may have occurred . . . ."[159] The MPCA pointed out that the purpose of the UST rules is preventative. Therefore, according to the MPCA, it is appropriate for the rules to address not only responses to past releases, but also the increased risk of release.[160] The MPCA did not propose any further changes to Minn. R. 7150.0030,

[156] Ex. P.2 at 3-4 (MPCA post-hearing response).
[157] *Id.*
[158] Tr. at 38 (C. Heinze.)
[159] Ex. P.2 at 4; *see* 40 C.F.R. § 280.50 (2015).
[160] Ex. P.2 at 4.

subp. 51a, or any changes to 7150.0250, subp. 1 in response to MPMA's comments during and after the hearing.

129. In relying on the federal regulatory language, "indicates a release may have occurred," to justify the MPCA's use of the phrase, "indicates the possibility of a release from a UST system," the MPCA failed to note the context of the federal regulation's use of the word "indicates." The word appears at 40 C.F.R. § 280.50 (c) where the regulation lists, among the conditions requiring owners and operators to report to the applicable agency, "[m]onitoring results . . . from a release detection method . . . that indicate a release may have occurred . . . ."

130. The federal reporting requirement that is triggered by release detection monitoring results indicating that a release may have occurred, is much more specific than the MPCA's proposed rule language, which requires action if there is a "condition, equipment deficiency, or occurrence" which "indicates the possibility of a leak from a UST system."

131. The Administrative Law Judge finds that the MPCA's proposed changes to Minn. R. 7150.0030, subp.51a, are needed and reasonable, but not sufficient to make the rule sufficiently clear to overcome the hurdle of vagueness which rises to the level of unconstitutionality. "A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."[161] Minn. R. 1400.2100 E requires that an Administrative Law Judge disapprove a rule that is unconstitutional or illegal. Therefore, Minn. R. 7150.0030, subp. 51a A(2) as proposed cannot be approved.

132. The Administrative Law Judge recommends that the MPCA can take one of several approaches to remedy the defect in Minn. R. 7150.0030, subp.51a A(2). The MPCA could delete the language at A(2) entirely. Or, the MPCA could specify what sort condition, equipment deficiency, or occurrence must indicate the possibility of a leak to amount to an unusual operating condition. The MPCA could amend Minn. R. 7150.0030, subp. 51a, adopting a limited portion of the language of the federal regulation, as follows:

A. a condition, equipment deficiency, or occurrence that <u>results in a release of a regulated substance;</u>

(1) ~~results in a release of a regulated substance; or~~

(2) ~~indicates the possibility of a leak from a UST system;~~

(3) ~~creates a reasonable expectation that a leak from a UST system is probable; or~~

(4) ~~may cause an undetected leak;~~

<u>B.</u> an unexplained presence of water in the tank;~~ or~~

[161] *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972)).

C. liquid in the interstitial space of secondary-containment systems~~.~~;

D. erratic behavior of product dispensing equipment; ~~or~~

E. a sudden loss of product from the UST system; or

F. monitoring results that indicate the possibility of a leak from a UST system.

133. Alternatively, the MPCA could replace Minn. R. 7150.0030, subp. 51a and adopt the definition of "unusual operating conditions" at 40 C.F.R. §280.50 (b) in its entirety. Any of these approaches would solve the problem of vagueness in the rule, and result in a version of Minn. R. 7150.0030, subp. 51a that is needed and reasonable. None of the proposed changes results in a rule that is substantially different than the rule as originally proposed and noticed.

134. The Administrative Law Judge finds that clarification of the definition of "unusual operating conditions" at Minn. R. 7150.0030, subp. 51a will resolve any questions of vagueness related to Minn. R. 7150.0250, subp. 1B, which only applies, by its terms, to unresolved operating conditions that may have resulted in a leak or that indicate a release has occurred. Because unresolved operating conditions will be clearly defined, only those possible leaks or releases connected to defined circumstances will be subject to the reporting requirement at Minn. R. 7150.0250, subp. 1B.

