

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

DEPARTMENT: Office of the Attorney General **STATE OF MINNESOTA**

OFFICE MEMORANDUM

DATE: January 31, 1991

TO: PAUL LIEMANDT
Executive Director
Department of Agriculture

FROM: CHARLENE HATCHER
Special Assistant Attorney General
525 Park Street, Suite 500 (55103)

PHONE: 296-9422

SUBJECT: In the Matter of the Adopted Rule Relating to
Agriculture Chemical Response Compensation Board

The above-referenced rule has been approved as to its legality by the Attorney General on January 30, 1991.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

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

CH:sc
Enclosures
cc: Ken Raschke
William Brown, Chief Judge
MaryAnn Hruby

DORSEY & WHITNEY

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February 11, 1991

Ms. Martha Casserly
Minnesota Office of the
Attorney General
Suite 200
525 Park Street
St. Paul, MN 55103

Re: Huntting Elevator Company/Proposed ACRRA Program

Dear Ms. Casserly:

Thank you for meeting earlier this month with Warren Spannaus and me regarding the Minnesota Department of Agriculture's Agricultural Chemical Response and Reimbursement Account ("ACRRA") program. As the enclosed letter indicates, we have received satisfactory clarification from the Minnesota Department of Agriculture, and accordingly have elected not to submit comments to you regarding the proposed rules. Nonetheless, your assistance was helpful in obtaining clarification.

Very truly yours,

Gregory A. Fontaine

GAF:cms
Enclosure
cc: Warren R. Spannaus

RECEIVED
FEB 12 1991
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Government Services Section
Capitol Office Bldg., Suite 500
525 Park Street
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January 31, 1991

Mr. Newell Searle
Deputy Commissioner
State of Minnesota
Department of Agriculture
90 West Plato
St. Paul, MN 55101

Dear Mr. Searle:

This letter follows up on the telephone conference last Friday among you on behalf of the Minnesota Department of Agriculture (MDA) and Warren Spannaus and myself representing Huntting Elevator Company (Huntting). You provided clarification with regard to MDA's interpretation of its proposed Minn. Rule 1512.0800 regarding certain eligible costs under the Agricultural Chemical Response and Reimbursement Account ("ACRRA") program. Huntting sought this clarification because it intends to proceed with an application for reimbursement to the ACRRA Board at an appropriate time in connection with certain actions ordered by the Minnesota Pollution Control Agency (MPCA).

As background, you indicated that you are aware that Huntting has been ordered to take certain actions by MPCA in response to pesticides discovered at and near Huntting's property in Lansing, Minnesota. You also indicated that you are aware that Huntting has been ordered to take such actions by MPCA acting under Minn. Stat. Chaps. 115B and 18B. I clarified that MPCA has, through a series of orders and correspondence, required such actions based on a Request for Response Action (RFRA) issued by the MPCA Board which specifically cites as authority Minn. Stat. Chaps. 115B and 18B. I further clarified that MDA has delegated its authority under Chapter 18B to MPCA for the state's activities regarding Huntting in Lansing, Minnesota.

Proposed Minn. Rule 1512.0800 provides in pertinent part that "[c]osts incurred in response to requests or orders issued to a responsible person under authorities contained in Minnesota Statutes Chapter 115B, or federal CERCLA are ineligible costs." Mr. Spannaus and I expressed concern to you that since Huntting has taken actions ordered under both Minn. Stat. Chaps. 115B and 18B, such actions could be construed to be ineligible costs under this proposed rule. You provided clarification that MDA, unless directed otherwise by the ACRRA Board, does not interpret proposed Minn. Rule 1512.0800 in this manner. You indicated that to the extent the actions required of Huntting may be based in part on Minn. Stat. Chap. 18B, MDA should consider, unless contradicted by the ACRRA Board, that costs incurred by Huntting pursuant to MPCA's directives would not be ineligible costs under Minn. Rule 1512.0800, solely because such costs also were incurred under MPCA's authority under Minn. Stat. Chap. 115B. You further indicated that (again subject to the ACRRA Board's findings) MDA, as staff to the ACRRA Board, would not object to Huntting's reimbursement application based on proposed Rule 1512.0800, assuming, of course, that the costs for which reimbursement are sought otherwise are eligible under the requirements of Minn. Stat. Chap. 18E and the relevant ACRRA rules. You further cautioned that although this is MDA's present comment on proposed Minn. Rule 1512.0800, the final decision on this issue will be made by the ACRRA Board.

Based on this conversation, comment and interpretation of proposed Minn. Rule 1512.0800, Huntting has elected not to file comments with the Minnesota Attorney General as permitted by Minn. Rule 2010.0900. We believe that a conclusion that proposed Minn. Rule 1512.0800 excludes Huntting from reimbursement in this instance, because its costs were incurred under Minn. Stat. Chap. 115B as well as Minn. Stat. Chap. 18B, would conflict with Minn. Stat. Chap. 18E allowing reimbursement for pesticide incidents. However, given MDA's comment on proposed Minn. Rule 1512.0900 as summarized above, and your explanation that the proposed rule is intended to eliminate reimbursement for sites which involve hazardous substances other than agricultural chemicals and response actions initiated solely under the authority of Minn. Stat. Chap. 115B or federal CERCLA, Huntting believes that the proposed rule is consistent with Minn. Stat. Chap. 18E.

Thank you for your assistance. We very much appreciate your prompt attention to this important matter.

Very truly yours,

Gregory A. Fontaine

GAF:cms
cc: Paul Liemandt
Ken Rathke, Esq.
Martha Casserly, Esq.
Warren Spannaus, Esq.
Jim Huntting

RECEIVED
FEB 12 1991
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CH

RULE REVIEW CHECKLIST

File No. 1784
DATE RECEIVED 1-18-91
REVIEW DATE 1-28-91
DUE DATE 2-1-91
(DIS)APPROVED 1-30-91
WITHDRAWN _____

Docket No. 05 0009 0987
ADOPTED W/O HEARING _____
EMERGENCY RULE _____
TO REVISOR ON 1/25/91
REVISOR (DIS)APPROVED _____
FILED W/SEC. OF STATE 1/30/91
RETURNED TO AGENCY _____

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
✓ July 23 1990 Date published in State Register
✓ ~~July 23, 1990~~ Comments

Petition for Adoption of a Rule

✓ Board's Authorizing Resolution
July 11, 1990 Date adopted

✓ Proposed Rule
✓ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
18E .05 Statutory Authority
_____ Small Business Statement
_____ Expenditure of public money statement
11-9-90 Signature

✓ Statement of Need and Reasonableness (if applicable)
NA Small Business Statement
_____ Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
November 21, 1990 Dated 30/25 days before adoption
✓ Notice attached indicates it is attached
_____ Copy of rule or summary attached

✓ Publication in State Register
November 26, 1990 Date 30/25 days before adoption

_____ 180-day deadline from:
LCRAR? ~~all my notes~~ Effective date of law requiring rule (14.12) (both rules) amendments don't apply
✓ end of comment period (§ 14.26) (rules without hearing)
_____ effective date of statutory authority (§ 14.29) (emergency rules)

✓ Resolution Adopting
January 16, 1991 Date adopted

✓ Findings of Fact, Conclusions & Order Adopting
January 16, 1991 Date

✓ Written Requests, Submissions or Comments

✓ Declaration of Attorney
Ken Raschke Name of SAAG representing agency

_____ ~~Notice of~~ Submission to Attorney General (if applicable)

~~Affidavit of Mailing~~

Department of Agriculture

Adopted Permanent Rules Relating to Agricultural Chemical Response Compensation Board

Rules as Adopted

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD RULES

1512.0100 DEFINITIONS.

Subpart 1. **Scope.** The definitions in this part and Minnesota Statutes, chapter 18B, 18C, 18D, or 18E apply to parts 1512.0100 to 1512.1100.

Subp. 2. **Corrective action design.** "Corrective action design" means a description of the actions necessary to investigate, minimize, or clean up an incident.

Subp. 3. **Eligible costs.** "Eligible costs" means costs that minimize, eliminate, or clean up an incident and are reasonable and necessary.

1512.0200 BOARD MEETINGS.

Subpart 1. **Regular meetings.** At least six regular meetings of the board must be scheduled a year. A scheduled meeting may be canceled if there is insufficient business.

Subp. 2. **Special meetings.** A special meeting of the board may be called by the chair or by written request of three board members.

1512.0300 BOARD CHAIR AND VICE-CHAIR.

A chair and vice-chair of the board must be elected by the board. Both positions must be elected at the first official meeting of the board on or after July 1, 1990. The chair shall preside at regular and special meetings, or the vice-chair in the absence of the chair, and the person chairing a meeting shall perform all duties assigned by the board.

The chair and vice-chair must be members of the board and may not be either the commissioner of agriculture or the commissioner of commerce.

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The term of the chair and vice-chair is one year, beginning January 1, 1991.

1512.0400 CONDUCT OF MEETINGS.

Subpart 1. **Quorum.** A quorum consists of three board members.

Subp. 2. **Minutes.** Meetings must be tape recorded and minutes subsequently prepared by the board's staff.

Subp. 3. **Parliamentary procedure.** Except as specifically provided by statute or negotiation, Robert's Rules of Order govern questions that may arise at a meeting of the board.

1512.0500 CONFLICT OF INTEREST.

A member of the board who has a direct or indirect financial or employment interest relating to a matter before the board, which interest is reasonably likely to affect impartiality of judgment in the matter, shall make known the interest and shall refrain from participating in or voting upon the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote.

1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS.

Subpart 1. **General.**

A. An eligible person who has taken corrective action and has incurred costs on or after July 1, 1989, may apply to the board for reimbursement or payment of eligible costs.

B. Reimbursement for eligible costs incurred is only for costs already paid by the eligible person. Reimbursement will not be made without proof that costs have been paid.

C. Payment of eligible costs incurred is only for costs that the eligible person is unable to pay.

Subp. 2. **Conditions.** A reimbursement or payment may not be made unless the board determines that the commissioner of agriculture has determined that the corrective action has adequately addressed, or will adequately address, the incident so as to eliminate unreasonable adverse effects on the environment.

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An eligible person must seek and report to the board any and all other cost coverage or recovery when making an application for reimbursement or payment from the agricultural chemical response and reimbursement account.

A reimbursement may not be made before the applicant receives approval from the commissioner of agriculture for a corrective action design.

A payment may not be made before the applicant receives the commissioner's approval for additional necessary corrective actions.

Subp. 3. **Multiple eligible persons.** If more than one eligible person incurs eligible costs for a single incident or for a single corrective action, each eligible person must apply separately to the board. Not more than the maximum amounts under Minnesota Statutes, chapter 18E, may be reimbursed or paid for corrective action costs associated with a single incident site, regardless of the number of eligible persons.

1512.0700 ELIGIBLE COSTS.

Subpart 1. **Reimbursable or payable corrective actions.** Costs associated with the following corrective actions may be eligible for reimbursement or payment:

A. emergency responses to incidents including, but not limited to, costs incurred that are necessary to abate acute risks to human health, safety, and the environment;

B. incident site hazard control measures including, but not limited to, containment and stabilization of the incident and removal of released material;

C. investigation and source identification including, but not limited to, collecting and analyzing soil samples, testing the groundwater, testing site and adjacent drinking water supplies, structural testing, and engineering and consultant services;

D. development of corrective action design according to requirements of the commissioner of agriculture; and

E. cleanup of incidents including, but not limited

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to, removal, treatment, or disposal of surface or subsurface contamination.

Cleanup must be performed according to a corrective action design, approved by the commissioner of agriculture, except in circumstances where an eligible person takes all reasonable emergency corrective action necessary to minimize and abate an incident and the action is subsequently approved by the commissioner of agriculture.

Subp. 2. **Documentation of reasonableness.** The applicant shall prove the reasonableness of all incurred eligible costs. Upon request of the board or the board's staff, the applicant shall document the reasonableness of any costs included on the reimbursement application, or on any request for payment, by providing one or more of the following:

A. evidence that the work was performed by a person or persons whose services were solicited through a competitive ~~bidding~~ selection procedure that considers qualifications and cost;

B. evidence that the cost is substantially equivalent to that charged by a comparable person or persons in the same geographical area for similar work performed;

C. evidence that only one party was reasonably available to perform the necessary work; or

D. evidence that only one party was reasonably qualified to perform the necessary work.

The board shall reimburse or pay only those costs it determines to be reasonable.

1512.0800 INELIGIBLE COSTS.

All costs associated with actions that do not minimize, eliminate, or clean up an incident are ineligible costs. Ineligible costs include, but are not limited to, costs related to the repair, replacement, or upgrading of agricultural chemical facility structures or equipment, cost of agricultural chemical product replacement, loss of income, attorney's fees, permanent relocation of residents, decreased property values,

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reimbursement for the eligible person's own time spent in planning and administering a corrective action design, costs for third party review of proposed investigative and corrective action or work plans, aesthetic improvements, or any work, except for emergency corrective actions, not in compliance with safety codes including, but not limited to, United States Occupational Safety and Health Administration requirements, well codes, fire codes, and costs for providing alternative sources of drinking water.

Corrective action costs covered or payable under an insurance or other contract are ineligible costs. Corrective action costs covered or payable under an insurance or other contract are ineligible costs because they are not considered to be costs incurred by the eligible person. Costs incurred in response to requests or orders issued to a responsible person under authorities contained in Minnesota Statutes, chapter 115B, or federal CERCLA are ineligible costs.

1512.0900 APPLICATION PROCESS.

Subpart 1. **Request for reimbursement.** A person who wishes to apply for reimbursement from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. summary of the corrective action design and the commissioner of agriculture's approval of the design, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action; and

D. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action; and

E. proof of payment.

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Subp. 2. **Request for payment.** A person who wishes to apply for payment from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. completed and signed affidavit summarizing the financial condition of eligible persons, and demonstrating an inability to pay the corrective action cost;

D. copies of federal and state income tax returns for the last two years (corporate, partnership, or individual);

E. monthly, quarterly, and annual financial statements for the last two years, prepared according to generally accepted accounting principles, relating to the financial condition of the applicant applying for payment, including financial statements for any businesses owned or operated by the applicant;

F. a summary of the corrective actions taken, as approved by the commissioner, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action;

G. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action;

H. information detailing why corrective actions have not been completed or initiated; and

I. evidence sufficient to prove applicant's payment of $1,000 for corrective action costs already incurred.

The board may waive the requirement for submission of all or a portion of the above described financial information, if reasonable and appropriate, upon written request of the applicant.

Only complete applications may be accepted by the board and incomplete applications must be returned to the applicant.

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Subp. 3. **Time of application.** The board shall hear initial requests for reimbursement and payment applications by eligible persons at every regular meeting.

The board shall establish a priority system for hearing requests for payment or reimbursement. The priority system must be based primarily on department incident response site priorities, taking into account the health and welfare of the public, the effects on the environment, and the commissioner of agriculture's incident response case load and staff resources.

Subp. 4. **Subsequent application.**

A. An eligible person who has already obtained partial reimbursement or payment from the board and who has incurred additional or continuing costs due to the same incident may reapply if:

(1) the amount of the person's original reimbursement or payment was less than the maximum allowed under Minnesota Statutes, section 18E.04;

(2) the eligible person offers adequate evidence that all payments have been properly applied towards costs of corrective action approved by the commissioner of agriculture;

(3) the eligible costs submitted on a subsequent application are not related to any new incidents at the site; and

(4) the total reimbursement and payments to all eligible persons for an incident must not exceed the maximum allowed under Minnesota Statutes, section 18E.04.

B. An eligible person may request reimbursement or payment of additional costs at the times indicated in subitems (1) ~~and (2)~~ to (3).

(1) Requests for reimbursement may be considered by the board no more than once every 12 months if the additional costs incurred are $5,000 or less.

(2) Requests for reimbursement of additional costs incurred of $5,000 or more may be considered by the board at every other regular board meeting. The board or the board's staff shall notify an eligible person requesting additional

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payments when the next regular board meeting is to be held at which requests will be considered.

(3) Request for direct payment may be made at every other board meeting.

Subp. ~~6.~~ 5. **Signatures.** An application must be signed as follows:

A. for a corporation, by a principal executive officer of at least the level of vice-president or the duly authorized representative or agent of the executive officer if the representative or agent is responsible for the overall operation of the facility or site that is the subject of the application or a person whom the board of directors designates by means of a corporate resolution; or

B. for a partnership, sole proprietorship, or individual by a general partner, the proprietor, or individual, respectively.

Subp. ~~7.~~ 6. **Certification.**

A. A person who signs an application for reimbursement or payment shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. I certify that the commissioner of agriculture has approved the corrective actions taken, as described in the approved corrective action design, or as otherwise approved by the commissioner. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge, true, accurate, and complete. I further certify that I have the authority to submit this application on behalf of ....."

B. A person who signs an application for payment shall also make the following certification:

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"I certify that if I have submitted invoices for costs that remain unpaid that I will pay those invoices within 30 days of receipt of payment from the board. I understand that if I fail to do so, the board may demand return of all or any portion of money paid to me."

