

Minnesota Attorney General: Administrative Rules Proceedings

Copyright Notice:

This material may be protected by copyright law (U.S. Code, Title 17). Researchers are liable for any infringement. For more information, visit www.mnhs.org/copyright.

Version 3
August 20, 2018

#462 PCA WPC34

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 9/5 Temporary Rule _____

Resubmitted and Received 11/29

DUE DATE 9/25 12/8

a. Returned to Agency w/o filing w/Secy of State 9/25
b. Approved 12/1 Date Sent Back to Agency _____
10-12

- -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable ✓
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓ Amended Findings ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable ✓ Amended ✓
13. Order Adopting ✓ Amended Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change (No)
    (ii) Permission to Incorporate by Reference, where applicable N.A.)
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable ✓
17. Petition by Public, where applicable N.A.

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Rule WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

SUPPLEMENTAL ORDER AMENDING ORDER ADOPTING RULES

The Minnesota Pollution Control Agency (hereinafter "Agency") adopted "Findings of Fact and Conclusions" and "Order Adopting Rules" on August 1, 1978. On August 29, 1978, the Agency adopted an "Order Amending Findings of Fact and Conclusions" and "Order Amending Order Adopting Rules." A "Supplemental Order Amending Order Adopting Rules" was adopted by the Agency on October 3, 1978.

On October 12, 1978, the rules, as finally adopted, were approved by the Attorney General with the exception of section B.18. Section B.18. was severed from the rules and the remaining rules were filed with the Secretary of State on October 13, 1978. The rules, as approved by the Attorney General and filed with the Secretary of State, were published in the State Register on October 30, 1978 (3 S.R. 866).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Order Adopting Rules dated August 1, 1978, shall be amended in the following manner:

1. The following sentence shall be added following the last sentence in section B.18:

> Requests for variances from the requirements of this section shall be governed by section E.9.1.

2. The following subdivision shall be added:

E.9.1. Variances. Any person may apply for a variance from any requirement of these rules. Such variance shall be applied for and acted upon by the Agency in accordance with Minn. Stat. §116.07 subd. 5 and other applicable statutes and rules.

Joseph F. Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: November 14, 1978

RULE AS ADOPTED
(Minn. Rule WPC 34 B.18. and E.9.1.)

B.18. "ADEQUATE ERRORS AND OMISSIONS INSURANCE" means a policy of insurance which provides the minimum amount of coverage for the corresponding estimated project construction cost as determined from the following table, which is maintained for a minimum of two years after acceptance of the project by the grantee.

Estimated Project Construction Cost	Minimum Amount of Coverage
less than $1,000,000	$250,000
$1,000,000 to $2,999,999	$500,000
$3,000,000 to $9,999,999	$1,000,000
$10,000,000 or over	$2,000,000

If an engineer has more than one project, the policy must provide for the minimum coverage applicable to the highest estimated project construction cost. Requests for variances from the requirements of this section shall be governed by section E.9.1.

E.9.1. VARIANCES. Any person may apply for a variance from any requirement of these rules. Such variance shall be applied for and acted upon by the Agency in accordance with Minn. Stat. §116.07, subd. 5, and other applicable statutes and rules.

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
DEC - 1 1978
Joan Anderson Growe
Secretary of State
2:00 PM

APPROVED AS TO FORM AND LEGALITY
DEC. 1 1978 19
WARREN SPANNAUS, ATTORNEY GENERAL
BY Lee E Sherbo
SPECIAL ASSISTANT ATTORNEY GENERAL

OUR FILE NO.462
ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

TO : Marlene Senechal
Special Assistant
Attorney General

DATE: October 12, 1978

FROM : Lee E. Sheehy
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: In the Matter of the Proposed Amendments to Minn. Rule WPC 34 Regarding the Administration of the Construction Grants and Loan Programs

Enclosed herewith are the above-captioned rules you have resubmitted for approval. With the one severable exception discussed below, these rules have been approved by this office and filed with the Secretary of State. Note that they have not been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages of the rules in the approved set.

Directly following the approved rules is a complete set of required documents and transcript which must be retained with the rules by you or your agency.

The one exception which is not approved is WPC 34 B (18). The agency's response to my rejection of this provision in my first memorandum to you on this matter was to delete the waiver provision. Yet, as I stated at that time: "In light of the substantial controversy surrounding the reasonableness of this instance (sic) requirement and the fact that this waiver provision may bear on that issue, it is incumbent upon the agency to have a clear, legally sufficient waiver provision." Given agency deletion of the waiver provision, I am forced to return this provision to the agency for further consideration.

I concur with Hearing Examiner Finding No. 6(c) that the agency has documented the need for and reasonableness of these provisions. Yet I also share the concerns raised by the Hearing Examiner regarding possible unavailability and related problems. The waiver provision addressed these concerns. It must be reinstituted on the rule in some form. As you requested and as is proper given the severability of your rules and this specific provision, I have filed the remaining rules.

If you have any questions, do not hesitate to call me.

LES:mb

cc: Duane Harves

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

TO : Marlene Senechal
Special Assistant
Attorney General

DATE:

FROM : Lee E. Sheehy
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: In the Matter of the Proposed Amendments to Minn. Reg. WPC 34

The above-captioned rule has not been approved by this office or filed with the Secretary of State. Upon consideration of the matters raised herein and appropriate action based on these matters, if any, the agency may resubmit this rule for review and approval by this office. I have retained copies of all relevant documents in this matter should you wish to discuss this matter with me.

The rule is being returned for the following reasons:

1. Change the word "regulation" to "rule" where appropriate: Agency Finding No. 25 requires this change; yet a cursory review of subdivisions A, B, and C, as well as the title of WPC 34, finds at least five (5) instances where this change has not been made as required by the agency finding. Such changes must be made throughout the rule.

2. WPC 34(B)(18): The agency's arguments presented by counsel to this office under cover of a letter dated September 8, 1978, and the record support the position that the agency has met its required showing relating to an affirmative presentation of facts establishing the need for and reasonableness of the provision and that no substantial change exists from the rule as proposed to the rule as adopted. However, this office concurs with the Chief Hearing Examiner's Finding No. 7 that the waivor provision relating to required insurance fails to establish criteria by which the Director may grant such waivor. Even the agency in its Finding No. 26 recognized that the waivor should only be permitted for "good cause". Similarly, even if criteria were listed, the use of the word "may" would permit the Director to ignore the criteria and conceivably deny waivor to someone who has met the "good cause" showing. In light of the substantial controversy surrounding the reasonableness of this instance requirement and the fact that this waivor provision may bear on that issue, it is incumbent upon the agency to have a clear, legally sufficient waivor provision. And such a provision must by law articulate the criteria of "general applicability and future effect to implement or make specific the law..." which would include criteria upon which a waivor would be granted. The provision as proposed for adoption fails to meet this requirement.

3. WPC 34(E)(d)(3) and Appendix A: The Chief Hearing Examiner's Conclusion No. 3 is correct in concluding that the inclusion of Appendix A in the final rule is a substantial change. The appendix should be the subject of a public hearing; and the agency's representation that the appendix is a mere proper "presentation of the presently existing ranking of the list of segments established pursuant to Section E.2.d.(3)" should be scrutinized after notice at such a hearing.

4. WPC 34(E)(7): Substantial questions are raised by individuals during this promulgation regarding the legality of this provision. Upon resubmittal to this office, the agency must address the arguments raised by the City of Saint Paul in its letter to this office dated September 11, 1978, a copy of which is attached. Specifically, the agency must address the issue of this provision's alleged non-compliance with the EPA regulation cited in the Saint Paul letter. This office will also request from the City of Saint Paul an elaboration on its claim that "an evidentiary-type of public hearing is required by the federal regulations."

   Secondly, the agency should discuss the language of EPA Regulation § 35.915(d) in the first sentence which requires "that public participation (including a public hearing) has taken place as required by Subpart B of this part." (Emphasis added.) Specifically, what is required in "Subpart B"?

This office reserves judgment on other issues until the above matters are resolved.

LES:mb

Enclosure

cc: Duane Harves
Jerome Segal

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 – 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

August 14, 1978

Marlene E. Senechal,
Special Assistant Attorney General
Minnesota Pollution Control Agency
1935 West County Road B2
Roseville, Minnesota 55113

Dear Ms. Senechal:

Re: In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program, No. PCA-78-010-HK

Enclosed please find the entire record of the above entitled proceeding together with the report of the Chief Hearing Examiner pursuant to Minn. Rules HE 107 and 108.

The review indicates, besides those items discussed in the Chief Hearing Examiner's Report, that there are several clerical changes in the rules such as changing "may" to "shall" which must be properly indicated in the final submission to the State Register. Another example is the published number 216 in the State Register has now become 206 without appropriate markings or explanation.

Hearing Examiner Howard Kaibel may be able to assist you in pointing out areas not covered by the purview of the Chief Hearing Examiner's report wherein changes have been made but not properly documented nor indicated.

Yours very truly,

DUANE R. HARVES
Chief Hearing Officer

DRH;ba
Encs.
cc Lee Sheehy, SAAG

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program	)))))	REPORT AND MEMORANDUM OF THE CHIEF HEARING EXAMINER

The above entitled matter was submitted to the Chief Hearing Examiner for review pursuant to the provision of Minn. Stat. §15.052, Subd. 4, and Minn. Rule HE 107, on Thursday, August 3, 1978. This review is limited to ensuring compliance with Minn. Stat. §15.0412, Subd. 4, and to determine whether or not the rules as finally adopted are substantially different from those prepared prior to hearing.

Based upon a review of the record, the Chief Hearing Examiner makes the following:

FINDINGS OF FACT

1. A Notice of Hearing was published in the State Register and mailed to all persons who had registered with the Secretary of State at least 30 days prior to the first day of hearing.

2. The amendments to these existing rules were published in the State Register at least 30 days prior to the first day of hearing.

3. All documents required to be filed prior to the hearing pursuant to Minn. Rule HE 103 were filed more than 25 days prior to the hearing.

4. At the hearing, the Pollution Control Agency (hereinafter "agency") staff prepared "clarifying changes" to the proposed amendments (See Exhibit 14) which are found to be changes needed to correct typographical and grammatical errors, change names, and other minor corrections.

5. During the course of the 5 days of public hearings, the Agency further amended the rules.

6. The Hearing Examiner issued his report on June 14, 1978 and the Agency adopted the rules on August 1, 1978, issuing its own Findings of Fact, Conclusions and Order on that date.

7. Following the hearing, in its Post Hearing Submissions, the Agency amended the rules by providing a definition of "adequate errors and omissions insurance" in response to testimony from engineers. This testimony was the result of published proposed amendments which would, for the first time, require engineering firms to carry errors and omissions insurance if the firm is to work on projects covered by this rule. [See WPC 34 E.8.d.(7), e.(5) and f. (6)]. At the hearing, the Agency presentation was as follows:

> "Proposed Minn. Reg. WPC 34E.8.d.(7), e(5) and f. (6), were added to insure that there is a fund from which recovery can be made if the disposal system has been improperly designed. This requirement was added because a number of projects constructed under this program have been improperly designed and the financial burden for making the correction has not always been borne by the responsible party. The insurance coverage requirement is one of several steps taken by the Agency to correct this problem to the extent possible. Most engineering firms already carry such insurance."

There was no testimony by the Agency that such insurance coverage was obtainable nor did they present any testimony or other evidence relating to the costs of such coverage.

At the hearings and in written comments following the hearing it was pointed out by those engineers who participated in the hearing that most engineering firms do not carry such insurance, due primarily to the cost. [See transcript paper 200-207, 374-383, 416-424, and comments B, D and K. See also the Hearing Examiner's Report at Finding 6 (c), page 5, for a detailed description of what is reflected by the record of this hearing.]

As a result of that testimony, the Agency proposed the new definition discussed herein for the first time in its final written submission received on May 12, 1978, (a Friday) with the

record closing on the following Monday, May 15, 1978. No persons had an opportunity to review the proposed amendment nor offer any comment on it. The record does not reflect that the Agency gave any notice of its proposed amendment to any person.

The proposal is more than a definition in that it provides a scale showing minimum amounts of coverage depending on the size of the project, gives the Director discretion to allow a lesser amount of coverage but does not establish any standards or criteria by which the discretion will be exercised.

In the Agency findings relating to the requirement for such insurance coverage (Finding 56, page 25), the Agency again states:

> "Most engineers in the state already carry errors and omissions insurance..."

The only support for such a finding is the unsupported statement of the Agency previously alluded to.

The Agency finding continues:

> "... so the costs to local governments will not be substantially increased by this requirement."

There is no evidence anywhere in the record of this proceeding to substantiate this finding. In fact, there is testimony to show that if coverage is required on each specific project, the costs will be passed on to the community.

8. Section WPC 34 E.2.d. (2) has been amended to state that priority points will be assigned based upon population determined by the most recent reliable census. The existing rule states that it will be determined by the most recent Federal census. (Emphasis added.) This change was never proposed prior to, during, or after the hearing process. Not even the Agency findings discuss the change. A Federal census is something which is readily available and ascertainable. What is a "reliable" census is unknown, absent specific criteria or definition.

9. Section WPC 34 E.2.d. (3) as adopted, adds an appendix (page 24 of Agency Order Adopting Rules) which was not published in the State Register nor mailed to persons on the Secretary of

State's list, but was added as an exhibit during the course of the public hearings (See transcript page 315). This rule determines priority points based on population per square mile. It has a direct effect upon the issuance of grants. The appendix was proposed for addition as a rule only in the final submission of the Agency. How affected communities of the State would have reacted to the addition would be pure speculation. The existing rule spells out a system for allocating points. The rule as adopted actually allocates points.

10. Rule WPC 34 E.9.b. (2) was proposed to be amended by adding a new sentence at the end. In its final order adopting the amendment, the Agency has further amended the rule by striking the words "bids on construction" from the existing rule. As it exists, the rule requires applicants to obtain bids. Now, this requirement has been removed without any findings relating to it. The record reflects that on the last day of hearing, with only Agency staff, the Hearing Examiner and the Court Reporter present, the Hearing Examiner suggested removing the word "construction" and Agency staff responded by saying they would take out the term "bids" from the rule also but without any statement of the reasons for removing it.

11. Rule WPC 34 E.9.h., entitled contract assignment, as originally proposed, allowed a grantee to assign its contracts, along with all rights, duties and obligations to the Agency (emphasis added). In the finally adopted rule, the underlined words have been deleted. There is nothing in the record to support the deletion. There is no indication of the change in the Agency findings. It results in the Agency being able to have all rights under a contract without assuming any of the duties and obligations.

12. The Hearing Examiner found and concluded that the Agency had failed to make an affirmative presentation of facts establishing the need for and reasonableness of the rule in several areas

(See Hearing Examiner Findings 8, 9, 10, and 13). The Agency has rejected those findings and conclusions in its own Findings of Fact and Conclusions (See Agency Findings 28, 35, 44 and 54).

A. The first two (Hearing Examiner Findings 8 and 9 - Agency findings 35 and 44) involve the same basic issue relating to the Municipal Needs List and the criteria for determining the priority of needs. The Agency presentation on the issue can be found in the Agency Statement of Evidence (MPCA Exhibit 9) which was read verbatim into the record at the hearing. A great amount of testimony was presented from the public on the issue, as was discussed in detail by the Hearing Examiner in his Report. The public argued, and the Agency basically agreed, that the effect of the amendments would foreclose funding of nontreatment works projects. The Agency Findings are based upon the Staff Post Hearing Comments (Comment A) which was submitted on May 12, 1978. Section 40 of the Federal Clean Water Act provides in part as follows:

> " Not less than 25 per centum of funds allocated to a state in any fiscal year under this title for construction of publicly owned treatment works in such state shall be obligated for those types of projects referred to in clauses (D), (E), (F), and (G) of this section, if such projects are on such state's priority list for that year and are otherwise eligible for funding in that year."

Items (D),(E), (F), and (G) of the Act are nontreatment works projects. The Agency comments state that "...it is the practice of the Agency to fund all treatment works and major interceptors in the state before funding any other interceptors or sewers." (Emphasis added).

The policy or practice of the Agency was explained in the record at the hearings by the agency. The facts presented to support the policy are that there are insufficient funds available for both treatment and nontreatment works projects, and that upgrading treatment works projects is the fastest way of clearing the waters of the state.

B. The Hearing Examiner, in Finding 10, found that the Agency failed to make an affirmative presentation of facts establishing the need for and reasonableness of the Agency proposal to conduct public information meetings in lieu of public hearings as that term is used by Environmental Protection Agency regulations (Emphasis added). The Agency "affirmative presentation" can be found on page 13 of the Agency Statement of Evidence. The only other presentation was made at the May 8th hearing (Transcript pages 473-476), which were then repeated in the Agency final written comments and in the Agency Findings.

The Minnesota Administrative Procedure Act requires rule-making and contested case hearings to be conducted pursuant to its provisions. A contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing (Minn. Stat. §15.041, Subd. 4).

Blacks Law Dictionary, 4th Edition, defines "hearing" as a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order.

The Agency states, without citation to support its position, that the Federal government has a different definition of what the public hearing is than what the State has. (Transcript page 476).

C. With respect to Hearing Examiner Finding 13 and Agency Finding 28, it is found that there is evidence in the record to support the Agency finding.

Based upon the foregoing Findings of Fact, the Chief Hearing Examiner now makes the following:

CONCLUSIONS

1. The Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4 in that it has failed to make an affirmative presentation of facts establishing the reasonableness

of the requirement that engineers carry "adequate errors and omissions insurance coverage" and in its proposed definition of that phrase. The proposed amendment defining the above referenced phrase is a substantial change to the rules as proposed in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing. Additionally, while the class of persons affected by the rule, engineers, were present at the hearings, the amendment was not presented in such a fashion as would allow them to react and comment.

2. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in its final amendment to WPC 34 E.2.d.(2) changing the census from the "Federal census" to a reliable census in that it has failed to make any presentation of facts establishing the need for or reasonableness of the proposed amendment. The amendment also makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing. Again, while the class of persons affected by the rule, primarily municipalities, were represented at the hearing, the amendment was not presented in such a fashion as would allow them to react and comment.

3. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of adding the appendix discussed at Finding 9 above, to WPC 34 E.2.d.(3). It is a substantial change from the rule as proposed in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing.

4. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of deleting the words "bids on construction" from WPC 34 E.9.b.(2). It is a substantial change in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing.

5. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of deleting the words "duties and obligations" from WPC 34 E.9.h. It is a substantial change in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing.

6. That the Agency has made an affirmative presentation of facts establishing the need for and reasonableness of adopting criteria for the prioritizing of projects which would, in effect, foreclose funding of nontreatment plant projects as discussed in Finding 12 above.

7. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of adopting WPC 34 E.7. calling for public meetings in lieu of hearings as required by regulations of the Environmental Protection Agency and in violation of the Minnesota Administrative Procedures Act.

NOW, THEREFORE, pursuant to the provisions of Minn. Stat. §15.052, Subd. 4, and Minn. Rule HE 108, the Pollution Control Agency shall either withdraw the proposed final rules or amendments discussed in the Conclusions above or reconvene the rule hearing.

Dated: August 14, 1978

DUANE R. HARVES
CHIEF HEARING EXAMINER

M E M O R A N D U M

Rules adopted by state agencies must be based upon the record of a public hearing at which the agency must make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption. Prior to the public hearing, the agency must give notice of its intended action. The agency must afford all affected interests an opportunity to participate. (See, Minn. Stat. §15.0412, subd. 4.)

The record of the hearing must support the rules as adopted [see, Minn. Rule Atty Gen 303 (c)]. Findings of Fact must contain that which the agency finds to be fact which supports the reasons or need for the rules adopted [see, Minn. Rule Atty Gen 302 (h)].

The 1975 Legislature amended the Minnesota Administrative Procedure Act (hereinafter "APA") to provide the rulemaking and contested case hearings were to be conducted by a Hearing Examiner from the Office of Hearing Examiners (Minn. Stat. §15.052, Subd 3). The amendments also directed the Chief Hearing Examiner to adopt procedural rules which were to include provisions for the recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing (Minn. Stat. §15.052, Subd. 4).

For rulemaking purposes, it is obvious that the APA requires notice to the public, an opportunity for the public to react, and places an affirmative burden on state agencies before they can adopt, amend, suspend or repeal rules.

In this case, the changes in the rules as enumerated in Findings 7 through 11 and Conclusions 1 through 5 above were made in such a fashion that notice and the opportunity to react were precluded. Additionally some were made without any presentation by the agency nor any Findings of Fact.

In sustaining its burden, at the hearing, of establishing the need for and reasonableness of the proposed rule by an affirmative presentation of facts, agencies must do more than present the rule and explain what the rule means or accomplishes. The presentation must be done at the hearing rather than in post-hearing submissions in order that the public can have an opportunity to react. The legislature has very carefully chosen its words in amending the APA. The presentation by the agency must consist of "facts".

Facts may be either adjudicative or legislative as was discussed by Agency Staff in its post hearing comments. When an agency relies on adjudicative facts to support its position, the substantial evidence test can be applied.

To discuss an example, the agency statement relating to the requirement for errors and ommissions insurance coverage can be examined as quoted in full in Finding 7 above. The agency stated adjudicative facts concerning improperly designed projects which facts remain uncontradicted in the record. Thus it can be found and concluded that safeguards are necessary. When it stated: "Most engineering firms already carry such insurance," it was also stating an adjudicative fact but that fact was totally contradicted by the record. It was that sole sentence which the agency apparently relied upon as its "fact" establishing reasonableness.

On the other hand, in stating that it was the "practice" of the agency to give higher priority to treatment work projects versus nontreatment work projects, the agency was stating that it had made a policy decision. That statement, standing alone, would not have been a sufficient "presentation of facts" under the Minnesota APA. However, the Agency presented facts relating to insufficient funding and what is the fastest way of clearing our waters, facts which were substantial evidence and uncontradicted on the record. The Agency has recognized that there are two evils,

inadequate treatment facilities and inadequate sewage transportation systems. It must be free to exercise its discretion in choosing which to solve.

Proposed Rule WPC 34 E.7., as admitted by the Agency at the hearing on May 8, 1978, was drafted in such a fashion so as to avoid the requirements of the APA. Regulations of the Environmental Protection Agency, which are law, require a public hearing. The"meetings" addressed in the proposed rule, including the "meeting" where the Agency adopts the lists, are actually the hearings to satisfy the law. Municipalities rights to receive or even be eligible for grants are determined following these "meetings". Municipalities are specific parties whose rights or privileges are determined after this hearing, which hearing is required by Federal law. It therefore falls within the definition of "contested case" in the APA.

D.R.H.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

November 16, 1978

RECEIVED
NOV 2[illegible]
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Mr. Lee Sheehy
Special Assistant Attorney General
Department of Administration
G-25 Administration Building
St. Paul, Minnesota 55155

Re: Minn. Rule WPC 34

Dear Mr. Sheehy:

The Minnesota Pollution Control Agency considered matters raised in your memorandum of October 13, 1978, at its November 14, 1978, meeting and took the following action with respect thereto:

(1) Section E.9.1. was added to the rule to provide procedures for requests for variances from the rule.

(2) A sentence was added to section B.18 referencing section E.9.1.

Accordingly, the Agency is resubmitting these provisions of the rule to you for your review and approval.

I have enclosed the original and one copy of the following documents:

(1) Supplemental Order Amending Order Adopting Rules;

(2) Certificate of Adoption of Resolution of Minnesota Pollution Control Agency (November 14, 1978, meeting);

(3) Rule as Adopted (Section B.18 and E.9.1. only).

Please contact me if you require any further documents or other information.

Yours very truly,

Marlene E. Senechal
Special Assistant
Attorney General

MES:dlm
Enclosures

CERTIFICATE OF ADOPTION OF RESOLUTION BY
MINNESOTA POLLUTION CONTROL AGENCY

I, Sandra S. Gardebring do hereby certify that I am the Executive Director of the Minnesota Pollution Control Agency, an Agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete and correct copy of a resolution adopted at a meeting of the Agency duly and properly called and held on the 14th day of November, 1978; that a quorum was present at said meeting; that the resolution was passed by a majority of the Agency; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified:

WHEREAS, the Minnesota Pollution Control Agency adopted its "Findings of Fact and Conclusions" and "Order Adopting Rules" on August 1, 1978, its "Order Amending Findings of Fact and Conclusions" and "Order Amending Order Adopting Rules" on August 29, 1978, and its "Supplemental Order Amending Order Adopting Rules" on October 3, 1978, with respect to amendments to Minn. Rule WPC 34;

WHEREAS, on October 12, 1978, the Attorney General approved the rules, as finally adopted, with the exception of section B.18.;

WHEREAS, Section B.18. was severed from the rules and the remaining rules were filed with the Secretary of State on October 13, 1978;

WHEREAS, the rules, as approved by the Attorney General and filed with the Secretary of State, were published in the State Register on October 30, 1978 (3 S.R. 866);

THEREFORE, BE IT RESOLVED that the following amendments shall be made to Minn. Rule WPC 34:

1. The following sentence shall be added following the last sentence in section B.18:

Requests for variances from the requirements of this section shall be governed by section E.9.1.

2. The following subdivision shall be added:

E.9.1. Variances. Any person may apply for a variance from any requirement of these rules. Such variance shall be applied for and acted upon by the Agency in accordance with Minn. Stat. §116.07 subd. 5 and other applicable statutes and rules.

BE IT FURTHER RESOLVED that the Chairman and the Executive Director are hereby authorized to sign an amended Order Adopting Rules in a form which reflects the above amendments.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 17th day of November, 1978.

Sandra S. Gardebring
Executive Director

Subscribed and sworn to before me
this 17th day of November, 1978:

NOTARY PUBLIC-MINNESOTA
My Comm. Expires Oct. 24, 1983

Mary E. Wyatt
Notary Public

STATE OF MINNESOTA

POLLUTION CONTROL AGENCY

WPC 34 ~~Regulation~~ Rule for the administration of ~~the Municipal Facilities Assistance Program and~~ the Minnesota State Water Pollution Control Fund and federal grant funds allotted to Minnesota.

~~(a)~~ A. Purpose. This ~~regulation~~ rule is herein adopted and promulgated by the Minnesota Pollution Control Agency to implement the provisions of ~~Minnesota Statutes, Chapters~~ Minn. Stat. chs. 115 and 116 (1976 and 1977 Supp.) ~~(as amended by Laws of 1973, Chapter 423 and Chapter 771)~~ and to comply with the Federal Water Pollution Control Act ~~Amendments of 1972 (United States Public Law 92-500~~ 33 U.S.C. §1251 et seq., and guidelines and regulations pursuant thereto ~~or resulting therefrom~~, by the establishment of procedures relating to the federal ~~Federal~~ construction grants and state construction grant and loan programs.

~~The regulation applies in general to the following:~~

~~(i) use of state and federal funds;~~

~~(ii) establishment of a municipal discharge inventory, list of municipalities and project list;~~

~~(iii) submission and evaluation of application;~~

~~(iv) administration of the grant and loan program;~~

~~(v) criteria for determination of priorities for grants and loans; and~~

~~(vi) the disbursement of funds.~~

The promulgation of this ~~regulation,~~ rule, in association with the Agency's enabling legislation, ~~as-amended-by-Laws-of-1973, Chapter-423-and-771,~~ provides ~~sufficient~~ authority for the State of Minnesota, upon approval by the Regional Administrator of the United States Environmental Protection Agency, to certify applicants for Federal construction grants and subsequently, to the extent funds are available, provide state construction grants. The Minnesota Pollution Control Agency is the State agency designated by State law to administer this program. Except as specifically provided herein, this ~~regulation~~ rule shall apply with equal force to state financial assistance and Federal grant funds.

~~(b)~~ B. Definitions. The terms "person", "sewage", "industrial wastes", "other wastes", "treatment works", "sewer system", "disposal ~~systems~~ system", "waters of the state", "pollution control fund", "municipality", "director", "Agency", "pollution of water", "eligible cost", "wastewater treatment facility", as well as any other pertinent terms for which definitions are given in ~~Minnesota-Statutes-Chapters~~ Minn. Stat. chs. 115 and 116~~, as amended,~~ shall have the meanings ascribed to them~~:~~ therein.

The terms specified below shall have the meanings ascribed to them:

~~(1)~~ 1. "ACT" means the Federal Water Pollution Control Act, ~~as amended,~~ 33 USC ~~1314~~ 1251 et seq.

~~(2)~~ 2. "EPA" means the United States Environmental Protection Agency.

~~(3)~~ 3. "ADMINISTRATOR" means the Administrator of the United States Environmental Protection Agency.

~~(4)~~ 4. "REGIONAL ADMINISTRATOR" means the EPA Regional Administrator for the region in which Minnesota is located (now Region Five).

~~(5) "ELIGIBLE COST" means, for state grant purposes, the cost as determined by the EPA.~~

5. "NEED" means a determination that a new or upgraded disposal system is currently required, or will be required within a five-year period to comply with State Water Pollution Control Rules; provided, the situation does not exist primarily due to inadequate operation and maintenance or primarily due to negligence on the part of any person.

6. "CATEGORY OF PROJECT" means the part of the disposal system the municipality intends to construct.

7. "TYPE OF PROJECT" means its "STEP".

a. "STEP 1" means all necessary preliminary engineering studies for the project.

b. "STEP 2" means the preparation of construction plans and specifications for the project.

c. "STEP 3" means the construction of the project.

8. "PROJECT" means the scope of work for which grant assistance is awarded.

9. "METROPOLITAN AREA" means Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington Counties.

10. "NON-METROPOLITAN AREA" means all counties of the state not in the metropolitan area.

11. "SECONDARY TREATMENT" shall have the meaning ascribed to it in Minn. Rule WPC 14 or 15 or amendments thereto.

12. "TERTIARY TREATMENT" means any level of treatment of higher quality than secondary treatment.

13. "PRIMARY TREATMENT" means any level of treatment of lesser quality than secondary treatment.

14. "SCOPE OF PROJECT" means Step 1, Step 2, or Step 3 of disposal system construction or segments thereof.

15. "PLANNING LOAN" means a loan for Step 1 and/or Step 2 projects.

16. "CONSTRUCTION LOAN" means a loan for a Step 3 project.

17. "RESIDENT INSPECTION" means that the consulting engineer or his agent shall be present on-site, during the hours of construction for purposes of inspection. It does not mean the inspector has to be a resident of the community.

18. "ADEQUATE ERRORS AND OMISSIONS INSURANCE" means a policy of insurance which provides the minimum amount of coverage for the corresponding estimated project construction cost as determined from the following table, which is maintained for a minimum of two years after acceptance of the project by the grantee.

NOT Appl'd.

NOT APPROVED
Lee Edsall
10-12-78

Estimated Project Construction Cost	Minimum Amount of Coverage
less than $1,000,000	$250,000
$1,000,000 to $2,999,999	$500,000
$3,000,000 to $9,999,999	$1,000,000
$10,000,000 or over	$2,000,000

If an engineer has more than one project, the policy must provide for the minimum coverage applicable to the highest estimated project construction cost.

19. "CONTRACT" means a contract between a municipality and an engineer or a contractor for the planning, design, or construction of a disposal system, or part thereof, which will be paid for, in all or in part, by state construction grant funds.

20. "GRANTEE" means the grantee of a state construction grant.

Other terms and abbreviations used herein which are not specifically defined by law shall be construed in conformance with the context and professional usage.

~~(c)~~ C. Severability. If any provision of this ~~regulation~~ rule or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect other provisions of the ~~regulation~~ rule or application of any other part of this ~~regulation~~ rule which can be given effect without application of the invalid provision. To this end, the provisions of all sections, subsections, or subdivisions herein and the various applications thereof are declared to be severable.

~~(d) Use of State Funds. The Agency in accordance with this regulation may provide financial assistance to municipalities as:~~

~~(1) A grant of nonrepayable funds for construction of disposal systems in an amount of not less than that required in applicable federal law and regulations for projects for which there becomes available, through use of these state funds, a grant of federal funds at a percentage of cost exceeding the percentage which would be available for the project if these state funds were not available.~~

~~(2) A grant of nonrepayable funds for construction of disposal systems in the amount of 15 per centum of the eligible cost of construction for projects tendered a grant of federal funds under Section 201(g), Section 202, Section 203, or Section 206(f) of the Act at 75 per centum of the eligible cost of construction. --Except as provided by Minnesota Statutes, Section 116.18, not less than 10 percent of such cost shall be paid by the municipality.~~

~~(3) A grant of state funds not exceeding 25 percentum -- to a municipality that would qualify for a grant of federal funds but desires to initiate construction of a project without a federal grant where such project is necessary to abate an immediate health hazard.~~

~~(4) Loans for the acquisition and betterment of public land, buildings, and improvements of a capital nature needed for the prevention, control and abatement of water pollution.~~

~~The Agency shall disburse state funds in any fiscal year to the extent that money is available and requested in the following order of priority: --Federal matching construction grants, construction grants, and planning and construction loans.~~

~~(c) Use of Federal Funds. --The Agency, in accordance with this regulation and the Act, guidelines and regulations pursuant thereto or resulting therefrom may:~~

~~(1) certify applications which have been determined to be complete for a grant of federal funds from any allotments and re-allotments allocated to Minnesota by the Administrator~~

~~pursuant to the Act; and~~

~~(2) utilize up to $250,000 from its allotment or re-allotment or both for the construction of a treatment works for a facility to train and upgrade waste treatment works operation and maintenance personnel.~~

~~(f) Municipal Discharge Inventory, List of Municipalities and Project Lists.~~

~~(1) The Director shall develop and maintain a municipal discharge inventory and a list of municipalities including a breakdown as to type of project required, which have known needs to install, construct, upgrade, or expand a disposal system, or any portion thereof. The list shall be periodically revised by the addition of the name of any municipality for which it is determined by the Director that such a need exists, or by the deletion of the name of any municipality or type of project which no longer has such a need. The municipal discharge inventory shall include all the municipalities with needs and all the municipalities which have adequate disposal systems.~~

~~(2) The names on the municipal discharge inventory shall be arranged in order of priority pursuant to the criteria established in Section (i)(2) except subsections (dd) and (ee). The names on the list of municipalities shall be arranged in order of priority pursuant to the criteria established in Section (i)(2) except subsection (ee).~~

~~(3) The Director shall prepare from the municipal discharge inventory and in turn from the list of municipalities for fiscal year 1974 (July 1, 1973 to June 30, 1974) and each~~

succeeding-fiscal-year,-for-Agency-and-EPA-approval-a-project list-of-those-projects-for-which-Federal-assistance-will-be requested-from-current-allotments.--Such-project-list-shall-be prepared-in-accordance-with-the-allocation-of-funds-set-forth in-Section-(i)(1)-and-shall-set-forth-a-tabulation-of-funding priorities-and-requirements.--The-Director-shall-define,-pursuant to-Section-(g)(3),-(g)(4),-(g)(5),-or-any-combination-thereof, allowed-by-the-EPA,-the-step-of-each-disposal-system-project- and-the-time-when-such-system-project-is-to-receive-Federal- financial-assistance.

(4)-The-Director,-where-he-deems-appropriate,-may-split or-stage-the-construction-of-the-type-of-project-for-a-disposal system-or-portion-thereof-(See-also-Section-(i)(2)(dd)-of-this regulation).

(5)-Notwithstanding-subsection-(3)-of-this-section, the-Director,-where-he-deems-appropriate-in-preparation-of-the list-of-projects-may,-to-the-extent-allowable-by-the-EPA, recommend-projects-in-a-variety-of-steps-as-a-means-of-assuming maximum-utilization-of-available-federal-and-state-funds-in future-fiscal-years.

(6)-The-Director,-in-preparation-of-the-list-of-projects, may-recommend-a-total-number-of-projects-which-would-utilize-all or-a-portion-of-the-current-fiscal-year-federal-allocation-and all-or-a-portion-of-any-succeeding-fiscal-year-federal-allocation.

~~(g) Applications for State and Federal Construction Grants.~~

~~(1)~~ [Moved to E.8.a.]

~~(2)~~ [Moved to E.8.b.]

~~(3)~~ [Moved to E.8.d.]

~~(4)~~ [Moved to E.8.e.]

~~(5)~~ [Moved to E.8.f.]

~~(6) Application for projects which do not receive a grant offer in the fiscal year for which the application is considered shall be retained, and if subsequently deemed necessary, shall be up-dated and revised within 30 days upon written notice from the Director.~~

~~(7)~~ [Moved to E.8.g.]

~~(8) A municipality may file an application at any time for any type of project. If the type of project is not shown on the list of municipalities, it shall be added to such list, provided that any such application shall be submitted at least 30 days prior to the date of the public hearing to be held annually on the state program plan of the Agency which is submitted to the EPA before the beginning of a new fiscal year (July 1 through June 30.) The Director shall indicate in the public hearing notice for the program plan hearing that any person upon request shall be given a copy of the municipal discharge inventory, list of municipalities and project list developed in accordance with Section (f) and pursuant to Section (i)(2)(ee), the list of segments in order of priority. The provisions of this subsection shall take effect upon the effective date of this regulation.~~

~~(h) Administration of Construction Grants.~~

~~(1) The priority ratings of the application on the list of municipalities and the project list for fiscal year 1974 and succeeding years shall be established in accordance with Section (i) excluding subsection (ee). The priority ratings for project applications submitted in and certified for fiscal year 1973 and earlier years shall remain as determined by the Agency on the basis of the established criteria, and such prior actions of the Agency are also hereby affirmed insofar as they relate to federal grant increases and state grants for such projects as authorized by the statutes and the EPA.~~

~~(2)~~ [Moved to E.9.a.]

~~(3)~~ [Moved to E.4.b.(4)]

~~(4)~~ [Moved to E.9.b.(1) and (2)]

~~(5) To the extent it determines reimbursement funds are available, the Agency shall authorize grants or grant increases for fiscal year 1972 and earlier eligible projects up to the required federal matching ratio, with such available funds being divided proportionally in accordance with Section (i)(1) between the seven-county Twin Cities Metropolitan Area and the area of the state outside the seven-county Twin Cities Metropolitan Area, and eligible projects being funded in order of established priority, such increases to be paid subject to conformance with EPA requirements and authorization thereof by the EPA.~~

~~(6) Notwithstanding subsection (4) or (5) of section, the Agency may, to the extent allowable by the EPA, limit grant increases to less than the eligible amount to provide a proportionate share to all eligible projects.~~

~~(7)~~ [Moved to E.9.c.]

~~(8)~~ [Moved to E.9.e.(3)(a)-(d)]

~~(i) Criteria for Determining Priority.~~

~~(1) Federal funds allocated to Minnesota under the program administered by the EPA for fiscal year 1972 and each succeeding fiscal year and state funds in like proportion shall be allocated initially by the Agency to the Twin Cities Metropolitan Area, consisting of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington Counties, and the outstate areas consisting of the remainder of the counties of the state in approximately the same ratio which the population of the sewered municipalities of the seven counties bears to the sewered population of the outstate counties. -- Allocations made by the Agency for fiscal year 1973 and prior years are hereby re-affirmed.~~

~~(2) The determination of the order of priority of the municipalities for state and federal grants for fiscal year 1974 and succeeding years shall be in accordance with the following criteria, except that subsection (ee) shall not be considered in establishing the municipal discharge inventory (which also will not take into consideration subsection (dd), the list of municipalities or the project list for federal grant purposes. -- The determination of the order of priority for grants certified for funding in fiscal year 1973 and prior years shall be as set forth in~~

~~actions of the Agency heretofore based on criteria duly established for such years, the same to apply also to grant increases for EPA eligible projects.~~

~~(aa)~~ [Moved to E.2.d.(1)]

~~(bb)~~ [Moved to E.2.d.(2)]

~~(cc)~~ [Moved to E.2.d.(3)]

~~(dd)~~ [Moved to E.3.c.(1)]

~~(ee)~~ [Moved to E.3.c.(2)]

~~(ff)~~ [Moved to E.3.c.(3)]

~~(3)~~ [Moved to E.6.a.]

~~(4)~~ [Moved to E.3.e.]

~~(5)~~ [Moved to E.6.b.]

~~(j)~~ [Moved to F.1.]

~~(k)~~ [Moved to F.2.]

~~(l)~~ [Moved to F.3.]

~~(m) Additional Purposes of State and Federal Funds.~~

~~(1) In accordance with Minnesota Statutes, Chapter 116, as amended, the Agency may where it determines that the prevention, control and abatement of water pollution and the public health of the state requires the construction of a project and the municipality is unable to provide 10 percent of the eligible cost of a disposal system project, expend funds for hardship cases to reduce or eliminate the municipal portion of the eligible cost. Each such hardship grant shall be made only to applicants who apply for consideration prior to initiation of construction and attain a minimal point rating of 40 under the criteria of section (i)(2)(ee) or such other numerical hardship levels as may be specified**

~~annually by the Agency for rating purposes under that section.~~

~~(2) After consideration of the amount of state funds required to match federal funds, the Agency may tender a grant of state funds not exceeding 25 per centum to a municipality that would qualify for a grant of federal funds, but desires to initiate construction of a project without a federal grant, where such project is necessary to abate an immediate health hazard. The Agency may limit the scope and eligible cost of such project. After it has been determined by the Agency that any project, or portion thereof, is necessary to abate an immediate health hazard, and available funds exist, the criteria for determining priority to be utilized for order of priority shall be section (i)(2), including but not limited to subsection (2)(ee). No municipality shall be eligible for consideration if construction of the project has been initiated prior to submission of the application and the items of section (g)(5). The Director for just cause may waive or defer the submission of any item required pursuant to section (g)(5).~~

~~(3) In accordance with section 109(b) of the Act and any guidelines or regulations thereto, the Agency may request, with or without giving consideration to section (i)(1), the Administrator to make a grant of up to $250,000 from any allocation of federal funds to Minnesota for any additional cost of construction of a treatment works required for a facility to train and upgrade waste treatment works operation and maintenance personnel.~~

D. Priority of Programs. Minn. Stat. §116.16 et seq. (1976) establishes a pollution control fund and authorizes grants and loans for the construction of municipal disposal systems. To the extent funds are available and requested, the Agency shall disburse funds from the pollution control fund in the following order:

1. Grants for projects tendered a 75% federal grant under the Act and, to the extent authorized by statute, grants for projects utilizing innovative or alternative wastewater treatment processes and techniques which have been tendered an 85% federal grant under the Act.

2. Grants to reduce or eliminate the local contribution of a municipality meeting the criteria set forth in section E.9.b.(4)

3. Grants to municipalities which would qualify for a federal grant but which desire to initiate construction of the project without a federal grant.

4. Loans for the construction of municipal disposal systems.

E. Construction Grant Program.

1. Summary of construction grants program.

a. The construction grants program generally consists of three steps:

(1) Step 1: preparation of all necessary preliminary engineering studies;

(2) Step 2: preparation of construction plans and specifications; and

(3) Step 3: construction of the disposal system or part thereof.

b. Grants may be awarded for a Step 1, Step 2, or Step 3 project or, as authorized by the Act, for a project which combines steps.

c. The scope of the project is initially defined by the applicant but may be revised by the Agency or by EPA.

d. Grants are awarded to municipalities on a priority basis. Priority is determined as follows:

(1) The Director shall develop a Municipal Discharge Inventory which lists in priority order, pursuant to section E.2.c., all municipalities which maintain a discharge of effluent, including those municipalities which utilize land application or individual sewage treatment systems. This inventory includes municipalities which have adequate disposal systems as well as those which have a need for a new or upgraded disposal system.

(2) The Agency shall develop a Municipal Needs List from the Municipal Discharge Inventory. The Municipal Needs List shall rank in priority order, pursuant to section E.3.b.(2) all municipalities or projects for which a need exists.

(3) A Municipal Project List shall be developed by the Agency from the Municipal Needs List. The Municipal Project List shall list in priority order, pursuant to section E.4.b., all projects which will be funded during the current fiscal year. The Municipal Project List shall also list any nonproject uses of the state's allotment of federal construction grant funds.

e. Public participation shall be sought by the Agency prior to the adoption of the Municipal Needs List and the Municipal Project List, pursuant to section E.7.

f. Each applicant must apply to the Agency for each proposed grant in the manner set forth in section E.8.

g. The Agency shall certify applications which have been determined to be complete for a grant of federal funds from EPA.

h. Funds shall be disbursed to a municipality in the manner set forth in section E.9.e.

2. Municipal Discharge Inventory

a. The Director shall develop and maintain a Municipal Discharge Inventory listing all those municipalities which maintain a discharge of effluent, including those which utilize land application or individual sewage treatment systems.

b. The Municipal Discharge Inventory shall include those municipalities which have adequate disposal systems as well as those which have a need for a new or upgraded disposal system.

c. Each municipality shall be awarded points pursuant to the criteria set forth in section E.2.d below. The municipalities shall be listed on the Municipal Discharge Inventory in descending order according to the number of points awarded to each.

d. Criteria.

~~(i)(2)(aa)~~ (1) Extent and Nature of Pollution. ~~Water pollution control priority~~ Priority points shall be ~~established~~ awarded as set forth below from a determination of the highest single beneficial water use seriously affected, or, if no pollution problem currently exists, from a determination of the highest single beneficial water use to be preserved,

Water Use		Point Rating
Class 1	Domestic Water Supply:	
	A. Direct consumption (groundwater)	70
	B. Consumption after only disinfection by chlorination	65
	C. Consumption after moderate water treatment process	60
	D. Consumption after very complete water treatment process	55
Class 2	Fisheries and Recreation Waters:	
	A. Propagation and maintenance of cold water fishery and all recreation uses	60
	B. Propagation and maintenance of mixed fishery and all recreational uses	50
	C. Propagation and maintenance of rough fishery and non-contact recreational uses	40
Class 3	Industrial Consumption, Except Food Processing and Related Uses:	
	A. Direct use without chemical treatment	40
	B. Use with moderate treatment	30
	C. Use for cooling and material transport	20
Class 4	Agriculture and Wildlife:	
	A. Irrigation and agricultural crops of all kinds	35
	B. Watering of livestock and wildlife	30
Class 5	Commercial navigation and waste disposal	10

~~(i)(2)(bb)~~ (2) Population Affected. ~~Water pollution control priority~~ Priority points shall be assigned for each type of project based on the population of the municipality, or population of the municipalities served by such project as determined by the most recent ~~federal~~ reliable census, as follows:

	Point Rating
~~(1)~~ (a) Municipal population under 250	2
~~(2)~~ (b) Municipal population from 251-500	4
~~(3)~~ (c) Municipal population from 501-750	6
~~(4)~~ (d) Municipal population from 751-1000	8
~~(5)~~ (e) Municipal population from 1001-1500	10
~~(6)~~ (f) Municipal population from 1501-3000	12
~~(7)~~ (g) Municipal population from 3001-5000	14
~~(8)~~ (h) Municipal population from 5001-10,000	16
~~(9)~~ (i) Municipal population from 10,001-20,000	20
~~(10)~~ (j) Municipal population from 20,001-50,000	25
~~(11)~~ (k) Municipal population from 50,001-450,000	35
~~(12)~~ (l) Municipal population in excess of 450,000	50

~~(i)(2)(ee)~~ (3) List of Segments. Pursuant to Section 303(e) of the Act and guidelines and regulations thereto relating to the state continuing planning process, all waters of the state shall be divided into segments and each segment classified as either water quality or effluent limited. The Director shall annually develop a list of segments, and after giving consideration to:

~~(i)~~ (a) severity of pollution problems;

~~(ii)~~ (b) population;

~~(iii)~~ (c) need for preservation of high quality waters; and

~~(iv)~~ (d) national priorities as determined by the Administrator; priority points will be established in accordance with criteria approved by the Agency and the EPA.

The segment ranked number one shall be awarded priority rating equal to the total number (N) of segments with any subsequent segment receiving a priority rating of N + 1 minus the numerical ranking of the segment. Priority points shall be accordingly awarded to a municipality for the type of project located in a segment.

3. Municipal Needs List

a. The Agency shall develop, and update whenever necessary, a Municipal Needs List listing all municipalities for which a need exists or which desire to construct eligible projects which do not meet the enforceable requirements of the Act.

b. Each municipality shall be awarded points in the following manner:

(1) Points awarded pursuant to section E.2.d in the development of the Municipal Discharge Inventory; and,

(2) Points awarded pursuant to the criteria set forth in section E.3.c below. The municipalities or projects shall be ranked on the Municipal Needs List according to the number of points awarded to each.

c. Criteria

~~(i)(2)(dd)~~ (1) ~~Type~~ Category of Project. Priority points shall be allocated on the basis of the single highest disposal system or part thereof, improvement to prevent, control,

and abate the source of pollution as follows:

Point Rating

~~(1)~~ (a) Provision of tertiary treatment. ~~(secondary-treatment-or-its-equivalent plus-additional-treatment-works-to-remove-additional 5-day-biochemical-oxygen-demand,-suspended-solids, or-dissolved-solids)-for-a-discharge-of-sewage-and industrial-waste.~~ For the purpose of this regulation, treatment works which provide for regulated discharge of effluents in lieu of tertiary treatment shall be construed to provide tertiary treatment. ~~40~~ 160

~~(2)~~ (b) Provision of secondary treatment. ~~for-a-municipality-which-does-not-have a-disposal-system,-other-than-individual-on-lot septic-tank-systems,-or-has-inadequate-secondary treatment,-or-provides-no-treatment-or-only-primary treatment-for-its-sewage-and-industrial-wastes.~~ ~~30~~ 150

~~(3)-Provision-of-a-disposal system-or-part-thereof-by-a-municipality-for-adequate disposal-of-wastes-from-its-water-treatment-plant,-or power-plant-or-similar-pollutants.~~ ~~20~~

~~(4)~~ (c) Provision of a new sewer system or portion thereof for a municipality, in existence on October 18, 1972 with sufficient existing or planned capacity to adequately treat such collected sewage or industrial waste. 10

Point Rating

~~(5)~~ (d) Provision by a municipality of storm water disposal system, including sewer systems to separate existing combined sanitary and storm sewers or treatment works. 10

(e) A municipality having only primary treatment. 20

(f) A municipality or an area part of an areawide study having a sewer system with no treatment including septic tanks overflowing to a sewer system. 30

~~(6)~~ (g) Subsections ~~(1)~~ (a), or ~~(2)~~ (b), whichever is applicable, ~~may~~ shall also include treatment works and/or any portion of sewer system improvements deemed necessary by the Director to insure the integrity and performance of a disposal system.

~~(7)~~ (h) An interceptor sewer which eliminates any existing treatment works or which, in accordance with an approved basin plan, eliminates the need for construction of new treatment works shall be considered equivalent to tertiary or secondary treatment and allocated the appropriate priority points pursuant to subsections ~~(1)~~ (a) or ~~(2)~~ (b), whichever is applicable.

Point Rating

~~(8)~~ (i) In the case of a sanitary sewer system being tributary to sewerage facilities which are on the ~~project list~~ Municipal Project List for funding but which the EPA will not fund until an infiltration/inflow analysis, and where required, a sewer system evaluation survey has been performed, this sewer system project ~~may~~ shall be awarded by the Director an equal number of priority points as the project on the ~~project list.~~ Municipal Project List.

~~(9) A proposed sewer system project, or portion thereof for a municipality with adequate treatment works which abates an immediate public health hazard relating to an area that does not have municipal sewer and water service may be considered equivalent to tertiary or secondary treatment and allocated the appropriate priority points pursuant to subsections (1) or (2), whichever is applicable.~~

~~(i)(2)(ee)~~ (2) Financial Aspects. Priority points shall be awarded by summing up the applicable rating points for the project from Tables 1, 2, and 3 relative to per capita project cost, the ratio of municipal bonded debt to ~~assessed evaluation~~ adjusted assessed values of municipalities and per capita buying income.

TABLE I

Per Capita Cost of Project

Per Capita Cost ($)		Point Rating
~~0-40~~	0-280	1
~~41-80~~	281-400	3
~~81-120~~	401-600	5
~~121-160~~	601-800	7
~~161-200~~	801-1000	9
~~201-240~~	1001-1300	11
~~241-280~~	1301-1600	13
over ~~280~~	1600	15

TABLE II

Ratio of Municipal Bonded Debt to ~~Assessed-Evaluation~~** Adjusted Assessed Values of Municipalities

Ratio x 100	Point Rating
0-3	3
4-9	5
10-15	7
16-21	9
22-27	11
28-33	13
over 33	15

**~~Based on bonded debt and assessed evaluation data obtained from the Department of Public Examiner and Research and Planning Unit of the Minnesota Department of Taxation, respectively.~~

TABLE III

Per Capita Buying Income***

Percent of Average	Point Rating
0-50	15
51-60	13
61-70	11
71-80	9
81-90	7
91-100	5
101-110	3
over 110	1

~~***Based on the report "Survey of Buying Power," by Sales Management, Inc.~~

~~(i) (2) (ii)~~ (3) Other. Ten ~~Additional~~ additional points ~~may be granted in the discretion of the Agency~~ will be awarded to an application which:

~~Point Rating~~

~~(i) relates to a point source or disposal system which is located within an area designated by the Administrator in writing to have national priority; and/or~~ ~~10~~

~~(ii)~~ includes planned participation in a sanitary district and/or other multi-municipal disposal system. ~~10~~

d. If a municipality or project is not included on the Municipal Needs List, the municipality may petition the Agency for inclusion on the list. The municipality must document its need in the following manner:

(1) Sewered communities: submission of data regarding: concentration of pollutants in existing discharge; volume of discharge; and waters of the state presently or potentially impacted by the discharge;

(2) Unsewered communities: submission of data regarding: type of soil in unsewered area; depth to seasonally high water table; size of all lots in the area; and age and type of existing system.

Following submission of this data, the Director will review the material and determine if a need has been shown. If so, the municipality will be added to the Municipal Needs List, in the manner set forth above. If not, the municipality will be notified of the reasons for the decision of the Director.

~~(i)(4)~~ e. If in the determination of the order of priority on the ~~list of municipalities,~~ Municipal Needs List, two or more municipalities have the same total number of priority points, the municipality in accordance with ~~subsection (c)(aa)~~ section E.2.d.(1) that has the highest single beneficial water use seriously affected or to be preserved shall be ranked higher. If two

or more municipalities have the same total number of priority points and the same highest single beneficial water use seriously affected or to be preserved, the municipalities shall be ranked based on population as determined by the most recent federal census in descending order below the municipality with the largest population.

4. Municipal Project List.

a. The Agency shall prepare a Municipal Project List each fiscal year which shall list in order of priority those projects for which federal grant funds will be requested from current allotments. The Municipal Project List shall also list any nonproject uses of the state's allotment of federal construction grant funds, including but not limited to training grants and costs of administration.

b. Projects with the highest priority on the Municipal Needs List will be placed on the Municipal Project List in the following manner:

(k) Funds shall be allocated between the Metropolitan Area and the Non-Metropolitan Area in approximately the same ratio which the population of sewered municipalities of the Metropolitan Area bears to the sewered population of the Non-Metropolitan Area.

(2) Funds will be set aside for such classifications of projects and in such amounts as is required by the Act. Such classification presently include:

(a) Treatment works utilizing innovative or alternative wastewater treatment processes and techniques for which an 85% federal grant may be tendered;

(b) Alternatives to conventional sewage treatment works for municipalities having a population of three thousand five hundred or less or for the highly dispersed sections of larger municipalities, as defined by the Administrator; and

(c) Construction of publicly owned treatment works for major sewer system rehabilitation, new collector sewers and appurtenances, new interceptors and appurtenances, and, correction of combined sewer overflows, if such projects are on the Municipal Project List for that year and are otherwise eligible for funding in that fiscal year.

These classifications are presently required by Sections 205 and 216 of the Act. Subsection E.4.b.(2) shall, therefore, be read in conjunction with the terms as defined in the Act and U.S. EPA regulations.

(3) The Agency shall provide for an adequate mixture of Step 1, 2, and 3 projects so as to permit funding to proceed in an orderly fashion and to fully utilize all allocated funds.

~~(h)~~ ~~(3)~~ (4) Federal grant funds allocated ~~under~~

~~Section-(i)(1)~~ to ~~outstate~~ Non-Metropolitan Area projects and for which there are not ~~any~~ sufficient certifiable Non-Metropolitan ~~outstate~~ projects by ~~December-31~~ the end of the fiscal year for which those funds were allotted shall ~~may~~ be ~~re-allocated~~ reallocated by the Agency to the ~~seven-county-Twin-Cities~~ Metropolitan Area. Any such federal grant funds which ~~in-fiscal-year-1972-or-succeeding fiscal-years-~~ are reallocated to the ~~seven-county-Twin-Cities~~ Metropolitan Area shall be recoverable in total for allocation to ~~outstate~~ Non-Metropolitan projects in later fiscal years ~~only-to-the-extent-of $2,000,000-in-any-one-fiscal-year.~~ in annual amounts deemed reasonable by the Director. Grant funds allocated to the ~~seven-county Twin-Cities~~ Metropolitan Area which are unused are subject to similar provisions for reallocation to and recovery from ~~outstate~~ Non-Metropolitan projects.

c. A reserve project list shall be developed by the Agency for the purpose of utlizing grant monies forfeited by any municipality pursuant to sections E.8.b. and E.8.c.

d. The Municipal Project List may be modified, in accordance with EPA regulations, to give higher priority to Step 2 or combined Step 2 and 3 projects utilizing innovative or alternative wastewater treatment processes and techniques to the extent necessary to comply with the set-asides required by the Act.

5. Project Eligibility

a. Projects which are not eligible for federal grants shall not be eligible for state grant funds except as provided in section E.9.b.

b. A project is not eligible for a grant if the construction has been initiated prior to the award of the grant, except as provided in section E.9.d.

c. Items are not grant eligible unless the Director determines that they are necessary to the cost effective functioning of an otherwise grant eligible disposal system.

6. Adjustments

~~(i)(3).--The numerical rating points established in Section (i)(2) shall be subject to readjustment in value for any category or class prior to the mailing of the public hearing notice established in Section (g)(8) if it is determined to be in the best interests of the state by resolution of the Agency.--At least 30 days notice of such proposed readjustments shall be furnished by United States mail to all persons registered on the appropriate list maintained by the Secretary of State, and all persons wishing to do so shall be given an opportunity to present their views on the proposals to the Agency prior to final Agency action.~~

~~(i)(5)~~ a. Notwithstanding any other provision in this ~~regulation~~ rule including, but not limited to, ~~Sections (i)(2) and (i)(3),~~ sections E.2.d., E.3.c. and E.6.a., to the contrary, the Director may, as necessary to establish criteria for determining priority for applications for federal and state ~~sewage~~ construction grants under the ~~Federal Water Pollution Control~~ Act, ~~as amended~~ and regulations and guidelines of the ~~United States Environmental Protection Agency~~ EPA promulgated pursuant thereto, and ~~Minnesota Statutes, Chapters~~ Minn. Stat. chs. 115 and 116, ~~as amended,~~ establish such criteria for determining priority upon a basis other than that provided herein, to the extent required to comply with ~~said federal act,~~ the Act, and guidelines and regulations

thereto or resulting therefrom.

7. Public Participation. Prior to the adoption of the Municipal Needs List and the Municipal Project List by the Agency, public participation shall be sought in the following manner:

a. Notice of the Agency Board meeting at which the Municipal Needs List and the Municipal Project List will be adopted shall be given to all affected municipalities at least 30 days prior to such meeting.

b. A free copy of the proposed Municipal Needs List and the proposed Municipal Project List will be mailed to any interested person upon request.

c. Prior to the Agency Board meeting, public informational meetings will be conducted at such locations as the Director deems appropriate. Notice of such meetings shall be given to all affected municipalities.

d. All interested persons shall have the opportunity to present oral or written statements to the Board in regard to the proposed Municipal Needs List or the proposed Municipal Project List if a request is submitted to the Board. Such request should be submitted fourteen days prior to the meeting to facilitate agenda preparation and must be submitted at least three days prior to the meeting. If such request is made during the Board meeting, interested persons may be afforded the opportunity to participate within such limits of time and manner as the Board may establish under the circumstances.

8. Applications

~~(g)(1)~~ a. ~~To expedite the program, unless~~ Unless otherwise specified by the Director, the state construction grant application form shall be the federal construction grant application form ~~(Budget Bureau No. 42 R1495 or revisions thereof)~~ of the EPA. ~~Projects which are not eligible under EPA rules, guidelines, or regulations shall not be eligible for state grant funds under this section, except as provided pursuant to Section (m)(2).~~

~~(g)(2)~~ b. ~~Any municipality shall within 30 days~~ Within 90 days for a Step 1, 150 days for a Step 2, and 150 days for a Step 3 after notification in writing from the Director ~~by first class mail~~, a municipality shall file a completed construction grant application or submit such information as the Director determines to be necessary to complete a previously submitted application. The Director may extend the date of filing or submission of any information subject to the municipality providing adequate justification therefor. ~~Should the municipality fail to provide such adequate justification, the initial filing or information requirement shall remain unchanged.~~ Failure to comply with this schedule may cause forfeiture of grant monies for the step grant involved and the municipality may be required to complete the work for that step without grant monies.

c. A specific schedule for completing the particular step of the project will be contained in each grant offer tendered. The municipality's National Pollutant Discharge Elimination System (NPDES) permit may be modified, pursuant to Agency rule, to include such schedule. Failure to comply with this schedule may cause forfeiture of grant monies for the

step grant involved and the municipality may be required to complete the work for that step without grant monies. Prior to the forfeiture of grant monies or the required completion of work without grant monies pursuant to Section E.8.b. or c., the municipality shall have the right to a hearing, if it so requests.

~~(g)(3)~~ d. The construction grant application ~~form~~ for a Step 1 project ~~to-undertake-preliminary-plans-and studies-(Step-1)~~ shall ~~be-supported-by~~ include the following attachments: and such other attachments as EPA may require:

~~(aa)~~ (1) Resolution of governing body of the municipality authorizing the filing of the application and designating the ~~official~~ municipal ~~representative;~~ official authorized to sign the application;

~~(bb)-A-brief-description-of-the-nature-and-scope-of the-proposed-project;~~

~~(cc)-Assurance-of-compliance-with-all-applicable requirements-of-the-Minnesota-Department-of-Human-Rights;~~

~~(dd)-An-estimate-of-the-proposed-project-cost;~~

~~(ee)-Statements-on-planning-requirements-from-the following:~~

~~(i)-State,-Metropolitan-or-Regional-Planning Agency;-and~~

~~(ii)-State-Clearinghouse-(Minnesota-State-Planning Agency);-and~~

(2) If more than one municipality is involved, resolutions from the governing body of all municipalities agreeing to cost sharing and agreeing to proceed to Steps 2 and 3 if cost-effective;

~~(ff)~~ (3) Proposed sub-agreements, or an explanation of the intended method of awarding sub-agreements for substantial portions of the project work~~.~~;

(4) Statement by the consulting engineer indicating the effluent limitations for which the disposal system is being designed;

(5) A resolution by the governing body of the municipality to the effect that the sewage collection system will, at the appropriate time, be constructed concurrently with the sewage treatment works; and

(6) A resolution by the governing body of the municipality as to the methods for financing the construction of the collection system; and

(7) Documentation by the engineer(s) that they carry adequate errors and omissions insurance.

~~(g)(4)~~ e. The construction grant application form for a ~~project to prepare construction drawings and specifications (Step 2) shall include but not be limited to:~~ Step 2 project shall include the following attachments and such other attachments as EPA may require:

~~(aa) Sewer system evaluation which demonstrates to the satisfaction of the Director and Regional Administrator that each sewer system discharging into such treatment works is not subject to excessive infiltration/inflow, through an infiltration/inflow analyses and, where appropriate and authorized by the Regional Administrator, a sewer system evaluation survey.~~

~~(bb) An acceptable engineering report describing the design concepts of the proposed project and its technological and economic feasibility including, but not limited to:~~

~~(i) Disposal system design data incorporating:~~

~~(a) Results of sewer system evaluation;~~

~~(b) Estimated effluent quality, with respect to all parameters required by applicable effluent limitations and water quality standards; and~~

~~(c) Proposed method for ultimate disposal of sludge.~~

~~(ii) Cost estimates for design and construction; and~~

~~(iii) Schedule for completion of design and construction.~~

~~(cc) A review of measures practiced or proposed to control excess flow resulting from ground water infiltration and/or extraneous flows of surface water into the sewer system.~~

~~(dd) A detailed analysis of the operation and maintenance requirements of the proposed project, including but not limited to staffing, operator qualifications, laboratory works, chemicals, annual budget and financing of the annual budget to insure adequate operation and maintenance of the disposal system.~~

~~(ee) For any project to be constructed with funds authorized for any fiscal year beinning after June 30, 1974, the grant applicant shall satisfactorily demonstrate that:~~

~~(i) alternative waste management techniques have been studied and evaluated and the works proposed for grant assistance will provide for the application of the best practicable waste treatment technology over the life of the works, and~~

~~(ii) As appropriate, the works proposed for grant assistance will take into account and allow to the extent practicable the application of technology at a later date which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants.~~

~~(ff) Statements on planning requirements from the following:~~

~~(i) State, Metropolitan or Regional Planning Agency, and~~

~~(ii) State Clearinghouse (Minnesota State Planning Agency);~~

~~(gg) Environmental assessment in accordance with the requirements of the EPA unless the Regional Administrator determines, at the request of the applicant, that there is insufficient data available to prepare such assessment, provided that the environmental assessment must then be submitted to the Regional Administrator at or prior to the time of submission of plans and specifications for the building and erection of a disposal system or portion thereof (Step 3);~~

~~(hh) Statement regarding availability of proposed site, if relevant;~~

~~(ii) Statement regarding ability of applicant to obtain discharge permit for proposed disposal system;~~

~~(jj) Statement regarding compliance with Title VI of Civil Rights Act of 1964;~~

~~(kk) Statement regarding applicant's proposed operation and maintenance program;~~

~~(ll) Proposed sub-agreements, or an explanation of the intended method of awarding sub-agreements for performance of any substantial portion of the project work;~~

~~(mm) User charge system in accordance with EPA rules and regulations; and~~

~~(nn) Assurance of compliance with all applicable requirements of the Minnesota Department of Human Rights.~~

(1) Any of the items listed in Section E.8.d. which were not previously submitted or which require updating;

(2) Resolution of the governing body of the municipality authorizing the application and designating the municipal official authorized to sign the application;

(3) If more than one municipality is involved, resolutions from the governing bodies of all municipalities agreeing to cost sharing and agreeing to proceed to Step 3 when so instructed by the Agency;

(4) A design summary based on the plans and specifications to be submitted when the plans and specifications are complete; and

(5) Documentation by the engineer(s) that they carry adequate errors and omissions insurance.