B. Minn. R. 7150.0205, subp. 8 – Emergency Stops

135. The Agency proposes to regulate the power supplies to pumps and dispensers that deliver regulated substances, such as fuel oil. MPCA proposes to require that an "emergency disconnect switch," which is capable of disconnecting the electric power to pumps and dispensers, be "readily available."[162]

136. At the rulemaking hearing, and later in public comments, stakeholders complained that the design standard for placements of the switches was not clear in proposed rule 7150.0205, subpart 8.[163]

137. When promulgating this rule, the agency's stated aim was to bring the proposed standard into close accord with the provisions of the Minnesota Fire Code.[164]

[162] Ex. C at 39.
[163] *See* Tr. at 43-44 (Krogman); Ex. I.4 at 8.
[164] Ex. D at 34-35.

138. Because of the way that the rule text is drafted, it is not clear whether the agency is adopting the standards on placement of the switches that are found in Minnesota Fire Code § 2303.2, or developing something new.[165] Regulated parties cannot be certain whether an emergency switch that met the requirements Minnesota Fire Code § 2303.2 would also meet the "readily available" standard in proposed rule 7150.0205, subpart 8.

139. Because proposed rule 7150.0205, subpart 8, fails to provide reasonable notice of whether particular placements of a disconnect switch will comply with the regulatory standards, it violated Minn. R. 1400.2100E because it is unconstitutionally void for vagueness.[166]

140. One possible cure to the defect would be to restate the key features of the Minnesota Fire Code standard in the proposed rule. Such a revision might read:

> Subp. 8. **Emergency stops**. Owners and operators must have an emergency disconnect switch that complies with the Minnesota State Fire Code and is readily available to persons dispensing a regulated substance so as to disconnect electric power to pumps and dispensers ~~in accordance with the Minnesota State Fire Code,~~ in the event of an emergency. For purposes of this subpart, the terms "readily available" means that an emergency disconnect switch shall be located within 100 feet of, but not less than 20 feet from, an exterior dispenser. For interior dispensers, the emergency disconnect switch shall be installed at a location as approved by the local fire chief or the chief's designee.

These revisions provide both the accessibility and design standards of the Minnesota Fire Code and are needed and reasonable. The revisions would not be a substantial change from the rule as originally proposed.

C. Minn. R. 7150.0250, subp. 3A(1): UST corrosion

141. Minn. R. 7150.0250, subp. 3A (1) as proposed requires owners and operators to replace any component of a UST system "that has corrosion that may cause the component to not function as intended by the manufacturer or that may cause a release of a regulated substance . . . ."

142. Four commenters raised concerns with this proposed language. The MPMA objected to the use of the word "corrosion," without further definition in the rule, particularly

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[165] *Compare* Ex. D at 34-35 *with* Post-Hearing Comments of the Agency at 12-13 (Nov. 14, 2018); *see also* Minn. Fire Code § 2303.2 (2015) (Emergency disconnect switches) ("An approved, clearly identified and readily accessible emergency disconnect switch shall be provided at an approved location to stop the transfer of fuel to the fuel dispensers in the event of a fuel spill or other emergency. An emergency disconnect switch for exterior fuel dispensers shall be located within 100 feet (30,480 mm) of, but not less than 20 feet (6,096 mm) from, the fuel dispensers. For interior fuel-dispensing operations, the emergency disconnect switch shall be installed at an approved location. Such devices shall be distinctly labeled as: EMERGENCY FUEL SHUTOFF. Signs shall be provided in approved locations.").

[166] *See, e.g., In re the Proposed Permanent Rules Relating to Mississippi River Corridor Critical Area*, No. 8-9014-33236, 2016 WL 6216528, at *16 (Minn. Office Admin Hearings Aug. 10, 2016); *see also N.P.*, 361 N.W. 2d at 394.

in combination with the condition that the corrosion "may" cause a component not to function as intended, or "may" cause a release.[167] The MPMA pointed out that the SONAR states that this rule part adds "the requirement that UST system components with excessive corrosion must be replaced if the components do not function as intended by the manufacturer."[168]

143. Other stakeholders similarly questioned what guidelines apply for determining an applicable level of corrosion under the proposed rule,[169] and that whether a particular level of corrosion "may" cause a release "is vague and open to interpretation."[170] Two commenters noted that, almost as soon as a component is put into the ground, it begins to corrode.[171]