C. A person who signs an application for subsequent payment or reimbursement shall also make the following certification:

"I certify that I have complied with the commissioner of agriculture approved corrective action design provisions and the corrective actions were taken as described in that design."

Subp. ~~8.~~ 7. **Report of commissioner of agriculture.** Upon notification by the board's staff that a complete application has been received, the commissioner shall, in a timely manner, provide the board with a written report on the applicant's compliance or noncompliance with Minnesota Statutes, section 18E.04.

In addition, the board may request additional information from the commissioner or may request participation of agency staff at a board meeting. All responses to requests for information must be delivered in a timely manner. The board may delegate these powers to its staff.

1512.1000 REVIEW AND DETERMINATION.

Subpart 1. **Review.** The board's staff shall review all applications. If the staff determines that the application is incomplete or otherwise deficient, the staff shall promptly advise the applicant of the incompleteness or deficiency. Further processing of the application affected by the deficiency must be suspended until the applicant has supplied the necessary information or otherwise corrected the deficiency. A complete application and the corresponding report of the commissioner of agriculture constitutes the written record. Any supplemental information explaining the application that is presented orally

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or in writing to the board will also be part of the written record.

Subp. 2. **Staff recommendation.** After a reimbursement or payment application is complete and the commissioner has provided the information relevant to the application, the board's staff shall make a recommendation as to the eligibility of the applicant and the costs specified in the application.

Subp. 3. **Board determination.** The board shall determine the amount of the reimbursement or payment based on the costs it finds are eligible, actually incurred, and reasonable. The determination must be made on the basis of the written record. The board may also allow supplemental information explaining the application to be presented in writing or orally. The board may establish a fair and reasonable limit on the time for oral presentation.

The applicant must be notified in writing within 30 days of the board's decision. If the board rejects part of the request for reimbursement or payment, a statement of the reasons for rejection must be included with the notification.

Subp. 4. **Appeal.** If a reimbursement or payment is denied, the eligible person may appeal the decision as a contested case hearing under Minnesota Statutes, chapter 14.

1512.1100 ENFORCEMENT.

An application for reimbursement or payment containing false statements or misrepresentations voids the application. Reimbursements or payments that are made that later are found to have been based upon false or misleading information result in forfeiture of any reimbursement or payment made, and are wholly recoverable through actions under general criminal or civil enforcement authorities by the Office of the Attorney General.

Approved
by Revisor _____

APPROVED AS TO LEGALITY

January 30, 19 91

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY Charlene H. Hatcher
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

JAN 30 1991

Joan Anderson Growe
Secretary of State

3:30 P.M.

m

STATE OF MINNESOTA
DEPARTMENT OF AGRICULTURE

STATEMENT OF NEED AND REASONABLENESS

In the Matter of the Proposed Adoption of Rules Relating to Agricultural Chemical Response Compensation Board

BACKGROUND

Chapter 326, Article 8, 1989 Laws of Minnesota created Minnesota Statutes Chapter 18E, cited as the Minnesota Agricultural Chemical Response and Reimbursement Law. The purpose of the law was to create and provide a means for compensation of costs incurred in taking corrective actions for agricultural chemical incidents. MS Chapter 18 E created the Agricultural Chemical Response Compensation Board to administer the Agricultural Chemical Response and Reimbursement Account (ACRRA) which will be the source of funds to pay the corrective action costs. The ACRRA is to be funded from surcharges assessed against pesticide and fertilizer manufacturers, distributors, licensed applicators and licensed dealers.

The law specifically limits the manner in which ACRRA funds may be used:

1. To pay for the Commissioner of Agriculture's responses to incidents under Chapters 18B, 18C, and 18D that are not eligible for payment under section 115B.21, subd. 2;
2. To pay for emergency responses that are otherwise unable to be funded; and,
3. To reimburse and pay corrective action costs under section 18E.04.

The primary ACRRA expenditure will be for reimbursement of eligible persons for corrective action costs. The basis upon which persons are eligible for reimbursement or payment, and the amount of reimbursement or payment, are specified in the law. Accordingly, a substantial amount of the more substantive provisions regarding administration of the ACRRA program are specified in the statute. However, the statute does mandate that rules be adopted regarding the ACRRA Board practices and procedures, the application form and procedures for determining eligibility for and the amount of reimbursement, and procedures for investigation of claims.

RULES

1512.0100 DEFINITIONS.

The definitions found in this part reference the applicable statutory definitions. The department and board have copies of Chapters 18B, 18C and 18D in booklet form for convenient distribution to interested parties. The two definitions found specifically in the rules are for "Corrective Action Design" and "Eligible Costs", and are defined for clarification of the corrective action process, as well as to delineate reimburseable or payable costs.

1512.0200 BOARD MEETINGS.

Subp. 1. **Regular Meetings.** This subpart establishes a framework for holding regular meetings of the board that will allow appropriate flexibility due to the somewhat unpredictable nature of the board's workload. It will be difficult to predict the number of applications for reimbursement or payment that will be received in any given time period and the rate of applications will likely be erratic. Therefore, setting a minimum number of yearly meetings and allowing cancellation of meetings due to insufficient business are practical and reasonable provisions.

Subp. 2. **Special Meetings.** The unpredictable and erratic workload described above also necessitates what is in any case a customary ability of boards to call special meetings, if such meetings are necessary to discharge the boards obligations.

1512.0300 BOARD CHAIR and VICE-CHAIR.

A board of this nature requires the designation of a chair and vice-chair. Provision must be made for the powers of the chair to be passed and assumed by the vice-chair in the event of the chair's absence so the board's business can be conducted. Since the three board members appointed by the Governor represent the various revenue sources and impacted clientele of the board's activities, it is reasonable and proper that they serve as board chair and vice-chair. Terms are for one year, and persons may be reelected for subsequent service as chair and vice-chair.

1512.0400 CONDUCT OF MEETINGS.

This section establishes the procedures which ensure that meetings are conducted in an orderly manner and that the business is dealt with in an orderly manner and that the proceedings are properly documented. Additionally, these necessary and reasonable procedures ensure a fair and impartial method of hearing requests from eligible persons.

1512.0500 CONFLICT OF INTEREST.

The composition of the board as set by statute increases the likelihood that a conflict of interest may arise. This section recognizes that possibility and ensures that the conflict will not taint a board decision and will not hamper the board during the course of a meeting. Board members and the public will know what is to be done when there is a conflict.

1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS.

Subp. 1. **General.** This subpart simply repeats the statutory provisions for reimbursement or payment.

Subp. 2. **Conditions.** This subpart reiterates the statutory standard for corrective actions for incidents. In order to avoid creating an opportunity for double recovery, this subpart also specifies that eligible persons who can receive reimbursement or payment from a source other than the board need to pursue and report such coverage to the board. This essentially will prohibit persons from "double-dipping" for corrective action costs. [Note: the Petrofund Board attempted to enforce such a provision through policy, and was subsequently unsuccessful when sued by an involved party. That board is intending, as a result of that lawsuit, to include direct language prohibiting such double recovery in their rules in the near future.] In order for the board to be assured that monies disbursed from the ACRRA to eligible persons are for reasonable and necessary actions, the board will require that such actions be included and be approved in a corrective action design submitted to the commissioner of agriculture.

Subp. 3. **Multiple Eligible Persons.** The law states that any eligible person who has incurred corrective action costs, and meets the statutory conditions for reimbursement or payment, is eligible to apply for reimbursement or payment. No specific provision is made in the law for handling situations in which there may be more than one eligible person for an incident. This subpart clarifies that in those circumstances each eligible person must apply separately, even though there is only one incident involved. This is necessary and reasonable for the board to be able to consider the different roles of and specific costs incurred by different eligible persons.

1512.0700 ELIGIBLE COSTS.

This section outlines the types and necessary documentation for costs incurred which are reimbursable or payable for corrective actions to agricultural chemical incidents under this chapter.

Subp.1. **Reimbursable or Payable Corrective Actions.** This subpart establishes five general categories (A-E) of eligible costs which coincide with the various phases typically involved in an incident response. Within each general category, some specific illustrative costs are listed. It is not feasible at this time to establish an exhaustive list of specific eligible costs. Instead, the general categories and illustrations establish the types of costs which will be eligible for reimbursement or payment. The categories and costs listed were developed in consultation and cooperation with the Minnesota Department of Agriculture, Incident Response Unit, and are based on the department's past experience as well as the experience, rules and regulations of the Minnesota Pollution Control Agency and the Minnesota Petroleum Tank Release Compensation Board in regard to environmental releases and clean-ups of petroleum products. The framework established in this subpart allows the board some flexibility while being specific enough to give potential applicants a clear idea of the types of costs which are reimbursable or payable.

In order for the board to be assured that clean-ups were performed in a reasonable manner, clean-up process oversight will be provided by the commissioner of agriculture, except in cases where emergency clean-ups were performed. In those instances the commissioner need only determine after the fact that the actions were reasonable and necessary, and the costs would be fully eligible.

Subp. 2. **Documentation of Costs.** The enacting legislation intended that the ACRRA would defray costs for persons who take responsible and appropriate actions in the event of an incident. The intent was not, however, to enable eligible persons, or their contractors, to profit from the ACRRA program. For that reason it is the responsibility of the person requesting reimbursement or payment to establish the reasonableness of the costs rather than the board having the responsibility to prove that a cost is unreasonable. If the burden were placed on the board, substantial additional board staffing and expenditure of funds would be necessary to ensure that the monies for corrective actions are not being inappropriately spent. Requiring the applicant to prove their case, and not the board, is a more financially prudent and judicious use of available funds, and carries out the purpose and intent of the legislation.

1512.0800 INELIGIBLE COSTS.

The purpose of this section is to allow reimbursements or payments only for actions that minimize, eliminate, or clean-up an incident. The board is directed by statute to reimburse, or pay, reasonable and necessary costs incurred by the eligible person in

taking corrective action. The purpose is also to rule out the use of ACRRA monies to accomplish tasks or pay for services not directly associated with the actual incident clean-up, for example, the costs of capital improvements at the incident site. The statute, and the rules, do not allow reimbursement or payment of costs that are not taken pursuant to a corrective action. As explained above, it is not feasible to enumerate each and every eligible cost. However, further clarification of eligible costs is accomplished in this section by identifying certain ineligible costs. The illustrations used in this section, and the previous section, will adequately put an applicant for reimbursement or payment on notice as to those items which the board considers clearly ineligible, or which should at least be considered potentially ineligible.

The board feels is reasonable and necessary to make an advance determination that it is not reasonable to reimburse or pay for work that is out of compliance with safety codes.

It is also clear the intent of MS Chapter 18E is to cover only incidents under MS Chapter 18B, 18C, and 18D. According to 18E, monies from the ACRRA may be used for commissioner of agriculture's responses to incidents under chapters 18B, 18C and 18D that are not covered under section 115B.20. Additionally, chapter 18E.04, subd.2 (4) states that reimbursement cannot occur unless the incident was reported as required in chapters 18B, 18C, and 18D. Therefore, it is reasonable to assume that the statutory intent of the ACRRA is to cover only incidents under 18B, 18C and 18D.

1512.0900 APPLICATION PROCESS

Subp. 1. **Request for Reimbursement.** This subpart describes in detail the information necessary for the applicant requesting reimbursement to provide to the board. The application form will give the board the basic information needed to evaluate the request, while still recognizing that additional work, eligible costs, and later applications may be necessary. The application shall specify the eligible person(s), the incident site, a summary of corrective actions taken, the commissioner of agriculture's approval of those actions, and an itemization of expenses, and other needed information.

Subp. 2. **Request for Payment.** This subpart describes in detail the information necessary for the applicant requesting payment to provide to the board. The application form, and the information requested, closely resembles the form and information required in subpart 1., as detailed above. Additionally, and pursuant to provisions contained in Chapter 18E, the application form also requires the applicant to submit certain financial information documenting the eligible person's financial condition,

and evidence the eligible person has spent the statutory required $1000.00 minimum amount on corrective action costs. Submission of tax returns and financial statements are generally accepted as a reasonable and necessary means for documentation of an individual's, or a company's, financial condition, particularly when a statute explicitly requires such a showing.

Both subpart 1. and 2. above require a complete application, whether for reimbursement or payment, be submitted in order for consideration by the board. This is reasonable and necessary in order for the board to have all necessary information available on which to base a decision, and to delay such decision until needed information is provided by the applicant. To do or allow otherwise would make for a disorderly, haphazard decision-making process.

Subp. 3. **Time of Application.** An orderly, manageable time process must be utilized in order for the board to conduct its business in a prompt manner. Eligible persons need for prompt consideration of requests for reimbursement or payment by the ACRRA Board is addressed. Additionally, reference is made to the need to prioritize requests based on reasonable criteria in regard to health, environmental, and workload.

Subp. 4. **Subsequent Application.** Eligible persons may request additional reimbursement or payment by making a subsequent application, if they meet certain criteria detailed in this part. This will lessen the burden of financing what may sometimes be an expensive clean-up. This part requires that evidence be offered to show that any payments have been applied to actual costs of corrective action work performed. This part also delineates that subsequent applications can be made only for previously reported incidents at the site. It also sets out a time period, depending on amount of additional costs incurred, when an eligible person can make a subsequent application. The board believes this reasonable due to the need to adequately limit the administrative workload on its available staff resources.

Subp. 6. **Signatures.** and, Subp. 7. **Certification.** The purpose of these two subparts are to ensure that an authorized person signs applications for reimbursement and payment, and takes responsibility for the information contained therein. Since incident response and clean-up actions may involve many contractors and subcontractors, as well as a variety of other persons employed by the eligible person, it is important to designate an authorized person for purposes of application. The certification language calls for a high degree of accountability on the part of the eligible person for the information submitted. Additionally, the certification gives the board assurances that any previous monies disbursed will actually be used for payment of costs incurred but unpaid.

Subp. 8. **Report of the Commissioner of Agriculture.** The eligible person is required in Chapters 18D and 18E to respond to requests or orders of the commissioner to minimize, eliminate or clean-up and incident. The board is dependent on the commissioner of agriculture to provide reports and other assurances that corrective actions taken have been reasonable, necessary, and approved by the commissioner. Additionally, since the board has statutory authority to give partial reimbursement under certain circumstances, the board is also reliant on the commissioner of agriculture for reports regarding the eligible persons compliance with applicable agricultural chemical regulations. This subpart sets the procedure for the submission of such information to the board, either orally or in writing.

1512.1000 REVIEW AND DETERMINATION.

Subp. 1. **Review.** and, Subp. 2. **Staff Recommendation.** The board will not convene each time an application is submitted, but will rather, except in extraordinary circumstances, meet at regularly scheduled times and review pending applications. Therefore it is reasonable and necessary to make sure than any applications submitted to the board be complete, in order to foster proper decision-making. Accordingly, it should be clear that the board's staff has the authority to make preliminary determinations regarding the completeness of each application and to request additional information if necessary prior to the board meeting, again to ensure that the applications to be reviewed by the board are as complete as possible at the time of the meeting. This subpart enables staff to assemble all information and documentation relevant to an application in order to provide board members with a complete application. Without this provision, the board members would continually face situations where information relevant to a claim is missing, making timely and proper reviews difficult or impossible.

Subp. 3. **Board Determination.** The entire application process is intended to obtain all information pertaining to an agricultural chemical incident, and corrective actions subsequently taken in regard to that incident, in order to allow for a board determination of reimbursement or payment amount. Chapter 18E allows reimbursement or payment only for corrective action costs eligible, actually incurred and reasonable and necessary. The application should, if complete, document that costs were actually incurred. This subpart requires that the board's determination be based upon the written record since the application process determines and documents corrective actions proposed, approved, taken and actual costs of those actions. It also determines whether the costs were eligible. Because most of this information is technical in nature, it is not expected that applicants will have to often make oral

presentations, or submit additional information to the board; however, provision for doing so is included. Additionally, since the law allows the board to made determinations of partial reimbursement, eligible persons must have a mechanism for providing additional factual information for purposes of explanation or rebuttal. Nevertheless, the board, in order to provide a timely and manageable process, must have an ability to limit to a reasonable measure the time and opportunity for such input. The board would like to encourage as much as possible that submissions be in writing because most of the matters to be dealt with are technical in nature. Written submissions provide a means for the board and it's staff to give a fair review prior to a meeting. Oral presentations may result in delays since the presentation may require board and staff to consider the information offered prior to making a determination. The board does feel it is important to make sure that no applicant is foreclosed from fully presenting their case to the board. While oral presentation is likely not the best or most efficient method for the applicant, it will be allowed. Finally, the board will notify all applicants of board determinations in a prompt and timely manner.

Subp. 4. **Appeal.** This right to appeal a board's determination on a request for reimbursement or payment is contained in Chapter 18E and is included here verbatim.

1512.1110 ENFORCEMENT.

The board, and the state, need to be able to recover monies if false statements or misrepresentations were made in an effort to obtain reimbursement or payment. Including this language in the rules may have a beneficial deterrence effect on potential abusers.