~~(g)(5)~~ f. The construction grant application form for a Step 3 project ~~to build and erect a disposal system or portion thereof (Step 3) shall include the items in subsection (4) of this section, and in addition shall include three complete sets of the construction drawings and specifications, suitable for bidding purposes, provided, that if any such information has been furnished with an earlier application, the applicant need only incorporate by reference and update or revise such information.~~ shall be supported by the following attachments and such other attachments as EPA may require:

(1) Any of the items listed in sections E.8.d. or E.8.e. which were not submitted or which require updating;

(2) Resolution of the governing body of the municipality authorizing the application and designating the municipal official authorized to sign the application;

(3) If any items are deleted from project eligibility after initial submittal of the plans and specifications, the cost of such items must be set out;

(4) Signature and registration number of the consulting engineer accompanying the following certification statement:

> The treatment works described in this grant application have been designed with full knowledge of the effluent limitations required by the Minnesota Pollution Control Agency as set forth in NPDES Permit No. dated . It is my judgment and carefully considered opinion that these treatment works are capable of consistently producing the required effluent quality, provided that the facility is operated in conformance with the approved operation and maintenance manual and that the volume and characteristics of raw wastewater are within the limits of the "Design Data" stated on page of the plans or as follows.

(5) Executed engineering contract, including, unless otherwise approved by the Director, full-time qualified resident inspection by the consulting engineer or his agent during construction. After project initiation, reports are to be sub-

mitted outlining type of construction inspected and time; and

(6) Documentation by the engineer(s) that they carry adequate errors and omissions insurance.

~~(g)(7)~~ g. ~~The~~ All construction grant application ~~form~~ forms and attachments shall be submitted in triplicate to the Agency at the address specified by the Director. Unless adequately justified in writing, failure to submit all the necessary documents by the date specified ~~may~~ shall constitute grounds for rejection of the application. Substantial deficiencies in the application and/or supporting documents or failure to conform with applicable requirements such as those set forth in the current Agency water

pollution control program plan or the applicable basin, regional, or area water quality management plan ~~or agency policy requirements~~ also may shall be grounds for rejection. Any application ~~may~~ shall be rejected at the discretion of the Agency if it does not include an engineering report acceptable to the ~~chief water pollution control engineer,~~ Director, or does not include an adequate commitment for support of operation and maintenance of the project or is not consistent with applicable statutes, or does not contribute to the overall objective of effective water quality management~~, or is not considered to be in the best interest of the state~~.

9. Administration

~~(h)(2)~~ a. Certification. ~~Municipalities on the list of municipalities which receive a priority rating sufficiently high in relation to available funds and are placed~~ Accepted applications of municipalities on the Municipal Project List ~~project list may~~ shall be certified to the EPA for a grant. ~~but such~~ Such certification ~~may~~ shall in any fiscal year be withheld or withdrawn by the Director if the project is not or cannot be implemented according to an acceptable schedule or otherwise poses a substantial likelihood of causing a loss of federal funds to the State.

b. Tender of Grant

~~(h)(4)~~ (1) After the EPA has determined the eligibilty of the application and tendered a federal grant, the ~~state~~ Agency shall make a similar grant offer to the municipality in an amount not less than that required by federal law and regula-

tion as a condition for the ~~increased~~ grant of federal funds or in an amount not less than that allowed by state statutes where not required by federal law.

(2) In the case of a project for which the applicant has solicited and received ~~bids on construction~~ contracts which exceed the costs estimated in the application, the Director may, after consideration of available federal funds and in accordance with EPA regulations, recommend a grant increase. A reasonable amount shall be reserved by the Agency from each allotment of funds for such increases.

(3) The Agency may tender a grant of state funds to a municipality that would otherwise qualify for a federal grant but desires to initiate construction of a project without a federal grant.

(4) The Agency may tender a grant of state funds to a municipality for what would otherwise be the local share of the cost if:

(a) The municipality is unable to finance the local share and attain a minimal point rating of 40 under the criteria of section E.3.c.(2); and,

(b) Application is made prior to the initiation of construction; and,

(c) The prevention, control, and abatement of water pollution and the public health of the state require the construction of the project.

~~(h)(7)~~ c. Change Orders. Any proposed changes in the contract which result in cost increases greater than that of the base contract plus contingencies as stated in the project summary or other proposed changes regardless of cost which substantially alter the type of treatment process, or its efficiency, versatility or reliability, shall be submitted to the Director for prior approval, except where the work is agreed by the ~~chief-water-pollution-control-engineer~~ Director to be of an ~~e~~mergency nature. Change orders not requiring prior approval of the Director shall be submitted ~~for-review-and-approval~~ within one month after the date on which the change is ordered by the applicant, its engineer or other authorized agent~~.~~ for review and approval.

d. Reimbursement Grants. If a project is eligible for a federal reimbursement grant, the Agency may provide a state grant or grant increase for such project.

e. Payment of Grant Funds

(1) Step 1 Grants. The Agency shall pay 50% of the grant when an adequate facilities plan has been received by the Director. The balance shall be paid upon Agency and EPA approval of the facilities plan.

(2) Step 2 Grants. The Agency shall pay 50% of the grant when adequate plans and specifications have been received by the Director. The balance shall be paid upon Agency and EPA approval of the plans and specifications.

(3) Step 3 Grants

~~(h)~~ ~~(8)~~ (a) Installment payments may be requested from ~~the EPA and~~ the Agency when twenty-five (25) percent, fifty (50) percent and seventy-five (75) percent of the eligible construction, as measured by its cost, has been completed, or in accordance with a schedule and conditions agreed upon between the grantee, EPA and the Director. The Director shall authorize such proportional installment payment upon notification from the EPA that a federal installment payment has been authorized in a given amount.

(b) Installment payments at the fifty (50) percent level shall not be made until the applicant has in its employ for the operation of the project treatment works, a waste-water treatment works operator having a valid state certificate or one who is capable of obtaining such a certificate for operation of the designated class of treatment works within a reasonable period of time. State installment payments at the seventy-five (75) percent level, and beyond the seventy-five (75) percent level, shall be based on an assessment of~~, including but not limited to,~~ the applicant's development of and progress towards completion of an acceptable manual for operation and maintenance of the disposal system~~.~~ and the establishment of adequate pretreatment requirements and facilities. Final payment shall not be made until final inspection of the project by the Agency.

(c) The ~~perportional~~ proportional installment payment to be made by the Agency shall not be in excess of the overall federal-state project cost ratio as authorized by the

Agency and Director.

~~Installment payments shall not be made on the cost of eligible parts of sewer systems unless adequate treatment works exist or are under construction, nor shall such payments be made for projects which upon completion of construction will not be reasonably usable or effective without construction of additional works.~~

f. Retained Payment. The Agency may withhold Step 3 grant payments in the following circumstances:

(1) If the Director determines that a project does not substantially conform to approved plans and specifications and/or there has been a major breach of a condition in the grant agreement, the Agency may withhold all unpaid funds and may request EPA to do likewise.

(2) If the Director determines that a project does not conform to approved plans and specifications, but such nonconformity is not substantial, and/or there has been a minor breach of a condition in the grant agreement, the Agency may withhold up to 10% of unpaid funds and may request EPA to do likewise.

(3) If the Director determines that a project has any other deficiency, the Agency may withhold up to 10% of the unpaid funds.

(4) If funds are withheld pursuant to (1), (2) or (3) above and the condition causing such action has been

corrected to the satisfaction of the Director, then all retained funds shall be released to the municipality, unless otherwise agreed to by the Director and the municipality.

g. Funds Recovery. In addition to any other remedies, the Agency may seek to recover any or all funds tendered or disbursed for a project which is improperly designed, improperly constructed, or improperly operated and maintained.

h. Contract Assignment. The grantee shall retain the right to assign its contract with a contractor or engineer, and any or all rights pursuant thereto, to the Agency.

i. Contract Beneficiary. The contract between the engineer or contractor and the grantee shall provide that the Agency is a third-party beneficiary to their contract.

j. Cost of Administration. The Agency may use federal funds from the state's allotment, in such amount as authorized by the Act, for administration of the construction grants program.

k. Procedural Rules and Appeals. All requests for hearing, appeals, and other procedural matters not specifically provided for herein shall be governed by the Agency Rules of Procedure, the Rules of the Office of Hearing Examiners and other applicable law.

~~(j)~~ F. ~~Applications for Disposal System Planning and Construction Loans.~~ Construction Loan Program.

1. Application

~~(1)~~ a. The application form shall be of the type set forth below:

MINNESOTA POLLUTION CONTROL AGENCY

Division of Water Quality

Application for Disposal System Planning and/or Construction Loan	To be filled in by the State Date Received Project Number Loan Request

Legal Name of Applicant

Address, Zip Code

Hereby Makes Application to the Pollution Control Agency of the State of Minnesota for a Loan of Funds for the Planning and/or Construction of:

Financial Aspects:

Estimated Project Cost	$
State Loan Funds	
Local Funds	
Other Funds	

Project Schedule:

Project Starting Date

Time to Complete Project

Name and Title of ~~Representative~~ Official	Signature of ~~Representative~~ Official	Date

~~(2)~~ b. The planning loan application form shall be supported by the following attachments:

~~(aa)~~ (1) Resolution of the governing body authorizing the filing of the application and designating the ~~official~~ municipal ~~representative.~~ official authorized to sign the application.

~~(bb)~~ (2) Resolution of the governing body of the municipality obligating the municipality to repay the loan to the state treasurer in annual installments including both principal and interest, each in an amount sufficient to pay the amount due~~,~~ within five (5) years from user charges, taxes, special assessments, or other funds available to it.

~~(cc)~~ (3) Resolution of the governing body of the municipality obligating the municipality to establish rates and charges or the execution of contracts sufficient to produce the revenues pledged if required by the Agency.

~~(dd)~~ (4) Proposed method of loan repayment.

~~(ee)~~ (5) Proposed contracts for engineering, legal, planning and other consulting services.

~~(3)~~ c. The construction loan application form shall be supported by:

~~(aa)~~ (1) The attachments of ~~subsection (2)(aa) (cc) and (dd)~~ sections F.1.b.(1), (3) and (4) of this section and the items of section ~~(g)(5).~~ E.8.f. The Director for just cause may waive or defer the submission of any items required pursuant to section ~~(g)(5).~~ E.8.f. if such items are EPA requirements.

~~(bb)~~ (2) Resolution of the governing body of the municipality obligating the municipality to repay the loan to the state treasurer in annual installments including both principal and interest, each in an amount sufficient to pay the principal amount within twenty (20) years or lesser time interval if ~~found to be in the best interest of the state,~~ the amount of the annual payment will not justify the administrative expenses of processing the payment, from user charges, taxes, special assessments, or other funds available to it.

~~(4)~~ d. The loan application form and attachments shall be submitted in duplicate to the Agency at the address specified by the Director. Substantial deficiencies in the application and supporting documents or failure to conform with applicable requirements such as those set forth in the current Agency water pollution control program plan or the applicable basin, regional or area water quality management plan ~~or Agency policy requirements may~~ shall be grounds for rejection. Any construction loan application ~~may~~ shall be rejected at the discretion of the Agency if it does not include an engineering report acceptable to the ~~chief water pollution control engineer~~ Director, or does not include an adequate commitment for support of operation and maintenance of the project, or does not conform to the intent of the applicable statutes, or does not contribute to the overall objectives of effective water quality management, or is not considered to be in the best interests of the state.

~~(5)~~ e. Applications must be restricted to those projects or portions thereof for which service contracts or construction contracts can be awarded by June 1, ~~or other date as may be specified by the Director,~~ except in cases of advance approval by the Director, of the state fiscal year in which the

loan is applied for.

~~(6) Applications may be submitted at any time, unless otherwise specified by the Director.~~

~~(k)~~ 2. Administration~~. of State Disposal System Planning and Construction Loans.~~

~~(1)~~ a. The allocation of state funds shall be established in accordance with section ~~(i)(1)~~ E.4.b(1) and priority rating points assignable to loan applications shall be established in accordance with section ~~(1).~~ F.3. Funds allocable to loans shall be determined each fiscal year by the Agency on the basis of total availability and demand for federal matching ~~construction grants and construction grants and there shall not be set aside for loans more than five (5) percent of the total funds available in any fiscal year, unless the Agency by resolution determines that another percent level would be in the best interests of the state.~~ grants listed in Section D.1., 2., and 3.

~~(2)~~ b. Those planning applications which receive a priority rating sufficiently high in relation to available funds shall be tendered a state planning loan. Within sixty (60) days after the acceptance of the offer and award of contracts, for engineering, legal and other consulting services the state payment shall be made.

~~(3)~~ c. Those construction loan applications which receive a priority rating sufficiently high in relation to available funds shall be tendered a state construction loan. Within thirty (30) days after acceptance of the offer and award of the construction contract for the project, the state payment

shall be made.

~~(4)~~ d. Principal and interest, each in an amount sufficient to pay the principal amount within the loan period, shall be paid in equal annual installments to the state treasurer. Interest shall be calculated on the declining balance at ~~a rate not less than~~ the average annual interest rate on state bonds of issue from the proceeds of which the loan was made.

~~(5)~~ e. Priority ratings shall be established each fiscal year for those loan applications filed on or before ~~a date to be set annually by the Director;~~ the end of the state fiscal year. Applications postmarked or hand delivered after that day ~~may~~ shall be rejected. ~~at the discretion of the Director;~~

~~(6) Funds loaned to a municipality shall not be useable for the purpose of matching an offered federal grant where the same is ineligible under federal statutes or regulations;~~

~~(i)~~ 3. Criteria for Determining Loan Priority.

~~(i)~~ a. The loan funds set aside in any fiscal year shall be allocated in the ratio of twenty-five (25) ~~per cent~~ percent for planning and seventy-five (75) ~~per cent~~ percent for construction~~, unless the Agency by resolution determines that another ratio would be in the best interests of the state~~.

~~(2)~~ b. The determination of the order of priority for planning loan applications shall be in accordance with:

~~(aa)~~ (1) The criteria set forth in ~~section~~ sections ~~(i)(2)~~ E.2.d., E.3.c. and F.3.b.(2). ~~including subsection 2(ee), and bb of this subsection;~~

~~(bb)~~ (2) Technological Feasibility. Priority

points shall be assigned based on the ~~planning needs~~ completion of the planning studies as set forth below:

	Point Rating
~~(i)~~ (a) Sewer system evaluation which shall demonstrate to the satisfaction of the Director and Regional Administrator that each sewer system discharging into such treatment works is not subject to excessive infiltration/inflow, through an infiltration/inflow analyses and, where appropriate and authorized by the Regional Administrator, a sewer system evaluation survey.	50
~~(ii)~~ (b) Report on wastewater disposal concepts.	40
~~(iii)~~ (c) Regionalization evaluations.	30
~~(iv)~~ (d) Other planning activities including assimilation studies.	20

~~(3)~~ c. The determination of the order of priority for construction loan applications shall be in accordance with section ~~(i)(2), including subsection (2)(ee).~~ E.2.d. and E.3.c.

~~(4) The numerical rating points~~ established ~~in subsection (2) and (3) of this section shall be subject to readjustment in value for any category or class prior to the deadline date for acceptance of applications established in section (k)(5) if it is determined to be in the best~~

~~interests of the state by resolution of the Agency. At least thirty (30) days notice of such proposed readjustments shall be furnished to all persons registered on the appropriate list maintained by the Secretary of State, and all persons wishing to do so shall be given an opportunity to present their views on the proposals to the Agency prior to final Agency action.~~

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 13 1978
Secretary of State

APPROVED AS TO FORM AND LEGALITY

OCT. 12 1978 19

WARREN SPANNAUS, ATTORNEY GENERAL

BY Ira E. Shudy

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 13 1978
James Andrew Hove
Secretary of State
8:50 AM

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

September 8, 1978

Mr. Lee Sheehy
Special Assistant Attorney General
G-19K Administration
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program, No. PCA-78-010-HK

Dear Mr. Sheehy:

Enclosed is a copy of the Agency's Memorandum in Support of Adoption of Rules in regard to the above-entitled matter.

Also enclosed is an excerpt from the minutes which have been prepared for the August 1, 1978, and the August 29, 1978, meetings of the Agency Board. These minutes are still in draft form as they are subject to approval by the Agency Board.

Yours very truly,

Marlene Senechal

Marlene E. Senechal
Special Assistant
Attorney General

MES:ms

Enclosures

P.S. I would appreciate a copy of any other briefs submitted in regard to this matter.

EXCERPT OF MINNESOTA POLLUTION CONTROL AGENCY
BOARD MEETING OF AUGUST 1, 1978,
CONCERNING MINN. REG. WPC 34

Water Quality

Consideration of Findings of Fact and Adoption of Revised Regulations for Administering the Construction Grant Program (WPC-34)

Marlene Senechal appeared before the Board at this time to discuss this Agenda item. She said she represented the staff at the hearing and was presenting the staff's Proposed Findings and Conclusions which were somewhat different than the Hearing Examiner.

Ms. Senechal said that she felt the Hearing Examiner gave little credance to the testimony of the staff and that the basic purpose of the amended Water Quality Act was still to control pollution and adopt standards that were fair to all areas of the state. She said the"25 per cent set-aside" for sewers was not required by the Federal Act in determining the Agency's priority system.

Ms. Barbara Luckermann, Chairperson of the Metropolitan Waste Control Commission, appeared before the assembly and referred to a memorandum from the Commission dated August 1, 1978. She advised that the Commission does not recommend adoption of either the Hearing Officer's or the staff's Findings of Fact, Conclusions and Proposed Order Adopting Rules without an amendment. She pointed out that the proposed amendments are to Findings 24, 32 and 44 and the Proposed Order Adopting Rules. According to Ms. Luckermann, the two main points of differences are first, a 25 per cent set-aside of funds for interceptor sewers should be incorporated in the regulations; and secondly, the Municipal Needs List and the Metropolitan Municipal Priority List should be indicated as those needs and projects identified in the Area-wide Water Quality Management Plan prepared pursuant to, and in accordance with, Section 208 of the Water Quality Act and guidelines and regulations thereto.

She suggested that in Section E 2d(2) the word "federal" be changed to "the latest state demographer's estimate." In this connection, Mr. Engelbrecht suggested substituting the word "reliable" for the word "federal."

Mr. Gene Franchette, Division of the Dept. of Physical Planning Council, addressed the Agency next and alluded to a letter from Mr. Boland to Chairman Grinnell dated August 1, 1978. He reported the Council agreed with the presentation of Ms. Luckermann and didn't think that any differences or dispute should delay the Council's present schedule of construction.

John Hoett, Assistant Attorney for the Metropolitan Council, indicated there were two possibilities for lawsuits over the proposed WPC-34 regulation, i.e., the reasonableness of the regulation and the 25 per cent set-aside requirement.

Mayor George Latimer of St. Paul addressed the Agency at this time and discussed a letter he had written to the Agency dated July 26, 1978. He said he agreed with the position of the Metropolitan Council and the Metropolitan Waste Control Commission. He also indicated his strong support for the 25 per cent set-aside for sewer construction and said the Congressional intent has always been to address the problems of the older cities to prevent decaying sewers from creating health hazards.

The next speaker to address the Agency in this regard was Dr. Stephen Chapman on behalf of Clear Air, Clear Water-Unlimited. He expressed concern over the attempt by the Metro Waste Control Commission to be included specifically by name in Regulation WPC-34 and to have the Commission propose to use its own engineers for resident inspection. He felt there was a need to stimulate engineers in the sanitary engineering field rather than in government service.

Dr. Chapman apprised the Board that he was in agreement with the staff's recommendations.

In discussion of the matter and in response to questions, Duane Anderson of the Water Quality Division and Eldon Kaul both indicated that the 25 per cent set-aside, as used in Minnesota, was a matter of interpretation of the law and also an Agency policy matter.

Board discussion preceded this motion by Mr. Engelbrecht:

> BE IT RESOLVED that the Minnesota Pollution Control Agency hereby approves and adopts the staff's proposed Findings of Fact and Conclusions in the matter of the proposed amendment to Minn. Reg. WPC-34 regarding the administration of the construction grants and loans program and hereby approves and adopts amendments to Minn. Reg. WPC-34 as finally amended by the staff's proposed Order Adopting Rules including the following changes in the proposed Order and Regulation:
>
> 1. p. 4, line 6 change "over $10,000,000" to "10,000,000 or over" (same change in proposed findings, p. 13, line 26).
>
> 2. p. 6, line 13 change "accoridng" to "according."
>
> 3. p. 7, line 12 change "may" to "shall"
>
> 4. add p. 6a -- Section E.3.c.(1)(g) (2.S.R. 1743) change "may" to "shall"
>
> 5. Add p. 10a. -- Section E.4.b(3) (2.S.R. 1744) change "may" to "shall"
>
> 6. p. 11, line 16 -- change "may" to "shall"
>
> 7. p. 12, line 2, change "may" to "shall"

8. P. 16, line 18 -- change "may" to "shall"

9. p. 17, lines 4 and 17 -- change "may" to "shall"

10. Add p. 20a. Section F.1.d. (2.S.R. 1750), change "may" to "shall"

11. P. 24, line 21 -- Change "25" to "26"

12. p. 26, line 8 -- change "ranged" to "rated"

13. Section E.2.d.(3) -- change "federal" to "reliable"; and

BE IT FURTHER RESOLVED that Joseph F. Grinnell, Chairman of the Agency, and the Executive Director, Sandra S. Gardebring, be and hereby are authorized to sign the Findings of Fact and Conclusions and Order Adopting Rules in the matter of the proposed amendment to Minn. Reg. WPC-34.

The motion was seconded by Ms. Buckmann and when put to a vote, it carried unanimously.

EXCERPT OF MINNESOTA POLLUTION CONTROL AGENCY
BOARD MEETING OF AUGUST 29, 1978,
CONCERNING MINN. REG. WPC 34

Ms. Marlene Senechal, Special Assistant Attorney General, appeared before the Agency. She stated that copies of the Chief Hearing Examiner's Report on amendments to WPC 34 had been distributed to all members of the Board and notice of its availability given to all those persons who made an entry into the record, either oral or written.

Mr. Kaul indicated the procedural posture was the same as that for the proposed hazardous waste regulations which were considered and acted upon earlier in the meeting. The matter, as one alternative, could be presented directly to the Attorney General as there are legal questions to be resolved. Ms. Senechal stated that the staff had reviewed the Chief Hearing Examiner's Report and could not agree with it and therefore recommended submitting the matter directly to the Attorney General. She said there were six (6) provisions which the Chief Hearing Examiner indicated were substantial changes or he regarded as not needed or reasonable. He stated these six provisions should either be removed or another public hearing on the changes should be held. Ms. Senechal then reviewed briefly the six items and indicated why the staff disagreed with the Chief Hearing Examiner. She then recommended the matter be referred to the Attorney General with the comments of the staff. She recommended that the last part of Finding No. 21 be deleted and listed ten minor amendments to the Order Adopting the Rules.

After considerable discussion Mr. Zentner moved and Ms. Watson seconded the following resolution which passed unanimously:

BE IT RESOLVED THAT the Board hereby makes the following amendment to the Findings of Fact and Conclusions:

1. Finding No. 21 - the last line of this finding shall be deleted.

BE IT FURTHER RESOLVED THAT the Board hereby makes the following amendment to its Order Adopting Rules:

1. p. 2 (Section WPC 34 A.) add the word "construction"

2. p. 3 (Section B.10) add "all"

3. p. 6 (Section E.3.a.) capitalize the word "municipal"

4. p. 7, p. 11, p. 12, p. 16, p. 17 (Sections E.3.c.(1)(i), E.4.b.(4), E.4.c., E.8.g., E.9.a.) indicate by strikeout and underlining that "shall" has been added and "may" has been deleted.

5. p. 11 (Section E.4.b(2)) change "206" to "216"

6. p. 13 (Section E.6.b.) change "b" to "a"

7. p. 18 (Section E.9.e.(3)(b)) add "and beyond the seventy-five (75) percent level"

8. p. 19 (Section E.9.g.) underline "the"

9. p. 22 (Section F.2.a.) underline "grants listed in Section D.1., 2., and 3."

10. p. 24 - p. 28 (Appendix A) underline entire appendix

BE IT FURTHER RESOLVED that the Chairman and the Executive Director are hereby authorized to sign an amended Findings of Fact and Conclusions and Order Adopting Rules in a form which reflects the above amendments.

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Rule WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

MINNESOTA POLLUTION CONTROL AGENCY MEMORANDUM IN SUPPORT OF ADOPTION OF RULES

INTRODUCTION

Minn. Rule WPC 34 governs the administration of the allocation of federal construction grants in Minnesota as well as the state construction grants and loans program. Pursuant to priorities established in the Rule, 1/ funds are disbursed to municipalities in the State for the purpose of planning, designing and constructing sewage disposal systems.

On March 17 and 20, 1978, the Minnesota Pollution Control Agency (hereinafter "Agency") gave notice that a hearing would be held regarding proposed amendments to Minn. Rule WPC 34. The notice indicated that the proposed amendments would, if adopted:

(1) reflect changes in federal law pursuant to 1977 amendments to the Federal Water Pollution Control Act;

(2) amend the criteria for determining the priority of municipalities and projects on the Municipal Needs List and the Municipal Project List;

1/ Priority points are awarded on the basis of: (a) extent and nature of pollution; (b) population affected; (c) segment of receiving water; (d) category of project; (e) financial aspects; and (f) participation in multi-district systems. Minn. Rule WPC 34 E.2.d. and E.3.c.

(3) provide for greater public participation prior to the adoption of the Municipal Needs List and the Municipal Project List;

(4) provide for Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained;

(5) amend other provisions of the regulation for purposes of clarification and more efficient administration of the programs.

MPCA Ex. 3, 3A & 3B.

Hearings were held on the proposed amendments April 21, 24, 25 and 26, and May 8, 1978. The Hearing Examiner's Report was issued June 14, 1978. On August 1, 1978, the Agency adopted amendments to Minn. Rule WPC 34. As required by Minn. Stat. §15.052 subd. 4 (1977 Supp.) the amendments to the Rule were submitted to the Chief Hearing Examiner for his review. On August 14, 1978, the Chief Hearing Examiner issued his report and memorandum.

The Chief Hearing Examiner concluded that all or part of six provisions 2/ of Minn. Rule WPC 34, as adopted, involved substantial changes and/or were not shown to be needed and reasonable. See Report of the Chief Hearing Examiner, Findings 7-11 and 12B; Conclusions 1-5 and 7. Certain other provisions, 3/ which the Hearing Examiner found were not shown to be needed and reasonable, were

---

2/ These provisions are: (a) errors and omissions insurance (sections B.18, E.8.d.(7), E.8.e.(5) and E.8.d.(6); (b) determination of population (section E.2.d.(2)); (c) list of segments (section E.2.d.(3) and Appendix A); (d) grant increases (section E.9.b.(2)); (e) contract assignment (section E.9.h.) and (f) public participation (section E.7.).

3/ These provisions are: (a) priority of programs (section D) and (b) funding on non-treatment works (sections E.3.c. and E.4.b.(2)).

specifically found by the Chief Hearing Examiner to be needed and reasonable. Id., Findings 12A and 12C, Conclusion 6.

The Agency considered the Report of the Chief Hearing Examiner at its August 29, 1978, meeting. 4/ The Agency generally agrees with Conclusion No. 6 5/ of the Chief Hearing Examiner but, for the reasons set forth herein, the Agency respectfully suggests that the Chief Hearing Examiner's Conclusions Nos. 1-5 and 7 are erroneous. The Agency also believes that the Chief Hearing Examiner's determination is advisory only and, accordingly, the Agency has submitted the rules to the Attorney General for his review pursuant to Minn. Stat. §15.0412 subd. 4 (1977 Supp.)

ARGUMENT

I. THE DETERMINATION OF THE CHIEF HEARING EXAMINER IS ADVISORY ONLY AND IS NOT BINDING ON THE AGENCY

Minn. Stat. §15.052 subd. 4 (1977 Supp.) provides in part that the Office of Hearing Examiners shall establish a procedure whereby "the proposed final rule of an agency shall be reviewed by the Chief Hearing Examiner to determine whether or not a new hearing is required because of substantial changes or failure of the agency to meet requirements of section 15.0412, subdivision 4."

4/ At this meeting, the Agency also amended its Order Adopting Rules to correct certain typographical errors. These changes are insubstantial and are of the type the Revisor of Statutes is authorized to make in regard to legislative enactments. Minn. Stat. §648.34 (1976).

5/ The Agency agrees that the need for and reasonableness of prioritizing projects has been established. For the reasons set forth in Findings No. 35 and 44, Agency Findings of Fact and Conclusions, the Agency does not agree that funding of non-treatment works projects will be foreclosed. See also Section II.G. infra.

(Emphasis added.) The question then is whether this determination is binding on the Agency.

Under Minn. Stat. §15.052 subd. 3 (1976), the Hearing Examiner has the power to issue a report and to recommend a course of action to the Agency. Notwithstanding the fact that the Hearing Examiner alone has heard all of the evidence, he has power to issue only an advisory opinion as to whether the burden of proof has been sustained by the Agency. The Agency may accept, modify, or reject the recommendations of the Hearing Examiner in whole or in part. Cf. Minn. Reg. MPCA 9(q)(4)(1973)(setting forth the Agency's power in contested cases). If the Chief Hearing Examiner, following Agency action, has power to reweigh the evidence and determine which aspects of the Agency's decision are supported by or not supported by the evidence, he has a veto authority which usurps the Agency's decisionmaking power. Under such a scheme, the Chief Hearing Examiner would be in a position to determine the content of all rules adopted by all agencies in the State of Minnesota. The Agency respectfully submits that the legislature could not have intended and did not intend that the Chief Hearing Examiner would play such a role, and that Minn. Stat. §15.052 subd. 4 (1977 Supp.) cannot be read so broadly as to give him that power.

The present case demonstrates the impropriety of such broad veto powers over the Agency's substantive decisions. Without the objection of any person or group, and without the assistance of briefs or other arguments by the participants in the rulemaking proceedings, and without any assurance that ex parte contacts did

not occur, the Chief Hearing Examiner has, in effect, reversed portions of several of the Findings of Fact made by the Agency Board. Judicial review resulting in a reversal of Agency action can only be accomplished under strict procedural rules affording opportunities to file briefs and submit argument. See, e.g., Special Rule of Practice of Fourth Judicial District 4(d)(1977); Minn. R. Civ. P. 56. Similarly, the Attorney General's review under Minn. Stat. §15.0412 subd. 4 (1977 Supp.) is accompanied by strict procedural protections allowing all interested persons to be fully heard by the Attorney General. See Minn. Rule Atty. Gen. 305(c)(1971). The Chief Hearing Examiner's review activities afford no procedural protections whatsoever.

The Attorney General's interpretation of his own power under Minn. Stat. §15.0412 subd. 4 (1977 Supp.) to review the substantive contents of rules is far less intrusive of Agency decisionmaking authority than the powers claimed by the Chief Hearing Examiner in this case. Minn. Rule Atty. Gen. 305(b)(2)(1971) provides:

> Regarding legality, the rule shall be disapproved if it:
>
> (aa) Exceeds the statutory authority conferred or the required conditions [of statute] have not been met.
>
> (bb) Conflicts with the governing statute or other relevant law.
>
> (cc) Has no reasonable relationship to statutory purposes.
>
> (dd) Is unconstitutional, arbitrary or unreasonable.

Significantly, the Attorney General has not interpreted his review power to include authority to reweigh the evidence to determine whether it demonstrates the need for and reasonableness of the

rules; at most, the Attorney General can disapprove of the rules when he affirmatively determines that the rules are, in fact, unreasonable. The Agency respectfully submits that the Attorney General's interpretation of his own review power is proper and that the Chief Hearing Examiner's conclusion that his power of review under the statute significantly exceeds that of the Attorney General is erroneous. The Chief Hearing Examiner's sweeping exercise of his limited review powers in the present case has profoundly and impermissibly usurped the decisionmaking power of the Agency charged with responsibility for promulgating these rules.

Furthermore, the legislature knows how to make the report of the hearing examiner binding on the agency and the phrase "to determine" as is used in Minn. Stat. §15.052 subd. 4 (1977 Supp.) is not the way it is done. In Minn. Stat. §363.071 subd. 1 (1976), involving hearings by the Department of Human Rights, the legislature said "the report of the hearing examiner shall be binding on all parties to the proceedings." (Emphasis added.) In Minn. Stat. §15.0412 subd. 4 (1977 Supp.) the legislature said that if the Attorney General does not approve a rule, "the rule shall not be filed." In the Agency's view the statutory authority of the Chief Hearing Examiner to review a rule and determine whether there is compliance with applicable procedures, after the hearing examiner has made only a recommendation and after the agency has made its final decision and before the Attorney General conducts his review, is not authority to make a binding decision on the Agency.

The Agency realizes that the Rules of the Office of Hearing Examiners, old HE 108 and new HE 111, could be read to require the Agency to reconvene the hearings whenever the Chief Hearing Examiner so demanded. However, the authority of the Chief Hearing Examiner can be no broader than that given to him in the statutes. See State, by Spannaus, v. Lloyd A. Fry Roofing Co., 246 N.W.2d 696 (Minn. 1976). The statutes do not justify such a reading of the rules.

It should be pointed out that a conclusion that the Chief Hearing Examiner's determination is only advisory and not binding would not allow the Agency to ignore the Chief Hearing Examiner. The Attorney General must still conduct his review and if the Attorney General agrees with the Chief Hearing Examiner that substantial changes have been made or that the Agency has not complied with the applicable procedures, the Attorney General will not file the rule and it will not become effective. On the other hand, if the Chief Hearing Examiner's determination were binding, the Attorney General would be usurped of his review because the Agency could not send the rule to the Attorney General until the Agency had complied with the Chief Hearing Examiner's directive.

The Agency has acted properly in considering the Chief Hearing Examiner's determination only advisory. The Attorney General should now proceed to determine whether the Agency has complied with all rulemaking requirements, and in so doing, determine whether the Chief Hearing Examiner or the Agency is correct on the merits.

II. THE RULES, AS ADOPTED, HAVE BEEN SHOWN TO BE NEEDED AND REASONABLE AND DO NOT INVOLVE SUBSTANTIAL CHANGE

A. Introduction

The Agency believes that the record amply supports the need for and reasonableness of the rules as adopted. See Conclusion D, Agency Findings of Fact and Conclusions. Furthermore, in adopting the proposed amendments, consideration was given to the issue of substantial change. The Agency does not believe that the amendments, as adopted, are substantially different from those proposed. Conclusion E, Id. Therefore, this memorandum will not discuss each and every provision of the rules 6/ but will, instead, focus on the provisions cited in the Report of the Chief Hearing Examiner. 7/ At the outset, however, it is necessary to make a few preliminary observations regarding the standards by which need, reasonableness and substantial change should be determined.

1. The Rules, As Adopted, Must be Supported by the Record

The Agency recognizes that it has an obligation to make an affirmative presentation of facts establishing the need for and reasonableness of its rules. Minn. Stat. §15.0412 subd. 4 (1977 Supp.) The record of the proceedings must support the rules as

---

6/ Citations to the record supporting provisions in the rule not discussed in this memorandum can be found in the Agency Staff's Post-Hearing Comments to the Hearing Examiner, (Comment A) and in the Staff's Memorandum to the Agency Board, July 22, 1978.

7/ Finding No. 12C is not discussed herein as the Chief Hearing Examiner made no conclusion in regard thereto and the issue was uncontested at the hearing.

adopted. Minn. Rule Atty. Gen. 303(c)(1971). The Chief Hearing Examiner, however, seems to be of the opinion that even more is required. His report appears to require that if the language adopted differs from the language proposed, not only must the record show that the language adopted is reasonable and needed. He also appears to require the record to document the reasons for each change in the rule as proposed. 8/

For example, Minn. Rule WPC 34.E.9.h., as proposed, required a municipality to retain its right to assign its "rights, duties and obligations" under its contract to the Agency. (emphasis added). The rule, as adopted, deleted the words "duties and obligations." The Chief Hearing Examiner concluded that the Agency had failed to make an affirmative presentation of facts establishing the need for and reasonableness of the deleting the phrase. This is simply not required. All that is required is that the record support the rule as it was actually adopted. Under certain circumstances, of course, a deletion or addition could constitute a substantial change. However, that is an entirely different issue than need and reasonableness.

In determining whether or not the Agency has shown the rules to be needed and reasonable, it must be kept in mind that in a rulemaking proceeding, most of the facts are legislative facts,

---

8/ That is to say, if the Agency proposed "A" and ultimately adopts "B", the Chief Hearing Examiner requires more than just a showing that "B" is needed and reasonable. He also requires a showing of the need and reasonableness of going from "A" to "B". The latter showing is not required by statute or regulation.

i.e., policy decisions and judgments. As such, there is no one right answer. There may, instead, be a number of reasonable answers. Therefore, the Agency need only show that its answer is reasonable. It need not show that it is the only answer.

A rule is needed if it is a means to achieve an authorized goal of the Agency in carrying out its statutory duties and responsibilities.

2. Not All Changes are Substantial Changes

The rulemaking process is designed to both provide information to the public as well as to allow the public to provide information to the Agency. Unless the Agency is allowed to propose some changes during the hearing in response to public concerns raised in that hearing, the public's right to provide information is essentially meaningless. If no changes are allowed in response to public comment, the hearing process becomes a mere formality for affirming an unchangeable Agency position. Alternatively, the Agency could engage in a never-ending cycle of rulemaking hearings on new rules incorporating changes proposed in the last rulemaking hearing. The Agency does not believe that either of these options was intended by the legislature. Rather, the Agency believes that the rules, as adopted, should be reviewed for substantial change by a reasonable standard which will allow the rulemaking process to function in a viable manner.

The standards for review for substantial change are set out in the Rules of the Office of the Hearing Examiners. Minn. Rule HE 108 provides that substantial change is to be determined by considering the degree to which the adopted rule:

(1) Affects classes of persons not represented at the previous hearing; or

(2) Goes to a new subject matter of significant substantive effect; or

(3) Makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; or

(4) Results in a rule fundamentally different from that contained in the Notice of Hearing.

It seems clear that these considerations should not lead to the determination that all changes are substantial changes. Rather, it is only when adoption of changes, without further hearing, would affect the rights of persons in such a way as to violate the principle of due process that such changes should not be allowed.

In reviewing the rules in regard to substantial change, the Agency believes it is also important to consider not only the notice that was given in regard to the original hearing, but also the notice of and the opportunity to participate in subsequent Agency and other administrative action in regard thereto. Throughout the hearing on Minn. Rule WPC 34, the Agency has gone well beyond its statutory duty in providing notice to and an opportunity to participate by members of the public. In addition to mailing the notice of hearing to persons and organizations on the Secretary of State's List, as required by Minn. Stat. §15.0412 subd. 4 (1977 Supp.), the Agency also sent notice to individual municipalities and engineers, the classes of persons most affected by the rule. MPCA Ex. 7.

All persons at the hearing were given the opportunity to indicate if they wished to be informed when; (1) the Hearing Examiner's report was available; (2) the Agency would consider the adoption of the proposed amendments; and, (3) the rule was sent to the Attorney General for review. Tr. at 5, 185, 189, 236-237, 350. All persons who requested such notification as well as those who participated in the hearing through oral or written comments were given the following notices: 9/

(1) June 16, 1978 - notice of the availability of Report of the Hearing Examiner (copy made available upon request).

(2) July 11, 1978 - notice of consideration of Report of the Hearing Examiner and the adoption of proposed amendments to Minn. Rule WPC 34 at August 1, 1978, meeting; notice regarding written and oral comments or statements to the Agency regarding evidence in the record, pursuant to Minn. Rule MPCA 13(a)(2)(ii); notice that Agency Staff not in agreement with portions of Hearing Examiner's Report and would submit a recommendation and memorandum to the Agency Board. (copies of agenda and Staff memorandum and recommendation made available upon request.)

(3) August 16, 1978 - notice of the availability of the Report and Memorandum of the Chief Hearing Examiner (copy made available on request.); notice of consideration of the Chief Hearing Examiner's Report at the August 29, 1978, Agency Board

---

9/ Copies of such notices together with the mailing lists therefor were transmitted to the Attorney General together with the record.

meeting; notice that if the Agency Staff prepared a memorandum in regard to the Chief Hearing Examiner's Report, it would be available upon request (no Agency Staff memorandum was prepared prior to the August 29, 1978, Board meeting.)

(4) September 1, 1978 - notice of transmittal of record to the Attorney General for his review; notice of right to submit briefs to the Attorney General; notice of Agency's intent to file brief (copy made available upon request).

The Agency adopted the proposed amendments to Minn. Rule WPC 34 at its public meeting, August 1, 1978. A number of written and oral statements and comments were presented to the Agency prior to such adoption. 10/ The Report and Memorandum of the Chief Hearing Examiner was also considered at a public meeting of the Agency held on August 29, 1978. Thus, it is abundantly clear that members of the public have had adequate notice of and an opportunity to participate in each stage of these proceedings.

B. Errors and Omissions Insurance: Minn. Rule WPC 34.B.18; E.8.d.(7), E.8.e.(5), and E.8.f.(6) (Finding No. 7; Conclusion No. 1) 11/

Minn. Rule WPC 34.E.8.d.(7), E.8.e.(5) and E.8.d.(6) were included in the rule as proposed for hearing. These sections require engineers to carry "adequate errors and omissions insurance" during all phases of the planning, design and construction of a municipal disposal system. In response to concerns

---

10/ Copies of such written comments and statements were transmitted to the Attorney General together with the record. A copy of the draft minutes of the August 1 and August 29, 1978, Board meetings were also submitted.

11/ References to Findings and Conclusions in this heading and subsequent headings refer to the Report of the Chief Hearing Examiner.

raised by participants at the hearing, the Agency Staff proposed a definition of "adequate errors and omissions insurance in its post-hearing comments. 12/

In regard to these provisions, the Chief Hearing Examiner concluded that:

> (a) the Agency failed to make an affirmative presentation of facts establishing the reasonableness of the requirement that engineers carry "adequate errors and omissions insurance";
>
> (b) the Agency failed to make an affirmative presentation of facts establishing the reasonableness of the definition of "adequate errors and omissions insurance";
>
> (c) the definition adopted by the Agency is a substantial change from the rule as proposed.

1. The Agency has demonstrated the reasonableness of the "adequate errors and omissions insurance" requirement

The reasonableness of requiring adequate errors and omissions insurance is amply supported by the record. Indeed, the Hearing Examiner, Howard L. Kaibel, Jr., found that, " . . . on balance, the Agency has documented the need for and reasonableness of these provisions . . .." Report of Hearing Examiner, p. 5. A significant number of construction grant projects have been improperly

---

12/ Comment A, pp. 22-23, May 12, 1978.

designed and constructed. Beaton, prepared testimony at 8. 13/ The insurance coverage requirement was added to ensure that there will be a fund from which recovery can be made if the engineer makes an error or omission in regard to the wastewater treatment facility. Anderson, prepared testimony at 16. 14/ See also Findings 18, 26, and 56, Agency Findings of Fact and Conclusions.

It is reasonable to require engineers to carry such insurance at all three stages of the planning, design and construction of the project as errors or omissions can occur at any or all of the three stages. 15/ Anderson, Tr. at 139-140. For example, at Step 1, errors and omissions regarding the infiltration/inflow analysis 16/ and/or the sewer system evaluation survey 17/ could have a major impact on the design of the treatment plant. At Step 2, all of the major design work is done. And, at Step 3, the engineer is required

---

13/ The prepared testimony of Perry T. Beaton is bound into the transcript following page 22.

14/ The prepared testimony of Duane Anderson is bound into the transcript following page 84.

15/ The construction of a disposal system under the construction grants program is generally completed in three stages: Step 1 (facilities planning, which involves an investigation of the area's wastewater treatment problems and the selection of the least costly and yet environmentally sound alternative); Step 2 (preparation of plans and specifications for the project); and Step 3 (actual construction of the project). Beaton, prepared testimony at 3.

16/ See 40 C.F.R. §35.927-1 for a discussion of this term.

17/ See 40 C.F.R. §35.927-2 for a discussion of this term.

to provide resident inspection to ensure that the project is built in conformity with approved plans and specifications. Comment A, p. 23. See also Finding 56, Agency Findings of Fact and Conclusions.

Contrary to the Chief Hearing Examiner's finding, the Agency did provide evidence regarding the availability of such insurance and the costs associated therewith. A witness for the Agency testified that, according to the Consulting Engineers Council, 18/ most engineers in the State already carry such insurance. Beaton, Tr. at 382. At least one engineer who testified at the hearing confirmed this fact. Trygstad, Tr. at 383. Contrary to the Chief Hearing Examiner's finding, this fact was uncontradicted, although there was testimony to the effect that some firms do not carry such insurance. Augustin, Tr. at 200-207, Comment K, (discussion of cost of insurance; no mention of number of firms carrying such insurance.); Trygstad, Tr. at 383 ("most engineers carry [errors and omissions insurance] anyway."); Betts, Tr. at 418, Comment D at p. 3. (" . . . not all firms have a claims record sufficient to justify the [errors and omissions] insurance . . .."); Trygstad, Comment B, p. 3 (" . . . many engineering firms do not carry such insurance because of the costs involved."); See also Finding 56, Agency Findings of Fact and Conclusions. Therefore, since most engineers already carry such insurance, it is only logical to infer that it is obtainable.

18/ The Consulting Engineers Council is a professional organization of consulting engineers. Letter, Consulting Engineers Council to Minnesota Pollution Control Agency Board, July 27, 1978. (This letter was a written comment presented to the Agency Board prior to its August 1, 1978, adoption of these rules.)

The Agency addressed the issue of costs quite fully in its post-hearing statement. See Comment A. According to this uncontradicted evidence, it is not possible to ascertain the exact cost of such insurance in regard to a specific engineer or a specific project. The cost of errors and omissions insurance varies. Rates are based on the type of project, the value of the project, the past work history of the insured, the record of claims of the insured, the amount of deductible, and other factors. Comment A, p. 23. See Finding 56, Agency Findings of Fact and Conclusions. However, since most engineers already carry such insurance, this requirement should not impose significantly increased costs in regard to most projects. Only 10% of any increased costs due to this requirement will be borne by local units of government since errors and omissions insurance is a grant eligible item. 19/ Anderson, Tr. at 133, 423. See also Finding 56, Agency Findings of Fact and Conclusions.

Therefore, this requirement will not impose an unreasonable burden on engineers or an unreasonable cost on local units of government. The benefits which will result from this requirement seem, at least, commensurate with any increased costs. The reasonableness of errors and omissions insurance requirement is amply supported by the record, as is its application to all three stages of the construction process.

19/ Pursuant to 33 U.S.C. §1251 et seq. and Minn. Stat. §116.16 et seq. (1976 and 1977 Supp.), federal and state construction grants will provide 90% funding for the eligible costs of such projects.

2. The Agency has demonstrated the reasonableness of the definition of "adequate errors and omissions insurance."

The Agency proposed a definition of the term "adequate errors and omissions insurance" in response to requests to do so by members of the public. Betts, Tr. at 418-419, Johnson, Tr. at 464-466. Specifically, inquiries were made as to the amount of coverage for single and multiple projects and the length of time such coverage would be required. Id. See also, Augustin, Tr. at 200-206. In fact, the Hearing Examiner requested the engineers who testified at the hearing to submit suggestions or proposals regarding such definition. Id. However, the only proposed definition was submitted by the Agency in its post-hearing comments. Comment A, pp.22-23.

The definition proposed and adopted by the Agency establishes an amount of coverage and length of time such coverage is required for single and multiple projects. See Comment A, pp. 22-23; Agency Order Adopting Rules, pp. 3-4. Thus, the definition addresses the specific concerns raised at the hearing. These provisions are reasonable in that a certain amount of coverage is necessary to provide a fund from which recovery can be made if the project is improperly designed and the minimum length of time is necessary to allow recourse in regard to design defects which are not immediately apparent. Comment A, p. 23. See also Finding 26, Findings of Fact and Conclusions.

The definition also provides that a lesser amount of coverage may be accepted if an insurance company refuses to provide the required amount of coverage to an engineer. This is reasonable because situations can arise in which it would be unreasonable to require that amount of coverage. For example, it is often difficult for a

new engineer to obtain coverage if he/she has no work history on which rates may be based. Id.

Therefore, it is clear that the definition of "adequate errors and omissions insurance" is reasonable. It was proposed in direct response to requests from members of the public and it addresses to specific concerns raised by members of the public. The specific provisions of the definition are reasonable for the reasons stated above.

3. The definition of "adequate errors and omissions insurance" is not a substantial change to the rule as proposed

The Chief Hearing Examiner found that the definition of "adequate errors and omissions insurance" was a substantial change because: (1) it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction; (2) it results in a rule fundamentally different from the proposed rule; (3) the amendment was not proposed in such a fashion as would allow comment and reaction from an affected class of persons 20/ (i.e. engineers). The Agency believes these conclusions are erroneous.

The definition does not make a major substantial change in the proposed rules. Adequate errors and omissions insurance was specifically required by the proposed rules. The definition neither adds an additional requirement nor eliminates an existing requirement. 21/ It merely clarifies what is meant by the term. It was the

---

20/ It should be noted that this is not a consideration listed in Minn. Rule HE 108. The Chief Hearing Examiner has apparently combined considerations (1) and (3) in the rule to reach this conclusion.

21/ It should be noted that imposing an additional requirement or eliminating an existing requirement would not necessarily constitute a substantial change.

undefined term in the proposed rules which invited and resulted in reaction from the public. It was in response to this reaction that the definition was proposed and adopted.

For essentially the same reasons, the definition does not result in a rule fundamentally different from that which was proposed. The definition imposes no additional requirement and affects no additional class of persons.

Any person who participated at the hearing had an adequate opportunity to respond to the proposed definition prior to its adoption by the Agency. The Agency's post-hearing comments, with the proposed definition, were submitted 3 days prior to the close of the record. As noted above, all persons who requested notification as well as those who participated in the hearing through oral or written comments were given notice of all subsequent Agency and other administrative action in regard to the proposed amendments. All interested persons were given the opportunity to participate at each stage of the proceedings.

A number of written and oral statements and comments were presented to the Agency prior to its August 1, 1978, adoption of the amendments to Minn. Reg. WPC 34. None of these statements and comments, which included a comment from the Consulting Engineers Council of Minnesota, raised any objection to the proposed definition of adequate errors and omissions insurance.

Therefore, interested and affected persons did have an adequate notice of all proposed Agency action and had an adequate opportunity to react to and comment on the proposed definition. As noted above, there were no comments in regard to the proposed definition.

In summary, the definition is not a substantial change from the rule as proposed as it neither imposes an additional requirement nor eliminates an existing requirement, it affects no additional class of persons, and all interested and affected persons had an adequate opportunity to react to and comment upon the definition prior to its adoption.

C. Determination of Population: Minn. Rule 34.E.2.d.(2) (Findings No. 8, Conclusion No. 2)

Minn. Rule 34.E.2.d.(2) awards priority points on the basis of the population affected by the proposed project. The rule as proposed determined the population by the most recent federal census. The rule as adopted provides that the population will be determined by the most recent reliable census. The Chief Hearing Examiner found that: (1) the Agency failed to make any presentation of facts establishing the need for or reasonableness of the proposed amendment, and (2) the amendment was a substantial change from the rule as proposed because: (a) it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; (b) it results in a rule fundamentally different from the proposed rule; and (c) the amendment was not proposed in such a fasion as would allow comment and reaction from an affected class of persons (i.e., municipalities). 22/ The change in wording does not appear in the actual hearing record which, pursuant to Minn. Rule HE 105, closed on the date of the last written statement to the Hearing Examiner. However, the record of the proceedings before the Agency does include and support the change in wording. In any event, the change is insubstantial.

Pursuant to Minn. Rule HE 107, the following documents were submitted to the Chief Hearing Examiner for his review: order

---

22/ See footnote 20.

adopting rules; findings of fact and conclusions of the Agency, amendments to Minn. Rule WPC 34 as originally proposed; and the complete hearing record.

Under Agency Rules of Procedure, (Minn. Rule MPCA 13(a)(2)(ii)) when a hearing has been held on an agenda item, any person is entitled to submit written statements or arguments to the Agency in regard to the hearing record. The Agency may also allow oral argument. A number of written statements and arguments were received by the Agency. In addition, oral arguments were presented to the Agency Board by several persons. The Chief Hearing Examiner did not request or receive copies of these written statements or a copy of the minutes 23/ of the Agency meeting. Thus, his review did not include consideration of these items.

The Chief Hearing Examiner correctly found that, based on his review, the change in wording of this provision was never proposed prior to, during, or after the hearing process. However, a review of the full proceedings before the Agency shows the change in wording and the basis therefor.

Barbara Lukermann, Metropolitan Waste Control Commission, suggested that some term other than "federal" census be used as the federal census is only made every 10 years and may, therefore, be outdated at certain times. The Agency Board discussed other possible census reports which could be utilized, in addition to the federal census, such as that of the state demographer. The term "reliable" census was then proposed as an amendment by one of the Board members and was included in the order adopting rules. See draft minutes, Agency Board meeting, August 1, 1978.

23/ See footnote 10.

The change in wording is reasonable and necessary because, as noted above, the federal census is only conducted every ten years and, because of population shifts, another reliable census may be more accurate. It is important for the Agency to base its decision on the best information available.

However, this is certainly not a substantial change. The change is not a major substantive change and the rule adopted is not fundamentally different from the rule proposed. Points are still awarded on essentially the same basis -- the most recent census. The only difference is the source, and the greater reliability, of that census. The change will have little, if any, substantive effect on the classes of persons affected. Even if there is a fairly significant population shift, the priority points assigned pursuant to this provision would only increase or decrease by a few points. Minn. Rule 34 E.2.d.(2). Therefore, in the overall rating system, the effect will be insubstantial. 24/ The fact that the Agency has adopted language that was not suggested at the hearing does not alone make the change substantial. The Agency as final policymaker and decisionmaker has that right. Furthermore, because of the insubstantial nature of the change it is not very likely that much comment or reaction would have ensued from any person affected even if the change had been suggested at the hearing. Also, all affected classes of persons, including municipalities, had notice of the hearing as well as the opportunity to participate in all stages of the proceedings; including the Agency Board meeting at which the rules were adopted.

24/ Population affected is just one of six criteria used to determine priority. Minn. Rule WPC 34 E.2.d. and E.3.c.

D. List of Segments: Appendix A. (Finding 9, Conclusion 3)

Minn. Rule WPC 34.E.2.d.(3) provides that priority points shall be awarded based on the water segment on which the project is located. This provision does not, itself, establish the water segments or the points awarded therefor. Rather, it provides that the segments shall be established by the Agency pursuant to Section 303 of the Federal Water Pollution Control Act 25/ and that priority points shall be established in regard thereto in accordance with criteria approved by the Agency and the U.S. Environmental Protection Agency. This provision is part of the existing rule and no changes were proposed in the amendments noticed for hearing.

During the hearing, inquiries were made regarding the present list of segments and the priority points awarded in relation thereto. The Agency introduced into evidence the currently existing list of segments, ranked in priority order, as well as the priority system used therefor. MPCA Ex. 37. In its post-hearing comments, the Staff proposed that this exhibit be included as an appendix to the rule in order to apprise regulated persons of the present priorities. Comment A, pp. 11-12. The Agency found this to be needed and reasonable. Finding No. 34, Agency Findings of Fact and Conclusions. 26/

The Chief Hearing Examiner found that: (1) the Agency failed

25/ 33 U.S.C. §1251 et seq.

26/ See also, Report of the Hearing Examiner, Finding 7, (except for provisions noted in his Report, all provisions were found by the Hearing Examiner to be needed and reasonable. Thus, the Hearing Examiner also found this provision to be needed and reasonable.)

to make an affirmative presentation of facts establishing the need for and reasonableness of adding the appendix; and (2) the appendix constitutes a substantial change. This conclusion is erroneous and appears to be based on the Chief Hearing Examiner's misunderstanding of the nature of the list.

As stated above, Minn. Rule WPC 34.E.2.d.(3) is an existing provision of the rule. The Agency was not required to establish its need or reasonableness. The substantive requirements of this provision remain unchanged. The appendix is merely a presentation of the presently existing ranking of the list of segments established pursuant to Section E.2.d.(3). Therefore, its substantive need and reasonableness need not be established either. However, as noted above, the Agency has shown that is is necessary and reasonable to include this document as an appendix to the rule in order to apprise regulated persons of the present priorities established by Minn. Rule WPC 34.E.2.d.(3).

The inclusion of the Appendix does not constitute a substantial change. In fact, it constitutes no change at all. Priorities are determined pursuant to Section E.2.d.(3), an existing provision of the rule. Appendix A is merely a compilation of the present priorities so established.

E. Grant Increases: Minn. Rule WPC 34.E.9.b.(2) (Finding 10, Conclusion 4)

Minn. Rule WPC 34.E.9.b.(2) provides that the Agency may recommend grant increases for projects which exceed the estimated costs. The existing provision provided that it applied to "projects for which the applicant has solicited and received bids on

construction contracts which exceed the costs estimated in the application . . .." (emphasis added). The rule as adopted deleted the words "bids on construction." The Chief Hearing Examiner concluded that: (1) the Agency failed to make an affirmative presentation of facts establishing the need for or reasonableness of the deletion;27/ and, (2) the deletion was a substantial change because: (a) it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction; and (b) it results in a rule fundamentally different from the proposed rule. The Chief Hearing Examiner appears to base his conclusions on his finding that "[a]s it now exists, the rule requires applicants to obtain bids [and] [n]ow this requirement has been removed . . .." Chief Hearing Examiner Report, p. 4. This finding is not an adequate basis for the Chief Hearing Examiner's conclusions as it is not correct.

First of all, the requirement that municipalities solicit bids on such contracts, as well as other contracts, exists independent of any provision in Minn. Rule WPC 34. See, e.g. Minn. Stat. §471.345 (1976 and 1977 Supp.) (uniform municipal contracting law - - applies to all political subdivisions of the state); 40 C.F.R. §35.936-18 (bid requirement for projects which will utilize federal grant funds.) Furthermore, Minn. Rule WPC 34.E.9.b(2) did not actually require municipalities to solicit bids. The only purpose of the provision was and is to provide for grant increases. Thus, dropping the phrase will not affect the bidding requirement in any manner. Since the effect on the bidding requirement is the only basis for the Chief Hearing Examiner's conclusion, his conclusions in regard to this provision are unwarranted.

The hearing record indicates that the reason for dropping

27/ See Finding 7, Report of Hearing Examiner; Finding 65, Agency Findings of Fact and Conclusions, which constitute a finding of need and reasonableness.

the term "construction" was to allow the grant increase provision to apply to contracts at all three steps of a construction grant project instead of just Step 3 contracts. Anderson, Tr. at 497. The reasonableness of and necessity for this provision is underscored by the U.S. Environmental Protection Agency which requires by regulation that the states set aside at least five percent of their allotment for grant increases which encompass all project steps. 43 Fed. Reg. 17706 (1978).

Therefore, the deletion of the term "construction" has been shown to be necessary and reasonable and the deletion of the term "bids" inconsequential. This certainly is not a substantial change as it is not a major substantive change and it does not result in a rule fundamentally different from that contained in the Notice of Hearing.

F. Contract Assignment: Minn. Rule WPC 34.E.9.h. (Finding 11, Conclusion 5)

Minn. Rule WPC 34.E.9.h. as proposed provided that:

> The grantee shall retain the right to assign its contract with a contractor or engineer, and any or all rights, duties and obligations pursuant thereto, to the Agency.

Minn. Rule WPC 34.E.9.h. as adopted provides that:

> The grantee shall retain the right to assign its contract with a contractor or engineer and any or all rights pursuant thereto, to the Agency.

The Chief Hearing Examiner found that the deletion of the words "duties and obligations" results in the Agency being able to have all rights under a contract without assuming any of the duties or obligations. The Chief Hearing Examiner then concluded that: (1) the Agency failed to make an affirmative presentation of facts

point. Comment A, pp. 27-28.

It should also be noted that Section E.9.h., as both proposed and adopted, does not compel the Agency to accept the assignment of contract rights or contract duties and obligations. It merely provides that the municipality cannot assign such rights (or duties and obligations) to anyone other than the Agency. Thus, deleting the phrase does not eliminate any existing Agency duties or obligations in any manner.

Therefore, it seems clear that, although the Agency was not required to justify the deletion, the deletion is reasonable and necessary to provide a correct statement of the law and to be consistent with the purpose of the provision. It is not a substantial change. The provision, as proposed, did not impose any duties or obligations on the Agency. Therefore, elimination of the phrase is not a major substantive change and does not result in a rule that is fundamentally different from the proposed rule.

G. Funding of Non-Treatment Works Projects: Minn. Rule WPC 34.E.3.c. and E.4.b.(2) (Finding 12A. and Conclusion 6)

In 1977, the Federal Water Pollution Control Act 29/ was amended to provide, among other things, that 25% of a state's allotment of construction grants funds is to be used for construction of

---

29/ 33 U.S.C. §1251 et seq.

establishing the need for or reasonableness of the deletion; and (2) the deletion was a substantial change because: (a) it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction; and (b) it resutls in a rule fundamentally different from the proposed rule. These conclusions are erroneous. The rule, as adopted, is clearly needed and reasonable. The deletion is also needed and reasonable and does not constitute a substantial change as it is merely a correct statement of the law regarding contract assignment.

First of all, it must be noted that the Agency was not required to demonstrate the need for and reasonableness of the deletion. Rather, it was only necessary to justify the rule as adopted. This was clearly done. Anderson, prepared testimony at 19-20, Tr. at 452-453. Comment A, pp. 27-28.

However, the deletion itself was also reasonable and necessary. See Comment A, pp.27-28, Findings 18 and 62, Agency Findings of Fact and Conclsions. 28/ It is basic contract law that only contract rights can be assigned. Contract duties and obligations may be delegated.Calamari & Perillo, Contracts, ch. 15 (1970). The substantive law governing assignment and delegation is quite different. Id.Thus, the deletion of the phrase "duties and obligations" is necessary for an accurate statement of the law.

The Agency made it clear at the hearing that the only purpose of Section E.9.h. was to ensure that the municipality retained its rights under its contract so that it could assign them to the Agency if necessary to allow for Agency recourse in regard to improperly designed or constructed projects. Anderson, prepared testimony at 19-20, Tr. at 452-453. The Staff proposed the deletion of the phrase "duties and obligations" to clarify this

---

28/ See also Finding 7, Report of the Hearing Examiner, which constitutes a finding of need and reasonableness.

certain non-treatment works projects 30/ if such projects are on the state's priority list for that year and are otherwise fundable. 31/

30/ As used herein, the terms "treatment works" and "non-treatment works" are defined pursuant to state law which is as follows. "Treatment works" means any plant, disposal field, lagoon, dam, pumping station, constructed drainage ditch or surface water intercepting ditch, incinerator, area devoted to sanitary land fills, or other works not specifically mentioned herein, installed for the purpose of treating, stabilizing or disposing of sewage, industrial waste, or other wastes. Minn. Stat. §115.01 subd. 7 (1976).

"Disposal system" means a system for disposing of sewage, industrial waste and other wastes, and includes sewer systems and treatment works. Minn. Stat. §115.01 subd. 8 (1976).

"Non-treatment works" projects, therefore, are grant eligible portions of a disposal system which do not come within the definition of "treatment works," such as sewers and interceptors.

Under federal law "treatment works" is a broader term. 33 U.S.C. §1292.