144. In addition to noting the discrepancies between the rule language and the SONAR, one commenter at the hearing noted that 7150.0250, subp. 3A(1) requires replacement of components that have corrosion that may cause malfunctions or a release, but that subpart 3A(2) requires replacement of "any component not functioning properly."[172]

145. The MPCA responded that the proposed language "is intended to describe when components are required to be replaced." According to the MPCA, the word "excessive" modified "corrosion" in an earlier draft of the rule, but was removed following advice from the Office of the Revisor of Statutes that the term "excessive" allowed the Agency too much discretion. Instead, the MPCA's intention was to define "corrosion" as corrosion that "may cause the component not to function, or may cause a release." The Agency explained that it attempted to clarify the requirement with the SONAR language, including explaining that "superficial corrosion would not cause the component to stop functioning or cause a release."[173]

146. The Administrative Law Judge concludes that the use of the undefined term "corrosion" in combination with the phrases "may cause the component to not function" and "may cause a release" is defective under Minn. R. 1400.2100 E because they are vague, and thus cannot be approved as proposed. "A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."[174] Reliance on language in the SONAR for clarification of a standard is insufficient to provide the regulated party with the required notice of standards. Nor does the SONAR have the force and effect of law.

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[167] Ex. I.4 at 3.
[168] *Id.*
[169] Ex. I.5 at 1.
[170] Ex. O.1 at 4.
[171] *Id.*; Tr. at 48-49 (F. Orton).
[172] Tr. at 48 (F. Orton).
[173] Ex. P.2 at 21-22.
[174] *N.P.*, 361 N.W. 2d at 394.

147. The Administrative Law Judge recommends that the MPCA can cure the defect by defining "corrosion" and clarifying the likelihood of component failure or release required by the rule:

> A. Components of a UST system that do not meet the performance standards in part 7150.0100 must be repaired or replaced. Owners and operators must replace:
>
> (1) any component that has corrosion that has caused damage sufficient to:
>
> a. ~~may~~ cause the component to fail to meet the performance standards in part 7150.0100, or to not function as intended by the manufacturer; or
>
> b. ~~or that may~~ be likely to cause a release of a regulated substance, as determined by the owner, operator, or an agency-approved tester; and . . . .

148. The Administrative Law Judge also notes that the language in subitem (2) appears to be more general than, and thus inclusive of, the language in subitem (1). Thus, it is possible that the MPCA could cure the defect identified at paragraph 145 above, by eliminating subitem (1) entirely, as follows:

> A. Components of a UST system that do not meet the performance standards in part 7150.0100 must be repaired or replaced. Owners and operators must replace~~:~~
>
> (1) ~~any component that has corrosion that may cause the component to not function as intended by the manufacturer or that may cause a release of a regulated substance; and~~
>
> (2) any component not functioning properly according to this chapter.

149. This would cure the defect, but would also remove any mention of corrosion. The Administrative Law Judge recognizes that the MPCA may find it is needed and reasonable to alert owners and operators specifically to the hazards of malfunctions or possible release due to corrosion, and to include a subitem that addresses corrosion specifically for that reason. Therefore, the Administrative Law Judge offers this possible cure without concluding that it is a better solution from the MPCA's perspective.

150. Either of the recommended changes to the defect identified in proposed Minn. R. 7150.0250, subp. 3A(1) would be needed and reasonable. Neither recommended change would result in a rule that is substantially different than the rule as originally proposed and noticed.

VII. MPCA's Proposed Changes

A. Minn. R. 7150.0205, subp. 6 B: Submersible sump pumps installed prior to December 22, 2007

151. New language proposed to be added as Minn. R. 7150.0205, subp. 6 B, would have required "[a]ny submersible pump installed before December 22, 2007, and not in a secondarily contained sump used for interstitial monitoring must be accessible for visual inspection and must not be covered by soil, water, or other obstacles that prevent visual inspections."

