

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File No. 744

11/9 Lisa Tegel requested Send Notice.

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 11/3/81
DATE FOR REVIEW 11/12/81
DATE DUE 11/17/81

Adopted w/a hearing _____
Adopted w/o a hearing X
Temporary rule _____

Approved 11-17-81 Disapproved _____ Returned to Agency 11-18-81

Resubmitted 11-10-81 Due _____
Approved _____ Disapproved _____ Returned to Agency _____

Date filed w/Secretary of State 11-18-81 Revisor approved 11/5/81
disapproved 11/5/81

____ Rule as Adopted

__✓__ Rule as Proposed

__✓__ Order Adopting 11.9.81 Date

__✓__ Notice of Intent to Solicit Outside Opinion SR. 6/22/81

__✓__ Order for rulemaking
_____ Date of Hearing

__✓__ Certificate of Board's Authorizing Resolution

__✓__ Notice of rulemaking
_____✓ Sufficiency

__✓__ Affidavit of Mailing Notice or rulemaking
8.21.81 At least 30 days prior to ~~hearing~~/adoption

__✓__ Mailing list Certificate

__✓__ Publication in State Register
_____✓ At least 30/20 days prior to ~~hearing~~/adoption

__N/A__ Hearing Examiner's Report

____ Chief Hearing Examiner's Report(s)
_____ Approving H.E.'s Report
_____ Approving agency action

__✓__ Agency's Findings of Fact

__N/A__ LCRAR Report or agency Affidavit

__✓__ Certificate of Board's Resolution Adopting Rules

____ Order Approving Incorporation by Reference

__✓__ Statement of Need and Reasonableness

__N/A__ Petition for Adoption of a Rule

__✓__ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

__✓__ Certificate of Compliance w/Rulemaking Procedures

__N/A__ Affidavit of Mailing Notice of Submission to Attorney General

__✓__ Notice of Submission to the Attorney General

see Affidavit of Notification

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

November 9, 1981

ADDRESS REPLY TO:
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
1935 WEST COUNTY ROAD B-2
ROSEVILLE, MN 55113
TELEPHONE: (612) 296-7342

Mr. Jerry Anderson
Special Assistant Attorney General
Office of the Attorney General
G-25 State Administration Building
50 Sherburne Avenue
St. Paul, Minnesota

Re: In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR § 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Dear Mr. Anderson:

On Friday, November 6, 1981, the Minnesota Pollution Control Agency received a "disapproval form" from the revisor's office regarding the above-referenced rules.

The Agency has approved the corrections required by the Revisor and hereby submits the original and three copies of a new order showing those corrections. Please substitute these forms for the ones I forwarded to you on October 30, 1981.

I have also enclosed one copy of the rule showing all the changes now made. Please substitute this rule for the one forwarded to you on October 30, 1981. It is my understanding that the revisor's office will submit the four copies of this rule to you as soon as it is approved.

If you have any questions regarding this rule, please call me at 296-7345.

Very truly yours,

LISA R. TIEGEL
Special Assistant
Attorney General

LRT/ps
Encs.

cc: Lorna Breiter

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

ADDRESS REPLY TO:
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
1935 WEST COUNTY ROAD B-2
ROSEVILLE, MN 55113
TELEPHONE: (612) 296-7342

November 10, 1981

Ms. Judith Wehrein
Office of the Attorney General
530 State Office Building
St. Paul, MN. 55155

Re: In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR § 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Dear Ms. Wehrein:

As you requested yesterday, I am enclosing with this letter a copy of the "Notice of Withdrawal of Previous Proposed Rule and Intent to Adopt a Rule Without Public Hearing" as mailed in the above-entitled matter. I have also enclosed a copy of the affidavit showing proper service.

Very truly yours,

Lisa R. Tiegel
Special Assistant
Attorney General

LRT:lt
Enclosures

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

ADDRESS REPLY TO:
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
1935 WEST COUNTY ROAD B-2
ROSEVILLE, MN 55113
TELEPHONE: (612) 296-7342

October 30, 1981

Mr. Jerry Anderson
Special Assistant Attorney General
Office of the Attorney General
G-25 State Administration Building
50 Sherburne Avenue
St. Paul, Minnesota

Re: In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR § 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Dear Mr. Anderson:

In accordance with Minn. Stat. § 15.0412, subd. 4h (1980), the above-captioned rule is hereby submitted to you for your review.

The following documents are enclosed:

1. Rule as adopted. (Original and three copies. Because the clean copy of the rule will ultimately be printed by the Office of the Revisor and accordingly stamped, we have not submitted a clean copy to you for your review. Note that the Order adopting does indicate the necessary changes to the proposed rule.)

2. Order Adopting. (Original and three copies.)

3. Certificate of Board's Resolution Adopting a Rule.

4. Notice of Intent to Solicit Outside Opinion.

5. Order for Notice of Intent to Adopt a Rule Without Public Hearing.

6. Certificate of Board's Authorizing Resolution (Ordering Notice).

7. Notice of Intent to Adopt a Rule Without a Public Hearing.

8. Affidavit of Mailing Notice of Intent to Adopt a Rule Without Public Hearing.

9. Mailing List Certificate.

10. Rule as Proposed.

11. Findings of Fact and Conclusions.

12. Statement of Need and Reasonableness.

13. Affidavit regarding comments submitted to the Agency.

14. Affidavit evidencing that no person requested notification of transmittal of rules to the Office of the Attorney General.

15. Certificate of Compliance with Rulemaking Procedures.

Unless it is otherwise indicated, I have attached only one copy of the above-referenced documents.

Under separate cover letter, we are today submitting the above-captioned rule to the Office of the Revisor for its review and approval.

If you have any questions regarding this rule, please call me at 296-7345.

Very truly yours,

LISA R. TIEGEL
Special Assistant
Attorney General

LRT/ps
Encs.

cc: Ann Bateson

SF-00006-02

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : LOUIS BREIMHURST, Executive Director
Minnesota Pollution Control Agency
Attention: LISA R. TIEGEL
Special Assistant Attorney General

DATE: 11/18/81

FROM :

TED A. MARTINEZ
Special Assistant
Attorney General

PHONE: 296-0315

SUBJECT:

IN THE MATTER OF THE PROPOSED ADOPTION OF A RULE OF THE STATE, 6 MCAR § 4.0041, GOVERNING THE AGENCY'S PERMIT PROGRAM FOR THE GROWTH OR EXPANSION OF INDUSTRY IN NONATTAINMENT AREAS

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Please 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 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 to the rules in the approved set.

If you have any questions in this regard, please contact me.

TAM:sll

Encs.

cc: Ms. Kathy Burek
Mr. Duane Harves

Pollution Control Agency

Air Quality Division

Adopted Rule Governing the Agency's Permit Program for Growth or Expansion of Industry in Nonattainment Areas

Rule as Adopted

6 MCAR S 4.0041 Offset rule.

A. Purpose. The purpose of this rule is to establish conditions to be included in permits which the agency issues, in accordance with the requirements of Minn. Stat. S 116.07, subd. 4a, to persons who propose to construct or modify certain emission facilities in nonattainment areas. This rule may be known as the "offset rule."

B. Applicability.

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in ~~6 MCAR S 4.0018~~ C.17.

2. This rule does not apply in nonattainment areas of the state for which a plan has been developed and approved by the agency and the United States Environmental Protection Agency as providing sufficient emission reductions to both:

a. Bring the area into attainment with the national primary ambient air quality standards by December 31, 1982; and

b. Allow for an increase in emissions in the nonattainment area during that period of time the area is designated nonattainment.

C. Definitions. The definitions in rule APC 2 of the Minnesota Pollution Control Agency apply to the terms used in this rule unless the terms are defined herein. For the purposes of this rule, the following words have the meanings defined below.

1. "Air quality control region" means any of the seven geographic areas specified by the agency for administrative purposes based on jurisdictional boundaries, urban and industrial concentrations, climate, meteorology, topography, and other factors affecting the interchange and diffusion of pollutants in the atmosphere. These are identified in 40 Code of Federal Regulations, Section 52.1221 (1980).

2. "Criteria pollutant" means any of the following: sulfur dioxide; particulate matter; nitrogen oxides; carbon monoxide; ozone; nonmethane hydrocarbons; and lead.

3. "Fugitive emissions" means those pollutant discharges which do not pass through a stack, chimney, vent, or other functionally equivalent opening and which discharges are quantifiable by methods in "Compilation of Air Pollutant Emission Factors" (OAQPS AP-42, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980), or methods that the director determines are comparably reliable.

~~4. "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the~~

~~subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.~~

~~5.~~ 4. "Lowest achievable emission rate" means, for any emission facility, the most stringent emission limitation or standard of performance that is achievable in practice by that class or category of emission facility. In no case shall the lowest achievable emission rate be construed to allow emissions in excess of any applicable standard. The emission limitation specified in any other state's plan shall be presumed to be achievable in practice unless a person demonstrates to the director that the emission limitation or standard of performance is not achievable for reasons other than economic costs.

~~6.~~ 5. "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in ~~an~~ a net increase in emissions. As used in this rule, the term modification or modified does not include:

a. Routine maintenance, repair or replacement;

b. Changes in method or hours of operation unless the changes are disallowed by an agency rule, stipulation agreement, permit or order, or by a court order;

c. Increases in production rates unless the increases

exceed the operating design capacity of any emission facility;

d. Use of a fuel generated from municipal solid waste in a steam generating unit;

e. A change in ownership; or

f. Use of a fuel or raw material in an emission facility that:

(1) Was designed to accommodate the use prior to December 21, 1976; or

(2) Is commencing or has commenced the fuel or raw material use pursuant to an order under sections 2(a) and (b) of the Energy Supply and ~~Environment~~ Environmental Coordination Act of 1974, 15 United States Code, Section 792 (1980), under a natural gas curtailment plan pursuant to the Federal Power Act, 16 United States Code, Section 791a et seq. (1980), or under section 125 of the Clean Air Act of 1977, 42 United States Code, Section 7425 (1980).

~~7.~~ 6. "National ambient air quality standards" means the primary (health related) and secondary (welfare related) pollutant concentrations established by the Administrator of the United States Environmental Protection Agency, pursuant to section 109 of the Clean Air Act of 1977, 42 United States Code, Section 7409 (1980).

~~8.~~ 7. "Net air quality benefit" means that, in the area that would be affected by the subject emission facility, offsets proposed to be obtained by a person pursuant to D.1. are sufficient to result in a net reduction, on both a pounds per hour and tons per year basis, in both the rate of emissions and the concentration of nonattainment criteria pollutants.

a. The area that would be affected by the subject emission facility is defined as follows:

(1) For subject emission facilities proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon, or ozone nonattainment areas, the area that would be affected by the subject emission facility is the air quality control region in which the subject emission facility is proposed to be located; and

(2) For subject emission facilities proposed to be located in sulfur dioxide, particulate matter, or lead nonattainment areas, the area that would be affected by the subject emission facility is the area that the modeling analysis, performed in accordance with D.2., demonstrates to be affected by the subject emission facility.

b. The director shall find that there is a net reduction in both the rate of emissions and the concentration of nonattainment criteria pollutants if Y divided by X is equal to or greater than 1.1, where:

(1) X = the restricted emissions to which the subject emission facility will be limited and

(2) Y = the offsets to be provided by the person proposing the subject emission facility.

~~9.~~ 8. "Net increase in emissions" means the net number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the net increase in emissions, the director

a. Shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but

b. Shall give a credit for

(1) All legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction on nonattainment criteria pollutant discharges that would result from installing required pollution control equipment); and

(2) Any other restrictions on or reductions of the nonattainment criteria pollutant discharges that the person proposing the subject emission facility both obtains within the same plant and agrees to include within the terms of any permit issued for the subject emission facility.

~~10.~~ 9. "Nonattainment area" means any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard.

~~11.~~ 10. "Nonattainment criteria pollutants" means as follows:

a. For all nonattainment areas except ozone nonattainment areas, nonattainment criteria pollutant means the criteria pollutant for which an area is designated nonattainment; and

b. For ozone nonattainment areas, nonattainment criteria pollutant means nonmethane hydrocarbons.

~~12.~~ 11. "Offsets" means any documented reductions in restricted emissions of nonattainment criteria pollutants that:

a. Are legally enforceable and

b. Are achieved after August 7, 1977, or after the

date of completion of the emission inventory used by the agency in developing the most recent revision to the plan, whichever is later.

~~13.~~ 12. "Plan" or "state implementation plan" means any state air quality control laws, rules, permits, stipulation agreements, and procedures, developed to insure compliance with state and national ambient air quality standards.

~~14.~~ 13. "Plant" means any assemblage of buildings, structures or emission facilities, on one or more adjacent or contiguous properties that are under common ownership or control and that are identified by the same two digit Standard Industrial Code as specified in the Standard Industrial Classification Manual, 1972, as prepared by the Executive Office of the President, Office of Management and Budget and as amended by the 1977 Supplement.

~~15.~~ 14. "Resource recovery facility" means any emission facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. An energy conversion facility must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this rule. In calculating whether solid waste is used to provide more than 50 percent of the heat input, a 30-day rolling average shall be used.

~~16.~~ 15. "Restricted emissions" means the maximum nonattainment criteria pollutant discharges, including fugitive emissions, which may be emitted from an emission facility based on the most stringent of the following:

a. Any emission standard or performance standard established in an applicable rule;

b. Any emission standard or performance standard established in an applicable installation or operating permit or stipulation agreement;

c. Any emission rate resulting from operation at design efficiency of air pollution control equipment for an emission facility;

d. Any emission rate used as the basis for a revision to this state's plan unless such a rate is shown to be in error within 90 days of the effective date of this rule in which case the corrected rate shall be used; or

e. The emission rate to which the subject emission facility is physically limited.

~~17.~~ 16. "State ambient air quality standards" means the pollutant concentrations in rule APC 1 of the Minnesota Pollution Control Agency.

~~18.~~ 17. "Subject emission facility" means:

a. An emission facility that is proposed to be constructed or modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed construction or modification and

(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

b. An emission facility that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification;

(2) Has existing restricted emissions of at least 100 tons per year of the nonattainment criteria pollutant; and

(3) The modification of which will result in a significant net increase in emissions of the nonattainment criteria pollutant. A net increase in emissions is significant if the rate of the increase is at least the rate specified below:

(a) carbon monoxide: 100 tons per year;

(b) sulfur dioxide: 40 tons per year;

(c) nitrogen oxides: 40 tons per year;

(d) nonmethane hydrocarbons: 40 tons per year;

(e) particulate matter: 25 tons per year;

(f) lead: 0.6 tons per year; or

c. A plant that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification and

(2) Which proposed modification, when considered in aggregate with X, will result in a significant net increase in emissions of the nonattainment criteria pollutant, where:

(a) X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period: any time both within the 18 months immediately prior to the date the agency receives the completed permit application for the proposed modification and

during which the area within which the plant is located was designated a nonattainment area.

(b) A net increase in emissions is significant if the rate of the increase is at least the rate specified in b.(3).

~~19.~~ 18. "Thirty-day rolling average" means the arithmetic mean of daily values calculated with each new day as the last of a 30-day period; provided however, that the arithmetic mean of daily values obtained during times of breakdown shall be excluded from the calculation.

D. Conditions for permit. Except as provided in 5., the agency shall not issue permits for any subject emission facility unless the permit applicant has satisfied the conditions in 1.-3. All permits issued for subject emission facilities shall contain the conditions set forth in 4.

1. Requirement to get offsets. Prior to constructing or modifying a subject emission facility, except an emission facility that is intended to be located in a nonattainment area for less than two years, the owner or operator of that facility shall obtain offsets for all emissions of nonattainment criteria pollutants that will result from the construction or modification. An emission facility that was intended to be located in the nonattainment area for less than two years but that remains for two years or more shall be subject to all the applicable requirements of this rule.

2. Requirement to demonstrate a net air quality benefit. Prior to constructing or modifying a subject emission facility, the permit applicant shall demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit,

as defined in ~~6.8~~ C.7.

a. For subject emission facilities located or proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon or ozone nonattainment areas, a permit applicant shall not be required to perform a modeling analysis to demonstrate net air quality benefit but shall submit to the agency a detailed statement of all information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification.

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, shall analyze the data obtained and shall submit to the agency the modeling data, the modeling analyses, a detailed description of the system of continuous emission reduction planned, and emission estimates made, together with any other information that the director needs in order to be able to determine whether a ~~new~~ net air quality benefit will result from the construction or modification. All modeling shall be performed in accordance with "Guidelines on Air Quality Models" (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978) or methods that the director finds to be comparably reliable.

3. Requirement to certify compliance. Prior to constructing or modifying a subject emission facility, the permit applicant shall certify that all emission facilities in

Minnesota which are either owned or operated in whole or in part by the same person for whom the application is made or which are operated under the common control of the same person for whom the application is made are in compliance or are on a compliance schedule.

4. Permit conditions. Any permit issued for a subject emission facility shall include a provision that

a. Limits emissions from the facility as follows:

(1) The owner or operator of a subject emission facility shall install technology that restricts emissions from the facility to the lowest achievable emission rate of the nonattainment criteria pollutants for which the facility is subject to this rule. The permit shall expressly describe the lowest achievable emission rate for the class or category of emission facility into which the subject emission facility falls.

(2) The director shall waive the requirement of (1) if the director determines that a performance standard based on design, equipment, work practice, operation or other alternative standard is more practicable than an emission rate.

b. States that the offsets that the subject emission facility has obtained in order to be issued a permit under this rule are legally enforceable by the agency and by the United States Environmental Protection Agency.

5. Exception from requirement to get offsets.

a. A permit applicant proposing to construct or modify a resource recovery facility burning municipal solid waste shall not be required to obtain sufficient offsets to demonstrate a net air quality benefit if the director determines that the

permit applicant

(1) Has made its best efforts to obtain sufficient offsets to comply with this rule and has demonstrated that such efforts were unsuccessful;

(2) Has obtained all available offsets; and

(3) Agrees to continue to seek the necessary offsets and apply them when they become available.

b. The director shall determine that the permit applicant has made its best efforts if the permit applicant demonstrates that the requirement to obtain sufficient offsets creates an undue economic hardship for the permit applicant or is technologically unachievable.

(1) If the permit applicant seeks to obtain an exception on the grounds of undue economic hardship, it shall submit to the director the information set out in rule MPCA 6(b)(5) of the Minnesota Pollution Control Agency.

(2) If the permit applicant seeks to obtain an exception on the grounds of technological unachievability, it shall submit to the director the information set out in rule MPCA 6(b)(6) of the Minnesota Pollution Control Agency.

E. Banking.

1. A person who has obtained a reduction in the amount of restricted emissions emitted from an emission facility shall be permitted to bank that reduction for future use as an offset (as allowed by this rule) under the following circumstances, limitations and conditions.

2. This rule authorizes a person to bank only those reductions in emissions that:

a. Were obtained after August 7, 1977, but prior to the effective date of this rule and that are reported to the agency within six months of the effective date of this rule; or

b. Are obtained after the effective date of this rule.

3. In order to be eligible for banking, the emission reductions shall be final and enforceable, either through the terms of a stipulation agreement, permit, or other legal instrument obtained by an owner of a facility or through a permanent, physical alteration of the facility.

4. In order to be able to bank reductions in emissions, the person obtaining those reductions shall report to the director the amount and location of the banked emissions and the time at which the banked emissions have become permanently and finally implemented. The report shall be made within six months after the reductions have become final and enforceable or within six months after this rule has been adopted, whichever is later.

F. Limitation on use of offsets. To the extent that this rule creates a program for the use of offsets or allows persons to purchase or obtain offsets, this rule shall not be construed to create a property right that requires compensation from the state should offsets later become unuseable due to a change in an applicable emission limitation or standard of the agency.

APPROVED AS TO LEGALITY

November 17 19 81

WARREN SPANNAUS, ATTORNEY GENERAL

BY Richard H. Mayland

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
NOV 18 1981
Joan Anderson Growe
Secretary of State

10:40 AM

Department of Labor and Industry
Occupational Safety and Health Division

Proposed Revisions to the Occupational Safety and Health Standards

Request for Comments

Please take notice that Russell B. Swanson, Commissioner of the Minnesota Department of Labor and Industry, has determined that the following revisions to the Occupational Safety and Health Codes shall be promulgated pursuant to Minn. Stat. § 182.655 (1980) modifying the Occupational Safety and Health Standard described below. This standard has already been proposed and adopted by the Federal Occupational Safety and Health Administration.

A copy of the standard is available by writing: Occupational Safety and Health Division, Minnesota Department of Labor and Industry, 444 Lafayette Road, St. Paul, Minnesota 55101.

Interested persons are hereby afforded a period of thirty (30) days to submit written data or comments on the proposed standard. Any person may file with the commissioner written objections to the proposed standard stating the grounds therefor; such person may request a public hearing on those objections.

Russell B. Swanson
Commissioner

Rules as Proposed

MOSHC 1 (8 MCAR § 1.7001) Minnesota Occupational Safety and Health Codes is hereby changed by incorporating and adopting by reference the following addition made to Title 29 of the Code of Federal Regulations:

Part 1910—Occupational Safety and Health Standards for General Industry as published in Part II, Volume 39, No. 125 of the Federal Register on October 24, 1978 and corrected on November 7, 1978.

"Subpart S—Electrical" published in the Federal Register, Volume 46, No. 11, on January 16, 1981. This standard establishes "Design Safety Standards for Electrical Systems" by revising Subpart S of 29 CFR Part 1910. The intent of this revised standard is to simplify and update the former standard as evidenced by the reduction from approximately 250,000 words in the National Electrical Code (NEC) to approximately 15,000 words in this standard. OSHA has determined that electrical hazards in the workplace pose a significant risk of injury or death to employees, and that these regulations, which draw heavily on the experience of the National Electrical Code, are reasonably necessary to provide protection from these hazards. The final rule places relevant requirements of the NEC into the text of the regulations, making it unnecessary for employers to refer to the NEC to determine their obligations and unnecessary for OSHA to continue to incorporate NEC by reference.

OSHA accommodates changes in technology without the need for constantly revising this subpart by writing this standard in "performance" terms rather than "specification" terms to allow alternative installation methods if they provide comparable safety to the employee.

This revised subpart covers electrical utilization systems; wiring design and protection; wiring methods, components and equipment; specific purpose equipment and installations; hazardous (classified) locations; and special systems. This revision was adopted by Federal OSHA on January 16, 1981.

The provisions of the 1978 National Electrical Code were incorporated by reference into the Minnesota Occupational Safety and Health Codes on July 7, 1980. When revised Subpart S is adopted, that incorporation by reference will be repealed.

Pollution Control Agency
Air Quality Division

Proposed Rule 6 MCAR § 4.0041 Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Notice of Withdrawal of Previous Proposed Rule and Intent to Adopt a Rule without Public Hearing

Notice is hereby given that the Minnesota Pollution Control Agency (hereinafter, "agency") withdraws its previously proposed offset rule. This rule was published at page 1603 of the April 13, 1981, *State Register* (5 S.R. 1603) and was identified as "14 MCAR § 4.0041 Offset Rule" at page 1604 of that *State Register*.

Notice is hereby given that the agency intends to adopt a revised version of the offset rule without public hearing. This revised version is published below and is identified as "6 MCAR § 4.0041 Offset rule." The agency has determined that the

proposed adoption of this rule is noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, subd. 4h (1980), as amended in 1981 Minn. Sess. Law Serv. (West) ch. 253, sec. 14.

If adopted, the proposed rule would establish a permit program for the expansion or growth of emission facilities in areas of the state identified as nonattainment areas. The permit conditions set out in the proposed rule will insure that a subject emission facility grows or expands in a manner that results in an improvement in air quality.

The agency is authorized to adopt this rule under Minn. Stat. § 116.07, specifically, Minn. Stat. § 116.07, subd. 4 and subd. 4a (1980).

The agency has prepared a statement of need and reasonableness that describes the agency's reasons for each provision of the proposed rule and identifies the data and information relied upon by the agency to support the proposed rule. A copy of the statement of need and reasonableness and of the proposed rule are available and may be obtained by contacting:

Mr. Douglas Benson
Division of Air Quality
Minnesota Pollution Control Agency
1935 West County Road B-2
Roseville, Minnesota 55113
[Telephone: (612) 296-7740].