31/ "Notwithstanding any other provision of this Act, the determination of the priority to be given each category of projects for construction of publicly owned treatment works within each State shall be made solely by that State, except that if the Administrator, after a public hearing, determines that a specific project will not result in compliance with the enforceable requirements of this Act, such project shall be removed from the State's priority list and such State shall submit a revised priority list. These categories shall include, but not be limited to (A) secondary treatment, (B) more stringent treatment, (C) infiltration-inflow correction, (D) major sewer system rehabilitation, (E) new collector sewers and appurtenances, (F) new interceptors and appurtenances, and (G) correction of combined sewer overflows. Not less than 25 per centum of funds allocated to a State in any fiscal year under this title for construction of publicly owned treatment works in such State shall be obligated for those types of projects referred to in clauses (D), (E), (F), and (G) of this section, if such projects are on such State's priority list for that year and are otherwise eligible for funding in that fiscal year." §40, Clean Water Act, Pub. Law 95-217. 33 U.S.C. §1296.

The most contested issue in the hearing on Minn. Rule WPC 34 was the funding of non-treatment works projects and, more specifically, the application of Section 40 of the Clean Water Act 32/ to Section E.4.b.(2 of the proposed amendments. The Hearing Examiner found that 25% of the State's allotment must be set-aside for funding non-treatment works projects. Report of Hearing Examiner, p. 12. The Agency found that a 25% set-aside was not required by federal law and that treatment works projects should be given a higher priority than non-treatment works projects. See, Findings 35 and 44, Agency Findings of Fact and Conclusions. The Chief Hearing Examiner agreed that that the Agency had made an affirmative presentation of facts establishing the need for and reasonableness of the establishing this funding priority. Report of the Chief Hearing Examiner, Conclusion 6.

The Agency believes that the Clean Water Act does not require states to set aside a minimum of 25% of its funds for non-treatment works projects. The Act gives the states the exclusive right to determine the relative priority of categories of projects, such as treatment works, interceptors, etc. Therefore, if the Agency chooses to give a higher priority to treatment works projects, it is free to do so. Nor does the Act require the Agency to place any particular category of project on its Municipal Project List. 33/

32/ Pub. Law 95-217, 33 U.S.C. §1296.

33/ The Municipal Project List is the list, in priority order, of projects for which federal grant funds will be requested during the current fiscal year. Minn. Rule WPC 34.E.1.d.(3). The Agency found that the "priority list" referred to in the Clean Water Act is the Municipal Project List. Finding 44, Agency Findings of Fact and Conclusions. This finding is consistent with U.S. Environmental Protection Agency regulations. See, 43 Fed. Reg. 17704 (1978) (MPCA Ex. 30A).

Instead, placement on the Municipal Project List is determined by the priorities established by the Agency.

It is only if non-treatment works projects are on the state's Municipal Project List pursuant to the state's priority system that the 25% set-aside comes into play. A state cannot bypass such projects merely because they are non-treatment works. However, if there are projects on the list which would utilize more than 25% of the state's allotment, the state is only required to use 25% of its allotment for such projects and may bypass the rest. 34/

Therefore, the Agency believes it is statutorily authorized to adopt Section E.4.b.(2) as proposed without providing a 25% set-aside for non-treatment works projects. The Agency further believes that it is reasonable and necessary to give a high priority to treatment works projects vis-a-vis other projects, pursuant to section E.3.c.(1), for the following reasons: 35/

(a) It is the construction of treatment works which will yield the greatest benefit in terms of water quality improvement;

(b) It is the intent of the Clean Water Act that construction grant funds be utilized for projects which will result in compliance with enforceable provisions of the Federal Water Pollution Control

---

34/ It should be noted, however, that U.S. EPA regulations provide that a maximum of 25% of a state's allotment may be used for non-treatment works projects. 43 Fed. Reg. 17705 (1978).

35/ See, e.g., Anderson, prepared testimony at 8, Tr. at 134-139; Comment A (Staff Post Hearing Comments) pp. 12-13, 36-37; Findings 14 and 35, Agency Findings of Fact and Conclusions.

Act. Construction of treatment works, rather than sewers or minor interceptors, will achieve this result, Id.;

(c) The State of Minnesota currently requires $1.6 billion to fully construct all needed disposal systems in the State. $874 million of the total disposal system needs are required for the construction of treatment works alone. $464 million has been authorized, although not yet fully appropriated, in federal construction grants. Since there is an insufficient amount of money available, it is reasonable to fund as many municipal treatment works as possible with those funds rather than constructing entire disposal systems for just a few select municipalities, Id.;

(d) The vast majority of construction grant funds expended thus far have been used to fund treatment plants in large cities in the state. It would be unfair to the numerous small communities in the state to change the emphasis on the type of projects receiving priority just when they are in a position to finally receive funding, Id.;

(e) If an interceptor or a cost effective sewer system rehabilitation project would eliminate the need for a treatment works, it will receive the same number of points as the treatment works would have received. Further, if a sanitary sewer system project is necessary to insure the hydraulic integrity of a treatment works, it will receive the same number of points as the treatment works, Id.

It should be noted that non-treatment works will be funded before treatment works if they receive a high enough priority. Points are awarded for the following categories, in addition to the category of project:

Section	Category	Point Spread
E.2.d.(1)	Extent and Nature of Pollution	40-70
E.2.d.(2)	Population Affected	2-50 (metro) 2-35 (non-metro)
E.2.d.(3)	List of Segments	1-44
E.3.c.(2)	Financial Aspects	5-45
E.3.c.(3)	Multi-District	0-10

It is, therefore, possible to overcome the amount of priority points awarded for treatment works projects. It should also be noted that, due to the metropolitan/non-metropolitan split of funds,[36/] non-treatment works could be funded in either area in any year if in that year, there is not a sufficient amount of treatment works projects in that area. See Agency Staff's Memorandum to the Agency Board, July 22, 1978.

Therefore, the Agency believes that Section E.3.c.(1) and E.4.b.(2) as adopted are needed, reasonable and statutorily authorized.

H. Public Participation: Minn. Rule WPC 34.E.7. (Finding 12B, Conclusion 7)

Minn. Rule WPC 34.E.7. establishes the public participation process which must be followed prior to Agency adoption of the Municipal Needs List and the Municipal Project List. The procedures to be followed include availability of the proposed list, public informational meetings, and 30 day notice to all affected municipalities prior to the Agency Board meeting at which the Lists will be adopted.

36/ See Minn. Rule WPC 34 E.4.b.(1) and E.4.b.(4).

The Chief Hearing Examiner concluded that the Agency failed to make an affirmative presentation of facts establishing the need for and reasonableness of utilizing public informational meetings instead of contested case hearings. The Agency believes that the question of whether or not a contested case hearing is required is a question of law, rather than a question of fact. The Agency believes that, as a matter of law, a contested case hearing is not required prior to Agency adoption of the Municipal Needs List and the Municipal Project List. Since a contested case hearing is not legally required, the Agency is free to adopt any reasonable and necessary public participation process. The process it has adopted is clearly needed and reasonable. See Finding 54, Agency Findings of Fact and Conclusions.

U.S. EPA regulations require that prior to the adoption of the state's Municipal Project List, the state "shall ensure that adequate public participation (including a public hearing) has taken place." The regulations go on to provide that this "public hearing" may be conducted jointly with any regular public meeting of the Agency provided persons are given adequate notice and given an opportunity to be heard. 43 Fed. Reg. 17705 (1978) (MPCA Ex. 30A). The Minnesota Administrative Procedures Act defines a "contested case" as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Minn. Stat. §15.0411 subd. 4 (1976). A contested case hearing is conducted pursuant to Rules of the Office of Hearing Examiners.

A contested case hearing is, by definition, a hearing which involves the adjudication of disputed facts. The development of the Municipal Needs List and the Municipal Project List will consist of applying the criteria established in Minn. Rule WPC 34 to the various municipalities and projects. For the most part, this will be an essentially ministerial task with little or no discretion involved. If the Agency has incorrectly applied the criteria, for example by assigning the wrong number of population points, this can be easily corrected at the public informational meeting. The development of the Lists will rarely, if ever, involve facts which are actually disputed. Therefore, a contested case hearing does not appear to be required or even appropriate.

If a dispute of fact does arise as to the application of the criteria to a particular municipality or a particular project, the aggrieved party always has the right to request a hearing, pursuant to Minn. Rule MPCA 9. At this point, a contested case hearing would be appropriate and, perhaps, required.

The Agency does not wish to deny any rights to members of the public. The proposed public participation process fully complies with the requirements of U.S. EPA regulations. In fact, the proposed amendments were designed to expand public participation through the addition of informational meetings to the List development process. The Agency believes that adding a contested case hearing is not statutorily required and would only add delay and expense to the process without any corresponding public benefit.

Therefore, the Agency believes that Section E.7. is both statutorily authorized as well as needed and reasonable.

CONCLUSION

The Minnesota Pollution Control Agency asserts that the findings of the Chief Hearing Examiner regarding the legality of rules adopted by an agency are only advisory, and an agency maintains the right to disagree with the Chief Hearing Examiner and send the rules to the Attorney General for his review. The Agency urges the Attorney General to similarly hold and to review the record in this case and make his own judgments on the legality of the Agency's rules.

The Agency strongly disagrees with the Chief Hearing Examiner that certain provisions of the rules are not supported by the record and are substantially changed from what was proposed. The Agency has pointed out evidence in the record that supports each of the provisions rejected by the Chief Hearing Examiner as lacking support. In addition, the Chief Hearing Examiner has not correctly interpreted the issue of substantial change and has too narrowly applied the law to these rules. None of the changes rejected by the Chief Hearing Examiner is the kind of change that fundamentally changes the rules or affects unrepresented classes of people or is the kind of change for which the public was not on notice would be a subject of this hearing. The original Notice of Hearing and subsequent notices gave the public ample opportunity to scrutinize the rules and to be heard on all aspects of the rules, including the final changes thereto. If any such persons have not been represented in the process, it has been by their own choice, not because they had a justifiable expectation that their interests were not affected or that the rules as

originally proposed would remain chiseled in stone.

The Agency, however, supports the Chief Hearing Examiner's conclusion of the need for and reasonableness of its priority of funding of projects. The Agency believes that it is statutorily authorized to adopt these rules without a set-aside for non-treatment works projects and, further, that it is reasonable and necessary to give a higher priority to treatment works projects.

The rules as adopted and submitted to the Attorney General are amply supported by the record, and have not resulted in rules substantially different from those which were originally proposed. The Agency urges the Attorney General to file the rules with the Secretary of State.

Respectfully submitted,

ELDON G. KAUL
Assistant Attorney General

By Marlene E. Senechal
Marlene E. Senechal
Special Assistant
Attorney General

Dated: September 8, 1978

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program	)))))	REPORT AND MEMORANDUM OF THE CHIEF HEARING EXAMINER

The above entitled matter was submitted to the Chief Hearing Examiner for review pursuant to the provision of Minn. Stat. §15.052, Subd. 4, and Minn. Rule HE 107, on Thursday, August 3, 1978. This review is limited to ensuring compliance with Minn. Stat. §15.0412, Subd. 4, and to determine whether or not the rules as finally adopted are substantially different from those prepared prior to hearing.

Based upon a review of the record, the Chief Hearing Examiner makes the following:

FINDINGS OF FACT

1. A Notice of Hearing was published in the State Register and mailed to all persons who had registered with the Secretary of State at least 30 days prior to the first day of hearing.

2. The amendments to these existing rules were published in the State Register at least 30 days prior to the first day of hearing.

3. All documents required to be filed prior to the hearing pursuant to Minn. Rule HE 103 were filed more than 25 days prior to the hearing.

4. At the hearing, the Pollution Control Agency (hereinafter "agency") staff prepared "clarifying changes" to the proposed amendments (See Exhibit 14) which are found to be changes needed to correct typographical and grammatical errors, change names, and other minor corrections.

5. During the course of the 5 days of public hearings, the Agency further amended the rules.

6. The Hearing Examiner issued his report on June 14, 1978 and the Agency adopted the rules on August 1, 1978, issuing its own Findings of Fact, Conclusions and Order on that date.

7. Following the hearing, in its Post Hearing Submissions, the Agency amended the rules by providing a definition of "adequate errors and omissions insurance" in response to testimony from engineers. This testimony was the result of published proposed amendments which would, for the first time, require engineering firms to carry errors and omissions insurance if the firm is to work on projects covered by this rule. [See WPC 34 E.8.d.(7), e. (5) and f. (6)]. At the hearing, the Agency presentation was as follows:

> "Proposed Minn. Reg. WPC 34E.8.d.(7), e(5) and f. (6), were added to insure that there is a fund from which recovery can be made if the disposal system has been improperly designed. This requirement was added because a number of projects constructed under this program have been improperly designed and the financial burden for making the correction has not always been borne by the responsible party. The insurance coverage requirement is one of several steps taken by the Agency to correct this problem to the extent possible. Most engineering firms already carry such insurance."

There was no testimony by the Agency that such insurance coverage was obtainable nor did they present any testimony or other evidence relating to the costs of such coverage.

At the hearings and in written comments following the hearing it was pointed out by those engineers who participated in the hearing that most engineering firms do not carry such insurance, due primarily to the cost. [See transcript paper 200-207, 374-383, 416-424, and comments B, D and K. See also the Hearing Examiner's Report at Finding 6 (c), page 5, for a detailed description of what is reflected by the record of this hearing.]

As a result of that testimony, the Agency proposed the new definition discussed herein for the first time in its final written submission received on May 12, 1978, (a Friday) with the

record closing on the following Monday, May 15, 1978. No persons had an opportunity to review the proposed amendment nor offer any comment on it. The record does not reflect that the Agency gave any notice of its proposed amendment to any person.

The proposal is more than a definition in that it provides a scale showing minimum amounts of coverage depending on the size of the project, gives the Director discretion to allow a lesser amount of coverage but does not establish any standards or criteria by which the discretion will be exercised.

In the Agency findings relating to the requirement for such insurance coverage (Finding 56, page 25), the Agency again states:

> "Most engineers in the state already carry errors and omissions insurance..."

The only support for such a finding is the unsupported statement of the Agency previously alluded to.

The Agency finding continues:

> "... so the costs to local governments will not be substantially increased by this requirement."

There is no evidence anywhere in the record of this proceeding to substantiate this finding. In fact, there is testimony to show that if coverage is required on each specific project, the costs will be passed on to the community.

8. Section WPC 34 E.2.d. (2) has been amended to state that priority points will be assigned based upon population determined by the most recent reliable census. The existing rule states that it will be determined by the most recent Federal census. (Emphasis added.) This change was never proposed prior to, during, or after the hearing process. Not even the Agency findings discuss the change. A Federal census is something which is readily available and ascertainable. What is a "reliable" census is unknown, absent specific criteria or definition.

9. Section WPC 34 E.2.d. (3) as adopted, adds an appendix (page 24 of Agency Order Adopting Rules) which was not published in the State Register nor mailed to persons on the Secretary of

State's list, but was added as an exhibit during the course of the public hearings (See transcript page 315). This rule determines priority points based on population per square mile. It has a direct effect upon the issuance of grants. The appendix was proposed for addition as a rule only in the final submission of the Agency. How affected communities of the State would have reacted to the addition would be pure speculation. The existing rule spells out a system for allocating points. The rule as adopted actually allocates points.

10. Rule WPC 34 E.9.b. (2) was proposed to be amended by adding a new sentence at the end. In its final order adopting the amendment, the Agency has further amended the rule by striking the words "bids on construction" from the existing rule. As it exists, the rule requires applicants to obtain bids. Now, this requirement has been removed without any findings relating to it. The record reflects that on the last day of hearing, with only Agency staff, the Hearing Examiner and the Court Reporter present, the Hearing Examiner suggested removing the word "construction" and Agency staff responded by saying they would take out the term "bids" from the rule also but without any statement of the reasons for removing it.

11. Rule WPC 34 E.9.h., entitled contract assignment, as originally proposed, allowed a grantee to assign its contracts, along with all rights, duties and obligations to the Agency (emphasis added). In the finally adopted rule, the underlined words have been deleted. There is nothing in the record to support the deletion. There is no indication of the change in the Agency findings. It results in the Agency being able to have all rights under a contract without assuming any of the duties and obligations.

12. The Hearing Examiner found and concluded that the Agency had failed to make an affirmative presentation of facts establishing the need for and reasonableness of the rule in several areas

(See Hearing Examiner Findings 8, 9, 10, and 13). The Agency has rejected those findings and conclusions in its own Findings of Fact and Conclusions (See Agency Findings 28, 35, 44 and 54).

A. The first two (Hearing Examiner Findings 8 and 9 - Agency findings 35 and 44) involve the same basic issue relating to the Municipal Needs List and the criteria for determining the priority of needs. The Agency presentation on the issue can be found in the Agency Statement of Evidence (MPCA Exhibit 9) which was read verbatim into the record at the hearing. A great amount of testimony was presented from the public on the issue, as was discussed in detail by the Hearing Examiner in his Report. The public argued, and the Agency basically agreed, that the effect of the amendments would foreclose funding of nontreatment works projects. The Agency Findings are based upon the Staff Post Hearing Comments (Comment A) which was submitted on May 12, 1978. Section 40 of the Federal Clean Water Act provides in part as follows:

> " Not less than 25 per centum of funds allocated to a state in any fiscal year under this title for construction of publicly owned treatment works in such state shall be obligated for those types of projects referred to in clauses (D), (E), (F), and (G) of this section, if such projects are on such state's priority list for that year and are otherwise eligible for funding in that year."

Items (D),(E), (F), and (G) of the Act are nontreatment works projects. The Agency comments state that "...it is the practice of the Agency to fund all treatment works and major interceptors in the state before funding any other interceptors or sewers." (Emphasis added).

The policy or practice of the Agency was explained in the record at the hearings by the agency. The facts presented to support the policy are that there are insufficient funds available for both treatment and nontreatment works projects, and that upgrading treatment works projects is the fastest way of clearing the waters of the state.

B. The Hearing Examiner, in Finding 10, found that the Agency failed to make an affirmative presentation of facts establishing the need for and reasonableness of the Agency proposal to conduct public information meetings in lieu of public hearings as that term is used by Environmental Protection Agency regulations (Emphasis added). The Agency "affirmative presentation" can be found on page 13 of the Agency Statement of Evidence. The only other presentation was made at the May 8th hearing (Transcript pages 473-476), which were then repeated in the Agency final written comments and in the Agency Findings.

The Minnesota Administrative Procedure Act requires rule-making and contested case hearings to be conducted pursuant to its provisions. A contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing (Minn. Stat. §15.041, Subd. 4).

Blacks Law Dictionary, 4th Edition, defines "hearing" as a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order.

The Agency states, without citation to support its position, that the Federal government has a different definition of what the public hearing is than what the State has. (Transcript page 476).

C. With respect to Hearing Examiner Finding 13 and Agency Finding 28, it is found that there is evidence in the record to support the Agency finding.

Based upon the foregoing Findings of Fact, the Chief Hearing Examiner now makes the following:

CONCLUSIONS

1. The Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4 in that it has failed to make an affirmative presentation of facts establishing the reasonableness

of the requirement that engineers carry "adequate errors and omissions insurance coverage" and in its proposed definition of that phrase. The proposed amendment defining the above referenced phrase is a substantial change to the rules as proposed in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing. Additionally, while the class of persons affected by the rule, engineers, were present at the hearings, the amendment was not presented in such a fashion as would allow them to react and comment.

2. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in its final amendment to WPC 34 E.2.d.(2) changing the census from the "Federal census" to a reliable census in that it has failed to make any presentation of facts establishing the need for or reasonableness of the proposed amendment. The amendment also makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing. Again, while the class of persons affected by the rule, primarily municipalities, were represented at the hearing, the amendment was not presented in such a fashion as would allow them to react and comment.

3. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of adding the appendix discussed at Finding 9 above, to WPC 34 E.2.d.(3). It is a substantial change from the rule as proposed in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing.

4. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of deleting the words "bids on construction" from WPC 34 E.9.b.(2). It is a substantial change in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing.

5. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of deleting the words "duties and obligations" from WPC 34 E.9.h. It is a substantial change in that it makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing and it results in a rule fundamentally different from that contained in the Notice of Hearing.

6. That the Agency has made an affirmative presentation of facts establishing the need for and reasonableness of adopting criteria for the prioritizing of projects which would, in effect, foreclose funding of nontreatment plant projects as discussed in Finding 12 above.

7. That the Agency has failed to comply with the provisions of Minn. Stat. §15.0412, Subd. 4, in that it failed to make an affirmative presentation of facts establishing the need for or reasonableness of adopting WPC 34 E.7. calling for public meetings in lieu of hearings as required by regulations of the Environmental Protection Agency and in violation of the Minnesota Administrative Procedures Act.

NOW, THEREFORE, pursuant to the provisions of Minn. Stat. §15.052, Subd. 4, and Minn. Rule HE 108, the Pollution Control Agency shall either withdraw the proposed final rules or amendments discussed in the Conclusions above or reconvene the rule hearing.

Dated: August 14, 1978

DUANE R. HARVES
CHIEF HEARING EXAMINER

M E M O R A N D U M

Rules adopted by state agencies must be based upon the record of a public hearing at which the agency must make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption. Prior to the public hearing, the agency must give notice of its intended action. The agency must afford all affected interests an opportunity to participate. (See, Minn. Stat. §15.0412, subd. 4.)

The record of the hearing must support the rules as adopted [see, Minn. Rule Atty Gen 303 (c)]. Findings of Fact must contain that which the agency finds to be fact which supports the reasons or need for the rules adopted [see, Minn. Rule Atty Gen 302 (h)].

The 1975 Legislature amended the Minnesota Administrative Procedure Act (hereinafter "APA") to provide the rulemaking and contested case hearings were to be conducted by a Hearing Examiner from the Office of Hearing Examiners (Minn. Stat. §15.052, Subd 3). The amendments also directed the Chief Hearing Examiner to adopt procedural rules which were to include provisions for the recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing (Minn. Stat. §15.052, Subd. 4).

For rulemaking purposes, it is obvious that the APA requires notice to the public, an opportunity for the public to react, and places an affirmative burden on state agencies before they can adopt, amend, suspend or repeal rules.

In this case, the changes in the rules as enumerated in Findings 7 through 11 and Conclusions 1 through 5 above were made in such a fashion that notice and the opportunity to react were precluded. Additionally some were made without any presentation by the agency nor any Findings of Fact.

In sustaining its burden, at the hearing, of establishing the need for and reasonableness of the proposed rule by an affirmative presentation of facts, agencies must do more than present the rule and explain what the rule means or accomplishes. The presentation must be done at the hearing rather than in post-hearing submissions in order that the public can have an opportunity to react. The legislature has very carefully chosen its words in amending the APA. The presentation by the agency must consist of "facts".

Facts may be either adjudicative or legislative as was discussed by Agency Staff in its post hearing comments. When an agency relies on adjudicative facts to support its position, the substantial evidence test can be applied.

To discuss an example, the agency statement relating to the requirement for errors and ommissions insurance coverage can be examined as quoted in full in Finding 7 above. The agency stated adjudicative facts concerning improperly designed projects which facts remain uncontradicted in the record. Thus it can be found and concluded that safeguards are necessary. When it stated: "Most engineering firms already carry such insurance," it was also stating an adjudicative fact but that fact was totally contradicted by the record. It was that sole sentence which the agency apparently relied upon as its "fact" establishing reasonableness.

On the other hand, in stating that it was the "practice" of the agency to give higher priority to treatment work projects versus nontreatment work projects, the agency was stating that it had made a policy decision. That statement, standing alone, would not have been a sufficient "presentation of facts" under the Minnesota APA. However, the Agency presented facts relating to insufficient funding and what is the fastest way of clearing our waters, facts which were substantial evidence and uncontradicted on the record. The Agency has recognized that there are two evils,

inadequate treatment facilities and inadequate sewage transportation systems. It must be free to exercise its discretion in choosing which to solve.

Proposed Rule WPC 34 E.7., as admitted by the Agency at the hearing on May 8, 1978, was drafted in such a fashion so as to avoid the requirements of the APA. Regulations of the Environmental Protection Agency, which are law, require a public hearing. The"meetings" addressed in the proposed rule, including the "meeting" where the Agency adopts the lists, are actually the hearings to satisfy the law. Municipalities rights to receive or even be eligible for grants are determined following these "meetings". Municipalities are specific parties whose rights or privileges are determined after this hearing, which hearing is required by Federal law. It therefore falls within the definition of "contested case" in the APA.

D.R.H.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed)
Amendment to Minn. Reg. WPC 34)
Regarding the Administration of) REPORT OF HEARING EXAMINER
the Construction Grants and Loans)
Program)

The above-entitled matter came on for hearing before Howard L. Kaibel, Jr., Hearing Examiner, on April 21, 1978, at the Board Room of the Minnesota Pollution Control Agency, 1935 West County Road B-2, Roseville, Minnesota, commencing at 9:00 a.m.; on April 24, 1978, in the North Hall, Multi-Purpose Building, Area Vocational Technical Institute, Highway 34 East, Detroit Lakes, Minnesota, commencing at 7:00 p.m.; on April 25, 1978, in the City Council Chambers, City Hall, 420 Pokegama Avenue North, Grand Rapids, Minnesota, commencing at 7:00 p.m.; on April 26, 1978, Room 102, Armstrong Hall, Mankato State University, Mankato, Minnesota, commencing at 7:00 p.m.; and on May 8, 1978, at the basement conference room of the Minnesota Pollution Control Agency, 1935 West County Road B-2, Roseville, Minnesota, commencing at 9:00 a.m.

Marlene E. Senechal, Special Assistant Attorney General, appeared for and on behalf of the Minnesota Pollution Control Agency Staff (hereinafter "Agency Staff") in support of the proposed amendments to Minn. Reg. WPC 34.

All interested persons, representatives of individuals or associations, and other interested groups present at the hearing had an opportunity to present evidence, make statements, and question witnesses.

Pursuant to Minn. Stat. § 15.0412, subd. 4 (Supp. 1977), this Report shall be available for review to all affected individuals upon request for at least five working days before the

Agency takes any final action on the proposed amendments. The Agency shall, if it proposes to adopt the amendments to Minn. Reg. WPC 34 as originally proposed or as further amended, submit the complete hearing record, including its Findings and Order, to the Attorney General for his review. The Agency shall give notice of such submission to all persons who requested to be informed of such submission.

The Hearing Examiner, upon all records, files, evidence, argument of counsel, and written comments filed before the close of the record, hereby makes the following Findings of Fact, Conclusions and Recommendations:

FINDINGS OF FACT

1. That on March 1, 1978, the Agency Staff filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing;
(c) A proposed Notice of Hearing; and
(d) A Statement of the estimated length and number of people attending the hearing.

2. That on March 20, 1978, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 1737.

3. That on March 17, 1978, the Agency Staff mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. That on March 8 and March 24, 1978, the Agency Staff filed the following documents:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Secretary of State's Certificate and list;
(f) The Statement of Need;
(g) The Statement of Evidence, including the names of witnesses to be called;
(h) The names of Agency personnel who will represent the agency.

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

5. That the record remained open through May 15, 1978, (five working days after the final hearing) for the receipt of written comments and statements. One written comment (o) from the City of Champlin received May 17, 1978, has been included because it was postmarked three days prior to record closure and because a copy was mailed to the Agency Director five days prior to record closure.

6. That the most difficult issue to resolve in this rules hearing was whether to recommend an additional hearing prior to final promulgation. The City of Saint Paul urged most strongly that "the proposed WPC 34 be withdrawn, redrafted to be consistent with the EPA's new rule and then reissued for public hearings". (Comment I) The Zenk Engineering firm joined in this recommendation going so far as to say that it would be necessary to prevent the "entire public hearing process" from "being useless and a waste of time". (Comment B) The representative of the Minnesota League of Cities also expressed concern in this area, "It might be necessary to all of a sudden turn around and redo them again . . .it kind of bothers me. Maybe we are rushing into something". (R. 53) The Agency Staff vigorously objected to the delay that such a new hearing would cause because it is anxious to get on with funding of summer construction. St. Cloud and other municipalities with eligible projects ready for funding joined in urging that the promulgation process be expedited, noting that any delay increases construction costs. (R. 227) The representative of the League of Cities also indicated that it was important to speed adoption. (R. 64) The Agency Staff, at one point, promised the public a further hearing on additional changes once the EPA regulations are finalized, "when those regulations come out and define more closely what is exactly meant, then we will address that issue". (R. 28) With something in excess of 2,000 pages of exhibits and 529 pages of transcript of testimony, proper exhaustive consideration of the full evidence bearing upon the ramifications of these proposed amendments has not been possible in the 30 days legally allowed for preparation of this Report.

It is nonetheless specifically found reviewing the entire record that on balance an additional hearing need not be held prior to final promulgation of these amendments, if changes are incorporated as hereinafter discussed in succeeding Findings to ensure that nontreatment-plant projects are funded; and if other minimal changes are adopted as hereinafter recommended to ensure that the overall operation of the rule on the State's first allotment of grant funds meets a minimal standard of reasonableness; and if the order adopting the proposed amendments specifically schedules an additional hearing to consider such further amendments as may be needed to ensure that the operation of the rule is equitable and reasonable with regard to the allocation of the remainder of the $450 million in federal funds that will be spent over the next five years pursuant to this rule.

This hearing should specifically consider several changes suggested on this record which appear to be "substantial" changes requiring adoption only after a new hearing and/or which were not thoroughly considered upon this record, including:

(a) There was considerable controversy regarding whether tertiary treatment should be accorded ten points more than secondary treatment. The Western Lakes Superior Sanitary District (Comment M), the Metropolitan Waste Control Commission (R. 114) and the representative of the U.S. EPA (R. 130) all urged that the situation be reversed, giving higher points to secondary treatment instead of utilizing limited funds on "going an extra mile". The EPA representative stressed that "our first priority concern is to get secondary treatment for the nation as a whole".

(b) The Agency Staff agreed that the population points are not fairly divided but are weighted in favor of small municipalities. They stressed that proper notice was not given of the possibility of changing that point system in the Notice of Hearing. If the points were equally divided, each project would get one point for every 9,000 persons served. Under the proposed

rule, a project serving 9,000 persons gets 15 points instead of the one point that it would be entitled to if the population points were not weighted. The Agency Staff defended the weighting of population points by suggesting that they felt population points were the most important factor in determining final priority, desiring to give special consideration to smaller municipalities. They later admitted, however, that they were unsure that population would be the major factor when the new financial points are added in the proposed amendment, noting that the per capita cost revisions examined in "Exhibit 36 generally shows that the tendancy is that the smaller communities have the larger per capita costs" and thus, will get more points under the amended rules. A reconvened hearing should evaluate the alternative of favoring smaller municipalities in a straightforward fashion by increasing the points accorded such other categories, instead of skewing the population category. It should also consider whether to openly favor such municipalities directly as is specifically permitted by the EPA in a program requirement memorandum made part of the record (Exhibit 29, p. 7), "the agency has no objection if a state chooses to set aside a reasonable percentage of its funds for projects of small communities".

(c) The initial experience with "errors and omissions" insurance incorporated in these amendments needs to be carefully scrutinized. While on balance, the Agency has documented the need for and reasonableness of these provisions, its presentation of facts in relation thereto has been, at best, scanty. They reported hearsay from some unidentified engineer to the effect that "most" engineering firms in the state already carry such insurance. None of the engineers at any of the hearings indicated that they carry such insurance. A representative of a Rochester engineering firm indicated that, "over 32 years of the firm's existence all claims for such things have been negotiated or paid out of cash and with the exception of one special project the firm has never felt that the risk was such that it was necessary to carry such insurance". (R. 422) One engineer had investigated the cost of

such insurance once at the request of a client, but was told to drop his investigation when he determined what it would cost. Agency Staff went into the hearing process with, at best, an ill-defined idea of what the rule meant by way of coverage, indicating at the second hearing, "I think we are looking at 100 percent coverage. . .To tell you the truth, I hadn't thought about it." (R. 201) They did not learn until the final hearing that "errors and omissions" insurance is an entirely separate and distinct kind of insurance from liability insurance. (R. 426) Although asked repeatedly for information as to the costs involved in implementing this requirement, Agency Staff could not locate data by the time of the close of the record. One engineer asserted without contradiction that:

> The annual premium for the insurance may exceed the total cost of a facility plan for a small community. And not all firms have a claims record sufficient to justify the insurance. . . it is recommended that the implications of this regulation should be thoroughly researched before implementation. . . . (R. 418)

It was further reported without contradiction that there are no standard policies or rates involved with this kind of insurance and that there are not many firms that offer it. (R. 425) There is insufficient data in the record to estimate the delays that will be introduced into the funding program as a result of adding this requirement, but one engineer indicated without contradiction that, "it takes quite some time and you have to submit a lot of data to these people to get the quotations". The Agency Staff clearly has not investigated this proposed requirement in any depth and has learned much about the concept from persons testifying at the hearing. At the second hearing, for example, they were evidently surprised to discover that you could not get "errors and omissions" insurance for a specific project, indicating "I was told by another consultant that that's what they were planning on doing. . .I guess we have to confess some ignorance on that". (R. 205) At least one engineering firm sought earnestly for a further definition of what is meant by this re-

quirement (Comment B) and because the proposed definition has been submitted in final comments, the firm has had no opportunity to reply or provide any kind of further input.

(d) Barbara Lukerman of the Metropolitan Waste Control Commission urges strongly in final written comments that the rules be revised to provide funding for on-land disposal and air quality projects (Comment H).

(e) The Metropolitan Council points out in its final written comments that sections E(c)(1)(c) and (g) of the proposed rule extend federal "collection system" restrictions to "sewer systems" more generally, going beyond federal restrictions without demonstrating either the need or reasonableness for doing so. They further urge that these sections would give Agency Staff unlimited unreasonable discretion without any standards. Their basic concern is fully and cogently set forth in Comment J.

(f) A further hearing will be able to analyze the "guts" of this rule which is the result of applying the proposed modified point system. Very little has been offered by way of an affirmative presentation of facts in this regard. The only hard evidence was a randomly selected breakdown for 40 municipalities or projects out of over 400, comparing the impacts of the proposed amendments as between those projects. Saint Paul pointed out that the breakdown included no large municipalities or large projects. The Metropolitan Council urged in final written comments (J) that further refinements be done with regard to points relating to per capita costs and bonded indebtedness. The importance and the difficulty of properly evaluating the interrelation and overall functioning of the point system is further elaborated in a subsequent Finding dealing with the proposal to quadruple and quintuple points for tertiary and secondary treatment plant projects.

(g) The proposed amendments do not fully deal with the revised federal act and existing and proposed revisions to the EPA regulations. The representative of the League of Cities

summarized the concern of many about this failing, "I think it's legitimate to raise the issue as to why something--an existing rule has not been changed to conform to or as a result of new federal law or new federal rules." It is axiomatic that substantive changes (and the avoidance of such changes) as opposed to nonsubstantive changes such as changing dates, cannot be found to be needed, reasonable or legally authorized without examining the impact and reasonableness of all vitally interrelated existing sections of the rule. Program requirement memorandum (Exhibit 29) requires setting forth a bypass procedure for certifying projects that are unready to proceed and requires public participation in that process. The subject appears to have been ignored in the proposed amendments. It also allows for a "step one-half reserve" for utilizing up to ten percent of each allotment for lower priority or newly discovered needs. There is nothing in the proposed amendments dealing with this vitally important discretionary authority. Agency Staff indicated that they have deliberately avoided dealing with a definition and priority system for the "alternative and innovative" category of projects sought by the Zenk Engineering firm (Comment B) and others, until the new EPA regulations dealing with the subject are issued.

(h) Barbara Lukerman of the Metropolitan Waste Control Commission explicitly indicated that they would continue to support the splitting of funds between metropolitan and outstate areas only "if the eligibility criteria is revised in accord with our comments above regarding those specific types of projects". Agency Staff has not provided that kind of revision in its final comments and proposed findings, so a reconvened hearing will have to examine carefully the MWCC objection and rationale for this geographical breakdown.

A major factor in support of the recommendation that the Agency proceed to promulgate without an additional hearing is the likelihood that the Agency Staff is "probably not going to

change their position as a result of St. Paul's presentation" as pointed out by the representative of the League of Cities. The recommendation to adopt the rule without a further hearing while ensuring funding for nontreatment-plant projects is explicitly made with recognition of the likelihood that the Staff will proceed to recommend adoption without ensuring funding for such projects. In the event that this is done, the City of Saint Paul will clearly have a very strong case for a declaratory judgment action invalidating the rule and enjoining allocations of federal funds pursuant to it, as discussed in more detail hereinafter in a subsequent Finding. Expediting promulgation will minimize the likelihood that such litigation will cause a loss of federal funds and will minimize the inevitable construction delay involved.

7. That a section-by-section analysis of these proposed rules and the need for and reasonableness of each of the proposed amendments is unnecessary on this record. Such an analysis is contained in the 36 pages of the Statements of Need and Evidence and in the 42 pages of Agency Staff post-hearing comments (A) and in the 43 pages of proposed findings. No useful purpose would be served by repeating most of that language in this Report. Except as hereinafter specifically noted with regard to specific provisions, the proposed amendments are specifically found to be needed and reasonable. The Agency has adequately documented this by an affirmative presentation of facts and it has further demonstrated that the rule is statutorily authorized. Most of the revisions were not opposed and this Report is generally limited to those that were. All of the concerns discussed on the record and in written comments have been carefully considered in the preparation of this Report. Specific reference to many, if not most, of the objections is omitted because the Agency has recognized their validity and agreed to rectify them in its proposed findings.

8. That the most important failing of the proposed amendments is their failure to provide for funding of nontreatment-

plant projects. Agency Staff is clearly opposed to efforts to spend federal and state funds on projects other than treatment plants and the rules have apparently been constructed to frustrate such efforts. The Agency Staff position stated simply was, "Historically this agency has placed, along with the EPA, priority on funding treatment systems versus collection and conveyance systems because wastewater treatment plants help meet water quality standards. . . ." (R. 138) Barbara Lukerman of the Metropolitan Waste Control Commission points out that the result is that "the proposed regulation fails to recognize the need to concurrently meet the requirements for both wastewater treatment and urban sewer construction. Both are essential to abatement and control of pollution." (Comment H - emphasis original) The Mayor of Saint Paul testified personally urging strongly that the rules be revised to take a more "balanced approach". (R. 50) He testified that mayors of older cities throughout the state have a serious problem with decaying sewers needing replacement or rehabilitation. (R. 49) A knowledgeable representative of a Rochester engineering firm pointed to the further need for nontreatment-plant sewers, "In the case of small communities which need both collection and treatment, the high cost of a collection system and the unavailability of EPA money for collection systems, have forced them to look at higher costs than are reasonable for the provision of sewer service." He noted that this was particularly a problem in southeastern Minnesota, where the PCA policy "has forced delays and a continuation of existing groundwater pollution problems". (R. 416) The Metropolitan Waste Control Commission stressed similar needs in the metropolitan area, "Perhaps as a concluding point of emphasis, we see coming down the road a need to do more in terms of rehabilitation and replacement of interceptors. . .that indeed could turn out to be a fairly heavy capital demand for the metropolitan area". This concern was shared by Brooklyn Park (Comment C), the Saint Paul Chamber of Commerce (Comment G), the

Metropolitan Council (Comment J), Champlin (Comment O) and Congressman Bruce Vento, who concluded that "the proposed amendments to WPC 34 do not work to effectively implement the Clean Water Act as intended by Congress". (Comment I)

Agency Staff presented evidence of the total needs for funding of projects identified in a "needs survey" (R. 134) which showed the statewide money needed for all types of projects amounts to $1.61 billion, of which the following are non-treatment-plant needs:

$10 million - major sewer system rehabilitation;

$170 million - new collection systems;

$307 million - new interceptors; and

$223 million - combined sewer overflow.

Thus, 43 percent of the identified needs, by the Agency Staff's own assessment, involves work other than treatment plants. In an explicit reversal of the "historical policy" of the EPA and the PCA, Congress amended the Clean Water Act to state:

> Not less than 25 per centum of funds allocated to a state in any fiscal year under this title for construction of publicly owned treatment works in such state shall be obligated for those types of projects referred to in clauses (d), (e), (f), and (g) of this section, if such projects are on such state's priority list for that year and are otherwise eligible for funding in that fiscal year.

The four listed clauses are: "(d) major sewer system rehabilitation, (e) new collector sewers and appurtenances, (f) new interceptors and appurtenances, and (g) correction of combined sewer overflows". (Section 216, entitled "Determination of Priority") Despite the clear, unambiguous and unequivocal nature of this amendment, the Staff testified at the first day's hearing (R. 43) and repeatedly thereafter, that the 25 percent is a "maximum" that can be spent on these nontreatment-plant projects. It is indicative of their strong objection to funding such projects that they persist in reading "not less than 25 per centum" as if it read "not more than 25 per centum". No one else concurred in this interpretation. The Statement of Need makes only brief reference to justification for the position:

> The present practice of the agency is to fund all treatment works and major interceptors before funding interceptors or sewers. . .[I]t is also consistent with the Clean Water Act of 1977 as it will result in compliance with the enforceable provisions of the Federal Water Pollution Control Act.

Reference to "present practice" is clearly not an affirmative presentation of facts showing that practice to be needed or reasonable. The importance of "compliance with the enforceable provisions" is directly contradicted by Staff testimony on the record, "It's our understanding that that 25 percent is a figure--amount of money that can be used outside the enforceable provisions of the permit for projects other than sewage treatment facilities." The EPA published regulations also clearly state that 25 percent of a state's projects shall be an exception to the enforceable requirements of the Act. It is specifically found that the Agency has not documented, by an affirmative presentation of facts, either the need for or the reasonableness of the proposed language dealing with projects other than treatment plants. No documentation of the legal authority for the proposed treatment of such projects has been advanced on the record. The amendment to the federal Act is clear and Minn. Stat. § 116.16 also clearly requires that these rules be consistent with the Act. There is no legal authority to promulgate rules that are inconsistent with that Act.

One way of rectifying the situation would be to adopt a separate classification system for nontreatment-plant projects as is recommended by the City of Saint Paul and the MWCC which is specifically provided for states as an option in the EPA regulations. If the Agency prefers the rejection of this optional separate classification system, at least five changes must be made in the rule as proposed as follows:

(a) Section E-3-a, defining the "needs list", must be amended by adding language similar to the following: "and for eligible projects which do not meet the enforceable requirements of the Act". The existing language limits this list to

projects "for which a need exists" and defines "need" as being necessary for compliance with the Act. The way the regulation is set up, a project must be on the "needs list" to be eligible for certification for funding. Obviously, if this change is not made, the "25 percent" type of projects will never be certifiable.

(b) Section E-4-b-2-c, which is meant to provide a set-aside for the "25 percent" type projects, needs to be changed so that language reading "if such projects are on the state's priority list" will read "if such projects are on the state's needs list for that year". The originally proposed language using "priority list" is meaningless because there is no such list. When this was called to Agency Staff's attention, Mr. Anderson strongly urged that it should read "project list. I want to change that, I want to make that crystal-clear". (R. 332) However, this subsection sets forth the procedure for making up the project list, so a project cannot already be on it. The principal section, E-4-b, reads: "Projects with the highest priority on the municipal needs list will be placed on the municipal project list in the following manner:". The circular language that Agency Staff is proposing would only place the projects on the project list if they are already on the project list, which would, by definition, prevent any "25 percent" projects from ever making the project list which is the list that is funded.

(c) This same subsection, which Agency Staff indicated was inserted for the purpose of allowing for funding of nontreatment-plant projects, starts out "construction of publicly owned treatment works for" the various types of nontreatment-plant projects. Obviously, "publicly owned treatment works for" must be stricken in this subsection if it is to be used for nontreatment-plant projects required by section 216 of the Act.

(d) Section E-4-d, as modified in the Agency Staff's final proposed findings, needs to be further modified to eliminate

any doubt that it applies to all set-asides as Staff indicated at the hearing. (R. 405) It should read simply: "The municipal project list may be modified, in accordance with EPA regulations, to give higher priority to projects to the extent necessary to comply with the set-asides required by the Act."

(e) Section I-2-dd-9 of the existing rule should not be stricken as proposed in the amendments herein. The section allows "equivalent" treatment plant points for nontreatment-plant projects which abate "an immediate public health hazard". The only reference in the record to the need to delete this section is contained in Agency Staff testimony (Anderson, p. 9) indicating that "such projects would not result in compliance with enforceable provisions of the Federal Water Pollution Control Act." As has been previously indicated in this Finding, it is clear that projects need not result in compliance in order to be fundable. No presentation of facts has been made to document either the need for or the reasonableness of eliminating this section of the rules on this record.

9. That sometime between March 1, when the proposed rules were initially sent over and March 7, when the Notice of hearing was issued, two additional proposed changes were made, one of which was to increase the number of points given to secondary treatment plant projects from 30 to 150, and tertiary treatment plant projects from 40 to 160. Agency Staff confirmed that the "net affect" of this increase in points for treatment plant projects was to give them priority over projects that did not involve construction of treatment plants. (R. 46) This led the Saint Paul City Attorney to label the proposed revision "kind of a catch 22 concept" ensuring that funding of nontreatment-plant projects will receive such a low priority that they will, in actuality, not be funded at all. Saint Paul officials were particularly exasperated because they are seeking funding for a "combined sewer overflow" project which Agency Staff said EPA

will not allow until 1982, (in a subsequent hearing, this date was revised to 1980, citing a section of Exhibit 23 which could not be confirmed) "we can put it on a project priority list. We can certify it for funding, but they actually tend to the grant, we don't." (R. 171) The end result of this proposed increase in points for treatment plant projects will be to ensure that even if EPA policies change or the city waits until 1980, they still will not be able to receive funding because of the priority given to treatment plant projects. Agency Staff cited past Board policy against funding anything other than treatment plants in defense of the proposed change indicating:

> Now we are opening this regulation up, albeit, you know, probably not to the extent that you are interested in it, but if your project can gain enough other priority points based upon population, receiving stream, financial need and all the rest of it that we are throwing in there, as opposed to someone who does need a wastewater treatment plant but has a very small population, has lots of money to spend on things and the rest of it, then you are going to get funded before them. (R. 161)

A close examination of the proposed point system, on the contrary, discloses that as the MWCC concluded, "the economic and population point ratings are so low in comparison to the tertiary and secondary ratings that they will have little or no effect on the priority order". (Comment H) The category "use of receiving waters" effectively gets up to 30 points (because everyone on the needs list gets at least 40). The population category yields up to 25 points (except for metropolitan projects which get either 35 or 50 points and should get their share anyway under the metro-nonmetro split). The "river segment" category gets up to 44 points and the maximum under the financial categories is 45 points. Staff confirmed under careful questioning of the Saint Paul City Attorney (R. 150, et seq.) that the maximum points available in the "type of project" category for nontreatment-plant projects is 10. Thus, the maximum effective priority points available to a nontreatment-plant project, if it got the maximum in every other category would be 154. A project involving

tertiary treatment would start with 160 "type of project" points (plus another 20 or 30 if the municipality presently has no treatment or only primary treatment) before adding any other points from the above listed categories. A project involving secondary treatment would start with at least 170 (because by definition they presently have, at best, primary treatment) and 180 points if they presently have no treatment at all. By proposing this extraordinary increase in points for primary and secondary treatment plants, it is clear that the Agency Staff is not "opening this regulation up", but is attempting to close it up by giving treatment plant projects an absolute priority over all nontreatment-plant projects.

As Barbara Lukerman of the MWCC points out, the increase in points proposed in this section is "arbitrary and totally subjective. No foundation has been provided by the Agency to support the points". (Comment H) This conclusion was also joined in by Saint Paul (R. 174) citing the "lack of testimony showing the rational basis" for the increase. No facts have been presented in the record to document either the need for or the reasonableness of giving treatment plant projects any extra points, certainly not for according them absolute priority over others. There is also a serious question of lack of statutory authority for such a revision in light of the previously discussed Congressional amendment to the Act.

10. That no facts have been presented to document either the need for or the reasonableness of eliminating the public "hearing" required in the existing rule and substituting "public information meetings" as is proposed herein. Agency Staff confirmed that their intention is to get around an EPA requirement of a public hearing:

> The EPA requires us to go out with a minimum of a 30 day notice to all affected communities. They require us to specifically advertise where and when we will hold what we call a public hearing and what, under our definition, would be a public information meeting. . . . (R. 474)

The only rationale for the provision came in response to a query as to why it was called a "meeting" instead of a "hearing".

> Because the EPA has a different--or the federal government has a different definition of what the public hearing is than what the state has and we do not want to go through a lengthy process. These monies are available to the state for a given length of time. Going through what the state calls a public hearing process would be too time-consuming for something that is as cut and dried as it is. . .so we do not want to go through a three or four month process beyond what we are going through. We don't feel that it will serve a useful purpose. (R. 475)

The "given length of time" available for this public hearing or meeting was never spelled out nor was there any specific showing of how much shorter a meeting process is than a hearing process. "Cut and dried" non-rule hearings should never last three or four months and no specific factual data was introduced tending to show that such hearings take that long. Indeed, the only "cut and dried" hearing this Examiner ever conducted for the PCA was held last month with oral findings on the record and took less than one hour. The "useful purpose" served by a fair and impartial hearing is ensuring due process to a public which was repeatedly concerned over the vagueness and discretion throughout these rules. Barbara Lukerman of the MWCC called the rules "fuzzy" (R. 104), and the Saint Paul City Attorney objected that "there are no guidelines or criteria". (R. 38) An engineering firm objected vigorously to the broad "decision-making power of the director" (Comment D), and the Metropolitan Council argues that provisions in the rule are "unreasonable in that it submits metropolitan area interceptor funding (which accounts for a large portion of the metropolitan area needs) to the complete discretion of the director". (Comment J) One member of the public objecting vigorously to the broad discretion indicated that an independent hearing would solve his problems. (R. 425)

There is also considerable question as to the legal authority for substituting meetings for a public hearing process. Section 35.915 D. of the federal regulations (submitted with

Comment I) state unequivocally, "The State shall ensure that adequate public participation (including a public hearing) has taken place. . ." (emphasis original). These regulations go on in Section 35.1033 (dealing with public participation in the delegation agreements situation) to clearly distinguish public meetings from public hearings. A "public hearing" has a clear meaning at law which is further defined at length in the Minnesota Administrative Procedures Act to set forth specific protections for public participation. Substituting "an information meeting" removes those protections.

11. That the proposed rule should be amended to explicitly cross-reference the right of persons adversely affected by Agency Staff decisions to request a hearing on such determinations. Existing Rule MPCA 9 allows for such requests which may be granted or denied in the discretion of the Agency which also has the power to substitute a meeting. Members of the public were sincerely unaware of this right to request a hearing, and were concerned that the appeal process be spelled out in the rule. Observing that "the director would be vested with awesome power" (R. 418), and that "many of these things are written by the staff and they are essentially just signed by the director" (R. 419), an engineer urged strongly that the appeal process be "spelled out" in the rule. Agency Staff repeatedly emphasized the right of the appeal to the Board (R. 146 and 419) which is some further indication of a need for notification in the rule itself.

12. That further clarification of the eligibility section (E-5) is necessary before it can be found to be needed and reasonable. Barbara Lukerman of the MWCC urged that these "eligibility criteria should be amended in final regulations to clearly define the basis for eligibility" suggesting that certain projects be listed. (R. 92) The Saint Paul City Attorney concurred, indicating "my concern is that there are no guidelines, the director might arbitrarily turn down a project which otherwise would be eligible". (R. 146) The Zenk Engineering firm concluded that

this section is "very vague and arbitrary" (Comment B). The potential for disagreements in this area appears real. When Agency Staff was asked, for example, as to whether there was any doubt as to the eligibility of the MWCC listed components, the response was--Beaton: "No"; Anderson: "Well, it should be noted that it somewhat depends. . . ." (R. 97) At a minimum, the section should be revised to read "necessary to the cost effective functioning of an otherwise grant eligible disposal system". Such language will, at least, ensure that the director and reviewing courts can make reviewable judgments.

13. That the priorities set forth in Section D. should be revised to give higher priority to loans. When this was suggested at the hearing, the Agency Staff listed a number of arguments against such priority. (R. 291, et seq.) At first, Agency Staff dismissed the concern indicating that Minn. Stat. § 116.16, "says that we must give first priority to matching federal grants". When it was pointed out that such language would not preclude utilizing a loan to match the federal grants and that the statute obviously was not meant to effect money in the pollution control fund that exceeded that necessary to match federal grants, the Agency Staff indicated that the Legislature added loans "only, as a second thought type of thing" and did not appropriate extra funds to cover the 1971 enabling legislation until 1975, "so even the Legislature didn't see any great need for it". That argument clearly demonstrates that Agency Staff seems unable to comprehend that the same amount of money appropriated to match federal grants can be interchangeably used as loans or grants. If expended as a loan, of course, it may be reused as it is repaid for further pollution control and thus, logically should have priority to the extent that municipalities are willing to use a loan instead of a grant. The appropriation of money over and above that necessary to match federal grants in 1975, is a clear, three-year-old indication that the Legislature is anxious to encourage such loans. The Staff then further pointed to

Farmers Home Administration loans, indicating that they do not want "to get into competition with another federal agency" calling it "wheel spinning". First of all, that decision has not been left to the Agency to make. The Legislature has already clearly and unequivocally decided that the state will have a loan program. If we are to believe the figures provided by the Agency, there is no way that state loans can be viewed as "competitive" with federal loans. The figures show that there are many more immediate "needs" than there are dollars from all sources. The state loan program merely supplements federal programs in expediting pollution control in Minnesota by speeding the clean-up of state waters. The Agency Staff then went on to admit that it is the existing rules that are creating the "wheel spinning" because under the existing rule assigning lowest priority to loans there have been no applications filed. The Staff then went on to argue that "we probably wouldn't be very competitive," noting that there is a 30 year more favorable limit on Farmers Home Administration loans. This ignores the fact that the Agency itself has set the less favorable 20 year limit and the statute (Minn. Stat. § 116.16, subd. 8) merely requires that the loan funds be repaid "within such period as may be determined by the agency". The Agency has further discouraged expediting pollution control by placing a five year limitation on the repayment of step one and step two planning and specification loans. Extension of the repayment period for such loans to 20 or more years might encourage municipalities (some of whom expressed a desire to get on quickly to construction) to short circuit other recalcitrant municipalities on the needs list in order to get step three federal construction grant money (the really expensive part of the project) during the next five years, which may be the last time that it is available. More favorable loan terms might be the solution for municipalities like St. Cloud who have utilized fully their initial grants to bring their systems into compliance and appear to be prohibited by a 1977 amendment to the state act from getting further grants (Laws 1977,

Ch. 418, § 1). The Staff then indicated "there is no question in the mind of the legislature that this is certainly to be considered a grant program and not a loan program". This statement is simply completely contrary to the letter of the legislation, the existing rules and the proposed amended rule. All establish that this is both a loan program and a grant program. Agency Staff finally cited to an incomplete reading of the statute, "Okay, we cited out of the state statute that says grants, in chapter 116.18, subdivision 1, it certainly uses the word to be granted". This quotation is taken out of context and the sentence goes on to read "and disbursed" unequivocally indicating that the Legislature intends "disbursements" other than grants.

In order to be found needed and reasonable, at a minimum, first priority should be given to loans to the extent that the pollution control funds exceed the amounts necessary to match federal grants. This is an insubstantial change necessary to make the overall proposed revisions reasonable and necessary. To do otherwise gives loans lower priority even than non-matching grants to communities that desire to circumvent the needs list which the Staff confirmed is possible under the existing rule. (R. 429) Such grants not only fail to draw any federal dollars to the state, but they cannot be reused in the future for pollution control by other municipalities because they are not repaid.

The reconvened hearing should consider whether to give additional priority to loan applications from communities willing to utilize loans to match federal grants. Because of the effect of such a revision upon all projects on the needs list, this would appear to be a substantial change which should only be considered after new notice and hearing.

14. That the section permitting recovery of funds for improperly designed, constructed, operated or maintained projects should be stricken from the rules upon final adoption. It was objected to at the hearing and in written comments (Comment B).

There is serious question as to the legal authority for such recovery, particularly the proposed open-ended recovery at any point in the future. The Agency Staff confirmed that there are other remedies available to deal with this situation (many of which are added or strengthened by other provisions of this rule) indicating, "this was just one more possible remedy, certainly one that--that just the threat of recovery of those funds may be sufficient inducement to turn the community around so they start committing adequate resources to operation and maintenance". (R. 449) It is noted that the suggestion by the public that the Agency registered engineer be required to sign his approval of plans and specifications has not been included in the Agency's final proposed revisions. If the Board chooses to ignore this finding and recommendation and include the recovery provision upon final adoption, at a minimum the section should explicitly guarantee a hearing upon such recovery if requested by the municipality.

15. That the forfeiture provision in situations where municipalities fail to submit applications for funds on a timely basis must also be limited in order to be found needed and reasonable. The Agency Staff admitted that "forfeiture of grant money is going to be a very drastic step. We have never asked for it in the past and it's going to be a very difficult situation in the future if we have to". (R. 482) It is a particularly significant example of unlimited discretion in that forfeiture "may" be required without setting forth standards as to how that discretion would be exercised. In order to be found to be needed, reasonable and statutorily authorized, the provision must be explicitly limited to the state portion of the grant funds and by striking the provision which would force the municipality "to complete the work for that step without grant monies". This is particularly true in light of the lack of information in this record as to the delays that will be attendant upon requiring errors and omissions insurance and because of lack of experience

with the other delays that may be involved in the extensive new requirements in the proposed amendments. No specific factual information was provided as to the nature and scope of the problem of municipalities delaying applications, other than the unsubstantiated conclusion of Agency Staff that some communities are "horsing around". If the Board chooses to ignore this finding and recommendation, adopting the forfeiture provision without revision, at a minimum the section should explicitly give municipalities the right to a hearing upon proper request.

16. That the section setting forth grounds for rejection of an application must be revised to strike the final clause in order to be found to be needed and reasonable. After setting forth six separate grounds for rejection, the rule adds a "catch-all" phrase: "or is not considered to be in the best interest of the state". Agency Staff indicated that this "catch-all" provision had never been used to their knowledge as a basis for rejection of an application, suggesting that it might be used where an application involved a treatment plant site which was too close to a major municipal water intake. (R. 492) That situation would appear to be covered by the previous grounds for rejection where the project "does not contribute to the overall objective of effective water quality management". This "effectiveness" ground itself is an extraordinarily broad provision.

17. That the provision establishing repayment of construction grant loans in 20 years "or lesser time interval if found to be in the best interest of the state" is undefined and must be in order to be found needed and reasonable. The Agency Staff indicated (R. 520) that the provision was meant to apply to situations where the amount of the annual payment will not justify the administrative expense of processing it. The section should be revised to say that, in order to be capable of proper application and review.

18. That two editorial changes should be made which were discussed on the record, but were not included in the Staff's

final proposed findings.

The proposed amendment to strike reference to Minnesota Statutes 1973, substituting "1976" was further revised after the hearing to add "and 1977 Supp." This merely extends and compounds the problem intended to be remedied in the original amendment. In another year, the proposed amended section will also be outdated and therefore, untrue, unless a new rules hearing is convened every year to change the date. Omission of reference to any date will solve the problems as the other proposed amendments do in relation to the federal act.

The Agency Staff confirmed at the hearing that the first sentence of the second paragraph of section A and the first sentence of Section D are merely "informational" and could not point to any regulatory purpose. As such, they do not belong in an agency rule and would undoubtedly be stricken by the Attorney General pursuant to his review as to "form and legality". Final adoption will be expedited by striking them prior to that review.

CONCLUSIONS

1. That the Pollution Control Agency duly acquired and now has jurisdiction over the within proceeding.

2. That, except as to documentation of need, reasonableness and statutory authority, the Agency has complied with all requirements of law and rule.

3. That, except as otherwise specifically noted in the foregoing Findings, the Agency has adequately documented the need for and reasonableness of the proposed revisions.

4. That, except as otherwise specifically noted in the foregoing Findings, the Agency has adequately documented and now has statutory authority to adopt the proposed revisions.

RECOMMENDATIONS

It is hereby recommended: That after attention to the matters discussed in the foregoing Findings, the Pollution Control Agency duly adopt and promulgate the proposed revisions.

It is further recommended: That the Order adopting the rules

contain an Order for a further hearing to adopt such further changes as are suggested by the foregoing Findings and this record.

Dated: June 14, 1978.

HOWARD L. KAIBEL, JR.
Hearing Examiner

Attorney General

Marlene Senechal
Special Assistant
Attorney General

October 10, 1978

Lee E. Sheehy
Special Assistant
Attorney General

296-1288

In the Matter of the Proposed Adoption of Amendments to WPC 34

Attached is a copy of the City of Saint Paul's most recent submittal to this office relating to the above-captioned matter, as you requested.

LES:mb

Attachment

GEORGE LATIMER
MAYOR

CITY OF SAINT PAUL
OFFICE OF THE CITY ATTORNEY

SUZANNE E. FLINSCH, CITY ATTORNEY
647 City Hall, Saint Paul, Minnesota 55102
612-298-5121

September 11, 1978

Mr. Lee Sheehy
Special Assistant Attorney General
Room G-25, State Administration Building
50 Sherburne Avenue
Saint Paul, Minnesota 55155

Dear Sir:

The Pollution Control Agency has taken action recently to adopt amendments to PCA Rules 34 regarding the administration of the Construction Grants and Loans Program involving Federal grant funds. These rules have been presented to your office for review as is required by Minnesota Statute, and received by your office on September 5, 1978. Pursuant to Rules of the Attorney General 305, the City of Saint Paul herewith submits for your consideration the following brief in support of the findings and recommendations made by the Chief Hearing Examiner, when he recommended that the Agency either withdraw the proposed final rules or reconvene the rule hearing, as contained in the Chief Hearing Examiner's August 14, 1978 Report and Memorandum.

Our reasons for requesting that the Amended Rules be disapproved by your office are based upon the fact that the rules conflict with both state and federal law, are unreasonable and arbitrary, and exceeds the statutory authority granted to the Agency.

The objections of the City of Saint Paul are documented in the record and transcript, including the testimony of the Mayor, the Findings of the Hearing Officer, and the Report of the Chief Hearing Officer.

Saint Paul's primary objection to the proposed rules is that they fail to comply with the intentions of Congress in that every effort is being made to not make available any grant funds for nontreatment works types projects. It is our position, and that adopted by the hearing examiner, that Congress wanted states to allocate at least 25% of grant funds for such nontreatment work

RECEIVED
SEP 18 19
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

projects. Your attention is respectfully directed to pages 9 through 14 of the Hearing Examiner's report of June 14, 1978.

The testimony of the PCA staff was that the priority system proposed by the rules would make it virtually impossible for any nontreatment works project to be on the state's priority list because the PCA's policy was to fund only treatment work projects.

We ask that the Attorney General concur in the findings of the Hearing Examiner and hold that the proposed rules are unreasonable and conflict with federal law.

The proposed rules further conflict with federal law in that no public hearing is provided to review the state's priority list. This failing was pointed out by both the Hearing Examiner and the Chief Hearing Examiner. PCA proposed rules provide an informational meeting, and this does not comply with federal law. EPA regulation, § 35.915(a) provides, in part, that "A public hearing shall be held prior to submission of the priority system (or revision thereof) by the State. Prior to the hearing, fact sheets describing the proposed system (including rating and ranking criteria) shall be distributed to the public. A summary of State responses to public comment and to any public hearing testimony shall be prepared and included in the priority system submission."

It is quite clear that an evidentiary-type of public hearing is required by the federal regulations, and in addition thereto, the State must supply responses to this testimony.

PCA rules provide for an informational type meeting prior to the adoption of the ratings list by the PCA. Testimony will be heard at the PCA meeting, but no such opportunity to be heard will be permitted at the prior informational type meetings. Nor is there any provision for the State's responses to public comment. No record is required to be kept of the public testimony, and therefore the EPA regulations are not being followed.

We further concur in the Report of the Chief Hearing Examiner in that changes to the proposed rules were made after the public's opportunity to testify, and that the record does not contain adequate support for these changes. Therefore, pursuant

to Minn. Stat. § 15.0412, Subd. 4, and Rules and Regulations of the State Hearing Examiner, HE 107, the PCA should have either reconvened the public hearing, or withdrawn the proposed rules. Saint Paul concurs in the memorandum contained in the Chief Hearing Examiner's Report.

If additional information is required by you, please notify me as soon as possible. I would appreciate receiving a copy of the official action taken by your office.