152. A written comment submitted at the hearing objected to the proposed language because it fails to define "visual inspection" and "other obstacles," leaving both phrases open to interpretation.[175] Specifically, the commenter noted that the rule does not specify how often the inspection is to occur, or what is required for sump accessibility. The commenter suggested that Item B removed from the proposed rule, or that the ambiguous terms be defined.[176]

153. In its November 14, 2018, Response to Public Comments, the MPCA agreed with the commenter and proposed to remove the proposed Item B in its entirety. The MPCA stated this choice was reasonable "because [the proposed language] is open to interpretation with respect to 'other obstacles' which is undefined." Furthermore, the MPCA maintained, the item is not required in order to maintain consistency with federal requirements.[177]

154. The Administrative Law Judge finds that the MPCA's proposed change to 7150.0205, subp. 6 B is needed and reasonable. The proposed change eliminates ambiguity from the rule, and does not result in a rule that is substantially different than the rule as originally proposed and noticed.

B. Minn. R. 7150.0205, subp. 7: Dispenser sumps

155. Several stakeholders[178] objected to the MPCA's proposed language at Minn. R. 7150.0205A (4), requiring owners and operators to install secondary containment under a dispenser if "the concrete or base material under the dispenser is replaced, repaired, or modified."[179]

156. The commenters asserted that, based on the proposed rule language, when bollards[180] or the concrete or base material under a dispenser is repaired due to cracking in the concrete, owners and operators would be required to install secondary

[175] Ex. O.1 at 5.
[176] *Id.*
[177] Ex. P.2 at 5-6.
[178] Tr. at 33-36 (C. Heinze), 45-46 (F. Orton); Ex. I.4 at 4.
[179] Ex. C at 38.9-38.10.
[180] Bollards are short, thick vertical posts used to divert traffic from an area or a dispenser. Ex. P.2 at 6.

containment. One commenter suggested that the rule be amended to require installation of secondary containment only if the work occurs below the shear valve.[181]

157. The MPCA responded:

> [T]he intent of the proposed rule language is to require the installation of under dispenser containment sumps when base material beneath the dispenser is removed and replaced which requires the use of demolition equipment to do work. The use of demolition equipment near the concrete has the potential to damage piping and thereby increase the likelihood of a release. The MPCA believes that minor modifications or repairs to the base material, such as repairing the island with concrete filler as the Commenter stated, does not present an increased likelihood of a release.[182]

The MPCA further explained that the rule's purpose was to "have dispenser sumps installed when the owner or operator chooses to do work on the concrete or base material beneath the dispenser that involves the removal or replacement of the base material (most commonly known as concrete islands)."[183] The MPCA noted that, while it would be convenient to install containment during removal or replacement of the base material, minor repairs or modifications would not provide an opportune time for such a major installation.[184]

158. Based on this reasoning, the MPCA proposed deleting the words "repaired or modified" from the proposed language at Minn. R. 7150.0205, subp. 7A (4). The amended rule language would read as follows: "the concrete or base material under the dispenser is replaced.~~,repaired or modified.~~"[185]

159. The Administrative Law Judge finds that the MPCA's proposed change to 7150.0205, subp. 7A (4) is needed and reasonable. The proposed change addresses the commenters' concerns and more clearly aligns the purpose of the rule as proposed and described in the SONAR. The proposed change does not result in a rule that is substantially different than the rule as originally proposed and noticed.

C. Minn R. 7150.0345, subp. 1: Investigating and Confirming

160. Proposed Minn. R. 7150.0345, subp. 1, as originally proposed, required, in relevant part:

> A. Owners and operators must immediately investigate, confirm, and remedy all suspected releases.

[181] Ex. I.4 at 4.
[182] Ex. P.2 at 6.
[183] *Id.* at 7; *see* Ex. D at 33-34.
[184] Ex. P.2 at 7.
[185] *Id.*

B. Within 24 hours of discovering an unusual operating condition while conducting leak detection according to part 7150.0330 or 7150.0340, owners and operators must investigate the condition by:

(1) conducting a visual inspection of aboveground and exposed below-grade components of a UST system for leaks and deficiencies; and

(2) if applicable, repeating any leak test that indicated an unusual operating condition conducted according to part 7150.0030, subpart 5, 6, or 6a, or 7150.0040, subpart 2, item A; 3, item B; or 4, item A.