Persons interested in this rule have until September 25, 1981, to submit comments on the proposed rule. In order to be considered, the comments must be written and must be received by the agency by 4:30 p.m. on September 25, 1981. The proposed rule may be modified if the data and views submitted to the agency warrant modifications and the modifications do not result in a substantial change in the proposed language of the rule.

If, during the comment period, seven or more persons submit to the agency a written request for a hearing on the proposed rule, the agency shall proceed to schedule a public hearing before it adopts the proposed rule. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, subds. 4-4f, as amended in 1981 Minn. Sess. Law Serv. (West) ch. 253, sec. 8-13.

Persons who wish to submit comments or to request a public hearing should submit such comments or requests to Mr. Douglas Benson at the address above. The agency asks that persons requesting a public hearing identify the particular provisions they object to, their suggested modifications to the proposed rule and the reasons and data relied on to support the suggested modifications.

In the event a hearing is required, a new notice of hearing will be mailed out and published in the *State Register*. Unless seven or more persons submit written requests for a public hearing, a public hearing will not be held and the agency will consider the adoption of the proposed rule at the October, 1981, agency meeting or as soon thereafter as possible. Persons who wish to receive a copy of the final rule as proposed for adoption should submit a written statement of such request to Mr. Douglas Benson at the address noted above.

After adopting the final rule without a public hearing, the agency will submit the proposed rule, this notice, the statement of need and reasonableness, all written comments received, and the final rule as adopted to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General should submit a written statement of such request to Mr. Douglas Benson at the address noted above.

Please be advised that Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1980) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

August 10, 1981

Louis Breimhurst, Executive Director
Minnesota Pollution Control Agency

Rule as Proposed (all new material)

6 MCAR § 4.0041 Offset rule.

A. Purpose. The purpose of this rule is to establish conditions to be included in permits which the agency issues, in accordance with the requirements of Minn. Stat. § 116.07, subd. 4a, to persons who propose to construct or modify certain emission facilities in nonattainment areas. This rule may be known as the "offset rule."

B. Applicability.

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in C.18.

2. This rule does not apply in nonattainment areas of the state for which a plan has been developed and approved by the agency and the United States Environmental Protection Agency as providing sufficient emission reductions to both:

a. Bring the area into attainment with the national primary ambient air quality standards by December 31, 1982; and

b. Allow for an increase in emissions in the nonattainment area during that period of time the area is designated nonattainment.

C. Definitions. The definitions in rule APC 2 of the Minnesota Pollution Control Agency apply to the terms used in this rule unless the terms are defined herein. For the purposes of this rule, the following words have the meanings defined below.

1. "Air quality control region" means any of the seven geographic areas specified by the agency for administrative purposes based on jurisdictional boundaries, urban and industrial concentrations, climate, meteorology, topography, and other factors affecting the interchange and diffusion of pollutants in the atmosphere. These are identified in 40 Code of Federal Regulations, Section 52.1221 (1980).

2. "Criteria pollutant" means any of the following: sulfur dioxide; particulate matter; nitrogen oxides; carbon monoxide; ozone; nonmethane hydrocarbons; and lead.

3. "Fugitive emissions" means those pollutant discharges which do not pass through a stack, chimney, vent, or other functionally equivalent opening and which discharges are quantifiable by methods in "Compilation of Air Pollutant Emission Factors" (OAQPS AP-42, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980), or methods that the director determines are comparably reliable.

4. "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.

5. "Lowest achievable emission rate" means, for any emission facility, the most stringent emission limitation or standard of performance that is achievable in practice by that class or category of emission facility. In no case shall the lowest achievable emission rate be construed to allow emissions in excess of any applicable standard. The emission limitation specified in any other state's plan shall be presumed to be achievable in practice unless a person demonstrates to the director that the emission limitation or standard of performance is not achievable for reasons other than economic costs.

6. "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in an increase in emissions. As used in this rule, the term modification or modified does not include:

a. Routine maintenance, repair or replacement;

b. Changes in method or hours of operation unless the changes are disallowed by an agency rule, stipulation agreement, permit or order, or by a court order;

c. Increases in production rates unless the increases exceed the operating design capacity of any emission facility;

d. Use of a fuel generated from municipal solid waste in a steam generating unit;

e. A change in ownership; or

f. Use of a fuel or raw material in an emission facility that:

(1) Was designed to accommodate the use prior to December 21, 1976; or

(2) Is commencing or has commenced the fuel or raw material use pursuant to an order under sections 2(a) and (b) of the Energy Supply and Environment Coordination Act of 1974, 15 United States Code, Section 792 (1980), under a natural gas curtailment plan pursuant to the Federal Power Act, 16 United States Code, Section 791a et seq. (1980), or under section 125 of the Clean Air Act of 1977, 42 United States Code, Section 7425 (1980).

7. "National ambient air quality standards" means the primary (health related) and secondary (welfare related) pollutant concentrations established by the Administrator of the United States Environmental Protection Agency, pursuant to section 109 of the Clean Air Act of 1977, 42 United States Code, Section 7409 (1980).

8. "Net air quality benefit" means that, in the area that would be affected by the subject emission facility, offsets proposed to be obtained by a person pursuant to D.1. are sufficient to result in a net reduction, on both a pounds per hour and tons per year basis, in both the rate of emissions and the concentration of nonattainment criteria pollutants.

a. The area that would be affected by the subject emission facility is defined as follows:

(1) For subject emission facilities proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon, or ozone nonattainment areas, the area that would be affected by the subject emission facility is the air quality control region in which the subject emission facility is proposed to be located; and

(2) For subject emission facilities proposed to be located in sulfur dioxide, particulate matter, or lead nonattainment areas, the area that would be affected by the subject emission facility is the area that the modeling analysis, performed in accordance with D.2., demonstrates to be affected by the subject emission facility.

b. The director shall find that there is a net reduction in both the rate of emissions and the concentration of nonattainment criteria pollutants if Y divided by X is equal to or greater than 1.1, where:

(1) X = the restricted emissions to which the subject emission facility will be limited and

(2) Y = the offsets to be provided by the person proposing the subject emission facility.

9. "Net increase in emissions" means the net number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the net increase in emissions, the director

a. Shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but

b. Shall give a credit for

(1) All legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction on nonattainment criteria pollutant discharges that would result from installing required pollution control equipment); and

(2) Any other restrictions on or reductions of the nonattainment criteria pollutant discharges that the person proposing the subject emission facility both obtains within the same plant and agrees to include within the terms of any permit issued for the subject emission facility.

10. "Nonattainment area" means any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard.

11. "Nonattainment criteria pollutants" means as follows:

a. For all nonattainment areas except ozone nonattainment areas, nonattainment criteria pollutant means the criteria pollutant for which an area is designated nonattainment; and

b. For ozone nonattainment areas, nonattainment criteria pollutant means nonmethane hydrocarbons.

12. "Offsets" means any documented reductions in restricted emissions of nonattainment criteria pollutants that:

a. Are legally enforceable and

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

b. Are achieved after August 7, 1977, or after the date of completion of the emission inventory used by the agency in developing the most recent revision to the plan, whichever is later.

13. "Plan" or "state implementation plan" means any state air quality control laws, rules, permits, stipulation agreements, and procedures, developed to insure compliance with state and national ambient air quality standards.

14. "Plant" means any assemblage of buildings, structures or emission facilities, on one or more adjacent or contiguous properties that are under common ownership or control and that are identified by the same two digit Standard Industrial Code as specified in the Standard Industrial Classification Manual, 1972, as prepared by the Executive Office of the President, Office of Management and Budget and as amended by the 1977 Supplement.

15. "Resource recovery facility" means any emission facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. An energy conversion facility must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this rule. In calculating whether solid waste is used to provide more than 50 percent of the heat input, a 30-day rolling average shall be used.

16. "Restricted emissions" means the maximum nonattainment criteria pollutant discharges, including fugitive emissions, which may be emitted from an emission facility based on the most stringent of the following:

a. Any emission standard or performance standard established in an applicable rule;

b. Any emission standard or performance standard established in an applicable installation or operating permit or stipulation agreement;

c. Any emission rate resulting from operation at design efficiency of air pollution control equipment for an emission facility;

d. Any emission rate used as the basis for a revision to this state's plan unless such a rate is shown to be in error within 90 days of the effective date of this rule in which case the corrected rate shall be used; or

e. The emission rate to which the subject emission facility is physically limited.

17. "State ambient air quality standards" means the pollutant concentrations in rule APC 1 of the Minnesota Pollution Control Agency.

18. "Subject emission facility" means:

a. An emission facility that is proposed to be constructed or modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed construction or modification and

(2) The construction or modification of which will result in a gross increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

b. An emission facility that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification;

(2) Has existing restricted emissions of at least 100 tons per year of the nonattainment criteria pollutant; and

(3) The modification of which will result in a significant net increase in emissions of the nonattainment criteria pollutant. A net increase in emissions is significant if the rate of the increase is at least the rate specified below:

(a) carbon monoxide:	100 tons per year;
(b) sulfur dioxide:	40 tons per year;
(c) nitrogen oxides:	40 tons per year;
(d) nonmethane hydrocarbons:	40 tons per year;
(e) particulate matter:	25 tons per year;
(f) lead:	0.6 tons per year; or

c. A plant that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification and

(2) Which proposed modification, when considered in aggregate with X, will result in a significant net increase in emissions of the nonattainment criteria pollutant, where:

(a) X = the gross increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period: any time both within the 18 months immediately prior to the date the agency receives the completed permit application for the proposed modification and during which the area within which the plant is located was designated a nonattainment area.

(b) A net increase in emissions is significant if the rate of the increase is at least the rate specified in b.(3).

19. "Thirty-day rolling average" means the arithmetic mean of daily values calculated with each new day as the last of a 30-day period; provided however, that the arithmetic mean of daily values obtained during times of breakdown shall be excluded from the calculation.

D. Conditions for permit. Except as provided in 5., the agency shall not issue permits for any subject emission facility unless the permit applicant has satisfied the conditions in 1.-3. All permits issued for subject emission facilities shall contain the conditions set forth in 4.

1. Requirement to get offsets. Prior to constructing or modifying a subject emission facility, except an emission facility that is intended to be located in a nonattainment area for less than two years, the owner or operator of that facility shall obtain offsets for all emissions of nonattainment criteria pollutants that will result from the construction or modification. An emission facility that was intended to be located in the nonattainment area for less than two years but that remains for two years or more shall be subject to all the applicable requirements of this rule.

2. Requirement to demonstrate a net air quality benefit. Prior to constructing or modifying a subject emission facility, the permit applicant shall demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit, as defined in C.8.

a. For subject emission facilities located or proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon or ozone nonattainment areas, a permit applicant shall not be required to perform a modeling analysis to demonstrate net air quality benefit but shall submit to the agency a detailed statement of all information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification.

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, shall analyze the data obtained and shall submit to the agency the modeling data, the modeling analyses, a detailed description of the system of continuous emission reduction planned, and emission estimates made, together with any other information that the director needs in order to be able to determine whether a new air quality benefit will result from the construction or modification. All modeling shall be performed in accordance with "Guidelines on Air Quality Models" (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978) or methods that the director finds to be comparably reliable.

3. Requirement to certify compliance. Prior to constructing or modifying a subject emission facility, the permit applicant shall certify that all emission facilities in Minnesota which are either owned or operated in whole or in part by the same person for whom the application is made or which are operated under the common control of the same person for whom the application is made are in compliance or are on a compliance schedule.

4. Permit conditions. Any permit issued for a subject emission facility shall include a provision that

a. Limits emissions from the facility as follows:

(1) The owner or operator of a subject emission facility shall install technology that restricts emissions from the facility to the lowest achievable emission rate of the nonattainment criteria pollutants for which the facility is subject to this rule. The permit shall expressly describe the lowest achievable emission rate for the class or category of emission facility into which the subject emission facility falls.

(2) The director shall waive the requirement of (1) if the director determines that a performance standard based on design, equipment, work practice, operation or other alternative standard is more practicable than an emission rate.

b. States that the offsets that the subject emission facility has obtained in order to be issued a permit under this rule are legally enforceable by the agency and by the United States Environmental Protection Agency.

5. Exception from requirement to get offsets.

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a. A permit applicant proposing to construct or modify a resource recovery facility burning municipal solid waste shall not be required to obtain sufficient offsets to demonstrate a net air quality benefit if the director determines that the permit applicant

(1) Has made its best efforts to obtain sufficient offsets to comply with this rule and has demonstrated that such efforts were unsuccessful;

(2) Has obtained all available offsets; and

(3) Agrees to continue to seek the necessary offsets and apply them when they become available.

b. The director shall determine that the permit applicant has made its best efforts if the permit applicant demonstrates that the requirement to obtain sufficient offsets creates an undue economic hardship for the permit applicant or is technologically unachievable.

(1) If the permit applicant seeks to obtain an exception on the grounds of undue economic hardship, it shall submit to the director the information set out in rule MPCA 6(b)(5) of the Minnesota Pollution Control Agency.

(2) If the permit applicant seeks to obtain an exception on the grounds of technological unachievability, it shall submit to the director the information set out in rule MPCA 6(b)(6) of the Minnesota Pollution Control Agency.

E. Banking.

1. A person who has obtained a reduction in the amount of restricted emissions emitted from an emission facility shall be permitted to bank that reduction for future use as an offset (as allowed by this rule) under the following circumstances, limitations and conditions.

2. This rule authorizes a person to bank only those reductions in emissions that:

a. Were obtained after August 7, 1977, but prior to the effective date of this rule and that are reported to the agency within six months of the effective date of this rule; or

b. Are obtained after the effective date of this rule.

3. In order to be eligible for banking, the emission reductions shall be final and enforceable, either through the terms of a stipulation agreement, permit, or other legal instrument obtained by an owner of a facility or through a permanent, physical alteration of the facility.

4. In order to be able to bank reductions in emissions, the person obtaining those reductions shall report to the director the amount and location of the banked emissions and the time at which the banked emissions have become permanently and finally implemented. The report shall be made within six months after the reductions have become final and enforceable or within six months after this rule has been adopted, whichever is later.

F. Limitation on use of offsets. To the extent that this rule creates a program for the use of offsets or allows persons to purchase or obtain offsets, this rule shall not be construed to create a property right that requires compensation from the state should offsets later become unuseable due to a change in an applicable emission limitation or standard of the agency.

6 MCAR § 4.0041 C.13. ". . . any state air quality control laws, rules, permits, stipulation agreements, and procedures developed to insure compliance with state and national ambient air quality standards.

6 MCAR § 4.0041 C.14. Standard Industrial Classification Manual, 1972 and 1977 Supplement.

6 MCAR § 4.0041 C.16. ". . . maximum nonattainment criteria pollutant discharges . . . which may be emitted from an emission facility based on the most stringent of the following:

a. any emission standard or performance standard established in an applicable rule . . . "

6 MCAR § 4.0041 C.17. Rule APC 1 of the Minnesota Pollution Control Agency

6 MCAR § 4.0041 D.2.b. "Guidelines on Air Quality Models." (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978).

6 MCAR § 4.0041 D.5.b.(1) Rule MPCA 6 (b) (5)

6 MCAR § 4.0041 D.5.b.(2) Rule MPCA 6 (b) (6)

AG copy

Pollution Control Agency

Air Quality Division

Adopted Rule Governing the Agency's Permit Program for Growth or Expansion of Industry in Nonattainment Areas

Rule as Adopted

6 MCAR S 4.0041 Offset rule.

A. Purpose. The purpose of this rule is to establish conditions to be included in permits which the agency issues, in accordance with the requirements of Minn. Stat. S 116.07, subd. 4a, to persons who propose to construct or modify certain emission facilities in nonattainment areas. This rule may be known as the "offset rule."

B. Applicability.

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in ~~C.18~~ C.17. Order Adopt. 4

2. This rule does not apply in nonattainment areas of the state for which a plan has been developed and approved by the agency and the United States Environmental Protection Agency as providing sufficient emission reductions to both:

a. Bring the area into attainment with the national primary ambient air quality standards by December 31, 1982; and

b. Allow for an increase in emissions in the nonattainment area during that period of time the area is designated nonattainment.

C. Definitions. The definitions in rule APC 2 of the Minnesota Pollution Control Agency apply to the terms used in this rule unless the terms are defined herein. For the purposes of this rule, the following words have the meanings defined below.

1. "Air quality control region" means any of the seven geographic areas specified by the agency for administrative purposes based on jurisdictional boundaries, urban and industrial concentrations, climate, meteorology, topography, and other factors affecting the interchange and diffusion of pollutants in the atmosphere. These are identified in 40 Code of Federal Regulations, Section 52.1221 (1980).

2. "Criteria pollutant" means any of the following: sulfur dioxide; particulate matter; nitrogen oxides; carbon monoxide; ozone; nonmethane hydrocarbons; and lead.

3. "Fugitive emissions" means those pollutant discharges which do not pass through a stack, chimney, vent, or other functionally equivalent opening and which discharges are quantifiable by methods in "Compilation of Air Pollutant Emission Factors" (OAQPS AP-42, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980), or methods that the director determines are comparably reliable.

~~4. "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the~~

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~~subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.~~

~~5.~~ 4. "Lowest achievable emission rate" means, for any emission facility, the most stringent emission limitation or standard of performance that is achievable in practice by that class or category of emission facility. In no case shall the lowest achievable emission rate be construed to allow emissions in excess of any applicable standard. The emission limitation specified in any other state's plan shall be presumed to be achievable in practice unless a person demonstrates to the director that the emission limitation or standard of performance is not achievable for reasons other than economic costs.

~~6.~~ 5. "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in ~~an~~ a net increase in emissions. As used in this rule, the term modification or modified does not include:

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a. Routine maintenance, repair or replacement;

b. Changes in method or hours of operation unless the changes are disallowed by an agency rule, stipulation agreement, permit or order, or by a court order;

c. Increases in production rates unless the increases

exceed the operating design capacity of any emission facility;

d. Use of a fuel generated from municipal solid waste in a steam generating unit;

e. A change in ownership; or

f. Use of a fuel or raw material in an emission facility that:

(1) Was designed to accommodate the use prior to December 21, 1976; or

(2) Is commencing or has commenced the fuel or raw material use pursuant to an order under sections 2(a) and (b) of the Energy Supply and ~~Environment~~ Environmental Coordination Act of 1974, 15 United States Code, Section 792 (1980), under a natural gas curtailment plan pursuant to the Federal Power Act, 16 United States Code, Section 791a et seq. (1980), or under section 125 of the Clean Air Act of 1977, 42 United States Code, Section 7425 (1980).

~~7.~~ 6. "National ambient air quality standards" means the primary (health related) and secondary (welfare related) pollutant concentrations established by the Administrator of the United States Environmental Protection Agency, pursuant to section 109 of the Clean Air Act of 1977, 42 United States Code, Section 7409 (1980).

~~8.~~ 7. "Net air quality benefit" means that, in the area that would be affected by the subject emission facility, offsets proposed to be obtained by a person pursuant to D.1. are sufficient to result in a net reduction, on both a pounds per hour and tons per year basis, in both the rate of emissions and the concentration of nonattainment criteria pollutants.

a. The area that would be affected by the subject emission facility is defined as follows:

(1) For subject emission facilities proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon, or ozone nonattainment areas, the area that would be affected by the subject emission facility is the air quality control region in which the subject emission facility is proposed to be located; and

(2) For subject emission facilities proposed to be located in sulfur dioxide, particulate matter, or lead nonattainment areas, the area that would be affected by the subject emission facility is the area that the modeling analysis, performed in accordance with D.2., demonstrates to be affected by the subject emission facility.

b. The director shall find that there is a net reduction in both the rate of emissions and the concentration of nonattainment criteria pollutants if Y divided by X is equal to or greater than 1.1, where:

(1) X = the restricted emissions to which the subject emission facility will be limited and

(2) Y = the offsets to be provided by the person proposing the subject emission facility.

~~9.~~ 8. "Net increase in emissions" means the net number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the net increase in emissions, the director

a. Shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but

b. Shall give a credit for

(1) All legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction on nonattainment criteria pollutant discharges that would result from installing required pollution control equipment); and

(2) Any other restrictions on or reductions of the nonattainment criteria pollutant discharges that the person proposing the subject emission facility both obtains within the same plant and agrees to include within the terms of any permit issued for the subject emission facility.

~~10.~~ 9. "Nonattainment area" means any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard.

~~11.~~ 10. "Nonattainment criteria pollutants" means as follows:

a. For all nonattainment areas except ozone nonattainment areas, nonattainment criteria pollutant means the criteria pollutant for which an area is designated nonattainment; and

b. For ozone nonattainment areas, nonattainment criteria pollutant means nonmethane hydrocarbons.

~~12.~~ 11. "Offsets" means any documented reductions in restricted emissions of nonattainment criteria pollutants that:

a. Are legally enforceable and

b. Are achieved after August 7, 1977, or after the

date of completion of the emission inventory used by the agency in developing the most recent revision to the plan, whichever is later.

~~13.~~ 12. "Plan" or "state implementation plan" means any state air quality control laws, rules, permits, stipulation agreements, and procedures, developed to insure compliance with state and national ambient air quality standards.

~~14.~~ 13. "Plant" means any assemblage of buildings, structures or emission facilities, on one or more adjacent or contiguous properties that are under common ownership or control and that are identified by the same two digit Standard Industrial Code as specified in the Standard Industrial Classification Manual, 1972, as prepared by the Executive Office of the President, Office of Management and Budget and as amended by the 1977 Supplement.

~~15.~~ 14. "Resource recovery facility" means any emission facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. An energy conversion facility must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this rule. In calculating whether solid waste is used to provide more than 50 percent of the heat input, a 30-day rolling average shall be used.

~~16.~~ 15. "Restricted emissions" means the maximum nonattainment criteria pollutant discharges, including fugitive emissions, which may be emitted from an emission facility based on the most stringent of the following:

a. Any emission standard or performance standard established in an applicable rule;

b. Any emission standard or performance standard established in an applicable installation or operating permit or stipulation agreement;

c. Any emission rate resulting from operation at design efficiency of air pollution control equipment for an emission facility;

d. Any emission rate used as the basis for a revision to this state's plan unless such a rate is shown to be in error within 90 days of the effective date of this rule in which case the corrected rate shall be used; or

e. The emission rate to which the subject emission facility is physically limited.

~~17.~~ 16. "State ambient air quality standards" means the pollutant concentrations in rule APC 1 of the Minnesota Pollution Control Agency.

~~18.~~ 17. "Subject emission facility" means:

a. An emission facility that is proposed to be constructed or modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed construction or modification and

(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

b. An emission facility that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification;

(2) Has existing restricted emissions of at least 100 tons per year of the nonattainment criteria pollutant; and

(3) The modification of which will result in a significant net increase in emissions of the nonattainment criteria pollutant. A net increase in emissions is significant if the rate of the increase is at least the rate specified below:

(a) carbon monoxide: 100 tons per year;

(b) sulfur dioxide: 40 tons per year;

(c) nitrogen oxides: 40 tons per year;

(d) nonmethane hydrocarbons: 40 tons per year;

(e) particulate matter: 25 tons per year;

(f) lead: 0.6 tons per year; or

c. A plant that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification and

(2) Which proposed modification, when considered in aggregate with X, will result in a significant net increase in emissions of the nonattainment criteria pollutant, where:

(a) X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period: any time both within the 18 months immediately prior to the date the agency receives the completed permit application for the proposed modification and

FRF App. B

during which the area within which the plant is located was designated a nonattainment area.

(b) A net increase in emissions is significant if the rate of the increase is at least the rate specified in b.(3).

~~19.~~ 18. "Thirty-day rolling average" means the arithmetic mean of daily values calculated with each new day as the last of a 30-day period; provided however, that the arithmetic mean of daily values obtained during times of breakdown shall be excluded from the calculation.

D. Conditions for permit. Except as provided in 5., the agency shall not issue permits for any subject emission facility unless the permit applicant has satisfied the conditions in 1.-3. All permits issued for subject emission facilities shall contain the conditions set forth in 4.

1. Requirement to get offsets. Prior to constructing or modifying a subject emission facility, except an emission facility that is intended to be located in a nonattainment area for less than two years, the owner or operator of that facility shall obtain offsets for all emissions of nonattainment criteria pollutants that will result from the construction or modification. An emission facility that was intended to be located in the nonattainment area for less than two years but that remains for two years or more shall be subject to all the applicable requirements of this rule.