Yours very truly,

JEROME J. SEGAL
Assistant City Attorney

JJS:cg

cc: Warren Spannaus
Attorney General
State of Minnesota

CERTIFICATE OF ADOPTION OF RESOLUTION BY
MINNESOTA POLLUTION CONTROL AGENCY

I, Sandra S. Gardebring, do hereby certify that I am the Executive Director of the Minnesota Pollution Control Agency, an Agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete and correct copy of a resolution adopted at a meeting of the Agency duly and properly called and held on the 1st day of August, 1978; that a quorum was present at said meeting; that the resolution was passed by a majority of the Agency; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified:

> BE IT RESOLVED that the Board hereby approves and adopts the Staff's proposed Findings of Fact and Conclusions in the matter of the proposed amendment to Minn. Reg. WPC 34 regarding the administration of the construction grants and loans program and hereby approves and adopts amendments to Minn. Reg. WPC 34, as finally amended by the Staff's proposed Order Adopting Rules including the following changes in the proposed Order and Regulation:
>
> 1. p. 4, line 6 change "over $10,000,000" to "$10,000,000 or over" (same change in proposed findings, p. 13, line 26).
>
> 2. p. 6, line 13 change "accoridng" to "according."
>
> 3. p. 7, line 12 change "may" to "shall"
>
> 4. add p. 6a. - Section E.3.c.(1)(g) (2.S.R. 1743) change "may" to "shall"
>
> 5. Add p. 10a. - Section E.4.b(3) (2.S.R. 1744) change "may" to "shall"
>
> 6. p. 11, line 16 - change "may" to "shall"
>
> 7. p. 12, line 2, change "may" to "shall"

8. p. 16, line 18 - change "may" to "shall"

9. p. 17, lines 4 and 17 - change "may" to "shall"

10. Add p. 20a. Section F.1.d. (2.S.R. 1750), change "may" to "shall"

11. p. 24, line 21 - change "25" to "26"

12. p. 26, line 8 - change "ranged" to "rated"

13. Section E.2.d.(3) - change "federal" to "reliable"; and

BE IT FURTHER RESOLVED that Joseph F. Grinnell, Chairman of the Agency, and Sandra S. Gardebring, Executive Director, be and are hereby authorized to sign the attached Findings of Fact and Conclusions and Order Adopting Rules in the matter of the proposed amendment to Minn. Reg. WPC 34.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 1st day of September, 1978.

Sandra Gardebring
Sandra S. Gardebring

Subscribed and sworn to
before me this 1st day
of September, 1978.

William Donohue
Notary Public

WILLIAM DONOHUE
NOTARY PUBLIC – MINNESOTA
RAMSEY COUNTY
My Commission Expires April 29, 1982

CERTIFICATE OF ADOPTION OF RESOLUTION BY
MINNESOTA POLLUTION CONTROL AGENCY

I, Sandra S. Gardebring, do hereby certify that I am the Executive Director of the Minnesota Pollution Control Agency, an Agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete and correct copy of a resolution adopted at a meeting of the Agency duly and properly called and held on the 29th day of August, 1978; that a quorum was present at said meeting; that the resolution was passed by a majority of the Agency; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified:

BE IT RESOLVED THAT the Board hereby makes the following amendment to the Findings of Fact and Conclusions:

1. Finding No. 21 - the last line of this finding shall be deleted.

BE IT FURTHER RESOLVED THAT the Board hereby makes the following amendment to its Order Adopting Rules:

1. p. 2 (Section WPC 34 A.) add the word "construction"

2. p. 3 (Section B.10) add "all"

3. p. 6 (Section E.3.a.) capitalize the word "municipal"

4. p. 7, p. 11, p. 12, p. 16, p. 17 (Sections E.3.c.(1)(i), E.4.b.(4), E.4.c., E.8.g., E.9.a.) indicate by strikeout and underlining that "shall" has been added and "may" has been deleted.

5. p. 11 (Section E.4.b(2) change "206" to "216"

6. p. 13 (Section E.6.b.) change "b" to "a"

7. p. 18 (Section E.9.e.(3)(b) add "and beyond the seventy-five (75) percent level"

8. p. 19 (Section E.9.g.) underline "the"

9. p. 22 (Section F.2.a.) underline "grants listed in Section D.1., 2., and 3."

10. p. 24 - p. 28 (Appendix A) underline entire appendix

BE IT FURTHER RESOLVED that the Chairman and the Executive Director are hereby authorized to sign an amended Findings of Fact and Conclusions and Order Adopting Rules in a form which reflects the above amendments.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 1st day of September, 1978.

Sandra S. Gardebring
Executive Director

Subscribed and sworn to
before me this 1st day
of September, 1978.

Notary Public

WILLIAM DONOHUE
NOTARY PUBLIC – MINNESOTA
RAMSEY COUNTY
My Commission Expires April 29, 1982

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

September 1, 1978

Mr. Lee Sheehy
Special Assistant
Attorney General
G-19K Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: In the matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

Dear Mr. Sheehy:

On August 1, 1978, the Minnesota Pollution Control Agency adopted amendments to Minn. Reg. WPC 34. On August 14, 1978, the Chief Hearing Examiner issued his Report and Memorandum in regard to these amendments. The Agency considered the Chief Hearing Examiner's Report at its August 29, 1978, meeting. The Agency does not agree with portions of the Report and plans to submit a brief to you in regard to the issues raised in the Report. We expect to file this brief on September 5 or 6, 1978.

In the meantime, enclosed for your review, pursuant to Minn. Stat. §15.0412 subd. 4 (1977 Supp.), are copies of the following hearing documents:

(a) complete hearing record

(b) four copies of the Rule as Adopted

(c) three copies of the Rule as Proposed

(d) the original and three copies of the Order Adopting Rules

(e) the original and three copies of the Order Amending Order Adopting Rules

(f) three copies of the Findings of Fact and Conclusions

(g) three copies of the Order amending Findings of Fact and Conclusions

(h) three copies of the Certificate of Adoption of Resolution of Minnesota Pollution Control Agency (August 1, 1978, meeting)

(i) three copies of the Certificate of Resolution of Minnesota Pollution Control Agency (August 29, 1978, meeting)

(j) three copies of the Hearing Examiner's Report

(k) three copies of the Chief Hearing Examiner's Report

(l) three copies of the Certificate of Adoption of Resolution of Minnesota Pollution Control Agency (October 25, 1977, meeting)

(m) three copies of Order for Hearing

(n) three copies of Notice of Hearing

(o) three copies of Affidavit of Receipt of Secretary of State's List, Certificate of Delivery and Affidavit of Mailing together with one copy of the Secretary of State's List

(p) three copies of Affidavit of Receipt of Response to Notice of Intent to Solicit Outside Opinion together with Notice of Intent

(q) three copies of Statement of Need

(r) three copies of Statement of Evidence

(s) three copies of Statement of Compliance with the Manuel of Rule Making Procedures.

All persons at the hearing were given the opportunity to indicate if they wished to be informed when (1) the Hearing Examiner's Report was available, (2) the Agency would consider the adoption of the proposed amendments, and (3) the rule was sent to the Attorney General for review. All persons who requested such notification as well as those who participated in the hearing were given such notices. Notice was also given in regard to the availability of the Chief Hearing Examiner's Report and consideration thereof at the August 29, 1978, meeting of the Agency. Copies of all such notices and the mailing lists therefor are enclosed herewith in a separate file.

Pursuant to Minn. Reg. MPCA 13(a)(2)(ii), when a hearing has been held on a matter, any person is entitled to submit written statements or arguments to the Agency. Oral statements or arguments are discretionary with the Board. A number of written and oral statements and comments were received by the Agency prior to its August 1, 1978, adoption of the amendments to Minn. Reg. WPC 34. Copies of such written comments are enclosed herewith for your information.

A tape recording of the August 1, 1978 meeting (as well as the August 29, 1978 meeting) was made and is available at the Agency offices. It is not our intention to transcribe the full tape unless you so request. Instead it is our intention to submit the minutes of these meetings, relative to the consideration of Minn. Reg. WPC 34, for your information, as soon as they have been prepared. This will provide a summary of oral comments received by the Agency.

Please contact me if you need any additional information for your review of this rule.

Yours very truly,

Marlene E. Senechal
Special Assistant
Attorney General

Enclosures

MES/jm

CITY OF SAINT PAUL
OFFICE OF THE CITY ATTORNEY

SUZANNE E. FLINSCH, CITY ATTORNEY
647 City Hall, Saint Paul, Minnesota 55102
612-298-5121

GEORGE LATIMER
MAYOR

October 5, 1978

Mr. Lee Sheehy
Special Assistant Attorney General
Room G-25, State Administration Building
50 Sherburne Avenue
Saint Paul, Minnesota 55155

Dear Mr. Sheehy:

This is in regards to your letter of September 27th. You are correct in that EPA 35.915(a) applies to the Pollution Control Agency's adoption of the project priority system, and that EPA 35.915(d) applies to the annual project priority list. We do not have a copy of "Subpart B" referred to in 35.915(d), but still am of the opinion that the intent of the federal regulations is to give units of local government and others not only an opportunity to be heard, but for the EPA to be apprised of those local concerns and objections to the manner in which the Pollution Control Agency annually selects projects for federal funding. This can only be provided with an evidentiary type of public hearing.

Thank you for the opportunity to present our concerns involving the proposed amendment to the Pollution Control Agency's rules, and if I can be of further assistance, please let me know.

Very truly yours,

JEROME J. SEGAL
Assistant City Attorney

JJS:cg

cc: Mayor Latimer
Shelley Wright
James O'Leary
Roy Bredahl

RECEIVED
OCT 10 1978
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

FINDINGS OF FACT AND CONCLUSIONS

The above-entitled matter came on for decision before the Minnesota Pollution Control Agency on the 1st day of August, 1978. After affording interested persons an opportunity to present written and oral data, statements, and arguments to Hearing Examiner Howard L. Kaibel, Jr., after considering the Report of the Hearing Examiner, and after considering all of the evidence adduced upon the records, files and proceedings herein, the Agency, being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions.

FINDINGS OF FACT

1. The above-entitled matter came on for hearing before Howard L. Kaibel, Jr., Hearing Examiner, on April 21, 1978, at the Board Room of the Minnesota Pollution Control Agency, 1935 West County Road B-2, Roseville, Minnesota, commencing at 9:00 a.m.; on April 24, 1978, in the North Hall, Multi-Purpose Building, Area Vocational Technical Institute, Highway 34 East, Detroit Lakes, Minnesota, commencing at 7:00 p.m.; on April 25, 1978, in the City Council Chambers, City Hall, 420 Pokegama Avenue North, Grand Rapids, Minnesota, commencing at 7:00 p.m.; on April 26, 1978, Room 102, Armstrong Hall, Mankato State University, Mankato, Minnesota, commencing at 7:00 p.m.; and on May 8, 1978, at the basement conference room of the Minnesota Pollution Control Agency, 1935 West

County Road B-2, Roseville, Minnesota, commencing at 9:00 a.m.

Marlene E. Senechal, Special Assistant Attorney General, appeared for and on behalf of the Minnesota Pollution Control Agency Staff in support of the proposed amendments to Minn. Reg. WPC 34.

All interested persons, representatives of individuals or associations, and other interested groups present at the hearing had an opportunity to present evidence, make statements, and question witnesses.

2. The record of the within proceeding remained open through May 15, 1978. All written submissions received by the State Office of Hearing Examiners before the close of the record are to be considered as part of the record of the proceeding. One written comment, Comment O, received May 17, 1978, has been included in the record because it was postmarked three days prior to record closure and because a copy was mailed to the Agency director five days prior to record closure.

3. Pursuant to Minn. Stat. §15.0412 subd 4 (Supp. 1977), the Hearing Examiner's Report was available for review to all affected individuals upon request for at least five working days before the Agency took any final action on the proposed amendments.

4. On March 1, 1978, the Agency filed the following documents with the Chief Hearing Examiner:

(a) A proposed Order for Hearing;

(b) A proposed Notice of Hearing; and

(c) A Statement of the estimated length and number of people attending the hearing.

5. On March 8 and March 24, 1978, the Agency filed the following documents:

(a) A copy of the proposed amendments;

(b) The Order for Hearing;

(c) The Notice of Hearing as mailed;

(d) The Affidavit of Receipt of the Secretary of State's list;

(e) The Affidavit of Mailing;

(f) The Secretary of State's Certificate and list;

(g) The Statement of Need;

(h) The Statement of Evidence, including the names of witnesses to be called;

(i) The names of Agency personnel who will represent the agency.

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

6. The Order for Hearing, issued on March 7, 1978, was in all respects proper in form, content, execution and filing. MPCA Exhibit 2.

7. Due, timely, and adequate Notice of Hearing as ordered by the Minnesota Pollution Control Agency (hereinafter sometimes referred to as the "Agency") was properly served and filed on March 17 and 20, 1978. See MPCA Exhibits 3 through 7. All other relevant substantive and procedural requirements of statute or rule have been complied with for the purposes of establishing jurisdiction of the subject matter to proceed to public hearing

pursuant to law. See MPCA Exhibits 1 and 8 through 10A.

8. The legal authority of the Agency to promulgate the proposed amendments to Minn. Reg. WPC 34 is contained in Minn. Stat. §115.03 subd 1(e) (1976) which authorizes the Agency to adopt regulations in order to prevent, control, or abate water pollution and Minn. Stat. §116.16 et seq. which authorizes the Agency to adopt regulations governing the allocation of federal construction grants in Minnesota and the state construction grant and loan program.

9. The proposed amendments:

(a) reflect changes in federal law pursuant to 1977 amendments to the Federal Water Pollution Control Act;

(b) amend the criteria for determining the priority of municipalities and projects on the Municipal Needs List and the Municipal Project List;

(c) provide for greater public participation prior to the adoption of the Municipal Needs List and the Municipal Project List;

(d) provide for Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained;

(e) amend other provisions of the existing rule for purposes of clarification and more efficient administration of the programs.

10. The Federal Water Pollution Control Act authorizes 75% or,

under certain circumstances, 85% federal grants for the planning, designing and constructing of municipal sewage disposal systems.

11. The Minnesota legislature has also authorized four different programs for the disbursement of state funds for this purpose: (a) state grants to match federal grants; (b) grants to eliminate the local share of the project costs of poor communities; (c) independent state grants (without a federal matching grant); and, (d) loans.

12. The purpose of both the federal construction grant and the state construction grant and loan programs is to assist municipalities in the construction of sewage disposal systems which will meet applicable water quality regulations.

13. Minn. Reg. WPC 34 presently governs the administration of the allocation of federal construction grant funds to Minnesota and the state construction grant and loan program.

14. The Agency has amply demonstrated the need for the proposed amendments. The State of Minnesota currently requires $1.6 billion to fully construct all needed disposal systems in the state. ($1,046,000,000 of these needs occur in the Metropolitan Area and the remainder of these funds are needed in the Non-Metropolitan Area) $874 million of the total disposal system needs are required for the construction of treatment works alone. ($539 million of this amount is required for the construction of treatment works in the Metropolitan Area and the balance is required for Non-Metropolitan Area treatment works.) Anderson, Tr. at 254-256.

15. The Clean Water Act of 1977, Pub. L. No. 95-217, (hereinafter "Clean Water Act") amended the Federal Water Pollution Control

Act, 33 U.S.C. §1251, with respect to many aspects of the construction grants program. Federal construction grant funds were authorized for fiscal years 1978-1982. If all of these funds are appropriated, Minnesota will get $464 million in federal construction grants. In order for Minnesota to continue to qualify for its appropriation and to comply with changes in federal law, amendment of Minn. Reg. WPC 34 is necessary. Beaton, prepared testimony at 6*, MPCA Exhibits 11 and 13. U.S. Environmental Protection Agency ("U.S. EPA") regulations reflecting the changes in federal law in regard to the federal construction grants program have not yet been adopted. However, interim final regulations have been published. MPCA Exhibits 16 and 30A. It was suggested that the Agency should delay adoption of the proposed amendments until final U.S. EPA regulations are adopted. However, it is not necessary to do so as the proposed amendments are drafted in such a way as to allow the Agency to fully comply with U.S. EPA regulations, regardless of the content of such regulations. Furthermore, U.S. EPA is not requesting that these proposed amendments be delayed but, rather, is encouraging states to proceed. Orzehoskie, Tr. at 121.

How?

16. The U.S. EPA required the Agency, as a condition of the fiscal year 1978 program plan approval, to amend the criteria in Minn. Reg. WPC 34 for determining the priorities of municipalities and projects on the Municipal Needs List ("MNL") and the Municipal Project List ("MPL"). Beaton, prepared testimony at 7, MPCA Exhibits 17 through 19. Pursuant to this requirement, the proposed amendments award an additional 20 points to a municipality having only primary

See this

* The prepared testimony of Perry T. Beaton is bound into the transcript following page 22.

treatment and an additional 30 points to a municipality with a raw sewage discharge. See proposed Minn. Reg. WPC 34.E.3.c.(1)(e) and (f).

17. Minn. Stat. §116.16 et seq. was amended in 1977. The proposed amendments reflect these changes, specifically, in regard to independent state grants.

18. A significant number of construction grants projects which have been or may be improperly designed, constructed, operated, or maintained establish the need for Agency recourse in regard to such projects. Since 1970, some 130 municipalities in Minnesota have built wastewater treatment facilities under the construction grants program utilizing approximately $360 million of federal and state construction grants funds. Of these projects about 35% have no significant problems and are operating well. Another 35% experienced minor problems while the remaining 30% experience serious problem. Primarily, the problems related to poor design and construction. The remaining problems were due to poor operation and maintenance. Beaton, Prepared testimony at 8-9. Anderson, Tr. at 525. Many of the proposed amendments serve to both prevent such problems from occuring as well as providing for Agency recourse when such problems do occur. See proposed Minn. Reg. WPC 34.E.8. and 9. The legislature has also recognized that substandard construction grants projects do pose a problem and it has enacted legislation in this regard. See Laws of Minnesota, 1978, Chapter 614.

19. The Agency has been administering the federal and state construction grants program under the present Minn. Reg. WPC 34 since 1973. During that time, several hundred grants have been awarded. Through this experience the need for certain changes

has become apparent. Changes were necessary to present the regulation in a more orderly and informative fashion, address problems and issues which are not dealt with in the existing regulation, add definitions to facilitate consistent interpretation and application of the regulation, eliminate duplication of U.S. EPA regulations, incorporate existing Agency practice and interpretation into the regulation, and provide clarification, consistency, and increased administrative efficiency. Beaton, Prepared testimony at 9-10.

20. As discussed above, there is statutory authority for the Agency to adopt the proposed amendments. Also, in accordance with the Findings hereinabove, the Agency has demonstrated the need for the proposed amendments. There only remains the determination of whether or not the amendments to the rule are reasonable as originally proposed and published or as finally proposed with certain changes, and whether the amendments as finally proposed with post-hearing changes differ substantially from the amendments as originally published and noticed.

21. The Agency finds that the amendments as finally proposed are not substantially different from the amendments as originally proposed and noticed for hearing when considering the appropriate criteria set forth in the rules of the Office of Hearing Examiners. However, the Agency recognizes that the final determination as to "substantial change" rests with the Chief Hearing Examiner.

22. Prior to the commencement of the public hearing in Roseville, the Agency Staff prepared a list of clarifying changes to the language of the proposed amendments for the purpose of correcting typographical errors and providing greater clarity. MPCA Exhibit 14. This list was made available to members of the public at every hearing location, and counsel made it clear that the amendments being proposed by the Agency Staff would contain these clarifying changes.

23. As noted above, Minn. Reg. WPC 34 is an existing rule of the Agency. The Agency has proposed amendments to some provisions of the existing regulation while it has proposed no substantive change in regard to other provisions. Pursuant to Minn. Stat. §15.0412, subd 4 (Supp. 1977), the Agency is only required to establish the need for and the reasonableness of the proposed amendments. The Agency is not required to "re-prove" the unchanged existing provisions of the rule. However, a number of questions did arise at the hearing regarding existing provisions of the rule. The Agency Staff responded to each question raised and, in some instances, submitted additional evidence for informational purposes.

24. The Agency has established the reasonableness of each and every provision of the proposed amendments. In addition, the Agency has established the need for and reasonableness of each and every existing provision of the rule which was questioned during the course of the hearing. Moreover, the reasonableness of most of proposed amendments and existing provisions of the rule have not been called into question by any member of the public. The Agency

has considered all issues raised in the record of the proceedings. Hereinbelow, specific findings are made pertaining to specific provisions of Minn. Reg. WPC 34, as proposed.

25. WPC 34 A. The only additions to or deletions from the existing provision were made to provide consistency with other Agency regulations, to update references to state and federal law, and to provide greater clarity. It was suggested that the final paragraph, except for the final sentence, was unnecessary as it was informative, rather than regulatory, in nature. However, since the information contained in this paragraph is useful to persons regulated by the rule, it should be retained. To conform with Minn. Stat. Ch. 15 (1977 Supp.) the term "regulation" in this paragraph & throughout the rule should be changed to "rule".

26. WPC 34 B. The Agency has established the reasonableness of each definition proposed. Anderson, prepared testimony, pp. 3-6. In addition to the definitions originally proposed by the Agency, it was suggested that "scope of project," "primary treatment," "resident inspection," "planning loan," "construction loan," "contract," "grantee," and "adequate errors and omissions insurance" be defined. The Agency Staff suggested "scope of project" should be defined in a manner consistent with U.S. EPA regulations. See 40 C.F.R. 35.905-16. The Agency Staff suggested that "primary treatment" be defined as "any treatment less than secondary treatment." This definition is consistent with the definitions of "secondary treatment" and "tertiary treatment." The Agency Staff suggested that "resident inspection" be defined in a manner consistent with the usage of the term by consulting engineers. The definitions

suggested for "planning loan" and "construction loan" relate those terms to the particular step of the project being undertaken. The Agency Staff suggested that "contract," as it is used in the regulation, relate only to the contract between the municipality and the engineer or contractor for the construction of a grant funded disposal system. The definition of "grantee" limits the term to the recipient of a state construction grant fund. The Agency finds that all of these proposed definitions are reasonable and necessary for clarity and consistent application of the rule.

A number of comments were received regarding the definition of "adequate errors and omissions insurance."

The Agency Staff suggested the following definition of "adequate errors and omissions insurance" in its post hearing comments:

HE 1.5 (c)

"B18. "ADEQUATE ERRORS AND OMISSIONS INSURANCE" means a policy of insurance which provides the minimum amount of coverage for the corresponding estimated project construction cost, as determined from the following table which is maintained for a minimum of two years after acceptance of the project by the grantee.

Estimated Project Construction Cost	Minimum Amount of Coverage
< $1,000,000	$ 250,000
$1,000,000 to $2,999,999	$ 500,000
$3,000,000 to $9,999,999	$1,000,000
$10,000,000 or more	$2,000,000

If an insurance company refuses to provide the minimum amount of coverage to an engineer, a lesser amount of coverage may be approved by the Director after a review is made of the insurance company's reasons for refusal. If an engineer has more than one project, the policy must provide for the coverage applicable to the highest estimated project construction cost.

The Agency finds that this definition is reasonable and necessary for the following reasons:

(a) The minimum amounts of coverage are necessary to provide a fund from which recovery can be made if the project is improperly designed;

(b) The minimum length of time is necessary to allow recourse in regard to design defects which are not immediately apparent; and

(c) It is reasonable to allow approval of a lesser amount of coverage for good cause.

27. WPC 34 C. This is an existing provision to which no amendments were proposed or questions raised.

28. WPC 34 D. Minn. Stat. §116.16-116.18 (1976 and 1977 Supp.) establish four different programs for the disbursement of funds from the state pollution control fund. The order in which the funds are to be utilized in the various programs is established in the present Minn. Reg. WPC 34(d). The proposed amendments delete the section as previously written but do not change the order of disbursement except as required to reflect changes in state and federal law. The Agency was not required to show the reasonableness of and need for this provision as there is no substantive change from the existing provision.

The provision establishes the following priority: (a) state grants to match federal grants; (b) grants to eliminate the local share of the project costs of poor communities; (c) independent state grants (without a federal matching grant); and, (d) loans. It was

suggested by the Hearing Examiner that loans be given the highest priority so that state funds could be "recycled" and "reused". The Agency finds the present priority system is reasonable for the following reasons:

(a) It was the clear intent of the legislature to give the highest priority to state grants to match federal grants. Minn. Stat. §116.18 (1976), Tr. at 291-301.

(b) Many local units of government have a difficult time financing even 10% of the project costs. Therefore, it would be difficult, if not impossible, for such local governments to locally finance 25%, which would be necessary if they received a 15% loan instead of a 15% matching grant; Tr. at 291-301.

(c) There are loans available from other sources such as the Farmers Home Administration, at lower rates of interest. Therefore, there is not a demand for construction grant loans. In fact, there has never been an application for such a loan. Tr. at 137-138, 291-301.

It was also suggested that the first sentence of this sentence was unnecessary as it was merely informational. However, since this information is useful to persons regulated by the rule, it is reasonable to include it in the rule.

29. WPC 34.E.1. This section provides a general summary of the construction grants program. As it is only a summary, its substantive provisions are more fully dealt with in subsequent sections of the rule. This provision is useful and necessary as it provides a general framework for understanding subsequent specific provisions

governing the construction grants program.

WPC 34E.1.c. provides that the scope of the project may be revised by the Agency or the EPA. This is reasonable as it is specifically authorized by 40 C.F.R. 35.903(d).

30. WPC 34.E.2. This section establishes the procedure for development of the Municipal Discharge Inventory. ("MDI") The Agency is required by U.S. EPA regulations to prepare a MDI. 40 C.F.R. §35.915. Minn. Reg. WPC 34(f) and (i) presently govern the development of this list. The amendments as proposed make no substantial changes in regard to the development of the MDI or the criteria used therefor. Therefore, the Agency finds that the Agency was not required to show the need for and reasonableness of these provisions. However, some questions did arise at the hearing in regard to these provisions and the Agency finds that their need and reasonableness have been established.

31. WPC 34E.2.d.(1) is reasonable and necessary as it is important to give the highest priority to the highest beneficial water use which is or could be affected by the project. The water use classifications are identical to those contained in Minn. Reg. WPC 14 and 15.

32. WPC 34E.2.d.(2) is reasonable and necessary because the larger populations, by necessity, require the disposal of greater amounts of sewage and industrial and other wastes. Therefore, if other priority rating criteria are equal, a large community should be given a higher priority than a small community. The cut off of population at 450,000 is reasonable because the largest city in the state, Minneapolis, has a population of only 434,000. Therefore,

the only "municipality" which has a population in excess of 450,000 is the Metropolitan Waste Control Commission. It was suggested that points should be awarded on a per person basis, for example, one point per 125 people. However, this would be unreasonable as the system would then be heavily weighted towards the large communities in the state and would make population the only factor controlling the distribution of grant funds. The present system is reasonable as these population categories are a more accurate reflection of the distribution of municipalities in the state.

33. WPC 34E.2.d.(3) is reasonable and necessary as it is a means of prioritizing the receiving waters in the state which are or may be impacted by municipal discharge. The Agency Staff suggested in its post-hearing comments that the present priority ranking of such receiving waters be included as Appendix A to the rule. The Agency finds that this is reasonable and necessary to apprise regulated persons of the present priorities.

34. WPC 34.E.3. This section governs the development of the Municipal Needs List ("MNL"). This procedure is presently governed by Minn. Reg. WPC 34(f), (h) and (i). The proposed amendments make several changes in regard to the MNL. The most important changes are with respect to the criteria used for determining the priority of needs. (See also Finding No. 44, p. 21)

35. Proposed Minn. Reg. WPC 34E.3.c.(1)(a) and (b) have been amended to give a higher point rating to tertiary and secondary treatment projects. The points awarded have been increased from 40 and 30, respectively, to 160 and 150, respectively. Presently, it is the practice of the Agency to fund all treatment works and

major interceptors in the state before funding any other interceptors or sewers. The proposed amendments would change this practice to allow other sewers and interceptors to be funded if they received a high enough priority rating based on other criteria. However, it is reasonable and necessary to give a very high priority to treatment works for the following reasons:

(a) it is the construction of treatment works which will yield the greatest benefit in terms of water quality improvement;

(b) it is the intent of the Clean Water Act that construction grant funds be primarily utilized for projects which will result in compliance with enforceable provisions of the Federal Water Pollution Control Act. Construction of treatment works, rather than sewers or minor interceptors, will achieve this result.

(c) there is a limited amount of money available to construct disposal systems. It is reasonable to fund as many municipal treatment works as possible with those funds rather than constructing entire disposal systems for just a few select municipalities. See Finding No. 14. See Anderson, prepared testimony at 8, Tr. at 138.

(d) if an interceptor or a cost-effective sewer system rehabilitation would eliminate the need for a treatment works, it will receive the same number of points as the treatment works. Further, if a sanitary sewer system project is necessary to the hydraulic integrity of a treatment works, it will receive the same number of points

as the treatment works.

Therefore, it is reasonable to give a point rating of 160 and 150 to tertiary and secondary treatment works so that these projects will, as a general rule, be the highest priority and, therefore, the first funded projects in the state.

36. It is also reasonable to give a higher priority to tertiary treatment than to secondary treatment. If a municipality is required to achieve tertiary treatment it is because either a higher quality or a more vulnerable receiving water must be protected. Anderson, prepared testimony at 9, Tr. at 137.

37. Proposed Minn. Reg. WPC 34E.3.c.(1)(c) and (d), as published, contain a typographical error. Both categories of projects presently are awarded 10 priority points and the proposed amendments should be changed to reflect the correct point rating.

38. Proposed Minn. Reg. WPC 34E.3.c.(1)(e) and (f) are necessary because U.S. EPA has required that additional priority be given to municipalities having only primary treatment or raw sewage discharge. See MPCA Exhibits 17 through 19. It is also necessary and reasonable because the construction of disposal systems to replace such systems would have a significant effect in terms of water quality improvements. Anderson, prepared testimony at 9.

39. Proposed Minn. Reg. WPC 34E.3.c.(1)(h) is the same as existing Minn. Reg. WPC 34(i)(2)(dd)(7), and provides that an interceptor sewer which eliminates an existing treatment works or the need for a new treatment works shall be allocated the same number of priority points as the eliminated treatment works would have received. It was suggested by MWCC that "interceptor" be

defined in a manner consistent with Minn. Stat. §473.121, subd. 23 (1976) for such projects in the Metropolitan Area and thereby provide funding for all Metropolitan Area interceptor sewers. This suggestion is without merit. To the extent it is more cost effective to build a major interceptor than a treatment works, it is certainly reasonable to award the same high priority. The definition proposed by MWCC has no similar rationale.

40. Minn. Stat. §116.16 et seq. (1976 & 1977 Supp.) requires the Agency to consider the financial need of the community in establishing the priority of projects. Therefore, section E.3.c.(2) is reasonable. Consideration of per capita costs (Table 1) is specifically required by the statute. Consideration of the indebtedness (Table 2) of a community together with buying power (Table 3) is an excellent measure of a municipality's financial capability.

41. The Agency Staff suggested that Minn. Reg. WPC 34E.3.c.(2) Table 1 be amended as follows:

TABLE 1

Per Capita Cost of Project

Per Capita Cost ($)	Point Rating
<280	1
281-400	3
401-600	5
601-800	7
801-1000	9
1001-1300	11
1301-1600	13
> 1600	15

The Agency finds that it is reasonable and necessary to increase the per capita cost figures to reflect the increased construction costs

in the state. The per capita cost categories proposed by the Staff are reasonable as they reflect the frequency distribution of such costs. Tr. at 324-331.

42. Proposed Minn. Reg. WPC 34E.3.d. is reasonable as it is a measure which will insure that all municipalities or projects will be placed on the Municipal Needs List if a need does, in fact, exist.

43. Proposed Minn. Reg. WPC 34E.4.b.(1) continues the present Metropolitan/Non-Metropolitan split of funds. Since it is an existing provision, the Agency was not required to justify it. However, this split of funds is necessary and reasonable for the following reasons:

(a) There is an abundance of high quality recreational waters in the Non-Metropolitan area of the state that require protection through the provision of adequate disposal systems.

(b) Federal law requires that population be considered in developing the priority in the award of grant funds. Without the split, the Metropolitan area would have received almost all of the grant funds.

(c) The Metropolitan Area comprises approximately 50% of the population of the state but only about 3 1/2% of the land area.

(d) The split of funds is proportional to the treatment needs of each area.

Tr. at 195-197, 254-256, MPCA Exhibit 34.

44. Section 40 of the Clean Water Act provides as follows:

> Notwithstanding any other provision of this Act, the determination of the priority to be given each category of projects for construction of publicly owned treatment works within each State shall be made solely by that State, except that if the Administrator, after a public hearing, determines that a specific project will not result in compliance with the enforceable requirements of this Act, such project shall be removed from the State's priority list and such State shall submit a revised priority list. These categories shall include, but not be limited to (A) secondary treatment, (B) more stringent treatment, (C) infiltration-inflow correction, (D) major sewer system rehabilitation, (E) new collector sewers and appurtenances, (F) new interceptors and appurtenances, and (G) correction of combined sewer overflows. Not less than 25 per centum of funds allocated to a State in any fiscal year under this title for construction of publicly owned treatment works in such State shall be obligated for those types of projects referred to in clauses (D), (E), (F), and (G) of this section, if such projects are on such State's priority list for that year and are otherwise eligible for funding in that fiscal year."

The application of this provision to WPC 34E.4.b(2) was probably the most controversial issue in the hearing.

The Agency finds that the Act gives the states the exclusive authority to rank categories of projects. The Agency finds that the "priority list" referred to in the Act is the Municipal Project List. The Act does not require the Agency to place non-treatment works projects on its Municipal Project List. For the reasons stated in Finding No. 35, the Agency finds that it is reasonable and necessary to give a higher priority to treatment works projects vis-a-vis non-treatment works projects. Therefore, the Agency finds that it is reasonable, necessary and statutorily authorized to adopt Section E.4.b(2)(c), as finally proposed by the Agency Staff, without providing a 25% set-aside for non-treatment works projects.

The Agency further finds that if U.S. EPA regulations and subsequent court action interpreting the Act require that 25% of the state's funds be used for such projects, the Agency will be able to comply with the requirement pursuant to Section E.4.b(c)(2) without amending the rule as such projects will then be required to be on the State's Municipal Project List.

The Agency finds that although a set-aside is not made for non-treatment works projects, such projects will be eligible for funding and are eligible for placement on the Municipal Needs List and the Municipal Project List. Therefore, the Agency finds that it is reasonable and necessary to amend the rule as proposed in the following manner to clarify the eligibility of non-treatment works projects:

1. Section E.3.a. should be amended to read as follows:

"The Agency shall develop, and update whenever necessary, a Municipal Needs List for which a need exists or which desire to construct eligible projects which do not meet the enforceable requirements of the Act."

2. The following language should be added at the end of Section E.4.b(2):

"Subsection E.4.b(2) shall, therefore be read in conjunction with the terms as defined in the Act and U.S. EPA regulations."

45. The entire section E.4.b.(2) is reasonable as it apprises regulated parties of the requirements of the Act while providing flexibility for the Agency to comply with U.S. EPA regulations interpreting the Act.

46. Proposed Minn. Reg. WPC 34E.4.b.(3) is reasonable as it

will prevent the loss of any portion of Minnesota's allotment due to an insufficient number of projects being developed for the present or future fiscal years.

47. It is reasonable for the Agency to be able to reallocate funds from the Metropolitan Area to the Non-Metropolitan Area and vice versa, pursuant to section E.4.b.(4). This will allow the Agency to fully utilize the State's allotment and thereby prevent the loss of any federal funds to Minnesota.

48. A reserve project list, pursuant to section E.4.c., is necessary to protect against the inability of the state to use its entire allotment of federal grant funds each fiscal year.

49. The Act requires the Agency to utilize a certain portion of its allotment for projects utilizing innovative and alternative technology. Therefore, section E.4.d. is reasonable as it will allow the Agency to give the necessary priority to such projects so that the allotment can be fully utilized. Section 20 of the Clean Water Act explicitly allows such modification for such projects.

50. Proposed Minn. Reg. WPC 34E.5.a. and E.9.d. provide that general state grant eligibility is dependant on federal eligibility. This is a requirement of Minn. Stat. §116.16 (1976 and 1977 Supp.).

51. Proposed Minn. Reg. WPC 34E.5.b. provides that generally a project is not grant eligible if construction is initiated prior to grant award. This provision is similar to federal requirements and is necessary to retain control over the project.

52. Proposed Minn. Reg. WPC 34E.5.c. provided that items are not grant eligible unless the Director determines that they are

essential to the efficient and effective operation of an otherwise grant eligible disposal system. This provision is reasonable as it is important to limit the use of state and federal grant funds to only those items which relate to the ability of a disposal system to function properly. It is not feasible to provide an itemized list of eligible/ineligible items as a preliminary engineering report is necessary to determine the need for and cost effectiveness of specific items. Therefore, it is necessary for the Director to exercise some discretion in this regard. However, it was recommended by the Hearing Examiner that this provision be amended to read as follows:

"Items are not grant eligible unless the Director determines that they are ~~essential-to-the-efficient-and effective-operation-of-an-otherwise-grant-eligible disposal-system~~ necessary to the cost effective functioning of an otherwise grant eligible disposal system.

The Agency Staff supported this change.

The Agency finds that this language is preferable as it clarifies the review procedure while still allowing needed flexibility.

53. It is reasonable to delete sections E.6.a. and F.3.d. while they are existing provisions of a validly adopted rule, they are inconsistent with the present provisions of the Administrative Procedures Act.

54. Proposed Minn. Reg. WPC 34E.7. establishes the public participation process in regard to the Agency adoption of the Municipal Needs List and the Municipal Project List. It was suggested that this provision be further amended to provide for a

public hearing prior to the adoption of these lists. However, the Agency finds that the procedure, as originally proposed, is reasonable for the following reasons:

(a) The proposed amendments expand, rather than reduce, the present public participation process by providing public informational meetings, in addition to the opportunity to participate at the Agency Board meeting;

(b) A contested case hearing is not required as the List development process will rarely, if ever, involve adjudication of disputed facts. If a dispute of facts does arise, the aggrieved party has a right to request a hearing.

(c) A contested case hearing would accomplish nothing that cannot be done through the proposed procedure; and would, therefore, add delay and expense without any corresponding benefit in public participation; and

(d) The proposed procedure provides for even greater public input than is required by U.S. EPA regulations.

55. If a municipality fails to proceed through the construction grants process in a timely manner, it is reasonable to provide for the possible forfeiture of grant funds to such a municipality, pursuant to section E.8.b. and c. This is consistent with the Agency's enforcement policy which provides that no action will be taken against a municipality which is proceeding expeditiously through the grants process. Furthermore, the forfeiture of funds will also prevent a tardy municipality from tying up grant funds which could be used for another municipality that is ready to proceed. However, it is reasonable and necessary to add the following language to this section as a municipality may be significantly impacted by such action:

"Prior to the forfeiture of grant monies or the required completion of work without grant monies, pursuant to Section E.8.b. or c., the municipality shall have the right to a hearing, if it so requests."

56. Sections E.8.d.(7), E.8.e.(5) and E.8.f.(6) require documentation by the engineer regarding adequate errors and omissions insurance. A number of questions were raised regarding the meaning of the term "adequate," the applicability of the requirement to all three steps of a project, and the cost of such insurance.

See Finding No. 21 in regard to the definition of the term adequate. See Finding No. 18 in regard to the need for and reasonableness of the general requirement.

It is reasonable to require errors and omissions insurance at all three steps of the project as errors and omissions can occur at all three stages. The cost of errors and omissions insurance varies based on the type of project, the value of the project, the past work history of the insured, the record of claims of the insured, the amount of deductible, and other factors. Most engineers in the state already carry errors and omissions insurance so the costs to local governments will not be substantially increased by this requirement. Furthermore, any cost in this regard will be a grant eligible item; therefore, only 10% of such increased cost would be borne by the local unit of government.

57. Proposed sections E.8.d.(2) and e.(3) are reasonable as it is necessary to have a commitment from all municipalities involved in a multi-municipality project.

58. A significant number of construction grant projects have failed to meet applicable effluent limitations. (See Finding No. 18). Proposed sections E.8.d.(4) and f.(4) are necessary to insure that the disposal system will be designed and constructed to meet the applicable effluent limitations. It is reasonable to commit the designing and consulting engineers to a knowledge of the limitations the facilities must achieve and to commit them to achieving such limits.

59. It is obviously necessary for a municipality to construct a sewage collection system if the treatment plant is to be of any value. Therefore, sections E.8.d.(5) and (6) are reasonable.

60. The full time resident inspection requirement of section E.8.f.(5) is reasonable as it will ensure that the project will be constructed in accordance with approved plans and specifications and otherwise ensure that the project is properly constructed. (See Finding No. 18). The provision would allow for an alternative method of inspection if circumstances warrant it. This is important as, for example, it may not be cost effective to have full time resident inspection on a small project.

61. Proposed Minn. Reg. WPC 34E.9.e. establishes the procedure for payment of grant funds. The payment schedule is reasonable in that it ensures adequate performance before payment is made. These payment provisions would also serve to induce the timely completion of the projects. See also Laws of Minnesota, 1978, Chapter 614.

62. Proposed Minn. Reg. WPC 34E.9.f. i. are necessary to provide Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained. (See Finding No. 18). Section E.9.f would allow the Agency to withhold funds if a project has major deficiencies. This mechanism will give the Agency some leverage at an early stage. Recovery of grant funds is another remedy available to the Agency if state funds are utilized for an inferior product. The only purpose of Section E.9.g. is to put persons on notice of this fact. Therefore, the Agency finds it is reasonable and necessary to amend the section as follows:

"Funds recovery. In addition to any other remedies, ~~The~~ the Agency may seek to recover any or all funds tendered or disbursed for a project which is ~~as-determined-by-the-Director-to-be~~ improperly designed, improperly constructed, or improperly operated and maintained. ~~In-any-of-the-above-situations,-the-Agency,-where-deemed-practical,-may-take-whatever-actions-deemed-appropriate-by-the-Director.~~"

Sections E.9.h. and i. will enable the Agency to sue for breach of the contract between the municipality and the engineer or contractor. Smaller municipalities are often unable to seek an appropriate legal remedy because of a lack of resources.

63. The Staff suggests the addition of the following section to the rule:

k. Procedural Rules and appeals. All requests for hearing, appeals, and other procedural matters not specifically provided for herein shall be governed by the Agency Rules of Procedure, the Rules of the Office of Hearing Examiners and other applicable law.

The Agency finds that this is reasonable and necessary to apprise affected person of their procedural rights.

64. Proposed Minn. Reg. WPC 34F. governs the administration of the construction loans program. This section is an existing provision of the rule and the only changes originally and finally proposed are necessary for the purposes of clarification and consistency. Additionally, the Hearing Examiner recommended that Section F.1.c(2) be amended to read as follows:

> "Resolution of the governing body of the municipality obligating the municipality to repay the loan to the state treasurer in annual installments including both principal and interest, each in an amount sufficient to pay the principal amount within twenty (20) years or lesser time interval if ~~found-to-be-in-the-best-interest-of-the-state,~~ the amount of the annual payment will not justify the administrative expense of processing the payment, from user charges, taxes, special assessments, or other funds available to it.

The Agency Staff supported this change.

The Agency finds that this is reasonable and necessary as it will add greater precision to the provision.

65. In addition to the items discussed in these Findings, a number of comments were made in regard to very specific or minor provisions of the proposed amendments or existing provisions of the rule. Many of these comments were directly addressed by the Agency Staff. Other comments were indirectly addressed through the testimony of Agency Staff witnesses and exhibits. Other comments

are deemed inappropriate or inconsistent with the weight of evidence as produced in the record of these proceedings. The Agency finds that the amendments and provisions addressed by such comments have been shown by the Agency to be reasonable.

66. Other minor changes, of an editorial nature, suggested by the Staff in its proposed order, are necessary to correct errors and provide greater clarity, precision and consistency.

67. The only amendments which may require the expenditure of funds by local units of government are sections E.8.d(7), E.8.e(5), E.8.f(6) (errors and omissions insurance) and E.8.f(5) (resident inspection). Most engineers already carry errors and omissions insurance. Both of these items are grant eligible. Therefore, these amendments will not result in a total cost of local public bodies greater than $100,000 in either of the two years immediately following adoption of the amendments for implementation of the amendments.

CONCLUSIONS

A. The Minnesota Pollution Control Agency duly acquired and now has jurisdiction over this proceeding.

B. All relevant legal and procedural requirements of statute and rule have properly been complied with.

C. The Minnesota Pollution Control Agency has statutory authority to promulgate and adopt the proposed amendments to Minn. Reg. WPC 34, as finally amended and supported by the Agency Staff and as is consistent with the Agency's Findings.

D. Considering the complete record of the within proceedings, the Agency concludes that the amendments, and considering the amendments as originally proposed, as finally amended and supported by the Agency Staff and as is consistent with the Agency's Findings, are reasonable and necessary for the purposes of complying with Minn. Stat. §115.03 subd. 1(e) (1976) and Minn. Stat. §116.16 et seq. (1976 and 1977 Supp.).

E. In reviewing the proposed amendments as noticed for public hearing, and in adopting the amendments in accordance with the Agency's Findings, consideration was given to the rules of the Office of Hearing Examiners which set forth the criteria necessary to determine whether rules as finally adopted are substantially different from the rules as originally proposed.

MINNESOTA POLLUTION CONTROL AGENCY

Joseph F. Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: August 1, 1978

Jerome J. Segal
Assistant City Attorney
City of Saint Paul
647 City Hall
Saint Paul, Minnesota 55102

Re: In the Matter of the Proposed Rule Amendments to Minn. Reg. W.P.C. 34.

Dear Mr. Segal:

I am in receipt of your letter dated September 11, 1978, relating to the above-captioned rule. The rule has not been approved by this office or filed with the Secretary of State; but rather returned to the Agency for additional changes and considerations regarding form and legality. One issue which the Agency has been asked to discuss upon resubmittal relates to a matter raised in your letter of September 11, 1978. Specifically, the Agency has been asked to address your argument that Agency Rule relating to public hearings is in violation of E.P.A. Regulation Section 35.915. This office has also underscored to the Agency your remark that "an evidentiary-type of public hearing is required by the Federal regulations..." At this time, I am requesting an elaboration of the City of Saint Paul's position that such an evidentiary-type hearing is required. From the E.P.A. provisions reviewed today, it appears that E.P.A. regulations section 35.915(a) applies only to due process guarantees relating to the Agencys adoption of the State priority system, as opposed to the Agency's adoption of the State Project Priority List in which public participation appears to be governed by 35.915(d) and "Subpart B" referenced therein.

Finally, I have enclosed a copy of my memorandum relating to the above-captioned rule to the Agency. If you have any questions, do not hesitate to call me at 296-1288.

Very truly yours,

Lee E. Sheehy
Special Assistant
Attorney General

LES:mb

cc: Marlene Senechal
Special Assistant
Attorney General

3. WPC 34(E)(d)(3) and Appendix A: The Chief Hearing Examiner's Conclusion No. 3 is correct in concluding that the inclusion of Appendix A in the final rule is a substantial change. The appendix should be the subject of a public hearing; and the agency's representation that the appendix is a mere proper "presentation of the presently existing ranking of the list of segments established pursuant to Section E.2.d.(3)" should be scrutinized after notice at such a hearing.

4. WPC 34(E)(7): Substantial questions are raised by individuals during this promulgation regarding the legality of this provision. Upon resubmittal to this office, the agency must address the arguments raised by the City of Saint Paul in its letter to this office dated September 11, 1978, a copy of which is attached. Specifically, the agency must address the issue of this provision's alleged non-compliance with the EPA regulation cited in the Saint Paul letter. This office will also request from the City of Saint Paul an elaboration on its claim that "an evidentiary-type of public hearing is required by the federal regulations."

   Secondly, the agency should discuss the language of EPA Regulation § 35.915(d) in the first sentence which requires "that public participation (including a public hearing) has taken place as required by Subpart B of this part." (Emphasis added.) Specifically, what is required in "Subpart B"?

   Other than the above-discussed matters, the remainder of the above-captioned rule has been approved as to form and legality. Resolution of the 25% set-aside controversy turns on an interpretation of federal law. The agency's position is arguably legal; and state statutory and regulatory provisions would permit an immediate change in state policy if the interpretation of federal law through court challenge or administrative interpretation was contrary to the position presently taken by the agency. Therefore, this office concurs with Chief Hearing Examiner's Conclusion No. 6.

LES:mb

Enclosure

cc: Duane Harves
Jerome Segal

DRAFT

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS

WHEREAS, the Findings of Fact and Conclusions in the above-entitled matter was approved by the Minnesota Pollution Control Agency Board and executed by the Chairman and the Executive Director of the Agency on August 1, 1978;

WHEREAS, Finding No. 21 does not accurately reflect the position of the Minnesota Pollution Control Agency;

NOW, THEREFORE, IT IS ORDERED THAT the Findings of Fact and Conclusions dated August 1, 1978, are hereby amended by deleting the last sentence in Finding No. 21.

MINNESOTA POLLUTION CONTROL AGENCY

Joseph F. Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: September 1, 1978.

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

RECEIVED
MAR 24 1978
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Porgram

NO. PCA-78-010-HK

STATEMENT OF NEED

MPCA Exhibit #8

INTRODUCTION

Minn. Reg. WPC 34 is an existing rule of the Minnesota Pollution Control Agency (Agency) last amended and filed with the Secretary of State on November 13, 1973. The purpose of this hearing is to amend the rule. The Agency's authority to promulgate the proposed amendments is contained in Minn. Stat. chs. 115 and 116 (1976) and, more specifically, Minn. Stat. §116.16 et seq. (1976).

Minn. Reg. WPC 34 governs the administration of the allocation of federal construction grants in Minnesota as well as the state grant and loan programs. Funds are disbursed to municipalities in the state pursuant to these programs for the purpose of planning, designing, and constructing municipal sewage treatment works and disposal systems.

The need for the proposed amendments to Minn. Reg. WPC 34 arises from five major factors:

(1) The Clean Water Act of 1977 (P.L. 95-217) enacted on December 27, 1977, amended the Federal Water Pollution Control Act relating to the construction grants program;

(2) The U.S. Environmental Protection Agency (U.S. EPA) required the Agency, as a condition of the Fiscal Year 1978 Program Plan approval, to amend the criteria in Minn. Reg.

WPC 34 for determining the priority of municipalities and projects on the Municipal Needs List (MNL) and the Municipal Project List (MPL);

(3) Minn. Stat. §116.16 et seq. was amended in 1977;

(4) A significant number of construction grant projects which have been and may be improperly designed, constructed, operated or maintained establish the need for Agency recourse in regard to such projects; and

(5) Five years of administering these programs under the existing regulation have shown that certain amendments are necessary.

Each of these factors will be discussed in turn:

1. The Clean Water Act of 1977 (P.L. 95-217) enacted on December 27, 1977, Amended the Federal Water Pollution Control Act Relating to the Construction Grants Program

The Clean Water Act of 1977 amended the Federal Water Pollution Control Act (the "Act"), 33 U.S.C. §1251, with respect to many aspects of the construction grants program. Construction grant funds were authorized for fiscal years 1978-1982. If these funds are appropriated, Minnesota will receive approximately $84 million in fiscal year 1978 and approximately $95 million for each subsequent fiscal year. It is anticipated that these appropriations will be sufficient to provide funding for all municipalities in the state which need a new or upgraded disposal system. In order for Minnesota to continue to qualify for its appropriation and to comply with the changes in the law and U.S. EPA regulations concerning the construction grants program, amendment of Minn. Reg. WPC 34 is necessary. Some of the significant changes in the federal

law are:

a. The federal share of a project can be raised from 75% to 85% if the project uses innovative or alternative wastewater treatment processes and techniques. A certain portion of federal funding must be set aside for this purpose. Higher priority may also be given to such projects.

b. Step 2 (preparation of plans and specifications) and Step 3 (actual construction) grants for projects with a total estimated cost of less than $3,000,000 and population served of 25,000 or less may now be combined.

c. Up to 2% of each state's allotment may be utilized by the state for the reasonable cost of administering various provisions of the Act.

d. A certain portion of the state's allotment of federal funds must be set aside for certain classifications of projects, in addition to the set aside noted in "a." above.

e. Privately owned treatment works are grant eligible under certain circumstances.

f. U.S. EPA may remove a project from the state's MPL if such a project will not result in compliance with enforceable requirements of the Act.

2. The U.S. EPA Required the Agency, as a Condition of the Fiscal Year 1978 Program Plan Approval, to Amend the Criteria in Minn. Reg. WPC 34 for Determining the Priority of Municipalities and Projects on the MNL and the MPL

The U.S. EPA required the Agency to amend its priority rating criteria to include consideration of the municipality's current treatment level. Pursuant to this requirement, the proposed

amendments award an additional 20 points for a municipality having only primary treatment and an additional 30 points to a municipality with a raw sewage discharge.

3. Minn. Stat. §116.16 et seq., Was Amended in 1977

Changes in the statute which specifically governs the construction grant and loan programs have necessitated some changes in the regulation in regard to independent state grants.

4. A Significant Number of Construction Grants Projects Which Have Been or May Be Improperly Designed, Constructed, Operated, or Maintained Establish the Need for Agency Recourse in Regard to Such Projects

Since 1970, some 130 municipalities in Minnesota have built wastewater treatment facilities under the construction grants program utilizing approximately $360 million of federal and state construction grant funds. Of these projects about 41 (or 35 percent) had no significant problems and are operating well. About 38 (or 35%), however, did experience minor problems primarily relating to design inadequacies and poor construction. About 31 (or 30 percent) did have serious problems again primarily related to design and construction problems.

Many smaller municipalities lack the staff and the expertise to adequately address these problems before they occur or during the construction grant process. Because of intermittent, and often infrequent, inspection of the actual construction, problems encountered and correctable in the field go unnoticed and appear only after startup of the treatment works when the source of the problem

is difficult to identify and costly to repair. Even after the problem has been identified, smaller municipalities are often unable to seek an appropriate legal remedy because of a lack of resources.

Several of the amendments to WPC 34 address these problems.

5. Five Years of Administering These Programs Under the Existing Regulation Have Shown that Certain Amendments Are Necessary

The Agency has been administering the present federal and state construction grants programs under the existing regulation since 1973, during which time several hundred grants were awarded. Through this experience, the need for certain changes has become apparent.

One major change in the proposed amendments is its restructuring. While the substantive content of many provisions remains unchanged, some provisions have been reordered, and in some cases, modified, to present the regulation in a more orderly and informative fashion.

In other areas, the existing regulation does not specifically address problems and issues which have become apparent in the day to day administration of the program. The Agency has developed procedures and interpretations in regard to such problems and issues. Such procedures and interpretations have been included in the proposed amendments with respect to project eligibility, project criteria, enforcement and other matters.

A number of definitions have also been added to facilitate consistent interpretation and application of the regulation.

The proposed amendments eliminate, to the extent possible, duplication of U.S. EPA regulations since the latter regulations may be

frequently amended. Instead, the proposed amendments, while making reference to applicable federal law and regulations, set out only independent Agency requirements.

Other changes have been proposed for purposes of clarification, consistency and increased administrative efficiency.

MINNESOTA POLLUTION CONTROL AGENCY

Sandra S. Gardebring

Sandra S. Gardebring
Executive Director

Dated: March 24, 1978

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the
Proposed Amendment to Minn.
Reg. WPC 34 Regarding the
Administration of the
Construction Grants and
Loans Program

NO. PCA-78-010-HK

I, Special Assistant Attorney General, Marlene E. Senechal, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manuel of Rule Making Procedures has been followed.

Marlene E. Senechal
Special Assistant
Attorney General

Dated: 9/1/78

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

ORDER ADOPTING RULES

IT IS ORDERED THAT, pursuant to authority vested in this Agency by Minn. Stat. §115.03 subd. 1(e) and §116.16 et seq. (1976 and 1977 Supp.), amendments to Minn. Reg. WPC 34 regarding the Administration of the Construction Grants and Loan Program are adopted this 1st day of August, 1978, in the form published in 2 State Register 1737 (March 20, 1978) with the following amendments. Deletions from the text appearing in the State Register are indicated by strikeout. Additions are indicated by underlining. The page references are to the text appearing in the State Register.

1. Section A. (p. 1737):

A. Purpose. This regulation is herein adopted and promulgated by the Minnesota Pollution Control Agency to implement the provisions of Minn. Stat. chs. 115 and 116 (1976 and 1977 Supp.) and to comply with the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq. and guidelines and regulations pursuant thereto ~~or resulting therefrom~~ by the establishment of procedures relating to the federal construction grants and state grant and loan programs.

The promulgation of this ~~regulation~~ rule, in association with the Agency's enabling legislation, provides authority for the State of Minnesota, upon approval by the Regional Administrator of the United States Environmental Protection Agency, to certify applicants for Federal construction grants and subsequently, to the extent funds are available, provide state construction grants. The Minnesota Pollution Control Agency is the State agency designated by State law to administer this program. Except as specifically provided herein, this regulation shall apply with equal force to state financial assistance and Federal grant funds.

2. Section B.6. (p. 1738):

~~6. "FORM OF PROJECT" means the form of disposal system a municipality intends to contract.~~

"CATEGORY OF PROJECT" means the part of the disposal system the municipality intends to construct.

3. Section B.10. (p. 1738):

10. "Outstate NON-METROPOLITAN AREA" means counties of the state not in the metropolitan area.

4. Section B.13. (p. 1738):

13. "PRIMARY TREATMENT" means any level of treatment of lesser quality than secondary treatment.

5. Section B.14. (p. 1738):

14. "SCOPE OF PROJECT" means Step 1, Step 2, or Step 3 of disposal system construction or segments thereof."

6. Section B.15. (p. 1738):

15. "PLANNING LOAN" means a loan for Step 1 and/or Step 2 projects.

7. Section B.16. (p. 1738):

16. "CONSTRUCTION LOAN" means a loan for a Step 3 project.

8. Section B.17. (p. 1738):

17. "RESIDENT INSPECTION" means that the consulting engineer or his agent shall be present on-site, during the hours of construction for purposes of inspection. It does not mean the inspector has to be a resident of the community.

9. Section B.18. (p. 1738):

18. "ADEQUATE ERRORS AND OMISSIONS INSURANCE" means a policy of insurance which provides the minimum amount of coverage for the corresponding estimated project construction cost as determined from the following table, which is maintained for a minimum of two years after acceptance of the project by the grantee.

Estimated Project Construction Cost	Minimum Amount of Coverage
less than $1,000,000	$250,000
$1,000,000 to $2,999,999	$500,000
$3,000,000 to $9,999,999	$1,000,000
$10,000,000 or over	$2,000,000

If an insurance company refuses to provide the minimum amount of coverage to an engineer, a lesser amount of coverage may be approved by the Director after a review is made of the insurance company's reasons for refusal. If an engineer has more than one project, the policy must provide for the minimum coverage applicable to the highest estimated project construction cost.

10. Section B.19. (p. 1738):

19. "CONTRACT" means a contract between a municipality and an engineer or a contractor for the planning, design, or construction of a disposal system, or part thereof, which will be paid for, in all or in part, by state construction grant funds.

11. Section B.20. (p. 1738):

20. "GRANTEE" means the grantee of a state construction grant.

12. Section D.2. (p. 1741):

2. Grants to reduce or eliminate the local contribution of a municipality meeting the criteria set forth in section E.9.b.4.

13. Section E.1.b. (p. 1741):

b. Grants may be awarded for a Step 1, Step 2, or Step 3 project or, as authorized by ~~statute~~ the Act, for a project which combines steps.

14. Section E.2.d.(3) (p. 1742):

(3) List of segments. Pursuant to ~~Sect~~ Section 303(e) of the Act and guidelines and regulations thereto relating to the state continuing planning process, all waters of the state shall be divided into segments and each segment classified as either water quality or effluent limited. The Director shall annually develop a list of segments, and after giving consideration to:

(a) severity of pollution problems;

(b) population;

(c) need for preservation of high quality waters; and

(d) national priorities as determined by the Administrator; priority points will be established in accordance with criteria approved by the Agency and the EPA.

The segment ranked number one shall be awarded priority rating equal to the total number (N) of segments with any subsequent segment receiving a priority rating of N + 1 minus the numerical ranking of the segment. Priority points shall be accordingly awarded to a municipality for the type of project located in a segment. The current priority point

13a. Section E.2.d.(2) (p. 1742):

(2) Population affected. Priority points shall be assigned for each type of project based on the population of the municipality, or population of the municipalities served by such project as determined by the most recent ~~Federal~~ reliable census, as follows:

	Point Rating
(a) Municipal population under 250	2
(b) Municipal population from 251-500	4
(c) Municipal population from 501-750	6
(d) Municipal population from 751-1000	8
(e) Municipal population from 1001-1500	10
(f) Municipal population from 1501-3000	12
(g) Municipal population from 3001-5000	14
(h) Municipal population from 5001-10,000	16
(i) Municipal population from 10,001-20,000	20
(j) Municipal population from 20,001-50,000	25
(k) Municipal population from 50,001-450,000	35
(l) Municipal population in excess of 450,000	50

rating and ranking of the segments is set forth in Appendix A.

15. Section E.3.a. (p. 1742):

a. The Agency shall develop, and update whenever necessary, a municipal Needs List listing all municipalities for which a need exists~~.~~ or which desire to construct eligible projects which do not meet the enforceable requirements of the Act.

16. Section E.3.b.(2) (p. 1742):

(2) Points awarded pursuant to the criteria set forth in section E.3.c. below.

The municipalities or projects shall be ranked on the Municipal Needs ~~Lists~~ List according to the number of points awarded to each.

17. Section E.3.c.(1) (p. 1742):

(1) ~~Type~~ Category of project. Priority points shall be allocated on the basis of the single highest disposal system or part thereof, improvement to prevent, control, and abate the source of pollution as follows:

18. Section E.3.c.(1)(c) & (d) (p. 1743):

(c) Provision of a new sewer system or portion thereof for a numicipality, in existence on October 18, 1972 with sufficient existing or planned capacity to adequately treat such collected sewage or industrial waste. 10

18a. Section E.3.c.(1)(g) (p. 1743)

(g) Subsections (a), or (b), whichever is applicable ~~may~~ shall also include treatment works and/or any portion of sewer system improvements deemed necessary by the Director to insure the integrity and performance of a disposal system.

(d) Provision by a municipality of storm water disposal system, including sewer systems to separate existing combined sanitary and storm sewers or treatment works. ~~10~~ 10

19. Section E.3.c.(1)(i) (p. 1743):

(i) In the case of a sanitary sewer system being tributary to sewerage facilities which are on the ~~project list~~ Municipal Project List for funding but which the EPA will not fund until an infiltration/inflow analysis, and where required, a sewer system evaluation survey has been performed, this sewer system project shall be awarded by the Director an equal number of priority points as the project on the ~~project list~~ Municipal Project List.

20. Section E.3.c.(2) (p. 1743):

(2) Financial aspects. Priority ~~points~~ points shall be awarded by summing up the applicable rating points for the project from Tables 1, 2, and 3 relative to per capita project cost, the ratio of municipal bonded debt to ~~assessed evaluation~~ adjusted assessed values of municipalities and per capita buying income.

TABLE I

Per Capita Cost of Project

Per Capita Cost ($)		Point Rating
0-40	0-280	1
41-80	281-400	3
81-120	401-600	5
121-160	601-800	7
161-200	801-1000	9
201-240	1001-1300	11
241-280	1301-1600	13
over 280	1600	15

TABLE II

Ratio of Municipal Bonded Debt to Assessed-Evaluation** Adjusted Assessed Values of Municipality

Ratio x 100	Point Rating
0-3	3
4-9	5
10-15	7
16-21	9
22-27	11
28-33	13
over 33	15

TABLE III

Per Capita Buying Income***

Percent of Average	Point Rating
0-50	15
51-60	13
61-70	11
71-80	9
81-90	7
91-100	5
101-110	3
over 110	1

21. Section E.3.d. (p. 1743):

d. If a municipality or project is not included on the Municipal Needs List, ~~it~~ the municipality may petition the Agency for inclusion on the list. The municipality must document its need in the following manner:

22. Section E.3.d.(2) (p. 1744):

(2) Unsewered communities: submission of data regarding: type of soil in unsewered area; depth to seasonally high water table; sizes of all lots in the area; and age and type of existing system.

Following submission of this data, the Director will review the material and determine if a need has been shown. If so, the municipality will be added ~~up~~ to the Municipal Needs ~~list~~ List, in the manner set forth above. If not, the municipality will be notified of the reasons for the decision of the Director.

23. Section E.3.e. (p. 1744):

(e) If in the determination of the order of priority on the Municipal Needs List, two or more municipalities have the same total number of priority points, the municipality in accordance with section E.2.d.(1) that has the highest single beneficial water use seriously affected or to be preserved shall be ranked higher. If two or more municipalities have the same total

number ~~or~~ of priority points and the same highest single beneficial water use seriously affected or to be preserved, the municipalities shall be ranked based on population as determined by the most recent federal census in descending order below the municipality with the largest population.

24. Section E.4.b.(1) (p. 1744):

(1) Funds shall be allocated between the Metropolitan Area and the ~~Outstate Area~~ Non-Metropolitan Area in approximately the same ratio which the population of sewered municipalities of the Metropolitan Area bears to the sewered population of the ~~Outstate Area.~~ Non-Metropolitan Area.