C. Within 24 hours of discovering an unusual operating condition or confirming an unusual condition according to item B, subitem (2), the owners and operators must initiate:

(1) tightness testing according to part 7150.0330, subpart 4, or 7150.0340, subpart 3, item A, on the component suspected of leaking; and

(2) if applicable, integrity testing, using an agency-approved tester, of interstitial and secondary-containment areas used for leak detection.[186]

161. Several commenters had concerns about requirements in the proposed rule. One commenter called the 24-hour notice requirement "extreme especially when compared with the 7-day notice" required by the federal agency. The same commenter asserted that it is not possible for vendors to get on site to complete the required testing within the allowed 24 hours and that "onsite personnel are not trained in the complexity of UST systems and how to accurately identify potential . . . 'unusual operating conditions.'" The commenter argued that the short timeframe could lead to unnecessary shutdowns and reporting.[187]

162. The MPCA responded that the 24-hour reporting requirement, applicable to unusual operating conditions unless the system is found not to be releasing regulated substances or is immediately repaired or replaced, is consistent with 40 C.F.R. § 280.50. However, the MPCA stated, for clarification, that the intent of the proposed rule language "is to require appropriate, reasonable, and proactive steps to investigate whether a leak detection method indicates a release." The Agency explained that, in outlining the investigation steps to be taken in proposed Minn. R. 7150.0345, subp. 1, it acknowledged that sometimes it is the leak detection equipment rather than the UST that is faulty. The reporting requirement does not arise until subpart 2. Further, the MPCA pointed out that the language at Minn. R. 7150.0345, subp. 1B only applies to unusual operating conditions in the context of leak detection methods pursuant to Minn. R. 7150.0330 (release detection methods for tanks) and .0340 (release detection methods for piping).[188] The MPCA expected that the steps outlined through proposed Minn. R. 7150.0345,

[186] Ex. C at 62.17-63.10.
[187] Ex. O.1 at 6; Ex. I-5 at 1; Tr. at 50-51 (F. Orton).
[188] Ex. P.1 at 27.

subp. 1B (1) and (2) could all be performed by onsite personnel within 24 hours, and would not require outside vendor services.[189]

163. Commenters also objected to the language at proposed part 7150.0345, subpart 1C, requiring owners or operators to initiate tightness testing, and, if applicable, integrity testing, within 24 hours of discovering or confirming an unusual operating condition under item B, subitem (2). This concern was based on the understanding that the 24-hour deadline applied to a confirmation of an unusual operating condition.[190]

164. The MPCA pointed out that the rule requires that the tightness or integrity testing mandated by subpart 1C, which calls for an outside vendor, must be initiated, but not completed, within 24 hours. The MPCA stated that it used the phrase "must initiate" to accommodate scheduling delays, and that, as long as the testing is "initiated," the owner or operator would be in compliance with the rule.[191]

165. Nonetheless, for the purpose of ensuring that the proposed rule language is clear, both as to the initiation requirement, and to insert a completion requirement, the MPCA proposed the following change to Minn. R. 7150.0345, subp. 1C:

> C. ~~Within 24 hours of~~ Upon discovering an unusual operating condition or confirming an unusual condition according to item B, subitem (2), ~~the~~ owners and operators must initiate within 24 hours, and complete within 7 days, the following items:
>
> (1) tightness testing according to part 7150.0330, subpart 4, or 7150.0340, subpart 3, item A, on the component suspected of leaking; and
>
> (2) if applicable, integrity testing, using an agency-approved tester, of interstitial and secondary-containment areas used for leak detection.[192]

166. The Administrative Law Judge finds the proposed change addresses the commenters' concerns and clarifies the intent of the rule. The proposed change does not result in a rule that is substantially different than the rule as originally proposed and noticed.

D. Minn. R. 7150.0345, subp. 5B: Operator Examinations

167. The MPCA's rule as proposed requires: "A Class B operator must retake the examination under item A within 30 days after a change in any of the following components of a UST system . . . ."[193]

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[189] *Id.* at 28.
[190] Ex. O.1 at 6; Ex. I-3 at 2; Ex. I.5 at 1.
[191] Ex. P.1 at 29.
[192] Ex. P.1 at 29.
[193] Ex. C at 72.9-72.10.