SMALL BUSINESS CONSIDERATION

MS Chapter 14.115 requires that the impact of the rules upon small businesses be considered in regard to any rulemaking procedure. In the present instance the rules have two functions: to determine how the board structurally is organized and operates; and to determine how the application process would affect small businesses. In regard to how the board is organized and operates, these rules would have no impact. The board considered the provisions of subpart 2 in regard to those small businesses and determined that because the nature of the rules was to assure that there was adequate documentation to show that small businesses incurred the costs in the manner the statute required, and met the statutory requirements for reimbursement or payment, there could be no distinction between small businesses and other businesses as to the level of proof required. To impose some lesser standard for

a small business in the present instance would defeat the purpose of the law of assuring that the funds are expended for the appropriate and correct reason.

In regard to subp. 2 (a): The establishment of less stringent compliance and reporting requirements for small businesses would not be applicable in this particular situation since the only reporting or compliance requirements pertain to filing an application. This is not a compliance or reporting requirement in the usual sense. All other compliance or reporting requirement would go to general state statutes regarding agricultural chemicals and incidents, and are not relevant here.

In regard to subp. 2 (b): Establishment of less stringent schedules or deadlines for compliance or reporting requirements is inapplicable. Since this is an application for reimbursement or payment, a small business might, if anything, want to speed up the process as much as possible to recover or obtain monies. The rules do provide for time period waivers.

In regard to subp. 2 (c): Consolidation or simplification of compliance or reporting requirements for small businesses again is inapplicable. In fact, it would be inappropriate to allow small businesses to produce less documentation for reimbursement or payment than large businesses. The purpose of the board in the administration of ACRRA is to assure that the funds are expended for the appropriate reasons and that there is an adequate showing that this has occurred. There can and should be no lower standard for small businesses.

In regard to subp. 2 (d): As to the establishment of performance standards to replace design or operational standards, there are no such standards in the rule, and this provision is inapplicable.

In regard to subp. 2 (e): Exemption of small businesses would not be appropriate because the entire procedure for reimbursement or payment is set up to make sure that expenses are incurred for an appropriate purpose, and are properly reimbursable or paid. The level of documentation is the same for all. It is difficult to see why small businesses could be exempted from these provisions since these provisions ensure that statutory requirements are being met, and that funds are being appropriately used.

This law, Chapter 18E, was created, at least partially, to benefit small agricultural chemical businesses which, in the absence of the "insurance" that ACRRA will provide, would likely go broke attempting to finance an agricultural chemical incident clean-up. It is presumed that many, if not most, of the applicants will be small businesses. When the rules were drafted one of the con-

sidérations was not creating so many requirements and documentation demands as to overload an individual or small business, while still ensuring adequate documentation to allow for proper board determinations.

STATE OF MINNESOTA

Agricultural Chemical Response Compensation Board

In the Matter of the Proposed Adoption of the Rule of the Agricultural Chemical Response Compensation Board Governing the Agricultural Chemical Response Compensation Board	FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING RULE WITHOUT PUBLIC HEARING

(1) Notice of the board's intent to adopt the above-entitled rule was published in the *State Register* on November 26, 1990, and was sent by United States mail to all persons on the list maintained by the board pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 on November 21, 1990. (2) The statement of need and reasonableness was prepared before the notice of intent to adopt a rule without a public hearing was mailed to all persons on the rulemaking mailing list and published in the *State Register* and was available to the public.

(4) All persons were given the opportunity to submit comment on the rule for 30 days after the notice of proposed rulemaking. (5) The department received 15 requests for a public hearing. Therefore, the department did not receive request for a public hearing from 25 or more persons which were not withdrawn.

(7) No requests for notice of submission to the attorney general were received by the department.

Based on the comments and evidence in the record before the board, I find the following:

1512.0700, subp. 2

There was some confusion that the original language required that work must go to the lowest bidder. That was not the intent of the rule, and the change was made to clarify that cost should not be the only criteria used for purchasing services. This change is not substantial because it only clarifies an existing requirement of the rule.

1512.0900

This part contains corrections of errors in numbering the subparts.

The above-captioned rule is needed and reasonable. (8)

NOW, THEREFORE, IT IS ORDERED that the rule identified as the rule governing the Agricultural Chemical Response Compensation Board as modified is adopted this 16th day of January, 1991, pursuant to authority vested in me by Minnesota Statutes, section 18E.05.

(9)

Paul Liemandt
Executive Director

18E.05 (c)

(c) The board shall adopt rules regarding its practices and procedures, the application form and procedures for determining eligibility for and amount of reimbursement

* mandatory all new material - 180 day - 14.12

1-23-91 - Talked to Carol Mulligan - told her about the 180 day limit. She said she would read the statute and if necessary send the letters. I told her I needed the Rules are for Agricultural Chemical Response Compensation Board Notice of Intend indicates Dept. of Agriculture intends to adopt rule - Caption indicates State Department of Agriculture Governing the Agricultural Compensation Board

letters prior to our 14 day review period which would be Feb. 1.

1-29-31

Received letter from Mulligan for 180 limit sent letters to Ag. Committees ~~Governor~~ and Governors

DEPARTMENT: OF AGRICULTURE

STATE OF MINNESOTA

Office Memorandum

DATE: January 24, 1991

TO: Legislative Commission to Review Administrative Rules
State Office Building
Room 55
100 Constitution Avenue
St. Paul, MN 55155

Governor's Office
Capitol Building
Room 130
75 Constitution Avenue
St. Paul, MN 55155

FROM: Paul Liemandt, Executive Director
Agricultural Chemical Response and Compensation Board
(ACRRA)

PHONE: 297-4872

SUBJECT: NOTIFICATION OF DATE NON-COMPLIANCE

I have been advised to write to both of your offices and give notification and explanation for exceeding certain time requirements under state rule-making authorities.

Although the authority for the new Agricultural Chemical Response and Compensation Board to promulgate rules was contained in the Minnesota Groundwater Protection Act of 1989 (See, 1989 Laws of Minnesota, Chapter 326, Article 8), the Agricultural Chemicals Response and Compensation Board (ACRRA Board) became statutorily effective July 1, 1990. (See, 1989 Laws of Minnesota, Chapter 326, Article 8, section 10; and 1990 Laws of Minnesota, Chapter 597, section 60).

This "delay" in effective date has likely resulted in a non-compliance with what I believe is a normal 180 day period in which to promulgate rules. The fact of the matter is that the Board, and its staff, had no authority to act until July 1, 1990.

One of the first orders of the new ACRRA Board's business was drafting, proposing, and adopting a Rule, pursuant to Minnesota Statutes, section 18E.05, subd. 1(c) (1990). As Executive Director to the Board, I coordinated this process. I was directed by the Board to give every and all opportunity to interested parties to comment on the proposed rule. In that light, I noticed a Solicitation of Outside Opinion, and then went forward with a Notice of Intent to Adopt a Rule Without a Public Hearing.

Because the ACRRA Board currently meets on a once a month basis, and the Board's wish to leave as much time open for public comment, I was unable to comply with what I believe is also a requirement to adopt the proposed rule within 180 days. I am enclosing an ACRRA Board Resolution, signed January 16, 1991.

I believe the ACRRA Board, and its staff, in pursuing an open and useful process for obtaining comment on the Rule, has inadvertently exceeded a time restriction. I am of the

understanding that this situation is not uncommon, and can be excused by submittal of a letter of this nature.

On behalf of the members of the ACRRA Board, I respectfully offer the above information as necessary and appropriate explanation.

If you have any questions, if additional information is wanted, or if any clarification can be offered, please call me.

Enclosure

cc: Paul Rhein, Chair - ACRRA Board
Kenneth Raschke, ACRRA Board Counsel
Sharon Huber, ACRRA Board Administrator
Carol Milligan, MDA

PML

Department : AGRICULTURE

STATE OF MINNESOTA

Office Memorandum

Date : January 18, 1991

To : Patty Nolte
Attorney General's Office

rec'd 1-18-91 mjc

From : Carol Milligan
Planning Division

Phone : 296-6906

Subject : **Review of Proposed Rule Governing the Agricultural Chemical Response Compensation Board**

The Agricultural Chemical Response Compensation Board adopted the above-mentioned rule pursuant to Minnesota Statutes, sections 14.22-14.28. Enclosed with this memo are the documents which are required to be submitted to the Attorney General for review prior to final approval of the rule. A list of the documents is attached for your convenience.

Please contact me if you have any questions.

cc: Elton Redalen, Commissioner
Herb Halvorson, Assistant Commissioner
Paul Strandberg, Special Assistant Attorney General
Jerry Heil, Planning Division
Paul Liemandt, ACRRA Board

greg Fontaine/Warren Sparrows is going to submit comment - deadline for comments is 1-28-91

LIST OF ATTACHED DOCUMENTS

A. Notice of Solicitation of Opinion

B. Certificate of Authorization

C. Rule as Proposed

D. Notice of Intent

E. Statement of Need

F. Affidavit of Mailing

G. Mailing List Certificate

H. *State Register* Photocopy

I. Rule as Adopted (four copies)

J. Certificate of Resolution

K. Findings of Fact

L. Comments

M. Declaration of Counsel

CERTIFICATE OF THE AGRICULTURAL CHEMICAL
RESPONSE COMPENSATION BOARD (ACRRA BOARD)

AUTHORIZING RESOLUTION

I, Paul Rhein, do hereby certify that I am a member and the chair of the Agricultural Chemical Response Compensation Board (ACRRA Board), a Board 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 ACRRA Board duly and properly called and held on the eleventh (11th) day of July, 1990, that a quorum was present, and that a majority of those present voted for the resolution which has not been rescinded or modified:

"RESOLVED, that Paul Liemandt, the executive director of the ACRRA Board, is hereby granted the authority and directed to sign and give the Notice of the Board's Solicitation of Outside Information or Opinions, and Intent to Adopt a Rule Without a Public Hearing, governing its practices and procedures for determining eligibility for and the amount of reimbursement, and other matters associated with the Board's activities to all persons who have registered their names with the Board for that purpose and publish such Notices and rule in the State Register, and to perform any and all acts incidental thereto.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 11th day of July, 1990.

Paul Rhein
(Officer of the Board)

William O. Bulger
Attest by one other Board member

Department of Agriculture

Agronomy Services Division

In the Matter of the Proposed Rule of the State Department of Agriculture Governing the Agricultural Response Compensation Board	NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING

(1) Notice is hereby given that the Minnesota Department of Agriculture intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedures Act for adopting rules without a public hearing in Minnesota Statutes, sections 14.22-14.28. The statutory authority to adopt this rule is Minnesota Statutes, section 18E.05.

(2) All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. (3) Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30-day comment period. (4) If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. (6) Any person requesting a public hearing should state their name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any proposed change. (7) If a public hearing is required, the department will proceed according to Minnesota Statutes, sections 14.131-14.20.

(5) Comments or written requests for a public hearing must be submitted to: Carol Milligan, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-6906.

(10) The proposed rule may be modified if the modifications are supported by the data and views submitted to the department and do not result in a substantial change in the proposed rule as noticed.

(11) A copy of the proposed rule is attached to this notice.

(12) A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available upon request from Ms. Milligan.

(14) The department has determined that this rule will have no negative impact on small business because the rule primarily deals with the procedures or the board. Additionally, the purpose of the board is to compensate individuals and businesses for cost incurred in taking corrective action for agricultural chemical incidents, which is a benefit for these businesses.

(9) If no hearing is required, upon adoption of the final rule, the rule and the required supporting documents will be submitted to Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted repealer must submit a written request to Ms. Milligan.

11/9/90
Date

STATE OF MINNESOTA

Paul Liemandt, Executive Director
Agricultural Chemical Response
Compensation Board

Department : Agriculture

STATE OF MINNESOTA
Office Memorandum

Date : November 26, 1990

To : Maryanne Hruby, Director
LCRAR

From : Carol Milligan
Planning Division

Phone : 296-6906

Subject : **Rule Governing The Agricultural Response Compensation Board**

As required by Minnesota Statutes, sections 14.131 and 14.23, attached is the Statement of Need and Reasonableness for the above-captioned rule. The Notice of Intent to Adopt and the rule will be published in the *State Register* on 11/26/90.

Attachment

In the Matter of the Proposed Adoption
of the Rule of the Agricultural Chemical
Response Compensation Board Governing
The Boards Practices and Procedures

AFFIDAVIT OF MAILING
THE NOTICE OF INTENT
TO ADOPT A RULE WITHOUT
A PUBLIC HEARING

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Marie Skerbitz, being sworn, says:

That on the 21st day of November, 1990, at the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the attached Notice of Intent to Adopt a Rule Without a Public Hearing by depositing in the State of Minnesota Central Mail System for United States mailing a copy thereof, with postage prepaid, to all persons and associations who have requested, pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 or 14.30, that their names be placed on the Agricultural Chemical Response Compensation Board rulemaking mailing list.

DIANE M. WINDHAM
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My commission expires 11-1-95

Marie Skerbitz
Marie Skerbitz
Mail Room Clerk

Subscribed and sworn to before me
this 21st day of November, 1990.

Diane M. Windham

In the Matter of the Proposed Adoption
of the Rule of the Agricultural Chemical
Response Compensation Board Governing
the Board's Practices and Procedures

CERTIFICATE OF MAILING LIST

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Paul Liemandt, being sworn, says:

I hereby certify that the list of persons and associations who have requested, pursuant to Minnesota Statutes, sections 14.14, subdivision 1a, and 14.22 or 14.30, that their names be placed on the Agricultural Chemical Response Compensation Board rulemaking mailing list is accurate, complete and current as of this 21st day of November, 1990.

Paul Liemandt
Executive Director

DIANE M. WINDHAM
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My commission expires 11-1-96

Subscribed and sworn to before me
this 21st day of November, 1990.

Diane M. Windham

Proposed Rules

Pursuant to Minn. Stat. §§ 14.22, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless 25 or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules; and
4. that the rule may be modified if the modifications are supported by the data and views submitted.

If, during the 30-day comment period, 25 or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of §§ 14.14-14.20, which state that if an agency decides to hold a public hearing, it must publish a notice of intent in the *State Register*.

Pursuant to Minn. Stat. §§ 14.29 and 14.30, agencies may propose emergency rules under certain circumstances. Proposed emergency rules are published in the *State Register* and, for at least 25 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Agriculture

Proposed Permanent Rules Relating to Agricultural Chemical Response Compensation Board

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Department of Agriculture intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedures Act for adopting rules without a public hearing in *Minnesota Statutes*, sections 14.22-14.28. The statutory authority to adopt this rule is *Minnesota Statutes*, section 18E.05.

All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing should state their name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any proposed change. If a public hearing is required, the department will proceed according to *Minnesota Statutes*, sections 14.131-14.20.

Comments or written requests for a public hearing must be submitted to: Carol Milligan, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-6906.

The proposed rule may be modified if the modifications are supported by the data and views submitted to the department and do not result in a substantial change in the proposed rule as noticed.

A copy of the proposed rule is attached to this notice.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available upon request from Ms. Milligan.

The department has determined that this rule will have no negative impact on small business because the rule primarily deals with the procedures or the board. Additionally, the purpose of the board is to compensate individuals and businesses for cost incurred in taking corrective action for agricultural chemical incidents, which is a benefit for these businesses.

If no hearing is required, upon adoption of the final rule, the rule and the required supporting documents will be submitted to Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule must submit a written request to Ms. Milligan.

Dated: 9 November 1990

Paul Liemandt, Executive Director
Agricultural Chemical Response
Compensation Board

Rules as Proposed (all new material)

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD RULES

1512.0100 DEFINITIONS.

Subpart 1. **Scope.** The definitions in this part and *Minnesota Statutes*, chapter 18B, 18C, 18D, or 18E apply to parts 1512.0100 to 1512.1100.

Subp. 2. **Corrective action design.** "Corrective action design" means a description of the actions necessary to investigate, minimize, or clean up an incident.

Subp. 3. **Eligible costs.** "Eligible costs" means costs that minimize, eliminate, or cleanup an incident and are reasonable and necessary.

1512.0200 BOARD MEETINGS.

Subpart 1. **Regular meetings.** At least six regular meetings of the board must be scheduled a year. A scheduled meeting may be canceled if there is insufficient business.

Subp. 2. **Special meetings.** A special meeting of the board may be called by the chair or by written request of three board members.

1512.0300 BOARD CHAIR AND VICE-CHAIR.

A chair and vice-chair of the board must be elected by the board. Both positions must be elected at the first official meeting of the board on or after July 1, 1990. The chair shall preside at regular and special meetings, or the vice-chair in the absence of the chair, and the person chairing a meeting shall perform all duties assigned by the board.

The chair and vice-chair must be members of the board and may not be either the commissioner of agriculture or the commissioner of commerce.

The term of the chair and vice-chair is one year, beginning January 1, 1991.