(2) Funds will be set aside for such classifications of projects and in such amounts as is required by the Act. Such classifications presently include:

(a) Treatment works utilizing innovative or alternative wastewater treatment processes and techniques for which an 85% federal grant ~~has been~~ may be tendered:

(b) Alternatives to conventional sewage treatment works for municipalities having a population of three thousand five hundred or less or for the highly dispersed sections of ~~a~~ larger larger municipalities, as defined by the Administrator; and

(c) Construction of publicly owned treatment works for major sewer system rehabilitation, new collector sewers and appurtenances, new interceptors and

25a. Section E.4.b.(3) (p. 1744)

(3) The Agency ~~may~~ shall provide for an adequate mixture of Step 1, 2, and 3 projects so as to permit funding to proceed in an orderly fashion and to fully utilize all allocated funds.

appurtenances, and, correction of combined sewer overflows, if such projects are on the ~~state's priority list~~ Municipal Project List for that year and are otherwise eligible for funding in that fiscal year.

25. Section E.4.b.(2) (p. 1744):

. . . These classifications are presently ~~required~~ required by Sections 205 and 206 of the Act. Subsection E.4.b.(2) shall, therefore, be read in conjunction with the terms as defined in the Act and U.S. EPA regulations.

26. Section E.4.b.(4) (p. 1744):

(4) Federal grants allocated ~~Section (i)(1)~~ to ~~Outstate~~ Non-Metropolitan Area projects and for which there are not sufficient certifiable ~~Outstate~~ Non-Metropolitan projects by the end of the fiscal year for which those funds were ~~alloted~~ allotted shall be ~~re-allocated~~ reallocated by the Agency to the Metropolitan Area. Any such federal grant funds which are reallocated to the Metropolitan Area shall be recoverable in total for allocation ~~of outstate~~ to Non-Metropolitan projects in later fiscal years in annual amounts deemed reasonable by the Director. Grant funds allocated to the Metropolitan Area which are unused are subject to similar provisions for reallocation to and recovery from ~~outstate~~ Non-Metropolitan projects.

27. Section E.4.c. (p. 1744):

c. A reserve project list shall be developed by the Agency for the purpose of utilizing grant monies forfeited by any municipality pursuant to ~~section~~ sections E.8.b. and E.8.c.

28. Section E.4.d. (p. 1744):

(d) The ~~project list~~ Municipal Project List may be modified, in accordance with EPA regulations, to give higher priority to Step 2 or combined Step 2 and 3 projects utilizing innovative or alternative wastewater treatment processes and techniques to the extent necessary to comply with the set asides required by the Act.

29. Section E.5.c. (pp. 1744-45)

c. Items are not grant eligible unless the Director determines that they are ~~essential to the efficient and effective operation of an otherwise grant eligible disposal system~~ necessary to the cost effective functioning of an otherwise grant eligible disposal system.

30. Section E.6.a. (p. 1745):

a. ~~The numerical rating points established in sections E.2.d. and E.3.e. shall be subject to readjustment in value for any category or class prior to the mailing of the public notice established in section E.7.e. if it is determined to be in the best interests of the state by resolution of the Agency. At least 30 days notice of such proposed readjustments shall be furnished by United States mail to all persons registered on the appropriate list maintained by the Secretary of State, and all persons wishing to do so shall be given an opportunity to present their views on the proposals to the Agency prior to final Agency action.~~

31. Section E.6.b. (p. 1745):

b. Notwithstanding any other provision in this ~~regulation~~ rule including, but not limited to, sections E.2.d., E.3.c. and E.6.a., to the contrary, the Director may, as necessary to establish criteria for determining priority for applications for federal and state construction grants under the Act, and regulations and guidelines of the EPA promulgated pursuant thereto, and Minn. Stat. chs. 115 and 116, establish such criteria for determining priority upon a basis other than that provided herein, to the extent required to comply with the Act, and guidelines and regulations thereto or resulting therefrom.

32. Section E.7.b. (p. 1745):

b. A free copy of the proposed Municipal Needs List and the proposed Municipal Project List will be mailed to any interested person upon request.

33. Section E.8.c. (p. 1745):

c. A specific schedule for completing the particular step of the project will be contained in each grant offer tendered. The municipality's National Pollutant Discharge Elimination System (NPDES) permit may be modified, pursuant to Agency regulation, to include such schedule. Failure to comply with this schedule may cause forfeiture of grant monies for the step grant involved and the municipality may be required to complete the work for that step without grant monies.

Prior to the forfeiture of grant monies or the required completion of work without grant monies, pursuant to Section E.8.b. or c., the municipality shall have the right to a hearing, if it so requests.

34. Section E.8.d.(6) (p. 1746):

(6) A resolution by the governing body of the municipality as to the methods for financing the construction of the collection system; and

35. Section E.8.e.(1)-(4) (p. 1747):

(1) Any of the items listed in Section E.8.d. which were not previously submitted or which require updating;

(2) Resolution of the governing body of the municipality authorizing the application and designating the municipal official authorized to sign the application;

(3) If more than one municipality is involved, resolutions from the governing body bodies of all municipalities agreeing to cost sharing and agreeing to proceed to Step 3 when so instructed by the Agency;

(4) A design summary based on the plans and specifications to be submitted when the plans and specifications are complete; and

36. Section E.8.f.(2) (p. 1747):

(2) Resolution of the governing body of the municipality authorizing the application and designating the municipal official authorized to sign the application;

37. Section E.8.f.(5) (p. 1748):

(5) Executed engineering contract, including, unless otherwise approved by the Director, full-time qualified resident inspection by the consulting engineer or his agent during construction. After project initiation, reports are to be submitted outlining type of construction inspected and time; and

38. Section E.8.g. (p. 1748):

(g) All construction grant application forms and attachments shall be submitted in triplicate to the Agency at the address specified by the Director. Unless adequately justified in writing, failure to submit all the necessary documents by the date specified shall constitute grounds for rejection of the application. Substantial deficiencies in the application and/or supporting documents or failure to conform with applicable requirements such as

those set forth in the current Agency water pollution control program plan or the applicable basin, regional, or area water quality management plan also shall be grounds for rejection. Any application shall be rejected at the discretion of the Agency if it does not include an engineering report acceptable to the Director, or does not include an adequate commitment for support of operation and maintenance of the project or is not consistent with applicable statutes, or does not contribute to the overall objective of effective water quality management~~, or is not considered to be in the best interest of the state~~.

~~34~~ Section E.9.a. (p. 1748):

(a) Certification. Accepted applications~~Applications~~ of municipalities on the ~~municipal project list~~ Municipal Project List may shall be certified to the EPA for a grant. Such certification shall in any fiscal year be withheld or withdrawn by the Director if the project is not or cannot be implemented according to an acceptable schedule or otherwise poses a substantial likelihood of causing a loss of federal funds to the State.

40. Section E.9.b.(2) (p. 1748):

(2) In the case of a project for which the applicant has solicited and received ~~bids on construction~~ contracts which exceed the costs estimated in the application, the Director may, after consideration of available federal funds and in accordance with EPA

regulations, recommend a grant increase. A reasonable amount shall be reserved by the Agency from each allotment of funds for such increases.

41. Section E.9.e.(3)(b) (p. 1749):

(b) Installment payments at the fifty (50) percent level shall not be made until the applicant has in its employ for the operation of the project treatment works, a waste-water treatment works operator having a valid state certificate or one who is capable of obtaining such a certificate for operation of the designated class of treatment works within a reasonable period of time. State installment payments at the seventy-five (75) percent level, shall be based on an assessment of, ~~including but not limited to,~~ the applicant's development of and progress towards completion of an acceptable manual for operation and maintenance of the disposal system, and the establishment of adequate pretreatment requirements and facilities. Final payment shall not be made until final inspection of the project by the Agency.

42. Section E.9.e.(3)(d) (p. 1749):

~~(d) Installment payments shall not be made on the cost of eligible parts of sewer systems unless adequate treatment works exist or are under construction, nor shall such payments be made for projects which upon completion of construction will not be reasonably usable useable or effective without construction of additional works,~~

43. Section E.9.g. (p. 1749):

g. Funds recovery. In addition to any other remedies, ~~The~~ the Agency may seek to recover any or all funds tendered or disbursed for a project which is ~~as-determined-by-the Director-to-be~~ improperly designed, improperly constructed, or improperly operated and maintained. ~~In-any-of-the above-situations,-the-Agency,-where-deemed-practical, may-take-whatever-actions-deemed-appropriate-by-the Directors.~~

44. Section E.9.h. (p. 1749):

h. Contract assignment. The grantee shall retain the right to assign its contract with a contractor or engineer, and any or all rights, ~~duties-and-obligations~~ pursuant thereto, to the Agency.

45. Section E.9.k. (p. 1749):

k. Procedural Rules and appeals. All requests for hearing, appeals, and other procedural matters not specifically provided for herein shall be governed by the Agency Rules of Procedure, the Rules of the Office of Hearing Examiners and other applicable law.

46 . Section F.1.a. (p.1750):

a. The application form shall be of the type set forth below:

MINNESOTA POLLUTION CONTROL AGENCY

Division of Water Quality

Application for Disposal System Planning and/or Construction Loan

To be filled in by the State

Date Received

Project Number

Loan Request

Legal Name of Applicant

Address, Zip Code

Hereby Makes Application to the Pollution Control Agency of the State of Minnesota for a Loan of Funds for the Planning and/or Construction of:

Financial Aspects:

Estimated Project Cost	$
State Loan Funds	
Local Funds	
Other Funds	

Project Schedule:

Project Starting Date	
Time to Complete Project	

Name and Title of Representative Official

Signature of Representative Official Date

48a. Section F.1.d. (p. 1750)

d. The loan application form and attachments shall be submitted in duplicate to the Agency at the address specified by the Director. Substantial deficiencies in the application and supporting documents or failure to conform with applicable requirements such as those set forth in the current Agency water pollution control program plan or the applicable basin, regional or area water quality management plan ~~may~~ shall be grounds for rejection. Any construction loan application ~~may~~ shall be rejected at the discretion of the Agency if it does not include an engineering report acceptable to the Director, or does not include an adequate commitment for support of operation and maintenance of the project, or does not conform to the intent of the applicable statutes, or does not contribute to the overall objectives of effective water quality management, or is not considered to be in the best interests of the state.

47. Section F.1.c.(1) (p. 1750):

(1) . . . cause may waive or defer the submission of any items required pursuant to section E.8.f. if such items are EPA requirements.

48. Section F.1.c.(2) (p. 1750):

(2) Resolution of the governing body of the municipality obligating the municipality to repay the loan to the state treasurer in annual installments including both principal and interest, each in an amount sufficient to pay the principal amount within twenty (20) years or lesser time interval if ~~found-to-be-in-the-best interest-of-the-state~~, the amount of the annual payment will not justify the administrative expense of processing the payment, from user charges, taxes, special assessments, or other funds available to it.

49. Section F.1.e. (p. 1750):

e. Applications must be restricted to those projects or portions thereof for which service contracts or construction contracts can be awarded by June 1~~,-or-other date-as-may-be-specified-by-the-Director~~, except in cases of advance approval by the Director of the state fiscal year . . . .

50. Section F.1.f. (p. 1750):

~~f.--Applications-may-be-submitted-at-any-time,-unless-otherwise-specified-by-the-Director.~~

51. Section F.2.a. (p. 1750):

a. . . . ~~federal-matching-construction-grants-and-construction and-there-shall-not-be-set-aside-for-loans-more-than-five-(5) percent-of-the-total-funds-available-in-any-fiscal-year, unless-the-Agency-by-resolution-determines-that-another percent-level-would-be-in-the-best-interests-of-the-state~~ grants listed in Section D.1., 2., and 3.

52. Section F.2.d. (p. 1751):

d. . . . period, shall be paid in <u>equal</u> annual installments to the state treasurer. Interest shall be calculated on the declining balance at ~~a-rate-not-less-than~~ the average annual . . ..

53. Section F.2.e. (p. 1751):

e. . . . year for those loan applications filed on or before ~~a-date-to-be-set-annually-by-the-Director:~~ <u>the end of the state fiscal year.</u> Applications postmarked or <u>hand</u> delivered after that date ~~may~~ <u>shall</u> be rejected<u>.</u> ~~at-the discretion-of-the-Director:~~

54. Section F.2.f. (p. 1751):

~~f.--Funds-loaned-to-a-municipality-shall-not-be-useable-for-the purpose-of-matching-an-offered-federal-grant-where-the-same is-ineligible-under-federal-statutes-or-regulations:~~

~~55.~~ Section F.3.a. (p. 1751):

a. . . . construction<u>.</u> ~~unless-the-Agency-by-resolution-determines that-another-ratio-would-be-in-the-best-interests-of-the state:~~

56.. Section F.3.b.(2) (p. 1751):

(2) . . . shall be assigned based on the ~~planning needs~~ completion of the planning studies as set . . . .

57.. Section F.3.d. (p. 1751):

d. ~~The numerical rating . . . final Agency action.~~

Dated this _____ day of _____, 1978.

58. (This entire section has been added.)

APPENDIX A

Pursuant to Minn. Reg. WPC 34, section E.2.d.(3), segments will be listed in priority order, based on the total points derived in consideration of the following:

1. Population density per square mile. Priority points shall be established as follows:

Population Per Square Mile	Points
0-2	2
3-4	4
5-6	6
7-8	8
9-10	10
11-12	12
13-14	14
15-16	16
17-18	18
19-20	20
21-31	22
31-40	24
41-50	26
51-60	28
61-70	30
71-80	32
81-90	34
91-100	36
101-500	38
501-1000	40
1001-1500	42
1501-2000	44
2001-2500	46
Over 2500	48

The volume of discharges within the segment not in compliance or without additional disposal system improvements would not remain in compliance with effluent and/or water quality standards. Priority

points shall be established as follows:

Volume in MGD	Points
0-.15	2
.16-.25	4
.26-.50	6
.51-.75	8
.76-1.0	10
1.01-2.0	12
2.01-3.0	14
3.01-4.0	16
4.01-5.0	18
5.01-6.0	20
6.01-7.0	22
7.01-8.0	24
8.01-9.0	26
9.01-10.0	28
10.01-20.0	30
20.01-30.0	32
30.01-40.0	34
40.01-50.0	36
50.01-60.0	38
60.01-70.0	40
70.01-80.0	42
80.01-90.0	44
90.01-100.0	46
Over 100.0	48

3. The need for preservation of high quality waters. Ten points were awarded to those segments considered of sufficient high quality to be classified as effluent quality limited. The St. Louis River-St. Louis Bay Segment was included due to its impact on Lake Superior.

4. In consideration of national priorities as determined by the Administrator of the U.S. Environmental Protection Agency, twenty points were awarded to the Lake Superior segment and the St. Louis River-St. Louis Bay Segment, due to its impact on Lake Superior.

If in determining the order of priority, two or more segments have the same total number of priority points, the segment that has the highest absolute value in determining category 2. shall be rated higher.

LIST OF SEGMENTS

Ranking	Segment Number	Water Quality or Effluent Limited	Name of Segment	Categories a	b	c	d	Total Points	Priority Points
1	41	Water	Mississippi River (Rum R. to L&D #2)	48	48			96	44
2	39	Water	St. Louis River-St. Louis Bay	26	32	10	20	88	43
3	23	Effluent	Mississippi River (L&D #2 to Iowa Border)	32	22	10		64	42
4	43	Water	Minnesota River (Carver Rapids to mouth)	40	20			60	41
5	25	Water	Zumbro River	26	30			56	40
6	30	Water	Shell Rock River	34	20			54	39
7	15	Effluent	Minnesota River (Inlet - Marsh Lake to Carver Rapids	20	22	10		52	38
8	29	Water	Cedar River	28	22			50	37
9	44	Water	Vermillion River	38	12			50	36
10	08	Effluent	Mississippi River (Source to Rum R.)	14	24	10		48	35
11	24	Water	Cannon River	24	24			48	34
12	12	Water	Crow River	22	20			42	33
13	42	Effluent	St. Croix River-Washington County Line to mouth)	28	2	10		40	32
14	33	Water	Des Moines River	20	16			36	31
15	38	Effluent	Lake Superior	4	2	10	20	36	30
16	18	Water	Redwood River	22	12			34	29
17	16	Water	Blue Earth River	20	12			32	28
18	09	Water	Swan River	22	10			32	27
19	04	Water	Ottertail River	14	14			28	26
20	27	Water	Root River	14	14			28	25
21	20	Water	LeSueur River	16	12			28	24
22	3	Effluent	Red R. of the No. (Buffalo River to Canadian Border)	6	12	10		28	23
23	11	Water	Sauk River	14	12			26	22
24	26	Water	Whitewater River	18	8			26	21
25	13	Effluent	Rum River	8	8	10		26	20
26	2	Water	Red R. of the North (Bois de Sioux to Buffalo River)	22	4			26	19
27	17	Water	Chippewa River	10	14			24	18
28	10	Water	Crow Wing River	8	14			22	17
29	21	Effluent	St. Croix River (Wisconsin Border to Washington County line)	6	6	10		22	16
30	19	Water	Cottonwood River	14	6			20	15
31	7	Effluent	Rainy River (Outlet of Rainy Lake through Lake of the Woods)	2	6	10		18	14
32	31	Water	Little Cedar River	14	4			18	13
33	14	Water	Minnesota River (Outlet of Big Stone Lake to Marsh Lake)	10	6			16	12

LIST OF SEGMENTS (con't)

Ranking	Segment Number	Water Quality or Effluent Limited	Name of Segment	Categories a	b	c	d	Total Points	Priority Points
34	6	Effluent	Rainy Lake and Tributaries	2	4	10		16	11
35	37	Water	Tributary of Missouri River	4	10			14	10
36	36	Water	Tributary of Big Sioux	6	8			14	9
37	01	Water	Mustinka River & Lake Traverse	6	6			12	8
38	22	Water	Kettle River	6	4			10	7
39	34	Water	East Fork, Des Moines River	8	2			10	6
40	32	Water	Tributary of Cedar River	8	2			10	5
41	28	Water	Upper Iowa River	4	2			6	4
42	5	Water	Roseau River	2	2			4	3
43	40	Water	Nemadji River	2	2			4	2
44	35	Water	Soldier Creek	2	2			4	1

Joseph Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: August 1, 1978

58. (This entire section has been added.)

APPENDIX A

Pursuant to Minn. Reg. WPC 34, section E.2.d.(3), segments will be listed in priority order, based on the total points derived in consideration of the following:

1. Population density per square mile. Priority points shall be established as follows:

Population Per Square Mile	Points
0-2	2
3-4	4
5-6	6
7-8	8
9-10	10
11-12	12
13-14	14
15-16	16
17-18	18
19-20	20
21-31	22
31-40	24
41-50	26
51-60	28
61-70	30
71-80	32
81-90	34
91-100	36
101-500	38
501-1000	40
1001-1500	42
1501-2000	44
2001-2500	46
Over 2500	48

The volume of discharges within the segment not in compliance or without additional disposal system improvements would not remain in compliance with effluent and/or water quality standards. Priority

points shall be established as follows:

Volume in MGD	Points
0-.15	2
.16-.25	4
.26-.50	6
.51-.75	8
.76-1.0	10
1.01-2.0	12
2.01-3.0	14
3.01-4.0	16
4.01-5.0	18
5.01-6.0	20
6.01-7.0	22
7.01-8.0	24
8.01-9.0	26
9.01-10.0	28
10.01-20.0	30
20.01-30.0	32
30.01-40.0	34
40.01-50.0	36
50.01-60.0	38
60.01-70.0	40
70.01-80.0	42
80.01-90.0	44
90.01-100.0	46
Over 100.0	48

3. The need for preservation of high quality waters. Ten points were awarded to those segments considered of sufficient high quality to be classified as effluent quality limited. The St. Louis River-St. Louis Bay Segment was included due to its impact on Lake Superior.

4. In consideration of national priorities as determined by the Administrator of the U.S. Environmental Protection Agency, twenty points were awarded to the Lake Superior segment and the St. Louis River-St. Louis Bay Segment, due to its impact on Lake Superior.

If in determining the order of priority, two or more segments have the same total number of priority points, the segment that has the highest absolute value in determining category 2. shall be rated higher.

LIST OF SEGMENTS

Ranking	Segment Number	Water Quality or Effluent Limited	Name of Segment	Categories a	b	c	d	Total Points	Priority Points
1	41	Water	Mississippi River (Rum R. to L&D #2)	48	48			96	44
2	39	Water	St. Louis River-St. Louis Bay	26	32	10	20	88	43
3	23	Effluent	Mississippi River (L&D #2 to Iowa Border)	32	22	10		64	42
4	43	Water	Minnesota River (Carver Rapids to mouth)	40	20			60	41
5	25	Water	Zumbro River	26	30			56	40
6	30	Water	Shell Rock River	34	20			54	39
7	15	Effluent	Minnesota River (Inlet - Marsh Lake to Carver Rapids	20	22	10		52	38
8	29	Water	Cedar River	28	22			50	37
9	44	Water	Vermillion River	38	12			50	36
10	08	Effluent	Mississippi River (Source to Rum R.)	14	24	10		48	35
11	24	Water	Cannon River	24	24			48	34
12	12	Water	Crow River	22	20			42	33
13	42	Effluent	St. Croix River-Washington County Line to mouth)	28	2	10		40	32
14	33	Water	Des Moines River	20	16			36	31
15	38	Effluent	Lake Superior	4	2	10	20	36	30
16	18	Water	Redwood River	22	12			34	29
17	16	Water	Blue Earth River	20	12			32	28
18	09	Water	Swan River	22	10			32	27
19	04	Water	Ottertail River	14	14			28	26
20	27	Water	Root River	14	14			28	25
21	20	Water	LeSueur River	16	12			28	24
22	3	Effluent	Red R. of the No. (Buffalo River to Canadian Border)	6	12	10		28	23
23	11	Water	Sauk River	14	12			26	22
24	26	Water	Whitewater River	18	8			26	21
25	13	Effluent	Rum River	8	8	10		26	20
26	2	Water	Red R. of the North (Bois de Sioux to Buffalo River)	22	4			26	19
27	17	Water	Chippewa River	10	14			24	18
28	10	Water	Crow Wing River	8	14			22	17
29	21	Effluent	St. Croix River (Wisconsin Border to Washington County line)	6	6	10		22	16
30	19	Water	Cottonwood River	14	6			20	15
31	7	Effluent	Rainy River (Outlet of Rainy Lake through Lake of the Woods)	2	6	10		18	14
32	31	Water	Little Cedar River	14	4			18	13
33	14	Water	Minnesota River (Outlet of Big Stone Lake to Marsh Lake)	10	6			16	12

LIST OF SEGMENTS (con't)

Ranking	Segment Number	Water Quality or Effluent Limited	Name of Segment	Categories a	b	c	d	Total Points	Priority Points
34	6	Effluent	Rainy Lake and Tributaries	2	4	10		16	11
35	37	Water	Tributary of Missouri River	4	10			14	10
36	36	Water	Tributary of Big Sioux	6	8			14	9
37	01	Water	Mustinka River & Lake Traverse	6	6			12	8
38	22	Water	Kettle River	6	4			10	7
39	34	Water	East Fork, Des Moines River	8	2			10	6
40	32	Water	Tributary of Cedar River	8	2			10	5
41	28	Water	Upper Iowa River	4	2			6	4
42	5	Water	Roseau River	2	2			4	3
43	40	Water	Nemadji River	2	2			4	2
44	35	Water	Soldier Creek	2	2			4	1

Joseph Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: August 1, 1978

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

ORDER AMENDING ORDER ADOPTING RULES

WHEREAS, the Order Adopting Rules in the above-entitled matter was approved by the Minnesota Pollution Control Agency Board and executed by the Chairman and Executive Director of the Agency on August 1, 1978;

WHEREAS, certain minor changes in the Order Adopting Rules are necessary to correct typographical errors;

NOW, THEREFORE, IT IS ORDERED THAT the Order Adopting Rules dated August 1, 1978, shall be amended in the following manner. The page and line references are to the Order Adopting Rules.

1. p. 2, line 9 (Section A.) add the word "construction" between the words "state" and "grant".

2. p. 3, line 2 (Section B.10) add the word "all" between the words "means" and "counties".

3. p. 6, line 5 (Section E.3.a.) capitalize the word "municipal"

4. p. 7, line 12 (Section E.3.c.(1)(i) indicate by strikeout and underlining that "shall" has been added and "may" deleted

5. p. 11, line 8 (Section E.4.b(2)) change "206" to "216"

6. p. 11, line 16 (Section E.4.b(4)) indicate by strikeout and underlining that "shall" has been added and "may" has been deleted.

7. p. 12, line 2 (Section E.4.c.) indicate by strikeout and underlining that "shall" has been added and "may" has been deleted.

8. p. 13, line 15 (Section E.6.b.) change "b" to "a"

9. p. 16, line 18, p. 17, line 4, (Section E.8.g.) indicate by strikeout and underlining that "shall" has been added and "may" has been deleted.

10. p. 17, line 17 (Section E.9.a.) indicate by strikeout and underlining that "shall" has been added and "may" has been deleted.

11. p. 18, line 13 (Section E.9.e.(3)(b)) add the words "and beyond the seventy-five (75) percent level" between the words "level" and "shall"

12. p. 19, line 3 (Section E.9.g.) underline "the"

13. p. 22, line 7 (Section F.2.a.) underline "grants listed in Section D.1., 2., and 3."

14. p. 24 - p. 28 (Appendix A) underline entire appendix

MINNESOTA POLLUTION CONTROL AGENCY

Joseph F. Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: September 1, 1978.

to effectuate the purpose of this
in all subcontracts expected to
opyrightable Subject Data.

HIBITION AGAINST LISTED VIOLATING FACILITIES

able only to a contract in excess of and when otherwise applicable pur-40 CFR Part 15.)

Contractor agees as follows:
omply with all the requirements of
14 of the Clean Air Act, as amend-
S.C. 1857, et seq., as amended by
2-604) and Section 308 of the Fed-
r Pollution Control Act (33 U.S.C.
mended by Pub. L. 92-500), respec-
lating to inspection, monitoring,
ports, and information, as well as
uirements specified in section 114
on 308 of the Air Act and the
t, respectively, and all regulations
lines issued thereunder before the
his contract.
t no portion of the work required
ime contract will be performed in
listed on the Environmental Pro-
gency list of violating facilities on
when this contract was awarded
d until the EPA eliminates the
uch facility or facilities from such

se his best efforts to comply with
and clean water standards at the
n which the contract is being per-

nsert the substance of the provi-
his clause, including this subpara-
in any nonexempt subcontract.
terms used in this clause have the
meanings:
term "Air Act" means the Clean
s amended (42 U.S.C. 1857 et seq.,
d by Pub. L. 92-604).
term "Water Act" means the Fed-
r Pollution Control Act, as amend-
S.C. 1251 et seq., as amended by
-500).
e term "Clean Air Standards"
y enforceable rule, regulations,
, standards, limitation, orders,
prohibitions, or other require-
ich are contained in, issued under,
ise adopted pursuant to the Air
ecutive Order 11738, an applicable
tation plan as described in section
he Air Act (42 U.S.C. 1857c-5(d)),
ed implementation procedure or
r section 111(c) or section 111(d),
proved implementation procedure
tion 112(d) of the Air Act (42
7c-7(d)).
term "Clean Water Standards"
y enforceable limitation, control,
prohibition, standard, or other re-
which is promulgated pursuant
ter Act or contained in a permit

issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by a local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "Compliance" means compliance with Clean Air or Water standards. Compliance shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Aency or an Air or Water Pollution Control Agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "Facility" means any building, plant, installation, structure, mine, vessel, or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are located in one geographical area.

PART 35—STATE AND LOCAL ASSISTANCE

Sec.
35.001 Purpose of regulation.
35.002 Applicability and scope.

Subpart A—Planning Grants

GRANTS TO STATE AND DESIGNATED AREA-WIDE PLANNING AGENCIES—CONDITIONS, POLICIES AND PROCEDURES

35.200 Purpose.
35.202 Definitions.
35.204 Allocation of funds.
35.206 Eligibility for grant award.
35.208 Application for grant.
35.208-1 Preapplication requirements.
35.208-2 Application requirements.
35.210 Review, certification and approval of grant application.
35.210-1 State review and certification of grant applications from areawide planning agencies designated by the Governor(s).
35.210-2 EPA review and approval.
35.212 Grant award and adjustment.
35.212-1 Rate of Federal assistance.
35.212-2 Matching.
35.212-3 Period of grant.
35.214 Grant conditions and limitations.
35.216 Allowable and unallowable costs.
35.218 Payments.
35.218-1 Payment method.
35.218-2 Advance payments—letter of credit.
35.218-3 Advance payments—Treasury check.
35.218-4 Reimbursable payments.
35.218-5 Compliance.
35.218-6 Withholding of funds.
35.220 Work plan development.
35.220-1 Applicability.
35.220-2 Content.
35.220-3 Submission.
35.220-4 Funding for work plan development.
35.222 Plan development.
35.222-1 Plan development period—areawide planning agencies.
35.222-2 Plan development period—State planning agencies.
35.224 Content of plan.
35.226 Submission of the plan.
35.228 Plan approval.
35.230 Authority of States for nonpoint source planning in areawide planning areas.
35.232 Reports.
35.232-1 Interim progress reports.
35.232-2 Financial status reports.
35.234 Suspension and termination.
35.236 Disputes.

SOLID WASTE PLANNING GRANTS

35.300 Purpose.
35.301 Authority.
35.302 Definitions.
35.302-1 Intermunicipal agency.
35.302-2 Interstate agency.
35.302-3 Municipality.
35.302-4 Solid waste.
35.302-5 Solid waste disposal.
35.302-6 State.
35.304 Solid waste planning projects.
35.304-1 Management planning.
35.304-2 Special purpose planning.
35.305 Grant limitations.
35.310 Eligibility.
35.315 Application.
35.315-1 Preapplication procedures.
35.315-2 Application requirements.
35.320 Criteria for award.
35.320-1 All applications.
35.320-2 State applications.
35.320-3 Local and regional applications.
35.330 Reports.
35.330-1 Progress reports.
35.330-2 Report of project expenditures.
35.330-3 Final report.
35.340 Continuation grant.

Subpart B—Program Grants

35.400 Purpose.
35.400-1 Air pollution control agency grant awards.

Sec.
35.400-2 Water pollution control program grant awards.
35.400-3 Public water system supervision program grant awards.
35.403 Authority.
35.404 Annual guidance.
35.405 Criteria for evaluation of program objectives.
35.410 Evaluation of agency performance.
35.415 Report of project expenditures.
35.420 Payment.
35.425 Federal and grantee program support.

AIR POLLUTION CONTROL PROGRAM GRANTS

35.501 Definitions.
35.501-1 Air pollution.
35.501-2 Air pollution control agency.
35.501-3 Air pollution control program.
35.501-4 Air quality control region.
35.501-5 Implementation plan.
35.501-6 Interstate air quality control region.
35.501-7 Municipality.
35.501-8 Nonrecurrent expenditures.
35.501-9 State.
35.505 Allocation of funds.
35.507 Federal assistance for agency programs.
35.507-1 Limitations on assistance.
35.507-2 Limitations on duration.
35.510 Grant allotment and amount.
35.510-1 Tentative allotment.
35.510-2 Grant amount.
35.510-3 Reduction of grant amount.
35.510-4 Limitations.
35.515 Control program eligibility.
35.520 Criteria for award.
35.526 Agency program preparation.
35.527 Major program elements and outputs.
35.528 Agency program submission.
35.529 Program approval.
35.530 Grant conditions.
35.535 Assignment of personnel.
35.538 Agency evaluation and reports.
35.538-1 Agency evaluation.
35.538-2 Reports.

WATER POLLUTION CONTROL STATE AND INTERSTATE PROGRAM GRANTS

35.551 Scope and purpose.
35.552 Definitions.
35.553 State and interstate allotments.
35.554 Regional allowances.
35.555 Determination of grant amount by Regional Administrator.
35.556 Reduction of grant amount.
35.557 Grant amount limitation and duration.
35.558 Eligibility.
35.559 Limitations on award.
35.560 State strategy formulation and program development.
35.561 Major program elements and outputs.
35.562 State program submission.
35.563 State project priority list submission.
35.564 Public participation.
35.565 Program approval.
35.566 State project priority list approval.
35.567 Grant conditions.
35.568 Adherence to budget estimates.
35.569 Program changes.
35.570 Program evaluation and reporting.
Appendix A—Water Quality and Pollutant Source Monitoring.

GRANTS FOR STATE PUBLIC WATER SYSTEM SUPERVISION PROGRAMS

35.600 Scope and purpose.
35.603 Definitions.
35.605 Determination of allotments.
35.605-1 Notification of allotments and reallotments.
35.607 Rate of Federal assistance.
35.611 Aplication for grant.
35.611-1 State program plan/grant submission.
35.613 Limitation on grant award.
35.620 Allowable costs.
35.622 Budget period.
35.624 Reduction of grant amount.
35.626 State Program Plan.
35.626-1 Program elements of a Public Water System Supervision Program.
35.626-2 Regional Administrator's action on grant application.
35.628 Program limitations.
35.630 Assignment of personnel.

Subpart C—Grants for Construction of Wastewater Treatment Works

35.800 Purpose.
35.801 Authority.
35.805 Definitions.
35.805-1 Construction.
35.805-2 Intermunicipal agency.
35.805-3 Interstate agency.
35.805-4 Municipality.
35.805-5 State.
35.805-6 State water pollution control agency.
35.805-7 Treatment works.
35.810 Applicant eligibility.
35.815 Allocation of funds.
35.815-1 Allotments to States.
35.815-2 Reallotment.
35.820 Grant limitations.
35.820-1 Exceptions.
35.825 Application for grant.
35.825-1 Preapplication procedures.
35.825-2 Formal application.
35.830 Determining the desirability of projects.
35.835 Criteria for award.
35.835-1 State plan and priority.
35.835-2 Basin control.
35.835-3 Regional and metropolitan plan.
35.835-4 Adequacy of treatment.

Sec.
35.835-5 Industria
35.835-6 Design.
35.835-7 Operatio
35.835-8 Operatio
35.835-9 Postconst
35.840 Supplement
35.845 Payments.

Subpart D—Rei

35.850 Purpose.
35.855 Project eligil
35.860 Eligible costs
35.865 Applications.
35.870 Allocations g
35.875 Priority for Pub. L. 92-399 an 93-207.
35.880 Grant amoun
35.882 Cutoff date f mation.
35.885 Obligation an
35.890 Initiation of c
35.895 Disputes.

Subpart E—Grants for ment Works—Federa trol Act Amendments

35.900 Purpose.
35.903 Summary of co gram.
35.905 Definitions.
35.905-1 The Act.
35.905-2 Combined sew
35.905-3 Complete was
35.905-4 Construction.
35.905-5 Excessive infil
35.905-6 Industrial cost
35.905-7 Industrial cost
35.905-8 Industrial user
35.905-9 Infiltration.
35.905-10 Infiltration/i
35.905-11 Inflow.
35.905-12 Interceptor se
35.905-13 Interstate age
35.905-14 Municipality.
35.905-15 Operable treat
35.905-16 Project.
35.905-17 Replacement.
35.905-18 Sanitary sewer
35.905-19 Sewage collect
35.905-20 State.
35.905-21 State agency.
35.905-22 Storm sewer.
35.905-23 Treatment wor
35.905-24 Treatment wor
35.905-25 Useful life.
35.905-26 User charge.
35.905-27 Value Engineer
35.908 Advanced technol ated construction techr
35.910 Allocation of funds
35.910-1 Allotment.
35.910-2 Reallotment.
35.910-3 Fiscal Years 197 ments.
35.910-4 Fiscal year 1975 a

tate program submission.
tate project priority list submis-

ublic participation.
rogram approval.
tate project priority list approval.
rant conditions.
dherence to budget estimates.
rogram changes.
rogram evaluation and reporting.
x A—Water Quality and Pollutant
ce Monitoring.

FOR STATE PUBLIC WATER SYSTEM SUPERVISION PROGRAMS

Scope and purpose.
Definitions.
Determination of allotments.
1 Notification of allotments and
llotments.
Rate of Federal assistance.
Aplication for grant.
1 State program plan/grant submis-
n.
Limitation on grant award.
Allowable costs.
Budget period.
Reduction of grant amount.
State Program Plan.
-1 Program elements of a Public
ater System Supervision Program.
-2 Regional Administrator's action
grant application.
Program limitations.
Assignment of personnel.

ubpart C—Grants for Construction of Wastewater Treatment Works

0 Purpose.
1 Authority.
5 Definitions.
05-1 Construction.
05-2 Intermunicipal agency.
05-3 Interstate agency.
05-4 Municipality.
05-5 State.
05-6 State water pollution control
agency.
05-7 Treatment works.
10 Applicant eligibility.
15 Allocation of funds.
15-1 Allotments to States.
15-2 Reallotment.
20 Grant limitations.
20-1 Exceptions.
25 Application for grant.
25-1 Preapplication procedures.
25-2 Formal application.
30 Determining the desirability of pro-
jects.
35 Criteria for award.
35-1 State plan and priority.
35-2 Basin control.
35-3 Regional and metropolitan plan.
35-4 Adequacy of treatment.

Sec.
35.835-5 Industrial waste treatment.
35.835-6 Design.
35.835-7 Operation and maintenance.
35.835-8 Operation during construction.
35.835-9 Postconstruction inspection.
35.840 Supplemental grant conditions.
35.845 Payments.

Subpart D—Reimbursement Grants

35.850 Purpose.
35.855 Project eligibility.
35.860 Eligible costs.
35.865 Applications.
35.870 Allocations generally.
35.875 Priority for funds appropriated by Pub. L. 92-399 and authorized in Pub. L. 93-207.
35.880 Grant amount.
35.882 Cutoff date for submission of information.
35.885 Obligation and payment schedule.
35.890 Initiation of construction.
35.895 Disputes.

Subpart E—Grants for Construction of Treatment Works—Federal Water Pollution Control Act Amendments of 1972

35.900 Purpose.
35.903 Summary of construction grant program.
35.905 Definitions.
35.905-1 The Act.
35.905-2 Combined sewer.
35.905-3 Complete waste treatment system.
35.905-4 Construction.
35.905-5 Excessive infilitration/inflow.
35.905-6 Industrial cost recovery.
35.905-7 Industrial cost recovery period.
35.905-8 Industrial user.
35.905-9 Infiltration.
35.905-10 Infiltration/inflow.
35.905-11 Inflow.
35.905-12 Interceptor sewer.
35.905-13 Interstate agency.
35.905-14 Municipality.
35.905-15 Operable treatment works.
35.905-16 Project.
35.905-17 Replacement.
35.905-18 Sanitary sewer.
35.905-19 Sewage collection system.
35.905-20 State.
35.905-21 State agency.
35.905-22 Storm sewer.
35.905-23 Treatment works.
35.905-24 Treatment works segment.
35.905-25 Useful life.
35.905-26 User charge.
35.905-27 Value Engineering (VE)
35.908 Advanced technology and accelerated construction techniques.
35.910 Allocation of funds.
35.910-1 Allotment.
35.910-2 Reallotment.
35.910-3 Fiscal Years 1973 and 1974 allotments.
35.910-4 Fiscal year 1975 allotments.
Sec.
35.910-5 Additional allotments of previously withheld sums.
35.910-6 Fiscal year 1977 public works allotments.
35.910-7 Fiscal year 1977 Supplemental Appropriations Act allotments.
35.912 Delegation to State Agencies.
35.913 State authority to collect fees from municipalities for certain construction grant activities performed by the State.
35.915 State determination of project priority list.
35.917 Facilities planning (Step 1).
35.917-1 Content of facilities plan.
35.917-2 State responsibilities.
35.917-3 Federal assistance.
35.917-4 Planning scope and detail.
35.917-5 Public participation.
35.917-6 Acceptance by implementing governmental units.
35.917-7 State review and certification of facilities plan.
35.917-8 Submission and approval of facilities plan.
35.917-9 Revision or amendment of facilities plan.
35.920 Grant application.
35.920-1 Eligibility.
35.920-2 Procedure.
35.920-3 Contents of application.
35.925 Limitations on award.
35.925-1 Facilities planning.
35.925-2 Basin plan.
35.925-3 Priority determination.
35.925-4 State allocation.
35.925-5 Funding and other capabilities.
35.925-6 Permits.
35.925-7 Design.
35.925-8 Environmental review.
35.925-9 Civil Rights.
35.925-10 Operation and maintenance program.
35.925-11 User charges.
35.925-12 Industrial cost recovery.
35.925-13 Sewage collection system.
35.925-14 Compliance with Environmental Laws.
35.925-15 Treatment of industrial wastes.
35.925-16 Federal activities.
35.925-17 Retained amounts for reconstruction and expansion.
35.925-18 Limitation upon project costs incurred prior to award.
35.925-19 Section 208: Agencies and plans.
35.925-20 Procurement.
35.926 Value Engineering (VE).
35.927 Sewer system evaluation and rehabilitation.
35.927-1 Infiltration/inflow analysis.
35.927-2 Sewer system evaluation survey.
35.927-3 Rehabilitation.
35.927-4 Sewer use ordinance.
35.927-5 Project procedures.
35.928 Industrial cost recovery.
35.928-1 Recovered amounts.
35.928-2 Retained amounts.

Sec.
35.930 Award of grant assistance.
35.930-1 Types of projects.
35.930-2 Grant amount.
35.930-3 Grant term.
35.930-4 Project scope.
35.930-5 Federal share.
35.930-6 Limitation on Federal share.
35.935 Grant conditions.
35.935-1 Non-Federal construction costs.
35.935-2 Procurement.
35.935-3 Bonding and insurance.
35.935-4 [Reserved]
35.935-5 Davis-Bacon and related statutes.
35.935-6 Equal employment opportunity.
35.935-7 Access.
35.935-8 Supervision.
35.935-9 Project completion.
35.935-10 Copies of contract documents.
35.935-11 Project changes.
35.935-12 Operation and maintenance.
35.935-13 User charges and industrial cost recovery.
35.935-14 Final inspection.
35.935-15 [Reserved]
35.935-16 Sewer use ordinance and evaluation/rehabilitation program.
35.935-17 Training facility.
35.935-18 Value Engineering.
35.936 Procurement.
35.936-1 Definitions.
35.936-2 Grantee procurement systems; State or local law.
35.936-3 Competition.
35.936-4 Profits.
35.936-5 Grantee responsibility.
35.936-6 EPA responsibility.
35.936-7 Small and minority business.
35.936-8 Privity of contract.
35.936-9 Disputes.
35.936-10 Federal procurement regulations.
35.936-11 General requirements for subagreements.
35.936-12 Documentation.
35.936-13 Specifications.
35.936-14 Force account work.
35.936-15 Limitations on subagreement award.
35.936-16 Code or standards of conduct.
35.936-17 Fraud and other unlawful or corrupt practices.
35.936-18 Negotiation of subagreements.
35.936-19 Small purchases.
35.936-20 Allowable costs.
35.936-21 Delegation to State agencies; certification of procurement systems.
35.937 Subagreements for architectural or engineering services.
35.937-1 Type of contract (subagreement).
35.937-2 Public notice.
35.937-3 Evaluation of qualifications.
35.937-4 Solicitation and evaluation of proposals.
35.937-5 Negotiation.
35.937-6 Cost and price considerations.
35.937-7 Profit.
35.937-8 Award of subagreement.
35.937-9 Required solicitation and subagreement provisions.
35.937-10 Subagreement payments—architectural or engineering services.
35.937-11 Applicability to existing contracts.
35.937-12 Subcontracts under subagreements for architectural or engineering services.
35.938 Construction contracts (subagreements) of grantees.
35.938-1 Applicability.
35.938-2 Performance by contract.
35.938-3 Type of contract.
35.938-4 Formal advertising.
35.938-5 Negotiation of contract amendments (change orders).
35.938-6 Progress payments to contractors.
35.938-7 Retention from progress payments.
35.938-8 Required construction contract provisions.
35.938-9 Subcontracts under construction contracts.
35.939 Protests.
35.940 Determination of allowable costs.
35.940-1 Allowable project costs.
35.940-2 Unallowable costs.
35.940-3 Costs allowable, if approved.
35.940-4 Indirect costs.
35.940-5 Disputes concerning allowable costs.
35.945 Grant payments.
35.950 Suspension or termination of grants.
35.955 Grant amendments to increase grant amounts.
35.960 Disputes.
35.965 Enforcement.
Appendix A—Cost Effectiveness Analysis Guidelines
Appendix B—Federal Guidelines
Appendix C-1—Required Provisions—Consulting Engineering Agreements
Appendix C-2—Required Provisions—Construction Contracts
Appendix D—EPA Transition Policy—Consulting Engineering Agreements

§ 35.001 Purpose of regulation.

This part establishes and codifies policies and procedures governing the award of State and local assistance grants by the Environmental Protection Agency.

[37 FR 11651, June 9, 1972]

§ 35.002 Applicability and scope.

This part establishes mandatory policies and procedures for all EPA State and local assistance grants. The provisions of this part supplement the EPA general grant regulations and

procedures (40 CFR Part 30). Accoi ingly, all EPA State and local ass tance grants are awarded subject the EPA interim general grant regu tions and procedures (40 CFR Part 3 and to the applicable provisions of th Part 35.

[37 FR 11651, June 9, 1972]

Subpart A—Planning Grants

GRANTS TO STATE AND DESIGNATE AREAWIDE PLANNING AGENCIES—CO DITIONS, POLICIES AND PROCEDURES

AUTHORITY: Sec. 208, Federal Water Pollu tion Control Act Amendments of 1972 (3 U.S.C. 1288).

SOURCE: Sections 35.200 to 35.236, 40 FI 55322, Nov. 28, 1975, unless otherwise noted

§ 35.200 Purpose.

These provisions establish conditions, policies and procedures for grants to State and areawide planning agencies, and reference requirements for the substance of the planning process and the content of required plans. These provisions supplement the EPA general grant regulations and procedures set forth in Part 30 of this chapter.

§ 35.202 Definitions.

The definitions of the terms contained in § 130.2 of this chapter shall be used herein except as the context otherwise requires.

§ 35.204 Allocations of funds.

(a) The Administrator will establish a Regional allotment ratio for each EPA Region in accordance with the following formulae:

(1) For fiscal year 1976 funds:

= ¾[(Population of Region) – (Population of Region's Previously Funded Designated Planning Areas) ÷ (Population of United States and Territories) – (Population of Previously Funded Designated Planning Areas Nationally)]
+ ¼[(Land Area of Region) – (Land Area of Region's Previously Funded Designated Planning Areas) ÷ (Land Area of United States and Territories) – (Land Area of Previously Funded Designated Planning Areas Nationally)]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 2 1978

OFFICE OF WATER AND
HAZARDOUS MATERIALS

FROM: THOMAS C. JORLING, ASSISTANT ADMINISTRATOR

PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Attached are public participation regulations which were recently proposed by the Environmental Protection Agency. The proposed regulations cover two areas: (1) overall regulations for programs under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act (40 CFR Part 25). (2) amendments to construction grants program regulations (40 CFR Part 35) which would implement the new overall public participation requirements of 40 CFR Part 25 with respect to the wastewater treatment facility planning program and other aspects of the construction grants program.

The Environmental Protection Agency values the views and suggestions of members of the public regarding these important regulations. I urge you to read the attached document carefully and provide us with your reactions, comments, and recommendations for changes. Comments on the proposed regulations may be submitted to the Agency through October 6, 1978. As indicated in the introduction (page 2) to the proposed regulations, written comments should be addressed to Lee Daneker, Environmental Protection Agency, WH-556, 401 M Street, S.W., Washington, D.C. 20460. The introduction (pages 2 and 3) also provides details regarding other opportunities for public involvement in the regulation development process. These consist of a toll-free telephone number to make comments or ask questions regarding the proposed public participation regulations, and a public hearing on the regulations to be held in Washington, D.C. on September 26, 1978.

RECEIVED
OCT 11 1978
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Parts 25 and 35]

(FRL 915-1)

PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Proposed Rule and Notice of Public Hearing

AGENCY: Environmental Protection Agency.

ACTION: Proposed Rule and notice of public hearing.

SUMMARY: The provisions which follow include proposed regulations which would establish overall public participation requirements for programs under the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Clean Water Act. These would replace existing regulations for public participation in water programs and interim final regulations for public participation in solid waste management programs. The proposed regulations also include provisions implementing the new overall public participation requirements with respect to the municipal wastewater treatment facility construction grant program. Where appropriate, regulations applicable to other Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act programs will be supplemented or revised at a later date to specify where the new overall public participation procedural requirements will be applicable. The proposed regulations would apply to covered activities which occur after the date of promulgation and to grants and significant grant amendments made after that date. Existing public participation regulations would remain applicable, in uncodified form, to all other ongoing activities.

DATES: Public Hearing: September 26, 1978 from 1:30 p.m. to 5:30 p.m. and 7:30 p.m. to 10:30 p.m.

Comments must be received on or before October 6, 1978.

ADDRESSES: Public Hearing: Department of Commerce Auditorium
14th and E Streets, N.W.
Washington, D.C.

Send requests to speak to: Ned Sullivan, Environmental Protection Agency, WH-556, 401 M Street, S.W., Washington, D.C. 20460 (For additional information regarding requests to speak and the agenda for the hearing see Public Hearing below)

Send written comments to: Lee Daneker, Environmental Protection Agency, WH-556, 401 M Street, S.W., Washington, D.C. 20460

Telephone Service: EPA will provide, during the hours and on the days specified below, a toll-free telephone number to assist the public in making comments or requesting clarifications regarding the proposed public participation regulations (CFR 40 parts 25 and 35). The toll-free number is 800-424-9390. The toll-free line will be open only from 1 p.m. to 5 p.m., Eastern Daylight Time from September 5 through 8, September 25 through 29, and October 2 through 6, 1978. This line will be open for the sole purpose of hearing comments and providing information on the proposed public participation regulations.

Comments submitted may be inspected at the Public Information Reference Unit, EPA Headquarters, Room 2922, Waterside Mall, 401 M Street, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Ned Sullivan, Environmental Protection Agency, WH-556, 401 M Street, S.W., Washington, D.C. 20460, (202)755-0511.

Public Hearing

A hearing to receive comments on the proposed public participation regulations will be held at the Department of Commerce Auditorium, 14th and E Streets, N.W., Washington, D.C., from 1:30 p.m. to 5:30 p.m. and 7:30 p.m. to 10:30 p.m., on September 26, 1978.

Individuals wishing to comment are requested to submit their names, addresses, and telephone numbers to Ned Sullivan, Environmental Protection Agency, WH-556, 401 M Street, S.W., Washington, D.C. 20460. Requests should indicate the length of time each individual wishes to comment and any preference to time. Statements will be limited to a maximum of 10 minutes. Individuals who request to comment will be notified in advance of the time scheduled for their statement. Time will be reserved for unscheduled comments. Each individual who plans to comment is requested to submit one typewritten copy of his or her statement at the hearing. The hearing record will be closed at the end of the hearing; however, as indicated above, written and telephone comments on the proposed regulations will be accepted by EPA if they are received no later than October 6, 1978. The agenda for the hearing is as follows: Afternoon Session: Introductory Presentation -- 1:30 - 1:50; Question and and Answer Session --1:50 - 2:10; Scheduled Presentations -- 2:10 - 4:45; Unscheduled Testimony --4:45 - 5:30; Recess -- 5:30. Evening Session: Introductory Presentation --7:30 - 7:50; Question and Answer Session -- 7:50 - 8:10; Scheduled Presentations -- 8:10 - 9:45; Unscheduled Testimony -- 9:45 - 10:30; Adjourn --10:30.

BACKGROUND

It is EPA policy that EPA, State and substate agencies implementing the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act shall provide for, encourage, and assist public participation.

All Federal programs are intended to serve the public interest, and all government agencies are, by definition, public servants. EPA's programs directly and indirectly affect the lives of all citizens. These citizens have the right to share in program decisions, and public servants who implement Federal environmental statutes have the responsibility to seek out and be responsive to the concerns of the public in their decisions. The term, "the public" in the broadest sense means the people as a whole, the general populace which all Federal programs are intended to serve.

For any given program decision, however, there are a number of identifiable "segments of the public" which have an interest in the outcome. These comprise individuals and organizations, governmental and nongovernmental. Interested and affected segments of the public may be directly impacted by a decision, either beneficially or adversely, or they may be indirectly affected or otherwise have some concern about the decision. The segments of the public relevant to any given decision tend to change over time, as do their interests in given issues.

EPA wishes to ensure that all interested and affected member of the public have an opportunity to participate in decisionmaking processes

under agency programs. In addition to private citizens, parties affected by agency action may include but are not limited to representatives of consumer, environmental, and minority associations; trade, industrial, and labor organizations; agricultural organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations. Special effort should be made to ensure that public interest groups and citizens representing themselves, whose resources and access to decisionmaking may be limited, have every opportunity to participate.

It is useful to reflect on the specific meanings of some of the terms used above. The term "participate" means to take part; to have a role in program deliberations prior to a decision being made. The term "encourage" means to stimulate. The term "assist" means to help, aid, give support. The term "responsive" means providing a timely answer or reply; reacting in a receptive manner; demonstrating that serious consideration has been given to public comment.

Public participation is that part of the decision-making process that seeks to determine the "public interest" in any given decision. "Public interest" may be defined as the composite of continuously shifting individual and group values, viewpoints, concerns and interests. It is inevitable in many decisions that

DEVELOPMENT OF PROPOSED REGULATIONS FOR PUBLIC PARTICIPATION

Since November 1977, a working group in the Office of Water and Waste Management (OWWM) has been reviewing public participation requirements for its areas of responsibility. The working group developed a set of concept papers addressing revisions to overall public participation requirements for all programs under OWWM and new requirements for public participation in the municipal wastewater treatment construction grants program. These concept papers were finalized in early March and circulated to approximately 7,000 interested parties including more than 3,000 who were mailed draft construction grant regulations dated March 3, 1978. The working group has held two public meetings to receive comment on the concept papers, met with EPA staff in all ten EPA regions, received numerous verbal comments telephoned to the Agency, and met with several outside interest groups including representatives of several States and municipalities and of the Association of State and Interstate Water Pollution Control Agencies.

As a result of these outreach activities, the Agency has received more than 300 written comments on the concept papers. After considering all comments, the working group has revised the concept papers. The revisions include: (1) Proposed 40 CFR Part 25 which would establish overall public participation requirements in programs under the Resource Conservation and Recovery Act, Safe Drinking Water Act, and Clean Water Act programs. (When the

proposed 40 CFR Part 25 is promulgated as a final regulation, the existing 40 CFR Part 105 (Public Participation in Water Pollution Control) and interim-final 40 CFR Part 249 (Public Participation in Solid Waste Management) will be deleted.) (2) Proposed revisions to 40 CFR Part 35 which would implement the new Part 25 with respect to the wastewater treatment facility construction grants program.

Major issues raised in comments are summarized below. Each issue is followed by an explanation of changes which are reflected in the proposed regulations or other ways in which the Agency has responded to comments received on the concept papers.

DISCUSSION OF COMMENTS RECEIVED ON THE CONCEPT PAPER FOR PUBLIC PARTICIPATION IN CLEAN WATER ACT, SAFE DRINKING WATER ACT, AND RESOURCE CONSERVATION AND RECOVERY ACT PROGRAMS:

1. Consistency. One of the issues highlighted for public comment in the concept papers was whether the new Part 25 would apply only to water programs or to other OWWM programs under the Safe Drinking Water Act and the Resource Conservation and Recovery Act as well. Comment has been virtually unanimous in favor of a single overall set of public participation requirements for all OWWM programs. Accordingly the proposed regulations have been drafted to cover activities under the Resource Conservation and Recovery Act and the Safe Drinking Water Act, as well as under the Clean Water Act.

Several commenters indicated that the concept papers should not be limited to OWWM programs, but should apply to all EPA activities. The Agency hereby requests public comment on whether such an expansion in scope would be desirable.

2. Discretion. The concept papers solicited comment on the degree of discretion which should be allowed in establishing public participation requirements. A closely related issue was the extent to which elements of a public participation program should be specified in regulation or in guidance. Many, although not all, governmental agencies commenting upon the regulations favored wide discretion and extensive use of guidance. A large volume of citizen comment called for significantly limiting discretion; these comments indicated that permitting broad discretion often frustrates active participation by leaving potential citizen participants unaware of their rights and opportunities to become involved. Some individuals provided examples of instances in which discretion had been exercised in a manner which did not foster participation in agency programs. While EPA recognizes such problems, we also recognize that flexibility is needed for effective environmental management. We have responded to several comments identifying areas where discretion should be expanded or where the use of guidance would be more appropriate than regulation. As a result, the current proposals provide considerable added flexibility,

especially in the area of advisory group responsibilities, organization, membership, and relation to grantee agencies.

3. Role of elected and appointed decisionmaking officials. Many commenters pointed out that the concept papers did not devote sufficient attention to the role of State and municipal officials. We concur. Accordingly, the current proposals place strong emphasis on the legal authority of official decisionmakers and encourage their inclusion on advisory groups.

4. Advisory Groups. Several Agency programs are already utilizing advisory groups as a public participation mechanism where careful scrutiny of a plan or project by an informed group of citizenry is needed. The advisory group requirements included in the concept papers were intended to foster the formation of an informed core group of citizens which would assist elected and appointed decision-making officials by becoming familiar with plans and programs funded by Federal grants, making recommendations to decisionmaking officials, and encouraging interchange and mutual education among interests represented on the group.

Many commenters suggested that the advisory group requirements were too stringent and would be difficult to apply in some planning areas. Others indicated that the requirements represent a vital initiative to ensure formation of truly balanced advisory groups.

Strong support was expressed for the requirement that a majority of advisory group members be private citizens and members of public interest groups and for the provision that would bar any person with a financial conflict of interest from the advisory group. These two requirements were also the subject of significant critical comment. A number of comments cited instances in which individuals with a financial stake in various grant-supported activities have made constructive contributions to advisory group deliberations. The lack of encouragement for placing elected officials on advisory groups was also criticized by a number of commenters.

The Agency concurs with much of the comment calling for changes in advisory group requirements. The proposed regulations provide considerably more flexibility in the form of encouragement for membership by State and local public officials, and permitting advisory group membership by individuals with an economic stake in the project activities. However, the Agency cannot ignore the large volume of comment indicating that private citizens and public interest representatives should make up at least half of the advisory group. Accordingly, this requirement has been retained with the qualification that this portion of advisory group membership should reflect a balance of community interests.

The proposed regulations establish two categories of advisory group membership for purposes of addressing potential conflicts of interest (See §25.4(d)(4)(iii). The proposed regulations do not

prohibit membership by economically interested persons as the concept paper would have. However, such a prohibition does apply to the private citizen, public interest group membership category. All advisory group members would be required to disclose any financial interest which they have in the plan or project.

Some comments stated that the portions of the requirements addressing advisory group duties and organization, and the responsibilities of the grantee to the advisory group were too detailed. Other comments pointed out that these features are critical in determining the effectiveness of an advisory group and should be of major concern to EPA in its role of providing grants for State and local assistance. The Agency concurs with both perspectives reflected above. The concept papers have been revised to include considerably less detail in these areas; however, the Agency will provide guidance addressing advisory group structure, duties, and staff support.

Strong support was expressed for the concept of training advisory groups to fulfill their role. Accordingly, the training provision of the concept papers has been retained. However, the Agency has determined that it is appropriate to address the content of the training in guidance. Therefore, the portions of the concept paper which discussed training content are not included in the proposed regulations.

5. Paperwork. Comments have indicated that the public participation work plan, the responsiveness summary, and the summary of public participation which were defined in the concept papers might frustrate the EPA (and Federal government) policy of reducing unnecessary paperwork. Some comments indicated that the summary of agency response and the summary of public participation appeared to be duplicative. Many other comments indicated that the work plan, responsiveness summary, and public participation summary would be important mechanisms to assure adequate public participation. Comments indicated that these documents would assist citizens to participate by enabling them to know what participation opportunities existed and to learn how agencies have taken their participation into account in decision-making. Many citizen comments indicated that, under the present system, feedback on participation is frequently inadequate. We concur with these comments. In addition, the Agency's experience suggests that the responsiveness summary, the public participation work plan, and the public participation summary are needed if the Agency is to fulfill its management responsibility to monitor public participation performance.

We are very concerned, however, with avoiding unnecessary paperwork and have revised the requirements of the public participation summary to indicate that it will require no work which duplicates responsiveness summaries. In addition, EPA is indicating

here, and will reiterate in program guidance, that the work plan and, where appropriate, other required material are intended to be brief documents which merely outline agency plans and action. They will not be lengthy materials which are a burden to prepare.

6. Advance notice of public hearings and meetings. The concept papers included a public hearing notice requirement of 45 days. The present requirement is 30 days. Many commenters with experience in hearing participation have strongly supported this change. They indicated that under current requirements they often do not receive notices or hearing materials in time to thoroughly prepare hearing testimony. This is of particular concern because the complex issues discussed in hearings in many Agency programs require more than just a few days for thoughtful preparation. Government agencies have, for the most part, indicated that they see no need to change the current notice requirement and would oppose extending the notice period to 45 days.

The proposed regulations specify a 45-day notice for hearings; however, the Agency wishes to hear additional public comment on this issue. We especially invite comment on whether or not 30 days has generally provided adequate time for notices to be mailed and received, hearing documents to be obtained and reviewed, and testimony prepared.

The proposed regulations permit reduction of advance notice of public meetings from the normally required 45 days to a lesser period. No limitation on the reduction is specified. The Agency solicits comment on whether an absolute minimum of advance notice for public meetings should be set and, if so, what the minimum time should be.

7. Reimbursement of participation expenses. The Agency has received considerable comment, both pro and con, regarding reimbursement of advisory group out-of-pocket expenses such as transportation, parking, or child care. This is currently a grant eligible expense, but many agencies have exercised their discretion not to apply for grant funding to pay such costs. Some agencies opposed reimbursement on the basis of their opinion that costs do not inhibit participation in any way. Many citizen commenters indicated their belief that covering advisory group expenses will encourage more active participation, especially by low income individuals. Given the general balance of comment between the two points-of-view described above, the proposed regulations neither require nor prohibit reimbursement of advisory group member expenses. Before departing from the current practice, the Agency wishes to hear further comment on the issue. Comment on whether the administration of reimbursement systems need be an excessive burden (assuming proper guidance) would be particularly helpful.

Some comment has addressed the issue, raised in the concept paper, of whether reimbursement or some other form of government assistance for costs of participation (other than out-of-pocket costs of advisory group members) would be appropriate. Much of this comment, especially interest expressed at public meetings, strongly supports at least a pilot program to provide technical assistance or expert advice to assist participation.

The Agency is currently conducting an experimental program to reimburse selected participants in a rulemaking conducted under the Toxic Substances Control Act (TSCA). However, rulemaking activities differ significantly from many of the environmental control programs administered by the Agency. Considering these differences, the additional time that would be required for a thorough evaluation of the TSCA experience, and the EPA's strong commitment to assist public participation, the Agency does not believe it to be appropriate to defer action on assistance in non-rulemaking activities until the TSCA results are evaluated. The Agency will begin development of a pilot program to explore means to provide technical or expert assistance to participants in programs (other than rulemaking activities) under the Clean Water Act, Resource Conservation and Recovery Act and the Safe Drinking Water Act.

DISCUSSION OF COMMENTS RECEIVED ON THE CONCEPT PAPER FOR PUBLIC PARTICIPATION IN THE MUNICIPAL WASTEWATER TREATMENT FACILITY CONSTRUCTION GRANT PROGRAM:

Recognizing that wastewater treatment projects vary in complexity and community impact, the proposed public participation requirements institute a two-tiered program: an Abbreviated Public Participation Program, suitable to less complex projects with only moderate or minimal community impact, and a Full-Scale Program, for projects of greater complexity and community impact.

It is currently estimated that a maximum of 30 percent of the Step 1 (facility planning) projects would require a Full-Scale Public Participation Program in FY 79. Exemptions from the Abbreviated Public Participation Program would be available for certain minor projects upon approval of the Regional Administrator.

Significant issues raised in comments submitted on the construction grant public participation concept paper are as follows:

1. Discretion. Many commenters supported the public participation requirements outlined in the March concept papers and suggested additional requirements which should be applied to assure an adequate level of public participation. Many other commenters indicated that the concept papers were already too detailed and suggested that they be revised to provide more discretion to States, localities, and EPA Regions.

The proposed regulations provide more flexibility and discretion than did the concept papers. Specific areas where flexibility or discretion have been provided are as follows:

o The criteria that trigger the Full-Scale Program were modified to permit the Regional Administrators increased discretion in making these determinations.

o The criteria for exempting projects were modified to permit grantees with minor projects to petition the Regional Administrator for an exemption from the Abbreviated Program requirements.

o Advisory groups are required for the Full-Scale Program to assist the grantee by providing a mechanism for consultation by an informed core group of citizens. This is considered an essential element for adequate public involvement in projects with potentially significant social, economic or environmental consequences. However, considerable flexibility has been provided in advisory group requirements (see the discussion of Advisory Groups above).