168. A commenter objected that this requirement would not be reasonable in situations where the Class B operator works for a company that has multiple sites and the Class B operator is already certified on equipment that is newly installed at a particular site because the company already has that equipment at another site.[194]

169. The MPCA agreed with the comment and plans to amend the proposed language at Minn. R. 7150.0445, subp. 5B, as follows:

> A Class B operator must retake the examination under item A within 30 days after a change in any of the following components of a UST system, unless the Class B operator has been previously certified in the system component that has changed:

170. To further clarify the amended language, the Administrative Law Judge recommends a slight alteration from the MPCA's proposed language, as follows:

> A Class B operator must retake the examination under item A within 30 days after a change in any of the following components of a UST system, unless the Class B operator has been previously certified in the newly installed system component ~~that has changed~~:

This amendment to the MPCA's proposed change would clarify that the Class B operator must have been previously certified on the new component, not on the one that was in place before the change.

171. The Administrative Law Judge finds the proposed change, including the Administrative Law Judge's recommended amendment, addresses the commenters' concerns and clarifies the intent of the rule. The proposed change does not result in a rule that is substantially different than the rule as originally proposed and noticed.

VIII. Recommended Technical Corrections

172. The Administrative Law Judge recommends technical changes to the proposed rules discussed in this section for improved clarity. A technical correction does not signify a defect in the proposed rule. Instead, a technical correction is a recommendation that the agency may adopt, if it chooses, to aid in the administration of the rule.

A. Minn. R. 7150.0216, subp. 1(A) – Operating, Maintaining, and Testing UST Systems – General Requirements

173. The agency proposes to establish a minimum set of standards for periodic testing of the components of an underground storage system. The agency describes the requirements functionally, permitting the tank operator to implement either: (a) inspection requirements of the equipment manufacturer and two inspection protocols from the

[194] Ex. I.5 at 2.

Petroleum Equipment Institute; or, alternatively, (b) "requirements determined by the commissioner to be equivalent . . . ."[195]

174. While there was some public comment that a broader range of "low-level sump tests" should also be authorized under the proposed rule,[196] the Administrative Law agrees with the agency that it has detailed its preferred approaches and those selections are reasonable.

175. However, the Administrative Law Judge recommends some editorial changes to proposed rule Minn. R. 7150.0216, subp. 1(A) so as to make the regulation clearer and easier to read. A revised rule might read:

Subpart 1. General.

A. Owners and operators must maintain, test, operate, and inspect tanks, piping, and associated components of a UST system as described in this part ~~and~~ in accordance with:

(1) the requirements of the manufacturer and,

(2) the practices incorporated by reference in parts 7150.0500 (G)(2) and (G)(4) ~~the following codes of practice developed by a nationally recognized association and incorporated by reference under part 7150.0500:~~

~~(a) Petroleum Equipment Institute, Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities, PEI/RP1200; and~~

~~(b) Petroleum Equipment Institute, Recommended Practices for the Inspection and Maintenance of UST Systems, PEI/RP900; or~~

(3) requirements determined by the commissioner to be equivalent and no less protective of human health and the environment than subitems (1) and (2).

These revisions, should the Agency choose to adopt them, would be needed and reasonable and would not be a substantial change from the rule as originally proposed.

[195] Ex. C at 44.
[196] Tr. at 39 (C. Heinze); *see also* Ex. P.2 at 13-15.

B. Minn. R. 7150.0216, subp. 3(C) – Operating, Maintaining, and Testing UST Systems – Release-Detection Equipment

176. The Agency proposes to require that, after October 13, 2020, annual inspections of release-detection equipment will be undertaken by an "agency-approved tester."[197]

177. In Minn. R. 7150.0216, subp. 3(C), the agency proposes a minimum set of assessments to be undertaken by that tester. Yet, because the subitems in the proposed rule lack a subject in the sentences that confer particular duties, the text is awkwardly phrased and is difficult to read. Accordingly, the Administrative Law Judge suggests the following revisions:

> A. As applicable to the facility, testing under this subpart must, at a minimum, include the following components and criteria:
>
> (1) for automatic tank gauges and other controllers, the tester shall test alarms, verify system configuration, and test battery backup;
>
> (2) for probes and sensors, the tester shall inspect for residual buildup, ensure floats move freely, ensure the shaft is not damaged, ensure cables are free of kinks and breaks, and test alarm operability and communication with controller;
>
> (3) for automatic line-leak detectors, the tester shall test the operation to ~~meet~~ ensure that it meets the criteria under part 7150.0340, subpart 2, item D;
>
> (4) for vacuum pumps and pressure gauges, the tester shall ensure proper communication with sensors and controllers,

These revisions, should the Agency choose to adopt them, would be needed and reasonable and would not be a substantial change from the rule as originally proposed.

C. Minn. R. 7150.0216, subp. 5: Overfill prevention equipment

178. MPCA's proposed language at Minn. R. 7150.0216, subp. 5 requires that owners and operators have overfill-prevention equipment inspected at least every three years. The rule states that the "inspection must ensure that the overfill-prevention equipment is set to activate at the correct level . . . ."[198]

179. One commenter noted that the "correct level" is 95 percent, and suggested that the rule should state 95 percent instead of using the words "correct level."[199]

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[197] Ex. C at 46.
[198] Ex. C at 47.20-47.21.
[199] Ex. I.5 at 1.

180. The MPCA responded that "[t]he percentage may not be identical for every tank because different overfill devices may be used."[200] The MPCA went on to note that Minn. R. 7150.0205, subp. 5A (2) "identifies the correct levels for various overfill devices."[201]

181. The Administrative Law Judge recommends that the MPCA include the reference to Minn. R. 7150.0205, subp. 5A (2) in the proposed language at Minn. R. 7150.0216, subp. 5. As is apparent from the commenter's statement, some owners and operators may not be aware of the differing correct levels for applicable to various overfill devices. A reference to the rule addressing the differences will alert the owners to the variation. The Administrative Law Judge recommends the following amendment to proposed Minn. R. 7150.0216, subp. 5:

> Owners and operators must ensure overfill-prevention equipment is inspected at least every three years. The inspection must ensure that the overfill-prevention equipment is set to activate at the correct level, as specified at Minn. R. 7150.0205, subp. 5A (2), and will activate when a regulated substance reaches that level.

This revision, should the Agency choose to adopt it, would be needed and reasonable and would not be a substantial change from the rule as originally proposed.

D. Minn. R. 7150.0345, subp. 2: Reporting Releases or Suspected Releases

182. The MPCA's proposed language for Minn. R. 7150.0345, subp. 2 requires: "A person who has knowledge of a release from a UST system must immediately notify the Minnesota duty officer upon discovering the release . . . ."[202]

183. In its discussion of this rule part in the SONAR, the MPCA stated, "The Agency is proposing to require a person with knowledge of the release of a product under their control to report the release to the Minnesota duty officer . . . ."[203]

184. The Administrative Law Judge notes that the language of the proposed rule is inconsistent with the SONAR in that the proposed rule language does not specify that the duty to report only applies to a person "with knowledge of the release of a product under their control . . . ." The language as proposed appears to place a duty to report upon any person who has knowledge of a release from a UST system. The Administrative Law Judge recommends that the MPCA amend proposed Minn. R. 7150.0345, subp. 2, as follows:

> A person who has knowledge of a release from a UST system under that person's control must immediately notify the Minnesota duty officer upon discovering the release . . . .

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[200] Ex. P.2 at 20.
[201] *Id.*
[202] Ex. C at 63.17-63.18.
[203] Ex. D at 56.

185. This revision, should the Agency choose to adopt it, would be needed and reasonable and would not be a substantial change from the rule as originally proposed.

IX. Responses to Other Proposed Controversial Rules

186. Stakeholders commented on other language in the proposed rule, and the MPCA responded to all of the comments it received.[204] The Administrative Law Judge notes specifically several of the more controversial provisions which were commented upon, but for which no changes are proposed or recommended.