2. Requirement to demonstrate a net air quality benefit. Prior to constructing or modifying a subject emission facility, the permit applicant shall demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit,

as defined in ~~6.~~8 C.7.

a. For subject emission facilities located or proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon or ozone nonattainment areas, a permit applicant shall not be required to perform a modeling analysis to demonstrate net air quality benefit but shall submit to the agency a detailed statement of all information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification.

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, shall analyze the data obtained and shall submit to the agency the modeling data, the modeling analyses, a detailed description of the system of continuous emission reduction planned, and emission estimates made, together with any other information that the director needs in order to be able to determine whether a ~~new~~ net air quality benefit will result from the construction or modification. All modeling shall be performed in accordance with "Guidelines on Air Quality Models" (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978) or methods that the director finds to be comparably reliable.

3. Requirement to certify compliance. Prior to constructing or modifying a subject emission facility, the permit applicant shall certify that all emission facilities in

Minnesota which are either owned or operated in whole or in part by the same person for whom the application is made or which are operated under the common control of the same person for whom the application is made are in compliance or are on a compliance schedule.

4. Permit conditions. Any permit issued for a subject emission facility shall include a provision that

a. Limits emissions from the facility as follows:

(1) The owner or operator of a subject emission facility shall install technology that restricts emissions from the facility to the lowest achievable emission rate of the nonattainment criteria pollutants for which the facility is subject to this rule. The permit shall expressly describe the lowest achievable emission rate for the class or category of emission facility into which the subject emission facility falls.

(2) The director shall waive the requirement of (1) if the director determines that a performance standard based on design, equipment, work practice, operation or other alternative standard is more practicable than an emission rate.

b. States that the offsets that the subject emission facility has obtained in order to be issued a permit under this rule are legally enforceable by the agency and by the United States Environmental Protection Agency.

5. Exception from requirement to get offsets.

a. A permit applicant proposing to construct or modify a resource recovery facility burning municipal solid waste shall not be required to obtain sufficient offsets to demonstrate a net air quality benefit if the director determines that the

permit applicant

(1) Has made its best efforts to obtain sufficient offsets to comply with this rule and has demonstrated that such efforts were unsuccessful;

(2) Has obtained all available offsets; and

(3) Agrees to continue to seek the necessary offsets and apply them when they become available.

b. The director shall determine that the permit applicant has made its best efforts if the permit applicant demonstrates that the requirement to obtain sufficient offsets creates an undue economic hardship for the permit applicant or is technologically unachievable.

(1) If the permit applicant seeks to obtain an exception on the grounds of undue economic hardship, it shall submit to the director the information set out in rule MPCA 6(b)(5) of the Minnesota Pollution Control Agency.

(2) If the permit applicant seeks to obtain an exception on the grounds of technological unachievability, it shall submit to the director the information set out in rule MPCA 6(b)(6) of the Minnesota Pollution Control Agency.

E. Banking.

1. A person who has obtained a reduction in the amount of restricted emissions emitted from an emission facility shall be permitted to bank that reduction for future use as an offset (as allowed by this rule) under the following circumstances, limitations and conditions.

2. This rule authorizes a person to bank only those reductions in emissions that:

a. Were obtained after August 7, 1977, but prior to the effective date of this rule and that are reported to the agency within six months of the effective date of this rule; or

b. Are obtained after the effective date of this rule.

3. In order to be eligible for banking, the emission reductions shall be final and enforceable, either through the terms of a stipulation agreement, permit, or other legal instrument obtained by an owner of a facility or through a permanent, physical alteration of the facility.

4. In order to be able to bank reductions in emissions, the person obtaining those reductions shall report to the director the amount and location of the banked emissions and the time at which the banked emissions have become permanently and finally implemented. The report shall be made within six months after the reductions have become final and enforceable or within six months after this rule has been adopted, whichever is later.

F. Limitation on use of offsets. To the extent that this rule creates a program for the use of offsets or allows persons to purchase or obtain offsets, this rule shall not be construed to create a property right that requires compensation from the state should offsets later become unuseable due to a change in an applicable emission limitation or standard of the agency.

6 MCAR S 4.0041 C.13. "...any state air quality control laws, rules, permits, stipulation agreements, and procedures developed to insure compliance with state and national ambient air quality standards."

6 MCAR S 4.0041 C.14. Standard Industrial Classification Manual, 1972 and 1977 Supplement.

6 MCAR S 4.0041 C.16. "...maximum nonattainment criteria pollutant discharges... which may be emitted from an emission facility based on the most stringent of the following:
a. any emission standard or performance standard established in an applicable rule..."

6 MCAR S 4.0041 C.17. Rule APC 1 of the Minnesota Pollution Control Agency

6 MCAR S 4.0041 D.2.b. "Guidelines on Air Quality Models." (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978).

6 MCAR S 4.0041 D.5.b.(1) Rule MPCA 6 (b) (5)

6 MCAR S 4.0041 D.5.b.(2) Rule MPCA 6 (b) (6)

OFFICE OF THE REVISOR OF STATUTES

Certificate of Approval of Adopted Rules

11/10/81
AR0012

Agency: Pollution Control Agency
Air Quality Division

Rule Numbers: 6 MCAR S 4.0041

Rule Title: Adopted Rule Governing the Agency's Permit Program for Growth or Expansion of Industry in Nonattainment Areas

Type of Rules: Permanent X

Temporary _____

Documents Incorporated by Reference:

6 MCAR S 4.0041 C.	Rule APC 2 of the Minnesota Pollution Control Agency
6 MCAR S 4.0041 C.1.	40 C.F.R. S 52.1221 (1980)
6 MCAR S 4.0041 C.3.	"Compilation of Air Pollutant Emission Factors." OAQPS AP-42 U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980
6 MCAR S 4.0041 C.6.f.(2)	15 U.S.C. S 792 (1980) 16 U.S.C. S 791a et. seq. (1980) 42 U.S.C. S 7425 (1980)
6 MCAR S 4.0041 C.7.	Pollutant concentrations established by the Administrator of the U.S. Environmental Protection Agency Source: 40 C.F.R. Part 50
6 MCAR S 4.0041 C.10.	"Any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard." Existing areas are in 40 C.F.R. 52.1226

The attached Rules are approved as to form.

(over)

Steven C. Cross
Revisor of Statutes

Name: Lorna Breiter
Lorna Breiter

Title: Assistant Revisor

Phone: 296-2778

OFFICE OF THE REVISOR OF STATUTES
Disapproval of Form of Rules

11/5/81
AR0012

__X__ The form of the attached rules is not approved. The revisor requests the changes described below before the rules will be approved.

Page 1, line 1, delete "Proposed (all new material)", after "as" insert "Adopted"

Page 3, line 11, after "in" insert "~~an~~ a net increase in"

Page 3, line 29, after "and" insert and strike "Environment" which appeared in the State Register and insert "Environmental"

Page 8, line 34, strike "C.8." and insert "C.7."

Page 9, line 16, after "a" insert and strike "new" which appeared in the State Register, and insert "net"

Steven C. Cross
Revisor of Statutes

Name: Lorna M. Breiter
Lorna M. Breiter

Title: Assistant Revisor

Phone: 296-2778

____ The changes requested by the revisor are approved by the agency.

____ The changes requested by the revisor are not approved by the agency

Agency's Representative

____ The attorney general agrees that the changes requested by the revisor are form changes, not substantive changes.

Assistant Attorney General

Rule as Proposed (all new material)

6 MCAR S 4.0041 Offset rule.

A. Purpose. The purpose of this rule is to establish conditions to be included in permits which the agency issues, in accordance with the requirements of Minn. Stat. S 116.07, subd. 4a, to persons who propose to construct or modify certain emission facilities in nonattainment areas. This rule may be known as the "offset rule."

B. Applicability.

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in ~~C.10.~~ C.17.

2. This rule does not apply in nonattainment areas of the state for which a plan has been developed and approved by the agency and the United States Environmental Protection Agency as providing sufficient emission reductions to both:

a. Bring the area into attainment with the national primary ambient air quality standards by December 31, 1982; and

b. Allow for an increase in emissions in the nonattainment area during that period of time the area is designated nonattainment.

C. Definitions. The definitions in rule APC 2 of the Minnesota Pollution Control Agency apply to the terms used in

this rule unless the terms are defined herein. For the purposes of this rule, the following words have the meanings defined below.

1. "Air quality control region" means any of the seven geographic areas specified by the agency for administrative purposes based on jurisdictional boundaries, urban and industrial concentrations, climate, meteorology, topography, and other factors affecting the interchange and diffusion of pollutants in the atmosphere. These are identified in 40 Code of Federal Regulations, Section 52.1221 (1980).

2. "Criteria pollutant" means any of the following: sulfur dioxide; particulate matter; nitrogen oxides; carbon monoxide; ozone; nonmethane hydrocarbons; and lead.

3. "Fugitive emissions" means those pollutant discharges which do not pass through a stack, chimney, vent, or other functionally equivalent opening and which discharges are quantifiable by methods in "Compilation of Air Pollutant Emission Factors" (OAQPS AP-42, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980), or methods that the director determines are comparably reliable.

~~4. "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.~~

4. ~~5.~~ "Lowest achievable emission rate" means, for any emission facility, the most stringent emission limitation or

standard of performance that is achievable in practice by that class or category of emission facility. In no case shall the lowest achievable emission rate be construed to allow emissions in excess of any applicable standard. The emission limitation specified in any other state's plan shall be presumed to be achievable in practice unless a person demonstrates to the director that the emission limitation or standard of performance is not achievable for reasons other than economic costs.

5. ~~6.~~ "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in emissions. As used in this rule, the term modification or modified does not include:

a. Routine maintenance, repair or replacement;

b. Changes in method or hours of operation unless the changes are disallowed by an agency rule, stipulation agreement, permit or order, or by a court order;

c. Increases in production rates unless the increases exceed the operating design capacity of any emission facility;

d. Use of a fuel generated from municipal solid waste in a steam generating unit;

e. A change in ownership; or

f. Use of a fuel or raw material in an emission facility that:

(1) Was designed to accommodate the use prior to December 21, 1976; or

(2) Is commencing or has commenced the fuel or raw material use pursuant to an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974, 15 United States Code, Section 792 (1980), under a natural gas curtailment plan pursuant to the Federal Power Act, 16 United States Code, Section 791a et seq. (1980), or under section 125 of the Clean Air Act of 1977, 42 United States Code, Section 7425 (1980).

6. ~~7.~~ "National ambient air quality standards" means the primary (health related) and secondary (welfare related)

pollutant concentrations established by the Administrator of the United States Environmental Protection Agency, pursuant to section 109 of the Clean Air Act of 1977, 42 United States Code, Section 7409 (1980).

7. ~~8.~~ "Net air quality benefit" means that, in the area that would be affected by the subject emission facility, offsets proposed to be obtained by a person pursuant to D.1. are sufficient to result in a net reduction, on both a pounds per hour and tons per year basis, in both the rate of emissions and the concentration of nonattainment criteria pollutants.

a. The area that would be affected by the subject emission facility is defined as follows:

(1) For subject emission facilities proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon, or ozone nonattainment areas, the area that would be affected by the subject emission facility is the air quality control region in which the subject emission facility is proposed to be located; and

(2) For subject emission facilities proposed to be located in sulfur dioxide, particulate matter, or lead nonattainment areas, the area that would be affected by the subject emission facility is the area that the modeling analysis, performed in accordance with D.2., demonstrates to be affected by the subject emission facility.

b. The director shall find that there is a net reduction in both the rate of emissions and the concentration of nonattainment criteria pollutants if Y divided by X is equal to or greater than 1.1, where:

(1) X = the restricted emissions to which the subject emission facility will be limited and

(2) Y = the offsets to be provided by the person proposing the subject emission facility.

8. ~~9.~~ "Net increase in emissions" means the net number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the net increase in emissions, the director

a. Shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but

b. Shall give a credit for

(1) All legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction on nonattainment criteria pollutant discharges that would result from installing required pollution control equipment); and

(2) Any other restrictions on or reductions of the nonattainment criteria pollutant discharges that the person proposing the subject emission facility both obtains within the same plant and agrees to include within the terms of any permit issued for the subject emission facility.

9. ~~10.~~ "Nonattainment area" means any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard.

10. ~~11.~~ "Nonattainment criteria pollutants" means as follows:

a. For all nonattainment areas except ozone nonattainment areas, nonattainment criteria pollutant means the criteria pollutant for which an area is designated nonattainment; and

b. For ozone nonattainment areas, nonattainment criteria pollutant means nonmethane hydrocarbons.

11. ~~12.~~ "Offsets" means any documented reductions in restricted emissions of nonattainment criteria pollutants that:

a. Are legally enforceable and

b. Are achieved after August 7, 1977, or after the date of completion of the emission inventory used by the agency in developing the most recent revision to the plan, whichever is later.

12. ~~13.~~ "Plan" or "state implementation plan" means any state air quality control laws, rules, permits, stipulation agreements, and procedures, developed to insure compliance with state and national ambient air quality standards.

13. ~~14.~~ "Plant" means any assemblage of buildings, structures or emission facilities, on one or more adjacent or contiguous properties that are under common ownership or control and that are identified by the same two digit Standard Industrial Code as specified in the Standard Industrial Classification Manual, 1972, as prepared by the Executive Office of the President, Office of Management and Budget and as amended by the 1977 Supplement.

14. ~~15.~~ "Resource recovery facility" means any emission facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. An energy conversion facility must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this rule. In calculating whether solid waste is used to provide more than 50 percent of the heat input, a 30-day rolling average shall be used.

15. ~~16.~~ "Restricted emissions" means the maximum nonattainment criteria pollutant discharges, including fugitive emissions, which may be emitted from an emission facility based on the most stringent of the following:

a. Any emission standard or performance standard established in an applicable rule;

b. Any emission standard or performance standard established in an applicable installation or operating permit or stipulation agreement;

c. Any emission rate resulting from operation at design efficiency of air pollution control equipment for an emission facility;

d. Any emission rate used as the basis for a revision to this state's plan unless such a rate is shown to be in error within 90 days of the effective date of this rule in which case the corrected rate shall be used; or

e. The emission rate to which the subject emission facility is physically limited.

16. ~~17.~~ "State ambient air quality standards" means the

pollutant concentrations in rule APC 1 of the Minnesota Pollution Control Agency.

17. ~~18.~~ "Subject emission facility" means:

a. An emission facility that is proposed to be constructed or modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed construction or modification and

(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

b. An emission facility that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification;

(2) Has existing restricted emissions of at least 100 tons per year of the nonattainment criteria pollutant; and

(3) The modification of which will result in a significant net increase in emissions of the nonattainment criteria pollutant. A net increase in emissions is significant if the rate of the increase is at least the rate specified below:

(a) carbon monoxide: 100 tons per year;

(b) sulfur dioxide: 40 tons per year;

(c) nitrogen oxides: 40 tons per year;

(d) nonmethane hydrocarbons: 40 tons per year;

(e) particulate matter: 25 tons per year;

(f) lead: 0.6 tons per year; or

c. A plant that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification and

(2) Which proposed modification, when considered in aggregate with X, will result in a significant net increase in emissions of the nonattainment criteria pollutant, where:

(a) X = the ~~gross~~ net increase in nonattainment

criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period: any time both within the 18 months immediately prior to the date the agency receives the completed permit application for the proposed modification and during which the area within which the plant is located was designated a nonattainment area.

(b) A net increase in emissions is significant if the rate of the increase is at least the rate specified in b.(3).

18. ~~19.~~ "Thirty-day rolling average" means the arithmetic mean of daily values calculated with each new day as the last of a 30-day period; provided however, that the arithmetic mean of daily values obtained during times of breakdown shall be excluded from the calculation.

D. Conditions for permit. Except as provided in 5., the agency shall not issue permits for any subject emission facility unless the permit applicant has satisfied the conditions in 1.-3. All permits issued for subject emission facilities shall contain the conditions set forth in 4.

1. Requirement to get offsets. Prior to constructing or modifying a subject emission facility, except an emission facility that is intended to be located in a nonattainment area for less than two years, the owner or operator of that facility shall obtain offsets for all emissions of nonattainment criteria pollutants that will result from the construction or modification. An emission facility that was intended to be located in the nonattainment area for less than two years but that remains for two years or more shall be subject to all the applicable requirements of this rule.

2. Requirement to demonstrate a net air quality benefit. Prior to constructing or modifying a subject emission facility, the permit applicant shall demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit, as defined in C.8.

a. For subject emission facilities located or proposed to be located in carbon monoxide, nitrogen oxide, nonmethane

hydrocarbon or ozone nonattainment areas, a permit applicant shall not be required to perform a modeling analysis to demonstrate net air quality benefit but shall submit to the agency a detailed statement of all information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification.

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, shall analyze the data obtained and shall submit to the agency the modeling data, the modeling analyses, a detailed description of the system of continuous emission reduction planned, and emission estimates made, together with any other information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification. All modeling shall be performed in accordance with "Guidelines on Air Quality Models" (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978) or methods that the director finds to be comparably reliable.

3. Requirement to certify compliance. Prior to constructing or modifying a subject emission facility, the permit applicant shall certify that all emission facilities in Minnesota which are either owned or operated in whole or in part by the same person for whom the application is made or which are operated under the common control of the same person for whom the application is made are in compliance or are on a compliance schedule.

4. Permit conditions. Any permit issued for a subject emission facility shall include a provision that

a. Limits emissions from the facility as follows:

(1) The owner or operator of a subject emission facility shall install technology that restricts emissions from the facility to the lowest achievable emission rate of the

nonattainment criteria pollutants for which the facility is subject to this rule. The permit shall expressly describe the lowest achievable emission rate for the class or category of emission facility into which the subject emission facility falls.

(2) The director shall waive the requirement of (1) if the director determines that a performance standard based on design, equipment, work practice, operation or other alternative standard is more practicable than an emission rate.

b. States that the offsets that the subject emission facility has obtained in order to be issued a permit under this rule are legally enforceable by the agency and by the United States Environmental Protection Agency.

5. Exception from requirement to get offsets.

a. A permit applicant proposing to construct or modify a resource recovery facility burning municipal solid waste shall not be required to obtain sufficient offsets to demonstrate a net air quality benefit if the director determines that the permit applicant

(1) Has made its best efforts to obtain sufficient offsets to comply with this rule and has demonstrated that such efforts were unsuccessful;

(2) Has obtained all available offsets; and

(3) Agrees to continue to seek the necessary offsets and apply them when they become available.

b. The director shall determine that the permit applicant has made its best efforts if the permit applicant demonstrates that the requirement to obtain sufficient offsets creates an undue economic hardship for the permit applicant or is technologically unachievable.

(1) If the permit applicant seeks to obtain an exception on the grounds of undue economic hardship, it shall submit to the director the information set out in rule MPCA 6(b)(5) of the Minnesota Pollution Control Agency.

(2) If the permit applicant seeks to obtain an exception on the grounds of technological unachievability, it shall submit to the director the information set out in rule

MPCA 6(b)(6) of the Minnesota Pollution Control Agency.

E. Banking.

1. A person who has obtained a reduction in the amount of restricted emissions emitted from an emission facility shall be permitted to bank that reduction for future use as an offset (as allowed by this rule) under the following circumstances, limitations and conditions.

2. This rule authorizes a person to bank only those reductions in emissions that:

a. Were obtained after August 7, 1977, but prior to the effective date of this rule and that are reported to the agency within six months of the effective date of this rule; or

b. Are obtained after the effective date of this rule.

3. In order to be eligible for banking, the emission reductions shall be final and enforceable, either through the terms of a stipulation agreement, permit, or other legal instrument obtained by an owner of a facility or through a permanent, physical alteration of the facility.

4. In order to be able to bank reductions in emissions, the person obtaining those reductions shall report to the director the amount and location of the banked emissions and the time at which the banked emissions have become permanently and finally implemented. The report shall be made within six months after the reductions have become final and enforceable or within six months after this rule has been adopted, whichever is later.

F. Limitation on use of offsets. To the extent that this rule creates a program for the use of offsets or allows persons to purchase or obtain offsets, this rule shall not be construed to create a property right that requires compensation from the state should offsets later become unuseable due to a change in an applicable emission limitation or standard of the agency.

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

ORDER ADOPTING RULE

Notice of the Agency's intent to adopt the above-entitled rule without a public hearing was published in the State Register on June 22, 1981 (5 S.R. 2073) and was sent by United States mail to all persons on the list maintained by the Agency pursuant to Minn. Stat. § 15.0412, subd. 4 (1981) on August 21, 1981. After affording interested and affected persons an opportunity to submit comments for 30 days after Notice, receiving fewer than seven written requests for a public hearing within the 30-day comment period, reviewing and considering the comments, and determining the need for and reasonableness of the above-captioned rule,

NOW, THEREFORE, IT IS ORDERED, that this rule identified as 6 MCAR §4.0041, a Rule Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas, is adopted this 30th day of October, 1981, as published in the State Register, 5 S.R. 220 et seq. with the following changes, pursuant to the authority invested in the Agency by Minn. Stat. § 116.07, subd. 4 (1981):

1. Section D.2.b. is amended to read as follows:

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment

areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, . . .

[the rest of the section remains unchanged.]

2. Section C.4. is deleted in its entirety.

3. Sections C.5. through C.19. are renumbered consecutively as C.4. through C.18.

4. Section B.1. is amended to read as follows:

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in ~~C.18.~~ C.17.

5. Section C.18.a.(2) is amended to read as follows:

(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

6. Section C.18.c.(2)(a) is amended to read as follows:

(a) X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time

period: [the rest of the section remains unchanged.]

MINNESOTA POLLUTION CONTROL AGENCY

Louis J. Breimhurst
Executive Director

DATED: OCTOBER 30, 1981

Rule as Proposed (all new material)

6 MCAR S 4.0041 Offset rule.

A. Purpose. The purpose of this rule is to establish conditions to be included in permits which the agency issues, in accordance with the requirements of Minn. Stat. S 116.07, subd. 4a, to persons who propose to construct or modify certain emission facilities in nonattainment areas. This rule may be known as the "offset rule."

B. Applicability.

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in C.18.

2. This rule does not apply in nonattainment areas of the state for which a plan has been developed and approved by the agency and the United States Environmental Protection Agency as providing sufficient emission reductions to both:

a. Bring the area into attainment with the national primary ambient air quality standards by December 31, 1982; and

b. Allow for an increase in emissions in the nonattainment area during that period of time the area is designated nonattainment.

C. Definitions. The definitions in rule APC 2 of the Minnesota Pollution Control Agency apply to the terms used in

this rule unless the terms are defined herein. For the purposes of this rule, the following words have the meanings defined below.

1. "Air quality control region" meahs any of the seven geographic areas specified by the agency for administrative purposes based on jurisdictional boundaries, urban and industrial concentrations, climate, meteorology, topography, and other factors affecting the interchange and diffusion of pollutants in the atmosphere. These are identified in 40 Code of Federal Regulations, Section 52.1221 (1980).

2. "Criteria pollutant" means any of the following: sulfur dioxide; particulate matter; nitrogen oxides; carbon monoxide; ozone; nonmethane hydrocarbons; and lead.

3. "Fugitive emissions" means those pollutant discharges which do not pass through a stack, chimney, vent, or other functionally equivalent opening and which discharges are quantifiable by methods in "Compilation of Air Pollutant Emission Factors" (OAQPS AP-42, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980), or methods that the director determines are comparably reliable.

4. "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.

5. "Lowest achievable emission rate" means, for any emission facility, the most stringent emission limitation or

standard of performance that is achievable in practice by that class or category of emission facility. In no case shall the lowest achievable emission rate be construed to allow emissions in excess of any applicable standard. The emission limitation specified in any other state's plan shall be presumed to be achievable in practice unless a person demonstrates to the director that the emission limitation or standard of performance is not achievable for reasons other than economic costs.