2. Resources. Implementation of a Full-Scale Program for a maximum of 30 percent of new Step 1 projects and an Abbreviated Program for the remaining projects (minus exemptions) would, as many commenters pointed out, increase the resource demands on EPA, States, and grantees. The Agency recognizes the resource requirements

of an adequate public participation effort and is taking action to meet its own staff requirements, particularly in the Regional offices. State resources may be augmented by funds available for State Management Assistance under section 205(g) of the Clean Water Act of 1977. At the local level, the required public participation activities will be eligible for 75 percent Federal funding. The additional local costs for public participation should be small in comparison to the total project costs, particularly construction and operating costs. Currently, the facilities planning process (Step 1) where the proposed public participation requirements are concentrated accounts for only 2 to 5 percent of the total cost of a municipal wastewater treatment project. Small additional expenditures in the facility planning stage ultimately can assist a community to achieve significant savings through development of projects which are less costly to build or operate.

3. Early Public Involvement. Numerous comments from many interests stressed the importance of informing and involving the public in the early, formative stages of the facilities planning process. The Agency agrees that public input should be focused in the early stages of facilities planning. However, since activities prior to Step 1 grant award are not grant eligible, the Agency is reluctant to impose public participation requirements at that stage. Consequently, the proposed regulations include no pre-Step 1 grant award public participation requirements except public notification and consultation in development of the plan of study and a

brief outline of the public participation program in the plan of study. The Agency encourages, but does not require, grantees to undertake other early involvement activities, especially during plan of study development.

4. Paperwork. See discussion of Paperwork above.

5. Coordination with Water Quality Management Planning. The water quality management planning program (authorized by §208 of the Clean Water Act) and the municipal wastewater treatment construction grants program (authorized by §201 of the Act) are closely related. Many commenters urged that 208 advisory groups be used for 201 planning.

EPA agrees that there must be formal liaison between 201 and 208 planning and public participation activities. It is Agency policy to encourage such coordination whenever possible; however, the mechanism for coordination will be left to local discretion. The Agency believes that the different geographic scope of 208 advisory groups and the already heavy demands upon their time militate against mandating that 208 advisory groups also provide detailed advice to 201 planners. This would, however, be acceptable to the Agency if grantees determine that it is the most effective approach.

6. Public Participation in Steps 2 and 3. The concept papers raised the issue of requiring that a public participation program continue in Step 2 (design) and Step 3 (construction) of the construction grant process. Comment was mixed on this matter. The current proposal provides that the grantee, after consultation with the public and the advisory group where appropriate, can plan and conduct public participation activities in Step 2 and Step 3. The grantee must prepare and have approved a brief work plan for public participation to make such activities grant eligible. The proposed regulations also require public notice, information, and consultation in the adoption of the user charge system and the industrial cost recovery system which are not usually finalized until sometime in Step 2 or Step 3.

7. Public participation staffing in Full-Scale Program. Many commenters indicated that the term "public participation specialist" which was used in the March concept papers, would require a community to recruit and hire highly trained professionals at considerable expense. These individuals might not be familiar with the community and its interests and problems. Other commenters suggested that EPA require the public participation staff to be very familiar with the community. It was suggested that public participation functions should be carried out by a community organization or local public interest group under contract to the grantee.

Academic training will not be a requirement for the public participation staff. To indicate the type of staffing which will satisfy the requirement, the term in the proposed regulations has been changed from "public participation specialist" to "public participation coordinator." The Agency is sympathetic with the concept of meeting public participation staff requirements through a contract to a community group, but it questions whether this should be a requirement. Additional public comment on this issue is invited.

Many commenters indicated that an advisory group must have its own staff to be effective. The Agency does not have enough information at this time to require that advisory groups to facility planning processes be provided with their own staff. However, the intent of the general advisory group requirements in Part 25 is that the grantee provide staff support to the advisory group.

8. Delay. Some commenters indicated that the public participation requirements would substantially increase the time required to construct facilities for municipal wastewater treatment. These contentions were not supported by data demonstrating that public participation necessarily results in delay. Some projects begun after promulgation of the new regulations may take

more time in facility planning due to public participation activities; however, public participation can also shorten project time by permitting faster progress through environmental reviews, avoiding time-consuming controversy, promoting public acceptability of the approved plan, and thus helping to obtain passage of bond issues to pay the local share.

NOTE -- The Environmental Protection Agency has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Analysis Statement under Executive Orders 11821 and 11949 and OMB Circular A-107.

DATED: July 31, 1978

Administrator

1. 40 CFR is amended by deleting Parts 105 and 249.

2. 40 CFR is amended by adding a new Part 25 reading as follows:

PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Sec.

25.1 Purpose and scope.

25.2 Policy and objectives.

25.3 Information and consultation responsibilities.

25.5 Enforcement.

25.7 Legal proceedings.

25.9 Rulemaking.

25.11 Grant work elements.

25.13 Responsiveness summaries.

25.15 Summary of public participation.

25.17 Assuring compliance with requirements.

25.19 Coordination and non-duplication.

AUTHORITY: Section 101(e) of the Clean Water Act, as amended, 33 U.S.C. 1251(e); section 7004(b) of the Resource Conservation and Recovery Act, 42 U.S.C. 6974(b); section 1450(a)(1) of the Safe Drinking Water Act, as amended, 42 U.S.C. 300j-9.

§25.1 Purpose and scope.

(a) This part sets forth requirements for public participation in activities described in paragraph (b) under the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act.

(b) The activities covered by this part are:

(1) EPA rulemaking;

(2) EPA administration of permit programs;

(3) Development by EPA of major informational materials intended for wide distribution to the public;

(4) When a Deputy Assistant Administrator determines it to be appropriate, development by EPA of strategy and policy guidance memoranda;

(5) Development and implementation of plans, programs, construction, and other activities supported with EPA grants to State, interstate, regional, and local agencies (hereinafter referred to as "State and substate agencies");

(6) Delegation of programs to States and substate agencies, and administration of such delegated programs;

(7) Such other activities as the Assistant Administrator for Water and Waste Management, the Assistant Administrator for Enforcement, or any EPA Regional Administrator deems appropriate in view of the Agency's responsibility to involve the public in significant decisions.

(c) Activities which are not covered by this part, except as otherwise provided under (b)(7) or (d) of this section, are activities under Parts 33, 39, 40, 45 and 46 of this chapter.

(d) Some programs covered by regulations in this chapter contain further provisions concerning public participation. Therefore, the reader should review both the provisions in this part and the provisions elsewhere in this chapter which are applicable to the program of interest. Regulations governing public information use and release are set forth in Part 2 of the chapter.

(e) These regulations are applicable to the activities of all grantees whose grants are awarded after (the effective date of final regulations), and to all other covered activities of EPA, State and substate agencies which occur after that date. These regulations will be applicable to ongoing grants or other activities upon any significant change in the activity (for example, upon a significant proposed increase in project scope of a construction grant). Parts 105 and 249 will no longer appear in the Code of Federal Regulations; however, they will remain applicable, in uncodified form, to grants awarded prior to the effective date of this part and to all other ongoing activities.

§25.2 Policy and objectives.

(a) It is EPA policy that EPA and all State and substate agencies participating in activities described in §25.1 will provide for, encourage, and assist the participation of the public

to the fullest extent practicable. Those responsible for covered activities must continuously strive to make public participation happen. Particular emphasis must be directed toward encouragement and assistance, including determining why the public does not participate in an action and overcoming the identified obstacles. Merely conferring with the public after a final agency decision does not meet this policy requirement.

(b) The following shall be the objectives of all actions of EPA and State and substate agencies under this part:

(1) to assure that the public understands official programs and proposed actions, and that government understands public concerns;

(2) to assure that no significant government decision on any activity covered under this part is made without consultation with interested and affected segments of the public;

(3) to assure that government action is responsive to the maximum extent feasible to public concerns, and to demonstrate that public concerns are evaluated and considered;

(4) to promote public support of environmental laws;

(5) to keep the public informed of significant issues and proposed project or program changes as they arise;

(6) to foster a spirit of openness and mutual trust among EPA, States, substate agencies and the public; and

(7) to continuously strive to make public participation happen, by using all feasible means to furnish opportunities for participation and by stimulating and supporting participation.

§25.3 Information and consultation responsibilities.

(a) General. EPA, State, and substate agencies shall conduct a continuing program for public information and participation in the development and implementation of activities covered by this part. Where functions are delegated to a State by EPA, the State shall be responsible for meeting the requirements for public participation which EPA otherwise would be required to meet.

(b) Information and assistance requirements. Public information is a necessary prerequisite for meaningful, active public involvement. Informational activities must be designed to encourage and facilitate the public's participation in all significant decisions, particularly where alternative courses of action are proposed. Each agency shall provide continuing policy, program, and technical information and assistance at the earliest practicable times and at places easily accessible to interested or affected persons and organizations. Fact sheets, news releases, newsletters and other publications may be used for this purpose. Informational materials must be comprehensive and easily understood. Special efforts shall be made to clearly and concisely summarize complex technical materials for public and media uses. Lengthy documents should be summarized (noting where the full document can be obtained). Information must be timely. It is essential that informational materials highlight significant issues that will be the subject of decision-making. Whenever possible, the social, economic, and environmental consequences of proposed decisions

should be clearly stated. Agencies should identify segments of the public likely to be affected by agency decisions and target specific informational materials toward them (in addition to the materials directed toward the general public). Each agency shall provide in a convenient location or locations, one or more central public collections or depositories of relevant documents. Examples of such documents are grant and permit applications, permits, effluent discharge information, compliance schedule reports, and materials specified in section 208(b) of the Clean Water Act. Copying facilities at reasonable cost should be available. Requests for information directed to the agency shall be promptly handled.

(c) Public notification. Each agency shall develop and maintain a list of persons and organizations who have expressed an interest in or may by the nature of their purposes, activities or members be affected by or have an interest in any covered activities. Those on the list shall receive timely and periodic distribution of materials under paragraph (b) of this section. In addition, the Agency shall provide written notification to those on its mailing list and media at times when major decisions are being made and in conjunction with consultation activities under paragraphs (d)(2), (3) and (4) of this section. Where specific hearing or other notice requirements exist in law or other regulations in this chapter, such actions shall be supplemented, to the extent not duplicative, with informal notice to all interested persons or

organizations having requested in advance such notice. All advance notifications under this part must be provided sufficiently in advance of Agency action to permit time for public response; generally, this should not be less than 30 days. Media publication which is obscure (e.g., legal notification pages) shall not be acceptable as the sole means of public notification.

(d) Public consultation. (1) General. "Public consultation" means an exchange of views between governmental agencies and interested or affected persons and organizations in order to meet the objectives set forth in §25.2. Three common forms of public consultation, discussed further below, are public hearings, public meetings, and advisory groups; other less formal consultation mechanisms include review groups, ad hoc committees, task forces, workshops, seminars and informal personal communications with individuals and groups. Public consultation must be preceded by timely information activities under paragraphs (b) and (c) of this section, and must occur sufficiently in advance of decision-making to permit response to public views prior to agency action. EPA, State and substate agencies shall provide for early and continuing public consultation in any significant action covered by this part. In addition to holding hearings and meetings as specifically required in this chapter, a hearing or meeting shall be held if there is significant public interest or if EPA, the State or substate agency determines that a hearing or meeting would be useful.

(2) Public Hearings. (i) Applicability. Where non-adjudicatory public hearings are required in this chapter, the following minimum requirements apply. These requirements are subordinate to any more stringent requirements found elsewhere in this chapter or otherwise imposed by EPA, State or substate agencies. Procedures developed for adjudicatory hearings required by this chapter shall be consistent with the public participation objectives of this part, to the extent practicable.

(ii) Notice. A notice of each hearing shall be well publicized, and shall also be mailed to the list of interested and affected persons and organizations under §25.3(c). Except as otherwise specifically provided elsewhere in this chapter, these actions must occur at least 45 days prior to the date of the hearing. The notice shall identify the matters to be discussed at the hearing and shall be accompanied by a fact sheet supplementing the contents of the notice with a discussion of the agency's tentative determination on major issues (if any), a bibliography of relevant materials, and procedures for obtaining further information. Reports, documents and data relevant to the discussion at the public hearing shall be available to the public for a reasonable time prior to the hearing, generally not less than 30 days.

(iii) Locations and time. Hearings must be held at times and places which, to the maximum extent feasible, avoid travel hardships and facilitate attendance by the public. Accessibility of public transportation, and use of evening and weekend hearings, should be considered. In the case of Statewide programs, holding more than one hearing should be considered.

(iv) Scheduling presentations. Witnesses at public hearings shall be scheduled in advance when necessary to ensure maximum participation and allotment of adequate time for all speakers. However, some time must be reserved for unscheduled testimony. Blocks of time may be considered for major categories of witnesses.

(v) Conduct of hearing. The agency conducting the hearing shall inform the audience of the issues involved in the decision to be made, the considerations the agency will take into account under law and regulations, the agency's tentative determinations (if any), and the information which is particularly solicited from the public. The agency should hold a question and answer period before presentations begin. Procedures shall not unduly inhibit free expression of views (for example, by onerous written statement requirements or qualification of witnesses beyond minimum identification).

(vi) Record. A transcript or other record of public hearing proceedings shall be developed and made promptly available at no more than cost to anyone who requests it.

(3) Public meetings. Public meetings differ from public hearings only in that they are less formal, formal presentation scheduling is not required, and a record of proceedings need not

be maintained. The requirements of §25.3(d)(2)(ii) and (iii) are applicable to public meetings, except that the notice requirement of 45 days may be reduced, if the notice specifies a reason.

(4) Advisory groups. (i) Applicability. The requirements of this section on advisory groups shall be met whenever provisions in Parts 30 or 35 of this chapter require use of an advisory group by State or substate agencies involved in activities supported by an EPA grant.

(ii) Role. Primary responsibility for decision-making in environmental programs is vested by law in the elected and appointed officials who serve on public bodies and agencies at various levels of government. Public participation in environmental quality planning must, however, extend to all segments of the public. Accordingly, where EPA finds that there is a need for continued attention of an informed core group of citizens, advisory groups are required in program regulations. Such advisory groups will not be the sole mechanism for public participation, but will complement other mechanisms. They are intended to assist the decision-making officials by making recommendations on important issues. In addition, advisory groups can encourage a constructive interchange among the various interests present on the group and enhance the prospect of community acceptance of agency action.

(iii) Membership. (A) Generally, where the activity has a particular geographic focus, the advisory group shall be made up of persons who are residents of that geographic area.

(B) A majority of advisory group members shall be private citizens and representatives of public interest groups reflecting a balance of interests in the project area. For purposes of this requirement, a "public interest group" is an organization which represents a general civic, social, environmental or public health perspective in the community and which does not directly reflect the economic interests of its membership or general economic interests otherwise appropriately represented under paragraph (d)(4)(iii)(C) of this section. While the private citizens and representatives of public interest groups must include interested and affected persons, no person may be included on the portion of the advisory group addressed by this paragraph who is likely to incur a substantial financial gain or loss as a result of any action likely to be taken by the grantee.

(C) The grantee should also provide an opportunity for representation on the advisory group of public elected and appointed officials and of organizations representing substantial economic interests of the community (for example, farmers' organizations in areas which are agricultural). Advisory group members appointed under this paragraph are not subject to the conflict-of-interest provision set forth in paragraph (d)(4)(iii)(B) of this section.

(D) The grantee shall require all prospective advisory group members to make written disclosure of personal and organizational economic interests in the activity as a condition of membership on the advisory group, in accordance with supplementary EPA guidance.

(iv) Grantee support and responsibilities. The grantee shall designate a staff contact who will be responsible for day-to-day coordination between the advisory group, the grantee, and the grantee's consultant. The grant agreement shall include a budget item for this staff contact. Where substantial portions of the grantee's responsibilities will be met under contract, the grantee shall require a similar designation, and budget specification, of its contractor. In the latter event, the grantee need not designate a separate staff contact on its own staff, if the Regional Administrator determines that the contractor's designation will result in an adequate level of coordination. In all cases, the staff contact shall be located in the project area. The grantee shall provide the advisory group with information and other appropriate support in accordance with EPA guidance.

(v) Advisory group authority and duties. The advisory group shall be appointed by the grantee in accordance with the requirements of this section. The advisory group shall undertake its responsibilities fully and promptly in accordance with the policies and requirements of this part. Nothing shall

preclude the right of the advisory group to request EPA to perform an evaluation of the grantee's compliance with the requirements of this part. EPA will provide supplementary guidance on advisory group coordination responsibilities, organization, and procedures.

(vi) Training and assistance. EPA will promptly provide appropriate written guidance and project information to the newly formed advisory group and may provide advice and assistance to the group throughout the life of the project. EPA will develop and carry out a program to provide a training session for the advisory committee and appropriate grantee representatives promptly after its formation. The grantee will provide that any additional needed training or information is provided to advisory group members as the need arises.

(vii) Grantee record keeping requirements. The grantee shall prepare a written statement of its responses to any formal recommendation of the advisory group, which shall be available to the public. The grantee shall record the names and addresses of each member of the advisory group, with the attributes of each in relation to the requirements of §25.3(d)(4)(iii) and shall provide a copy to EPA and make the list available to the public.

§25.5 Enforcement.

Each State and substate agency shall develop internal procedures for receiving and ensuring proper consideration of information and evidence submitted by citizens about violations of pollution control requirements. Public effort in reporting violations shall be encouraged, and the agency shall make available information on reporting procedures. Alleged violations shall be promptly investigated by the Agency.

§25.7 Legal proceedings.

EPA and each State and substate agency shall provide full and open information on legal proceedings to the extent not inconsistent with court requirements, and where such disclosure would not prejudice the conduct of the litigation. EPA actions shall be consistent with the Statement of Policy issued by the Department of Justice with regard to affording opportunities for public comment before the Department of Justice consents to a proposed judgement in an action to enjoin discharges of pollutants into the environment. (see Title 28, Code of Federal Regulations, Chapter 1, §50.7)

§25.9 Rulemaking.

In addition to providing an opportunity for public hearings on proposed and interim regulations, EPA shall invite and consider comments in writing from any interested or affected persons and organizations. All such comments shall be part of the public record and a copy of each comment shall be available for public inspection. EPA will maintain a docket of comments received and Agency responses, if any. Notices of proposed and interim rulemaking, as well as final

rules and regulations, shall be distributed in accordance with §25.3(c) to interested or affected persons promptly after publication. Each notice shall include information as to the availability of the full texts of rules and regulations (where these are not set forth in the notice itself) and places where copying facilities shall be available at reasonable cost to the public. Under Executive Order 12044 (March 23, 1978), further EPA guidance will be issued concerning public participation in EPA rulemaking. A summary of public participation will be published as part of the preamble to interim and final regulations.

§25.11 Grant work elements.

(a) This section is applicable to activities under §25.1(b)(4) except as otherwise provided in Parts 30 or 35.

(b) Each grant applicant shall set forth in the application a public participation work plan or work element which reflects how public participation will be provided for, encouraged, and assisted in accordance with this part. This work plan or element shall cover the project period. At a minimum, the work plan or element shall state:

(1) staff and budget resources to be devoted to public participation by category;

(2) a proposed schedule of public participation activities according to major points in the program;

(3) the types of consultation to be used;

(4) informational mechanisms to be used; and

(5) the segments of the public targeted for involvement.

(c) All reasonable costs of public participation incurred by grantees which are identified in an approved public participation work plan or element, or which are otherwise approved by EPA, shall be allowable.

§25.13 Responsiveness Summaries.

At specific decision points specified in program regulations, agencies are required to prepare a responsiveness summary. This document is an identification of the public participation activity conducted; a summary of the public's views, comments, criticisms and suggestions; and the Agency's specific responses in terms of modifications to the proposed action or an explanation for rejection of proposals made by the public. The responsiveness summary shall accompany the record of the decision. Responsiveness summaries shall be made available to the public. Responsiveness summaries shall be used as part of evaluations required under this part or elsewhere in this chapter.

§25.15 Summary of public participation.

Each agency which conducts any activities required under this part shall prepare a Summary of Public Participation where specified in program regulations. The summary shall describe the matters brought before the public, the measures taken by the agency to meet its responsibilities under this part and related provisions elsewhere in this chapter, the public response, and the agency's response to significant comments. Responsiveness summaries may be used to meet appropriate portions of these requirements to avoid duplication. The summary of public participation shall be forwarded to the appropriate EPA Assistant Administrator or Regional Administrator as required in program regulations and shall be made available to the public.

§25.17 Assuring compliance with requirements.

(a) Grant programs. (1) Grant applications. EPA shall review the public participation work plan (or, if no work plan is required for the particular grant by this chapter, the public participation element) included in the grant application to determine consistency with all policies and requirements of this part. No grant shall be awarded unless EPA is satisfied that the public participation policies and requirements of this part and Part 35 will be met.

(2) Compliance. (i) Evaluation. EPA shall evaluate grantee compliance with public participation requirements using

the work plan, responsiveness summary, summary of public participation, and other available information. The adequacy of public participation effort shall be judged in relation to the requirements of §25.2 and §25.3. In conducting such evaluation, EPA may request additional information from the grantee, including records of hearings and meetings, and may invite public comment on the performance of the grantee. The evaluation will be undertaken as part of any mid-project review required in various programs under this chapter; where no such review is required the review shall be conducted at an approximate mid-point in continuing EPA oversight activity. EPA may, however, undertake such evaluation at any point in the project period, and will do so whenever it believes there may be a failure to meet public participation requirements.

(ii) Remedial actions. Whenever EPA determines that public participation requirements are not fully met, EPA shall take actions which it deems appropriate to assure that the adverse effects of the failure are mitigated and the failure is not repeated. For ongoing projects, such action shall include, at a minimum, imposing more stringent requirements on the grantee for the next budget or other period of the project (including such actions as more specific output requirements and milestone schedules for output achievement; interim EPA review of public participation activities and materials prepared by the grantee; and phased release of grant funds based on compliance with milestone schedules.) EPA may terminate or suspend part or all of a grant for non-compliance with public participation requirements,

and may take such other further actions it deems appropriate in accordance with the provisions of Parts 30 and 35 of this chapter (see, in particular, §§30.340 and 30.615-3, and Subpart H of Part 30).

(b) Water permit programs. Compliance with public participation requirements in the permit programs (see Part 124) administered by approved States shall be monitored by EPA during the annual review of the State's water program (see §35.570) and during the review of State permit programs. Failure to comply with public participation requirements may constitute grounds for withdrawing the program from a State.

(c) Other covered programs. (reserved)

§25.19 Coordination and non-duplication.

Public participation activities and materials required under this part may be combined with closely related programs or activities wherever such combination will enhance the economy, the effectiveness, or the timeliness of the effort, enhance the clarity of the issue, and not be detrimental to participation by the widest possible public. Hearings and meetings may be held jointly by more than one agency on the same matter, where such procedure does not conflict with the policy above. Special efforts shall be made to coordinate public

participation procedures under this part and applicable regulations elsewhere in this chapter with environmental assessment and analysis procedures under 40 CFR Part 6. Interstate agencies particularly are encouraged to develop combined proceedings on behalf of the States concerned.

3. 40 CFR Part 35 Subpart E is amended by revising S35.903(o) to read as follows:

S35.903 Summary of construction grant program.

* * * * *

(o) It is the policy of the Environmental Protection Agency to provide for, encourage, and assist public participation in the construction grant program. Public participation is required:

(1) in the development of the state project priority system and list under S35.915;

(2) in the development of facilities plans, in accordance with S35.917-5;

(3) in the development of user charge systems, in accordance with S35.925-11, and industrial cost recovery systems, in accordance with S35.925-12; and

(4) in the delegation of administrative responsibilities for the construction grant program under S35.1000 et seq.

4. 40 CFR Part 35 Subpart E is amended by revising S35.917-1(g) to read as follows:

S35.917-1 Content of Facilities Plans.

* * * * *

(g) A summary of public participation, consistent with S25.15 of this chapter and S35.917-5(g).

5. 40 CFR Part 35 Subpart E is amended by revising S35.917-5 to read as follows:

S35.917-5 Public Participation.

(a) General. Public participation in the facilities planning process shall be provided for, encouraged, and assisted consistent with §101(e) of the Act and with Part 25 of this chapter. Citizens shall be provided with information about and shall be given the opportunity to become involved in:

(1) the assessment of local water quality problems and needs;

(2) the identification and evaluation of appropriate waste treatment technologies and locations for treatment works;

(3) the evaluation of social, economic, fiscal, and environmental impacts; and

(4) the resolution of other significant facilities planning decisions.

(b) Abbreviated Public Participation Program. Public participation in the facilities planning process (except for those projects exempt under paragraph (c) of this section and those qualifying for the Full-Scale Program under paragraph (d) of this section) shall include, but not be limited to, the following:

(1) Public notification and consultation in development of the plan of study.

(2) An outline in the plan of study of the types of consultation and information mechanisms to be used, the segments of the public targeted for involvement, the mechanisms for coordination with any pertinent 208 public participation programs, projected budget and staff commitments, and the schedule for public participation as part of the schedule for completion of specific tasks (see S35.920-3(a)(1)).

(3) Submission to EPA of a brief public participation work plan (see S25.11 of this chapter) within 45 days after the date of acceptance of a Step 1 grant award. The work plan shall be widely distributed to groups and individuals who may be interested in or affected by the project. A project fact sheet shall accompany the work plan and shall identify the professional consulting engineer responsible for preparation of the facilities plan. The work plan shall set forth:

(i) Staff and budget resources committed to public participation;

(ii) A schedule of public participation activities according to major points in the program;

(iii) Types of public consultation mechanisms to be used (see S25.3(d)) of this chapter);

(iv) Types of informational materials and mechanisms to be used and methods for distribution;

(v) Segments of the public targeted for involvement; and

(vi) Coordination mechanisms with any pertinent 208 public participation programs.

(4) Consultation with the public (see S25.3(d) of this chapter) early in the facilities planning process when the assessment of the existing and future situations is being made and before the selection of alternatives for evaluation according to the cost-effectiveness analysis procedures.

(5) A public meeting when alternatives are largely developed but before an alternative or plan has been selected.

(6) A public hearing in accordance with S25.3(d)(2) of this chapter prior to the adoption of the facilities plan. This public hearing may be held in conjunction with the public hearing on the draft Environmental Impact Statement under S6.914 of this chapter.

(7) Efforts to keep the public continuously informed of the progress of the facilities planning process, especially treatment alternatives, costs, and environmental impacts.

(8) A summary of public participation (in accordance with SS25.15 and 35.917-5(g) of this chapter).

(c) Exemption from public participation program requirements.

(1) Upon petition by the grant applicant, the Regional Administrator may exempt from the requirements of paragraphs (b) and (d) of this section, except for the public hearing required by S35.917-5(b) and public disclosure of costs, projects in which only minor plant upgrading or minor sewer rehabilitation is anticipated by the State Project Priority List. Before granting any exemption, the Regional Administrator shall issue a public notice of intent to waive the above requirements and shall allow 30 days for response. If responses indicate that serious local issues exist, then the Regional Administrator shall deny the exemption.

(2) During the facilities planning process, if the Regional Administrator determines that the project no longer meets the exemption criteria stated above, then the exemption to public participation program requirements lapses. The grantee, in consultation with the Regional Administrator, shall then undertake

public participation activities commensurate with the Abbreviated Public Participation Program but adjusted for constraints imposed by facilities planning activities already completed.

(3) If a project is segmented, the Regional Administrator shall look at the project as a whole when considering any petition for exemption.

(d) Full-Scale Public Participation Program Criteria. (1) A Full-Scale Public Participation Program under paragraph (e) of this section is required for all projects for which EPA prepares an Environmental Impact Statement under Part 6 of this chapter during facilities planning. In addition, a Full-Scale program under paragraph (e) is required during facilities planning for any other project for which the Regional Administrator determines that enhanced public access to decisionmaking is needed because of the possibility of particularly acute effects on matters of citizen concern, as indicated by one or more of the following:

(i) Significant change in land use or impact on environmentally sensitive areas;

(ii) Significant increase in treatment plant, interceptor capacity or sewered area;

(iii) Substantial total cost to the community or substantial cost to users, (i.e. costs not reimbursed under grant);

(iv) Significant general public controversy;

(v) Significant impact on local population or economic growth;

(vi) Substantial opportunity for use of innovative or alternative technology.

(2) A Full-Scale Public Participation Program shall be initiated as soon as the determination in subparagraph (1) of this paragraph is made. Generally, the determination should be made prior to or with the award of the Step 1 grant. However, if the Regional Administrator's determination under subparagraph (1) of this paragraph to require a full-scale program occurs after initiation of facility planning because of newly discovered circumstances, the grantee shall initiate an expanded public participation program at that point. The Regional Administrator shall determine that the expanded program is at least as inclusive as a normal Full-Scale Public Participation Program, except for constraints imposed by facilities planning activities already completed.

(e) Full-Scale Public Participation Program. The Full-Scale Public Participation Program shall include the following:

(1) All of the requirements for an Abbreviated Public Participation Program contained in paragraph (b) of this section, except that a public

meeting, rather than other public consultation mechanisms, is required when the assessment of the existing and future situations is being made and before the alternatives to be studied are selected.

(2) A public participation coordinator designated or hired by the grantee immediately after the Step 1 grant award.

(3) A public advisory group established by the grantee immediately after the Step 1 award, in compliance with the advisory group requirements of S25.3(d)(4) of this chapter.

(4) Consultation with the advisory group and the public:

(i) In the development of the work plan;

(ii) Early in the facilities planning process when the assessment of the existing and future situations is being made and before the selection of alternatives for evaluation according to the cost-effectiveness analysis procedures;

(iii) When alternatives are largely developed but before an alternative or plan has been selected;

(iv) Otherwise as appropriate.

(f) Public notification. Adequate advance notice of public meetings and public hearings shall be provided the public, consistent with S25.3(d)(2) of this chapter. Generally, 45 days (but not less than 30 days) notice shall be provided. Appropriate local and State agencies, State and

regional clearinghouses, interested environmental groups and appropriate local public officials should receive written notice of public meetings and hearings.

(g) Reporting. The grantee shall prepare responsiveness summaries in accordance with S25.13 of this chapter and this section. For projects conducted under the Abbreviated Public Participation Program the grantee shall prepare responsiveness summaries following the public consultation and the public meetings required by paragraph (b) of this section, and also as a part of the summary of public participation (see S25.15 of this chapter) in the completed facilities plan. For projects conducted under the Full-Scale Public Participation Program the grantee shall prepare responsiveness summaries following the required public meetings and as a part of the summary of public participation in the completed facilities plan. The grantee shall promptly and widely distribute copies of the responsiveness summaries to interested or affected members of the public and will submit a copy to EPA separately or in conjunction with progress reports (see 40 CFR Part 35 §917-3(d)).

(h) Relationship between facility planning (201) and water quality management planning (208). The grantee must provide for a formal liaison between the facilities planning advisory group (or the grantee, where there is no advisory group) and any areawide advisory committee established under §208 of the Act.

6. 40 CFR Part 35 Subpart E is amended by revising 35.920-3(a)(1) and by adding a new subparagraph (10) to S35.920-3(b) to read as follows:

§35.920-3 Contents of application.

(a) * * *

(1) A plan of study presenting (i) the proposed planning area; (ii) an identification of the entity or entities that will be conducting the planning; (iii) the nature and scope of the proposed Step 1 project and public participation program, including a schedule for the completion of specific tasks; and (iv) an itemized description of the estimated costs for the project;

* * * * *

(b) * * *

(10) A work plan for public participation for Steps 2 and 3 if the grant applicant, after consultation with the public and its advisory group (if one exists), determines it to be necessary;

7. 40 CFR Part 35 Subpart E is amended by revising S35.925-11 to read as follows:

S35.925-11 User charges.

That, in the case of grant assistance awarded after March 1, 1973, for a project involving Step 2 or Step 3, an approvable plan and schedule of implementation have been developed, with adequate public information and consultation, for a system of user charges to assure that each recipient of

waste treatment services within the applicant's service area will pay its proportionate share of the costs of operation and maintenance (including replacement as defined in S35.905-17 of this chapter) of all waste treatment service provided by the applicant and the applicant must agree that such system(s) will be maintained. See Appendix B to this subpart.

8. 40 CFR Part 35 Subpart E is amended by revising paragraph (a) of S35.925-12 to read as follows:

S35.925-12 Industrial cost recovery.

(a) That, in the case of any grant awarded after March 1, 1973, for a project involving Step 2 or Step 3, signed letters of intent have been received by the applicant from each significant industrial user to pay that portion of the grant amount allocable to the treatment of its wastes. Each such letter shall also include a statement of the industrial user's intended period of use of the treatment works. A significant industrial user is one that will contribute greater than 10 percent of the design flow or design pollutant loading of the treatment works. In addition, the applicant shall inform and consult with the public about the industrial cost recovery system and must agree to require all industrial users to pay that portion of the grant amount allocable to the treatment of wastes from such users.

9. 40 CFR Part 35 Subpart E is amended by revising paragraph (h) of S35.928-1 of the interim final regulations published in the FEDERAL REGISTER on April 25, 1978, to read as follows:

S35-928-1 Approval of the industrial cost recovery system.

* * * * *

(h) Adoption of system. The industrial cost recovery system must be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works accepting wastewaters from other municipalities, the subscribers receiving waste treatment service from the grantee shall have adopted industrial cost recovery systems in accordance with section 204(b)(1)(b) of the Act and these regulations. Such industrial cost recovery systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing waste to the system. Affected segments of the public shall be consulted prior to adoption of the industrial cost recovery system.

10. 40 CFR Part 35 Subpart E is amended by revising paragraph (e) of S35.929-2 of the interim final regulations published in the FEDERAL REGISTER on April 25, 1978, to read as follows:

§35.929-2 General requirements for all user charge systems.

* * * *

(e) Adoption of system. The user charge system must be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works or part of a regional system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall have adopted user charge systems in accordance with section 204 (b)(1)(A) of the Clean Water Act and SS35.929 through 35.929-3. Such user charge systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing waste to the system. Affected segments of the public shall be informed of the financial impact of the user charge system on them and shall be consulted prior to adoption of the system.

11. 40 CFR Part 35 Subpart E is amended by adding a new paragraph (r) to S35.940-1 to read as follows:

S35.940-1 Allowable project costs.

* * * * *

(r) Reasonable costs of public participation incurred by grantees which are identified in a public participation work plan, or which are otherwise approved by EPA, shall be allowable.

*U.S. GOVERNMENT PRINTING OFFICE : 1978 0-725-435/1375

United States
Environmental Protection
Agency
Washington DC 20460

WH-556

Official Business
Penalty for Private Use $300

Postage and
Fees Paid
Environmental
Protection
Agency
EPA 335



First-Class

CERTIFICATE OF ADOPTION OF RESOLUTION BY
MINNESOTA POLLUTION CONTROL AGENCY

I, Sandra S. Gardebring, do hereby certify that I am the Executive Director of the Minnesota Pollution Control Agency, an Agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete and correct copy of a resolution adopted at a meeting of the Agency duly and properly called and held on the 3rd day of October, 1978; that a quorum was present at said meeting; that the resolution was passed by a majority of the Agency; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified:

WHEREAS, the Minnesota Pollution Control Agency adopted its Order Adopting Rules on August 1, 1978, and adopted its Order Amending Order Adopting Rules on August 29, 1978, with respect to amendments to Minn. Rule WPC 34;

WHEREAS, the Attorney General has not approved the rule and has returned it to the Agency for consideration of certain matters;

WHEREAS, delay in the approval of Minn. Rule WPC 34 will result in delay in the adoption of the Fiscal Year 1979 Municipal Project List which will, in turn, delay the construction of needed municipal wastewater treatment projects in Minnesota;

THEREFORE, BE IT RESOLVED, that the following amendments shall be made to the Order Adopting Rules:

1. The word "regulation," when such term refers to regulations of agencies of the State of Minnesota, shall be deleted wherever it appears and the word "rule" shall be inserted in lieu thereof.

2. The first sentence following the table in Section B.18 shall be deleted.

3. Section E.2.d.(3) shall be amended by deleting the last sentence.

4. Appendix A shall be deleted.

BE IT FURTHER RESOLVED that the Chairman and the Executive Director are hereby authorized to sign an amended Order Adopting Rules in a form which reflects the above amendments.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 3rd day of October, 1978.

Sandra S. Gardebring
Executive Director

Subscribed and sworn to before me this 3rd day of October, 1978:

MARY E. WYATT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Oct. 24, 1983

Mary E. Wyatt
Notary Public

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Rule WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

SUPPLEMENTAL ORDER AMENDING ORDER ADOPTING RULES

IT IS ORDERED THAT the Order Adopting Rules dated August 1, 1978, shall be amended in the following manner. The page and line references are to the Order Adopting Rules.

1. The word "regulation," when such term refers to regulations of agencies of the State of Minnesota, shall be deleted wherever it appears in Minn. Rule WPC 34 and the word "rule" shall be inserted in lieu thereof.

2. p. 4, lines 7 through 11. The first sentence following the table in Section B.18 shall be deleted.

3. p. 5, line 27, p. 6, lines 1 and 2. Section E.2.d.(3) shall be amended by deleting the last sentence.

4. page 24 through 28. Appendix A shall be deleted.

Joseph F. Grinnell
Chairman

Sandra S. Gardebring
Executive Director

Dated: 10/3/78

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

October 4, 1978

Lee Sheehy
Special Assistant
Attorney General
Room G19K Administration
Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

RE: Minn. Rule WPC 34

Dear Mr. Sheehy:

The Minnesota Pollution Control Agency considered matters raised in your memorandum of September 25, 1978, at its October 3, 1978, meeting and took action with respect thereto. Accordingly, the Agency is resubmitting the rule to you for your review and approval.

I have enclosed all of the documents submitted to you on September 1, 1978, when the rule was originally submitted for your review. (The copies of the Rule as Adopted have been amended to reflect changes made pursuant to Agency action on October 3, 1978.) Also enclosed are the original and three copies of:

(1) Supplemental Order Amending Order Adopting Rules

(2) Certificate of Adoption of Resolution of Minnesota Pollution Control Agency (October 3, 1978 meeting).

(3) Notice sent to interested persons regarding the Agency's consideration of the Report of the Attorney General

The Agency took the following action with respect to the matters raised in your memo:

(1) The word "regulation" when such term referred to regulations of agencies of the State of Minnesota, was deleted and the word "rule" inserted in lieu thereof.

(2) Section B.18. was amended by deleting the waiver provision.

(3) Appendix A was deleted from the rule and the reference thereto in Section E.2.d.(3) was also deleted.

(4) The Agency has addressed the issues you raised in regard to Section E.7. in the memo attached hereto.

Please contact me if you require any further documents or other information.

Very truly yours,

Marlene E. Senechal
Special Assistant
Attorney General

Enclosures

MES/mw

FOX RIVER BOND
25% COTTON

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Rule WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

MINNESOTA POLLUTION CONTROL AGENCY SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ADOPTION OF RULES

Minn. Rule WPC 34E.7. establishes the public participation process which must be followed prior to Agency adoption of the Municipal Needs List and the Municipal Project List. The procedures to be followed include availability of the proposed lists, public informational meetings, and 30 day notice to all affected municipalities prior to the Agency Board meeting at which the Lists will be adopted and an opportunity for all interested persons to present statements prior to the Agency's adoption of the Lists.

The City of St. Paul has challenged the provision as being in conflict with federal law in two respects: (1) the City believes that U.S. EPA regulations, section 35.915(a), which governs the State's adoption of a priority system, is applicable to the Agency's adoption of the Municipal Project List; and (2) the City believes that U.S. EPA regulations require an evidentiary hearing.

The Attorney General's Office has requested the Agency to address the contentions of the City of St. Paul in its resubmittal of the rule. The Office has also requested a discussion of what is required by Subpart B of U.S. EPA regulations governing the public participation process.

Contrary to the contentions of the City of St. Paul, U.S. EPA regulation section 35.915(a)(43 Fed.Reg. 44057 (1978)) 1/ is not applicable to the Agency's adoption of the Municipal Project List. As noted above, section 35.915(a) refers to the adoption of the State's priority system, which, in the case of Minnesota, is Minn. Rule WPC 34. The Agency has complied with all applicable requirements of section 35.915(a) in its adoption of Minn. Rule WPC 34.

Public participation prior to the Agency's adoption of the Municipal Project List is governed by U.S. EPA regulation section 35.915(d) (43 Fed.Reg. 44057 (1978)). 2/ This provision requires a "public hearing" but provides that this may be "conducted jointly with any regular public meeting of the State agency," if certain procedural requirements are met. Id. Thus, the public hearing required by U.S. EPA regulations is satisfied by the Agency Board meeting of which all interested persons will be given adequate notice and at which such persons will be given an adequate opportunity to be heard. The public informational meetings, while not required, will provide an additional means of gaining public input prior to the Agency's adoption of the Municipal Project List.

1/ The interim final rule was published April 25, 1978, at 43 Fed.Reg. 17697 et seq. (1978). This was submitted into the hearing record as MPCA Exhibit 30A. The final rule appears in 43 Fed. Reg. 44022 et seq. (1978). A copy of section 35.915 as it appears in the final rule is attached hereto.

2/ Id.

Section 35.915(d) further provides that public participation must meet the requirements of "Subpart B of this part." 3/ Subpart B of Part 35 of 40 C.F.R. consists of Sections 35.400-35.630. See 40 C.F.R. Part 35 (1977). Section 35.564 of Subpart B provides for public participation with respect to water pollution control grants. Section 35.564, in turn, references 40 C.F.R. Part 105. Section 105.6 of 40 C.F.R. Part 105 sets out guidelines for evaluating public participation. 4/ The guidelines for a "public hearing" require 30 day notice to interested and affected persons, availability of information prior to the hearing and an adequate opportunity to participate and be heard. 5/ All of these requirements are met by Minn. Rule WPC 34E.7.

It is clear that Minn. Rule WPC 34E.7. satisfies all U.S. EPA requirements regarding public participation prior to Agency adoption of the Municipal Project List. Furthermore, for the reasons stated in the Agency's Memorandum in Support of Adoption of Rules, pp.

3/ Section 35.915(d), in its interim final form, referred to "Subpart B." In its final form, the reference is to "Subpart G." "Subpart G" is a proposed rule which, if adopted, will be part of 40 C.F.R. Part 35. See 43 Fed.Reg. 40742 (1978). Section 35.1507-8 of proposed Subpart G references 40 C.F.R. Part 25. Id. at 40747. Part 25 is a proposed rule which, if adopted, would replace 40 C.F.R. Part 105. See 43 Fed.Reg. 34794 (1978). Thus, currently, the applicable reference appears to be "Subpart B."

4/ Proposed revisions to 40 C.F.R. Part 105 (1977) make it clear that "public hearings," such as those required prior to the Agency's adoption of the Municipal Project List, are nonadjudicatory hearings. See 43 Fed.Reg. 34800 (1978). This further refutes the City's claim that an evidentiary type of public hearing is required by U.S. EPA regulations.

5/ A tape recording is made of each Agency Board meeting. Thus, a record is available as required by 40 C.F.R. §105.6(j)(1977).

34-36, a contested case hearing is not required by State law. Therefore, the Agency believes that section E.7. meets the requirements of both federal and State law.

Respectfully submitted,

ELDON G. KAUL
Assistant Attorney General

By Marlene E. Senechal
Marlene E. Senechal
Special Assistant
Attorney General

Dated: October 4, 1978

State	Percentage
Florida	3.8386
Georgia	1.9418
Hawaii	.7928
Idaho	.4952
Illinois	5.1943
Indiana	2.7678
Iowa	1.2953
Kansas	.8803
Kentucky	1.4618
Louisiana	1.2625
Maine	.7495
Maryland	2.7777
Massachusetts	2.9542
Michigan	4.1306
Minnesota	1.8691
Mississippi	.9660
Missouri	2.4957
Montana	.3472
Nebraska	.5505
Nevada	.4138
New Hampshire	.8810
New Jersey	3.5715
New Mexico	.3819
New York	10.6209
North Carolina	1.9808
North Dakota	.3197
Ohio	6.4655
Oklahoma	.9279
Oregon	1.2974
Pennsylvania	4.3618
Rhode Island	.5252
South Carolina	1.1766
South Dakota	.3733
Tennessee	1.5486
Texas	4.2634
Utah	.4457
Vermont	.3845
Virginia	1.9602
Washington	1.7688
West Virginia	1.7903
Wisconsin	1.9503
Wyoming	.3003
Guam	.0744
Puerto Rico	1.1734
Virgin Islands	.0378
American Samoa	.0616
Trust Territory of Pacific	.1530
Total	100.00

(b) Based on paragraph (a), and table 4 of the committee print, the following authorizations are allotted among the States subject to the limitations of paragraph (c) of this section:

State	For fiscal year 1978	For each of the fiscal years 1979, 1980, 1981
Alabama	$57,789,000	$64,210,000
Alaska	19,057,500	21,175,000
Arizona	34,906,500	38,785,000
Arkansas	33,808,500	37,565,000
California	257,604,000	297,560,000
Colorado	41,341,500	45,935,000
Connecticut	49,824,000	55,360,000
Delaware	17,982,000	19,980,000
District of Columbia	14,368,500	15,965,000
Florida	172,647,000	191,830,000
Georgia	87,381,000	97,090,000
Hawaii	35,676,000	39,640,000
Idaho	22,284,000	24,760,000
Illinois	233,743,500	259,715,000
Indiana	124,551,000	138,390,000
Iowa	58,288,500	64,765,000
Kansas	39,613,500	44,015,000
Kentucky	65,781,000	73,090,000
Louisiana	56,812,500	63,125,000
Maine	33,727,500	37,475,000
Maryland	124,996,500	138,885,000
Massachusetts	132,939,000	147,710,000
Michigan	185,877,000	206,530,000
Minnesota	84,109,500	93,455,000
Mississippi	43,470,000	48,300,000
Missouri	112,306,500	124,785,000
Montana	15,624,000	17,360,000
Nebraska	24,772,500	27,525,000
Nevada	18,621,000	20,690,000
New Hampshire	39,645,000	44,050,000
New Jersey	160,717,500	178,575,000
New Mexico	17,185,500	19,095,000
New York	477,940,500	531,045,000
North Carolina	89,136,000	99,040,000
North Dakota	13,981,500	15,535,000
Ohio	290,947,500	323,275,000
Oklahoma	41,755,500	46,395,000
Oregon	58,383,000	64,870,000
Pennsylvania	196,272,000	218,080,000
Rhode Island	23,634,000	26,260,000
South Carolina	52,947,000	58,830,000
South Dakota	16,798,500	18,665,000
Tennessee	69,687,000	77,430,000
Texas	196,353,000	218,170,000
Utah	20,056,500	22,285,000
Vermont	17,302,500	19,225,000
Virginia	88,209,000	98,010,000
Washington	79,596,000	88,440,000
West Virginia	80,563,500	89,515,000
Wisconsin	87,783,500	97,515,000
Wyoming	13,513,500	15,015,000
Guam	3,348,000	3,720,000
Puerto Rico	52,803,000	58,670,000
Virgin Islands	1,701,000	1,890,000
American Samoa	2,772,000	3,080,000
Trust Territory of the Pacific Islands	6,885,000	7,650,000
Total	4,500,000,000	5,000,000,000

(c) The authorizations in paragraph (b) of this section depend on appropriation. Therefore, the Regional Administrator may not obligate any portion of any authorization for a fiscal year until a law is enacted appropriating part or all of the sums authorized for that fiscal year. If sums appropriated are less than the sums authorized for a fiscal year, EPA will apply the percentages in paragraph (a) of this section to distribute all appropriated sums among the States, and promptly will notify each State of its share. The Regional Administrator may not obligate more than the State's share of appropriated sums.

(d) If supplementary funds are appropriated in any fiscal year under section 205(e) of the Act to carry out the purposes of this paragraph, no State shall receive less than one-half of 1 percent of the total allotment among all States for that fiscal year, except that in the case of Guam, the Virgin Islands, American Samoa, and the Trust Territories not more than thirty-three one-hundredths of 1 percent of the total allotment shall be allotted to all four of those jurisdictions. If for any fiscal year the amount appropriated to carry out this paragraph is less than the full amount needed, the following States will share in any funds appropriated for the purposes of this paragraph in the following percentages, drawn from the note to table 3 of committee print numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alaska	5.4449
Delaware	7.1459
District of Columbia	12.8612
Idaho	.3416
Montana	10.8755
Nevada	6.1352
New Mexico	8.4057
North Dakota	13.4733
South Dakota	9.0178
Utah	3.8648
Vermont	8.2206
Wyoming	14.2135
Total	100.00

§ 35.912 Delegation to State agencies.

EPA's policy is to maximize the use of staff capabilities of State agencies. Therefore, in the implementation of the construction grant program, optimum use will be made of available State and Federal resources. This will eliminate unnecessary duplicative reviews of documents required in the processing of construction grant awards. Accordingly, the Regional Administrator may enter into a written agreement, where appropriate, with a State agency to authorize the State agency's certification of the technical or administrative adequacy of specifically required documents. The agreement may provide for the review and certification of elements of: (a) Facilities plans (step 1), (b) plans and specifications (step 2), (c) operation and maintenance manuals, and (d) such other elements as the Regional Administrator determines may be appropriately delegated as the program permits and State competence allows. The agreement will define requirements which the State will be expected to fulfill as part of its general responsibilities for the conduct of an effective preaward applicant assistance program; compensation for this program is the responsibility of the State. The agreement will also define specific duties regarding the review of identified documents prerequisite to the receipt of grant awards. A certification agreement must provide that an applicant or grantee may request review by the Regional Administrator of an adverse recommendation by a State agency. Delegation activities are compensable by EPA only under section 106 of the Act or subpart F of this part.

§ 35.915 State priority system and project priorty list.

Construction grants will be awarded from allotments according to the State priority list, based on the approved State priority system. The State priority system and list must be designed to achieve optimum water quality management consistent with the goals and requirements of the Act.

(a) *State priority system.* The State priority system describes the methodology used to rate and rank projects that are considered eligible for assistance. It also sets forth the administrative, management, and public participation procedures required to develop and revise the State project priority list. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide water quality management (WQM) plans. The State shall hold a public hearing before submission of the priority system (or revision thereto). Before the hearing, a fact sheet describing the proposed system (including rating and ranking criteria) shall be distributed to the public. A summary of State responses to public comment and to any public hearing testimony shall be prepared and included in the priority system submission. The Regional Administrator shall review and approve the State priority system for procedural completeness, insuring that it is designed to obtain compliance with the enforceable requirements of the Act as defined in § 35.905. The Regional Administrator may exempt grants for training facilities under section 109(b)(1) of the Act and § 35.930-1(b) from these requirements.

(1) *Project rating criteria.* (i) The State priority system shall be based on the following criteria:

(A) The severity of the pollution problem;

(B) The existing population affected;

(C) The need for preservation of high quality waters; and

(D) At the State's option, the specific category of need that is addressed.

(ii) The State will have sole authority to determine the priority for each category of need. These categories comprise mutually exclusive classes of facilities and include:

(A) Category I—Secondary treatment;

(B) Category II—More stringent treatment;

(C) Category IIIA—Infiltration/inflow correction;

(D) Category IIIB—Sewer system replacement or major rehabilitation;

(E) Category IVA—New collectors and appurtenances;

(F) Category IVB—New interceptors and appurtenances; and

(G) Category V—Correction of combined sewer overflows.

(iii) Step 2, step 3 and step 2+3 projects utilizing processes and techniques meeting the innovative and alternative guidelines in appendix E of this part may receive higher priority. Also 100 percent grants for projects that modify or replace malfunctioning treatment works constructed with an 85 percent grant may receive a higher priority.

(iv) Other criteria, consistent with these, may be considered (including the special needs of small and rural communities). The State shall not consider the project area's development needs not related to pollution abatement, the geographical region within the State, or future population growth projections.

(2) *Criteria assessment.* The State shall have authority to determine the relative influence of the rating criteria used for assigning project priority. The criteria must be clearly delineated in the approved State priority system and applied consistently to all projects. A project on the priority list shall generally retain its priority rating until an award is made.

(b) *State needs inventory.* The State shall maintain a listing, including costs by category, of all needed treatment works. The most recent needs inventory, prepared in accordance with section 516(b)(1)(B) of the Act, should be used for this purpose. This State listing should be the same as the needs inventory and fulfills similar requirements in the State WQM planning process. The State project priority list shall be consistent with the needs inventory.

(c) *State project priority list.* The State shall prepare and submit annually a ranked priority listing of projects for which Federal assistance is expected during the 5-year planning period starting at the beginning of the next fiscal year. The list's fundable portion shall include those projects planned for award during the first year of the 5-year period (hereinafter called the funding year). The fundable portion shall not exceed the total funds expected to be available during the year less all applicable reserves provided in § 35.915-1 (a) through (d). The list's planning portion shall include all projects outside the fundable portion that may, under anticipated allotment levels, receive funding during the 5-year period. The Administrator shall provide annual guidance to the States outlining the funding assumptions and other criteria useful in developing the 5-year priority list.

(1) *Project priority list development.* The development of the project priority list shall be consistent with the rating criteria established in the approved priority system, in accordance with the criteria in paragraph (a)(1) of this section. In ranking projects, States must also consider the treatment works and step sequence; the allotment deadline; total funds available; and other management criteria in the approved State priority system. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide WQM plans. The Regional Administrator may request that a State provide justification for the rating or ranking established for specific project(s).

(2) *Project priority list information.* The project priority list shall include the information for each project that is set out below for projects on the fundable portion of the list. The Administrator shall issue specific guidance on these information requirements for the planning portion of the list, including phase-in procedures for the fiscal year 1979 priority planning process.

(i) State assigned EPA project number;

(ii) Legal name and address of applicant;

(iii) Short project name or description;

(iv) Priority rating and rank of each project, based on the approved priority system;

(v) Project step number (step 1, 2, 3, or 2+3);

(vi) Relevant needs authority/facility number(s);

(vii) NPDES number (as appropriate);

(viii) Parent project number (i.e., EPA project number for predecessor project);

(ix) For step 2, 3, or 2+3 projects, indication of alternative system for small community;

(x) For step 2, 3, or 2+3 projects, that portion (if any) of eligible cost to apply to alternative techniques;

(xi) For step 2, 3, or 2+3 projects, that portion (if any) of eligible cost to apply to innovative processes;

(xii) For step 3 or 2+3 projects, the eligible costs in categories IIIB, IV, and V (see § 35.915(a)(1)(ii));

(xiii) Total eligible cost;

(xiv) Date project is expected to be certified by State to EPA for funding;

(xv) Estimated EPA assistance (not including potential grant increase from the reserve in § 35.915-1(b)); and

(xvi) Indication that the project does or does not satisfy the enforceable requirements provision, including (as appropriate) funding estimates for those portions which do not meet the enforceable requirements of the Act.

(d) *Public participation.* Before the State submits its annual project priority list to the Regional Administrator, the State shall insure that adequate public participation (including a public hearing) has taken place as required by subpart G of this part. Before the public hearing, the State shall circulate information about the priority list including a description of each proposed project and a statement concerning whether or not it is necessary to meet the enforceable requirements of the Act. The information on the

proposed priority list under paragraph (c)(2) of this section may be used to fulfill these requirements. This public hearing may be conducted jointly with any regular public meeting of the State agency. The public must receive adequate and timely statewide notice of the meeting (including publication of the proposed priority list) and attendees at the meeting must receive adequate opportunity to express their views concerning the list. Any revision of the State priority list (including project bypass and the deletion or addition of projects) requires circulation for public comment and a public hearing unless the State agency and the Regional Administrator determine that the revision is not significant. The approved State priority system shall describe the public participation policy and procedures applicable to any proposed revision to the priority list.

(e) *Submission and review of project priority list.* The State shall submit the priority list as part of the annual State program plan under subpart G of this part. A summary of State agency response to public comment and hearing testimony shall be prepared and submitted with the priority list. The Regional Administrator will not consider a priority list to be final until the public participation requirements are met and all information required for each project has been received. The Regional Administrator will review the final priority list within 30 days to insure compliance with the approved State priority system. No project may be funded until this review is complete.

(f) *Revision of the project priority list.* The State may modify the project priority list at any time during the program planning cycle in accordance with the public participation requirements and the procedures established in the approved State priority system. Any modification (other than clerical) to the priority list must be clearly documented and promptly reported to the Regional Administrator. As a minimum, each State's priority list management procedure must provide for the following conditions:

(1) *Project bypass.* A State may bypass a project on the fundable portion of the list after it gives written notice to the municipality and the NPDES authority that the State has determined that the project to be bypassed will not be ready to proceed during the funding year. Bypassed projects shall retain their relative priority rating for consideration in the future year allotments. The highest ranked projects on the planning portion of the list will replace bypassed projects. Projects considered for funding in accordance with this provision must comply with paragraph (g) of this section.

(2) *Additional allotments.* If a State receives any additional allotment(s), it may fund projects on the planning portion of the priority list without further public participation if:

(i) The projects on the planning portion have met all administrative and public participation requirements outlined in the approved State priority system; and

(ii) The projects included within the fundable range are the highest priority projects on the planning portion.

If sufficient projects that meet these conditions are not available on the planning portion of the list, the State shall follow the procedures outlined in paragraph (e) of this section to add projects to the fundable portion of the priority list.

(3) *Project removal.* A State may remove a project from the priority list only if:

(i) The project has been fully funded;

(ii) The project is no longer entitled to funding under the approved priority system;

(iii) The Regional Administrator has determined that the project is not needed to comply with the enforceable requirements of the Act; or

(iv) The project is otherwise ineligible.

(g) *Regional Administrator review for compliance with the enforceable requirements of the Act.* (1) Unless otherwise provided in paragraph (g)(2) of this section, the Regional Administrator may propose the removal of a specific project or portion thereof from the State project priority list during or after the initial review where there is reason to believe that it will not result in compliance with the enforceable requirements of the Act. Before making a final determination, the Regional Administrator will initiate a public hearing on this issue. Questioned projects shall not be funded during this administrative process. Consideration of grant award will continue for those projects not at issue in accordance with all other requirements of this section.

(i) The Regional Administrator shall establish the procedures for the public notice and conduct of any such hearing, or, as appropriate, the procedures may be adapted from existing agency procedures such as § 6.400 or §§ 123.32 and 123.34 of this chapter. The procedures used must conform to minimum Agency guidelines for public hearings under part 25 of this chapter.

(ii) Within 30 days after the date of the hearing, the Regional Administrator shall transmit to the appropriate State agency a written determination about the questioned projects. If the Regional Administrator determines that the project will not result in compliance with the enforceable requirements of the Act, the State shall remove the project from the priority list and modify the priority list to reflect this action. The Regional Administrator's determination will constitute the final agency action, unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

(2) The State may use 25 percent of its funds during each fiscal year for projects or portions of projects in categories IIIB, IVA, IVB, and V (see § 35.915(a)(1)(ii)). These projects must be eligible for Federal funding to be included on the priority list. EPA will generally not review these projects under paragraph (g)(1) of this section to determine if they will result in compliance with the enforceable requirements of the Act. The Regional Administrator will, however, review all projects or portions thereof which would use funds beyond the 25-percent level according to the criteria in paragraph (g)(1) of this section.

(h) *Regional Administrator review for eligibility.* If the Regional Administrator determines that a project on the priority list is not eligible for assistance under this subpart, the State and municipality will be promptly advised and the State will be required to modify its priority list accordingly. Elimination of any project from the priority list shall be final and conclusive unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

§ 35.915-1 Reserves related to the project priority list.

In developing the fundable portion of the priority list, the State shall provide for the establishment of the several reserves required or allowed under this section. The State shall submit a statement specifying the amount to be set aside for each reserve with the final project priority list.

(a) *Reserve for State management assistance grants.* The State may (but need not) propose that the Regional Administrator set aside from each allotment a reserve not to exceed 2 percent or $400,000, whichever is greater, for State management assistance grants under subpart F of this part. Grants may be made from these funds to cover the reasonable costs of administering activities delegated to a State. Funds reserved for this purpose that are not obligated by the end of the allotment period will be added to the amounts last allotted to a State. These funds shall be immediately available for obligation to projects in the same manner and to the same extent as the last allotment.

(b) *Reserve for innovative and alternative technology project grant in-*

(2) A description by program element of the work to be conducted, including the work, if any, to be funded under Section 208(f) of the Act (See § 35.220-2). The program description shall consist of:

(i) A summary of the current year's program;

(ii) A description of the work to be performed (including an identification of person-years to be expended), and its relationship to the State strategy;

(iii) The expected outputs to be achieved;

(iv) An identification of all general operating funds, both Federal and non-Federal, which the State anticipates receiving during the fiscal year for use by the State agency in achieving the expected outputs. Each major State revenue source (for example general State revenue funds, State fees, Federal grants or contracts and other sources of funding) shall be identified.

(3) Changes in the State continuing planning process made pursuant to § 130.40 of this chapter.

(4) Changes in the State priority system, described in § 35.915(a) of this chapter, including the criteria used by the State in determining priority for construction grant projects pursuant to § 35.915(c)(1).

NOTE: The State priority system may be amended by a State, as necessary at any time, provided the Regional Administrator approves each revision.

(5) A preliminary State project priority list pursuant to § 35.563(a).

(b) A final program (grant application) by September 1 for each fiscal year consisting of the initial program (not including the final State project priority list to be submitted pursuant to § 35.563(b)) described in § 35.562(a), modified as appropriate to reflect the results of public participation, and comments of the Regional Administrator. In addition, all agencies applying for grants under this section must comply with all applicable requirements of Office of Management and Budget (OMB) Circular No. A-95, pursuant to § 30.305 of this subchapter.

[41 FR 17697, Apr. 27, 1976, as amended at 41 FR 20659, May 20, 1976]

§ 35.563 State project priority list submission.

(a) Each State shall submit to the Regional Administrator a preliminary State project priority list described in § 35.915(c) by May 1 of each year as part of the initial program submission (See § 35.562(a)).

(b) Each State shall submit to the Regional Administrator a final State project priority list by July 15 for his approval which reflects the results of public participation and comments of the Regional Administrator.

NOTE: The State project priority list may be amended by a State, as necessary, at any time pursuant to § 35.915(f).

§ 35.564 Public participation.

The final State program submission described in § 35.562 shall be the subject of public participation pursuant to 40 CFR Part 105 and in accordance with any time schedules and procedures agreed upon by the Regional Administrator and the State or interstate agency prior to initiation of development of the State strategy and program.

§ 35.565 Program approval.

(a) The Regional Administrator shall review the initial program submission and provide written comments to the State within thirty calendar days of its receipt.

(b) The Regional Administrator shall approve, conditionally approve or disapprove a final State program submission within thirty calendar days of its receipt, notwithstanding the provisions of § 30.345 of this chapter. Such program shall be approved only if the program is in compliance with the requirements set forth in the Act and this chapter.

(c) The Regional Administrator may award a grant based on conditional approval of a State program which requires minor changes to qualify for approval. In the event conditional approval is granted, the Regional Administrator shall provide the State with an explicit statement regarding the deficiency found in the State program submission and include, as a part of the grant award, a statement of the conditions which must be met to

secure final approval ar
which such conditions
Noncompliance with su
may result in a reductio
amount as reflected i
agreement.

(d) Approval of the S
submission shall be refle
tion of the grant agreeme

§ 35.566 State project prior al.

(a) The Regional A
shall review the prelimi
priority list submission
written comments to the
thirty calendar days of its

(b) The Regional A
shall approve or disappr
project priority list submi
thirty calendar days of
Such lists shall be approv
is in compliance with the r
set forth in the Act
§ 35.915(c) of this chapter.

NOTE: The State priority syst
in § 35.915(a) and the project
in § 35.915(c) may not be conc
proved.

(c) The Regional Adminis
approve or disapprove any a
to the State priority syste
ject priority list within thir
days of the date of receipt.
disapproved, the Regional A
tor shall detail to the State
ic reasons for disapproval.

§ 35.567 Grant conditions.

In addition to the require
forth in Part 30 of this cha
grant for a State water poll
trol program shall be subje
following condition:

The Regional Administrator ma
ally suspend or terminate this gr
ant to 40 CFR Parts 30 and 35 wh
ally assumed enforcement as defi
tion 309(a)(2) of the Act is in effe

§ 35.568 Adherence to budget est

Grantee expenditures shall
sistent with the resource e
contained in the approved S
gram. In the event that rebud
funds among program elem
comes necessary, the provi

submission under Section 106 of the Act as required under Part 35 of this Chapter, shall include a description of public participation provisions and activities. In addition, and in order that the public and reviewing or approving officials may be fully aware of the actual extent of public input and involvement, a Summary of Public Participation related to particular actions or documents shall be publicly presented as follows:

(a) In the case of regulations and standards required to be published by the Administrator in the FEDERAL REGISTER or required to be published by a State agency in an official form, the Summary of Public Participation shall be published as part of the introductory material.

(b) In the case of Statewide or areawide plans or portions thereof (including the continuing planning process under section 303(e) of the Act and plans developed under such process), or comparable matters required to be approved by the Administrator, the Summary of Public Participation shall be submitted as a part of the plan or of the public transmittal document.

(c) In the case of applications for grants for construction projects other than those under section 206 of the Act, or for planning or annual program grants (including grants under sections 102(c), 106, and 208 of the Act), the Summary of Public Participation shall be a part of the application.

(d) Each Summary of Public Participation shall describe the measures taken by the agency to provide for, encourage, and assist public participation in relation to the matter; the public response to such measures; and the disposition of significant points raised.