A. Minn. R. 7150.0216, subp. 3(B) – Operating, Maintaining, and Testing UST Systems – General Requirements

187. The agency proposes to require that, after October 13, 2020, annual inspections of release-detection equipment must be undertaken by an "agency-approved tester."[205]

188. Several stakeholders complained that this proposal will unduly restrict the number of qualified inspectors and sharply raise the cost of regulatory compliance.[206]

189. While not discounting the impacts that a rise in compliance costs would have, the Administrative Law Judge agrees with MPCA that the agency has the statutory authority to promulgate such rules, and, given the history of poorly-performed tests,[207] the more stringent requirements are ones that a reasonable agency could select. Therefore, the Administrative Law Judge finds the requirements for agency-approved testers are needed and reasonable.

B. Minn. R. 7150.0250, subp. 4A: Upward Shifting

190. Minn. R. 7150.0250, subp. 4A as proposed requires permanent closure of a UST if it has "shifted upward from its original burial position to the extent that the UST has caused a bulge in the concrete or cover material over the tank or components secured to the top of the UST are contacting access covers," unless appropriate repairs can be made to prevent shifting and damage to the UST.[208]

191. Several commenters expressed concerns that UST owners or operators would be required to close USTs when cracked or bulging concrete was caused by conditions other than shifting tanks, or when a tank shifted but not in a way that would cause damage to the UST. Some of the commenters suggested an expert should be consulted before the tank is required to be closed.[209]

192. The MPCA acknowledged that conditions other than USTs may cause concrete to crack or bulge, but cautioned that if a tank causes cracking or bulging, it is likely because a problem has occurred. Furthermore, the MPCA pointed out that closure

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[204] Exs. L, P.2, Q.
[205] Exs. L, P.2, Q.
[206] *Compare* Ex. C at 44 *with* Ex. P.2 at 15.
[207] Ex. C at 46; Post-Hearing Comments of the Agency at 17-19.
[208] Ex. C at 53.17-53.19.
[209] Ex. I.4 at 3-4; Ex. O.1 at 5; Tr. at 44 (B. Krogman).

is required “unless repairs can be made.” Thus, the rule allows for the owner or operator to consult with an MPCA-certified tank installer.

193. The proposed language only applies “to the extent that the UST has caused a bulge . . . .” The rule would not apply if the MPCA could not show that the UST was the cause of the surface damage. Furthermore, the rule requires that action be taken to “ensure that the UST system has not been, nor will be, damaged.” If there is no damage, or appropriate repairs can be made to forestall or correct damage, there is no closure requirement. The Administrative Law Judge agrees with the MPCA that Minn. R. 7150.0250, subp. 4A is clear enough to be enforced.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Agency gave notice to interested persons in this matter and fulfilled its additional notice requirements.

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

3. The MPCA demonstrated it has statutory authority to adopt the proposed rules, and it 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).

4. The Notice of Hearing, the proposed rules, and the SONAR complied with Minn. R. 1400.2080, subp. 5 (2017).

5. 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 and 14.50, with the exception of Minn. R. 7150.0030, subp. 51a; .0205, subp.8; and .0250, subp. 3A(1), as discussed in Section VI of this Report.

6. The modifications to the proposed rules suggested by the Agency after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

7. During the public comment process, a number of stakeholders urged the Agency to adopt other revisions to the proposed rules. In each instance where the Agency declined, the Agency’s rationale in declining to make the requested revisions to its rules was well-grounded in the record and reasonable.

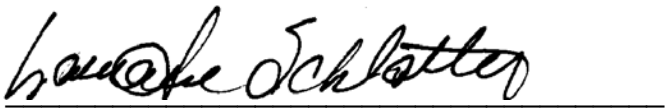
8. A Finding or Conclusion that a proposed rule is needed and reasonable does not preclude, and should not discourage, the MPCA from further modification of the proposed rules – provided that the rules finally adopted are based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

The proposed amended rules should be adopted, except as otherwise noted at Findings 131, 139, and 146, and with any further modifications the Agency may choose consistent with this Report.

Dated: December 20, 2018



LAURASUE SCHLATTER
Administrative Law Judge

NOTICE

The Agency must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Agency makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Agency of actions that will correct the defects, and the Agency may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Agency may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Board makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Agency elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Agency makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the

rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Agency must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the MPCA, and the MPCA will notify those persons who requested to be informed of their filing.