1512.0400 CONDUCT OF MEETINGS.

Subpart 1. **Quorum.** A quorum consists of three board members.

Subp. 2. **Minutes.** Meetings must be tape recorded and minutes subsequently prepared by the board's staff.

Subp. 3. **Parliamentary procedure.** Except as specifically provided by statute or negotiation, Robert's Rules of Order govern questions that may arise at a meeting of the board.

1512.0500 CONFLICT OF INTEREST.

A member of the board who has a direct or indirect financial or employment interest relating to a matter before the board, which interest is reasonably likely to affect impartiality of judgment in the matter, shall make known the interest and shall refrain from participating in or voting upon the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote.

1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS.

Subpart 1. **General.**

A. An eligible person who has taken corrective action and has incurred costs on or after July 1, 1989, may apply to the board for reimbursement or payment of eligible costs.

B. Reimbursement for eligible costs incurred is only for costs already paid by the eligible person. Reimbursement will not be made without proof that costs have been paid.

C. Payment of eligible costs incurred is only for costs that the eligible person is unable to pay.

Subp. 2. **Conditions.** A reimbursement or payment may not be made unless the board determines that the commissioner of agriculture has determined that the corrective action has adequately addressed, or will adequately address, the incident so as to eliminate unreasonable adverse effects on the environment.

An eligible person must seek and report to the board any and all other cost coverage or recovery when making an application for reimbursement or payment from the agricultural chemical response and reimbursement account.

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.

A reimbursement may not be made before the applicant receives approval from the commissioner of agriculture for a corrective action design.

A payment may not be made before the applicant receives the commissioner's approval for additional necessary corrective actions.

Subp. 3. **Multiple eligible persons.** If more than one eligible person incurs eligible costs for a single incident or for a single corrective action, each eligible person must apply separately to the board. Not more than the maximum amounts under *Minnesota Statutes*, chapter 18E, may be reimbursed or paid for corrective action costs associated with a single incident site, regardless of the number of eligible persons.

1512.0700 ELIGIBLE COSTS.

Subpart 1. **Reimbursable or payable corrective actions.** Costs associated with the following corrective actions may be eligible for reimbursement or payment:

A. emergency responses to incidents including, but not limited to, costs incurred that are necessary to abate acute risks to human health, safety, and the environment;

B. incident site hazard control measures including, but not limited to, containment and stabilization of the incident and removal of released material;

C. investigation and source identification including, but not limited to, collecting and analyzing soil samples, testing the groundwater, testing site and adjacent drinking water supplies, structural testing, and engineering and consultant services;

D. development of corrective action design according to requirements of the commissioner of agriculture; and

E. cleanup of incidents including, but not limited to, removal, treatment, or disposal of surface or subsurface contamination.

Cleanup must be performed according to a corrective action design, approved by the commissioner of agriculture, except in circumstances where an eligible person takes all reasonable emergency corrective action necessary to minimize and abate an incident and the action is subsequently approved by the commissioner of agriculture.

Subp. 2. **Documentation of reasonableness.** The applicant shall prove the reasonableness of all incurred eligible costs. Upon request of the board or the board's staff, the applicant shall document the reasonableness of any costs included on the reimbursement application, or on any request for payment, by providing one or more of the following:

A. evidence that the work was performed by a person or persons whose services were solicited through a competitive bidding procedure;

B. evidence that the cost is substantially equivalent to that charged by a comparable person or persons in the same geographical area for similar work performed;

C. evidence that only one party was reasonably available to perform the necessary work; or

D. evidence that only one party was reasonably qualified to perform the necessary work.

The board shall reimburse or pay only those costs it determines to be reasonable.

1512.0800 INELIGIBLE COSTS.

All costs associated with actions that do not minimize, eliminate, or clean up an incident are ineligible costs. Ineligible costs include, but are not limited to, costs related to the repair, replacement, or upgrading of agricultural chemical facility structures or equipment, cost of agricultural chemical product replacement, loss of income, attorney's fees, permanent relocation of residents, decreased property values, reimbursement for the eligible person's own time spent in planning and administering a corrective action design, costs for third party review of proposed investigative and corrective action or work plans, aesthetic improvements, or any work, except for emergency corrective actions, not in compliance with safety codes including, but not limited to, United States Occupational Safety and Health Administration requirements, well codes, fire codes, and costs for providing alternative sources of drinking water.

Corrective action costs covered or payable under an insurance or other contract are ineligible costs. Corrective action costs covered or payable under an insurance or other contract are ineligible costs because they are not considered to be costs incurred by the eligible person. Costs incurred in response to requests or orders issued to a responsible person under authorities contained in *Minnesota Statutes*, chapter 115B, or federal CERCLA are ineligible costs.

1512.0900 APPLICATION PROCESS.

Subpart 1. **Request for reimbursement.** A person who wishes to apply for reimbursement from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. summary of the corrective action design and the commissioner of agriculture's approval of the design, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action; and

D. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action; and

E. proof of payment.

Subp. 2. **Request for payment.** A person who wishes to apply for payment from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. completed and signed affidavit summarizing the financial condition of eligible persons, and demonstrating an inability to pay the corrective action cost;

D. copies of federal and state income tax returns for the last two years (corporate, partnership, or individual);

E. monthly, quarterly, and annual financial statements for the last two years, prepared according to generally accepted accounting principles, relating to the financial condition of the applicant applying for payment, including financial statements for any businesses owned or operated by the applicant;

F. a summary of the corrective actions taken, as approved by the commissioner, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action;

G. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action;

H. information detailing why corrective actions have not been completed or initiated; and

I. evidence sufficient to prove applicant's payment of $1,000 for corrective action costs already incurred.

The board may waive the requirement for submission of all or a portion of the above described financial information, if reasonable and appropriate, upon written request of the applicant.

Only complete applications may be accepted by the board and incomplete applications must be returned to the applicant.

Subp. 3. **Time of application.** The board shall hear initial requests for reimbursement and payment applications by eligible persons at every regular meeting.

The board shall establish a priority system for hearing requests for payment or reimbursement. The priority system must be based primarily on department incident response site priorities, taking into account the health and welfare of the public, the effects on the environment, and the commissioner of agriculture's incident response case load and staff resources.

Subp. 4. **Subsequent application.**

A. An eligible person who has already obtained partial reimbursement or payment from the board and who has incurred additional or continuing costs due to the same incident may reapply if:

(1) the amount of the person's original reimbursement or payment was less than the maximum allowed under *Minnesota Statutes*, section 18E.04;

(2) the eligible person offers adequate evidence that all payments have been properly applied towards costs of corrective action approved by the commissioner of agriculture;

(3) the eligible costs submitted on a subsequent application are not related to any new incidents at the site; and

(4) the total reimbursement and payments to all eligible persons for an incident must not exceed the maximum allowed under *Minnesota Statutes*, section 18E.04.

B. An eligible person may request reimbursement or payment of additional costs at the times indicated in subitems (1) and (2).

(1) Requests for reimbursement may be considered by the board no more than once every 12 months if the additional costs incurred are $5,000 or less.

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.

(2) Requests for reimbursement of additional costs incurred of $5,000 or more may be considered by the board at every other regular board meeting. The board or the board's staff shall notify an eligible person requesting additional payments when the next regular board meeting is to be held at which requests will be considered.

(3) Request for direct payment may be made at every other board meeting.

Subp. 6. **Signatures.** An application must be signed as follows:

A. for a corporation, by a principal executive officer of at least the level of vice-president or the duly authorized representative or agent of the executive officer if the representative or agent is responsible for the overall operation of the facility or site that is the subject of the application or a person whom the board of directors designates by means of a corporate resolution; or

B. for a partnership, sole proprietorship, or individual by a general partner, the proprietor, or individual, respectively.

Subp. 7. **Certification.**

A. A person who signs an application for reimbursement or payment shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. I certify that the commissioner of agriculture has approved the corrective actions taken, as described in the approved corrective action design, or as otherwise approved by the commissioner. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge, true, accurate, and complete. I further certify that I have the authority to submit this application on behalf of ....."

B. A person who signs an application for payment shall also make the following certification:

"I certify that if I have submitted invoices for costs that remain unpaid that I will pay those invoices within 30 days of receipt of payment from the board. I understand that if I fail to do so, the board may demand return of all or any portion of money paid to me."

C. A person who signs an application for subsequent payment or reimbursement shall also make the following certification:

"I certify that I have complied with the commissioner of agriculture approved corrective action design provisions and the corrective actions were taken as described in that design."

Subp. 8. **Report of commissioner of agriculture.** Upon notification by the board's staff that a complete application has been received, the commissioner shall, in a timely manner, provide the board with a written report on the applicant's compliance or noncompliance with *Minnesota Statutes*, section 18E.04.

In addition, the board may request additional information from the commissioner or may request participation of agency staff at a board meeting. All responses to requests for information must be delivered in a timely manner. The board may delegate these powers to its staff.

1512.1000 REVIEW AND DETERMINATION.

Subpart 1. **Review.** The board's staff shall review all applications. If the staff determines that the application is incomplete or otherwise deficient, the staff shall promptly advise the applicant of the incompleteness or deficiency. Further processing of the application affected by the deficiency must be suspended until the applicant has supplied the necessary information or otherwise corrected the deficiency. A complete application and the corresponding report of the commissioner of agriculture constitutes the written record. Any supplemental information explaining the application that is presented orally or in writing to the board will also be part of the written record.

Subp. 2. **Staff recommendation.** After a reimbursement or payment application is complete and the commissioner has provided the information relevant to the application, the board's staff shall make a recommendation as to the eligibility of the applicant and the costs specified in the application.

Subp. 3. **Board determination.** The board shall determine the amount of the reimbursement or payment based on the costs it finds are eligible, actually incurred, and reasonable. The determination must be made on the basis of the written record. The board may also allow supplemental information explaining the application to be presented in writing or orally. The board may establish a fair and reasonable limit on the time for oral presentation.

The applicant must be notified in writing within 30 days of the board's decision. If the board rejects part of the request for reimbursement or payment, a statement of the reasons for rejection must be included with the notification.

Subp. 4. **Appeal.** If a reimbursement or payment is denied, the eligible person may appeal the decision as a contested case hearing under *Minnesota Statutes*, chapter 14.

1512.1100 ENFORCEMENT.

An application for reimbursement or payment containing false statements or misrepresentations voids the application. Reimbursements or payments that are made that later are found to have been based upon false or misleading information result in forfeiture of any reimbursement or payment made, and are wholly recoverable through actions under general criminal or civil enforcement authorities by the Office of the Attorney General.

Minnesota State Arts Board

Proposed Permanent Rules Relating to Deadlines

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the State Board of the Arts intends to adopt amendments to the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in *Minnesota Statutes*, section 14.22 to 14.28. The statutory authority to adopt the rule is 139.10, subd. 1(e)(1988).

All persons have 30 days in which to submit comment in support or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing should state his or her name and address and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the Board will proceed pursuant to *Minnesota Statutes* 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to: Robert Booker, Minnesota State Arts Board, 432 Summit Avenue, St. Paul, Minnesota 55102.

The proposed rule may be modified if the modifications are supported by data and views submitted to the agency and do not result in a substantial change in the proposed rule as noticed.

A copy of the proposed rule is attached to this notice.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rules has been prepared and is available from Robert Booker upon request.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Robert Booker, Minnesota State Arts Board, 432 Summit Avenue, St. Paul, Minnesota 55102.

Dated: 8 November 1990

Robert Booker
Assistant Director

Rules as Proposed

1900.1400 APPLICATION FORMS AND DEADLINE.

All applications for grants must be made on official application forms for the appropriate program available at the offices of the board. Applicants must use grant application forms for the appropriate fiscal year. Requests for other forms of assistance may be made directly to the board at its offices.

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CERTIFICATION OF THE

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD (ACRRA BOARD)

RESOLUTION ADOPTING THE RULE

I, Paul Rhein, do hereby certify that I am a member and the Chair of the Agricultural Chemical Response Compensation Board, a board 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 Agricultural Chemical Response Compensation Board, duly and properly called and held on the 16 day of January, 1991, that a quorum was present, and that a majority of those present voted for the resolution which has not been rescinded or modified.

> "RESOLVED, that the rule relating to the Agricultural Chemical Response Compensation Board is approved and adopted, pursuant to authority vested in the board by Minnesota Statutes, section 18E.05. Paul Liemandt, the executive director of the Agricultural Chemical Response Compensation Board, is authorized to sign the findings of fact, conclusions, and order adopting the rule and further is authorized to modify the rule if necessary to obtain the approval of the rule by the attorney general and to perform the necessary acts to provide that the rule shall have the force and effect of law."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 16 day of January, 1991

Paul Rhein
Officer of the Board

Harlan W. Moore
Attest by one other Board Member

In the Matter of the Adoption of the Rule of the State Agricultural Chemical Response Compensation Board Governing The Agricultural Chemical Response Compensation Board

DECLARATION OF COUNSEL

I, Kenneth Raschke, Assistant Attorney General, do hereby declare that I have examined the above-captioned rule and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, chapter 2010 have been followed. Any exceptions are listed below. For Attorney General billing purposes, the four-digit docket client code is 0987.

Kenneth Raschke
Assistant Attorney General

Dated: 1/17/91

AMERICAN
ENGINEERING
TESTING, INC.

CONSULTANTS
• GEOTECHNICAL
• MATERIALS

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DEC 2 0 1990

PLANNING DIVISION

December 18, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

RE: Public Hearing Request
"ACCRA" Program

Dear Ms. Milligan:

I request that a public hearing be held concerning the proposed rules relating to the Agricultural Chemical Response Compensation Board.

Of concern to me is the section of the proposed rules that requires the recipient of funds to provide evidence that the work was solicited through a competitive bidding procedure. I am firm in my opinion that competitive bidding for professional engineering services is not in the public's best interest.

Sincerely,

Charles W Bisek

Charles W. Bisek

CWB/sk

2102 University Ave. W. • St. Paul, MN 55114 • Phone 612-659-9001 • Fax 612-659-1379

AMERICAN
ENGINEERING
TESTING, INC.

CONSULTANTS
• GEOTECHNICAL
• MATERIALS

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DEC 19 1990

PLANNING DIVISION

December 18, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

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Sincerely,

Julie Mohagen Dresel

Julie Mohagen Dresel, PE
Environmental Engineering Manager

JMD/sk

2102 University Ave. W. • St. Paul, MN 55114 • Phone 612-659-9001 • Fax 612-659-1379

AMERICAN
ENGINEERING
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Sincerely,

Steven D. Koenes

Steven D. Koenes, PE
Principal Engineer

SDK/sk

2102 University Ave W • St. Paul MN 55114 • Phone 612-659-9001 • Fax 612-659-1379

AMERICAN
ENGINEERING
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90 West Plato Boulevard
St. Paul, MN 55107

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Sincerely,

Jeffery K. Voyen

Jeffery K. Voyen, PE
Manager, Geotechnical Engineering

JKV/sk

2102 University Ave W • St. Paul MN 55114 • Phone 612-659-9001 • Fax 612-659-1379

AMERICAN
ENGINEERING
TESTING, INC.

CONSULTANTS
• GEOTECHNICAL
• MATERIALS

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PLANNING DIVISION

December 18, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

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Sincerely,

Donovan K. Stormoe

Donovan K. Stormoe, PE
Principal

DKS/sk

2102 University Ave W. • St. Paul, MN 55114 • Phone 612-659-9001 • Fax 612-659-1379

TSP/ADG

Architecture • Engineering • Planning
Interiors • Energy Consultation • Design

1500 Highway 52 North, Rochester, Minnesota 55901 (507) 288-8155 FAX: (507) 288-7220

December 17, 1990

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DEC 19 1990

PLANNING DIVISION

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Blvd.
St. Paul, MN 55107

Reference is made to the State Register, Monday, November 26, 1990, page 1254, in which the Department of Agriculture is proposing that permanent rules be adopted relating to Agricultural Chemical Response Compensation Board. I feel that these proposed rules are of such significance that they should be given the opportunity of a formal hearing.

I object to these rules being adopted without a formal hearing process. Thank you.

TSP/ADG

Roger K. Toulouse, P.E.

DC14RKTk

Barr
Engineering Company

7803 Glenroy Road
Minneapolis, MN 55439-3123
612/830-0555
612/835-0186 (Facsimile)

December 12, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Dear Ms. Milligan:

By this letter I am requesting that a public hearing be held on the Permanent Rules Relating to Agricultural Chemical Response Compensation Board. In particular, I believe that 1512.0700 Subp. 2 is ill advised and not in the public interest. Emergency response, site hazard control measures, release investigations and clean-up designs are not activities that should be subject to competitive bidding. The public is best served by having experienced and qualified individuals conducting these tasks rather than low bid providers.

Sincerely,

Dale Wikre

Dale L. Wikre
Vice President

DLW/lah
0003003/CM1212.LTR

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DEC 13 1990
PLANNING DIVISION

DAG I. KNUDSEN & ASSOCIATES, INC.