§ 105.6 Guidelines for Evaluation.

The Administrator, Regional Administrator, or other approving official shall review and evaluate each Summary of Public Participation in relation to the matter submitted. He may call for additional information, or for the records of meetings or hearings. If he finds that there has been inadequate opportunity for public participation on the matter, he may disapprove or suspend action; or alternatively take measures, or require the sponsoring agency to take measures, to obtain additional public participation, prior to final action. Such final action shall include a statement of findings in regard of public participation.

§ 105.7 Guidelines for Public Hearings.

Any public hearing, whether mandatory or discretionary, to be held under the Act shall be in conformity with this section. If conflict exists between the minimum guidelines of this section and requirements of State or Federal law or other regulations pertaining to a particular hearing, the more stringent requirements shall be observed.

(a) *Purpose.* Generally, a public hearing gives persons and organizations a formal opportunity to be heard on a matter prior to decision-making. Although public hearing testimony may focus on the prospective action to be taken in the form of a tentative plan or decision, the final actions shall benefit from and reflect consideration of the public hearing content.

(b) *Public Meetings.* Agencies are encouraged to hold public meetings or workshops, jointly where feasible, on significant matters or proposed actions. Such meetings shall not supplant public hearings when such are required, and shall be informational in nature with opportunity for public response.

(c) *Opportunity for Hearings.* Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing shall be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation.

(d) *Hearing Notices.* In addition to any other formal legal requirements, a notice of each hearing or public meeting shall be well publicized and be mailed to interested or affected persons and organizations as soon as the hearing or meeting is scheduled by the agency and in the case of a hearing, at least thirty calendar days before the hearing is to take place. If it should be necessary to allow less than thirty days' notice prior to a hearing, the hearing notice shall state the reasons for such shorter time period.

(e) *Location and Time.* In determining the locations and times for hearings, consideration shall be given to easing travel hardship and to facilitating attendance and testimony by a cross-section of interested or affected persons and organizations. Accessibility of hearing

sites by public transportation shall be considered.

(f) *Documents.* Reports, documents, and data to be discussed at the public hearing shall be available to the public for a reasonable time prior to the hearing. For complex matters, a Fact Sheet outlining major issues, tentative staff determinations if appropriate, bibliography, and procedures for obtaining further information, for requesting a public hearing, and for other appropriate actions shall be prepared and its availability made known in the notice called for in paragraph (d) of this section.

(g) *Agenda.* The elements of the public hearing, proposed time schedule, and any constraints on statements shall be specified in the notice of the hearing.

(h) *Scheduling.* Witnesses at public hearings shall be scheduled in advance when necessary to ensure maximum participation and allotment of adequate time for testimony, provided that such scheduling is not used as a bar to unscheduled testimony. Blocks of time shall be considered for major categories of witnesses. Evening and weekend schedules shall be considered.

(i) *Statements.* Public hearing procedures shall not inhibit free expression of views by requirements of more than one legible copy of any statement submitted, or for qualification of witnesses beyond that needed for identification.

(j) *Records.* A record of public hearing proceedings shall be made promptly available to the public at cost.

§ 105.8 Coordination and Non-Duplication.

In accordance with the policy of section 101(f) of the Federal Water Pollution Control Act, public participation activities and materials required under the Act or these regulations may be combined with closely related programs or activities of the agencies concerned, wherever such combination will enhance the economy, the effectiveness, or the timeliness of the effort, enhance the clarity of the issue, and not be detrimental to participation by the widest possible public. Hearings and meetings may be held jointly by more than one agency on the same matter under the Act, where such procedure does not conflict with other provisions. Interstate agencies particularly are encouraged to develop combined proceedings on behalf of the States concerned.

§ 105.9 Applicability.

The provisions of this part shall apply only to actions taken after the effective date of this part.

PART 103—EMPLOYEE PROTECTION HEARINGS

Sec.

103.1 Applicability.
103.2 Definitions.
103.3 Request for investigation.
103.4 Investigation by Regional Administrator.
103.5 Procedure.
103.6 Recommendations.
103.7 Hearing before Administrator.

AUTHORITY: Sec. 507(e), Pub. L. 92-500, 86 Stat. 816 (33 U.S.C. 1251 et seq.)

SOURCE: 39 FR 15398, May 3, 1974, unless otherwise noted.

§ 103.1 Applicability.

This part shall be applicable to investigations and hearings required by section 507(e) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq. (Pub. L. 92-500).

§ 103.2 Definitions.

As used in this part, the term:

(a) "Act" means the Federal Water Pollution Control Act, as amended;

(b) "Effluent limitation" means any effluent limitation which is established as a condition of a permit issued or proposed to be issued by a State or by the Environmental Protection Agency pursuant to section 402 of the Act; any toxic or pretreatment effluent standard established under section 307 of the Act; any standard of performance established under section 306 of the Act; and any effluent limitation established under section 302, section 316, or section 318 of the Act.

(c) "Order" means any order issued by the Administrator under section 309 of the Act; any order issued by a State to secure compliance with a permit, or condition thereof, issued under a program approved pursuant to section 402 of the Act; or any order issued by a court in an action brought pursuant to section 309 or section 505 of the Act.

(d) "Party" means an employee filing a request under § 103.3, any employee similarly situated, the employer of any such employee, and the Regional Administrator or his designee.

(e) "Administrator" or "Regional Administrator" means the Administrator or a Regional Administrator of the Environmental Protection Agency.

Pollution Control Agency

Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

Rule as Proposed

WPC 34 Regulation for the administration of ~~the Municipal Facilities Assistance Program and~~ the Minnesota State Water Pollution Control Fund and federal grant funds allotted to Minnesota.

~~(a)~~ A. Purpose. This regulation is herein adopted and promulgated by the Minnesota Pollution Control Agency to implement the provisions of ~~Minnesota Statutes, Chapters~~ Minn. Stat. chs. 115 and 116 (1976) ~~(as amended by Laws of 1973, Chapter 423 and Chapter 771)~~ and to comply with the Federal Water Pollution Control Act ~~Amendments of 1972 (United States Public Law 92-500),~~ 33 U.S.C. § 1251 et seq., and guidelines and regulations pursuant thereto or resulting therefrom, by the establishment of procedures relating to the federal ~~Federal~~ construction grants and state construction grant and loan programs.

~~The regulation applies in general to the following:~~

~~(i) use of state and federal funds;~~

~~(ii) establishment of a municipal discharge inventory, list of municipalities and project list;~~

~~(iii) submission and evaluation of application;~~

~~(iv) administration of the grant and loan program;~~

~~(v) criteria for determination of priorities for grants and loans, and~~

~~(vi) the disbursement of funds.~~

The promulgation of this regulation, in association with the Agency's enabling legislation, ~~as amended by Laws of 1973, Chapter 423 and 771,~~ provides ~~sufficient~~ authority for the State of Minnesota, upon approval by the Regional Administrator of the United States Environmental Protection Agency, to certify applicants for Federal construction grants and subsequently, to the extent funds are available, provide state construction grants. The Minnesota Pollution Control Agency is the State agency designated by State law to administer this program. Except as specifically provided herein, this regulation shall apply with equal force to state financial assistance and Federal grant funds.

~~(b)~~ B. Definitions. The terms "person", "sewage", "industrial wastes", "other wastes", "treatment works", "sewer system", "disposal ~~systems~~ system", "waters of the state", "pollution control fund", "municipality", "director", "Agency", "pollution of water", "eligible cost", "wastewater treatment facility", as well as any other pertinent terms for which definitions are given in ~~Minnesota Statutes Chapters~~ Minn. Stat. chs. 115 and 116, ~~as amended,~~ shall have the meanings ascribed to them ~~:~~ therein.

The terms specified below shall have the meanings ascribed to them:

~~(1)~~ 1. "ACT" means the Federal Water Pollution Control Act, ~~as amended,~~ 33 USC ~~1314~~ 1251 et seq.

~~(2)~~ 2. "EPA" means the United States Environmental Protection Agency.

~~(3)~~ 3. "ADMINISTRATOR" means the Administrator of the United States Environmental Protection Agency.

~~(4)~~ 4. "REGIONAL ADMINISTRATOR" means the EPA Regional Administrator for the region in which Minnesota is located (now Region Five).

~~(5) "ELIGIBLE COST" means, for state grant purposes, the cost as determined by the EPA.~~

5. "NEED" means a determination that a new or upgraded disposal system is currently required, or will be required within a five-year period to comply with State Water Pollution Control Regulations; provided, the situation does not exist primarily due to inadequate operation and maintenance or primarily due to negligence on the part of any person.

6. "FORM OF PROJECT" means the form of disposal system a municipality intends to construct.

7. "TYPE OF PROJECT" means its "STEP".

a. "STEP 1" means all necessary preliminary engineering studies for the project.

b. "STEP 2" means the preparation of construction plans and specifications for the project.

c. "STEP 3" means the construction of the project.

8. "PROJECT" means the scope of work for which grant assistance is awarded.

9. "METROPOLITAN AREA" means Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington Counties.

10. "OUTSTATE AREA" means all counties of the state not in the metropolitan area.

11. "SECONDARY TREATMENT" shall have the meaning ascribed to it in Minn. Reg. WPC 14 or 15 or amendments thereto.

12. "TERTIARY TREATMENT" means any level of treatment of higher quality than secondary treatment.

Other terms and abbreviations used herein which are not specifically defined by law shall be construed in conformance with the context and professional usage.

~~(e)~~ C. Severability. If any provision of this regulation or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect other provisions of the regulation or application of any other part of this regulation which can be given effect without application of the invalid provision. To this end, the provisions of all sections, subsections, or subdivisions herein and the various applications thereof are declared to be severable.

~~(d) Use of State Funds. The Agency in accordance with this regulation may provide financial assistance to municipalities as:~~

~~(1) A grant of nonrepayable funds for construction of disposal systems in an amount of not less than that required in applicable federal law and regulations for projects for which there becomes available, through use of these state funds, a grant of federal funds at a percentage of cost exceeding the percentage which would be available for the project if those state funds were not available.~~

~~(2) A grant of nonrepayable funds for construction of disposal systems in the amount of 15 per centum of the eligible cost of construction for projects tendered a grant of federal funds under Section 201(g), Section 202, Section 203, or Section 206(f) of the Act at 75 per centum of the eligible cost of construction. Except as provided by Minnesota Statutes, Section 116.18, not less than 10 percent of such cost shall be paid by the municipality.~~

~~(3) A grant of state funds not exceeding 25 percentum to a municipality that would qualify for a grant of federal funds but desires to initiate construction of a project without a federal grant where such project is necessary to abate an immediate health hazard.~~

~~(4) Loans for the acquisition and betterment of public land, buildings, and improvements of a capital nature needed for the prevention, control and abatement of water pollution.~~

~~The Agency shall disburse state funds in any fiscal year to the extent that money is available and requested in the following order of priority: Federal matching construction grants, construction grants, and planning and construction loans.~~

~~(e) Use of Federal Funds. The Agency, in accordance with this regulation and the Act, guidelines and regulations pursuant thereto or resulting therefrom may:~~

~~(1) certify applications which have been determined to be complete for a grant of federal funds from any allotments and re-allotments allocated to Minnesota by the Administrator pursuant to the Act; and~~

~~(2) utilize up to $250,000 from its allotment or re-allotment or both for the construction of a treatment works for a facility to train and upgrade waste treatment works operation and maintenance personnel.~~

~~(f) Municipal Discharge Inventory, List of Municipalities and Project Lists.~~

~~(1) The Director shall develop and maintain a municipal discharge inventory and a list of municipalities including a breakdown as to type of project required, which have known needs to install, construct, upgrade, or expand a disposal system, or any portion thereof. The list shall be periodically revised by the addition of the name of any munic-~~

~~ipality for which it is determined by the Director that such a need exists, or by the deletion of the name of any municipality or type of project which no longer has such a need. The municipal discharge inventory shall include all the municipalities with needs and all the municipalities which have adequate disposal systems.~~

~~(2) The names on the municipal discharge inventory shall be arranged in order of priority pursuant to the criteria established in Section (i) (2) except subsections (dd) and (ee). The names on the list of municipalities shall be arranged in order of priority pursuant to the criteria established in Section (i) (2) except subsection (ee).~~

~~(3) The Director shall prepare from the municipal discharge inventory and in turn from the list of municipalities for fiscal year 1974 (July 1, 1973 to June 30, 1974) and each succeeding fiscal year, for Agency and EPA approval a project list of those projects for which Federal assistance will be requested from current allotments. Such project list shall be prepared in accordance with the allocation of funds set forth in Section (i) (1) and shall set forth a tabulation of funding priorities and requirements. The Director shall define, pursuant to Section (g) (3), (g) (4), (g) (5), or any combination thereof, allowed by the EPA, the step of each disposal system project and the time when such system project is to receive Federal financial assistance.~~

~~(4) The Director, where he deems appropriate, may split or stage the construction of the type of project for a disposal system or portion thereof (See also Section (i) (2) (dd) of this regulation).~~

~~(5) Notwithstanding subsection (3) of this section, the Director, where he deems appropriate in preparation of the list of projects may, to the extent allowable by the EPA, recommend projects in a variety of steps as a means of assuming maximum utilization of available federal and state funds in future fiscal years.~~

~~(6) The Director, in preparation of the list of projects, may recommend a total number of projects which would utilize all or a portion of the current fiscal year federal allocation and all or a portion of any succeeding fiscal year federal allocation.~~

~~(g) Applications for State and Federal Construction Grants.~~

~~(1)~~ [Moved to E.8.a.]

~~(2)~~ [Moved to E.8.b.]

~~(3)~~ [Moved to E.8.d.]

~~(4)~~ [Moved to E.8.e.]

~~(5)~~ [Moved to E.8.f.]

~~(6) Application for projects which do not receive a grant offer in the fiscal year for which the application is considered shall be retained, and if subsequently deemed necessary, shall be up-dated and revised within 30 days upon written notice from the Director.~~

~~(7)~~ [Moved to E.8.g.]

~~(8) A municipality may file an application at any time for any type of project. If the type of project is not shown on the list of municipalities, it shall be added to such list; provided that any such application shall be submitted at least 30 days prior to the date of the public hearing to be held annually on the state program plan of the Agency which is submitted to the EPA before the beginning of a new fiscal year (July 1 through June 30.) The Director shall indicate in the public hearing notice for the program plan hearing that any person upon request shall be given a copy of the municipal discharge inventory, list of municipalities and project list developed in accordance with Section (f) and pursuant to Section (i) (2) (ee), the list of segments in order of priority. The provisions of this subsection shall take effect upon the effective date of this regulation.~~

~~(h) Administration of Construction Grants.~~

~~(1) The priority ratings of the application on the list of municipalities and the project list for fiscal year 1974 and succeeding years shall be established in accordance with Section (i) excluding subsection (ee). The priority ratings for project applications submitted in and certified for fiscal year 1973 and earlier years shall remain as determined by the Agency on the basis of the established criteria, and such prior actions of the Agency are also hereby affirmed insofar as they relate to federal grant increases and state grants for such projects as authorized by the statutes and the EPA.~~

~~(2)~~ [Moved to E.9.a.]

~~(3)~~ [Moved to E.4.b.(4)]

~~(4)~~ [Moved to E.9.b.(1) and (2)]

~~(5) To the extent it determines reimbursement funds are available, the Agency shall authorize grants or~~

grant increases for fiscal year 1972 and earlier eligible projects up to the required federal matching ratio, with such available funds being divided proportionally in accordance with Section (i) (1) between the seven county Twin Cities Metropolitan Area and the area of the state outside the seven county Twin Cities Metropolitan Area, and eligible projects being funded in order of established priority, such increases to be paid subject to conformance with EPA requirements and authorization thereof by the EPA.

(6) Notwithstanding subsection (4) or (5) of section, the Agency may, to the extent allowable by the EPA, limit grant increases to less than the eligible amount to provide a proportionate share to all eligible projects.

(7) [Moved to E.9.c.]

(8) [Moved to E.9.e.(3) (a)-(d)]

(i) Criteria for Determining Priority.

(1) Federal funds allocated to Minnesota under the program administered by the EPA for fiscal year 1972 and each succeeding fiscal year and state funds in like proportion shall be allocated initially by the Agency to the Twin Cities Metropolitan Area, consisting of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington Counties, and the outstate areas consisting of the remainder of the counties of the state in approximately the same ratio which the population of the sewered municipalities of the seven counties bears to the sewered population of the outstate counties. Allocations made by the Agency for fiscal year 1973 and prior years are hereby re-affirmed.

(2) The determination of the order of priority of the municipalities for state and federal grants for fiscal year 1974 and succeeding years shall be in accordance with the following criteria, except that subsection (ee) shall not be considered in establishing the municipal discharge inventory (which also will not take into consideration subsection (dd), the list of municipalities or the project list for federal grant purposes. The determination of the order of priority for grants certified for funding in fiscal year 1973 and prior years shall be as set forth in actions of the Agency heretofore based on criteria duly established for such years, the same to apply also to grant increases for EPA eligible projects.

(aa) [Moved to E.2.d.(1)]

(bb) [Moved to E.2.d.(2)]

(ee) [Moved to E.2.d.(3)]

(dd) [Moved to E.3.c.(1)]

(ee) [Moved to E.3.c.(2)]

(ff) [Moved to E.3.c.(3)]

(3) [Moved to E.6.a.]

(4) [Moved to E.3.e.]

(5) [Moved to E.6.b.]

(j) [Moved to F.1.]

(k) [Moved to F.2.]

(l) [Moved to F.3.]

(m) Additional Purposes of State and Federal Funds.

(1) In accordance with Minnesota Statutes, Chapter 116, as amended, the Agency may where it determines that the prevention, control and abatement of water pollution and the public health of the state requires the construction of a project and the municipality is unable to provide 10 percent of the eligible cost of a disposal system project, expend funds for hardship cases to reduce or eliminate the municipal portion of the eligible cost. Each such hardship grant shall be made only to applicants who apply for consideration prior to initiation of construction and attain a minimal point rating of 40 under the criteria of section (i) (2) (ee) or such other numerical hardship levels as may be specified annually by the Agency for rating purposes under that section.

(2) After consideration of the amount of state funds required to match federal funds, the Agency may tender a grant of state funds not exceeding 25 per centum to a municipality that would qualify for a grant of federal funds, but desires to initiate construction of a project without a federal grant, where such project is necessary to abate an immediate health hazard. The Agency may limit the scope and eligible cost of such project. After it has been determined by the Agency that any project, or portion thereof, is necessary to abate an immediate health hazard, and available funds exist, the criteria for determining priority to be utilized for order of priority shall be section (i) (2), including but not limited to subsection (2) (ee). No municipality shall be eligible for consideration if construction of the project has been initiated prior to submission of the application and the items of section (g) (5). The Director for just cause may waive or defer the submission of any item required pursuant to section (g) (5).

(3) In accordance with section 109(b) of the Act and any guidelines or regulations thereto, the Agency may request, with or without giving consideration to section (i) (1), the Administrator to make a grant of up to $250,000 from any allocation of federal funds to Minnesota for any additional cost of construction of a treatment works required for a facility to train and upgrade waste treatment works operation and maintenance personnel.

D. Priority of programs. Minn. Stat. § 116.16 et seq. (1976) establishes a pollution control fund and authorizes grants and loans for the construction of municipal disposal systems. To the extent funds are available and requested, the Agency shall disburse funds from the pollution control fund in the following order:

1. Grants for projects tendered a 75% federal grant under the Act and, to the extent authorized by statute, grants for projects utilizing innovative or alternative wastewater treatment processes and techniques which have been tendered an 85% federal grant under the Act.

2. Grants to reduce or eliminate the local contribution of a municipality meeting the criteria set forth in section E.9.4.

3. Grants to municipalities which would qualify for a federal grant but which desire to initiate construction of the project without a federal grant.

4. Loans for the construction of municipal disposal systems.

E. Construction grant program.

1. Summary of construction grants program.

a. The construction grants program generally consists of three steps:

(1) Step 1: preparation of all necessary preliminary engineering studies;

(2) Step 2: preparation of construction plans and specifications; and

(3) Step 3: construction of the disposal system or part thereof.

b. Grants may be awarded for a Step 1, Step 2, or Step 3 project or, as authorized by statute, for a project which combines steps.

c. The scope of the project is initially defined by the applicant but may be revised by the Agency or by EPA.

d. Grants are awarded to municipalities on a priority basis. Priority is determined as follows:

(1) The Director shall develop a Municipal Discharge Inventory which lists in priority order, pursuant to section E.2.c., all municipalities which maintain a discharge of effluent, including those municipalities which utilize land application or individual sewage treatment systems. This inventory includes municipalities which have adequate disposal systems as well as those which have a need for a new or upgraded disposal system.

(2) The Agency shall develop a Municipal Needs Lists from the Municipal Discharge Inventory. The Municipal Needs List shall rank in priority order, pursuant to section E.3.b.(2) all municipalities or projects for which a need exists.

(3) A Municipal Project List shall be developed by the Agency from the Municipal Needs List. The Municipal Project List shall list in priority order, pursuant to section E.4.b., all projects which will be funded during the current fiscal year. The Municipal Project List shall also list any nonproject uses of the state's allotment of federal construction grant funds.

e. Public participation shall be sought by the Agency prior to the adoption of the Municipal Needs List and the Municipal Project List, pursuant to section E.7.

f. Each applicant must apply to the Agency for each proposed grant in the manner set forth in section E.8.

g. The Agency shall certify applications which have been determined to be complete for a grant of federal funds from EPA.

h. Funds shall be disbursed to a municipality in the manner set forth in section E.9.e.

2. Municipal discharge inventory.

a. The Director shall develop and maintain a Municipal Discharge Inventory listing all those municipalities which maintain a discharge of effluent including those which utilize land application or individual sewage treatment systems.

b. The Municipal Discharge Inventory shall include those municipalities which have adequate disposal systems as well as those which have a need for a new or upgraded disposal system.

c. Each municipality shall be awarded points pursuant to the criteria set forth in section E.2.d below. The

municipalities shall be listed on the Municipal Discharge Inventory in descending order according to the number of points awarded to each.

d. Criteria.

~~(i) (2) (aa)~~ (1) Extent and nature of pollution. ~~Water pollution control priority~~ Priority points shall be ~~established~~ awarded as set forth below from a determination of the highest single beneficial water use seriously affected, or, if no pollution problem currently exists, from a determination of the highest single beneficial water use to be preserved.

Water Use	Point Rating
Class 1 Domestic Water Supply:	
A. Direct consumption (groundwater)	70
B. Consumption after only disinfection by chlorination	65
C. Consumption after moderate water treatment process	60
D. Consumption after very complete water treatment process	55
Class 2 Fisheries and Recreation Waters:	
A. Propagation and maintenance of cold water fishery and all recreation uses	60
B. Propagation and maintenance of mixed fishery and all recreational uses	50
C. Propagation and maintenance of rough fishery and non-contact recreational uses	40
Class 3 Industrial Consumption, Except Food Processing and Related Uses:	
A. Direct use without chemical treatment	40
B. Use with moderate treatment	30
C. Use for cooling and material transport	20
Class 4 Agriculture and Wildlife:	
A. Irrigation and agricultural crops of all kinds	35
B. Watering of livestock and wildlife	30
Class 5 Commercial navigation and waste disposal	10

~~(i) (2) (bb)~~ (2) Population affected. ~~Water pollution control priority~~ Priority points shall be assigned for each type of project based on the population of the municipality, or population of the municipalities served by such project as determined by the most recent Federal census, as follows:

	Point Rating
~~(1)~~ (a) Municipal population under 250	2
~~(2)~~ (b) Municipal population from 251-500	4
~~(3)~~ (c) Municipal population from 501-750	6
~~(4)~~ (d) Municipal population from 751-1000	8
~~(5)~~ (e) Municipal population from 1001-1500	10
~~(6)~~ (f) Municipal population from 1501-3000	12
~~(7)~~ (g) Municipal population from 3001-5000	14
~~(8)~~ (h) Municipal population from 5001-10,000	16
~~(9)~~ (i) Municipal population from 10,001-20,000	20
~~(10)~~ (j) Municipal population from 20,001-50,000	25
~~(11)~~ (k) Municipal population from 50,001-450,000	35
~~(12)~~ (l) Municipal population in excess of 450,000	50

~~(i) (2) (cc)~~ (3) List of segments. Pursuant to Sect. 303(e) of the Act and guidelines and regulations thereto relating to the state continuing planning process, all waters of the state shall be divided into segments and each segment classified as either water quality or effluent limited. The Director shall annually develop a list of segments, and after giving consideration to:

~~(i)~~ (a) severity of pollution problems;

~~(ii)~~ (b) population;

~~iii)~~ (c) need for preservation of high quality waters; and

~~(iv)~~ (d) national priorities as determined by the Administrator; priority points will be established in accordance with criteria approved by the Agency and the EPA.

The segment ranked number one shall be awarded priority rating equal to the total number (N) of segments with any subsequent segment receiving a priority rating of N + 1 minus the numerical ranking of the segment. Priority points shall be accordingly awarded to a municipality for the type of project located in a segment.

3. Municipal needs list.

a. The Agency shall develop, and update whenever necessary, a Municipal Needs List listing all municipalities for which a need exists.

b. Each municipality shall be awarded points in the following manner:

(1) Points awarded pursuant to section E.2.d in the development of the Municipal Discharge Inventory; and,

(2) Points awarded pursuant to the criteria set forth in section E.3.c below. The municipalities shall be ranked on the Municipal Needs Lists according to the number of points awarded to each.

c. Criteria.

~~(i) (2) (dd)~~ (1) Type of project. Priority points shall be allocated on the basis of the single highest disposal system or part thereof, improvement to prevent, control, and abate the source of pollution as follows:

	Point Rating
~~(1)~~ (a) Provision of tertiary treatment. ~~(secondary treatment or its equivalent plus additional treatment works to remove additional 5-day biochemical oxygen demand, suspended solids, or dissolved solids) for a discharge of sewage and industrial waste.~~ For the purpose of this regulation, treatment works which provide for regulated discharge of effluents in lieu of tertiary treatment shall be construed to provide tertiary treatment.	~~40~~ 160
~~(2)~~ (b) Provision of secondary treatment. ~~for a municipality which does not have a disposal system, other than individual on lot septic tank systems, or has inadequate secondary treatment,~~	

~~or provides no treatment or only primary treatment for its sewage and industrial wastes.~~

~~30~~ 150

~~(3) Provision of a disposal system or part thereof by a municipality for adequate disposal of wastes from its water treatment plant, or power plant or similar pollutants.~~

~~20~~

~~(4)~~ (c) Provision of a new sewer system or portion thereof for a municipality, in existence on October 18, 1972 with sufficient existing or planned capacity to adequately treat such collected sewage or industrial waste.

10

~~(5)~~ (d) Provision by a municipality of storm water disposal system, including sewer systems to separate existing combined sanitary and storm sewers or treatment works.

(e) A municipality having only primary treatment.

20

(f) A municipality or an area part of an areawide study having a sewer system with no treatment including septic tanks overflowing to a sewer system.

30

~~(6)~~ (g) Subsections ~~(1)~~ (a), or ~~(2)~~ (b), whichever is applicable, may also include treatment works and/or any portion of sewer system improvements deemed necessary by the Director to insure the integrity and performance of a disposal system.

~~(7)~~ (h) An interceptor sewer which eliminates any existing treatment works or which, in accordance with an approved basin plan, eliminates the need for construction of new treatment works shall be considered equivalent to tertiary or secondary treatment and allocated the appropriate priority points pursuant to subsections ~~(1)~~ (a) or ~~(2)~~ (b), whichever is applicable.

~~(8)~~ (i) In the case of a sewer system being tributary to sewerage facilities which are on the project list for funding but which the EPA will not fund until an infiltration/inflow analysis, and where required, a sewer system evaluation has been performed, this sewer system project may be awarded by the Director an equal number of priority points as the project on the project list.

~~(9) A proposed sewer system project, or portion thereof for a municipality with adequate treatment works which abates an immediate public health hazard relating to an area that does not have municipal sewer and water service may be considered equivalent to tertiary or secondary treatment and allocated the appropriate priority points pursuant to subsections (1) or (2), whichever is applicable.~~

~~(1) (2) (ee)~~ (2) Financial aspects. Priority pionts shall be awarded by summing up the applicable rating points for the project from Tables 1, 2, and 3 relative to per capita project cost, the ratio of bonded debt to assessed evaluation and per capita buying income.

TABLE I
Per Capita Cost of Project

Per Capita Cost ($)	Point Rating
0-40	1
41-80	3
81-120	5
121-160	7
161-200	9
201-240	11
241-280	13
over 280	15

TABLE II
Ratio of Bonded Debt to Assessed Evaluation**

Ratio x 100	Point Rating
0-3	3
4-9	5
10-15	7
16-21	9
22-27	11
28-33	13
over 33	15

~~** Based on bonded debt and assessed evaluation data obtained from the Department of Public Examiner and Research and Planning Unit of the Minnesota Department of Taxation, respectively.~~

TABLE III
Per Capita Buying Income***

Percent of Average	Point Rating
0-50	15
51-60	13
61-70	11
71-80	9
81-90	7
91-100	5
101-110	3
over 110	1

~~*** Based on the report "Survey of Buying Power," by Sales Management, Inc.~~

~~(i) (2) (ff)~~ (3) ~~Other.~~ Ten ~~Additional~~ additional points ~~may be granted in the discretion of the Agency~~ will be awarded to an application which:

~~Point Rating~~

~~(i) relates to a point source or disposal system which is located within an area designated by the Administrator in writing to have national priority, and/or~~

~~10~~

~~(ii)~~ includes planned participation in a sanitary district and/or other multi-municipal disposal system.

~~10~~

d. If a municipality is not included on the Municipal Needs List, it may petition the Agency for inclusion on the list. The municipality must document its need in the following manner:

(1) Sewered communities: submission of data re-

garding: concentration of pollutants in existing discharge; volume of discharge; and waters of the state presently or potentially impacted by the discharge ;

(2) Unsewered communities: submission of data regarding: type of soil in unsewered area; depth to seasonally high water table; size of all lots in the area; and age and type of existing system.

Following submission of this data, the Director will review the material and determine if a need has been shown. If so, the municipality will be added up to the Municipal Needs list, in the manner set forth above. If not, the municipality will be notified of the reasons for the decision of the Director.

~~(i) (4)~~ e. If in the determination of the order of priority on the ~~list of municipalities.~~ Municipal Needs List, two or more municipalities have the same total number of priority points, the municipality in accordance with ~~subsection (c) (aa)~~ section E.2.d.(1) that has the highest single beneficial water use seriously affected or to be preserved shall be ranked higher. If two or more municipalities have the same total number or priority points and the same highest single beneficial water use seriously affected or to be preserved the municipalities shall be ranked based on population as determined by the most recent federal census in descending order below the municipality with the largest population.

4. Municipal project list.

a. The Agency shall prepare a Municipal Project List each fiscal year which shall list in order of priority those projects for which federal grant funds will be requested from current allotments. The Municipal Project List shall also list any nonproject uses of the state's allotment of federal construction grant funds, including but not limited to training grants and costs of administration.

b. Projects with the highest priority on the Municipal Needs List will be placed on the Municipal Project List in the following manner:

(1) Funds shall be allocated between the Metropolitan Area and the Outstate Area in approximately the same ratio which the population of sewered municipalities of the Metropolitan Area bears to the sewered population of the Outstate Area.

(2) Funds will be set aside for such classifications of projects and in such amounts as is required by the Act. Such classification presently include:

(a) Treatment works utilizing innovative or alternative wastewater treatment processes and techniques for which an 85% federal grant has been tendered;

(b) Alternatives to conventional sewage treatment works for municipalities having a population of three thousand five hundred or less or for the highly dispersed sections of alrger municipalities, as defined by the Administrator; and

(c) Construction of publicly owned treatment works for major sewer system rehabilitation, new collector sewers and appurtenances, new interceptors and appurtenances, and, correction of combined sewer overflows, if such projects are on the state's priority list for that year and are otherwise eligible for funding in that fiscal year.

These classifications are presently requried by Sections 205 and 216 of the Act.

(3) The Agency may provide for an adequate mixture of Step 1, 2, and 3 projects so as to permit funding to proceed in an orderly fashion and to fully utilize all allocated funds.

~~(h) (3)~~ (4) Federal grants allocated ~~under~~ Section (i) (1) to ~~outstate~~ Outstate Area projects and for which there are not ~~any~~ sufficient certifiable outstate projects by ~~December 31~~ the end of the fiscal year for which those funds were alloted may be re-allocated by the Agency to the ~~seven county Twin Cities~~ Metropolitan Area. Any such federal grant funds which ~~in fiscal year 1972 or succeeding fiscal years~~ are reallocated to the ~~seven county Twin Cities~~ Metropolitan Area shall be recoverable in total for allocation of outstate projects in later fiscal years ~~only to the extent of $2,000,000 in any one fiscal year.~~ in annual amounts deemed reasonable by the Director. Grant funds allocated to the ~~seven county Twin Cities~~ Metropolitan Area which are unused are subject to similar provisions for reallocation to and recovery from outstate projects.

c. A reserve project list may be developed by the Agency for the purpose of utilizing grant monies forfeited by any municipality pursuant to section E.8.c.

d. The project list may be modified, in accordance with EPA regulations, to give higher priority to Step 2 or combined Step 2 and 3 projects utilizing innovative or alternative wastewater treatment processes and techniques.

5. Project eligibility.

a. Projects which are not eligible for federal grants shall not be eligible for state grant funds except as provided in section E.9.b.

b. A project is not eligible for a grant if the construction has been initiated prior to the award of the grant, except as provided in section E.9.d.

c. Items are not grant eligible unless the Director

determines that they are essential to the efficient and effective operation of an otherwise grant eligible disposal system.

6. Adjustments.

~~(i) (3)~~ a. The numerical rating points established in ~~Section (i) (2)~~ sections E.2.d. and E.3.c. shall be subject to readjustment in value for any category or class prior to the mailing of the public ~~hearing~~ notice established in ~~Section (g) (8)~~ section E.7.c. if it is determined to be in the best interests of the state by resolution of the Agency. At least 30 days notice of such proposed readjustments shall be furnished by United States mail to all persons registered on the appropriate list maintained by the Secretary of State, and all persons wishing to do so shall be given an opportunity to present their views on the proposals to the Agency prior to final Agency action.

~~(i) (5)~~ b. Notwithstanding any other provision in this regulation including, but not limited to, ~~Sections (i) (2) and (i) (3),~~ sections E.2.d., E.3.c. and E.6.a., to the contrary, the Director may, as necessary to establish criteria for determining priority for applications for federal and state ~~sewage~~ construction grants under the ~~Federal Water Pollution Control~~ Act, ~~as amended~~ and regulations and guidelines of the ~~United States Environmental Protection Agency~~ EPA promulgated pursuant thereto, and ~~Minnesota Statutes, Chapters~~ Minn. Stat. chs. 115 and 116, ~~as amended,~~ establish such criteria for determining priority upon a basis other than that provided herein, to the extent required to comply with ~~said federal act,~~ the Act, and guidelines and regulations thereto or resulting therefrom.

7. Public participation. Prior to the adoption of the Municipal Needs List and the Municipal Project List by the Agency, public participation shall be sought in the following manner:

a. Notice of the Agency Board meeting at which the Municipal Needs List and the Municipal Project List will be adopted shall be given to all affected municipalities at least 30 days prior to such meeting.

b. A copy of the proposed Municipal Needs List and the proposed Municipal Project List will be mailed to any interested person upon request.

c. Prior to the Agency Board meeting, public informational meetings will be conducted at such locations as the Director deems appropriate. Notice of such meetings shall be given to all affected municipalities.

d. All interested persons shall have the opportunity to present oral or written statements to the Board in regard to the proposed Municipal Needs List or the proposed Municipal Project List if a request is submitted to the Board. Such request should be submitted fourteen days prior to the meeting to facilitate agenda preparation and must be submitted at least three days prior to the meeting. If such request is made during the Board meeting, interested persons may be afforded the opportunity to participate within such limits of time and manner as the Board may establish under the circumstances.

8. Applications.

~~(g) (1)~~ a. ~~To expedite the program, unless~~ Unless otherwise specified by the Director, the state construction grant application form shall be the federal construction grant application form ~~(Budget Bureau No. 42 R1495 or revisions thereof)~~ of the EPA. ~~Projects which are not eligible under EPA rules, guidelines, or regulations shall not be eligible for state grant funds under this section, except as provided pursuant to Section (m) (2).~~

~~(g) (2)~~ b. ~~Any municipality shall within 30 days~~ Within 90 days for a Step 1, 150 days for a Step 2, and 150 days for a Step 3 after notification in writing from the Director ~~by first class mail,~~ a municipality shall file a completed construction grant application or submit such information as the Dirctor determines to be necessary to complete a previously submitted application. The Director may extend the date of filing or submission of any information subject to the municipality providing adequate justification therefor. ~~Should the municipality fail to provide such adequate justification, the initial filing or information requirement shall remain unchanged.~~ Failure to comply with this schedule may cause forfeiture of grant monies for the step grant involved and the municipality may be required to complete the work for that step without grant monies.

c. A specific schedule for completing the particular step of the project will be contained in each grant offer tendered. The municipality's National Pollutant Discharge Elimination System (NPDES) permit may be modified, pursuant to Agency regulation, to include such schedule. Failure to comply with this schedule may cause forfeiture of grant monies for the step grant involved and the municipality may be required to complete the work for that step without grant monies.

~~(g) (3)~~ d. The construction grant application ~~form~~ for a Step 1 project ~~to undertake preliminary plans and studies (Step 1)~~ shall ~~be supported by~~ include the following attachments~~:~~ and such other attachments as EPA may require:

~~(aa)~~ (1) Resolution of governing body of the municipality authorizing the filing of the application and designating the ~~official~~ municipal ~~representative:~~ official authorized to sign the application;

~~(bb) A brief description of the nature and scope of the proposed project;~~

~~(cc) Assurance of compliance with all applicable requirements of the Minnesota Department of Human Rights.~~

~~(dd) An estimate of the proposed project cost;~~

~~(ee) Statements on planning requirements from the following:~~

~~(i) State, Metropolitan or Regional Planning Agency; and~~

~~(ii) State Clearinghouse (Minnesota State Planning Agency); and~~

(2) If more than one municipality is involved, resolutions from the governing body of all municipalities agreeing to cost sharing and agreeing to proceed to Steps 2 and 3 if cost-effective;

~~(ff)~~ (3) Proposed sub-agreements, or an explanation of the intended method of awarding sub-agreements for substantial portions of the project work~~:~~;

(4) Statement by the consulting engineer indicating the effluent limitations for which the disposal system is being designed;

(5) A resolution by the governing body of the municipality to the effect that the sewage collection system will, at the appropriate time, be constructed concurrently with the sewage treatment works; and

(6) A resolution by the governing body of the municipality as to the methods for financing the construction of the collection system.

(7) Documentation by the engineer(s) that they carry adequate errors and omissions insurance.

~~(g) (4)~~ e. The construction grant application form for a ~~project to prepare construction drawings and specifications (Step 2) shall include but not be limited to:~~ Step 2 project shall include the following attachments and such other attachments as EPA may require:

~~(aa) Sewer system evaluation which demonstrates to the satisfaction of the Director and Regional Administrator that each sewer system discharging into such treatment works is not subject to excessive infiltration/inflow, through an infiltration/inflow analyses and, where appropriate and authorized by the Regional Administator, a sewer system evaluation survey.~~

~~(bb) Acceptable engineering report describing the design concepts of the proposed project and its technological and economic feasibility including, but not limited to:~~

~~(i) Disposal system design data incorporating:~~

~~(a) Results of sewer system evaluation;~~

~~(b) Estimated effluent quality, with respect to all parameters required by applicable effluent limitations and water quality standards; and~~

~~(c) Proposed method for ultimate disposal of sludge.~~

~~(ii) Cost estimates for design and construction; and~~

~~(iii) Schedule for completion of design and construction.~~

~~(cc) A review of measures practiced or proposed to control excess flow resulting from ground water infiltration and/or extraneous flows of surface water into the sewer system.~~

~~(dd) A detailed analysis of the operation and maintenance requirements of the proposed project, including but not limited to staffing, operator qualifications, laboratory works, chemicals, annual budget and financing of the annual budget to insure adequate operation and maintenance of the disposal system.~~

~~(ee) For any project to be constructed with funds authorized for any fiscal year beginning after June 30, 1974, the grant applicant shall satisfactorily demonstrate that:~~

~~(i) alternative waste management techniques have been studied and evaluated and the works proposed for grant assistance will provide for the application of the best practicable waste treatment technology over the life of the works; and~~

~~(ii) As appropriate, the works proposed for grant assistance will take into account and allow to the ex-~~

~~tent practicable the application of technology at a later date which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants.~~

~~(ff) Statements on planning requirements from the following:~~

~~(i) State, Metropolitan or Regional Planning Agency, and~~

~~(ii) State Clearinghouse (Minnesota State Planning Agency).~~

~~(gg) Environmental assessment in accordance with the requirements of the EPA unless the Regional Administrator determines, at the request of the applicant, that there is insufficient data available to prepare such assessment, provided that the environmental assessment must then be submitted to the Regional Administrator at or prior to the time of submission of plans and specifications for the building and erection of a disposal system or portion thereof (Step 3);~~

~~(hh) Statement regarding availability of proposed site, if relevant;~~

~~(ii) Statement regarding ability of applicant to obtain discharge permit for proposed disposal system;~~

~~(jj) Statement regarding compliance with Title VI of Civil Rights Act of 1964;~~

~~(kk) Statement regarding applicant's proposed operation and maintenance program;~~

~~(ll) Proposed sub-agreements, or an explanation of the intended method of awarding sub-agreements for performance of any substantial portion of the project work;~~

~~(mm) User charge system in accordance with EPA rules and regulations; and~~

~~(nn) Assurance of compliance with all applicable requirements of the Minnesota Department of Human Rights.~~

(1) Any of the items listed in Section E.8.d. which were not previously submitted or which require updating.

(2) Resolution of the governing body of the municipality authorizing the application and designating the municipal official authorized to sign the application.

(3) If more than one municipality is involved, resolutions from the governing body of all municipalities agreeing to cost sharing and agreeing to proceed to Step 3 when so instructed by the Agency.

(4) A design summary based on the plans and specifications to be submitted when the plans and specifications are complete.

(5) Documentation by the engineer(s) that they carry adequate errors and omissions insurance.

~~(g) (5)~~ f. The construction grant application form for a Step 3 project ~~to build and erect a disposal system or portion thereof (Step 3) shall include the items in subsection (4) of this section, and in addition shall include three complete sets of the construction drawings and specifications, suitable for bidding purposes; provided, that if any such information has been furnished with an earlier application, the applicant need only incorporate by reference and update or revise such information.~~ shall be supported by the following attachments and such other attachments as EPA may require:

(1) Any of the items listed in sections E.8.d. or E.8.e. which were not submitted or which require updating ;

(2) Resolution of the governing body of the municipality authorizing the application and designating the municipal official authorized to sign the application.

(3) If any items are deleted from project eligibility after initial submittal of the plans and specifications, the cost of such items must be set out;

(4) Signature and registration number of the consulting engineer accompanying the following certification statement:

> The treatment works described in this grant application have been designed with full knowledge of the effluent limitations required by the Minnesota Pollution Control Agency as set forth in NPDES Permit No. dated . It is my judgment and carefully considered opinion that these treatment works are capable of consistently producing the re-

quired effluent quality, provided that the facility is operated in conformance with the approved operation and maintenance manual and that the volume and characteristics of raw wastewater are within the limits of the "Design Data" stated on page of the plans or as follows.

(5) Executed engineering contract, including, unless otherwise approved by the Director, full-time qualified resident inspection by the consulting engineer or his agent during construction. After project initiation, reports are to be submitted outlining type of construction inspected and time.

(6) Documentation by the engineer(s) that they carry adequate errors and omissions insurance.

~~(g)~~ ~~(7)~~ g. ~~The~~ All construction grant application form and attachments shall be submitted in triplicate to the Agency at the address specified by the Director. Unless adequately justified in writing, failure to submit all the necessary documents by the date specified may constitute grounds for rejection of the application. Substantial deficiencies in the application and/or supporting documents or failure to conform with applicable requirements such as those set forth in the current Agency water pollution control program plan or the applicable basin, regional, or area water quality management plan ~~or agency policy requirements~~ also may be grounds for rejection. Any application may be rejected at the discretion of the Agency if it does not include an engineering report acceptable to the ~~chief water pollution control engineer.~~ Director, or does not include an adequate commitment for support of operation and maintenance of the project or is not consistent with applicable statutes, or does not contribute to the overall objective of effective water quality management, or is not considered to be in the best interest of the state.

9. Administration.

~~(h)~~ ~~(2)~~ a. Certification. ~~Municipalities on the list of municipalities which receive a priority rating sufficiently high in relation to available funds and are placed~~ Applications of municipalities on the municipal project list may be certified to the EPA for a grant. ~~but such~~ Such certification may in any fiscal year be withheld or withdrawn by the Director if the project is not or cannot be implemented according to an acceptable schedule or otherwise poses a substantial likelihood of causing a loss of federal funds to the State.

b. Tender of grant.

~~(h)~~ ~~(4)~~ (1) After the EPA has determined the eligibility of the application and tendered a federal grant, the ~~state~~ Agency shall make a similar grant offer to the municipality in an amount not less than that required by federal law and regulation as a condition for the ~~increased~~ grant of federal funds or in an amount not less than that allowed by state statutes where not required by federal law.

(2) In the case of a project for which the applicant has solicited and received bids on construction contracts which exceed the costs estimated in the application, the Director may, after consideration of available federal funds and in accordance with EPA regulations, recommend a grant increase. A reasonable amount shall be reserved by the Agency from each allotment of funds for such increases.

(3) The Agency may tender a grant of state funds to a municipality that would otherwise qualify for a federal grant but desires to initiate construction of a project without a federal grant.

(4) The Agency may tender a grant of state funds to a municipality for what would otherwise be the local share of the cost if:

(a) The municipality is unable to finance the local share and attain a minimal point rating of 40 under the criteria of section E.3.c. (2)and,

(b) Application is made prior to the initiation of construction; and,

(c) The prevention, control, and abatement of water pollution and the public health of the state require the construction of the project.

~~(h)~~ ~~(7)~~ c. Change orders. Any proposed changes in the contract which result in cost increases greater than that of the base contract plus contingencies as stated in the project summary or other proposed changes regardless of cost which substantially alter the type of treatment process, or its efficiency, versatility or reliability, shall be submitted to the Director for prior approval, except where the work is agreed by the ~~chief water pollution control engineer~~ Director to be of an emergency nature. Change orders not requiring prior approval of the Director shall be submitted ~~for review and approval~~ within one month after the date on which the change is ordered by the applicant, its engineer or other authorized agent. for review and approval.

d. Reimbursement grants. If a project is eligible for a federal reimbursement grant, the Agency may provide a state grant or grant increase for such project.

e. Payment of grant funds.

(1) Step 1 grants. The Agency shall pay 50% of the grant when an adequate facilities plan has been received

by the Director. The balance shall be paid upon Agency and EPA approval of the facilities plan.

(2) Step 2 grants. The Agency shall pay 50% of the grant when adequate plans and specifications have been received by the Director. The balance shall be paid upon Agency and EPA approval of the plans and specifications.

(3) Step 3 grants.

~~(h)~~ ~~(8)~~ (a) Installment payments may be requested from ~~the~~ ~~EPA~~ ~~and~~ the Agency when twenty-five (25) percent, fifty (50) percent and seventy-five (75) percent of the eligible construction, as measured by its cost, has been completed, or in accordance with a schedule and conditions agreed upon between the grantee, EPA and the Director. The Director shall authorize such proportional installment payment upon notification from the EPA that a federal installment payment has been authorized in a given amount.

(b) Installment payments at the fifty (50) percent level shall not be made until the applicant has in its employ for the operation of the project treatment works, a waste-water treatment works operator having a valid state certificate or one who is capable of obtaining such a certificate for operation of the designated class of treatment works within a reasonable period of time. State installment payments at the seventy-five (75) percent level, and beyond the seventy-five (75) percent level, shall be based on an assessment of, including but not limited to, the applicant's development of and progress towards completion of an acceptable manual for operation and maintenance of the disposal system; and the establishment of adequate pretreatment requirements and facilities. Final payment shall not be made until final inspection of the project by the Agency.

(c) The ~~porportional~~ proportional installment payment to be made by the Agency shall not be in excess of the overall federal-state project cost ratio as authorized by the Agency and Director.

(d) Installment payments shall not be made on the cost of eligible parts of sewer systems unless adequate treatment works exist or are under construction, nor shall such payments be made for projects which upon completion of construction will not be reasonably ~~usable~~ useable or effective without construction of additional works.

f. Retained payment. The Agency may withhold Step 3 grant payments in the following circumstances:

(1) If the Director determines that a project does not substantially conform to approved plans and specifications and/or there has been a major breach of a condition in the grant agreement, the Agency may withhold all unpaid funds and may request EPA to do likewise.

(2) If the Director determines that a project does not conform to approved plans and specifications, but such nonconformity is not substantial, and/or there has been a minor breach of a condition in the grant agreement, the Agency may withhold up to 10% of unpaid funds and may request EPA to do likewise.

(3) If the Director determines that a project has any other deficiency, the Agency may withhold up to 10% of the unpaid funds.

(4) If funds are withheld pursuant to (1), (2) or (3) above and the condition causing such action has been corrected to the satisfaction of the Director, then all retained funds shall be released to the municipality, unless otherwise agreed to by the Director and the municipality.

g. Funds recovery. The Agency may recover any or all funds tendered or disbursed for a project as determined by the Director to be improperly designed, improperly constructed, or improperly operated and maintained. In any of the above situations, the Agency, where deemed practical, may take whatever actions deemed appropriate by the Director.

h. Contract assignment. The grantee shall retain the right to assign its contract with a contractor or engineer, and any or all rights, duties and obligations pursuant thereto, to the Agency.

i. Contract beneficiary. The contract between the engineer or contractor and the grantee shall provide that the Agency is a third-party beneficiary to their contract.

j. Cost of administration. The Agency may use federal funds from the state's allotment, in such amount as authorized by the Act, for administration of the construction grants program.

~~(j)~~ F. ~~Applications for Disposal System Planning and Construction Loans.~~ Construction loan program.

1. Application.

WPC 34

~~(1)~~ a. The application form shall be of the type set forth below:

MINNESOTA POLLUTION CONTROL AGENCY
Division of Water Quality

Application for Disposal System Planning and/or Construction Loan	To be filled in by the State
	Date Received
	Project Number
	Loan Request
Legal Name of Applicant	
Address, Zip Code	
Hereby Makes Application to the Pollution Control Agency of the State of Minnesota for a Loan of Funds for the Planning and/or Construction of:	
Financial Aspects:	
Estimated Project Cost	$
State Loan Funds	
Local Funds	
Other Funds	
Project Schedule:	
Project Starting Date	
Time to Complete Project	
Name and Title of Representative	Signature of Representative Date

~~(2)~~ b. The planning loan application form shall be supported by the following attachments:

~~(aa)~~ (1) Resolution of the governing body authorizing the filing of the application and designating the ~~official~~ municipal ~~representative.~~ official authorized to sign the application.

~~(bb)~~ (2) Resolution of the governing body of the municipality obligating the municipality to repay the loan to the state treasurer in annual installments including both principal and interest, each in an amount sufficient to pay the amount due~~,~~ within five (5) years from user charges, taxes, special assessments, or other funds available to it.

~~(cc)~~ (3) Resolution of the governing body of the municipality obligating the municipality to establish rates and charges or the execution of contracts sufficient to produce the revenues pledged if required by the Agency.

~~(dd)~~ (4) Proposed method of loan repayment.

~~(ee)~~ (5) Proposed contracts for engineering, legal, planning and other consulting services.

~~(3)~~ c. The construction loan application form shall be supported by:

~~(aa)~~ (1) The attachments of ~~subsection (2) (aa) (cc) and (dd)~~ sections F.1.b. (1), (3) and (4) of this section and the items of section ~~(g) (5).~~ E.8.f. The Director for just cause may waive or defer the submission of any items required pursuant to section ~~(g) (5).~~ E.8.f.

~~(bb)~~ (2) Resolution of the governing body of the municipality obligating the municipality to repay the loan to the state treasurer in annual installments including both principal and interest, each in an amount sufficient to pay the principal amount within twenty (20) years or lesser time interval if found to be in the best interest of the state, from user charges, taxes, special assessments, or other funds available to it.

~~(4)~~ d. The loan application form and attachments shall be submitted in duplicate to the Agency at the address specified by the Director. Substantial deficiencies in the application and supporting documents or failure to conform with applicable requirements such as those set forth in the current Agency water pollution control program plan or the applicable basin, regional or area water quality management plan ~~or Agency policy requirements~~ may be grounds for rejection. Any construction loan application may be rejected at the discretion of the Agency if it does not include an engineering report acceptable to the ~~chief water pollution control engineer~~ Director, or does not include an adequate commitment for support of operation and maintenance of the project, or does not conform to the intent of the applicable statutes, or does not contribute to the overall objectives of effective water quality management, or is not considered to be in the best interests of the state.

~~(5)~~ e. Applications must be restricted to those projects or portions thereof for which service contracts or construction contracts can be awarded by June 1, or other date as may be specified by the Director, of the fiscal year in which the loan is applied for.

~~(6)~~ f. Applications may be submitted at any time, unless otherwise specified by the Director.

~~(k)~~ 2. Administration. ~~of State Disposal System Planning and Construction Loans.~~

~~(1)~~ a. The allocation of state funds shall be established in accordance with section ~~(i) (1)~~ E.4.b.(1) and priority rating points assignable to loan applications shall be established in accordance with section ~~(1).~~ F.3. Funds allocable to loans shall be determined each fiscal year by the Agency on the basis of total availability and demand for federal matching construction grants and construction grants and there shall not be set aside for loans more than five (5) percent of the total funds available in any fiscal year, unless

the Agency by resolution determines that another percent level would be in the best interests of the state.

~~(2)~~ b. Those planning applications which receive a priority rating sufficiently high in relation to available funds shall be tendered a state planning loan. Within sixty (60) days after the acceptance of the offer and award of contracts, for engineering, legal and other consulting services the state payment shall be made.

~~(3)~~ c. Those construction loan applications which receive a priority rating sufficiently high in relation to available funds shall be tendered a state construction loan. Within thirty (30) days after acceptance of the offer and award of the construction contract for the project, the state payment shall be made.

~~(4)~~ d. Principal and interest, each in an amount sufficient to pay the principal amount within the loan period, shall be paid in annual installments to the state treasurer. Interest shall be calculated on the declining balance at a rate not less than the average annual interest rate on state bonds of issue from the proceeds of which the loan was made.

~~(5)~~ e. Priority ratings shall be established each fiscal year for those loan applications filed on or before a date to be set annually by the Director. Applications postmarked or delivered after that date may be rejected at the discretion of the Director.

~~(6)~~ f. Funds loaned to a municipality shall not be useable for the purpose of matching an offered federal grant where the same is ineligible under federal statutes or regulations.

~~(f)~~ 3. Criteria for determining loan priority.

~~(1)~~ a. The loan funds set aside in any fiscal year shall be allocated in the ratio of twenty-five (25) ~~per cent~~ percent for planning and seventy-five (75 ~~per cent~~ percent for construction, unless the Agency by resolution determines that another ratio would be in the best interests of the state.

~~(2)~~ b. The determination of the order of priority for planning loan applications shall be in accordance with:

~~(aa)~~ (1) The criteria set forth in ~~section~~ sections ~~(i)~~ ~~(2)~~ E.2.d., E.3.c. and F.3.b. (2). ~~including subsection 2(ee), and bb of this subsection.~~

~~(bb)~~ (2) Technological Feasibility. Priority points shall be assigned based on the planning needs as set forth below:

	Point Rating
~~(i)~~ (a) Sewer system evaluation which shall demonstrate to the satisfaction of the Director and Regional Administrator that each sewer system discharging into such treatment works is not subject to excessive infiltration/inflow, through an infiltration/inflow analyses and, where appropriate and authorized by the Regional Administrator, a sewer system evaluation survey.	50
~~(ii)~~ (b) Report on wastewater disposal concepts.	40
~~(iii)~~ (c) Regionalization evaluations.	30
~~(iv)~~ (d) Other planning activities including assimilation studies.	20

~~(3)~~ c. The determination of the order of priority for construction loan applications shall be in accordance with section ~~(i)~~ ~~(2), including subsection (2) (ee).~~ E.2.d. and E.3.c.

~~(4)~~ d. The numerical rating ~~point~~ points established in subsection ~~(2)~~ b. and ~~(3)~~ c. of this section shall be subject to readjustment in value for any category or class prior to the deadline date for acceptance of applications established in section ~~(k)~~ ~~(5)~~ F.2.e. if it is determined to be in the best interests of the state by resolution of the Agency. At least thirty (30) days notice of such proposed readjustments shall be furnished to all persons registered on the appropriate list maintained by the Secretary of State, and all persons wishing to do so shall be given an opportunity to present their views on the proposals to the Agency prior to final Agency action.

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

September 28, 1978

TO: ALL INTERESTED INDIVIDUALS

RE: In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program, No. PCA-78-010-HK

The Attorney General issued a memorandum on September 25, 1978, which indicated that the above-captioned rules were not approved and were being returned to the Agency for consideration of certain matters. The Agency will consider the matters raised in this memorandum during the legal report of the October 3, 1978, meeting of the Agency Board. The legal report is generally given at 9:15 a.m.

Upon consideration of the matters raised by the Attorney General and appropriate action, if any, by the Agency, the Agency may resubmit the rule to the Attorney General's office for review and approval.

Please contact me at the telephone number or address noted above if you wish to have a copy of the memorandum of the Attorney General.

Very truly yours,

Marlene E. Senechal

Marlene E. Senechal
Special Assistant
Attorney General

MES/jm

AN EQUAL OPPORTUNITY EMPLOYER

WPC 34 Mailing List

George Latimer, Mayor
City Hall
St. Paul, MN 55102

Richard Hudak
125 3rd Avenue No.
St. Paul, MN 55075

Barbara Lukermann
2211 Folwell St.
St. Paul, MN 55102

Robert Simon
125 3rd Avenue No.
South St. Paul, MN 55075

Archie D. Cloud
Ellison-Pihlstrom, Inc.
2305 Ford Pkwy
St. Paul, MN 55116

Jerome Segal
Asst. City Atty
647 City Hall
St. Paul, MN 55102

Duane T. Prew
TKDA
1408 Pioneer Bldg
St. Paul, MN 55101

Bob Joiner
S.E.H., Inc.
2353 Rice St.
St. Paul, MN 55113

Duke Addicks
League of Cities
390 Hanover Bldg
480 Cedar St.
St. Paul, MN 55101

John Bearsen
Comstock and Davis
1446 County Rd J
Minneapolis, MN 55432

Roy Bredahl
Rm 200
Lowry Building
St. Paul, MN 55102

Richard H. Renner
St. Paul Chamber of Commerce
300 Osborn Bldg
St. Paul, MN 55102

Bob Tuff
Blackduck, MN 56630

Howard A. Kuusisto
Rm. N 196
Griggs Midway Bldg
1821 University Avenue
St. Paul, MN 55104

J.M. Madisen
City Engineer
City Hall
Hibbing, MN 55746

William Trygstad
Zenk Engineering, Inc.
P.O. Box 689
Albert Lea, MN 56007

James J. Krautkremer, Mayor
City of Brooklyn Park
5800 85th Ave No.
Brooklyn Park, MN 55443

R. F. Hoffman
Ellerbe
One Appletree Square
Bloomington, MN 55420

Daniel Hartman
City Administrator
City of Champlin
12001 Hiway 52
Champlin, MN 55316

William Radio
City Manager
City of Benson
Benson, MN 56215

John M. Klaers
Manager of Planning
603 Meierhoff Building
Duluth, MN 55802

Robert Overby
Upper Minnesota Valley Regional
Development Commission
323 West Schlieman Avenue
Appleton, MN 56208

Tom Augustin, P.E.
Larson-Peterson & Associates, INc.
522 W. Main Street, Box 150
Detroit Lakes, MN 56501

John Boland, Chairman
Metropolitan Council
300 Metro Square Building
St. Paul, MN 55101

Jerome H. Kuehn
Acting Asst Comm, Planning
Department of Natural Resources
Centennial Office Building
St. Paul, MN 55155

James M. Harrison,
Executive Director
Minnesota-Wisconsin Boundary
Area Commission
619 Second Street
Hudson, Wisconsin 54016

Douglas N. Betts
McGhie & Betts, Inc.
1648 3rd Avenue S.E.
Rochester, MN 55901

Shelley Wright
City Hall
St. Paul, MN 55102

OFFICE O ATTORNEY GENERAL

EMPLOYEE TIME REPORT

10/7-[illegible]/20 ( ) 11/4-11/17 ( ) 12/2-12/15 ( ) 12/30-
10/21-11/3 ( ) 11/18-12/1 ( ) 12/16-12/29 (✓) 1/12 ( )

TOTAL HOURS REPORTED THIS PAY PERIOD:

Employee No. 2075	Employee Signature	Supervisor Signature

Date	Project I.D./Activity I.D.*	Time**	Codes (limit 2) and/or Description of Work Performed		
12-29-81	05.0002.0050	.7	60		Ques re: data privacy
"	05.J022.0770	5.7			
"	05.0004.0050	1.3			
	--.----.----				
	--.----.----				
	--.----.----				
	--.----.----				
	--.----.----				

7.7

* Enter Project I.D. for docketed matters. For matters not docketed, enter Activity I.D. as follows:

Div. Code	Activity Code	Client Code
	0001	Client Assist.
	0002.0050	Citizen Assist.
	0003.0050	Local Gov't Assist.
	0004.0050	Other Services
	0005.0050	Leave With Pay
	0007.0050	Admin/Mgmt.
	0014	Legislative
	0015	Rulemaking
	0016	Investigation

** Use Decimals (Min. Unit .1 hr.)

6 min. = .1
12 min. = .2
30 min. = .5
60 min. = 1.0

6-

OFFICE OF ATTORNEY GENERAL

EMPLOYEE TIME REPORT

10/7- /20 ( ) 11/4-11/17 ( ) 12/2- 12/15 ( ) 12/30-
10/21-11/3 ( ) 11/18-12/1 ( ) 12/16-12/29 (X) 1/12

TOTAL HOURS REPORTED THIS PAY PERIOD:

Employee No. 2075	Employee Signature	Supervisor Signature

Date	Project I.D./Activity I.D.*	Time**	Codes (limit 2) and/or Description of Work Performed		
12-23-81	05.0004.0050	4.1			
12-24-81	05.J022.0770	4.0			
"	05.0004.0050	3.0			
12-25-81	05.0005.0050	8.0	152		
12-28-81	05.J022.0770	.9	1		D. Epstein
"	05.J022.0770	6.3			
"	05.0004.0050	1.5			
12-29-81	05.0001.0002	.3	11		Judeth re: Garnishments

28.1

* Enter Project I.D. for docketed matters. For matters not docketed, enter Activity I.D. as follows:

Div. Code	Activity Code	Client Code
	0001	Client Assist.
	0002.0050	Citizen Assist.
	0003.0050	Local Gov't Assist.
	0004.0050	Other Services
	0005.0050	Duties With Bar
	0007.0050	Admin/Mgmt.
	0014	Legislative
	0015	Rulemaking
	0016	Investigation

** Use Decimals (Min. Unit .1 hr.)

6 min. =	.1
12 min. =	.2
30 min. =	.5
60 min. =	1.0

5-

OFFICE O ATTORNEY GENERAL

EMPLOYEE TIME REPORT

10/7-10/20 ( ) 11/4-11/17 ( ) 12/2-12/15 ( ) 12/30-1/12 ( )
10/21-11/3 ( ) 11/18-12/1 ( ) 12/16-12/29 (X)

TOTAL HOURS REPORTED THIS PAY PERIOD:

Employee No. 2075	Employee Signature	Supervisor Signature

Date	Project I.D./Activity I.D.*	Time**	Codes (limit 2) and/or Description of Work Performed		
12-22-81	05.0001.0479	.6	1		D. Wexler re: data privacy
"	05.0001.0664	.4	1		D. Topp re: data privacy
"	05.J022.0770	4.6			
"	05.0004.0050	1.5			
12-23-81	05.0001.0770	.4	1		J. Mannion re: Unclaimed Property
"	05.0001.0002	.4	1		D. Gemberling re: data privacy
"	05.0001.0770	.1	1		F. Woodman re: Jostens
"	05.J022.0770	3.0			

* Enter Project I.D. for docketed matters. For matters not docketed, enter Activity I.D. as follows:

(11.0)

0001	Client Assist.	0007.0050	Admin/Mgmt.
0002.0050	Citizen Assist.	0014	Legislative
0003.0050	Local Gov't Assist.	0015	Rulemaking
0004.0050	Other Services	0016	Investigation
0005.0050	Leave With Pay		

Div. Code — Activity Code — Client Code

** Use Decimals (Min. Unit .1 hr.)

6 min. = .1
12 min. = .2
30 min. = .5
60 min. = 1.0

4

OFFICE OF ATTORNEY GENERAL

EMPLOYEE TIME REPORT

10/7 - /20 ( ) 11/4-11/17 ( ) 12/2- 2/15 ( ) 12/30-
10/21 -3/3 ( ) 11/18-12/1 ( ) 12/16 12/29 (X) 1/12 (

TOTAL HOURS REPORTED THIS PAY PERIOD:

Employee No. 2075	Employee Signature	Supervisor Signature

Date	Project I.D./Activity I.D.*	Time**	Codes (limit 2) and/or Description of Work Performed		
12-21-81	05.0001.0002	1.0	1		D. Gemberling re: data privacy
"	05.0001.0770	1.7	27		+ mtg w/Jostens
"	05.0001.0770	1.3	11		Woodman + Commodore re: Misc
"	05.0001.0770	.5	11		J. Anderson re: Misc
"	05.J022.0770	1.8			
"	05.0004.0050	1.4			
12-22-81	05.0001.0018	.4	11		Anderson re: New Elm
"	05.0001.0770	1.0	1		J. Tuttle

* Enter Project I.D. for docketed matters. For matters not docketed, enter Activity I.D. as follows:

(9.3)

0001	Client Assist.	0007.0050	Admin/Mgmt.
0002.0050	Citizen Assist.	0014	Legislative
0003.0050	Local Gov't Assist.	0015	Rulemaking
0004.0050	Other Services	0016	Investigation
0005.0050	Leave With Pay		

Div. Code	Activity Code	Client Code

** Use Decimals (Min. Unit .1 hr.)

6 min. =	.1
12 min. =	.2
30 min. =	.5
60 min. =	1.0

OFFICE O ATTORNEY GENERAL

EMPLOY 2E TIME REPORT

10/7-1 /20 ( ) 11/4-11/17 ( ) 12/2- 2/15 ( ) 12/30-
10/21- 11/3 ( ) 11/18-12/1 ( ) 12/16-12/29 (X) 1/12)

TOTAL HOURS REPORTED THIS PAY PERIOD:

Employee No. 2075	Employee Signature	Supervisor Signature

Date	Project I.D./Activity I.D.*	Time**	Codes (limit 2) and/or Description of Work Performed		
12-18-81	05.0001.0002	.3	11		Judeth re: Garnishments
11	05.J026.0770	2.1	90		Defense Counsel
11	05.0001.0770	.2	1		R. Slowes
11	05.0001.0770	.1	1		A. Maclin
11	05.0003.0050	.3	1		J. Berus re: data privacy
11	05.J022.0770	.7			
11	05.0004.0050	4.3			
12-21-81	05.0001.0770	.3	29		Sup. Ct. opinion

* Enter Project I.D. for docketed matters.
For matters not docketed, enter
Activity I.D. as follows:

(8.3)

Div. Code	Activity Code	Client Code
	0001	Client Assist.
	0002.0050	Citizen Assist.
	0003.0050	Local Gov't Assist.
	0004.0050	Other Services
	0005.0050	Leave With Pay
	0007.0050	Admin/Mgmt.
	0014	Legislative
	0015	Rulemaking
	0016	Investigation

** Use Decimals (Min. Unit .1 hr.)

6 min. = .1
12 min. = .2
30 min. = .5
60 min. = 1.0

2-

[illegible] ATTORNEY GENERAL

EMPLOYEE TIME REPORT

10/7- /20 ( ) 11/4-11/17 ( ) 12/2- [illegible] ( ) [illegible]
10/2[illegible] 11/3 ( ) 11/18-12/1 ( ) 12/16 [illegible] (X) 1/12 (

TOTAL HOURS REPORTED THIS PAY PERIOD: 80.6

Employee No.	Employee Signature	Supervisor Signature
2075	Robert R. Nauch	

Date	Project I.D./Activity I.D.*	Time**	Codes (limit 2) and/or Description of Work Performed		
12-16-81	05.0005.0050	8.0	150		
12-17-81	05.0002.0050	.2	2		data privacy
11	05.0007.0050	.3	11		Niles
11	05.0001.0770	.2	27		Mtg w/Lord etal
11	05.J026.0770	.8	11		Anderson
11	05.0002.0050	.4	2		re: data privacy
11	05.J022.0770	5.0			
11	05.0004.0050	1.3			

16.2

* Enter Project I.D. for docketed matters. For matters not docketed, enter Activity I.D. as follows:

0001	Client Assist.	0007.0050	Admin/Mgmt.
0002.0050	Citizen Assist.	0014	Legislative
0003.0050	Local Gov't Assist.	0015	Rulemaking
0004.0050	Other Services	0018	Investigation
0005.0050	Leave With Pay		

Div. Code | Activity Code | Client Code

** Use Decimals (Min. Unit .1 hr.)

6 min. =	.1
12 min. =	.2
30 min. =	.5
60 min. =	1.0

1-

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

September 19, 1978

Mr. Lee Sheehy
Administration Building
Room G-19K
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: Minn. Rule WPC 34

Dear Mr. Sheehy:

Enclosed are the following letters which we received in regard to the Chief Hearing Examiner's report on Minn. Rule WPC 34:

(1) Douglas N. Betts, McGhie & Betts, Inc., to Marlene E. Senechal, Special Assistant Attorney General, September 13, 1978.