6. "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in an increase in emissions. As used in this rule, the term modification or modified does not include:

a. Routine maintenance, repair or replacement;

b. Changes in method or hours of operation unless the changes are disallowed by an agency rule, stipulation agreement, permit or order, or by a court order;

c. Increases in production rates unless the increases exceed the operating design capacity of any emission facility;

d. Use of a fuel generated from municipal solid waste in a steam generating unit;

e. A change in ownership; or

f. Use of a fuel or raw material in an emission facility that:

(1) Was designed to accommodate the use prior to December 21, 1976; or

(2) Is commencing or has commenced the fuel or raw material use pursuant to an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974, 15 United States Code, Section 792 (1980), under a natural gas curtailment plan pursuant to the Federal Power Act, 16 United States Code, Section 791a et seq. (1980), or under section 125 of the Clean Air Act of 1977, 42 United States Code, Section 7425 (1980).

7. "National ambient air quality standards" means the primary (health related) and secondary (welfare related)

pollutant concentrations established by the Administrator of the United States Environmental Protection Agency, pursuant to section 109 of the Clean Air Act of 1977, 42 United States Code, Section 7409 (1980).

8. "Net air quality benefit" means that, in the area that would be affected by the subject emission facility, offsets proposed to be obtained by a person pursuant to D.1. are sufficient to result in a net reduction, on both a pounds per hour and tons per year basis, in both the rate of emissions and the concentration of nonattainment criteria pollutants.

a. The area that would be affected by the subject emission facility is defined as follows:

(1) For subject emission facilities proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon, or ozone nonattainment areas, the area that would be affected by the subject emission facility is the air quality control region in which the subject emission facility is proposed to be located; and

(2) For subject emission facilities proposed to be located in sulfur dioxide, particulate matter, or lead nonattainment areas, the area that would be affected by the subject emission facility is the area that the modeling analysis, performed in accordance with D.2., demonstrates to be affected by the subject emission facility.

b. The director shall find that there is a net reduction in both the rate of emissions and the concentration of nonattainment criteria pollutants if Y divided by X is equal to or greater than 1.1, where:

(1) X = the restricted emissions to which the subject emission facility will be limited and

(2) Y = the offsets to be provided by the person proposing the subject emission facility.

9. "Net increase in emissions" means the net number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the net increase in emissions, the director

a. Shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but

b. Shall give a credit for

(1) All legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction on nonattainment criteria pollutant discharges that would result from installing required pollution control equipment); and

(2) Any other restrictions on or reductions of the nonattainment criteria pollutant discharges that the person proposing the subject emission facility both obtains within the same plant and agrees to include within the terms of any permit issued for the subject emission facility.

10. "Nonattainment area" means any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard.

11. "Nonattainment criteria pollutants" means as follows:

a. For all nonattainment areas except ozone nonattainment areas, nonattainment criteria pollutant means the criteria pollutant for which an area is designated nonattainment; and

b. For ozone nonattainment areas, nonattainment criteria pollutant means nonmethane hydrocarbons.

12. "Offsets" means any documented reductions in restricted emissions of nonattainment criteria pollutants that:

a. Are legally enforceable and

b. Are achieved after August 7, 1977, or after the date of completion of the emission inventory used by the agency in developing the most recent revision to the plan, whichever is later.

13. "Plan" or "state implementation plan" means any state air quality control laws, rules, permits, stipulation agreements, and procedures, developed to insure compliance with state and national ambient air quality standards.

14. "Plant" means any assemblage of buildings, structures or emission facilities, on one or more adjacent or contiguous properties that are under common ownership or control and that are identified by the same two digit Standard Industrial Code as specified in the Standard Industrial Classification Manual, 1972, as prepared by the Executive Office of the President, Office of Management and Budget and as amended by the 1977 Supplement.

15. "Resource recovery facility" means any emission facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. An energy conversion facility must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this rule. In calculating whether solid waste is used to provide more than 50 percent of the heat input, a 30-day rolling average shall be used.

16. "Restricted emissions" means the maximum nonattainment criteria pollutant discharges, including fugitive emissions, which may be emitted from an emission facility based on the most stringent of the following:

a. Any emission standard or performance standard established in an applicable rule;

b. Any emission standard or performance standard established in an applicable installation or operating permit or stipulation agreement;

c. Any emission rate resulting from operation at design efficiency of air pollution control equipment for an emission facility;

d. Any emission rate used as the basis for a revision to this state's plan unless such a rate is shown to be in error within 90 days of the effective date of this rule in which case the corrected rate shall be used; or

e. The emission rate to which the subject emission facility is physically limited.

17. "State ambient air quality standards" means the

pollutant concentrations in rule APC 1 of the Minnesota Pollution Control Agency.

18. "Subject emission facility" means:

a. An emission facility that is proposed to be constructed or modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed construction or modification and

(2) The construction or modification of which will result in a gross increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

b. An emission facility that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification;

(2) Has existing restricted emissions of at least 100 tons per year of the nonattainment criteria pollutant; and

(3) The modification of which will result in a significant net increase in emissions of the nonattainment criteria pollutant. A net increase in emissions is significant if the rate of the increase is at least the rate specified below:

(a) carbon monoxide: 100 tons per year;

(b) sulfur dioxide: 40 tons per year;

(c) nitrogen oxides: 40 tons per year;

(d) nonmethane hydrocarbons: 40 tons per year;

(e) particulate matter: 25 tons per year;

(f) lead: 0.6 tons per year; or

c. A plant that is proposed to be modified

(1) In any area designated a nonattainment area on the date the agency receives the completed permit application for the proposed modification and

(2) Which proposed modification, when considered in aggregate with X, will result in a significant net increase in emissions of the nonattainment criteria pollutant, where:

(a) X = the gross increase in nonattainment

criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period: any time both within the 18 months immediately prior to the date the agency receives the completed permit application for the proposed modification and during which the area within which the plant is located was designated a nonattainment area.

(b) A net increase in emissions is significant if the rate of the increase is at least the rate specified in b.(3).

19. "Thirty-day rolling average" means the arithmetic mean of daily values calculated with each new day as the last of a 30-day period; provided however, that the arithmetic mean of daily values obtained during times of breakdown shall be excluded from the calculation.

D. Conditions for permit. Except as provided in 5., the agency shall not issue permits for any subject emission facility unless the permit applicant has satisfied the conditions in 1.-3. All permits issued for subject emission facilities shall contain the conditions set forth in 4.

1. Requirement to get offsets. Prior to constructing or modifying a subject emission facility, except an emission facility that is intended to be located in a nonattainment area for less than two years, the owner or operator of that facility shall obtain offsets for all emissions of nonattainment criteria pollutants that will result from the construction or modification. An emission facility that was intended to be located in the nonattainment area for less than two years but that remains for two years or more shall be subject to all the applicable requirements of this rule.

2. Requirement to demonstrate a net air quality benefit. Prior to constructing or modifying a subject emission facility, the permit applicant shall demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit, as defined in C.8.

a. For subject emission facilities located or proposed to be located in carbon monoxide, nitrogen oxide, nonmethane

hydrocarbon or ozone nonattainment areas, a permit applicant shall not be required to perform a modeling analysis to demonstrate net air quality benefit but shall submit to the agency a detailed statement of all information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification.

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, shall analyze the data obtained and shall submit to the agency the modeling data, the modeling analyses, a detailed description of the system of continuous emission reduction planned, and emission estimates made, together with any other information that the director needs in order to be able to determine whether a net air quality benefit will result from the construction or modification. All modeling shall be performed in accordance with "Guidelines on Air Quality Models" (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978) or methods that the director finds to be comparably reliable.

3. Requirement to certify compliance. Prior to constructing or modifying a subject emission facility, the permit applicant shall certify that all emission facilities in Minnesota which are either owned or operated in whole or in part by the same person for whom the application is made or which are operated under the common control of the same person for whom the application is made are in compliance or are on a compliance schedule.

4. Permit conditions. Any permit issued for a subject emission facility shall include a provision that

a. Limits emissions from the facility as follows:

(1) The owner or operator of a subject emission facility shall install technology that restricts emissions from the facility to the lowest achievable emission rate of the

nonattainment criteria pollutants for which the facility is subject to this rule. The permit shall expressly describe the lowest achievable emission rate for the class or category of emission facility into which the subject emission facility falls.

(2) The director shall waive the requirement of (1) if the director determines that a performance standard based on design, equipment, work practice, operation or other alternative standard is more practicable than an emission rate.

b. States that the offsets that the subject emission facility has obtained in order to be issued a permit under this rule are legally enforceable by the agency and by the United States Environmental Protection Agency.

5. Exception from requirement to get offsets.

a. A permit applicant proposing to construct or modify a resource recovery facility burning municipal solid waste shall not be required to obtain sufficient offsets to demonstrate a net air quality benefit if the director determines that the permit applicant

(1) Has made its best efforts to obtain sufficient offsets to comply with this rule and has demonstrated that such efforts were unsuccessful;

(2) Has obtained all available offsets; and

(3) Agrees to continue to seek the necessary offsets and apply them when they become available.

b. The director shall determine that the permit applicant has made its best efforts if the permit applicant demonstrates that the requirement to obtain sufficient offsets creates an undue economic hardship for the permit applicant or is technologically unachievable.

(1) If the permit applicant seeks to obtain an exception on the grounds of undue economic hardship, it shall submit to the director the information set out in rule MPCA 6(b)(5) of the Minnesota Pollution Control Agency.

(2) If the permit applicant seeks to obtain an exception on the grounds of technological unachievability, it shall submit to the director the information set out in rule

MPCA 6(b)(6) of the Minnesota Pollution Control Agency.

E. Banking.

1. A person who has obtained a reduction in the amount of restricted emissions emitted from an emission facility shall be permitted to bank that reduction for future use as an offset (as allowed by this rule) under the following circumstances, limitations and conditions.

2. This rule authorizes a person to bank only those reductions in emissions that:

a. Were obtained after August 7, 1977, but prior to the effective date of this rule and that are reported to the agency within six months of the effective date of this rule; or

b. Are obtained after the effective date of this rule.

3. In order to be eligible for banking, the emission reductions shall be final and enforceable, either through the terms of a stipulation agreement, permit, or other legal instrument obtained by an owner of a facility or through a permanent, physical alteration of the facility.

4. In order to be able to bank reductions in emissions, the person obtaining those reductions shall report to the director the amount and location of the banked emissions and the time at which the banked emissions have become permanently and finally implemented. The report shall be made within six months after the reductions have become final and enforceable or within six months after this rule has been adopted, whichever is later.

F. Limitation on use of offsets. To the extent that this rule creates a program for the use of offsets or allows persons to purchase or obtain offsets, this rule shall not be construed to create a property right that requires compensation from the state should offsets later become unuseable due to a change in an applicable emission limitation or standard of the agency.

OFFICE OF THE REVISOR OF STATUTES
PROPOSED RULES

Agency Pollution Control Agency

Division Air Quality Division

Agency Contact Lisa Tiegil Phone Number 296-7345

Title: Proposed Rule Governing the Agency's Permit Program for Growth or Expansion of Industry in Nonattainment Areas

Type of Rules: Permanent X Temporary ____

Incorporations by References:

6 MCAR S 4.0041 C. Rule APC 2 of the Minnesota Pollution Control Agency

6 MCAR S 4.0041 C.1. 40 C.F.R. S 52.1221 (1980)

6 MCAR S 4.0041 C.3. "Compilation of Air Pollutant Emission Factors." OAQPS AP-42 U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 1980

6 MCAR S 4.0041 C.6.f.(2) 15 U.S.C. S 792 (1980)
16 U.S.C. S 791a et. seq. (1980)
42 U.S.C. S 7425 (1980)

6 MCAR S 4.0041 C.7. Pollutant concentrations established by the Administrator of the U.S. Environmental Protection Agency
Source: 40 C.F.R. Part 50

6 MCAR S 4.0041 C.10. "Any geographic region that has been designated by the agency as violating a state or national ambient air quality standard or by the United States Environmental Protection Agency as violating a national ambient air quality standard."
Existing areas are in 40 C.F.R. 52.1226

See Additional references on back Yes X No ___

Duplication of Statutory Language

Rule Number Statutory Section Duplicated

The attached rules are approved as to form.

Steven C. Cross
Revisor of Statutes

Name: Ann L. Bateson
Ann L. Bateson

Title Deputy Revisor

Phone: 296-1536

6 MCAR S 4.0041 C.13. "...any state air quality control laws, rules, permits, stipulation agreements, and procedures developed to insure compliance with state and national ambient air quality standards."

6 MCAR S 4.0041 C.14. Standard Industrial Classification Manual, 1972 and 1977 Supplement.

6 MCAR S 4.0041 C.16. "...maximum nonattainment criteria pollutant discharges... which may be emitted from an emission facility based on the most stringent of the following:
a. any emission standard or performance standard established in an applicable rule..."

6 MCAR S 4.0041 C.17. Rule APC 1 of the Minnesota Pollution Control Agency

6 MCAR S 4.0041 D.2.b. "Guidelines on Air Quality Models." (OAQPS No. 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, 1978).

6 MCAR S 4.0041 D.5.b.(1) Rule MPCA 6 (b) (5)

6 MCAR S 4.0041 D.5.b.(2) Rule MPCA 6 (b) (6)

8 + 9

STATE OF MINNESOTA

COUNTY OF RAMSEY

AFFIDAVIT OF MAILING

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR §4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Dale Newton, being first duly sworn, deposes and says:

That on the 21st day of August, 1981, at the City of Roseville, County of Ramsey, State of Minnesota, he served the attached Notice of Withdrawal and Intent to Adopt Rule Without Public Hearing, together with a copy of the above-referenced proposed rule, on all persons and associations who have requested that their names be placed on file with the Minnesota Pollution Control Agency for the purpose of receiving notice of proposed adoption of rules by this agency and on all other persons and associations named on the attached mailing list, by depositing in the United States Mail, a copy thereof, properly enveloped, with first-class postage prepaid.

Dale E. Newton

Minnesota Pollution Control Agency

Subscribed and sworn to before me this 24th day of August, 1981.

Margaret Frank

MARGARET FRANK
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Commission Expires Sept 26, 1985

STATE OF MINNESOTA

COUNTY OF RAMSEY

MAILING LIST CERTIFICATE

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR §4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minn. Stat. § 15.0412, subd. 4, that their names be placed on file with and maintained by the Minnesota Pollution Control Agency for the purpose of receiving notice of the proposed adoption of rules by this Agency is accurate and complete as of 1:00 o'clock P.M., this 20th day of August, 1981.

Marjorie A. Borchard

Minnesota Pollution Control Agency

DATED: 8-20-81

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October 30, 1981

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Re: In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR § 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Dear Ann:

In accordance with Minn. Stat. § 15.0412, subd. 4g (1980), the above-captioned rule is hereby submitted to you for your review.

In adopting this rule, the Agency made several changes to the rule as originally proposed. In an effort to make your review easier, we have made those changes on a copy of the rule printed by your office. The changes are noted with underlinings and cross-outs. A list of the changes is contained in the Agency's Order Adopting Rule (a copy of which is attached.)

Under separate cover letter, we are today submitting the above-captioned rule to the Attorney General for its review and approval.

If you have any questions regarding this rule, please call me at 296-7345.

Very truly yours,

LISA R. TIEGEL
Special Assistant
Attorney General

LRT/ps
Encs.

cc: Jerry Anderson

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

ADDRESS REPLY TO:
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
1935 WEST COUNTY ROAD B-2
ROSEVILLE, MN 55113
TELEPHONE: (612) 296-7342

November 9, 1981

Ms. Lorna M. Breiter
Assistant Revisor
State Office Building
Room 670
St. Paul, Minnesota 55155

Re: In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR § 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Dear Ms. Breiter:

The Minnesota Pollution Control Agency, by its Executive Director, approves the corrections requested by the revisor's office on its disapproval form. I have enclosed with this letter the original form, showing a check by the appropriate line and the signature of the Executive Director.

Thank you for your prompt attention to this matter. If you have any further questions regarding this rule, please call me at 296-7345.

Very truly yours,

LISA R. TIEGEL
Special Assistant
Attorney General

LRT/ps
Encs.

✓ cc: Jerry Anderson

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

AFFIDAVIT OF NOTIFICATION OF TRANSMITTAL

Douglas M. Benson, being duly sworn on oath, deposes and says:

1. That he is an employee of the Air Quality Division, Minnesota Pollution Control Agency, State of Minnesota;

2. That he was named in the Notice of Intent to Solicit Outside Opinion, 5 S.R. 2073 (June 22, 1981), as the person to be contacted as to comments on the above-referenced rule;

3. That he was also named in the Notice of Intent to Adopt a Rule Without a Public Hearing, 6 S.R. 218 et seq. (August 24, 1981), as the person to be contacted as to comments on the above-referenced rule;

4. That no person requested, either orally or in writing, that he or she be notified of the transmittal by the Minnesota Pollution Control Agency of the above-referenced rule to the Office of the Attorney General; and,

5. That, accordingly, no such notice need be made.

FURTHER AFFIANT SAYETH NOT.

Douglas M. Benson

Douglas M. Benson

Subscribed to and Sworn to
before me this 30 day
of Oct, 1981.

Mary Ann Hammer

Notary Public

MARY ANN HAMMER
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Commission Expires Dec. 11, 1985

Pollution Control Agency
Air Quality Division

Notice of Intent to Solicit Outside Opinion Regarding Proposed Rule Governing the Issuance of Air Quality Permits in Nonattainment Areas

On April 13, 1981, the Minnesota Pollution Control Agency proposed to adopt without a public hearing a rule governing the agency's permit program for the growth or expansion of industry in nonattainment areas (5 S.R. 1603). The Minnesota Pollution Control Agency intends to re-publish and propose the rule with changes made in response to comments received by the agency.

Notice is therefore hereby given that the Minnesota Pollution Control Agency is seeking information or opinions from sources outside the agency in preparing to promulgate the new rule governing the issuance of air quality permits to persons proposing to construct or modify new or expanded emission facilities in nonattainment areas. The promulgation of this rule is authorized by Minn. Stat. § 116.07, subd. 4a (1980), which permits the agency to "issue, continue in effect or deny permits, under such conditions as [the agency] may prescribe for the prevention of pollution, for the emission of air contaminants, or for the installation or operation of any emission facility, air contaminant treatment facility, treatment facility, potential air contaminant storage facility, or storage facility, or any part thereof . . ."

The Minnesota Pollution Control Agency requests information and comments concerning the subject matter of this rule. Interested or affected persons or groups may submit statements of information or comments orally or in writing. Written statements should be addressed to:

Douglas M. Benson, Planner
Air Quality Planning Section
Minnesota Pollution Control Agency
1935 West County Road B-2
Roseville, MN 55113
(612) 296-7740

All written materials received by the Minnesota Pollution Control Agency shall become part of the record in the event that the rule is promulgated. Any written materials received by the Minnesota Pollution Control Agency to date shall also become part of the record in the event that the rule is promulgated.

Dated this 11th day of June, 1981.

Louis J. Breimhurst
Executive Director

Pollution Control Agency
Water Quality Division

Notice of Intent to Solicit Outside Opinions on the Proposed Reclassification of Various Waters of the State

Notice is hereby given that the Minnesota Pollution Control Agency is seeking information and opinions from sources outside the agency in preparing to promulgate amendments to its existing rule pertaining to the classifications of intrastate waters, 6 MCAR § 4.8024. The amendments would reclassify certain waters as Class 7 Limited Resource Value. The amendment of this rule is authorized by Minnesota Statutes, §§ 115.03 and 115.44 (1980).

Reclassification requests have been received by the agency on the following waters:

St. Louis River Watershed (No. 1)

Buhl Creek Buhl	T58,R19,S20,29
Penobscot Creek Hibbing	T57,R20

Mustinka—Bois de Sioux Rivers Watershed (No. 7)

South Fork Rabbit River Tintah	T129,130,R45,46

STATE OF MINNESOTA

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR §4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

ORDER FOR NOTICE OF INTENT TO ADOPT A RULE WITHOUT PUBLIC HEARING

IT IS ORDERED this 10th day of August, 1981, that Notice of Intent to Adopt a Rule Without Public Hearing in the above-entitled matter be given to all persons who have registered their names with the Minnesota Pollution Control Agency for that purpose and be published in the State Register.

Louis Breimhurst

LOUIS BREIMHURST
Executive Director

Minnesota Pollution Control Agency

CERTIFICATE OF AGENCY'S AUTHORIZING RESOLUTION

I, Virgil Herrick, do hereby certify that I am the Chairman and a member 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 Minnesota Pollution Control Agency duly and properly called and held on the 28th day of July, 1981, that a quorum was present at said meeting, that a majority of all the members of the agency voted for the resolution and that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified:

> RESOLVED, that the Minnesota Pollution Control Agency withdraws its proposal to adopt the offset rule (proposed Minn. Rule APC 41), proposed in March, 1981; and
>
> RESOLVED, that the Minnesota Pollution Control Agency finds that the attached proposed offset rule is noncontroversial in nature; and
>
> RESOLVED, that Louis Breimhurst, Executive Director of the Minnesota Pollution Control Agency, be and hereby is granted the authority and directed (1) to sign an Order of the Agency directing that Notice be given of the Agency's intent to adopt without a public hearing the attached rule governing the Agency's permit program for the growth or expansion of emission facilities in nonattainment areas; (2) to sign the Notice thereof; (3) to make any form changes in the proposed rule that the Revisor of Statutes requires or suggests that the Agency make in order for the Agency to obtain the Revisor's certification as required by law, [to be codified at Minn. Stat. § 15.0412, subd. 2a (1981)]; and, (4) to perform any all other acts incidental to the promulgation of said proposed rule. In the event a public hearing becomes necessary, Louis Breimhurst is also hereby granted the authority and directed to call a hearing for the purpose of promulgating said rule as well as perform any and all acts incidental thereto, including without being limited to

signing an Order for Hearing and Notice of Hearing as well as acting as the Agency's representative at all hearings.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 28th day of July, 1981.

Virgil G. Hammock

C. T. Engelbrecht

Attest by one other Agency member

Pollution Control Agency

Air Quality Division

In the Matter of the Proposed Adoption of a Rule of the State 6 MCAR § 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

Notice of Withdrawal of Previous Proposed Rule and Intent to Adopt a Rule Without Public Hearing

Notice is hereby given that the Minnesota Pollution Control Agency (hereinafter, "agency") withdraws its previously proposed offset rule. This rule was published at page 1603 of the April 13, 1981, State Register (5 S.R. 1603) and was identified as "14 MCAR § 4.0041 Offset Rule" at page 1604 of that State Register.

Notice is hereby given that the agency intends to adopt a revised version of the offset rule without public hearing. This revised version is published below and is identified as "6 MCAR § 4.0041 Offset Rule." The agency has determined that the proposed adoption of this rule is noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, subd. 4h (1980), as amended in 1981 Minn. Sess. Law Serv. (West) ch. 253, sec. 14.

If adopted, the proposed rule would establish a permit program for the expansion or growth of emission facilities in areas of the state identified as nonattainment areas. The permit conditions set out in the proposed rule will insure that a subject emission facility grows or expands in a manner that results in an improvement in air quality.

The agency is authorized to adopt this rule under Minn. Stat. § 116.07, specifically, Minn. Stat. § 116.07, subd. 4 and subd. 4a (1980).

The agency has prepared a Statement of Need and Reasonableness that describes the agency's reasons for each provision of the proposed rule and identifies the data and information relied upon by the agency to support the proposed rule. A copy of the Statement of Need and Reasonableness and of the proposed rule are available and may be obtained by contacting:

Mr. Douglas Benson
Division of Air Quality
Minnesota Pollution Control Agency
1935 West County Road B-2
Roseville, Minnesota 55113
[Telephone: (612) 296-7740].

Persons interested in this rule have until September 25, 1981, to submit comments on the proposed rule. In order to be considered, the comments must be written and must be received by the agency by 4:30 p.m. on September 25, 1981. The proposed rule may be modified if the data and views submitted to the agency warrant modifications and the modifications do not result in a substantial change in the proposed language of the rule.

If, during the comment period, seven or more persons submit to the agency a written request for a hearing on the proposed rule, the agency shall proceed to schedule a public hearing before it adopts the proposed rule. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, subds. 4 - 4f, as amended in 1981 Minn. Sess. Law Serv. (West) ch. 253, sec. 8 - 13.

Persons who wish to submit comments or to request a public hearing should submit such comments or requests to Mr. Douglas Benson at the address above. The agency asks that persons requesting a public hearing identify the particular provisions they object to, their suggested modifications to the proposed rule and the reasons and data relied on to support the suggested modifications.