612-943-2254 Fax 612-943-2255

...Institute for Effective Presentations

...8761 Lakeview Road, Bloomington, MN 55438

December 11, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Dear Ms. Milligan,

This regards the proposed Permanent Rules Relating to Agricultural Chemical Response Compensation Board", as advertised in *State Register*, Monday November 26, 1990.

I oppose the proposed rule in part and request a Public Hearing prior to adoption of the rules.

Ref: 1512.0700 ELIGIBLE COSTS
Subpart 2A. Evidence that the work was performed by a person or persons whose services were solicited through a competitive bidding procedure:

This requirement should be eliminated for "collecting and analyzing soil samples, testing the ground water, testing site and adjacent drinking water supplies, structural testing, and engineering and consultant services." (ref: 1512.0700 Eligible Cost Subpart 1, C&D)

Reasons:

There is strong precedence at the Federal and State of Minnesota levels for selection of professional engineering and related services on the basis of qualifications only. Fees are negotiated with the firm deemed most competent as determined through a Quality Based Selection process.

The "Brooks Law" (PL 92-582) applies to all procurement of professional engineering and architecture services where federal funds are involved.

State of Minnesota, through the State Designer Selection Board, also practices the intent of the Brooks Law.

Clients are best served, and their investments best protected, when they first identify professionals with quality credentials, select one firm or individual and negotiate a fee for the work to be accomplished. By eliminating the proposed rule paragraphs referenced above, your applicants are assured of receiving quality services at a reasonable cost and cost-effective solutions.

Sincerely yours,
DAG I. KNUDSEN & ASSOCIATES, INC.

Dag I. Knudsen , P.E.

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DEC 14 1990

PLANNING DIVISION

GME CONSULTANTS, INC.
CONSULTING ENGINEERS
14000 21st Ave. No. / Minneapolis, MN 55447
Phone (612) 559-1859 / Fax (612) 559-0720

December 7, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, Minnesota 55107

RE: Hearing regarding Proposed Permanent Rules Relating to Agricultural Chemical Response Compensation Board

Dear Ms. Milligan:

I recently read the announcement in the State Bulletin of November 26, 1990, regarding the Proposed Permanent Rules adoption. I am very interested in this matter, and I am submitting this letter to request that there be a public hearing held to discuss the Proposed Rules.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

GME CONSULTANTS, INC.

William C. Kwasny, P.E.
President

WCK:dws

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DEC 10 1990
PLANNING DIVISION

WILLIAM C. KWASNY, P.E.
GREGORY R. REUTER, P.E.
MARK D. MILLSOP

THOMAS PAUL VENEMA, P.E.
JOEL D. ULRING, P.E.
SANDRA J. FORREST

WILLIAM E. BLOEMENDAL, P.E.
WYATT A. GUTZKE, P.E.
KENNETH J. La FOND, P.E.
Consultant

14600 Minnehaha Place
Wayzata, MN 55391
December 7, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Subject: Permanent Rules Relating to Agriculture Chemical Response Compensation Board Rules

Dear Ms. Milligan:

I would like to request a hearing on the above referenced rules which were published in the State Register on November 26, 1990.

Thank you for the opportunity to extend this request. I would also appreciate being advised, at the above address, of the date a public hearing is scheduled.

Very truly yours

James R. Orr

RECEIVED
DEC 13 1990
PLANNING DIVISION

8009 Edgewood Avenue No.
Brooklyn Park, MN 55455
December 7, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Subject: Permanent Rules Relating to Agriculture Chemical Response Compensation Board Rules

Dear Ms. Milligan:

I would like to request a hearing on the above referenced rules which were published in the State Register on November 26, 1990.

Thank you for the opportunity to extend this request. I would also appreciate being advised, at the above address, of the date a public hearing is scheduled.

Very truly yours

Dan Naughton

RECEIVED
DEC 17 1990
PLANNING DIVISION

5300 Highway 63 South
Rochester, MN 55904

December 10, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Dear Ms. Milligan:

The proposed rules 1512.0100 through 1512.1000, Agricultural Chemical Response Compensation Board Rules, contain provisions which should be clarified through revisions. I respectfully request a public hearing on the proposed rules for that purpose.

Very truly yours,

WALLACE HOLLAND KASTLER SCHMITZ & COMPANY

Kenneth E. Boyer, P.E.

KEB:ses

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DEC 1 2 1990

PLANNING DIVISION

15585 Canyon Ridge
Eden Prairie, MN 55347
December 10, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Subject: Permanent Rules Relating to Agriculture Chemical Response Compensation Board Rules

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Thank you for the opportunity to extend this request. I would also appreciate being advised, at the above address, of the date a public hearing is scheduled.

Very truly yours

Kenneth Adolf

Kenneth Adolf

RECEIVED
DEC 14 1990
PLANNING DIVISION

twin city testing corporation

662 CROMWELL AVENUE
ST. PAUL, MN 55114
PHONE 612/645-3601

December 11, 1990

Ms Carol Milligan
MN Dept of Agriculture
90 West Plato Boulevard
St Paul, MN 55107

Subj: Proposed Permanent Rules
Agricultural Chemical Response Compensation Board

Dear Ms Milligan:

I have reviewed the proposed rules, and they are generally very good and reasonable. However there is one provision which causes great concern to the consulting engineering community, and one which needs clarification.

The concern is proposed Rule 1512.0700, Subpart 2, A. This rule states that the work was performed by a person or persons whose services were solicited through a competitive bidding procedure. Consulting engineering work is best done on a negotiated fee basis, wherein the consultant has some flexibility to make judgments that are appropriate to his/her findings. This fact was long ago recognized by the Federal Government, and is codified in a law which is commonly referred to as the Brooks Bill. We would prefer that you go to a Qualifications Based Selection (QBS) system similar to the one in use in Wisconsin.

In Section 1512.0800, Ineligible Costs, one of the items noted is costs for third party review of proposed investigative and correction action of work plans. This certainly needs clarification, since it could include review by qualified geotechnical or hydrogeologic engineers.

We hope that these two items can be clarified by modifications or revisions, to the proposed rules. If not, we would formally request that a public hearing should be held to discuss them.

Sincerely,

Mervyn Mindess

Mervyn Mindess, P.E.
Principal Geotechnical Engineer
Registered Monitoring Well Contractor

MM/kmk

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DEC 1 3 1990

PLANNING DIVISION

CONSULTING ENGINEERS COUNCIL OF MINNESOTA

SUITE A / 5407 EXCELSIOR BOULEVARD / MINNEAPOLIS, MINNESOTA 55416 / 612-922-9696

TO: CEC/M Member Firms

FROM: Dave Oxley, Executive Director

DATE: Thursday, December 6, 1990

RE: Hearing for Proposed Rules by the Minnesota Department of Agriculture on the "ACCRA" Program

The Minnesota Department of Agriculture (MDA) has proposed adopting the rules relating to the Agricultural Chemical Response Compensation Board (ACCRA Board, similar to Petrofund). MDA has proposed to adopt the rules without a public hearing, pursuant to Minnesota Statute 14.22. Among the requirements in the proposed rules is that the recipient of funds provide evidence that the work was solicited through a competitive bidding procedure. We would like to have these rules discussed at a public hearing, with the intention of eliminating or changing this requirement.

We must have at least 25 separate letters from individuals requesting a hearing, in order to prevent adoption without a hearing. We are asking that you and other members of your firm write letters to the MDA. These letters must be received at the MDA within 30 days of the date of announcement (State Register, November 26, 1990). Thus, the end date is December 24, 1990. We strongly suggest mailing a letter to arrive on or before December 21, 1990.

The letter should be similar to the type CEC/M members sent last year to the Minnesota Department of Health requesting a hearing on proposed rules changes in the monitoring well laws: a single one page letter requesting a hearing. The letter should be sent to:

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

We ask that you please send a blind carbon copy to the CEC/M office. Please call if you have any questions regarding this matter.

Member of American Consulting Engineers Council

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DAVID OXLEY
5407 Excelsior Boulevard, Suite A
Minneapolis, MN 55416
(612) 922-9696 / (612) 927-8705

Proposed Rules

Pursuant to Minn. Stat. §§ 14.22, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless 25 or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules; and
4. that the rule may be modified if the modifications are supported by the data and views submitted.

If, during the 30-day comment period, 25 or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of §§ 14.14-14.20, which state that if an agency decides to hold a public hearing, it must publish a notice of intent in the *State Register*.

Pursuant to Minn. Stat. §§ 14.29 and 14.30, agencies may propose emergency rules under certain circumstances. Proposed emergency rules are published in the *State Register* and, for at least 25 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Agriculture

Proposed Permanent Rules Relating to Agricultural Chemical Response Compensation Board

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Department of Agriculture intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedures Act for adopting rules without a public hearing in *Minnesota Statutes*, sections 14.22-14.28. The statutory authority to adopt this rule is *Minnesota Statutes*, section 18E.05.

All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing should state their name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any proposed change. If a public hearing is required, the department will proceed according to *Minnesota Statutes*, sections 14.131-14.20.

Comments or written requests for a public hearing must be submitted to: Carol Milligan, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-6906.

The proposed rule may be modified if the modifications are supported by the data and views submitted to the department and do not result in a substantial change in the proposed rule as noticed.

A copy of the proposed rule is attached to this notice.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available upon request from Ms. Milligan.

The department has determined that this rule will have no negative impact on small business because the rule primarily deals with the procedures or the board. Additionally, the purpose of the board is to compensate individuals and businesses for cost incurred in taking corrective action for agricultural chemical incidents, which is a benefit for these businesses.

If no hearing is required, upon adoption of the final rule, the rule and the required supporting documents will be submitted to Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule must submit a written request to Ms. Milligan.

Dated: 9 November 1990

Paul Liemandt, Executive Director
Agricultural Chemical Response
Compensation Board

Rules as Proposed (all new material)

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD RULES

1512.0100 DEFINITIONS.

Subpart 1. **Scope.** The definitions in this part and *Minnesota Statutes*, chapter 18B, 18C, 18D, or 18E apply to parts 1512.0100 to 1512.1100.

Subp. 2. **Corrective action design.** "Corrective action design" means a description of the actions necessary to investigate, minimize, or clean up an incident.

Subp. 3. **Eligible costs.** "Eligible costs" means costs that minimize, eliminate, or cleanup an incident and are reasonable and necessary.

1512.0200 BOARD MEETINGS.

Subpart 1. **Regular meetings.** At least six regular meetings of the board must be scheduled a year. A scheduled meeting may be canceled if there is insufficient business.

Subp. 2. **Special meetings.** A special meeting of the board may be called by the chair or by written request of three board members.

1512.0300 BOARD CHAIR AND VICE-CHAIR.

A chair and vice-chair of the board must be elected by the board. Both positions must be elected at the first official meeting of the board on or after July 1, 1990. The chair shall preside at regular and special meetings, or the vice-chair in the absence of the chair, and the person chairing a meeting shall perform all duties assigned by the board.

The chair and vice-chair must be members of the board and may not be either the commissioner of agriculture or the commissioner of commerce.

The term of the chair and vice-chair is one year, beginning January 1, 1991.

1512.0400 CONDUCT OF MEETINGS.

Subpart 1. **Quorum.** A quorum consists of three board members.

Subp. 2. **Minutes.** Meetings must be tape recorded and minutes subsequently prepared by the board's staff.

Subp. 3. **Parliamentary procedure.** Except as specifically provided by statute or negotiation, Robert's Rules of Order govern questions that may arise at a meeting of the board.

1512.0500 CONFLICT OF INTEREST.

A member of the board who has a direct or indirect financial or employment interest relating to a matter before the board, which interest is reasonably likely to affect impartiality of judgment in the matter, shall make known the interest and shall refrain from participating in or voting upon the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote.

1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS.

Subpart 1. **General.**

A. An eligible person who has taken corrective action and has incurred costs on or after July 1, 1989, may apply to the board for reimbursement or payment of eligible costs.

B. Reimbursement for eligible costs incurred is only for costs already paid by the eligible person. Reimbursement will not be made without proof that costs have been paid.

C. Payment of eligible costs incurred is only for costs that the eligible person is unable to pay.

Subp. 2. **Conditions.** A reimbursement or payment may not be made unless the board determines that the commissioner of agriculture has determined that the corrective action has adequately addressed, or will adequately address, the incident so as to eliminate unreasonable adverse effects on the environment.

An eligible person must seek and report to the board any and all other cost coverage or recovery when making an application for reimbursement or payment from the agricultural chemical response and reimbursement account.

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.

A reimbursement may not be made before the applicant receives approval from the commissioner of agriculture for a corrective action design.

A payment may not be made before the applicant receives the commissioner's approval for additional necessary corrective actions.

Subp. 3. **Multiple eligible persons.** If more than one eligible person incurs eligible costs for a single incident or for a single corrective action, each eligible person must apply separately to the board. Not more than the maximum amounts under *Minnesota Statutes*, chapter 18E, may be reimbursed or paid for corrective action costs associated with a single incident site, regardless of the number of eligible persons.

1512.0700 ELIGIBLE COSTS.

Subpart 1. **Reimbursable or payable corrective actions.** Costs associated with the following corrective actions may be eligible for reimbursement or payment:

A. emergency responses to incidents including, but not limited to, costs incurred that are necessary to abate acute risks to human health, safety, and the environment;

B. incident site hazard control measures including, but not limited to, containment and stabilization of the incident and removal of released material;

C. investigation and source identification including, but not limited to, collecting and analyzing soil samples, testing the groundwater, testing site and adjacent drinking water supplies, structural testing, and engineering and consultant services;

D. development of corrective action design according to requirements of the commissioner of agriculture; and

E. cleanup of incidents including, but not limited to, removal, treatment, or disposal of surface or subsurface contamination.

Cleanup must be performed according to a corrective action design, approved by the commissioner of agriculture, except in circumstances where an eligible person takes all reasonable emergency corrective action necessary to minimize and abate an incident and the action is subsequently approved by the commissioner of agriculture.

Subp. 2. **Documentation of reasonableness.** The applicant shall prove the reasonableness of all incurred eligible costs. Upon request of the board or the board's staff, the applicant shall document the reasonableness of any costs included on the reimbursement application, or on any request for payment, by providing one or more of the following:

A. evidence that the work was performed by a person or persons whose services were solicited through a competitive bidding procedure;

B. evidence that the cost is substantially equivalent to that charged by a comparable person or persons in the same geographical area for similar work performed;

C. evidence that only one party was reasonably available to perform the necessary work; or

D. evidence that only one party was reasonably qualified to perform the necessary work.

The board shall reimburse or pay only those costs it determines to be reasonable.

1512.0800 INELIGIBLE COSTS.

All costs associated with actions that do not minimize, eliminate, or clean up an incident are ineligible costs. Ineligible costs include, but are not limited to, costs related to the repair, replacement, or upgrading of agricultural chemical facility structures or equipment, cost of agricultural chemical product replacement, loss of income, attorney's fees, permanent relocation of residents, decreased property values, reimbursement for the eligible person's own time spent in planning and administering a corrective action design, costs for third party review of proposed investigative and corrective action or work plans, aesthetic improvements, or any work, except for emergency corrective actions, not in compliance with safety codes including, but not limited to, United States Occupational Safety and Health Administration requirements, well codes, fire codes, and costs for providing alternative sources of drinking water.

Corrective action costs covered or payable under an insurance or other contract are ineligible costs. Corrective action costs covered or payable under an insurance or other contract are ineligible costs because they are not considered to be costs incurred by the eligible person. Costs incurred in response to requests or orders issued to a responsible person under authorities contained in *Minnesota Statutes*, chapter 115B, or federal CERCLA are ineligible costs.

1512.0900 APPLICATION PROCESS.

Subpart 1. **Request for reimbursement.** A person who wishes to apply for reimbursement from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. summary of the corrective action design and the commissioner of agriculture's approval of the design, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action; and

D. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action; and

E. proof of payment.

Subp. 2. **Request for payment.** A person who wishes to apply for payment from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. completed and signed affidavit summarizing the financial condition of eligible persons, and demonstrating an inability to pay the corrective action cost;

D. copies of federal and state income tax returns for the last two years (corporate, partnership, or individual);

E. monthly, quarterly, and annual financial statements for the last two years, prepared according to generally accepted accounting principles, relating to the financial condition of the applicant applying for payment, including financial statements for any businesses owned or operated by the applicant;

F. a summary of the corrective actions taken, as approved by the commissioner, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action;

G. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action;

H. information detailing why corrective actions have not been completed or initiated; and

I. evidence sufficient to prove applicant's payment of $1,000 for corrective action costs already incurred.

The board may waive the requirement for submission of all or a portion of the above described financial information, if reasonable and appropriate, upon written request of the applicant.

Only complete applications may be accepted by the board and incomplete applications must be returned to the applicant.

Subp. 3. **Time of application.** The board shall hear initial requests for reimbursement and payment applications by eligible persons at every regular meeting.