(2) William J. Trygstad, Zenk Engineering, Inc., to Warren Spannaus, Attorney General, September 15, 1978.

As you will note from the record, both of these individuals participated in the hearing of this matter and received notice of all subsequent actions in regard thereto.

Yours very truly,

Marlene E. Senechal

Marlene E. Senechal
Special Assistant
Attorney General

Enclosures

MES/jm

RECEIVED
SEP 20 1978
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

AN EQUAL OPPORTUNITY EMPLOYER

September 15, 1978

RECEIVED
SEP 18 1978
MPCA
ATTORNEY GENERAL

Warren Spannaus
Attorney General
Centennial Building
State Capital
St. Paul, Minnesota 55105

Re: In the matter of the Proposed Amendment to Minn. Reg. WPC 34 regarding the administration of the Construction Grants and Loans Program, No. PCA-78-010-HK

Dear Mr. Spannaus:

On September 5, 1978, I received a letter from Marlene Senechal, Special Assistant Attorney General, which stated that the Minnesota Pollution Control Agency (MPCA) disagreed with portions of the Chief Hearing Examiner's Report for the above referenced matter. The letter indicated that the record of the proceedings with regard to the above referenced matter had been sent to the Attorney General on September 1, 1978, for review and subsequent approval or disapproval. The letter also indicated that briefs concerning this matter could be submitted within the next 10 days and that the MPCA would be submitting a brief on September 5 or 6.

Based upon the report submitted by Hearing Examiner Howard L. Kaibel Jr. in which he suggested an additional hearing be held concerning the proposed changes to WPC 34, and the report submitted by Chief Hearing Examiner Duane R. Harves requiring the MPCA to either withdraw the proposed final rules or amendments discussed in the report or reconvene the rule hearing, I believed that additional briefs concerning the matter would not be required. As a result, I did not submit an additional brief concerning this matter prior to September 11, 1978, the deadline for submitting briefs.

On September 11, 1978 I received a copy of the Minnesota Pollution Control Agency Memorandum in Support of Adoption of Rules in regard to the above matter which was submitted to the office of the Attorney General on

STAFF: Harland C. Zenk, P.E. *President*; B. A. Nelson, P.E. *Structural Engineer*; D. A. Schellhammer, E.I.T. *Civil Engineer*; Larry A. Read, P.E. *Vice President*; A. C. Schellhammer, P.E. *Marketing*; T. H. Veenker, R.L.S. *Surveyor*; H. M. McLaird, L.S. *Land Surveyor*; Wm. J. Trygstad, P.E. *Sanitary Engineer*

H.C. ZENK
L.A. READ
ZENK ENGINEERING, INC.
1206 West Front Street • Box 689
Albert Lea, Minnesota 56007
PHONE: 507-373-0689

September 8, 1978 (Friday). Upon review of this memorandum, I am compelled to comment on its contents and the general method employed by the MPCA and MPCA Board to amend WPC 34, even though the September 11, 1978 deadline has passed.

With regard to specific information presented in section II.B. (Errors and Omissions Insurance), I wish to make the following comments:

The MPCA has not made an affirmative presentation of facts establishing the reasonableness of the "adequate errors and omissions insurance" requirement. The Agency has stated that a significant number of construction grant projects have been improperly designed and constructed. However, to my knowledge, the Agency has not indicated who determined the plants were improperly designed and constructed, what portion of the plants in question were improperly designed or constructed, or what criteria was used to determine that plants were inadequately designed or constructed. In addition, have the design engineers whose projects have been determined to be inadequately designed or constructed by the MPCA been given the opportunity to defend the design criteria, or construction practices used? I suggest that utilizing a statement that a certain number of plants have been inadequately designed or constructed, without a detailed engineering analysis of the design and construction practices used for the projects in question, does not document the reasonableness of the insurance requirement.

In addition, evidence used in the MPCA memorandum contradicts evidence presented in the Chief Hearing Examiners Report with regards to testimony and written comments made by me. In my testimony at the April 26 hearing, I didn't state that most engineering firms carry errors and omissions insurance. During discussion on this topic, errors and omissions, and liability insurance were both discussed. I believe that I indicated most engineering firms carry liability insurance, but not errors and omissions insurance. In support of this, I refer you to the Hearing Examiners Report and Chief Hearing Examiners Report. The Hearing Examiner's Report (page 5) states that none of the engineers at any of the hearings indicated they carry errors and omissions insurance. The Chief Hearing Examiner's Report (page 2) refers

> to the same transcripts and comments as the MPCA Memorandum, however, it states that engineers participating in the hearings indicated that most engineering firms do not carry such insurance, due primarily to the cost. Therefore, I believe the statement presented in the Agency Memorandum was taken out of context of the entire discussion on insurance maintained by engineering firms and is very misleading as evidence.

I am quite concerned that the memorandum and other documents submitted by the Agency with regard to this matter keep repeating the statement that most engineers already carry such insurance, when in fact concrete evidence documenting this statement has not been submitted. All of the arguments presented by the Agency for the reasonableness of errors and omission insurance invariably return to the above mentioned statement as evidence and justification. It appears to me that this undocumented statement is the major basis the MPCA is using to document the reasonableness of the requirement, and is in fact, unsupported by the record.

The Agency states that only 10% of any increased costs due to this requirement will be borne by local units of government since errors and omissions insurance is a grant eligible item. This statement is very misleading. I do not know where errors and omission insurance is available on a project by project basis. Rather, in order to obtain the insurance for Federally funded EPA projects, in which the 10% factor is applicable, a firm must carry errors and omissions insurance on all of the projects it is involved in. This means that every project, whether Federally funded or not, will have to bear the burden of the cost for errors and omissions insurance. As a result, projects not affected by the proposed amendments to WPC 34 will also be increased in cost. The increase will be of a greater magnitude than the amount indicated by the Agency statement. In essence, even on Federally funded projects the 10% increase is misleading because the Federal funds used for the remaining 90% portion must be obtained from tax dollars paid by all taxpayers. It is very apparent to me that the Agency is very near sighted and misleading with regards to increase costs because of this requirement as evidenced by the above statement presented in the memorandum.

The Agency believes that the definition submitted for adequate errors and ommissions insurance is reasonable because it addresses the concerns raised during the hearing process and because no objections to the proposed definition were made. I did not present an alternative definition because I did not feel that the insurance requirement was necessary. However, in a letter dated May 8, 1976 to Mr. Kaibel, I did make a response to the concept of errors and omissions insurance. Commenting on the MPCA proposed definition was not permitted as the proposed definition was not available until May 12, 1978 (Friday) with the record closing on Monday, May 15, 1978. Contrary to the Agency belief, adequate time to review and comment on the proposed definition was not provided prior to the closing of the hearing period on May 15, 1978.

It is apparent from the reports submitted by the Chief Hearing Examiner and the Hearing Examiner and subsequent memorandums submitted by the MPCA that disagreement between the parties involved exists with regards to the errors and omissions insurance requirement in addition to other issues concerning WPC 34. Based upon my review of the actions regarding this matter, it appears that the MPCA is determined to have the proposed amendments to WPC 34 become a part of the rule as they were originally proposed without adequately addressing issues raised by the public, hearing examiner or chief hearing examiner. All of the above entities, except the MPCA, have indicated that additional hearings regarding various matters of the proposed amendments should be held prior to adopting the amendments.

If the office of the Attorney General allows the MPCA proposed amendments to become a part of WPC 34 at this time in the form the MPCA has proposed, I fail to see what purpose any of the rule making process serves. First of all, it appears that the MPCA has followed all of the legal requirements concerning notices, hearings, etc. However, the timing of the notices leaves much to be desired. Specifically, I refer to the fact that the MPCA submitted its post hearing comments on May 12, 1978 (Friday) with the record closing on the following Monday, May 15, 1978. The post hearing comments contained the MPCA comments concerning issues raised during the public hearing period and thus, did not allow the public to review the comments and submit additional comments prior to the date that the record closed. Also, the MPCA submitted a memorandum to the Attorney General on September 8, 1978 (Friday) with the final date for submitting comments September 11, 1978 (Monday). Again, the public was not allowed to refute or comment on the comments made in the memorandum. As I have indicated in this letter, some of the evidence submitted in the Memorandum was misleading especially with regard to the errors and omissions insurance requirement section.

I am greatly concerned about the actions of the MPCA with regards to timing of the above mentioned submittals. In addition, the actions of the MPCA staff and MPCA Board in adopting the rules on August 1, 1978 as proposed by the MPCA staff without requiring an additional hearing as recommended by the Hearing Examiner leaves me to wonder what purpose the whole hearing process serves. Obviously, the Hearing Examiner, after completely reviewing the records, believed that certain matters concerning the proposed amendments were not adequately addressed by the MPCA. However, as I mentioned this did not matter to the MPCA and MPCA Board as the rules were adopted on August 1, 1978 anyway. To make matters worse, the Chief Hearing Examiner reviewed the records following adoption of the proposed rules by the MPCA Board and ordered that the MPCA either withdraw the proposed final rules or amendments or reconvene the hearing because of the MPCA's failure to establish the need for and/or reasonableness of some of the proposed requirements. However, the MPCA has again chosen to ignore the order of the Chief Hearing Examiner and go directly to the Attorney General for a determination.

Based upon the record concerning this matter, the rules as proposed should not be filed with the Secretary of State until additional hearings have been held. If the proposed rules are submitted as they now exist to the Secretary of State, the whole hearing process will have been useless and a waste of time. The MPCA will have succeeded in changing the rules while circumventing the public hearing portion of the rule making process as many of the questions and comments made during the public hearing have been basically ignored.

As I mentioned in a comment letter dated May 8, 1978, I feel that many of the changes proposed for WPC 34 were added to increase the arbitrary authority of the MPCA without considering the best interest of the people of Minnesota.

Based upon my review of the matter, I believe that the rules as finally adopted are substantially different from those prepared prior to the hearing, that the agency has not made an affirmative presentation of facts establishing the need for the reasonableness of the proposed rules, and

that inadequate opportunity for the public to react to some portions of the proposed rules is obvious with regards to this matter. Therefore, I urge the Attorney General not to file the MPCA Board adopted rules with the Secretary of State.

Respectfully submitted,

ZENK ENGINEERING, INC.

William Trygstad

William J. Trygstad, P.E.

CC: Marlene Senechal
Special Assistant Attorney General
Office of Attorney General
Minnesota Pollution Control Agency
1935 W. County Road B-2
Roseville, Minnesota 55113

McGHIE & BETTS, INC.
CONSULTING ENGINEERS
1648 - 3rd AVENUE S.E.
ROCHESTER, MINNESOTA 55901
PHONE: 507 - 289-3919

K. M. McGHIE, P.E., R.L.S.
1904 - 1975

DOUGLAS N. BETTS, P.E., R.L.S.
President
JAMES E. SWANSON, R.L.S.
Vice President

WILLIAM E. TOINTON, C.E.T.
Vice President
HOWARD E. HUNT
Secretary
DALE R. ALLEN, P.E.
STEVEN R. REUSSER, P.E.

September 13, 1978

RECEIVED
SEP 18 1978
MPCA
ATTORNEY GENERAL

Ms. Marlene Senechal
Office of Attorney General
Minnesota Pollution Control Agency
1935 West County Road B2
Roseville, Minnesota 55113

Dear Ms. Senechal:

This is in reference to the proposed amendment to Minn. Reg. WPC 34 regarding the Construction Grants Program.

Our firm was present at the public hearing on the amendments and also made written comments concerning the amendments. These comments were intended to improve the quality of the amendments, as we believe the Agency did not provide adequate research and attention to details and conciseness of definition of several items in the amendments.

We are in concurrence with the Chief Hearing Examiner in that substantive changes have been made in the amendments, and that the Agency has not provided adequate evidence for some of the changes. For this reason another public hearing is imperative.

The fact that we made no comment prior to this time is due to the fact that a time lag is inherent in receiving notices from the Agency and the subsequent information. This method of inviting comment is no substitute for a public hearing. In our own case, the July 11, 1978, notice was not received by our firm and we were not aware of the August 1 board meeting. When the August 16 notice was received, we requested the available information by letter dated August 22, 1978. The information was received on September 6, 1978. We have not had time to make comment on proposed Agency changes in the amendments and would like to do so, but we believe the only way that our comments would receive proper consideration at this time is through the form of a public hearing.

Thank you.

Sincerely yours,
McGHIE & BETTS, INC.

Douglas N. Betts, P.E.

DNB/bkz

STATE OF MINNESOTA

COUNTY OF RAMSEY

RECEIVED
MAR 24 1978
OFFICE OF HEARING EXAMINERS

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendments to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

STATEMENT OF EVIDENCE

MPCA Exhibit #9

In addition to the "Statement of Need," which is available for inspection or purchase at the Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota, and in support thereof, the Minnesota Pollution Control Agency (hereinafter "Agency") intends to introduce the following letters, regulations, statutes, memoranda, and other documentary evidence:

1. Proposed Amendments to Minn. Reg. WPC 34.

2. Public Law 95-217, 95th Congress, December 27, 1977.

3. Congressional Record, December 6, 1977, H12690-H12721; December 15, 1977, S19636-S19688 and H12916-H12965.

4. Committee Print 95-30.

5. Minnesota Pollution Control Agency, Division of Water Quality, List of Segments, September 6, 1973.

6. 40 C.F.R. Part 35.

7. U.S. Environmental Protection Agency (U.S. EPA) Draft Concept Papers for Public Law 95-217.

8. Letter dated October 7, 1977, from the U.S. EPA to the Minnesota Pollution Control Agency.

9. Grant Agreement No. I005 270 780, September 30, 1977.

10. Letter dated October 31, 1977, from U.S. EPA to the Agency.

11. Letter dated December 1, 1977, from U.S. EPA to the Agency.

12. Letter dated January 5, 1978, from the Consulting Engineers Council of Minnesota (CEC) to the Agency.

13. Agency Memorandum dated December, 1976, on "Referral Procedures for the CEC Special Review Committee."

14. Agency Memorandum dated March, 1977, on "Guidance in the Selection of Consultant Services for the Planning and Construction of Wastewater Treatment Work Projects."

15. Agency Memorandum dated October, 1977, on "Construction Grant Program Management."

16. U.S. EPA Municipal Wastewater Treatment Works Construction Grants Program, Supplement No. 1, dated August, 1976.

17. U.S. EPA Municipal Wastewater Treatment Works Construction Grants Program, Supplement No. 2, dated November, 1976.

18. U.S. EPA Handbook of Procedures, dated February, 1976.

19. U.S. EPA Handbook of Procedures/Transmittal Memorandum, No. 76-1, dated August, 1976.

20. U.S. EPA Handbook of Procedures/Transmittal Memorandum, No. 77-1, dated December, 1976.

21. U.S. EPA Municipal Wastewater Treatment Works Construction Grants Program/References-Regulation, Guidance, Procedures.

22. U.S. EPA Program Requirements Memorandum, Nos. 77-7 and 78-9.

23. Agency Municipal Discharge Inventory.

24. Agency Municipal Needs List.

25. Agency Municipal Project List.

The Agency may call one or more of the following expert witnesses:

1. Mr. Charles Orzehoskie, Chief, Minnesota/Wisconsin Planning Section, U.S. EPA, Region V, who will testify in regard to U.S. EPA regulations and guidelines as they relate to proposed amendments to Minn. Reg. WPC 34.

2. Mr. Perry T. Beaton, Chief, Facilities Section, Division of Water Quality, Minnesota Pollution Control Agency, who will testify on the need for and the reasonableness of the proposed amendments to Minn Reg. WPC 34. He will also discuss the construction grants program generally.

3. Mr. Duane L. Anderson, Supervisor, Construction Grants Unit, Facilities Section, Division of Water Quality, Minnesota Pollution Control Agency, who will testify as to the need for and reasonableness of the proposed amendments to Minn. Reg. WPC 34.

The testimony of these witnesses will be substantially as follows:

I. INTRODUCTION

The proposed amendments to Minn. Reg. WPC 34 are designed to accomplish two major purposes: (1) restructure the format in order to present the regulation in a more orderly and informative fashion; and, (2) make substantive changes in the content of the regulations. The substantive changes can be more easily addressed once the structural changes are presented.

II. RESTRUCTURING OF THE REGULATION

Changes in Minn. Reg. WPC 34 are indicated in the text of the proposed amendments by three methods: (1) underlining indicates additions to pre-existing rule language; (2) ~~strikeouts~~ indicate deletions from pre-existing rule language; and (3) [moved to . . .] indicate that an existing provision of the rule was moved to another section. However, the subject matter of some deleted provisions is dealt with by proposed additional provisions. Also existing provisions which have been moved to another section may contain some deletions and additions.

An outline of the present and proposed format of Minn. Reg. WPC 34 is set out in Attachments A and B, respectively. With respect to the outline of the present Minn. Reg. WPC 34, the parenthetical insertion indicates either: (1) the section of proposed Minn. Reg. WPC 34 in which such provision appears; or, (2) that the provision has been deleted. If the subject matter of the deleted provision is dealt with in the proposed amendments, the relevant section of proposed Minn. Reg. WPC 34 is indicated by footnote.

With respect to the outline of the proposed amendments to Minn. Reg. WPC 34, the parenthetical insertion indicates either: (1) the section of the present Minn. Reg. WPC 34 in which such provision appears; or (2) that the provision has been added. If the existing provision which has been moved contains deletions or

additions (other than renumbering), the provision is marked with an asterisk. If the subject matter of the new provision is dealt with in the present regulation, the relevant section of the present Minn. Reg. WPC 34 is indicated by footnote.

III. CHANGES IN CONTENT OF THE REGULATION

The headings below are to sections of the proposed amendments to Minn. Reg. WPC 34.

A. Purpose.

The only additions and deletions made were to provide consistency with other Agency regulations, to update references to state and federal law, and to provide greater clarity.

B. Definitions.

Additional definitions to Minn. Reg. WPC 34B. were added to specify and/or clarify certain terms used in the administration of the construction grants and loans program. The witnesses will explain the need for these definitions and the reasonableness thereof. The definition of "eligible cost" was deleted as it is defined by Minn. Stat. chs. 115 and 116.

C. Severability.

There are no proposed changes.

D. Priority of programs.

The present Minn. Reg. WPC 34(d) establishes the priority of construction grant and loan programs as follows: Federal matching construction grants; construction grants; and planning and construction loans. The proposed amendments delete the above section as previously written, but do not change the priorities except as necessary to reflect changes in state and federal law and to clarify the priority of the two types of independent state grants. To the extent authorized by statute, proposed Minn. Reg. WPC 34D.1. gives the same priority to state grants which will be used to match 75% federal grants or the newly authorized 85% federal grants. Proposed Minn. Reg. WPC 34D.2. and 3. clarify that "hardship" grants to eliminate the local share of the project cost will be given priority over grants to municipalities which desire to commence construction before a federal grant is available. This is necessary and reasonable because of the demonstrated environmental and financial need of the municipality applying for the higher priority grant.

E. Construction grants program.

1. Summary of construction grants program.

A summary of the program was added to the regulation to provide a general framework for understanding the subsequent specific provisions governing the construction grants program. This is similar to the format of U.S. EPA regulations governing construction grants.

2. Municipal discharge inventory.

The Agency is required, pursuant to 40 C.F.R. §35.915, to prepare a Municipal Discharge Inventory ("MDI"). Minn. Reg. WPC 34(f) and (i) presently governs the development of this list. The proposed amendments make no substantial changes in regard to the development of the MDI or the criteria used therefor. The only substantive change is in proposed Minn. Reg. WPC 34E.2.a. which defines the MDI to include those municipalities utilizing land application or individual sewage treatment systems. At present, the MDI includes only municipalities with an actual discharge to a body of water. This is not satisfactory as the Municipal Needs List ("MNL") cannot be developed from the MDI since some communities with a "need" have no discharge.

All other changes are necessary for the purpose of clarification.

3. Municipal needs list.

The Municipal Needs List ("MNL") lists all municipalities for which a need for a new or upgraded disposal system exists. This procedure is presently governed by Minn. Reg. WPC 34(f), (h) and (i). The proposed amendments make several changes in regard to the MNL. The most important changes are with respect to the criteria used for determining the priority of needs.

Proposed Minn. Reg. WPC 34E.3.c.(1)(a) and (b) have been amended to give a higher point rating to tertiary and secondary treatment projects. It is the present practice of the Agency to

fund all treatment works and major interceptors before funding interceptors or sewers. It is necessary and reasonable to give a higher priority to treatment works as it is the construction of these projects which will yield the greatest benefits in terms of water quality improvement. It is also consistent with the Clean Water Act of 1977 as it will result in compliance with enforceable provisions of the Federal Water Pollution Control Act.

The deletions in proposed Minn. Reg. WPC 34E.3.c.(1)(a) were made because "tertiary treatment" is now defined in section B.12. of the proposed amendments. The deletions in proposed Minn. Reg. WPC 34E.3.c.(1)(b) were made because the relevance of the existing system is now dealt with in section E.3.c.(1)(e) and (f). Present Minn. Reg. WPC 34(i)(2)(dd)(3) was deleted because disposal systems for water treatment plants and power plants are no longer grant eligible under federal law.

Proposed Minn. Reg. WPC 34E.3.c.(1)(e) and (f) are necessary because U.S. EPA has required that additional priority be given to municipalities having only primary treatment or raw sewage discharge. It is also necessary and reasonable because the construction of disposal systems to replace such systems would have a significant effect in terms of water quality improvement. Present Minn. Reg. WPC 34(i)(2)(dd)(9) has been deleted because it would be inconsistent with subsections (a) and (b) since such projects would not result in compliance with enforceable provisions of the Federal Water Pollution Control Act.

Proposed Minn. Reg. WPC 34E.3.c.(2) is identical to present Minn. Reg. WPC 34(i)(2)(ee). However, the proposed amendments

would apply this criteria to the entire construction grants and loans program while the present regulation applies this criteria only to independent state grants and construction loans. Minn. Stat. §116.16 subd. 6 (1976) requires consideration of financial aspects but does not specify whether the criteria is to be applied to the grants program, the loans program, or both. Minn. Stat. §116.16 subd. 7 (1976) allows the Director of the Agency to use such criteria as is necessary to comply with federal law or U.S. EPA guidelines and regulations.

In the past, U.S. EPA policy has disallowed consideration of financial aspects in determining priority for federal construction grants. Policy Requirements Memorandum No. 77-7. However, the Clean Water Act of 1977 appears to give greater control over the priority system to the states. Therefore, the proposed amendments include consideration of financial aspects.

It now appears, however, that future U.S. EPA regulations may expressly prohibit such consideration. U.S. EPA Draft Concept Papers for Public Law 95-217. If such regulations are adopted, the Agency will, of course, not be able to consider financial aspects in determining the priority for construction grants. As noted above, Minn. Stat. §116.16 subd. 7 (1976) allows the Agency to use such criteria as is necessary to comply with U.S. EPA regulations.

Present Minn. Reg. WPC 34(i)(2)(ff)(i) was deleted because it is no longer a federal requirement.

Proposed Minn. Reg. WPC 34E.3.d. was added to provide a mechanism for municipalities to petition for inclusion on the MNL. This procedure has been used by the Agency in the past and

is necessary to assure that all municipalities have an opportunity to participate in the construction grants program if, in fact, they do have a need.

All other additions or deletions in this section were done for purposes of clarification.

4. Municipal project list.

The Municipal Project List ("MPL") lists all projects which the Agency expects to certify to U.S. EPA for a federal grant during the current fiscal year. The procedure for developing the MPL is presently governed by Minn. Reg. WPC 34(f), (h) and (i). Most proposed changes in regard to the MPL have been made to reflect changes in federal law.

Proposed Minn. Reg. WPC 34E.4.a. provides that, in addition to listing all projects for which federal grant funds will be used, the MPL also lists any non-project uses of federal grant funds. The Clean Water Act of 1977 provides that a state may utilize up to 2% of its allotment for administration of various programs and up to $500,000 for training grants. Listing these non-project uses is reasonable and necessary to apprise the public of such uses.

Proposed Minn. Reg. WPC 34E.4.b.(1) provides for the same Metropolitan/Outstate split of grant funds as is presently provided in Minn. Reg. WPC 34(i)(1).

Proposed Minn. Reg. WPC 34E.4.b.(2) lists the "set-asides" that are required by the Clean Water Act of 1977. (Sections 205 and 216 of the Federal Water Pollution Control Act.)

Proposed Minn. Reg. WPC 34E.4.b.(3) is similar in intent to the present provisions of Minn. Reg. WPC 34(f)(3)-(6). The proposed provision authorizes the Agency to provide an adequate mix of projects in all stages of planning, design and construction. This is necessary to prevent loss of any portion of Minnesota's allotment due to an insufficient number of projects being developed for the present or future fiscal years.

Proposed Minn. Reg. WPC 34E.4.b.(4) is a modification of the present Minn. Reg. WPC 34(h)(3). There are only two substantial changes. One is changing the date for which reallocation can be made from December 31 to the end of the fiscal year (now September 30). This change is reasonable and necessary to allow greater flexibility in obligating funds by adding nine months to the time that reallocation can be made from one area of the state to another. The other change is deletion of the provision which limited recovery of reallocated funds to $2,000,000 in any one fiscal year. All reallocated funds will, of course, be returned to the area to which they were originally allocated. However, it is important for the Agency to be able to fund the highest priority projects first, regardless of their geographic location. This deletion is reasonable and necessary as the present limitation does not allow enough flexibility in administering the program.

Proposed Minn. Reg. WPC 34E.4.c. authorizes a reserve project list for the purpose of using forfeited grant funds. This procedure has been used by the Agency in the past and is necessary to protect against inability to utilize the entire state allotment of federal grant funds for each fiscal year.

Proposed Minn. Reg. WPC 34E.4.d. reflects changes in the federal law pursuant to the Clean Water Act of 1977. (Section 203 of the Federal Water Pollution Control Act.) Higher priority may now be given to certain projects utilizing innovative or alternative wastewater treatment processes and techniques.

5. Project eligibility.

Proposed Minn. Reg. WPC 34E.5.a. provides that general state grant eligibility is dependent on federal eligibility. This is a requirement of Minn. Stat. §116.18 (1976) and is also presently required by Minn. Reg. WPC 34(g)(1).

Proposed Minn. Reg. WPC 34E.5.b. provides that generally a project is not grant eligible if construction is initiated prior to the grant award. This provision is similar to federal requirements and is necessary to retain control over the projects.

Proposed Minn. Reg. WPC 34E.5.c. limits grant eligibility to items essential to the operation of the disposal system. The purpose of this requirement, which is a present Agency interpretation, is to limit the use of state and federal funds to only those items necessary to achieve water quality benefits. If a municipality wishes to construct a more ornate building or an unnecessarily elaborate system, the additional costs should be incurred by the municipality.

6. Adjustments.

Proposed Minn. Reg. WPC 34E.6.a. and b. are essentially the

same as Minn. Reg. WPC 34(i)(3) and (i)(5). The only changes are for the purposes of consistency and clarification.

7. Public participation.

This is a new section added by proposed WPC 34E.7. Public participation has been solicited in the past by notice of the Agency Board meeting at which the MNL and the MPL are adopted. The proposed amendments would allow for greater public participation through the use of public informational meetings as well. This will enable all interested municipalities a greater opportunity for input into the decision making process. Proposed Minn. Reg. WPC 34E.7.d. is a restatement of current Agency Rules of Procedures. (Minn. Reg. MPCA 13.)

8. Applications.

The procedure for the submission of construction grant applications is currently governed by Minn. Reg. WPC 34(g). The present provisions are, to a large extent, duplicative of U.S. EPA requirements. To eliminate such duplication, the proposed amendments delete all application requirements other than those which are independent of U.S. EPA requirements. Of course, applicants will still be subject to U.S. EPA requirements, as noted in proposed Minn. Reg. WPC 34E.8.d., e. and f. Agency staff will inform applicants of current U.S. EPA requirements, as necessary.

Proposed Minn. Reg. 34E.8.a. is a modification of Minn. Reg. WPC 34(g)(1). The only changes made were for the purposes of

clarification. The last sentence which has been deleted is now a provision of proposed Minn. Reg. WPC 34E.5.a.

Proposed Minn. Reg. WPC 34E.8.b. is a modification of Minn. Reg. WPC 34(g)(2). The time period for submitting applications has been extended. This is necessary because more documentation and information is now required. A provision has been added which provides that failure to file a timely application may result in forfeiture of grant funds. This is necessary to prevent one municipality from tying up grant funds which could be used for another municipality that is also ready to proceed.

Proposed Minn. Reg. WPC 34E.8.c. contains provisions to implement the Agency's current enforcement program. Pursuant to provisions of the Clean Water Act of 1977, a qualifying municipality that is in the construction grants program may be given a time extension until July 1, 1983, to meet secondary treatment standards. (Section 301(i)(1) of the Federal Water Pollution Control Act). Prior to this enactment, it had also been the policy of the Agency and U.S. EPA not to enforce secondary treatment standards against municipalities which were proceeding in good faith through the construction grants program. The proposed amendments are consistent with the Agency's enforcement program as both the permit modification and the possibility of forfeiture of grant funds for failing to meet the schedule for completion will provide a means of insuring the municipality's expeditious completion of the construction of its disposal system.

Proposed Minn. Reg. WPC 34E.8.(d)(1) and (3) are modifications of Minn. Reg. WPC 34(g)(3)(aa) and (ff), respectively. The only changes made have been for the purposes of clarification and consistency. Present Minn. Reg. WPC 34(g)(3)(bb), (cc), (dd), and (ee) have been deleted as they are duplicative of U.S. EPA requirements.

Proposed Minn. Reg. WPC 34E.8.d.(2) and e.(2) were added as it is necessary to have a commitment from all municipalities involved in a multi-district project.

Proposed Minn. Reg. WPC 34E.8.d.(4) and f.(4) were added to insure that the disposal system will be designed and constructed to meet the applicable effluent limitations.

Proposed Minn. Reg. WPC 34E.8.d.(5) and (6) have been added as it is obviously nonsensical to construct a sewage treatment works if the municipality does not construct a sewage collection system.

Proposed Minn. Reg. WPC 34E.8.d.(7), e.(5) and f.(6) were added to insure that there is a fund from which recovery can be made if the disposal system has been improperly designed.

The present provision of Minn. Reg. WPC 34(g)(4)(aa) - (nn) have been deleted as duplicative of U.S. EPA requirements.

Proposed Minn. Reg. WPC 34E.8.e.(4) has been added to facilitate the Agency's review and approval process and thereby shorten the time required for this activity.

Proposed Minn. Reg. WPC 34E.8.f.(3) was added to provide efficient administrative processing of the application.

Proposed Minn. Reg. WPC 34E.8.f.(5) was added to insure that the project will be constructed in accordance with approved

plans and specifications and otherwise insure that the project is properly constructed.

All other deletions or additions in proposed Minn. Reg. WPC 34E.8.d., e., f., and g. were made for the purposes of consistency and clarification.

9. Administration.

Proposed Minn. Reg. WPC 34E.9.a. and c. are modifications of Minn. Reg. WPC 34(h)(2) and (h)(7), respectively. The changes contained therein were made for the purposes of clarification and consistency.

Proposed Minn. Reg. WPC 34E.9.b. is a modification of Minn. Reg. WPC 34(h)(4). Subsections (3) and (4) are, in substance, a modification of Minn. Reg. WPC 34(m)(1) and (2). Changes in subsection (1) have been made only for the purposes of clarification and consistency. Subsection (2) was modified to include authorization for a reserve for grant increases. Future regulations of U.S. EPA may provide that a minimum of 5% of the state's allotment must be set aside for such purpose. U.S. EPA Draft Concept Papers for Public Law 95-217. If such regulations are adopted, the Agency would, of course, set aside the requisite minimum amount. The proposed changes in subsections (3) and (4) were made to reflect changes in state law and for clarification and consistency. Minn. Stat. §116.18 (Supp. 1977).

Proposed Minn. Reg. WPC 34E.9.d. authorizes state reimbursement grants only when such projects are federally eligible. This is

consistent with proposed Minn. Reg. WPC 34E.5.a. which governs project eligibility.

Proposed Minn. Reg. WPC 34E.9.e. establishes the procedure for the payment of grant funds. The proposed substantive changes (subsections (1), (2) and (3)(b)) are necessary to insure adequate performance before payment is made. All other changes are for the purposes of consistency and clarification.

Proposed Minn. Reg. WPC 34E.9.f. - i. are necessary to provide Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained. Since 1970, some 130 municipalities in Minnesota have built wastewater treatment facilities under the construction grants program utilizing approximately $360 million of federal and state construction grant funds. Of these projects about 41 (or 35 percent) had no significant problems and are operating well. About 38 (or 35 percent), however, did experience minor problems primarily relating to design inadequacies and poor construction. About 31 (or 30 percent) did have serious problems again primarily related to design and construction problems.

Many smaller municipalities lack the staff and the expertise to adequately address these problems before they occur or during the construction grant process. Even after the problem has been identified, smaller municipalities are often unable to seek an appropriate legal remedy because of a lack of resources. These proposed amendments will provide the mechanisms necessary for the Agency to deal with such problems. By doing so, the Agency will be able to insure that construction grant funds are properly utilized

and that disposal systems are properly constructed so that the ultimate purpose of water quality improvement is achieved.

Proposed Minn. Reg. WPC 34E.9.j. reflects a change in federal law. The Clean Water Act of 1977 authorizes the state to use up to 2% of its federal allotment for costs of administration of various programs.

F. Construction loan program.

Proposed Minn. Reg. WPC 34F. is a modification of Minn. Reg. WPC 34(j), (k) and (l). Any deletions or additions are made only for the purposes of clarification and consistency.

MINNESOTA POLLUTION CONTROL AGENCY

Sandra S. Gardebring
Executive Director

Dated: March 24, 1978

PRESENT MINN. REG. WPC 34

(a) Purpose (A.)

(b) Definitions (B.)

(1) (B.1.)

(2) (B.2.)

(3) (B.3.)

(4) (B.4.)

(5) (Deleted)

(c) Severability (C.)

(d) Use of State Funds 1/

(1) - (4) (Deleted)

(e) Use of Federal Funds 2/

(1) and (2) (Deleted)

(f) Municipal Discharge Inventory, List of Municipalities and Project List 3/

(1) - (6) (Deleted)

(g) Applications for State and Federal Construction Grants

(1) (E.8.a.) 4/

(2) (E.8.b.)

(3) (E.8.d)

(aa) (E.8.d.(1))

(bb) (Deleted)

(cc) (Deleted)

1/ See proposed Minn. Reg. WPC 34D. and E.9.b.

2/ See proposed Minn. Reg. WPC 34E.1.d. and g. and E.4.a.

3/ See proposed Minn. Reg. WPC 34E.1.d. and E.2., E.3., and E.4.

4/ See proposed Minn. Reg. WPC 34E.5.a.

(dd) (Deleted)

(ee) (Deleted)

(ff) (E.8.d.(3))

(4) (E.8.e.)

(aa) (Deleted)

(bb) (Deleted)

(cc) (Deleted)

(dd) (Deleted)

(ee) (Deleted)

(ff) (Deleted)

(gg) (Deleted)

(hh) (Deleted)

(ii) (Deleted)

(jj) (Deleted)

(kk) (Deleted)

(ll) (Deleted)

(mm) (Deleted)

(nn) (Deleted)

(5) (E.8.f.)

(6) (Deleted)

(7) (E.8.g.)

(8) (Deleted) 5/

(h) Administration of Construction Grants

(1) (Deleted) 6/

5/ See proposed Minn. Reg. WPC 34E.7.

6/ See proposed Minn. Reg. WPC 34E.1.d., E.3. and E.4.

(2) (E.9.a.)

(3) (E.4.b.(4))

(4) (E.9.b.(1) & (2))

(5) (Deleted) 7/

(6) (Deleted)

(7) (E.9.c.)

(8) (E.9.e.(3)(a)-(d))

(i) Criteria for Determining Priority

(1) (Deleted) 8/

(2) (Deleted) 9/

(aa) (E.2.d.(1))

(bb) (E.2.d.(2))

(cc) (E.2.d.(3))

(dd) (E.3.c.(1))

(ee) (E.3.c.(2))

(ff) (E.3.c.(3))

(3) (E.6.a.)

(4) (E.3.e.)

(5) (E.6.b.)

(j) Application for Disposal System Planning and Construction Loans (F.1.)

(1) (F.1.a.)

(2) (F.1.b.)

7/ See proposed Minn. Reg. WPC 34E.9.d.

8/ See proposed Minn. Reg. WPC 34E.4.b.(1)

9/ See proposed Minn. Reg. WPC 34E.1.d., E.2., E.3., and E.4.

(aa) (F.1.b.(1))

(bb) (F.1.b.(2))

(cc) (F.1.b.(3))

(dd) (F.1.b.(4))

(ee) (F.1.b.(5))

(3) (F.1.c.)

(aa) (F.1.c.(1))

(bb) (F.1.c.(2))

(4) (F.1.d.)

(5) (F.1.e.)

(6) (F.1.f.)

(k) Administration of State Disposal System Planning and Construction Loans (F.2.)

(1) (F.2.a.)

(2) (F.2.b.)

(3) (F.2.c.)

(4) (F.2.d.)

(5) (F.2.e.)

(6) (F.2.f.)

(l) Criteria for Determining Loan Priority (F.3.)

(1) (F.3.a.)

(2) (F.3.b.)

(aa) (F.3.b.(1))

(bb) (F.3.b.(2))

(3) (F.3.c.)

(4) (F.3.d.)

(m) Additional Purposes of State and Federal Funds

(1) (Deleted) 10/

(2) (Deleted) 11/

(3) (Deleted) 12/

10/ See proposed Minn. Reg. WPC 34D.2. & E.9.b.(4)

11/ See proposed Minn. Reg. WPC 34D.3. & E.9.b.(3)

12/ See proposed Minn. Reg. WPC 34E.1.d(3) & E.4.a.

PROPOSED MINN. REG. WPC 34

A. Purpose (a)*

B. Definitions (b)*

1. ((b)(1))*
2. ((b)(2))
3. ((b)(3))
4. ((b)(4))
5. (Added)
6. (Added)
7. (Added)
8. (Added)
9. (Added)
10. (Added)
11. (Added)
12. (Added)

C. Severability ((c))

D. Priority of Programs 1/ (Added)

1. (Added)
2. (Added)
3. (Added)
4. (Added)

E. Construction Grants Program 2/ (Added)

1. Summary of Construction Grants Program

a. (Added)

(1) (Added)

1/ See present Minn. Reg. WPC WPC 34(d) and (m)

2/ See generally present Minn. Reg. WPC 34(f), (g), (h) & (i)

(2) (Added)

(3) (Added)

b. (Added)

c. (Added)

d. (Added)

(1) (Added) 3/

(2) (Added) 4/

(3) (Added) 5/

e. (Added)

f. (Added)

g. (Added) 6/

h. (Added)

2. Municipal Discharge Inventory

a. (Added) 7/

b. (Added) 7/

c. (Added) 7/

d. (i)

3/ See present Minn. Reg. WPC 34(f)(1) & (2) & (i)(2)

4/ See present Minn. Reg. WPC 34(f)(1) & (2), (h)(1) & (i)(2)

5/ See present Minn. Reg. WPC 34(e)(2), (f)(3), (h)(1), (i)(2) and (m)(3)

6/ See present Minn. Reg. WPC 34(e)(1)

7/ See present Minn. Reg. WPC 34(f)(1) & (2) & (i)(2)

(1) ((i)(2)(aa))*

(2) ((i)(2)(bb))*

(3) ((i)(2)(cc))

3. Municipal Needs List

a. (Added) 8/

b. (Added) 8/

(1) (Added) 8/

(2) (Added) 8/

c. (i)

(1) ((i)(2)(dd))*

(2) ((i)(2)(ee))*

(3) ((i)(2)(ff))*

d. (Added)

e. ((i)(4))*

4. Municipal Project List

a. (Added) 9/

b. (Added)

(1) (Added) 10/

(2) (Added)

(3) (Added) 11/

(4) ((h)(3))*

8/ See present Minn. Reg. WPC 34(f)(1) & (2), (h)(1), (i)(2), and (m)(3)

9/ See present Minn. Reg. WPC 34(e)(2), (f)(3), (h)(1), & (i)(2)

10/ See present Minn. Reg. WPC 34(i)(1)

11/ See present Minn. Reg. WPC 34(f)(3), (4), (5) & (6)

c. (Added)

d. (Added)

5. Project Eligibility

a. (Added) 12/

b. (Added)

c. (Added)

6. Adjustments

a. ((i)(3))*

b. ((i)(5))*

7. Public Participation 13/

a. (Added)

b. (Added)

c. (Added)

d. (Added)

8. Applications

a. ((g)(1))*

b. ((g)(2))*

c. (Added)

d. ((g)(3))*

(1) ((g)(3)(aa))*

(2) (Added)

(3) ((g)(3)(ff))

(4) (Added)

(5) (Added)

(6) (Added)

(7) (Added)

12/ See present Minn. Reg. WPC 34(g)(1)

13/ See present Minn. Reg. WPC 34(g)(8)

e. ((g)(4))*

(1) (Added)

(2) (Added)

(3) (Added)

(4) (Added)

(5) (Added)

f. ((g)(5))*

(1) (Added)

(2) (Added)

(3) (Added)

(4) (Added)

(5) (Added)

(6) (Added)

g. ((g)(7))*

9. Administration

a. ((h)(2))*

b. (Added)

(1) ((h)(4))*

(2) ((h)(4))*

(3) (Added) 14/

(4) (Added) 15/

c. ((h)(7))*

d. (Added) 16/

14/ See present Minn. Reg. WPC 34(d) and (m)(2)

15/ See present Minn. Reg. WPC 34(d) and (m)(1)

16/ See present Minn. Reg. WPC 34(h)(5)

e. (Added)

(1) (Added)

(2) (Added)

(3) ((h)(8))*

f. (Added)

g. (Added)

h. (Added)

i. (Added)

j. (Added)

F. Construction Loans Program (j)

1. Application

a. ((j)(1))

b. ((j)(2))

(1) ((j)(2)(aa))*

(2) ((j)(2)(bb))*

(3) ((j)(2)(cc))*

(4) ((j)(2)(dd))

(5) ((j)(2)(ee))

c. ((j)(3))

(1) ((j)(3)(aa))

(2) ((j)(3)(bb))*

d. ((j)(4))

e. ((j)(5))

f. ((j)(6))

2. Administration (k)*

   a. ((k)(1))

   b. ((k)(2))

   c. ((k)(3))

   d. ((k)(4))

   e. ((k)(5))

   f. ((k)(6))

3. Criteria for Determining Loan Priority (l)

   a. ((l)(1))

   b. ((l)(2))

      (1) ((l)(2)(aa))

      (2) ((l)(2)(bb))

   c. ((l)(3))

   d. ((l)(4))

MPCA Exhibit #2

STATE OF MINNESOTA
COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

ORDER FOR HEARING

IT IS HEREBY ORDERED THAT public hearings on the above-captioned amendments be held in the Board Room of the Minnesota Pollution Control Agency, 1935 West County Road B2, Roseville, Minnesota, on April 21, 1978, commencing at 9:00 a.m.; in the North Half, Multi-Purpose Building, Area Vocational Technical Institute, Highway 34 East, Detroit Lakes, Minnesota, on April 24, 1978, commencing at 7:00 p.m.; in the City Council Chambers, City Hall, 420 Pokegama Avenue North, Grand Rapids, Minnesota, on April 25, 1978, commencing at 7:00 p.m.; and in Room 101, Armstrong Hall, Mankato State University, Mankato, Minnesota, on April 26, 1978, commencing at 7:00 p.m. These hearings shall continue until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to representatives of associations or other interested groups or persons who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register pursuant to Minn. Stat. §15.0412 subd. 4 (Minn. Supp. 1977).

Sandra S. Gardebring
Executive Director

Dated: March 7, 1978

MPCA Exhibit #1

CERTIFICATE OF ADOPTION OF RESOLUTION BY
MINNESOTA POLLUTION CONTROL AGENCY

I, Sandra S. Gardebring, do hereby certify that I am the Executive Director of the Minnesota Pollution Control Agency, an Agency duly authorized under the laws of the State of Minnesota, and that the following is a true, complete and correct copy of a resolution adopted at a meeting of the Agency duly and properly called and held on the 25th day of October, 1977; that a quorum was present at said meeting; that the resolution was passed by a majority of the Agency; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified:

> BE IT RESOLVED that the Agency Board authorizes the staff to schedule hearings for the purpose of revising Regulation WPC-34 and authorizes the Executive Director to sign all documents relating to the amended regulations.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 7th day of March, 1978.

Sandra S. Gardebring
Executive Director

Subscribed and sworn to before me
this 7th day of March, 1978.

MARY E. WYATT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Oct. 24, 1983

Mary E. Wyatt
Notary Public

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that public hearings in the above-entitled matter will be held in the Board Room of the Minnesota Pollution Control Agency, 1935 West County Road B2, Roseville, Minnesota, on April 21, 1978, commencing at 9:00 a.m.; in the North Half, Multi-Purpose Building, Area Vocational Technical Institute, Highway 34 East, Detroit Lakes, Minnesota, on April 24, 1978, commencing at 7:00 p.m.; in the City Council Chambers, City Hall, 420 Pokegama Avenue North, Grand Rapids, Minnesota, on April 25, 1978, commencing at 7:00 p.m.; and in Room 101, Armstrong Hall, Mankato State University, Mankato, Minnesota, on April 26, 1978, commencing at 7:00 p.m. These hearings shall continue until all persons have had an opportunity to be heard. The Agency will present its witnesses and evidence establishing the need for and reasonableness of the amendments to the above-captioned rule at the hearing in Roseville, Minnesota.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to Hearing Examiner Howard L. Kaibel, Jr., 1745 University Avenue, St. Paul, Minnesota 55104, phone - (612) 296-8107, either before the hearing or within five working days after the close of the hearing, unless the Hearing Examiner orders the record to remain open for a longer period not to exceed 20 days, in which case written comments may be submitted within that period. To save time and to avoid duplication, it is suggested that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests.

The existing regulation, Minn. Reg. WPC 34, establishes procedures relating to the administration of the state and federal grants program and the state loans program for the construction of municipal sewage treatment works and disposal systems. The proposed amendments would, if adopted:

(1) reflect changes in federal law pursuant to 1977 amendments to the Federal Water Pollution Control Act;

(2) amend the criteria for determining the priority of municipalities and projects on the Municipal Needs List and the Municipal Project List;

(3) provide for greater public participation prior to the adoption of the Municipal Needs List and the Municipal Project List;

(4) provide for Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained;

(5) amend other provisions of the regulation for purposes of clarification and more efficient administration of the programs.

Copies of the proposed rule are now available and one free copy may be obtained by writing to Mr. Perry Beaton, Minnesota Pollution Control Agency, Division of Water Quality, 1935 West County Road B2, Roseville, Minnesota, 55113. Additional copies will be available at the door on the dates of the hearings. The Agency's authority to promulgate the proposed rule is contained in Minnesota Statutes Chapters 115 and 116 and, more specifically, Minnesota Statutes § 116.16, et seq. (1976). A "statement of need" explaining why the proposed amendments are necessary and a "statement of evidence" outlining the testimony which the Agency will be introducing will be filed with the Hearing Examiner's Office at least 25 days prior to the hearing and will be available for public inspection at the Hearing Examiner's Office at the address noted above.

Please be advised that Minnesota Statutes, Chapter 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rulemaking by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota, 55155, phone - (612) 296-5615.

Sandra S. Gardebring

Sandra S. Gardebring
Executive Director

Dated: March 7, 1978

MPCA Exhibit #6

STATE OF MINNESOTA

COUNTY OF RAMSEY

RECEIVED
MAR 24 1978
OFFICE OF HEARING EXAMINERS

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

John Wexler, being duly sworn on oath deposes and says:

1. That he is an employee of the Minnesota Pollution Control Agency.

2. That on the 15th day of March, 1978, he went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notice of public hearings relating to the promulgation of rules pursuant to Minn. Stat. §15.0412 (1976).

3. That on the 15th day of March, 1978, in response to the above request, the Secretary of State provided him with such a list, a copy of which is attached hereto and incorporated by reference.

FURTHER AFFIANT SAYETH NOT.

John J. Wexler

Subscribed and sworn to before me this 15th day of March, 1978:

MARY E. WYATT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Oct. 24, 1983

Mary E. Wyatt
Notary Public

MPC Exhibit #5

RECEIVED
MAR 24 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

CERTIFICATE

I hereby certify that the attached 484 labels, 13 sheets constitute the complete list of persons, associations, and other interested groups who as of 3:30 o'clock pm, this 15th day of March, 1978, have requested pursuant to Minn. Stat. §15.0412 subd. 4 (1976), that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules.

SECRETARY OF STATE

By Cheri L. Mattson

MPCA Exhibit #7

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

AFFIDAVIT OF MAILING

RECEIVED
MAR 24 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

N. A. Whited, being first duly sworn, deposes and says:

That on the 17th day of March, 1978, at the City of Roseville, County of Ramsey, State of Minnesota, she served the attached "Notice of Hearing" in the above entitled matter by depositing in the United States mail at said City of Roseville, a true and correct copy thereof, properly enveloped, with postage prepaid, and addressed to those named on the attached Mailing List.

N. A. Whited

Subscribed and sworn to before me
this 17th day of March, 1978:

Lila Holmdahl
Notary Public

LILA HOLMDAHL
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires Nov. 1, 1983

MPCA Exhibit #10

RECEIVED
MAR 24 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

NO. PCA-78-010-HK

AFFIDAVIT OF RECEIPT OF RESPONSE TO NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Perry T. Beaton, being first duly sworn, deposes and says:

1. That he is an employee of the Facilities Section, Division of Water Quality, Minnesota Pollution Control Agency.

2. That he has been primarily responsible for the development of the above captioned proposed amendments.

3. That he caused to be published in the March 28, 1977, edition of the State Register (1 S.R. 1441) the attached Notice of Intent to Solicit Outside Opinion regarding the above-captioned proposed amendments which Notice has been marked for identification as Attachment "A."

4. That he was the person specified in the said Notice to receive the said Outside Opinion.

5. That the period for response to said Notice expired on May 15, 1977.

6. That in response to the said Notice he has received no written comments.

FURTHER AFFIANT SAYETH NOT, except that this affidavit is prepared for the purpose of offering the attached Notice of Intent

to Solicit Outside Opinion into the hearing record in the above-captioned proceedings and for establishing that no written comments were received in response to said Notice.

Perry T. Beaton

Subscribed and sworn to before me
this 24th day of March, 1978:

MARY E. WYATT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Oct. 24, 1983

Mary E. Wyatt
Notary Public

ATTACHMENT "A"

EQC MONITOR

Pollution Control Agency

Proposed Amendments to Rules Governing Federal Construction Grants and State Construction Grant and Loan Programs

Notice of Intent to Solicit Outside Opinion

Notice is hereby given that the Minnesota Pollution Control Agency is considering proposed amendments to Minnesota Regulations WPC 34 governing the administration of

the municipal facilities assistance program, the Minnesota state water pollution control fund and federal grant funds allotted to Minnesota. In order to adequately determine the nature and utility of such amendments, the Minnesota Pollution Control Agency hereby requests information and comments from all interested persons or groups concerning the subject matter of the proposed amendments.

All interested or affected persons or groups are requested to participate. Statements of information and comment may be made orally or in writing. Written statements of information and comment may be addressed to:

Mr. Perry T. Beaton
Minnesota Pollution Control Agency
Division of Water Quality
1935 West County Road B2
Roseville, Minnesota 55113

Oral statements of information and comment will be received during regular business hours over the telephone at (612) 296-7201, and in person at the above address.

All statements of information and comment must be received by May 15, 1977. Any written material received by the Agency shall become part of the hearing record.

PROPOSED MINN. REG. WPC 34

A. Purpose (a)*

B. Definitions (b)*

1. ((b)(1))*
2. ((b)(2))
3. ((b)(3))
4. ((b)(4))
5. (Added)
6. (Added)
7. (Added)
8. (Added)
9. (Added)
10. (Added)
11. (Added)
12. (Added)

C. Severability ((c))

D. Priority of Programs 1/ (Added)

1. (Added)
2. (Added)
3. (Added)
4. (Added)

E. Construction Grants Program 2/ (Added)

1. Summary of Construction Grants Program

a. (Added)

(1) (Added)

1/ See present Minn. Reg. WPC WPC 34(d) and (m)

2/ See generally present Minn. Reg. WPC 34(f), (g), (h) & (i)

(2) (Added)

(3) (Added)

b. (Added)

c. (Added)

d. (Added)

(1) (Added) 3/

(2) (Added) 4/

(3) (Added) 5/

e. (Added)

f. (Added)

g. (Added) 6/

h. (Added)

2. Municipal Discharge Inventory

a. (Added) 7/

b. (Added) 7/

c. (Added) 7/

d. (i)

3/ See present Minn. Reg. WPC 34(f)(1) & (2) & (i)(2)

4/ See present Minn. Reg. WPC 34(f)(1) & (2), (h)(1) & (i)(2)

5/ See present Minn. Reg. WPC 34(e)(2), (f)(3), (h)(1), (i)(2) and (m)(3)

6/ See present Minn. Reg. WPC 34(e)(1)

7/ See present Minn. Reg. WPC 34(f)(1) & (2) & (i)(2)

(1) ((i)(2)(aa))*

(2) ((i)(2)(bb))*

(3) ((i)(2)(cc))

3. Municipal Needs List

a. (Added) 8/

b. (Added) 8/

(1) (Added) 8/

(2) (Added) 8/

c. (i)

(1) ((i)(2)(dd))*

(2) ((i)(2)(ee))*

(3) ((i)(2)(ff))*

d. (Added)

e. ((i)(4))*

4. Municipal Project List

a. (Added) 9/

b. (Added)

(1) (Added) 10/

(2) (Added)

(3) (Added) 11/

(4) ((h)(3))*

8/ See present Minn. Reg. WPC 34(f)(1) & (2), (h)(1), (i)(2), and (m)(3)

9/ See present Minn. Reg. WPC 34(e)(2), (f)(3), (h)(1), & (i)(2)

10/ See present Minn. Reg. WPC 34(i)(1)

11/ See present Minn. Reg. WPC 34(f)(3), (4), (5) & (6)

c. (Added)

d. (Added)

5. Project Eligibility

a. (Added) 12/

b. (Added)

c. (Added)

6. Adjustments

a. ((i)(3))*

b. ((i)(5))*

7. Public Participation 13/

a. (Added)

b. (Added)

c. (Added)

d. (Added)

8. Applications

a. ((g)(1))*

b. ((g)(2))*

c. (Added)

d. ((g)(3))*

(1) ((g)(3)(aa))*

(2) (Added)

(3) ((g)(3)(ff))

(4) (Added)

(5) (Added)

(6) (Added)

(7) (Added)

12/ See present Minn. Reg. WPC 34(g)(1)

13/ See present Minn. Reg. WPC 34(g)(8)

e. ((g)(4))*

(1) (Added)

(2) (Added)

(3) (Added)

(4) (Added)

(5) (Added)

f. ((g)(5))*

(1) (Added)

(2) (Added)

(3) (Added)

(4) (Added)

(5) (Added)

(6) (Added)

g. ((g)(7))*

9. Administration

a. ((h)(2))*

b. (Added)

(1) ((h)(4))*

(2) ((h)(4))*

(3) (Added) 14/

(4) (Added) 15/

c. ((h)(7))*

d. (Added) 16/

14/ See present Minn. Reg. WPC 34(d) and (m)(2)

15/ See present Minn. Reg. WPC 34(d) and (m)(1)

16/ See present Minn. Reg. WPC 34(h)(5)

e. (Added)

(1) (Added)

(2) (Added)

(3) ((h)(8))*

f. (Added)

g. (Added)

h. (Added)

i. (Added)

j. (Added)

F. Construction Loans Program (j)

1. Application

a. ((j)(1))

b. ((j)(2))

(1) ((j)(2)(aa))*

(2) ((j)(2)(bb))*

(3) ((j)(2)(cc))*

(4) ((j)(2)(dd))

(5) ((j)(2)(ee))

c. ((j)(3))

(1) ((j)(3)(aa))

(2) ((j)(3)(bb))*

d. ((j)(4))

e. ((j)(5))

f. ((j)(6))

September 11, 1978

Mr. Lee Sheehy
Special Assistant Attorney General
Room G-25, State Administration Building
50 Sherburne Avenue
Saint Paul, Minnesota 55155

Dear Sir:

The Pollution Control Agency has taken action recently to adopt amendments to PCA Rules 34 regarding the administration of the Construction Grants and Loans Program involving Federal grant funds. These rules have been presented to your office for review as is required by Minnesota Statute, and received by your office on September 5, 1978. Pursuant to Rules of the Attorney General 305, the City of Saint Paul herewith submits for your consideration the following brief in support of the findings and recommendations made by the Chief Hearing Examiner, when he recommended that the Agency either withdraw the proposed final rules or reconvene the rule hearing, as contained in the Chief Hearing Examiner's August 14, 1978 Report and Memorandum.

Our reasons for requesting that the Amended Rules be disapproved by your office are based upon the fact that the rules conflict with both state and federal law, are unreasonable,and arbitrary, and exceeds the statutory authority granted to the Agency.

The objections of the City of Saint Paul are documented in the record and transcript, including the testimony of the Mayor, the Findings of the Hearing Officer, and the Report of the Chief Hearing Officer.

Saint Paul's primary objection to the proposed rules is that they fail to comply with the intentions of Congress in that every effort is being made to <u>not</u> make available any grant funds for nontreatment works types projects. It is our position, and that adopted by the hearing examiner, that Congress wanted states to allocate <u>at least</u> 25% of grant funds for such nontreatment work

projects. Your attention is respectfully directed to pages 9 through 14 of the Hearing Examiner's report of June 14, 1978.

The testimony of the PCA staff was that the priority system proposed by the rules would make it virtually impossible for any nontreatment works project to be on the state's priority list because the PCA's policy was to fund only treatment work projects.

We ask that the Attorney General concur in the findings of the Hearing Examiner and hold that the proposed rules are unreasonable and conflict with federal law.

The proposed rules further conflict with federal law in that no public hearing is provided to review the state's priority list. This failing was pointed out by both the Hearing Examiner and the Chief Hearing Examiner. PCA proposed rules provide an informational meeting, and this does not comply with federal law. EPA regulation, § 35.915(a) provides, in part, that "A public hearing shall be held prior to submission of the priority system (or revision thereof) by the State. Prior to the hearing, fact sheets describing the proposed system (including rating and ranking criteria) shall be distributed to the public. A summary of State responses to public comment and to any public hearing testimony shall be prepared and included in the priority system submission."

It is quite clear that an evidentiary-type of public hearing is required by the federal regulations, and in addition thereto, the State must supply responses to this testimony.

PCA rules provide for an informational type meeting prior to the adoption of the ratings list by the PCA. Testimony will be heard at the PCA meeting, but no such opportunity to be heard will be permitted at the prior informational type meetings. Nor is there any provision for the State's responses to public comment. No record is required to be kept of the public testimony, and therefore the EPA regulations are not being followed.

We further concur in the Report of the Chief Hearing Examiner in that changes to the proposed rules were made after the public's opportunity to testify, and that the record does not contain adequate support for these changes. Therefore, pursuant

to Minn. Stat. § 15.0412, Subd. 4, and Rules and Regulations of the State Hearing Examiner, HE 107, the PCA should have either reconvened the public hearing, or withdrawn the proposed rules. Saint Paul concurs in the memorandum contained in the Chief Hearing Examiner's Report.

If additional information is required by you, please notify me as soon as possible. I would appreciate receiving a copy of the official action taken by your office.

Yours very truly,

JEROME J. SEGAL
Assistant City Attorney

JJS:cg

cc: Warren Spannaus
Attorney General
State of Minnesota