In the event a hearing is required, a new notice of hearing will be mailed out and published in the State Register. Unless seven or more persons submit written requests for a public hearing, a public hearing will not be held and the agency will consider the adoption of the proposed rule at the October, 1981, Agency meeting or as soon thereafter as possible. Persons who wish to receive a copy of the final rule as proposed for adoption should submit a written statement of such request to Mr. Douglas Benson at the address noted above.

After adopting the final rule without a public hearing, the agency will submit the proposed rule, this Notice, the Statement of Need and Reasonableness, all written comments received, and the final Rule as Adopted to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General should submit a written statement of such request to Mr. Douglas Benson at the address noted above.

Please be advised that Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1980) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend

money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

for Jay M. Hoffman

DATED: August 18, 1981

LOUIS BREIMHURST
Executive Director
Minnesota Pollution Control Agency

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

FINDINGS OF FACT AND CONCLUSIONS

The above-entitled matter came on for decision before the Minnesota Pollution Control Agency (hereinafter, "Agency") on the 27th day of October, 1981. After affording all interested persons an opportunity to present written and oral data, statements and arguments to the Agency, in accordance with the statutory requirements regarding the adoption of noncontroversial rules, after considering the Statement of Need and Reasonableness and the written comments submitted to the Agency, and after considering all the evidence adduced upon the records, files and proceedings herein, the Agency, being fully advised in the premises, hereby accepts and adopts the following Findings of Fact and Conclusions.

FINDINGS OF FACT

1. The Agency adopts the Statement of Need and Reasonableness, in its entirety, as the factual basis for the rule. The Agency hereby incorporates the Statement of Need and Reasonableness into these Findings.

2. The Agency finds that, in publishing the proposed rule, the State Register erroneously included as part of the proposed

rule certain incorporations permitted by the Office of the Revisor. See the last eleven lines printed at page 224 of State Register, Volume 6, Number 8 [6 S.R. 224 (August 24, 1981)]. The Agency also finds that on September 14, 1981, the State Register printed an Errata stating that

> at page 224 of [the August 24, 1981] issue [of the State Register], reference was made to subdivisions C.13. through D.5.b.(2) of the proposed rule. Printing of the reference to these subdivisions was an oversight, and does not indicate additional proposed language.

See page 470 of State Register, Volume 6, Number 11 [6 S.R. 470 (September 14, 1981)]. The Agency therefore finds that the proposed rule as published in the State Register correctly includes only those portions of the rule through subdivision F.

3. The Agency finds that it received no written comments on the proposed rule, in response to the Notice of Intent to Solicit Outside Opinion, and three written comments in response to the Notice of Intent to Adopt a Rule Without A Hearing. After considering these comments, the Agency makes the following findings:

A. Letter from John Powers, Senior Planner, Metropolitan Interstate Committee, September 2, 1981.

Mr. Powers requested a clarification on the effect of the proposed offset rule on a study approved by this Agency and being done in Duluth by the Metropolitan Interstate Committee with funds from the U.S. Environmental Protection Agency. The Agency's

response to Mr. Power's letter is found in the attached September 11, 1981, letter, prepared by Douglas Benson, Head of the Program Development section of the Division of Air Quality of the Minnesota Pollution Control Agency. This September 11, 1981, letter is hereby incorporated into these findings. In considering and responding to Mr. Power's comments, the Agency makes no change to the language of the rule.

B. Letter from Edwin F. Erickson, Vice President, General Manager, Northwest Paper Division, Potlach Corporation, September 23, 1981.

Mr. Erickson raised seven comments. The Agency's response to these seven comments is found in the attached October 5, 1981, letter, prepared by Douglas Benson, Head of the Program Development section of the Division of Air Quality of the Minnesota Pollution Control Agency. This October 5, 1981, letter is hereby incorporated into these findings. (Note, however, that the page numbers noted in the October 5 letter refer to the Agency's double spaced copy of the offset rule. Therefore, the page references do not correctly identify the pages at which section D.2.b. appears in the attached offset rule. The attached offset rule is a duplicate of the rule printed by the Office of the Revisor.)

In considering and responding to Mr. Erickson's comments, the Agency finds that one change in the language of the proposed rule is both needed and reasonable. This change is to

amend the rule to more clearly indicate the method through which persons in lead nonattainment areas shall demonstrate the required net air quality benefit.

As the rule was originally proposed, section C.8. states that subject emission facilities located in lead nonattainment areas must perform the modeling anaylsis required in part D.2. However, in describing this modeling analysis, part D.2. did not restate that such anaylsis was required for facilities locating in lead nonattainment areas. Accordingly, the Agency finds that section D.2.b. should be amended to clearly indicate that such modeling is required as follows:

> b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, . . .
>
> [the rest of the section remains unchanged.]

The Agency finds that this change is not a substantial change because parts C.2. and C.8. already indicate that the modeling analysis described in D.2.b. are required for lead nonattainment areas. Thus, the amendment is merely made to more clearly state a requirement of the rule as it was originally proposed. In addition, the change is not substantial because there are currently no designated lead nonattainment areas in Minnesota and,

therefore, no persons that would be affected by the modeling requirement.

c. Letter from James T. Shields, Vice-President, Energy and Environmental Affairs, Minnesota Association of Commerce and Industry, September 24, 1981.

Mr. Shields reaffirmed the Minnesota Association of Commerce and Industry's support of the proposed rule and made several comments regarding the implementation of the proposed rule. In addition, Mr. Shields noted that:

> immediately prior to the official publication of the proposed Offset Rule, the U.S. EPA proposed a change in the definition of "source" in non-attainment areas. Under the old definition U.S. EPA viewed a source as an individual emission point or the smallest division of a process to which a rule was being applied. The proposed change will redefine source as the entire plant. This proposed change makes U.S. EPA's definition of source the same in both attainment and non-attainment areas. The proposed Minnesota Offset Rule as presently written incorporates the old, more restrictive definition of source. MACI recommends that as soon as U.S. EPA finally adopts the change in the definition of source, that the MPCA immediately commence a non-controversial rulemaking procedure to amend the definition of source as used in the Minnesota Offset Rule.

On October 14, 1981, the U.S. Environmental Protection Agency published a final rule in the Federal Register making the changes that Mr. Shields referenced. [46 Fed. Reg. 50766 - 50771 (October 14, 1981) See Appendix A]. (Although the comment period for the offset rule ended on September 25, 1981, the Agency may take administrative notice of the final rules of another agency. Accordingly, the Agency may consider the changes to EPA's rule in

promulgating its own offset rule.)

The Agency finds that the changes recommended by Mr. Shields are reasonable. Further, the Agency finds that, because EPA adopted its final version of the offset rule earlier than expected, the Agency is able to incorporate the changes in its offset rule at this time. Finally, the Agency finds that the changes are not substantial because they do not relate to any subject matter different than the matters discussed in the originally proposed offset rule, because they are merely responsive to comments made in reaction to the originally proposed offset rule, and because they do not affect any class of persons who were not affected by the originally proposed offset rule. Accordingly, the Agency makes the changes to the offset rule noted on Appendix B.

4. The Agency finds that it received no request for a hearing on the proposed rule and that, therefore, no hearing is required to be held prior to the adoption of the rule.

5. The record in this rulemaking consists of the Statement of Need and Reasonableness, the documents referred to in that Statement, these Findings of Fact and Conclusions, the documents incorporated into these Findings, and all jursidictional documents required to be included in the record by statute or rule.

CONCLUSIONS

1. The Agency duly acquired and has jurisdiction over this proceeding.

2. The Agency published and served due, timely and adequate notice of the adoption of the rule without a hearing.

3. The Agency has statutory authority to promulgate and adopte the proposed rule, as finally amended and adopted by the Agency.

4. All relevant legal and procedural requirements of statutes and rules have been properly complied with.

5. The changes discussed in Finding 3 are not substantial changes and may, therefore, be included within the adopted rule without additional procedural requirements.

DATED THIS 27th DAY OF OCTOBER, 1981.

MINNESOTA POLLUTION CONTROL AGENCY

Virgil Herrick
Chairman

Louis Breimhurst
Executive Director

APPENDIX A

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL 1919-3]

Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On August 7, 1980 (45 FR 52676), EPA promulgated rules for review of major new sources and major modifications in areas where air quality does not meet federal standards (nonattainment areas). Those rules defined "source" in essence as *either* an entire plant *or* an individual piece of process equipment within the plant. On March 12, 1981 (46 FR 16280), EPA proposed to change the definition of source to be an entire plant only. That proposal is being promulgated as a final rule today. The practical significance of this change will be to reduce the coverage of nonattainment area new source review (NSR). The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Clean Air Act (which prohibits major new construction in nonattainment areas lacking a State Implementation Plan (SIP) approved by EPA under Part D of the Act). This change will similarly shrink the coverage of the moratorium.

EPA's August 7 rules also required reconstructed facilities to undergo nonattainment area NSR. As was proposed on March 12, EPA is also deleting that requirement today. These changes will allow states to reduce the regulatory burden of new source review programs without impeding timely attainment and maintenance of air quality standards.

DATES: This rule is effective on October 14, 1981.

FOR FURTHER INFORMATION CONTACT: Kirt Cox, Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919-541-5592.

SUPPLEMENTARY INFORMATION:

I. Background

A. Definition of Source

Under the Clean Air Act, all major new stationary sources and modifications to existing major sources must obtain a permit before they may construct—a Prevention of Significant Deterioration (PSD) permit if the source or modification locates in an area which is cleaner than a national ambient air quality standard (NAAQS), or a nonattainment permit if the source or modification locates in a nonattainment area. The Act defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3).[1]

In *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit held that EPA has discretion to define the constituent terms of the definition of "source" (*i.e.*, the terms "building," "structure," "facility," and "installation") so as to meet the purposes of the various NSR programs mandated by the Act. On August 7, 1980, EPA promulgated amended rules affecting PSD NSR, nonattainment NSR, and the construction moratorium to take into account the court's holding. 45 FR 52676 (August 7 rules). For PSD purposes, EPA defined "source" in essence as an entire plant (the "plantwide" definition). But for nonattainment purposes, EPA defined "source" as both the entire plant and each piece of process equipment at the plant (the "dual" definition).[2]

The practical significance of these different definitions largely lies in the number of modifications each definition would bring in for review. EPA's August 7 rules define a "modification" as a significant net increase in emissions at a source. *See, e.g.*, 45 FR 52747. Since the PSD definition defines "source" in essence as a plant, only net increases occurring at the entire plant need a PSD permit. For example, if a plant increased emissions at one piece of process equipment, but reduced emissions by the same amount at another piece of process equipment at the plant, then there would be no net increase in emissions at the plant, and therefore no modification to the "source." But under the nonattainment definition, the piece of process equipment itself is a "source," which means that only equivalent reductions at that particular piece of process equipment would enable the source to avoid the need for a nonattainment permit. As a result, the nonattainment definition affords fewer opportunities for a source to use a reduction in emissions to compensate for an increase at the source, and therefore avoid the need for a permit.

EPA promulgated a plantwide definition for the PSD program pursuant to *Alabama Power*. *See* 636 F.2d at 397; 45 FR 52695, 52730, 52736 (August 7, 1980). But EPA adopted the more inclusive dual definition for nonattainment areas in order to most effectively use NSR to aid in the cleanup of nonattainment areas. *See* 45 FR 52697 (August 7, 1980). EPA asserted that a narrow definition of source brings in more sources for review, which will enable states to ensure more reductions in emissions through new source permitting. These additional reductions from permitting were said to arise from the greater applicability of the provision in Section 173(1)(A) of the Act (which was adopted by most states) that a new source or modification must obtain offsetting reductions in emissions which are greater than the increase from the new source or modification. EPA further noted that the permit requirement also brings into play Section 173(3) of the Act, under which the owner of a proposed new source or modification must certify that all other sources owned, operated, or controlled by him are in compliance with the applicable State Implementation Plan. Finally, EPA felt that increased applicability of the construction moratorium through use of a narrow definition of source would serve as a strong incentive for states to develop plans to clean up their nonattainment areas.

However, on March 12, 1981, EPA proposed to delete the dual definition for nonattainment areas and to substitute a plantwide definition identical to that of the PSD program. 46 FR 16280, EPA stated that it could, by adopting a plantwide definition, reduce these regulatory burdens and complexities associated with NSR and the construction moratorium without interfering with timely attainment of the NAAQS in accordance with the Act. In particular, EPA argued that by bringing in more sources for review or subjecting them to the construction moratorium, the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air. In addition, EPA noted that a source would still be subject to any applicable new source performance standards (NSPS) and that significant net increases at a plant as well as

[1] Where a state does not have an approved plan in place for cleaning up a nonattainment area, the Act imposes a moratorium on construction of major new sources and modifications in that nonattainment area (construction moratorium).

[2] Formally, for PSD purposes, EPA defined each of the terms "building," "structure," "facility," and "installation" as an entire plant. However, for nonattainment purposes, EPA defined "Building, structure, or facility" as an entire plant and "installation" as a piece of process equipment.

wholly new plants, still would undergo nonattainment review. Third, EPA stated that its proposal would simplify the regulatory process by adopting the same definitions for PSD and nonattainment permits. Finally, EPA stated that even if a state adopted a plantwide definition, it nonetheless had to demonstrate attainment of the NAAQS and reasonable further progress (RFP) towards attainment by the statutory deadlines. For these reasons, EPA concluded that the dual definition was unnecessarily burdensome, and so should be deleted.

B. Reconstruction

EPA's August 7 rules also required reconstructed or replacement facilities to undergo NSR in nonattainment areas as if they were new sources. Specifically, the rules provided that whenever a company rebuilt a "source" so that more than 50 percent of its capital cost represented new investment, that rebuilt source had to obtain a nonattainment permit. EPA did not adopt a similar provision for PSD, because few if any whole plants are likely to be rebuilt.

On March 12, 1981, EPA proposed to delete this requirement. EPA stated that since it was proposing to use a plantwide definition for nonattainment areas, and since few entire plants are likely to be rebuilt, there is little need for review of reconstructions. In addition, this change would further reduce the differences between PSD and nonattainment NSR.

II. Today's Action

A. Definition of Source

EPA has decided to adopt the plantwide definition of source and to delete the reconstruction requirement as it proposed last March. After evaluation of the comments received, EPA has concluded that two concerns warrant this approach to NSR.

First, today's action means that both the PSD and nonattainment programs will use the same definition of "source." This alone will reduce regulatory complexity. Sources will no longer have to figure out what an "installation" is, which should lessen any confusion engendered by EPA's August 7 rules.

Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution control. Sections 101(a)(3), 101(b). It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. *See, e.g.*, Sen. Rep. 95-127 at pp. 10-11; *cf. NRDC* v. *Train*, 421 U.S. 60 (1975). Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations. Since demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D.

This rulemaking in no way affects either the current status of any EPA-approved SIP or the state's duty to assure RFP and attainment of the NAAQS by the statutory deadlines. All state plans containing the dual definition and the reconstruction provisions remain fully valid after this rulemaking. States may, however, choose to adopt a plantwide definition, provided that they submit that change to EPA as a SIP revision.

States choosing to delete the dual definition must demonstrate that their plans, as revised, continue to demonstrate RFP and attainment. Many state plans are based in part upon a projection of reductions in emissions obtained through the state's NSR program. This projection in turn rested upon an anticipated number of permit applications. Use of a plantwide definition would mean that many sources will no longer need a permit. Unless counterbalanced by other consequences of the deletion (*e.g.*, more rapid construction of new clean emission units), this may result in the loss of reductions originally expected by the state. In other instances, where RFP demonstrations were more general in nature, states relied on the NSR program to assist in their enforcement efforts and to identify additional more efficient means to control emissions. In either case, a state's RFP demonstration, which was predicated on those assumptions for NSR coverage, might no longer apply; and the state might have to obtain or guarantee those reductions in other ways (such as requiring additional reductions from existing sources and stepping up enforcement efforts). States changing from a dual to a plantwide definition must therefore reassess their general attainment strategies and revise them as necessary to ensure RFP and attainment by the statutory deadlines.

A related problem may arise if a state decides to rescind existing nonattainment permits. A modification which required a permit under the dual definition may not have needed one had the plantwide definition been in effect, and some states may choose to rescind those permits and reissue them with conditions more favorable to the affected sources (such as deleting the requirement that the source install the technology assuring the lowest achievable emission rate (LAER)). However, the emissions reductions required by that permit may have been included in the state's RFP demonstration, and rescission might therefore damage that demonstration. States should thus be careful that, in designing any rescission procedure, they do not interfere with RFP and attainment. Any such rescission procedure must be submitted to EPA as a SIP revision and must assure that each rescission is consistent with the state's RFP demonstration.[3]

B. Reconstruction

EPA is also taking a final action today to delete the requirement that reconstructed facilities (as that term is defined in the rules) be subject to nonattainment requirements. The rationale for that decision is the one offered in the proposal: Adoption of the plantwide definition means that the reconstruction requirement applies only to entire plants which are rebuilt. Since few if any such reconstructions are anticipated, there is little reason to retain this requirement. In addition, deletion of the requirement makes the PSD and nonattainment rules the same in this respect.

As with the dual definition, some state plans may be based upon emission reductions obtained from the reconstruction provision. States choosing to delete this requirement should therefore assess and adjust their RFP and attainment demonstrations as necessary.

III. Response to Comments

EPA received 81 comments in response to its March 12 proposal, the majority of which favored deletion of the dual definition and the reconstruction requirement. The particular comments, as well as EPA's response, are discussed below.

A. Modernization

Many commenters who agreed with the proposal stated that it would be conducive to modernization of existing plants and so would enhance economic efficiency. These commenters also agreed that the dual definition acted as a disincentive to replacement of

[3] Permit rescissions granted under an EPA-approved permit rescission procedure would not have to be submitted to EPA as a SIP revision.

outmoded dirty facilities with newer cleaner ones, and some cited specific examples where this in fact has happened. Other commenters, however, noted that EPA had cited no data to corroborate its claim that the dual definition impeded modernization, and argued, also without supporting data, that the direct cost of offsets and of the installation (pursuant to Section 173(2)) of technology resulting in LAER was so much less than the total cost of a modified plant that it did not act as a disincentive.

EPA believes that the examples provided by the commenters support its statement in the proposal that the dual definition impedes legitimate efforts to modernize existing plants. (*See, e.g.*, comments of Crown Zellerbach; Union Oil Corporation.) This is particularly true in areas subject to the construction moratorium, where plants cannot modernize a particular facility, even if emissions at the plant as a whole actually *decrease*. To deny construction to candidate modernization projects which would cause no significant increase in air pollution at the plant, and which in some cases would produce a net air quality improvement, may call upon such projects to bear an unacceptably large part of the overall burden for cleaning up a nonattainment area. Accordingly, EPA has concluded that elimination of the dual definition requirement will remove a barrier to modernization of the nation's industrial base.

A related issue raised by some commenters was that deletion of the dual definition would actually result in more economic inefficiency in the nonattainment area as a whole. The argument here rests on two claims. First, installation of technology representing LAER means the new source will have lower emissions and thus need fewer offsets; sources not installing LAER would need more offsetting reductions to avoid the need for a permit. Deletion of the dual definition therefore would mean that more cost-effective reductions would be used up quickly, leaving fewer reductions available over the long term. This would make it more difficult for new sources to find needed offsets and so could actually impede growth over time; and if additional reductions were needed to attain the NAAQS, they could only be obtained by imposing additional controls on existing sources, controls which would require costly retrofits. Second, the proposal was alleged to favor large existing sources over new sources, because many existing sources have significant amounts of available emission reductions that can be used to avoid the need for a permit, whereas new sources would always have to undergo nonattainment area NSR. This means that existing sources might use up all the available reductions, and so preclude all new construction.

The concerns raised by these commenters are at this point speculative, particularly in view of the fact that the commenters provided no data to support their claims. In addition, they contradict a central principle of economic efficiency, under which the cheapest and most cost-effective emission reductions should be allowed to be used first, not saved until some hypothetical future need develops while more expensive controls are used first. More importantly, given the structure of the Act, EPA believes that the choice of whether to take the risks these commenters mention is one properly made by the states, not the federal government. If a state feels that the long-term risks of the plantwide definition outweigh its potential short-term benefits, then that state may properly retain the dual definition. But this kind of decision is essentially based on economic factors, not air quality concerns, and so is appropriately left to the states. *Cf. Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

B. Regulatory Complexity

Supporters of the proposal endorsed it as a means of simplifying the regulations, thereby reducing some of the confusion in the permit review process and eliminating an inconsistency with the PSD program. Other commenters asserted that the dual definition adds only slightly to the complexity of the regulations and that anyone who carefully reviews the regulations can readily understand the way in which the definition works.

EPA believes that elimination of the dual definition clearly simplifies what any objective observer would agree is a quite complex regulation. First, plants sometimes must get a PSD permit for one pollutant and a nonattainment permit for another pollutant. Using the same definition for PSD and nonattainment purposes simplifies the permit process. Second, by defining "source" in essence as an entire plant, EPA has eliminated the problem of determining what an "installation" is in a given situation.

C. Application of Control Technology

Many commenters agreed that adequate use of the most up-to-date control technology is assured, regardless of the applicability of nonattainment area NSR, because NSPS will continue to apply to many new or modified facilities. Other commenters argued, however, that there is no applicable NSPS for many categories of sources, and that NSPS is often not as stringent as LAER. These commenters also claimed that Congress intended that all new sources must install some form of advanced pollution control technology, particularly in nonattainment areas where the maximum possible emission reductions must be obtained.

EPA has embarked upon an expanded program of NSPS development. *See* 40 CFR 60.16. This program will assure that most major emitting source categories will be covered by an NSPS. Accordingly, EPA believes that eventually the NSPS program will ensure that new and modified sources will adequately apply state-of-the-art control technology. To the extent that the controls imposed are not as strict as LAER, the internal offsets needed to "net out" of NSR will make up the difference.

EPA agrees that in some cases an NSPS will be less stringent than LAER. But this comment is not wholly relevant, for while Congress intended that new or modified *sources* apply LAER, it left EPA discretion to define "source." As noted above, EPA believes that a plantwide definition of "source" is consistent with the purposes of the nonattainment provisions of the Act, and so comports with Congressional intent. Consequently, EPA's approach with regard to application of control equipment is consistent with the Act.

D. Assuring Reasonable Further Progress and Attainment

Many commenters who supported the proposal emphasized that the states will remain subject to the requirement that they demonstrate that each nonattainment area will attain the NAAQS as expeditiously as practicable and will show reasonable further progress toward attainment. These commenters thus agreed with EPA that use of a plantwide definition need not interfere with the fundamental purpose of Part D of the Act (relating to nonattainment areas). Other commenters challenged EPA's analysis, arguing that most RFP analyses and attainment demonstrations are so imprecise that extensive NSR coverage is essential to assuring attainment and RFP. These commenters claimed that this imprecision is exacerbated by the fact that most Part D SIPs are based on deficient emission inventories. Therefore, the reviewing authority cannot say with confidence that any opportunities for emissions reductions can be ignored. They added that this

also means that even "insignificant" increases in emissions could pose a problem, since states would have difficulty using NSR to offset their cumulative impact.[4] As a result, the commenters felt it was crucial to have a comprehensive NSR system to manage air quality in nonattainment areas and assure tight control of pollution. Therefore, under these commenters' analysis, deletion of the dual definition would remove an essential state tool for clean-up of nonattainment areas. In fact, several commenters argued that EPA's approach as a whole is short-sighted, because it will enable sources to build without any review, despite the fact that such sources might have to install expensive retrofit technology when the state or EPA discovers that the area has not attained the NAAQS.

These comments miss the point. As noted above, and as correctly pointed out by several commenters, state plans *must* assure RFP and attainment by the statutory deadlines. If a state wishes to use a plantwide definition and run the risks identified by these commenters, then that state has discretion to do so, provided that its choice does not interfere with RFP and attainment. EPA believes that it is more appropriate for the states to make any needed decisions in this area, for it is the states that are closest to their own particular situations and problems and so it is the states that are best equipped to make the choices about which the commenters are concerned.[5]

E. Impact on State Plans

Some states asked EPA to allow them to choose the definition of source most appropriate to their own program—they were concerned that EPA's proposal would keep them from continuing to use a narrower definition. Other states pointed out that they may have no choice but to use a plantwide definition if EPA were to promulgate one, for these states have laws which prohibit them from developing SIPs which are more stringent than what EPA's rules would require. Finally, one commenter was concerned that a plantwide definition would jeopardize existing NSR rules which require permits for *all* changes at a plant, regardless of whether these changes would increase emissions at the entire plant. These rules were claimed to be necessary to keep track of the activities at different sources in the state and to monitor RFP.