The board shall establish a priority system for hearing requests for payment or reimbursement. The priority system must be based primarily on department incident response site priorities, taking into account the health and welfare of the public, the effects on the environment, and the commissioner of agriculture's incident response case load and staff resources.

Subp. 4. **Subsequent application.**

A. An eligible person who has already obtained partial reimbursement or payment from the board and who has incurred additional or continuing costs due to the same incident may reapply if:

(1) the amount of the person's original reimbursement or payment was less than the maximum allowed under *Minnesota Statutes*, section 18E.04;

(2) the eligible person offers adequate evidence that all payments have been properly applied towards costs of corrective action approved by the commissioner of agriculture;

(3) the eligible costs submitted on a subsequent application are not related to any new incidents at the site; and

(4) the total reimbursement and payments to all eligible persons for an incident must not exceed the maximum allowed under *Minnesota Statutes*, section 18E.04.

B. An eligible person may request reimbursement or payment of additional costs at the times indicated in subitems (1) and (2).

(1) Requests for reimbursement may be considered by the board no more than once every 12 months if the additional costs incurred are $5,000 or less.

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.

(2) Requests for reimbursement of additional costs incurred of $5,000 or more may be considered by the board at every other regular board meeting. The board or the board's staff shall notify an eligible person requesting additional payments when the next regular board meeting is to be held at which requests will be considered.

(3) Request for direct payment may be made at every other board meeting.

Subp. 6. **Signatures.** An application must be signed as follows:

A. for a corporation, by a principal executive officer of at least the level of vice-president or the duly authorized representative or agent of the executive officer if the representative or agent is responsible for the overall operation of the facility or site that is the subject of the application or a person whom the board of directors designates by means of a corporate resolution; or

B. for a partnership, sole proprietorship, or individual by a general partner, the proprietor, or individual, respectively.

Subp. 7. **Certification.**

A. A person who signs an application for reimbursement or payment shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. I certify that the commissioner of agriculture has approved the corrective actions taken, as described in the approved corrective action design, or as otherwise approved by the commissioner. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge, true, accurate, and complete. I further certify that I have the authority to submit this application on behalf of ....."

B. A person who signs an application for payment shall also make the following certification:

"I certify that if I have submitted invoices for costs that remain unpaid that I will pay those invoices within 30 days of receipt of payment from the board. I understand that if I fail to do so, the board may demand return of all or any portion of money paid to me."

C. A person who signs an application for subsequent payment or reimbursement shall also make the following certification:

"I certify that I have complied with the commissioner of agriculture approved corrective action design provisions and the corrective actions were taken as described in that design."

Subp. 8. **Report of commissioner of agriculture.** Upon notification by the board's staff that a complete application has been received, the commissioner shall, in a timely manner, provide the board with a written report on the applicant's compliance or noncompliance with *Minnesota Statutes*, section 18E.04.

In addition, the board may request additional information from the commissioner or may request participation of agency staff at a board meeting. All responses to requests for information must be delivered in a timely manner. The board may delegate these powers to its staff.

1512.1000 REVIEW AND DETERMINATION.

Subpart 1. **Review.** The board's staff shall review all applications. If the staff determines that the application is incomplete or otherwise deficient, the staff shall promptly advise the applicant of the incompleteness or deficiency. Further processing of the application affected by the deficiency must be suspended until the applicant has supplied the necessary information or otherwise corrected the deficiency. A complete application and the corresponding report of the commissioner of agriculture constitutes the written record. Any supplemental information explaining the application that is presented orally or in writing to the board will also be part of the written record.

Subp. 2. **Staff recommendation.** After a reimbursement or payment application is complete and the commissioner has provided the information relevant to the application, the board's staff shall make a recommendation as to the eligibility of the applicant and the costs specified in the application.

Subp. 3. **Board determination.** The board shall determine the amount of the reimbursement or payment based on the costs it finds are eligible, actually incurred, and reasonable. The determination must be made on the basis of the written record. The board may also allow supplemental information explaining the application to be presented in writing or orally. The board may establish a fair and reasonable limit on the time for oral presentation.

The applicant must be notified in writing within 30 days of the board's decision. If the board rejects part of the request for reimbursement or payment, a statement of the reasons for rejection must be included with the notification.

Subp. 4. **Appeal.** If a reimbursement or payment is denied, the eligible person may appeal the decision as a contested case hearing under *Minnesota Statutes*, chapter 14.

Delta
Environmental
Consultants, Inc.

1801 Highway 8, Suite 114
St. Paul, MN 55112
612/636-2427
FAX:612/636-8552

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DEC 24 1990

PLANNING DIVISION

December 21, 1990

Ms. Carol Milligan
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Subject: Agricultural Chemical Response and Reimbursement Account Program Rules

Dear Ms. Milligan:

We have reviewed the Proposed Rules for the Agricultural Chemical Response and Reimbursement Account (ACRRA), and have the following concerns regarding their implementation. This letter is not a request for a public hearing.

Our concerns are primarily in regard to Section 1512.0700, subpart 2. This portion of the rules requires proof of the reasonableness of any costs incurred during the clean up of an agricultural chemical spill. We believe that this rule is by itself not improper. Our concern is with the implementation of the competitive bidding procedure specified in subpart 2A.

We are concerned that the applicants will not be familiar with the usual proposal process where a detailed scope of work is submitted to each remedial consulting firm. Without this scope of work, firm A may submit a proposal based on a very limited scope of work while firm B will submit a broader, more realistic, and thus more costly work plan. An applicant may select the lower proposal, and then find themselves having to go back for additional work which may again require a request for proposals. This will especially be a problem at the beginning of the ACCRA program when a track record of normal clean up costs has not been established.

A similar problem could arise if firms are only asked to submit a fee schedule. Firms that employ highly skilled people and use proper health and safety procedures will have a higher fee schedule than other firms but will likely work more quickly and efficiently and produce a professional product at a lower overall cost.

Delta Environmental Consultants, Inc. (Delta), recommends that the competitive bid process as described in subpart 2 be applied to project activities that are precisely specified thereby producing competitive and comparible bids. Professional consulting services should not be considered as project activities for soliciting bids.

We would like to work with the Agricultural Chemical Response Compensation Board and their staff to resolve these concerns and to allow the program to work fairly and efficiently. If you have any questions regarding these comments, please feel free to call me at (612) 636-2427. Again, this letter should not be construed as a request for hearing an the ACRRA Rules.

Sincerely,

DELTA ENVIRONMENTAL CONSULTANTS, INC.

Terry E. Huntrods
Engineering Division Manager

TEH/jmp

Agricultural Division

CIBA-GEIGY Corporation
P.O. Box 18300
Greensboro, North Carolina 27419
Telephone 919 632 6000

CIBA-GEIGY

December 6, 1990

RECEIVED
DEC 10 1990
PLANNING DIVISION

Ms. Carol Milligan
Planning Division
Minnesota Department of Agriculture
90 West Plato Blvd.
St. Paul, MN 55107

Dear Ms. Milligan:

SUBJECT: ACRRA BOARD - PROPOSED RULES

The Agricultural Division of CIBA-GEIGY Corporation is a major producer and supplier of pest management chemicals used in Minnesota and throughout the United States. The purpose in this correspondence is to submit comments for the record on the subject proposed rules.

In general, CIBA-GEIGY applauds the Board's and the Department's efforts in advancing the proposal. Many in industry view the Minnesota ACRRA approach as a reasonable and viable tool toward creating sufficient incentives that lead to a high degree of voluntary compliance with timely incident reporting.

The following offers comment on the concepts outlined in the draft. Please note the absence of comment on a section should not be viewed as supportive unless so stated.

(pp. 1 and 2) Part 1512.0300 BOARD CHAIR AND VICE-CHAIR

The term of the chair and vice-chair should be two (2) years rather than one (1). Often it takes at least a year for a new chair, particularly if that individual is a new member, to become familiar enough with the system. A one (1) year term is too disruptive to the administration and to interested persons who are involved with the Board. A degree of Board (chair) predictability is necessary and is usually not achieved until some time has elapsed. It is suggested that the chair and vice-chair serve for two (2) years with eligibility to succeed themselves for one additional two year period only.

(pg. 2) Part 1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS

If one of the objectives of the ACRRA program rules is to encourage timely reporting of incidents, the "conditions" (subpart 2., page 3, line 1) placed on an eligible person to

"seek and report any and all other cost coverage or recovery before making an application for reimbursement or payment" can create a major disincentive. A reading of the statute fails to show this implied "ability-to-pay" as a condition for reimbursement. It doesn't seem unreasonable for this information to be factored into the reimbursement equation; however, the weight assigned to it should be minimal in the decision-making process. Insurable interests and good business sense should not be penalized in this regard. The Division supports the direct link between incidents hazard mitigation minimization and elimination with reimbursement.

(pg. 3) Part 1512.0700 ELIGIBLE COSTS

The section generally appears reasonable. However, as a goal for the future, the Commissioner and the Board's staff should study the feasibility of developing a model "corrective action plan," much like an emergency response plan, that if followed, would virtually guarantee reimbursement. Such a plan could drastically reduce the workload on the Board and its staff and further foster voluntary compliance among the eligible parties. Certain incidents may, of course, have to be handled on a case-by-case basis but such a goal should be set by the Board.

Suggested Revisions

A one sentence addition to page 4, subpart 1, line 8, as follows would send appropriate signals to the affected community:

> "The Commissioner shall endeavor to develop and distribute general corrective action and emergency response guidelines to aid reimbursement and payment of eligible costs."

(pp. 4 and 5) Part 1512.0800 INELIGIBLE COSTS

Clean up of incidents can involve a number of actions as listed in the proposal. In situ methods are apparently ruled out by the proposal particularly with the ineligibility of costs associated with alternative sources of drinking water (pg. 5, lines 7 and 8). Back siphonage into a well may provide a case in point. Admittedly, reimbursement eligibility may be only partial if an anti-siphon device was not in place, but some provision should be made to provide recognition of clean up to include the providing of alternative drinking water and in situ methods during the interim. This point is reemphasized when one reads the eligibility criteria in part 1512.0700, subpart 1. A dealing with the

abatement of "acute risks to human health and safety". The temporary providing of alternative drinking water to private residences seems an appropriate response to hazard abatement on a case by case basis and should be an eligible cost when ordered by the Commissioner for this purpose.

It seems totally inconsistent for the Board to adopt rules on one hand that are designed to create environmental responsibility through reimbursements and payments and, then, to "nix" one of the most important health considerations, that of providing alternative drinking water. The key to this inconsistency may be found in the addition of modifiers that address the providing of temporary alternative drinking water and not a new well or city water main funded by ACRRA. Part of the model cleanup plan (see ELIGIBLE COSTS comments) could involve the providing by a responsible party, a temporary source of drinking water for which the eligible person could apply for reimbursement from ACRRA.

Costs of product replacement should also be ineligible.

Adjustments in the amounts of reimbursement should be tied to actual reimbursements, not just coverage, as there can be a very real difference, particularly with insurance between policy limits (coverage) and actual pay-out.

The Commissioner should be in a position to order temporary supplies of drinking water and/or provide such temporary supplies in cases where an incident results in exceedance of a health risk limit. The public welfare is of utmost importance in this regard. Therefore, the rules should permit reimbursement or payment for temporary alternative drinking water supplies in cases where an acute health risk limit has been exceeded or is reasonably expected to be exceeded.

Suggested Revisions

To part 1512.0800, page 5, line 8, add the following sentence: "part 1512.0800 notwithstanding, the Board may consider temporary, alternative drinking water provided to private residences for purposes of abating potential acute hazards by order of the Commissioner after consultation with the Commissioner of Health to be an eligible cost as provided in part 1512.0700 of this Rule."

Strike lines 9 through the word person on line 13 of page 5 as per comments.

Add a new paragraph after line 16, page 5, as follows:

"Costs of product replacement or reprocessing or reconditioning are ineligible costs."

Thank you very much for your consideration of these comments, and those previously submitted regarding the earlier draft.

Sincerely,

Charles G. Rock

Charles G. Rock
Manager, State Government Relations

L404BT1206CR

cc: Mr. Bill Bulger (MDA)
Mr. Paul Liemandt (MDA)
Mr. Paul Rhein (ACRRA, Chair)

DOHERTY
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& BUTLER
PROFESSIONAL ASSOCIATION

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Telephone (202) 293-0555
FAX (202) 659-0466

Attorneys at Law

Writer's direct dial number: 291-9438

Reply to Saint Paul office

DEC 27 1990

December 26, 1990

ACRRA Board
Sharon Huber, Administrator
Agronomy Services
90 West Plato Boulevard
St. Paul, Minnesota 55107

Dear ACCRA Board Members:

I am taking the time to respond to the proposed rules so that there is less confusion as the board begins to make reimbursement determinations.

Notice Invalid. First, the notice of the rule is invalid. The notice states that the Minnesota Department of Agriculture intends to adopt the rule, not the board. It is the board that is given authority under Minn. Stat. § 18E.05, not the MDA. The attorney general should be contacted regarding the issue and whether Minnesota Statutes, chapter 14 requires renoticing the rules because of a material change.

Purpose of Fund. It would be helpful if there was a statement describing the purpose for the fund. My recollection is that the fund was established as a financial mechanism to pay persons to take corrective action, to address incidents, and that it was to be an insurance mechanism. The only set off was to be for violations that caused the incidents. A person who took reasonable and necessary corrective action would be compensated. The draft rules don't seem to reflect these purposes. There are a number of provisions that seem to be present to assure compliance with MDA. There are other provisions that attempt to deny reimbursement of costs whether or not they are reasonable and necessary as provided by statute. I think the legislation requires a considerable amount of case by case evaluation and doesn't anticipate or authorize denial of claims without a determination of reasonableness. The Commissioner of Agriculture is given the directive to maintain fund balances; the Board is directed to pay and reimburse responsible parties and landowners for reasonable and necessary corrective action costs. It seems that the Board's rules should focus on procedures to determine reasonable and necessary costs as provided by statute.

Corrective Action Design. In the draft rules part 1512.0100, subpart 2 a new term, "corrective action design" is defined to mean "a description of the actions necessary to investigate, minimize, eliminate, or cleanup an incident. In further reading the draft rules, the corrective action design must be approved by the Department of Agriculture before reimbursement may be obtained. In looking through the MDA's guidance documents, it is confusing about the role that a remedial investigation report (RIP) plays in whether it is to be part of or different than

a corrective action design. In the guidance documents dated July 27, 1990, on the first page it states that "work plans for all RI activities must be approved by the MDA staff prior to initiation of any RI work. This approval is necessary in part if the RP intends to apply to the ACRRA Board . . . for partial reimbursement of investigation and cleanup costs".

The guidance document continues on page two under item 6 "if corrective action is recommended, a '*Corrective Action Design Proposal*' must be submitted". The guidance documents suggest that there are two different documents that require approval from the MDA; the work plan for the site investigation and a Corrective Action Design Proposal. In the document entitled "Corrective Action Design Proposal" there is no indication that the Corrective Action Design must be approved before reimbursement can be obtained; however, it does indicate that a separate section entitled "Storage Handling and Disposal Plan", which is a description of changes in practices to prevent future incidents, must be completed and implemented before there is reimbursement by the ACRRA Board.

After reading these examples from the guidance documents, I have not found any clarification in the rules as to what is to be required based on the guidance documents.

Draft rules only require the Commissioner's approval of a corrective action design, presumably Step No. 4. The guidance documents suggest that a corrective action design will only be prepared if corrective action is to be taken. The rules also state that the cost of developing a corrective action design are reimbursable. Are the costs of the site investigation, which must be approved by the Commissioner of Agriculture, and the remedial investigation report which must be developed and prepared by a consultant reimbursable? Is Commissioner's approval of the report on corrective action required?

I realize that the program has continuously developed in the last couple months, but before the Board adopts draft rules it would be helpful to see a road map as to what actions the Board contemplates responsible parties to take and which will be reimbursable. It would also be helpful to see how the draft rules and the guidance documents relate to each other.

The Board should note that the statutory requirements (Minn. Stat. § 18E.04, subd. 1) are quite straightforward.

1. Report incident and submit written report (presumably Remedial Investigation Report).

2. Take action to minimize and abate incident, which is subsequently approved by Commissioner.

3. Comply with reasonable requests and orders of the Commissioner.

Conditions for Payment. In the draft rules part 1512.0600, subpart 2 the Board has placed conditions on the corrective action that are not allowed by statute. The statute requires under § 18E.04, subd. 1 that a person shall be reimbursed if the Board determines

"(1) the eligible person takes all reasonable action necessary to minimize and abate an incident and the action is subsequently approved by the Commissioner;

(2) the eligible person complies with any reasonable request for corrective action issued to the eligible person by the Commissioner;

(3) the eligible person complied with the corrective action orders if issued to the eligible person by the Commissioner; and

(4) the incident was reported as required in Chapters 18B, 18C, and 18D."

There is no provision in the law that authorizes the Board to determine that the Commissioner has determined the corrective action has adequately addressed the incident. In addition, there is no authority that the corrective action must "eliminate" unreasonable adverse effects on the environment. For example, if there is a liquid nitrogen spill does the corrective action have to reduce level to below background concentrations? The draft rules imply that these will be conditions for reimbursement. The Board should request that the Attorney General give the statutory authority for this provision and whether the rule can prescribe different requirements from the statute.

In Part 1512.600, subpart 2 the Board adopted language for the draft rules that state "an eligible person must seek and report to the Board any and all other cost coverage or recovery when making an application for reimbursement or payment from the Agricultural Chemical Response and Reimbursement Account". Under this language, an eligible person would be required to research and determine all insurance policies that may provide coverage. Many times insurance coverage is a legal issue which must be determined through litigation. In many other instances spills have occurred over a number of years and policies dating back many years must be found

and an interpretation made whether or not they cover the incident. I would suggest that this language, if enforced, will require many eligible persons to incur thousands of dollars in investigative costs to discover whether or not insurance policies were in force, and whether they covered the incident. The Board seems more interested in double dipping than researching potential coverage. Insurance policies currently in force would allow initial discovery of coverage plus subrogation language to cover past policies.

This subpart further states "a reimbursement may not be made before the applicant receives approval from the Commissioner of Agriculture for a corrective action design." As pointed out previously, if the guidance documents are followed, a remedial investigation is made and a Remedial Investigation Report is prepared by a consultant and submitted recommending whether further corrective action is needed. If no further action is needed and this language is adopted, the initial investigation by the consultant would appear not to be reimbursable - the costs of a consultant would only be reimbursable if a corrective action design is developed and receives approval by the Commissioner of Agriculture. I would suggest that this language be removed and it be made clear that the initial investigation by a consultant be covered for reimbursement.

The same subpart states "a payment may not be made before the applicant receives the Commissioner's approval for additional necessary corrective actions." This language suggests that there are corrective actions taken prior to when payment is going to be made. It's not clear what the word "additional" means and how it is to limit as to when payments are going to be made.

Part 1512.0700, subpart 2 states the applicant shall prove the reasonableness of all incurred eligible costs. It should be noted that nowhere in the statute is the term "eligible" cost used. The statute only refers to "reasonable and necessary costs incurred by an eligible person".

Subpart 2 also states that the method for establishing reasonableness will be through a competitive bidding process. Although this may be a method of holding costs down, it many times will be relatively meaningless when consultants are first contacted to go into a site. In addition, receiving bids is usually like comparing apples and oranges because there isn't the same set of standards to compare the bids against.

On page six, part 1512.0800 entitled Ineligible Costs, in this section a number of costs are stated to be ineligible and will not be reimbursed or paid. I would direct the Board's attention to the statutory language. In § 18E.04, subd. 1 it states "the Commissioner shall reimburse an eligible person from the Agricultural Chemical Response and Reimbursement Account for the reasonable

and necessary costs incurred by the eligible person in taking corrective action as provided in subdivision 4 . . .." Subdivision 4 states the Board shall pay a person that is eligible for reimbursement . . . for

> (1) 90 percent of the total **reasonable and necessary** corrective action costs greater than $1,000 and less than $100,000 . . .."

The language throughout the statute gives an entitlement to a person to receive reimbursement for reasonable and necessary costs. The Board has made no finding of facts that the items listed under the part entitled "Ineligible Costs" do not, in fact, meet the standard of reasonable or necessary. If costs are incurred that are associated with actions that minimize, eliminate, or cleanup an incident and those costs are reasonable and necessary, they are by law reimbursable costs. The Board does not have authority under the law to prescribe ineligible costs. The legal authority for the Board to adopt rules is in § 18E.05, subd. 1(c) which states "the Board shall adopt rules regarding its practices and procedures, the application form, and **procedures** for determining eligibility for and the amount of reimbursement, and procedures for investigation of claims." There is no authority for adopting rules that prescribe an eligible cost. The law gives the Board authority to adopt **procedures** to determine eligibility. The procedures for determining eligibility must be based on whether or not the costs are reasonable and necessary. The two items that the Board voted on, namely, attorneys fees and costs for third party review of proposed investigative and corrective action or work plans may be reasonable and necessary costs associated with corrective actions. If an eligible person incurs attorneys fees or costs for third party review and demonstrates that these costs are reasonable and necessary, they must be reimbursed as provided by law and cannot be denied by a rule which the Board does not have authority to adopt.

The Board should request the Attorney General to give a written opinion on whether or not the Board has the authority under the law to prescribe rules that deny costs before making a determination of whether or not they are reasonable and necessary.

The draft rules state that costs incurred in response to requests or orders issued to a responsible person under authorities contained in Minnesota Statutes, Chapter 115B, or Federal CERCLA are ineligible costs. Again, the law under Minnesota Statutes, Chapter 18E states that reasonable and necessary costs incurred in taking corrective actions must be reimbursed. There is no provision or authority for the Board to deny reasonable and necessary corrective action costs to be reimbursed just because they are ordered under authority contained in Chapters 115B or the federal Superfund law. The MDA authority for emergency responses must be paid from

DOHERTY
RUMBLE
& BUTLER
PROFESSIONAL ASSOCIATION

Superfund before the ACCRA fund which requires a request to a responsible person. This provision eliminates some of the insurance aspects of the fund because an EPA official or MDA official can make response costs ineligible by having an order issued under 115B or CERCLA. In addition, MDA emergency responses will need to be funded strictly from Superfund and collected from the responsible party, rather than being reimbursed from the fund.

The Board should direct the Attorney General to give them an opinion in writing whether or not reasonable and necessary corrective action costs incurred are ineligible because an action was ordered under Chapter 115B or CERCLA. The statute does not condition reimbursement on which authority the Commissioner of Agriculture uses to order cleanup. The statute only says that reasonable and necessary corrective action costs must be reimbursed.

I would also suggest that the Commissioner's written report, of which there is no requirement for it to be submitted to the responsible party, be submitted to the responsible party at least 10 days before the Board's meeting. If there is going to be a reduction of a reimbursement, or information in the report that the Board will consider, the responsible party must be given that information so that they can have a chance to review it and respond to the report at the Board meeting.

In summary, I think that the statute has set out an orderly procedure for reimbursement and I would suggest that the Board proceed to receive and consider requests for reimbursement and make determinations of reasonable and necessary costs. The proposed rules take away some of the board's authority to make reimbursement determinations. It is the board's role both in adopting rules and making reimbursements to assure that payments are fairly made. The board under law has the authority to deny any costs that are not reasonable and necessary. The proposed rules will have the effect of denying some reasonable and necessary costs which the board thinks should be paid on a case by case basis. If a need occurs to prohibit certain costs by rule, legislative authority should be obtained and further rules be adopted at that time. If these comments cannot be addressed, a hearing should be held to give the proper explanations. Questionable provisions should be removed and addressed later. If you have any questions concerning these comments, please contact me.

Sincerely,

Mark J Hanson

Mark J. Hanson

MJH028.ltr/mm

cc: Paul Liemandt

WHEREAS, the Governor is authorized by statute to appoint individuals to state boards, commissions, committees, councils, authorities, public corporations, and task forces; and

WHEREAS, Minnesota state government is enhanced by involving as many of our citizens as possible in public policy- and decision-making; and

WHEREAS, the effective administration of government in Minnesota requires the participation of our most able citizens, and

WHEREAS, Minnesota state government is strengthened by appointing to state agencies the widest possible diversity of our citizens including women, youth, minorities, elderly, the disabled, and others who traditionally may not have served in state government;

NOW, THEREFORE, I hereby order that a Governor's Advisory Committee on Appointments to Multi-Member State Agencies be established:

1. The committee shall consist of the Lieutenant Governor and 15 members, appointed by the Governor. There shall be one member from each congressional district and seven at-large members. Members shall serve at the pleasure of the Governor for terms designated by him. The Lieutenant Governor shall serve as the committee chair.

2. The committee shall assist the Governor in evaluating applicants for positions on multi-member agencies as provided in *Minnesota Statutes* 1988, Section 15.0597. The committee may, at the request of the Governor or another appointing authority, evaluate applicants for positions on other multi-member state agencies.

3. The committee shall establish its own rules of procedure. For each vacancy the committee shall recommend to the Governor the names of three to five applicants it deems most qualified and best able to serve the interests of the people of Minnesota.

4. Committee members may be reimbursed for expenses as provided in *Minnesota Statutes* 1988, Section 15.0593.

Executive Order 89-15 is rescinded.

Pursuant to *Minnesota Statutes* 1988, Section 4.035, this Order shall be effective fifteen days after publication in the *State Register* and filing with the Secretary of State and shall remain in effect until rescinded by proper authority or it expires in accordance with *Minnesota Statutes* 1988, Section 4.035, subdivision 3.

IN TESTIMONY WHEREOF, I have set my hand this 11th day of July, 1990.

Rudy Perpich
Governor

Official Notices

Pursuant to the provisions of Minnesota Statutes § 14.10, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Agricultural Chemical Response Compensation Board (ACRRA Board)

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing the Agricultural Chemical Response Compensation Board (ACRRA Board)

NOTICE IS HEREBY GIVEN that the Agricultural Chemical Response Compensation Board (ACRRA Board) is seeking infor-

mation or opinions from outside the board in preparing to propose adoption of a rule governing the ACRRA Board. The adoption is authorized by *Minnesota Statutes*, section 18E.05 which requires the board to adopt rules that establish the boards practices and procedures, reimbursement eligibility procedures, and claims investigation procedures.

The board requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to: Carol Milligan, Planning Division, Minnesota Department of Agriculture, 90 West Plato Blvd., St. Paul, MN 55107. Oral statements will be received during regular business hours over the telephone at (612) 296-6906 and in person at the above address.

All statements of information and opinions shall be accepted until August 17, 1990. Any written material received by the board shall become part of the rulemaking record to be submitted to the attorney general or administrative law judge in the event that the rule is adopted.

Dated: 16 July 1990

Paul Liemandt
Executive Director

Board of Chiropractic Examiners

Notice of Intent to Solicit Outside Opinions in the Matter of the Proposed Adoption of a Rule of the Board of Chiropractic Examiners Relating to Acupuncture in the Practice of Chiropractic

NOTICE IS HEREBY GIVEN that the State Board of Chiropractic Examiners is seeking information or opinions from sources outside the agency in preparing to propose the adoption of a rule governing acupuncture as it relates to chiropractic. The adoption of the rule is authorized by *Minnesota Statutes*, section 148.08, subdivision 3, which permits the agency to promulgate rules necessary to administer sections 148.01 to 148.105.

The State Board of Chiropractic Examiners requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Minnesota Board of Chiropractic Examiners
Dr. Joel Wulff, Executive Director
2700 University Avenue, Suite 20
St. Paul, MN 55114

Oral statements will be received during regular business hours over the telephone at 642-0591 and in person at the above address.

All statements of information and opinions shall be accepted until August 31, 1990. Any written material received by the State Board of Chiropractic Examiners shall become part of the rulemaking record to be submitted to the attorney general or administrative law judge in the event that the rule is adopted.

Dated: 10 July 1990

Dr. Joel B. Wulff
Executive Director

Board of Chiropractic Examiners

Notice of Intent to Solicit Outside Opinions in the Matter of the Proposed Adoption of a Rule of the Board of Chiropractic Examiners Relating to Independent Medical Examinations in the Practice of Chiropractic

NOTICE IS HEREBY GIVEN that the State Board of Chiropractic Examiners is seeking information or opinions from sources outside the agency in preparing to propose the adoption of a rule governing Independent Medical Examinations as it relates to chiropractic. The adoption of the rule is authorized by *Minnesota Statutes*, section 148.08, subdivision 3, which permits the agency to promulgate rules necessary to administer sections 148.01 to 148.105.

The State Board of Chiropractic Examiners requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Agricultural Chemical Response Compensation Board (ACRRA Board)
Notice of Solicitation of Outside Information or Opinions Regarding
Proposed Rules Governing the Agricultural Chemical Response
Compensation Board (ACRRA Board)

Notice is hereby given that the Agricultural Chemical Response Compensation Board (ACCRA Board) is seeking information or opinions from sources outside the board in preparing to propose adoption of a rule governing the ACCRA Board. The adoption is authorized by Minnesota Statutes, section 18E.05 which requires the board to adopt rules that establish the boards practices and procedures, reimbursement eligibility procedures, and claims investigation procedures.

The board requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to: Carol Milligan, Planning Division, Minnesota Department of Agriculture, 90 West Plato Blvd., St. Paul, MN 55107. Oral statements will be received during regular business hours over the telephone at (612)296-6906 and in person at the above address.

All statements of information and opinions shall be accepted until August 17, 1990. Any written material received by the board shall become part of the rulemaking record to be submitted to the attorney general or administrative law judge in the event that the rule is adopted.

7/16/90
Date

Paul Liemandt
Executive Director

DOHERTY
RUMBLE
& BUTLER
PROFESSIONAL ASSOCIATION

2800 Minnesota World Trade Center
30 East Seventh Street
Saint Paul, Minnesota 55101-4999
Telephone (612) 291-9333
FAX (612) 291-9313

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Washington, D.C. 20036-3203
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FAX (202) 659-0466

Attorneys at Law

Writer's direct dial number: 291-9438

Reply to Saint Paul office

RECEIVED
AUG 20 1990
PLANNING DIVISION

August 17, 1990

Ms. Carol Milligan
Planning Division
Minnesota Department of Agriculture
90 W. Plato Boulevard
St. Paul, Minnesota 55107

Re: Agricultural Chemical Response Compensation Board Draft Rules

Dear Ms. Milligan:

Thank you for providing me the opportunity to comment on your proposed rules. Having taken part in drafting of the statutory provisions, I feel that these rules in general are necessary to implement the intent of the legislature in enacting the ACCRA Board and fund. Currently I represent a cooperative that is taking corrective action for an agricultural chemical incident and has worked with the Department personnel to coordinate the investigation, corrective action, and reimbursement. From that perspective I am commenting on some points that should be reexamined for conformity with the law and legislative intent as well as aiding responsible parties to take efficient corrective action.

1. Conditions for Reimbursement Approval. On page two under the provision reimbursement or payment of costs, under the second paragraph entitled "Conditions" it provides that a reimbursement or payment may not be made unless the Board determines the Commissioner of Agriculture has determined the corrective action has "adequately addressed, or will adequately address" the incident in terms of public health, welfare, and the environment. Under Minn. Stat. § 18E.04 subd. 1 there are four conditions that need to be met by an eligible person. First, "all reasonable action necessary to minimize and abate the incident" is taken and the action is subsequently approved by the Commissioner; second, compliance with "any reasonable request for corrective action issued to the eligible person by the Commissioner;" third, compliance with corrective action orders issued to the eligible person; and last, reporting of the incident as required under the agricultural chemical laws. It is not clear how the term "adequately addressed" relates to "taking reasonable action necessary to minimize and abate the incident." It is also not clear how minimizing or abating the incident relates to public health, welfare, and the environment. The statutory directive relates to "reasonable action necessary to

minimize and abate the incident." Without relating to these terms, it can be argued that some actions will protect the environment, but will not minimize the incident and that other actions will minimize the incident and not protect the public welfare. "Public welfare" without further definition is a broad and vague term. When it is used as a condition in that corrective actions must adequately address the incident in terms of public welfare there is no standard an eligible person can rely on. The legislature debated and carefully chose the phrase "all reasonable action necessary to minimize and abate the incident." These terms are also used in the groundwater protection provisions in Minnesota Statutes, chapter 103H. The additional terms proposed by rule add a number of undefined terms, which alter the legislative directive of minimizing and abating the incident.

In the third paragraph under "Conditions" it states that "a reimbursement may not be made prior to the applicant receiving a Commmissioner of Agriculture approval for their corrective action plan. Again, under Minn. Stat. § 18E.04 subd. 1, cl. 1, it states that the eligible person takes reasonable action necessary to minimize and abate the incident and the action is subsequently approved by the Commissioner. It may be clearer and reduce the possibility for future conflicts if prior approval of the corrective action plan was not made a condition for reimbursement or payment, but rather as a guide to speed, aid, or enhance the chances of the Commissioner of Agriculture granting subsequent approval. My concern is that it may be challenged on the basis that the statute provides subsequent approval and the rule requires prior approval before a corrective action is taken. I think it is a good idea in most cases to get prior approval, but certainly there should be an emergency exception.

For purposes of better understanding both eligible costs and what is required, it would be helpful if a "corrective action plan" was defined in terms of what it must contain. If the statutory terms are used, a corrective action plan is a plan for action to minimize or abate an incident. It would be helpful to clarify that a corrective action plan is to cover not only the actual cleanup or removal actions of the agricultural chemical, but should also address the monitoring and assessment of the contamination, which the Department is currently requiring.