By this rulemaking, EPA does not intend to require any state to change its NSR rules. Similarly, nothing in today's promulgation is meant to forbid states from requiring permits for all changes at a plant. Finally, to the extent that a state has laws which prohibit state rules from being more stringent than federal regulations, EPA recognizes that this may be a problem. States may as a result have to change either their rules or their laws.

F. Construction Moratorium

Some commenters argues that elimination of the dual definition for the construction moratorium will mean that many fewer sources will be subject to the moratorium and so will reduce the incentive for states lacking Part D plans to develop them. However, this comment ignores the fact that the primary purpose of the construction moratorium is to preserve ambient air quality while the states are preparing their plans for cleaning up nonattainment areas. A plantwide definition is consistent with this purpose, since it ensures that emissions will not increase significantly during this time.[6] In any event, the moratorium will continue to fulfill its secondary purpose as an incentive to state action, since new sources and modifications which result in a significant net increase in emissions will still be prohibited from constructing in nonattainment areas subject to the construction moratorium.

G. Use of Standard Industrial Classification (SIC) Codes

One commenter requested that EPA expand the definition of "source" to include a group of commonly-owned plants on a contiguous property or complex. However, EPA has already considered and rejected this comment. *See* 45 FR 52695 (August 7, 1980). EPA had originally proposed a definition similar to that requested by the commenter, but it decided instead to adopt the present system, based upon SIC codes, since a broader definition would severely strain the boundaries of even the most elastic of the four terms which define the term "source," *i.e.*, "building," "structure," "facility," and "installation." EPA believes that the aggregation of separate contiguous plants under common ownership into one source would be inconsistent with the common sense notion of plant. *See Alabama Power*, 636 F.2d at 397–98.

H. Reconstruction

Most commenters also agreed that EPA should delete the reconstruction test for nonattainment NSR. Others argued that EPA should retain the test, relying basically upon the same claims as those addressed above for the dual definition. For the reasons laid out above, EPA has concluded that the adoption of a plantwide definition means that a reconstruction test no longer is needed.[7]

I. Legal Arguments

Many commenters adduced legal arguments to the effect that EPA lacked discretion to define "source" for nonattainment purposes. Some commenters claimed that EPA was legally compelled to adopt a plantwide definition, while others asserted that EPA must as a matter of law use a dual definition. However, in view of the lack of express statutory language and the conflicting Congressional signals found by the various commenters in the legislative history, EPA believes that it has discretion to choose a definition of "source" best suited to the nonattainment program. This authority was expressly noted in *Alabama Power*, where the court held that "EPA had descretion to define (the) statutory terms (for "source") reasonably so as to carry out the expressed purposes of the Act." 636 F.2d at 396.

Those commenters who favored the dual definition raised a variety of legal arguments.[8] These claims will be addressed individually.

(1) *A dual definition is required by Alabama Power and by ASARCO v. EPA, 578 F.2d 319 (D.C. Cir. 1978).*

The commenters asserted that the *Alabama Power* and *ASARCO* cases held that where the purpose of a program is to maintain air quality, as in PSD, a plantwide definition is appropriate; but where the purpose is to *improve* air quality, a much narrower definition of "source" must be used. Since the purpose of Part D of the Act is to clean up nonattainment areas, the commenters claimed that EPA must continue to use a dual definition.

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[4] One commenter erroneously claimed that EPA's rules enabled sources to increase emissions up to 100 tons per year (tpy) without having to undergo review. In fact, EPA has defined as "insignificant" (*i.e.* as below the level requiring review) emission increases which generally range from 25 tpy to 40 tpy, depending on the pollutant in question. *See e.g.*, 45 FR 52747 (August 7, 1980).

[5] In any event, the commenters can raise these concerns at the state level during state proceedings on whether to adopt a plantwide definition.

[6] At the same time, the present moratorium imposes costs on plants that want to modify internally without lowering emission.

[7] Some commenters urged EPA to delete the reconstruction test from the NSPS rules. That comment is not relevant to this rulemaking, which addresses *only* requirements for new source review in nonattainment areas.

[8] One commenter requested that EPA insert each state's SIP into the record for this rulemaking. EPA is not granting this request because the SIPs have been incorporated by reference into the Code of Federal Regulations and so are documents of public record.

The difficulty with this claim is that it ignores the fact that states have the discretion to define the approaches best suited to their own problems and needs, provided that those approaches will demonstrate RFP and attainment. If a state can demonstrate attainment despite the use of a plantwide definition of source, then EPA must approve the state's plan. Accordingly, use of a plantwide definition can be consistent with the purposes of Part D.

(2) *Use of a plantwide definition means that state plans will not demonstrate attainment as expeditiously as practicable, since fewer sources will be brought in for review.*

This objection ignores the basic point that this is a matter for the states to decide: they are still subject to the statutory requirements, but EPA believes that they may use a plantwide definition if that wil not interfere with their demonstration of attainment.

(3) *The legislative history of the Act requires that as many changes at a "source" as possible be brought in for NSR.*

This begs the question, for the legislative history and, more importantly, the statute, speak of "sources," and EPA has descretion to define what that term means for the purposes of the nonattainment program.

(4) *The definitions of "source" used in the Act themselves mandate a dual definition.*

The commenters noted that the PSD definitional structure uses only the term "facility," while NSPS and nonattainment structures use both "source" and "facility." This difference was a point on which *Alabama Power* relied to distinguish *ASARCO*. Accordingly, the commenters claim that since *ASARCO* applied to NSPS and since the terms are defined identically for NSPS and Part D (see Section 111(a)(3) and 172(b)(6)), EPA must for Part D use at least the narrow definition contained in the NSPS rules.

While it is true that the court in *Alabama Power* used the different definitional structures of NSPS and PSD to distinguish *ASARCO*, the critical element of the court's opinion rests on the fact that EPA may define the term "source" so as to best meet the purposes of a particular program. *See* 636 F.2d at 391–98. As discussed above, EPA believes that a plantwide definition is consistent with the purposes of Part D. Consequently, EPA may define the constituent terms of "source" differently for NSPS and Part D.

(5) *Congress ratified the dual definition.*

The commenters argue that in Section 302(j), Congress used the terms "source" and "facility" in defining the unit to which NSR applies, and it must have known that EPA at that time defined "facility" quite narrowly in terms of particular pieces of process equipment. Congress adopted the entire Offset Ruling in 1977, and therefore ratified the Ruling's use of a dual definition.

The difficulty with this argument is that Congress used "facility" in defining the unit to which PSD review applies, Section 165(a), yet in *Alabama Power*, the court held that EPA had discretion to interpret this term to mean in essence an entire plant. *See* 636 F.2d at 397. Moreover, Congress provided in Section 129(a)(1) of the Clean Air Act Amendments of 1977 that EPA could modify the Offset Ruling "by rule." It therefore contemplated that EPA could make the kind of change to the Ruling being made today.

(6) *Congress' definition of LAER implies that it chose the dual definition.*

The commenters claim that LAER is supposed to be applied to a "source," Sections 171(3), 173(2), yet LAER actually is applied to pieces of process equipment. In addition, the LAER definition references any applicable NSPS, and NSPS applies to pieces of process equipment. From this, the commenters infer that Congress intended "source" to be defined at least as a piece of process equipment.

This argument was implicitly rejected by *Alabama Power*. The PSD program requires that "sources" install the Best Available Control Technology (BACT). BACT is also applied to pieces of process equipment, and it also refers to any applicable NSPS. Yet *Alabama Power* authorized EPA to define "source" as in essence plant for PSD purposes. Consequently, the use of the term "source" in the definition of LAER does not necessarily mean that "source" must be defined narrowly for nonattainment purposes.

(7) *EPA's proposal treats reconstructions as modifications, yet the Act requires that they be treated as new sources.*

The commenters assert that Section 173 uses the phrase "by the time the source is to commence operation," which means Congress was referring only to new sources. Moreover, they argue that when a facility is replaced or rebuilt, it is first shut down, which means that there is no "source" to modify. As a result, reconstruction must obtain a NSR permit as new source, not modifications.

The language to which the commenters refer applies to *both* new sources and modifications, not solely to new sources as the commenters suggest. *See* Sections 172(b)(6), 173(1)(A). Any other reading of Section 173 would read all modifications out of the Act, which clearly is contrary to the statute. In addition, this argument begs the question, for it assumes that the "source" is a piece of process equipment. Yet the issue is precisely how to define "source," and this is a matter left to EPA's discretion.

(8) *EPA did not provide the factual basis for its proposal, as mandated by Section 307(d)(3)(A) of the Act.*

EPA does not believe that it is required to follow Section 307(d) in this rulemaking. That section only applies to particular types of EPA actions, of which only Section 307(d)(1)(B) is relevant here. That subsection requires Section 307(d) procedures for federal promulgation of a SIP. Here, EPA is modifying regulations codified at 40 CFR Part 51, which are minimum requirements for the content of SIPs, and not promulgation of SIPs themselves. Consequently, these rules clearly are not subject to Section 307(d). The construction moratorium, which is also the subject of today's action, is codified at 40 CFR Part 52, but it is a *generic* rulemaking, not a rulemaking for a particular SIP, and so is not subject to Section 307(d) either.[9]

IV. Conclusion

By today's action EPA is modifying the definition of "installation" to mean the same as "building, structure, and facility," and is deleting the definition of "reconstruction" and its supporting definition of "fixed capital cost." These actions apply to the Offset Ruling (codified at 40 CFR Part 51 Appendix S), 40 CFR 51.18(j) (requirements for new source review in nonattainment areas), and 40 CFR 52.24 (the construction moratorium). They will have the effect of defining a "source" for nonattainment purposes as in essence an entire plant, and of treating reconstruction and replacement as a modification to an existing source, rather than as a new source.

[9] It should also be pointed out that the issue of the definition of "source" in nonattainment areas has been before the public for several years. EPA first solicited comments on its definition on January 16, 1979, when it modified the Offset Ruling. *See* 44 FR 3298. Many comments were received at that time. On September 5, 1979, EPA solicited further comments on this issue, when it proposed comprehensive amendments to its PSD and nonattainment regulations. *See* 44 FR 51924. Accordingly, even if Section 307(d) were applicable, the commenters have had adequate opportunity to raise their concerns to EPA and have presented no evidence that they were harmed by EPA's failure to follow precisely the procedures set out in that Section.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this action will not have a significant economic impact upon a substantial number of small entities. These rules will reduce regulatory burdens since fewer sources will be subject to NSR and the construction moratorium. Since the requirements of the Clean Air Act apply to all sources defined as major, EPA did not have the additional flexibility to alter the applicability of these requirements to any small entities that meet the definition of major source.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because it reduces the coverage of nonattainment area NSR and the construction moratorium and so lessens regulatory burdens.

This action was submitted to the Office of Management and Budget (OMB) for review as required by the Order. Any comments from OMB to EPA and any EPA response are available for public inspection at the Central Docket Section, U.S. Environmental Protection Agency, West Tower, 401 M Street, SW., Washington, D.C. 20460 (Docket A-81-14)

Pursuant to 5 U.S.C. 553(d)(1), this action is being made immediately effective because it relieves a restriction.

The rules being promulgated today are nationally applicable, and this action is based upon a determination of nationwide scope and effect. Under Section 307(b)(1) of the Clean Air Act, judicial review may only be sought in the United States Circuit Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before December 14, 1981.

(Secs. 110(a)(2)(I), 172(b)(6), 173, 301(a) of the Clean Air Act, as amended, (42 U.S.C. 7410(a)(2)(I), 7502(b)(6), 7503, 7601(a)); sec. 129(a)(1) of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977))

Dated: October 3, 1981.

Anne M. Gorsuch,

Administrator.

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Appendix S [Amended]

1. Section II, Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), 45 FR 52741 (August 7, 1980), and 45 FR 59879 (September 11, 1980) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly; and

c. By removing paragraphs 9 and 10 and renumbering the succeeding paragraphs accordingly.

§ 51.18 [Amended]

2. Section 40 CFR 51.18(j)(1) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (j)(1)(ii) to read "Building, structure, facility or installation";

b. By removing paragraph (j)(1)(iii) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (j)(1)(ix) and (x) and renumbering the succeeding subparagraphs accordingly.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

§ 52.24 [Amended]

3. Section 40 CFR 52.24(f) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (f)(2) and to read "Building, structure, facility or installation";

b. By removing paragraph (f)(3) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (f)(9) and (10) and renumbering the succeeding subparagraphs accordingly.

[FR Doc. 81-29706 Filed 10-13-81; 8:45 am]

BILLING CODE 6560-26-M

APPENDIX B

Suggested Revisions Due to 46 Federal Register 196:50766-50771

Part C.4., the definition of "Gross increase in emissions", should be deleted entirely and parts C.5. through C.19. should be renumbered accordingly. Part C.4. reads as follows:

> "Gross increase in emissions" means the gross number of new tons per year of a nonattainment criteria pollutant that could be legally discharged from a subject emission facility. In determining the gross increase in emissions, the director shall include all nonattainment criteria pollutant discharges that the subject emission facility could emit but shall give a credit for all legally enforceable restrictions on or reductions of the nonattainment criteria pollutant discharges from the subject emission facility (such as a restriction in nonattainment criteria pollutant discharges that would result from installing required pollution control equipment). No credit shall be allowed for any other reductions of or restrictions on nonattainment criteria pollutant discharges.

OK

Part C.6., the definition of "Modification", should be amended as follows, for clarity:

> "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in ~~an~~ net increase in emissions.

OK

Part C.18.a.(2), part of the "Subject emission facility" definition, should be amended as follows:

> The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

OK

Part C.18.c.(2)(a), also part of the "Subject emission facility" definition, should be amended as follows:

X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time period:

(the rest of the section remains unchanged).

OK

CERTIFICATE OF AGENCY's
RESOLUTION ADOPTING RULES

I, Virgil Herrick, do hereby certify that I am the Chairman and a member 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 27th day of October, 1981, that a quorum was present at said meeting, that a majority of the Agency members voted for the resolution, and that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

> RESOLVED, that the Minnesota Pollution Control Agency adopts the attached Findings of Fact and Conclusions and the Order Adopting 6 MCAR §4.0041, a rule governing the Agency's permit program for the growth or expansion of industry in nonattainment areas; and,
>
> RESOLVED, that the rule governing the Agency's permit program for the growth or expansion of industry in nonattainment areas be and hereby is approved and adopted, pursuant to authority vested in us by Minnesota Statutes § 116.07, subd. 4 and subd. 4a (1980) and that the Executive Director of the Agency be and hereby is authorized to sign the order adopting these rules and further is authorized to perform the necessary acts to provide that these rules shall have the force and effect of law.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 27th day of October, 1981.

MINNESOTA POLLUTION CONTROL AGENCY

Virgil C. Herrick

Virgil Herrick
Chairman

Lois West

Attest by one other Agency member

STATE OF MINNESOTA

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

ORDER ADOPTING RULE

Notice of the Agency's intent to adopt the above-entitled rule without a public hearing was published in the State Register on August 24, 1981, (6 S.R. 218 et seq.) and was sent by United States mail to all persons on the list maintained by the Agency pursuant to Minn. Stat. § 15.0412, subd. 4 (1981) on August 21, 1981. After affording interested persons an opportunity to submit comments for more than 30 days after Notice, receiving fewer than seven written requests for a public hearing within the comment period, reviewing and considering the comments, and determining the need for and reasonableness of the above-captioned rule,

NOW, THEREFORE, IT IS ORDERED, that this rule identified as 6 MCAR § 4.0041, a Rule Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas, as published in the August 24, 1981, State Register, is adopted this 27th day of October, 1981, with the following changes, pursuant to the authority invested in the Agency by Minn. Stat. § 116.07, subd. 4 and subd. 4a (1980):

1. Section D.2.b. (page 11 of the attached rule) is amended as follows:

b. For subject emission facilities located or proposed to be located in sulfur dioxide or

particulate matter or lead nonattainment areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, . . .

[the rest of the section remains unchanged.]

2. Section C.4. (page 2 of the attached rule) is deleted in its entirety.

3. Sections C.5. through C.19. (pages 3 through 10 of the attached rule) are renumbered consecutively as C.4. through C.18.

4. Section B.1. (page 1 of the attached rule) is amended by changing the reference in the last line from ~~C.18.~~ to C.17.

5. Section C.17.a.(2) [formerly C.18.a.(2)] (page 8 of the attached rule) is amended to read as follows:

(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

6. Section C.17.c.(2)(a) [formerly C.18.c.(2)(a)] (page 9 of the attached rule) is amended to read as follows:

(a) X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted

by the agency during the following time period: [the rest of the section remains unchanged.]

7. Two typographical errors in the State Register are corrected as follows:

a. D.2.b.: The last word on page 11, line 19 of the attached rule is "new." The Agency proposed and the Revisor approved a version of the rule which included the word "net" and not the word "new." The State Register incorrectly substituted the word "new" for "net." The Agency adopts the language it proposed and submitted to the State Register and not the language incorrectly printed by the State Register.

b. C.5.f.2. (formerly C.6.f.2.): Page 4, line 11 of the attached rule includes a citation to "the Energy Supply and Environment Coordination Act of 1974." The Agency proposed and the Revisor approved a version of the rule including a citation to "the Energy Supply and Environmental Coordination Act of 1974." The State Register incorrectly substituted the word "Environment" for "Environmental." The Agency adopts the language it proposed and submitted to the

State Register and not the language incorrectly printed by the State Register.

8. Section C.5. [formerly C.6.] (page 3 of the attached rule) is amended to read as follows:

5. ~~6.~~ "Modification" or "modified" means any physical change in, change in the method of operation of, or addition to an emission facility which would result in ~~an~~ a net increase in emissions. [The rest of the section remains unchanged.]

9. Section D.2. (page 10 of the attached rule) is amended by changing the reference in the last line from ~~C.8.~~ to C.7.

MINNESOTA POLLUTION CONTROL AGENCY

Louis Breimhurst

Louis Breimhurst
Executive Director

DATED: November 9, 1981

1st Order - superseded by Later Order 2

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

ORDER ADOPTING RULE

Notice of the Agency's intent to adopt the above-entitled rule without a public hearing was published in the State Register on June 22, 1981 (5 S.R. 2073) and was sent by United States mail to all persons on the list maintained by the Agency pursuant to Minn. Stat. § 15.0412, subd. 4 (1981) on August 21, 1981. After affording interested and affected persons an opportunity to submit comments for 30 days after Notice, receiving fewer than seven written requests for a public hearing within the 30-day comment period, reviewing and considering the comments, and determining the need for and reasonableness of the above-captioned rule,

NOW, THEREFORE, IT IS ORDERED, that this rule identified as 6 MCAR §4.0041, a Rule Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas, is adopted this 30th day of October, 1981, as published in the State Register, 5 S.R. 220 et seq. with the following changes, pursuant to the authority invested in the Agency by Minn. Stat. § 116.07, subd. 4 (1981):

1. Section D.2.b. is amended to read as follows:

b. For subject emission facilities located or proposed to be located in sulfur dioxide or particulate matter or lead nonattainment

areas, a permit applicant shall perform a modeling analysis to determine whether the offsets to be provided are sufficient to result in a net air quality benefit, . . . [the rest of the section remains unchanged.]

2. Section C.4. is deleted in its entirety.

3. Sections C.5. through C.19. are renumbered consecutively as C.4. through C.18.

4. Section B.1. is amended to read as follows:

1. Except as provided in 2., this rule applies to persons who propose to construct or modify a subject emission facility, as defined in ~~C.18.~~ C.17.

5. Section C.18.a.(2) is amended to read as follows:

(2) The construction or modification of which will result in a ~~gross~~ net increase in emissions of at least 100 tons per year of a nonattainment criteria pollutant; or

6. Section C.18.c.(2)(a) is amended to read as follows:

(a) X = the ~~gross~~ net increase in nonattainment criteria pollutant discharges resulting from any construction or modification of the plant which was permitted by the agency during the following time

period: [the rest of the section remains unchanged.]

MINNESOTA POLLUTION CONTROL AGENCY

Louis J. Breimhurst
Executive Director

DATED: OCTOBER 30, 1981

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed
Adoption of a Rule of the State,
6 MCAR 4.0041, Governing the
Agency's Permit Program for the
Growth or Expansion of Industry
in Nonattainment Areas

CERTIFICATE OF
COMPLIANCE WITH
RULEMAKING PROCEDURES

- - - - - - - - - - - - - - - - - - - -

I, Special Assistant Attorney General Lisa R. Tiegel, do hereby declare that I have examined the proposed rule and all related documents and that, based on them and my person familiarity with the applicable requirements, all rulemaking procedures required by statute and rule have been followed.

Lisa R. Tiegel
Special Assistant Attorney General

DATED: October 30, 1981

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

AFFIDAVIT REGARDING COMMENTS SUBMITTED TO AGENCY

Douglas M. Benson, being duly sworn on oath, deposes and says:

1. That he is an employee of the Air Quality Division, Minnesota Pollution Control Agency, State of Minnesota;

2. That he was named in the Notice of Intent to Solicit Outside Opinion, 5 S.R. 2073 (June 22, 1981), as the person to be contacted as to comments on the above-referenced rule;

3. That he was also named in the Notice of Intent to Adopt a Rule Without a Public Hearing, 6 S.R. 218 et seq. (August 24, 1981), as the person to be contacted as to comments on the above-referenced rule;

4. That the Agency received no written responses or comments to the Agency's Notice of Intent to Solicit Outside Opinion and that, therefore, there are no such written responses or comments to submit to the Office of the Attorney General;

5. That the Agency received the following written comments in response to the Agency's Notice of Intent to Adopt a Rule Without a Public Hearing and that complete and accurate copies of these comments are attached to this affidavit:

a. Letter from John Powers, Senior Planner,

Metropolitan Interstate Committee, September 2, 1981.

b. Letter from Edwin F. Erickson, Vice President, General Manager, Northwest Paper Division, Potlach Corporation, September 23, 1981.

c. Letter from James T. Shields, Vice-President, Energy and Environmental Affairs, Minnesota Association of Commerce and Industry, September 24, 1981.

FURTHER AFFIANT SAYETH NOT.

Douglas M. Benson

Douglas M. Benson

Subscribed to and Sworn to before me this 30 day of Oct, 1981.

Mary Ann Hammer

Notary Public



metropolitan interstate committee

200 Arrowhead Place Duluth, Minnesota 55802 218-722-5545

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SEP 4 1981
MINN. POLLUTION
CONTROL AGENCY

Doug—
Signed contracts are on their way via separate package

September 2, 1981

Mr. Douglas Benson
Division of Air Quality
MPCA
1935 West County Road B2
Roseville,MN 55113

RE: Proposed Rule 6 MCAR 4.0041

Dear Doug,

I am seeking clarification of Section D.1.2.b. This section states that modeling of the impact of designated offsets is required to determine if the offsets will actually provide a net air quality benefit. My questions are:

1. Although there is no reference to modeling in Section E, does the statement in Section D mean that modeling is in fact necessary in order to obtain meaningful offsets?

2. What is meant by the phrase "or methods that the director finds to be comparably reliable" in D.1.2.b?

My concern relates both to the proposed rule and to the contract we are signing with the MPCA on air quality planning. If modeling is required to verify the impact of the offsets, we will need an increase in the contract funding in order to do the work. If modeling is preferred but not required, then we need to know what methods the director will find to be "comparably reliable." I do not want to do work or have our consultant do work that will result in offsets that will not be accepted by the PCA based on these statements in the rule.

Part of my concern stems from statements in the SIP for Duluth which said that macro-scale modeling cannot be applied to Duluth because of the topography. Another statement suggested that micro-scale modeling "should" be possible to measure potential impacts of new or expanded sources. The lack of sureness in these statements makes me wonder if modeling can be reliably done in Duluth and if so under what circumstances and at what expense. In responding to my questions above, can you also address this issue?

I would like your response prior to the expiration of the comment period so that, if necessary, we and the City can officially comment on the rule. You can call me with the clarification although I will also desire a written response.

Sincerely,

John Powers
Senior Planner

cc: Bill Majewski
Jim Filippi

JP/vg

Potlatch

Edwin F. Erickson
Vice President
General Manager
Northwest Paper Division

Potlatch Corporation
Avenue C & Arch Street
P.O. Box 510
Cloquet, Minnesota 55720
Telephone (218) 879-2363

One Maritime Plaza
P.O. Box 3591
San Francisco, California 94119
Telephone (415) 981-5980

September 23, 1981

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SEP 25 1981
MINN. POLLUTION
CONTROL AGENCY

Mr. Douglas Benson
Division of Air Quality
Minnesota Pollution Control Agency
1935 West County Road B-2
Roseville, Minnesota 55113

Dear Mr. Benson:

Re: State of Minnesota Rule 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Non-attainment Areas

We have reviewed the proposed "offset" rule which the Agency proposes to adopt without public hearing. While we believe the proposal is a forthright effort on the part of the MPCA to comply with the rules and regulations as promulgated by the U.S. Environmental Protection Agency, we do offer the following concerns and ask that they be entered into the record and carefully considered by the Agency staff prior to any final adoption of the rule:

1) Page 2. Item 5 is close to a direct quotation of the E.P.A. terminology for LAER and, as such, its inclusion is understandable. However, the statement that the "emission limitations specified in any other state's plan shall presumed to be achievable in practice unless a person demonstrates to the director that the emission limitations or standard of performance is not achievable for reasons other than economic cost" subjects industries to the vagaries of levels specified by any state's program. For a variety of reasons, such as a pollutant not posing a problem or simply a desire to insure that a type of industry does not locate in a state, such levels may be set inordinately low. The onus then is on industry to identify and prove which LAER actually should be considered. It would appear more realistic if it were to read "emission limitations specified in any other state plan and demonstrated achievable in similar applications ..."

2) Page 2. Item 6c. The design capacity, as we interpret it, refers to the rated capacity of a piece of equipment as specified by the manufacturer. As stated, the throughput would then be permanently limited to that throughput regardless of work done to increase its efficiency by alteration or technical advancements. A restriction based on the emission from the equipment as total quantity would protect the environment to the level of original design and would allow additional capacity.

3) Page 2. Item 6f (2). Specific legislative acts are listed but others can and have been involved. If some statement such as "or other federal or state acts" were added, it would eliminate the need for making later changes.

4) Page 3. Item 8. As a matter of clarification, are the offsets within categories interchangeable (e.g. reductions of carbon monoxide be used to offset nitrogen oxides, particulates to offset lead) or is it to be assumed that offsets are only for particular pollutants as would be expected?

5) Page 7. Item 2b. Lead is omitted here after being included previously on page 3, item 8a(2).

6) Page 7. Item 3. The phrase "are in compliance" is very difficult to assess since any one of the numerous facilities could, at a moment in time, be out of compliance for one reason or another. "Operating under an applicable permit" would insure that the interest was satisfied.

7) Page 8. Item 5b(1) and (2). No criteria is specified nor is there any recourse available. It appears that the permit applicant is subject to the opinion of the director and that an appeal procedure is not available or contemplated. We urge your reconsideration.

Generally speaking, if the present non-attainment classification of the Cloquet area were to remain, the proposed language of the rule would hamper any significant industrial expansion in this locale.

The regulations would require that a net air quality benefit in the affected area be demonstrated. This can be accomplished by 1) installing more efficient pollution abatement equipment; or 2) having offsets in the "bank" that can be utilized in the future.

As for the equipment option, Potlatch believes that this is highly improbable in our case in that our Cloquet pulp and paper mill has the latest technology already in place.

While we do have particulate offsets that could be "banked" as a result of the shutdown of our boilers #1-4 in conjunction with the start-up of our #9 power boiler, we cannot be certain at this time whether these would be sufficient to offset emissions from any future plant expansion.

Potlatch's ongoing commitment to pollution control in Minnesota has been well established. We cannot, however, emphasize too strongly our concern over Cloquet's questionable status of "non--attainment" as a potential threat both to possible expansion of existing facilities and to the economic growth of this region.

Thank you for considering our views.

Sincerely,

E. F. Erickson

EFE:lrn

MINNESOTA ASSOCIATION
OF
COMMERCE AND INDUSTRY

maci
200 HANOVER BUILDING
480 CEDAR STREET
SAINT PAUL, MINNESOTA 55101
(612) 292-4661

JAMES T. (Ted) SHIELDS
Vice-President
Energy & Environmental Affairs

September 24, 1981

Mr. Douglas Benson
Division of Air Quality
Minnesota Pollution Control Agency
1935 West County Road B2
Roseville, MN 55113

RECEIVED
SEP 24 1981
MINN. POLLUTION
CONTROL AGENCY

RE: 6MCAR S 4.0041 Comments to Proposed Rule

Dear Mr. Benson:

The following comments are submitted by MACI in response to the MPCA's request for comments on proposed Minnesota Rule 6 MCAR S 4.0041 commonly referred to as the "Offset Rule".

As stated in our May 12, 1981 letter on the subject rule, MACI supports the Agency in its decision to adopt this rule via the non-controversial rulemaking procedures. While there are several facets of the rule with which we do not totally agree, in the spirit of compromise that has led to the development of the rule, MACI is willing to accept the non-controversial rulemaking procedures.

In the same spirit of compromise, MACI would request that as soon as the proposed rule is promulgated the Agency immediately address two related issues, i.e. the boundaries of non-attainment areas and the definition of source.

With regard to the boundaries of non-attainment areas, it should be noted that MACI does not disagree with the basic concept that the Offset Rule is required in non-attainment areas which do not have an accommodative State Implementation Plan. However, it is MACI's position that some areas which are currently designated non-attainment are, in reality, attainment areas. This is particularly true for the TSP designations in the seven county metropolitan area. It is MACI's belief that the Agency staff shares this view.

As these designations now stand, the proposed rule essentially prohibits construction or modification of a source in "clean" areas. According to the rule, a new source is required to obtain an offset which can be shown to effect a "net air quality benefit" through modeling. Unless there are offsets available in the immediate vicinity of the new source's location, it is impossible for the new source to obtain a permit.

Since MPCA's own published monitoring data shows large portions of the seven county metropolitan area to be below the NAAQS for TSP and SO_2, MACI believes it is in the best interest of the state for the Agency to immediately initiate changes in the areas currently designated non-attainment for TSP and SO_2.

Turning to the definition of "source", it should be noted that immediately prior to the official publication of the proposed Offset Rule, the U.S.EPA proposed a change in the definition of "source" in non-attainment areas. Under the old definition U.S.EPA viewed a source as an individual emission point or the smallest division of a process to which a rule was being applied. The proposed change will redefine source as the entire plant. This proposed change makes U.S.EPA's definition of source the same in both attainment and non-attainment areas. The proposed Minnesota Offset Rule as presently written incorporates the old, more restrictive definition of source. MACI recommends that as soon as U.S.EPA finally adopts the change in the definition of source, that the MPCA immediately commence a non-controversial rulemaking procedure to amend the definition of source as used in the Minnesota Offset Rule.

As you know, MACI has actively worked with the Agency in the development of the proposed rule and stands ready to be of further assistance in the consideration and implementation of the above referenced issues. If the Agency has any questions concerning these brief comments on said issues, please contact me.

While as noted above MACI will neither request nor otherwise press for a hearing on the proposed rule, it should be noted that in the event a hearing is requested by other persons and subsequently held on said rule, MACI reserves its right to raise and pursue at such a hearing any and all issues raised by the proposed rule.

Finally, MACI wants to take this opportunity to congratulate those members of the Agency staff who have been responsible for and responsive to the long rule drafting process. The patience and expertise demonstrated by those persons should serve as a model of excellence in gaining relevant input to the rulemaking process outside of a hearing context. We look forward to similar efforts on future rulemaking.

Sincerely,

James T. Shields

JTS:cms

cc: Louis J. Breimhurst

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA POLLUTION

CONTROL AGENCY

In the Matter of the Proposed Adoption of a Rule of the State, 6 MCAR 4.0041, Governing the Agency's Permit Program for the Growth or Expansion of Industry in Nonattainment Areas

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The subject of this rulemaking is the proposed adoption by the Minnesota Pollution Control Agency (hereinafter referred to as the "Agency") of Minn. Rule 6 MCAR §4.0041 (hereinafter referred to as "Minn. Rule APC 41," "APC 41," "the rule", or "the offset rule.") This rule is not an amendment to any existing rule of the Agency. This rule is proposed for adoption pursuant to Minn. Stat. § 116.07, subd. 4 (1980), which authorizes the Agency to adopt rules for the prevention, abatement, and control of air pollution.

If adopted, the proposed rule will apply to any person who proposes to construct or modify a subject emission facility in any area of the state that the Agency has designated nonattainment for any primary or secondary ambient air quality standard. The terms "nonattainment area," "ambient air quality standard," and "subject emission facility" are defined in the rule and are discussed below.

Rulemaking on proposed Minn. Rule APC 41 was authorized by the Agency on July 28, 1981. At the same time it authorized the initiation of rulemaking, the Agency found that the proposed adoption of the rule is noncontroversial in nature and directed

that the rulemaking proceedings be conducted in accordance with the statutory provisions governing the adoption of noncontroversial rules, Minn. Stat. § 15.0412, subd. 4h (1980). Accordingly, the rulemaking proceedings on the proposed adoption of the rule are governed by that statute and no hearing will be conducted on the adoption of the rule unless, on or before September 25, 1981, seven or more persons submit to the Agency a written request for such a hearing.

In accordance with the requirements of Minn. Stat. § 15.0412, subd. 4h (1980), this document, the Statement of Need and Reasonableness, was prepared and completed prior to the dates that the proposed adoption of the rule was noticed in the State Register and mailed to persons on the Agency's mailing list. The discussion provided in this Statement is divided into the following parts: Part II. Need for the Rule; Part III. Reasonableness of the Rule; Part IV. Summary; and, Part V. Exhibit List.

II. NEED FOR THE RULE

The need to adopt the proposed offset rule arises from the requirements of federal and state law.

A. Federal law.

The federal Clean Air Act, 42 U.S.C. § 7401, et seq., is divided into four different subchapters. Subchapter I of the Clean Air Act, 42 U.S.C. § 7401, establishes a program for the prevention and control of air pollution from stationary sources of pollution.

Subchapter I is itself divided into several parts. Part A of Subchapter I establishes the framework within which air pollution standards are set and existing stationary sources of air pollution are controlled. Part D of Subchapter I establishes the framework within which new stationary sources of air pollution are permitted to be constructed and operated in those areas of the United States that are classified as "nonattainment areas."

It is the requirements of Part A and Part D of Subchapter I, in addition to other things, that give rise to the need for the proposed offset rule. These requirements are discussed below.

1. Subchapter I, Part A of the Clean Air Act

The framework for the control of air pollution established in Subchapter I, Part A of the Clean Air Act is the following:

a. First, the Administrator of the United States Environmental Protection Agency (hereinafter referred to as "the EPA") is required to publish (and revise, from time to time) a list which includes, among other things, each air pollutant "the emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." [Clean Air Act, 42 U.S.C. § 7408(a)(1)(A)]. Pollutants appearing on this list are commonly referred to as "criteria pollutants." To date, the EPA has listed seven criteria pollutants: sulfur oxides (measured as sulfur dioxide), particulate matter, carbon monoxide, ozone, hydrocarbons, nitrogen oxides and lead. 40 CFR Part 50.

b. Second, the Administrator is required to adopt national primary ambient air quality standards and national

secondary ambient air quality standards for each criteria pollutant. [Clean Air Act, 42 U.S.C. § 7409(a)]. Primary ambient air quality standards are to be set at levels sufficient to protect the public health [Clean Air Act, 42 U.S.C. § 7409(b)(1)]. Secondary ambient air quality standards are to be set at levels sufficient to protect the public welfare [42 U.S.C. § 7409(b)(2)].[1]

c. Third, each state is required to submit to the EPA a list classifying the entire state, by air quality control regions, as: (1) in attainment of the primary and secondary ambient air quality standards (attainment areas); (2) not in attainment of the primary and secondary ambient air quality standards (nonattainment areas); and, (3) unclassifiable, due to lack of sufficient information to determine the status of the area with respect to the primary and secondary ambient air quality standards (unclassified areas.) Clean Air Act, 42 U.S.C. § 7407(d)(1). The Administrator of the EPA reviews each state's list, makes such revisions as the Administrator deems necessary, and promulgates the list as a federal rule. Clean Air Act, 42 U.S.C. § 7407(d)(2).

A region can be classified as attainment of a primary standard for a particular pollutant and nonattainment of the

---

[1]Ambient air quality standards establish the maximum levels of pollution wich may be tolerated in the air around us, without reference to any particular source of pollution. Ambient standards are not the same as emission standards (or emission limitations), which, unlike ambient standards, establish the maximum levels of pollution that may be emitted from a discrete source of pollution (such as a stack.)

secondary standard for that pollutant. In addition, a region can be classified as attainment for some pollutants and nonattainment for others.

d. Fourth, each state is required to develop and submit to the EPA, for approval, a State Implementation Plan (or "SIP"). These SIPs describe the control strategy that the state will implement to bring their nonattainment areas into compliance with federal ambient air quality standards. In developing their SIPs, the states are relatively free to choose any strategy which will result in attainment of the national ambient air quality standards by the required deadlines. However, the states' control strategies must satisfy the eleven enumerated Clean Air Act requirements, including, among other things, the establishment of a program for permitting the growth of industry in nonattainment areas. Clean Air Act, 42 U.S.C. § 7410(a)(2), see in particular, § 7410 (a)(2)(I). The basic framework of this "growth" program is set out in Chapter I, Part D of the Clean Air Act and is further discussed below.[2]

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[2]A state's failure to satisfy the requirements of the Clean Air Act and to obtain the EPA's approval of its SIP by July 1, 1979, resulted in a prohibition of major industrial growth or expansion in that state until such time as the state's SIP is approved. As stated above, the "growth program" is a necessary part of any State Implementation Plan. If adopted by the Agency and approved by the EPA, the proposed offset rule (i.e., Minn. Rule APC 41), would establish the necessary growth program and eliminate the no-growth sanction currently in effect in Minnesota's nonattainment areas.

2. Subchapter I, Part D of the Clean Air Act

The framework for the control of air pollution established in Subchapter I, Part D of the Clean Air Act is the following:

a. Under section 7502(b)(6) of the Clean Air Act, each state must include within its SIP a provision which requires certain new air pollution sources proposed to be located in nonattainment areas to obtain construction and operating permits in accordance with the requirements set out in section 7503 of the Clean Air Act.

b. Section 7503 of the Clean Air Act specifies the four conditions that the owner or operator of a new source must satisfy in order to be issued a construction or operating permit. One of these conditions is commonly referred to as the "reasonable further progress" requirement, Clean Air Act, 42 U.S.C. § 7503(1)(A).

The "reasonable further progress requirement" relates to the progress that is being made in bringing a given nonattainment area into compliance with a specific ambient air quality standard and is defined in section 7501 of the Clean Air Act. In order to ensure that a nonattainment area continues to make "reasonable further progress" toward attainment of a standard even if proposed new sources of air pollution are located in that area, the Clean Air Act establishes two specific permit programs that the states' may implement. A state may not issue a permit to any proposed new source subject to these permit requirements unless the state has adopted one of these two permit programs.

These two "permit program" options flow from the requirements

of sections 7503(1)(A) and 7503(1)(B) of the Clean Air Act. The second option [established in section 7503(1)(B)] is one in which a state would "build into" its State Implementation Plan a "growth allowance." As long as the emissions from a proposed new source would be within the allowance provided in the SIP, the state may permit that new source to be constructed and operated.[3]

The first option [established in section 7503(1)(A)][4] is one in which the state would adopt an "offset program" as a means of issuing permits to new sources. If adopted, proposed Minn. Rule APC 41 would establish this offset program.

At the heart of the offset program is the requirement that, before a new source of air pollution may be constructed, it must obtain from existing sources of that pollution a reduction in emissions of that pollutant. The reduction required by the "offset program" is a decrease in emissions in the area which would be affected by the new source to more than "offset" the additional pollution which would be contributed if the new source was constructed and operated.

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[3]The proposed offset rule recognizes this option as an alternative to the requirements of the rule. See section B.2.b. of the proposed rule and the discussion below regarding that section of the proposed rule.

[4]The United States Environmental Protection Agency (EPA) has adopted rules to implement the provisions of the Clean Air Act regarding offset programs. See 40 C.F.R. § 51.18 (1980) as amended; see also Appendix S to 40 C.F.R. §51.18. In order to be approved by the EPA, the State of Minnesota's offset program must meet the requirements specified in these rules.

B. State law.

The national ambient air quality standards are the maximum levels of certain pollutants that may be tolerated on a nationwide basis. The states are, therefore, prohibited from adopting ambient air quality standards that are less stringent than those adopted by the EPA. However, the states may adopt standards that are more stringent than the EPA if they so choose.

The legislature of the State of Minnesota has designated the Minnesota Pollution Control Agency the state body with primary responsibility for improving air quality and for dealing with the various and complex problems relating to, among other things, air pollution. Minn. Stat. ch. 116 (1980), see especially, sections 116.01 and 116.07.

Under state law, the Agency is required to

> adopt standards of air quality . . . . Such standards of air quality shall be premised upon scientific knowledge of causes as well as effects based on technically substantiated criteria and commonly accepted practices.

Minn. Stat. § 116.07, subd. 2 (1980). In addition, the Agency is required to

> adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, Chapter 1046 [i.e., Minn. Stat. ch. 116] for the prevention, abatement, or control of air pollution.

Minn. Stat. §116.07, subd. 4 (1980).

"Air pollution" is defined in Minn. Stat. § 116.06, subd. 3 (1980) to mean

> the presence in the outdoor atmosphere of any air contaminant or combination thereof in such quantity, of such nature and duration, and under such conditions as would be injurious to human health or welfare, to animal or plan life, or to property, or to interfere unreasonably with the enjoyment of life or property.

C. Conclusion.

The need for the proposed offset rule arises out of both the federal and the state statutory requirements related to the prevention and control of air pollution. In specific, the need for the proposed offset rule arises out of (1) the need to satisfy the requirements of the federal program established to ensure the attainment and maintenance of ambient air quality standards in nonattainment areas; (2) the need to satisfy the general requirements of state law to ensure the prevention and abatement of air pollution; and, (3) the need to establish a mechanism for considering and managing both environmental and economic concerns related to the growth and expansion of industry in the nonattainment areas in Minnesota. The Agency's proposed offset rule, Minn. Rule APC 41, is intended to meet these needs.

III. REASONABLENESS OF THE RULE

The following discussion provides an explanation and justification of the individual provisions of the rule. The purpose of this section of the Statement is to demonstrate that each provision is a reasonable approach to its function.

A. Purpose. The purpose of this rule is to establish conditions to be included in certain permits issued by the Agency

to emission facilities in nonattainment areas.

B. Applicability.

1. Section B.1. of the rule establishes the basic applicability requirements of the proposed rule. In specific, section B.1. establishes that, except as provided in section B.2. of the proposed rule, the rule would apply to any person who proposes to construct or modify (as defined in section C.6.) a subject emission facility (as defined in section C.18.) in a designated nonattainment area (as defined in section C.10.). These basic applicability requirements are "reasonable" for the following reasons.

In developing its SIP (see discussion above), the Agency developed a program to ensure that the emissions from existing emission facilities do not cause or contribute to a violation of ambient air quality standards. Thus, the SIP addresses emissions from existing sources of air pollution. Since existing emissions of air pollution are addressed by the Agency in the SIP, they are not addressed in proposed Minn. Rule APC 41.

The pollutant emissions resulting from the construction of new or modification of existing emission facilities are not addressed in the SIP. Proposed Minn. Rule APC 41 would apply to the emissions from these facilities and would thereby ensure that emissions from these "unaccounted for" facilities do not create ambient air quality violations in nonattainment areas.

It is reasonable to make the offset rule applicable only to new or modified facilities in nonattainment areas but not to new

or modified facilities in other areas since the emissions from these "other" sources are controlled through other federal programs. In specific, increases in emissions that result from the construction or modification of facilities in attainment areas or unclassified areas are regulated under the federal "Prevention of Significant Deterioration" program (40 C.F.R. Part 51.24).

In summary, the proposed offset rule applies to those facilities that (1) may emit pollutants that are not otherwise accounted for by the Agency and (2) may cause or contribute to violations of the ambient air quality standards. In order to protect the public health and welfare, it is reasonable for the Agency to adopt a rule that reaches those sources that may cause or contribute to an ambient air quality violation and are not otherwise accounted for by the Agency.

2. Section B.2. of the rule establishes an exception from the applicability requirements set out in section B.1. The reasons for this exception are described below.

As discussed above, the Clean Air Act establishes two permit program options that the states may implement to control the emissions from growing or expanding industries. (See discussion at pages 6 and 7.) The proposed offset rule generally follows the first of the two options set out in the Clean Air Act. However, section B.2. of the proposed rule allows for the implementation of the second option in a nonattainment region. If the second option is implemented in that area, then the requirements established in the proposed offset rule are not applicable in that area.

The exception established in section B.2. is effective only

if a qualified alternate Plan has been developed and approved by both the Agency and the Environmental Protection Agency for the nonattainment area. If the alternate Plan establishes a growth allowance such that additional growth will not result in a violation of the ambient air quality standards, the alternate Plan would accomplish the same result as the offset rule. Section B.2. is therefore reasonable in that it allows local units of government the option of selecting the growth approach they wish to implement in their area (i.e., the alternate Plan approach or the offset rule approach.) It is reasonable to include the requirement that both the Agency and the EPA approve the alternate Plan since, absent such approval, the Clean Air Act would prohibit the use of this option. Clean Air Act, 42 U.S.C. § 7502(b)(5).

C. Definitions. In general, the Agency continues to use earlier definitions the Agency has established for terms appearing in the proposed rule (see Minn. Rule APC 2). This approach is reasonable in that it maintains consistency among various Agency rules.

Proposed Minn. Rule APC 41 contains nineteen definitions. These definitions are reasonable for the following reasons:

1. "Air quality control region." The term "air quality control region" is used in section C.8.a.(1) of the proposed rule to identify the area within which an offset for certain pollutants must be obtained. Although this term appears in the Clean Air Act, no definition is given for it. The definition proposed by the Agency in C.1. is reasonable in that it

reflects the actual administrative practice of the Agency.

2. "Criteria pollutant." The term criteria pollutant is used in section C.11.a. as part of the definition of "nonattainment criteria pollutant," which is used in section C.18. to identify the basis for subjecting emission facilities to the proposed rule and is used elsewhere in the proposed rule to collectively refer to the pollutants of interest. The term "criteria pollutant" is a commonly used "term of art" in the air pollution field. The derivation of this term is discussed above at page 3.

3. "Fugitive emissions." This term is referred to in section C.16., where it is included within the definition of "restricted emissions." The term "fugitive emissions" is defined in the proposed rule because the public commonly thinks only of point source emissions (such as smokestack emissions) when considering air pollution. Since fugitive emissions may contribute to violations of ambient standards, it is reasonable to apply the proposed rule to both fugitive emissions and point source emissions.

In addition, since it is more difficult to quantify fugitive emissions than other sorts of emissions, it is reasonable to specify the manner in which fugitive emissions shall be quantified. Under the proposed rule, fugitive emissions would be quantified in accordance with commonly accepted methods of calculation.

4. "Gross increase in emissions." This term is used in section C.18., the definition of "subject emission facility"

and is needed to adequately describe the applicability of the proposed rule. Section C.18. contains three separate applicability sections (i.e., C.18.a., C.18.b., and C.18.c.). The term "gross increase in emissions" specifically relates to section C.18.a.

The definition of "gross increase in emissions" is consistent with the Environmental Protection Agency's requirements regarding the applicability of state offset rules. [See Alabama Power Company v. Costle, 13 ERC 1225 (D.C. Circuit June 18, 1979); see also Alabama Power Company v. Costle, 13 ERC 1993 (D.C. Circuit December 14, 1979)]. Accordingly, in calculating the gross increase in emissions that would result from the construction or modification of the proposed new emission facility, the Agency shall consider the total emissions to be expected from the new facility when the facility is operated with pollution control equipment or other legally enforceable restrictions to be applied to or incorporated in that facility.

5. "Lowest achievable emission rate." This term is vital to accomplish the objectives of the proposed rule. It is used in D.4.a.(1) to describe the maximum level of emissions that a proposed new or modified facility would be allowed to emit. The term is defined in the Clean Air Act and EPA regulations. Clean Air Act, 42 U.S.C. § 7501(3); 40 CFR Part 51.18, Appendix S, II.7. Both the Clean Air Act and the EPA regulations require states to limit the emissions from sources subject to the requirements of a federally-required offset program to the "lowest achievable emission rate." Clean Air Act, 42 U.S.C. § 7503(1)(B)(2) and 40

CFR Part 51.18(j)(2), as amended at 45 Fed. Reg. 52745 (August 7, 1980).

The Clean Air Act includes within their definition of "lowest achievable emission rate" the emission limitations specified in any other state's Plan. Id. The Clean Air Act provides that, if an owner or operator demonstrates that such limitations are not achievable, then those limitations are not considered the "lowest achievable emission rate" for that source. 42 U.S.C § 7501(3). In the proposed rule, the Agency proposes to incorporate this definition to make the limitations appearing in another state's Plan presumptively but not conclusively achievable in practice. This is reasonable in that it appears that some states adopt unachievable emission limitations in order to keep certain sorts of industries from locating in that state.

6. "Modification" or "modified." This term is also a critical part of the definition of "subject emission facility." The definition provided in C.6. excludes several activities from the definition of the term "modification" or "modified." These exclusions are reasonable in that they would eliminate the possibility of inappropriate application of the proposed rule. That is, these exclusions are based on the Agency's belief that certain modifications at an emission facility are not particularly important from a pollution standpoint or are, on balance, tolerable and therefore should not be subject to the proposed offset rule. Thus, section C.6.a. of the proposed rule excludes from the rule those emissions that are not permanent (i.e., those

emissions that result from routine maintenance, repair or replacement.) Sections C.6.b., c., d. and f. exclude from the rule emissions that result from relatively insignificant (from a pollution perspective) changes in the operations of an existing facility. The exclusions in C.6.e. and g. are provided in response to energy concerns and constraints, are consistent with federal rulings on this subject [see 40 CFR Part 51.18(j)(1)(vi)(c)(2) as amended at 45 Fed. Reg. 52744 (August 7, 1980)] and are, therefore, also reasonable.

7. "National ambient air quality standards." This term is used in section C.10. of the proposed rule, along with the term "state ambient air quality standards" in defining the term "nonattainment area." Since the term "nonattainment area" is used to describe the applicability of the proposed rule, the definition of both the term national ambient air quality standards and state ambient air quality standards are needed. It is reasonable to tie the applicability of the proposed rule to violations of the national standards (as determined by the agency or by the Environmental Protection Agency) since the Clean Air Act requires the offset program to be applied in those areas. See Clean Air Act, 42 U.S.C. § 7409 and Part D.

8. "Net air quality benefit." This term, like "lowest achievable emission rate," is also vital to accomplishing the objectives of the offset rule and relates directly to the "reasonable further progress requirement" described at page 6 above. The Agency believes that it is

reasonable and desirable to specify the ratio of offsets to new emissions in order to leave no doubt as to the reduction in emissions required to accomplish the "reasonable further progress" requirement of the Clean Air Act, as implemented by the State. The term is used in D.2. as the purpose or objective of the modeling analyses.

9. "Net increase in emissions." This term is used in section C.18., the definition of "subject emission facility," and is needed to adequately describe the applicability of the proposed rule. While the term "gross increase in emissions" relates to section C.18.a., the term "net increase in emissions" relates specifically to sections C.18.b. and c. Like the term "gross increase in emissions," the term "net increase" is consistent with the Environmental Protection Agency's requirements. Unlike the term "gross increase," the term net increase excludes all emission reductions obtained within the same plant from the calculation of the total emissions that will result from the construction of the new facility or modification of the existing facility.

10. "Nonattainment area." The term "nonattainment area" is used throughout the rule. Generally, the proposed rule would apply to sources located within regions identified as "nonattainment areas." The proposed definition of "nonattainment area" reflects the actual usage of that term in that the EPA has the authority to designate areas of the State that violate federal

ambient air quality standards while the Agency is responsible for addressing the pollution problem. In addition, since some state ambient air quality standards are more stringent than federal standards, the Agency may have to independently designate areas violating state ambient standards different than their federal counterparts.

It should be emphasized that areas of the state are designated nonattainment of a federal standard pursuant to federal rulemaking by the Environmental Protection Agency. Thus, the federal nonattainment designations are made by the EPA pursuant to authority it is granted in the Clean Air Act (and not pursuant to any delegated authority from the Agency.) The federal designations appear as rules in the Code of Federal Regulations, at 40 CFR Part 81.324. The Agency has not yet designated any areas nonattainment of state standards more stringent than federal standards, but would do so in a proceeding separate than this rulemaking. As stated above, it is reasonable for the Agency to refer to both the federal and state designations as nonattainment areas. Such designations are readily understood by all persons to whom this rule might apply.

11. "Nonattainment criteria pollutants." This term is used throughout the rule and generally describes the types of emissions that would make a source subject to the proposed offset rule. C.11. provides that for all nonattainment areas except ozone, nonattainment criteria pollutant means the criteria pollutant (as defined in C.2.) for which an area is designated

nonattainment. For ozone nonattainment areas, nonattainment criteria pollutant means nonmethane hydrocarbons. It is reasonable to treat ozone somewhat separately from the other pollutants addressed in this rule since ozone is a pollutant, unlike the other pollutants, which is not directly emitted by a source but which results from a chemical reaction of, among other things, emissions of nonmethane hydrocarbons.

12. "Offsets." This term describes the basic requirement of the proposed rule, that is, the requirement that a new source "offset" the emissions it would add in an area by accomplishing a reduction in the existing emissions in that area. It is reasonable to require that all offsets be documented and legally enforceable in order to ensure that a long-term, real contribution to attainment of standards is made by subject emission facilities. It is reasonable to establish August 7, 1977, as the baseline date against which "offsets" will be calculated since this date is both required by the Clean Air Act and is used by the Agency in developing its State Implementation Plan. Clean Air Act, 42 U.S.C. § 7407(d)(1).

In addition, it is reasonable to include the alternative baseline date specified in section C.12.b. since the Agency would make existing offsets part of any future revisions to its State Implementation Plan and would thereby change the basic emission inventory against which offsets would be calculated. (In revising its SIP, the Agency determines the amount of emissions that are currently emitted by sources, and then develops a control program

to ensure a reduction in emissions by an amount necessary to achieve ambient air quality standards. The amount of emissions allowed by the State Implementation Plan is often referred to as "baseline emissions." It is against this amount (i.e., the maximum amount of emissions allowed if ambient standards are to be attained and maintained) that offsets may be obtained. See discussion, below, of definition of "restricted emissions," in section C.16.)

13. "Plan" or "State Implementation Plan." This term is used in sections B.2. and C.12.b. and reflects the actual usage of that term in the Clean Air Act.

14. "Plant." This term is used in section C.18.c. and must be defined to clearly delineate the applicability of the proposed rule to modifications of existing emission facilities. The use of the Standard Industrial Code to define "plant" is reasonable in that this code is readily accessible and is a common tool of the industrial community, as is evidenced by the use of this Code in the federal emission offset interpretive ruling, 40 CFR Part 51.18(j)(1)(ii) as amended at 45 Fed. Reg. 52744 (August 7, 1980).

15. "Resource recovery facility." This term is used in section D.5., which establishes a limited exclusion for resource recovery facilities. The definition provided in the proposed rule is reasonable in that it is consistent with the Environmental Protection Agency's definition of the term. 40 C.F.R. 51.18, Appendix S II.A.12 (1980). However, in its definition, the Environmental Protection Agency does not explain what averaging

period it will use to determine whether a facility meets the definition of a resource recovery facility. The proposed definition set out in C.15. contains a thirty day rolling average. "Thirty day rolling average" is defined in C.19. and is reasonable for the reasons stated below.

16. "Restricted emissions." This term is used in the definition of "net air quality benefit" and, like the term offsets, is vital to the workings of the proposed rule. In order to understand the need for and reasonableness of this provision, the way in which an offset is to be calculated must be understood.

To satisfy the requirements of the proposed rule, an offset must result in a net air quality benefit. In order to result in a net air quality benefit, the reduction in emissions from an existing source must be greater than the proposed increase in emissions from the new or modified source.

In order to determine the amount of reduction to be achieved, it is necessary to know the baseline against which the reduction is calculated. (This is quite a simple fact. For instance, in order to know how much weight one has reduced, it is necessary to know the weight at which one began to diet.)

The baseline against which reductions are calculated is referred to in this proposed rule as "restricted emissions." The definition of "restricted emissions" in the proposed rule constitutes a reasonable "baseline" against which to measure offsets and net air quality benefit in that it recognizes the various ways in which the Agency may account for emissions from

existing sources in both the Agency's emission inventory and in its SIP. Further, the definition of "restricted emissions" is reasonable in that it provides a mechanism for sources to correct errors in the Agency's records (see C.16.d.).

17. "State ambient air quality standards." Along with the term "national ambient air quality standards," this term is used in section C.10. of the proposed rule in defining the term "nonattainment area." Since state ambient air quality standards may be more stringent than national standards, it is possible for areas to be nonattainment of a state standard but attainment of a national standard. Since the Agency is charged with the responsibility under state as well as federal law of preventing and abating air pollution, it is reasonable for the proposed rule to include a definition that would have the rule apply in both federal and state nonattainment areas. (See also explanation of national ambient air quality standards at page 16.)

18. "Subject emission facility." This term defines the sources to which the offset rule would apply. The rule applies to sources proposed to be constructed or modified in areas designated nonattainment on the date the agency receives a completed permit application for the construction or modification. This date is reasonable in that it is consistent with Environmental Protection Agency guidance on this subject. See 46 Fed. Reg. 9124 - 9127 (January 28, 1981.)

C.18. is divided into three basic parts, C.18.a., C.18.b. and C.18.c. C.18.a. describes the applicability of the rule to the construction of new sources and to larger modifications of

existing sources. Under this section of the rule, only large sources [i.e., those with a "gross increase in emissions" (as defined in C.4.) of 100 tons per year of a nonattainment criteria pollutant] are subject to the rule.

C.18.b. describes the applicability of the rule to modifications of existing sources. The emission rates specified in this section have the effect of limiting the rule's applicability to those facilities which are relatively large in terms of both emissions and economics. Relatively small facilities are thereby spared the burden of satisfying the requirements of proposed Minn. Rule APC 41. Those few facilities that may have small emission increases that would cause a disproportionate local degradation of ambient air quality can be addressed through existing Agency rules [Minn. Rule APC 3(f)]. Further, since C.18.b. refers to net increases in emissions (as opposed to gross increases), the proposed rule allows sources to obtain offsets within the existing facility and thereby avoid the other requirements of the offset rule. This is reasonable in that it ensures that "reasonable further progress" toward achievement of the standards will be maintained.

C.18.c. describes the applicability of the proposed rule to modifications of a plant. This section is needed and reasonable to avoid the possibility that a facility may make several modifications (all of which are smaller than the amounts that would make them subject to the rule) and might, accordingly, avoid having the offset rule applied to them. Thus, this section

provides a mechanism through which modifications made over a specified time period may be considered in aggregate for the purpose of determining whether the offset rule applies to the sources being modified. This definition is consistent with the requirements of the Environmental Protection Agency on this subject.

19. "Thirty day rolling average." This term is used in section C.15., which is the definition of "resource recovery facility." In order to be considered a resource recovery facility under the proposed rule, the facility must utilize solid waste to provide more than 50 percent of the heat input. In calculating whether solid waste is used to provide more than 50 percent heat input, a 30 day rolling average shall be used.

It is reasonable to include an explanation in the rule of the averaging period that the agency will use in determining whether a source meets the definition of resource recovery facility. A thirty day rolling average is a reasonable time period in that it provides a reasonably accurate statement of the overall operations of the facility.

D. Conditions for Permit. Section D of the proposed rule establishes the conditions under which permits for subject emission facilities shall be issued (see D.1. through D.3.), requires that certain conditions be contained in permits issued to subject emission facilities (see D.4.), and establishes a limited exclusion from some of the requirements in D. (see D.5.)

1. The first condition, that offsets be obtained prior to construction or modification, is the heart of the offset rule. Under D.1., sufficient offsets (as defined in C.12.) must be obtained. The amount of offsets that must be obtained is described by section D.2. (net air quality benefit.)

The requirement to get offsets (in the amount specified in D.2.) applies to all subject emission facilities except those emission facilities that are temporary. Temporary emission facilities are those that will be located in the nonattainment area for less than two years. These temporary facilities can be assumed to have little significant impact on the nonattainment area. It is, therefore, reasonable to exempt these facilities from the offset requirements but not from the "lowest achievable emission rate" and "certification" requirements (in sections D.4. and D.3., respectively.) This is because the reasons for requiring offsets are not the same as the reasons for requiring

certification and lowest achievable emission rate. If these "exempt" sources did not implement "lowest achievable emission rate," they could interfere with the short-term "reasonable further progress" being made in the area. However, since these sources will not be in the area over the long-term, there is little concern regarding their interference with "reasonable further progress" over the long-term. Since the offset requirement is intended as a long-term mechanism for achieving "reasonable further progress," it is reasonable to exempt temporary (i.e., short-term) sources from the offset requirement. (The certification requirement is equally applicable to temporary and permanent sources for the reasons stated in the discussion of that requirement, below.) Finally, this partial exemption (from the offset requirement but not the other requirements of section D. of the proposed rule) is consistent with federal rulings on the subject. 40 C.F.R. Part 51, Appendix S, IV.B.3.

2. The second condition, that the owner or operator demonstrate that the offsets to be provided are sufficient to result in a net air quality benefit, describes the amount of offsets that must be obtained. It is necessary to obtain sufficient offsets to result in a net air quality benefit because existing emission facilities have the burden, under the SIP, of reducing emissions to attain ambient air quality standards and requiring new and expanded emission facilities to contribute to attainment of these standards is only fair. To allow new emissions to be offset at a ratio of one to one is to allow maintenance of the status quo and the status quo is unacceptably

high concentrations of ambient air pollution. A net air quality benefit is defined at C.8.b. as a ratio of offsets to new emissions of 1.1 to 1. In other words, offsets must exceed new emissions by 10 percent. Absent such a ratio, subject emission facilities could be constructed without significantly contributing to attainment of ambient standards. For example, consider a subject emission facility of 100 tons per year which could otherwise obtain an offset of 101 tons per year. The first 100 tons per year of offset prevents a net air quality degradation and only the last 1 ton per year contributes to attainment of standards. With the ratio specified in C.8.b., the offset required in this example would be 110 tons per year, with 10 tons per year contributing to attainment of ambient standards.

In addition to the argument that the net air quality benefit requirement is fair (considering the SIP requirements on existing emission facilities), the argument can be made that a net air quality benefit at the ratio of 1.1 to 1 from large new emission facilities is more practical than extending the offset rule to new small emission facilities for the purpose of attaining ambient air quality standards. As mentioned previously, those few facilities which would have small emission increases that would cause a disproportionate local degradation of ambient air quality are more appropriately addressed through existing rules. Finally, the 1.1 to 1 ratio is also consistent with the federal requirement that the State make "reasonable further progress in attaining ambient air quality standards". (See discussion above).

In addition, section D.2. describes the methods to be used to ensure that a subject emission facility will obtain sufficient reductions to result in a net air quality benefit. For subject emission facilities located or proposed to be located in carbon monoxide, nitrogen oxide, nonmethane hydrocarbon or ozone nonattainment areas, no modeling anlysis is required. For sulfur dioxide and particulate matter nonattainment areas, a modeling analysis is required.

The modeling analysis requirement is reasonable in that large point sources, i.e., emission facilities discharging pollutants through a discrete emission point such as a smokestack, typically emit large amounts of sulfur dioxide and particulate matter. Computerized atmospheric dispersion modeling is the most appropriate tool for assessing ambient effects of point source emissions and therefore is the appropriate tool to determine whether a net air quality benefit will result from offsets for particulate matter and sulfur dioxide.

The other criteria pollutants are unlike particulate matter and sulfur dioxide in that these other pollutants are typically emitted by a broad range of mobile sources and small area sources spread over an entire air quality control region as well as by large emission faciliites. Thus, for these other pollutants, it is reasonable to assume a net air quality benefit without requiring modeling analyses if the offset requirement is met within the region.

3. The third condition established in section D. (in specific, in D.3.) requires all permit applicants for subject emission facilities to certify that all emission facilities in Minnesota which are under common control are in compliance with air pollution rules or are on a compliance schedule. This is reasonable since, from an air quality management viewpoint, it is desirable that all disputes regarding the existing compliance status of a permit applicant be resolved before new permits (and possible points of disagreement) are issued. Further, the condition is reasonable since it is needed to satisfy the requirements of the Clean Air Act, 42 U.S.C. § 7503.

4. D.4. establishes the conditions to be included in permits issued to subject emission facilities. Section D.4.a. describes the actual emission limitation to be included in permits issued to subject emission facilities. Section D.4.a. establishes two possible permit conditions. The first condition is referred to as the lowest achievable emission rate (or LAER) and is defined at section C.5. of the proposed rule. Limiting emissions from subject emission facilities to the lowest achievable emission rate, as D.4.a.1. does, is necessary and reasonable to minimize the demand for offsets and thereby maximize the possible amount of economic growth in a nonattainment area. If a few emission facilities found it less expensive to consume all the available offsets in an area than to limit emissions to the lowest achievable emission rate, then subsequent permit applicants would be unable to locate in that area without contributing to violation

of ambient standards. This emission limitation is also reasonable in that it is required by the Clean Air Act, 42 U.S.C. § 7503.

The alternate condition established in D.4.a. is applicable in those instances in which an emission rate is less practicable than an alternative standard, such as a performance standard or work practice. For example, in instances in which the proposed new source's emissions will not be from a discrete point source and will be a pollutant such as total suspended particulate matter, it may not be possible to establish a specific emission rate for that source's pollution (and would, therefore, not be possible to establish the "lowest achievable emission rate" for that source.) Accordingly, it is reasonable to provide some other, more practicable mechanism to control that new source's pollution. These alternatives are commonly referred to as "performance standards" since they usually establish conditions according to which a task may be performed (as compared to the amount of emissions allowable from that task.) Finally, the inclusion of this alternative in D.4.a.2. makes D.4.a.1. (the LAER requirement) more reasonable.

Further, D.4.b. requires that permits issued to subject emission facilities include a condition that the offsets that the subject emission facility has obtained are legally enforceable by the agency and by the Environmental Protection Agency. This is reasonable in that, for the offset program to be effective, it is vital that agreed upon limitations or reductions in emissions be maintained.

5. D.5. establishes a limited exclusion from the requirements of D.1. and D.2. Thus, otherwise subject resource recovery facilities may, under certain conditions, be excepted from the requirement to obtain offsets. This exclusion provides a reasonable mechanism through which potential difficulties in the siting of resource recovery facilities may be avoided. The Agency believes that, to the extent possible, such difficulties should be avoided. This belief is consistent with Minnesota law. See, e.g., Minn. Stat. § 115A.

Section D.5. describes the conditions that must be met in order for the exception to apply. These conditions are reasonable in that they are consistent with the conditions provided by the Environmental Protection Agency's offset rule 40 C.F.R. § 51.18, Appendix S IV.B.) Unlike the Environmental Protection Agency's rule, the proposed rule specifies the manner in which the Agency shall determine if the permit applicant has satisified the conditions in D.5. (See D.5.b.). Section D.5.b. is reasonable in that it relates to existing Agency rules and reasonably describes the way in which a permit applicant can demonstrate eligibility for the exception specified in D.5.b. Finally, for the same reasons as described in the explanation of the temporary facility exception (see pages 25 and 26), it is reasonable to only partially except resource recovery facilities from the requirements of the proposed offset rule.

E. Banking. The banking provision included within the rule is reasonable in that it removes a possible and unintentional

disincentive that may exist without this provision. Without such a provision, an industry may hesitate to shutdown a particular inefficient or unneconomical facility out of concern that it will lose the opportunity to use the "offset emissions" from that facility at a later point. Thus, proposed Section E. allows a person to save offsets resulting from shutdown of equipment or from control of existing emission facilities beyond what might be legally required. The "saved offsets" may then be used at a later time when the "saver" either needs the offsets for a permit application or sells the offsets to someone else. In order to be used at a later point in a permit application, banked offsets must satisfy the same criteria as offsets in general. The Agency's review of the availability of these offsets occurs at the point they are proposed to be used to allow the growth or expansion of a particular new subject facility. The reporting requirements in Section E. exist to ensure that the banking of offsets is done in an orderly fashion and to allow the Agency a mechanism for recording and verifying offsets that may be used in the future.

F. Limitation on use of offsets. The proposed offset rule establishes a program for the growth or expansion of industries in nonattainment areas. Under this program, a proposed new source must more than "offset" the increase in emissions that it will create by finding and achieving a decrease in emissions from an existing source. Without such an "offset," the new source will not be eligible for a construction or an operating permit.

By creating a program through which new and existing sources

may "trade" in allowable emissions, the offset program may encourage persons to buy, sell or trade in allowable emissions. Although this permit program may, therefore, create a mechanism through which emissions can be traded, the program is not intended to create a "property right" in emissions that would require the State to compensate persons if, due to a change in the Agency's regulatory program, the use of those emissions become limited or unavailable. The proposed section F. is, therefore, reasonable in that it puts persons on notice of the fact that the creation of the offset program does not create a property right that would require compensation from the State for the unavailability of the use of the offset at a later time.

Finally, in considering the reasonableness of the proposed rule, some mention should be given to the overall economic impact of the effect of the rule. The offset rule creates an economic mechanism through which new sources will be permitted to locate in nonattainment areas of the State, while at the same time air quality in those nonattainment areas is improved. It is difficult (if not impossible) to assess the actual economic impact of this rule since the extent to which persons may actually buy and sell offsets depends entirely on the plans of different industries to locate in various nonattainment areas of the State some time in the future. In any event, it should be understood that the rule itself does not require any owner of any existing facility to spend any monies for the control of their existing emissions.

IV. SUMMARY

In accordance with Minn. Stat. §15.0412, subd. 4h (1980), the Agency has, in this Statement, set out an affirmative presentation of facts establishing the need for and reasonableness of the proposed offset rule. As stated earlier, the purpose of the rule is to provide a mechanism through which industries will be permitted to grow and expand in nonattainment areas of the State. The rule is needed and reasonable in that it establishes a coherent and comprehensive permit program through which such industrial growth and expansion could be accomplished.

V. EXHIBIT LIST

In drafting the proposed rule, the Agency staff relied on personal experience and expertise in dealing with construction and operating permits. In addition, the staff relied on the following documents and laws (these documents are hereby incorporated into this document by reference):

1. Minn. Stat. ch. 116 (1980)
2. Clean Air Act, 42 U.S.C. §7401, et seq. (1977)
3. 40 CFR Part 51 (1980) (including Appendix S)
4. 40 CFR Part 52 (1980)
6. 45 Fed. Reg. 31304- 31312 (May 13, 1980)
7. 45 Fed. Reg. 52675- 52748 (August 7, 1980)
8. 45 Fed. Reg. 59874 - 59879 (September 11, 1980)
9. 46 Fed. Reg. 9124 - 9127 (January 28, 1981)

10. 46 Fed. Reg. 16280 - 16282 (March 12, 1981)

11. "Compilation of Air Pollutant Emission Factors," OAQPS AP-42, U.S. Environmental Protection Agency, Office of Air Quality Planning Standards.

12. "Guidelines on Air Quality Models," OAQPS No. 1.2-080, U.S. Environmental Protection Agency.

13. Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement.

14. Alabama Power Company v. Costle, 13 ERC 1225 (D.C. Circuit June 18, 1979)

15. Alabama Power Company v. Costle, 13 ERC 1993 (D.C. Circuit December 14, 1979).

Dated: August 21, 1981

Louis Breimhurst

LOUIS J. BREIMHURST
Executive Director

MINNESOTA POLLUTION CONTROL AGENCY