2. Documentation of Reasonableness. On page three under the heading "Documentation of Reasonableness" I have the following comments. Having received bids from four consultants based on a preliminary site assessment, I found that bids vary dramatically between various consultants. A person evaluating the bids needs to have substantial physical, chemical, and agricultural chemical knowledge as well as some understanding of the legal requirements to properly evaluate the various bids. In short, comparing bids was like comparing apples and oranges and it will continue to be difficult until work is standardized so that there is a competitive bidding proceedure. If you know very little about the extent of the contamination, it is difficult to provide specifications to bid on.

3. Ineligible Costs. Under the section entitled "Ineligible Costs" on page three, it states that costs that do not minimize, eliminate, or clean up an incident to protect the public health, welfare, or the environment are ineligible costs. The mandate under § 18E.04, subd. 1 is that the Commissioner shall reimburse an eligible person for "reasonable and necessary costs incurred by the eligible person in taking corrective action." Corrective action means an action taken to minimize, eliminate, or clean up an incident. There is no statutory reference providing that the cost must "protect the public health, welfare, or the environment." Furthermore, under § 18E.05, subd. 1, ¶ c the Board's authority to adopt rules is limited to (1) rules about its practices and procedures; (2) rules regarding application form and procedures for detemining eligibility for and the amount of reimbursement; and (3) procedures for investigation of claims. Declaring costs to be ineligible does not seem to be a procedural matter, but is rather a legislative pronouncement of what is eligible. I only mention this in that it may be subject to challenge. The statute contemplates that the Board will determine which costs are eligible. It also contemplates that this determination will be made on a case-by-case basis. There doesn't appear to be authority to adopt rules to preclude certain costs that fit within the statutory definition. In addition, the ACCRA fund is supported by user fees. These users should be entitled to all reasonable reimbursement for their costs within the statutory limits.

One of the listed ineligible costs is attorneys fees. If consultants fees are eligible because they aid the eligible person in conducting corrective actions, I do not see any legislative intent or statutory indication that attorneys fees

per se are ineligible costs. I can understand that the Board does not want to foster a litigious procedure in processing its claims. However, the Board should be aware that whether services are performed by an attorney, or by a consultant, if they facilitate reporting and taking the corrective action the costs should be reimbursed. The responsible party still pays at least 10% and many times it will be the attorney who assures that procedures are being met to be properly reimbursed. The Board should also be aware that there will be a number of eligible persons involved in agricultural chemical incidents that are not sophisticated enough to require the proper conditions in a contract with a consultant. For example, who will advise the eligible person of the monitoring well construction requirements, and responsibility for the well sealing? Who will advise the eligible person as to which consultant's proposal more properly addresses the incident and will be most likely to result in reimbursement? The Board should reexamine the term "attorneys fees" and decide whether or not it means litigation fees or whether it means fees for facilitating a corrective action, much in the same way as a consultant. Again, this should be determined on a case-by-case basis. For example, what if a responsible party had to get a court order to get onto property to minimize or abate an incident? It would seem to be shortsighted to preclude these costs by rule when a responsible person is conducting the corrective action which the legislature intended.

Costs for third party review of proposed investigative and corrective action or work plans are not eligible costs. I don't understand the reason for this. It seems that the Board and the Department would want a third party to review consultants proposals, unless the eligible person can have the Department personnel review proposals and select the one that most adequately meets corrective action reimbursement requirements. Board members should review consultants plans before prescribing by rule that no outside help is necessary or should be reimbursed. If the consultant's original plan or proposal is an eligible cost, there doesn't seem to be any reason to deny the review of a number of different proposals by a third party as an eligible cost.

The last provisions of ineligible costs that should be reviewed are the provisions excluding any work performed that is not in compliance with safety codes, including OSHA requirements, well codes, and fire codes. In an emergency situation there may be

measures that need to be taken to minimize, or abate the incident that will not meet those particular codes, but nevertheless are necessary. Again, a determination should be made on a case-by-case basis and if the Board feels these are items that should not be reimbursed, they should put the burden on the applicant to show how they, in fact, are reasonable and necessary corrective action costs.

4. Application Process. On page four under the heading of "Application Process" the third paragraph requires a summary of the corrective action plan and the Commissioner of Agriculture's approval of the plan, or in the alternative, a description of emergency corrective action taken and evidence of the Commissioner of Agriculture's subsequent approval of the action. In this provision, it infers that Minn. Stat. § 18E.04, subd. 1, cl. 1, prescribes subsequent approval by the Commissioner only for "emergency corrective actions."

5. Board Determination. On page seven under the heading "Board Determination" this provision correctly states the provisions of the law, that the Board shall determine the amount of reimbursement or payment based on the costs it finds eligible actually incurred and reasonable.

In summary, I think the proposed rules as a whole reflect the intent of the legislature and promote the efficient cleanup of agricultural chemical incidents. I pointed out a number of provisions may result in problems later if, in fact, they are adopted. I am not arguing that some of these provisions may not be good for the process as a whole, but I am cautioning the Board that restrictive rule provisions may not give them the flexibility for case-by-case determination of eligible costs based on the unique facts of each incident. In the initial stages of the ACCRA fund, I would recommend that the Board proceed very slowly in denying costs by rule until it has the experience of processing claims for reasonable and necessary costs incurred by the eligible person in taking corrective action.

Sincerely,

Mark J. Hanson
for Doherty, Rumble & Butler

MJH:mm:26

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

PUBLIC RESOURCES SECTION
SUITE 200
520 LAFAYETTE ROAD
ST. PAUL, MN 55155
TELEPHONE: (612) 297-1075
FACSIMILE: (612) 297-4139

August 17, 1990

Carol Milligan
Department of Agriculture
90 West Plato Blvd.
St. Paul, MN 55107

RECEIVED
AUG 21 1990
PLANNING DIVISION

RE: ACRRA Draft Rules

Dear Carol:

My comments are generally included with the text of the proposed rules for the ACRRA Board. Generally, I think the proposed rules look very good.

I do have a few additional comments. First, are you planning not to include rules regarding partial reimbursement Minn. Stat. § 18E.04? Are you planning to establish any criteria under § 18E.04, subd. 5(c), for the denial of additional requests for reimbursement? The Board could, of course, develop the rules on a case-by-case basis as questions regarding these sections come up. However, if the Board intends to adopt a policy on these matters before the issues come up, that policy should be articulated in the rules.

If you have any questions regarding my comments, please call me.

Sincerely,

JOHN K. LAMPE
Special Assistant
Attorney General
(612) 297-4393

JKL:crh.ae9

cc: Scott R. Strand

Comments of John Lampe

LAND OF QUALITY FOODS

90 WEST PLATO BOULEVARD
SAINT PAUL, MINNESOTA 55107

STATE OF MINNESOTA

DEPARTMENT OF AGRICULTURE

TO : Interested Parties

FROM : Paul Liemandt, Chief
Compliance and Enforcement Section
Agronomy Services Division

DATE : August 1, 1990

SUBJECT: **Agricultural Chemical Response Compensation Board (ACRRA Board) Draft Rules**

Enclosed is a Notice of Solicitation of Outside Information or Opinions regarding proposed rules governing the ACRRA Board.

Enclosed also is a copy of the draft Rules that the ACRRA Board will be considering for adoption. The Minnesota Department of Agriculture (MDA), providing staff to the new ACRRA Board, is looking for comments and opinions on the enclosed.

Please send your written comments to: Carol Milligan, Planning Division, MDA, 90 West Plato Blvd., St. Paul, MN, 55107.

PML:llc

cc: Carol Milligan
William Bulger
Paul Rhein, Chair, ACRRA Board
Carolyn Ham, ACRRA Board Counsel, MOAG

DRAFT

H:Rules4

Minnesota Department of Agriculture

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD RULES

DEFINITIONS:

For purposes of this rule, the terms have the meanings given to them, or the ~~meaning as defined~~ under ~~MS~~ Minn. Stat. chapters 18B, 18C, 18D or 18E.

BOARD MEETINGS: TIME, PLACE, NOTICE

Regular Meetings: A regular meeting of the board must be scheduled at least ~~six~~ (6) times a year. A scheduled meeting may be canceled if there is insufficient business.

Special Meetings: A special meeting may be called by the chair or by written request of three board members.

BOARD CHAIR and VICE-CHAIR

A chair and vice-chair of the board shall be elected by the board. Both positions shall be elected at the first official meeting of the board on or after July 1, 1990. The chair shall preside at regular and special meetings, or the vice-chair in the absence of the chair, and whoever is ~~chairing a meeting~~ presiding shall perform all duties assigned by the board.

The chair and vice-chair shall be members ~~appointed by the Governor to~~ of the board but ~~and~~ shall not include either the commissioner of agriculture or the commissioner of commerce.

The chair and vice-chair shall be elected by the board for a term of one year, beginning ~~with~~ January 1, 1991.

CONDUCT OF MEETINGS

Quorum. A quorum shall consist of three board members.

Minutes. Meetings shall be tape recorded and minutes subsequently prepared by the board's staff.

Parliamentary Procedure. Except, as specifically provided by statute or negotiation, Robert's Rules of Order shall govern questions that may arise at a meeting of the Board.

CONFLICT OF INTEREST

A member of the board who has a direct or indirect financial or employment interest relating to a matter before the board, which interest is reasonably likely to affect impartiality of judgement in the matter, shall make known the interest and shall refrain from participating in, or voting upon, the matter. The abstention of a board member or members shall not prevent the remaining members from conducting a legal vote.

REIMBURSEMENT OR PAYMENT OF COSTS

General. Each eligible person who has taken corrective action and has incurred reimbursable costs on or after July 1, 1989, may apply to the board for partial reimbursement or payment of eligible costs.

Conditions. A reimbursement or payment may not be made unless ~~the board determines that~~ the commissioner of agriculture has determined that the corrective action has adequately addressed, or will adequately address, the incident in terms of public health, welfare, and the environment.

An eligible person must first seek and report to the board any and all other cost coverage or recovery before making an application for reimbursement or payment from the agricultural chemical response and reimbursement account. confusing ?

A reimbursement may not be made prior to ~~the applicant receiving a commissioner of agriculture~~ approval ~~for their~~ of an applicant's corrective action plan by the Commissioner of Agriculture.

Multiple Eligible Persons. If ~~there is~~ more than one eligible person ~~who~~ incurs reimbursable costs for a single incident or for a single corrective action, each eligible person must apply separately to the board for reimbursement. Not more than the maximum reimburseable amounts under MS Chapter 18E may be reimbursed for corrective action costs associated with a single incident site, regardless of the number of persons eligible for reimbursement.

ELIGIBLE COSTS

Reimbursable or Payable Corrective Actions. Costs associated with the following corrective actions may be eligible for reimbursement or payment:

Emergency responses to incidents, including, but not limited to, costs incurred that are necessary to abate acute risks to human health, safety, and the environment.

Incident site hazard control measures, including but not limited to containment and stabilization of the incident, and removal of released material.

Investigation and source identification including, but not limited to, collecting

and analyzing soil samples, testing the groundwater, testing site and adjacent drinking water supplies, structural testing, and engineering and consultant services.

Development of corrective action plan in accordance with commissioner of agriculture requirements.

Clean-up of incidents, including, but not limited to, removal, treatment, or disposal of surface or subsurface contamination. Clean-up must be performed in accordance with a corrective action plan approved by the commissioner of agriculture, except in circumstances where an eligible person takes all reasonable action necessary to minimize and abate and incident and the action is subsequently approved by the commissioner of agriculture.

Documentation of Reasonableness. It is the responsibility of the applicant to prove the reasonableness of all incurred eligible costs. Upon request of the board or the board's staff, the applicant shall document the reasonableness of any costs included on the reimbursement application, or on any request for payment, by providing one or more of the following:

Evidence that the work was performed by a person or persons whose services were solicited through a competitive bidding procedure;

Evidence that the cost is substantially equivalent to that charged by comparable person or persons in the same geographical area for similar work performed;

Evidence that ~~there was~~ was only one party reasonably available to perform the necessary work; or

Evidence that ~~there was~~ was only one party reasonably qualified to perform the necessary work.

The board shall reimburse, or pay, only those costs which it determines to be reasonable.

INELIGIBLE COSTS

All costs associated with actions that do not minimize, eliminate, or clean-up an incident to protect the public health, welfare, or the environment are ineligible costs. Ineligible costs include, but are not limited to, any costs related to the repair or replacement of agricultural chemical facility structures or equipment, upgrading of such facility structure or equipment, loss of income, attorney's fees, permanent relocation of residents, decreased property values, reimbursement for the eligible persons own time spent in planning and administering a corrective action plan, costs for rental or lease of property used for corrective action purposes, costs for third party review of proposed investigative and corrective action or work plans, aesthetic improvements, or any work ~~performed that is~~ not in compliance with safety codes, including but not limited to Occupational Safety and Health Administration requirements, well codes, and fire codes, and costs for providing alternative sources of drinking

water.

Corrective action costs which are covered or payable under an insurance or other contract are ineligible costs. Costs incurred in response to requests or orders issued under authorities contained in MS Chapters 115B or federal CERCLA are ineligible costs.

APPLICATION PROCESS

Applications. A person who wishes to make application for reimbursement, or payment, from the account shall complete, sign and submit to the board a written application. The application shall be ~~made~~ on a form prescribed by the board ~~and prepared by the staff to the board,~~ and shall contain ~~at least~~ the following:

Name of person making the application;

Description of the site of the incident;

Summary of the corrective action plan and the commissioner of agriculture's approval of the plan, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action;

Itemized list of all corrective actions taken, the eligible costs associated with those actions, and the name of the person, contractor, consultant, or engineer who performed the action.

Additionally, if the application is a request for payment, the application shall contain ~~at least~~ the following:

Completed and signed affidavit summarizing the financial condition of eligible person, and demonstrating an inability to pay the corrective action costs.

Copies of federal and state income tax returns for the last ~~two~~ (2) years (corporate, partnership, or individual).

Monthly, quarterly and annual financial statements for the last ~~two~~ (2) years, prepared according to generally accepted accounting principles, relating to the financial condition of the applicant applying for payment, including financial statements for any related businesses ~~which are~~ owned or operated by the applicant.

↑ Do you want only "related" business

Information detailing why corrective actions have not been completed or initiated.

~~Description of corrective action completion status.~~

The board may waive the requirement for submission of all or a portion of the above described financial information, if reasonable and appropriate,

What is the purpose of this sentence. Is it necessary? Isn't this ... person who's seeking payment

The Board must receive

upon written request of the applicant.

Only complete applications will be accepted by the board, and incomplete applications will be returned to the applicant. The board may request additional information from the applicant if necessary to carry out its duties under the statute or these rules.

Time of Application. The application and all accompanying documentation must be received by the board's staff office at least 30 days before a board meeting in order for the application for reimbursement or payment, to be considered at that meeting. The board may waive this requirement, if delay would cause undue financial hardship to the applicant.

The board shall hear initial requests for reimbursement and payment applications by eligible persons at every regular meeting.

The board shall establish a priority system for hearing requests for payment or reimbursement. The priority system shall be based primarily on department incident response site priorities, taking into account the health and welfare of the public, the effects on the environment, and the commissioner of agriculture's incident response case load and staff resources.

Subsequent Application. An eligible person who has already obtained partial reimbursement, or payment, from the board and who has incurred additional or continuing costs due to the same incident may reapply if:

The amount of the person's original reimbursement was less than the maximum allowed under chapter 18E.04, or

The additional cost are eligible costs as required by paragraph above.

The eligible costs submitted on a subsequent application are not related to any new incidents at the site. The total reimbursement to an eligible person for an incident shall not exceed the maximum allowed under chapter 18E.04, regardless of the number of applications for reimbursement submitted by the eligible person or person.

This should be separate section following application section

The eligible person offers adequate evidence that all past reimbursements or payments have been properly applied towards commissioner of agriculture-approved corrective action costs.

The application meets the requirements of paragraph — above.

An eligible person making a request for reimbursement, or payment, of additional costs may do so in the following manner:

Requests for payment shall be considered by the board only once in any calendar year if the additional costs incurred are $5000 or less;

Requests for payment of additional costs incurred of $5000 or greater shall be considered by the board at every other regular board meeting. The board, or the board's staff, shall notify an eligible person requesting additional payments when the next regular board meeting is to be held when such requests shall be considered.

Signatures. An application must be signed as follows:

Move up

For a corporation, by a principal executive officer of at least the level of vice-president or the duly authorized representative of agent of the executive officer if the representative or agent is responsible for the overall operation of the facility or site that is the subject of the application or a person whom the board of directors designates by means of a corporate resolution.

For a partnership, sole proprietorship or individual, by a general partner, the proprietor, or individual respectively.

Certification. A person who signs an application for reimbursement or payment shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. I certify that the commissioner of agriculture has approved the corrective actions taken, as described in the corrective action plan. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge ~~and belief, true,~~ accurate, and complete. I further certify that I have the authority to submit this application on behalf of ....."

A person who signs an application for subsequent payment or reimbursement shall also make the following certification: " I certify that I have complied with commissioner of agriculture corrective action plan ~~provisions~~ and the corrective actions were taken as described in that plan."

Report of the Commissioner of Agriculture. Upon notification by the board's staff that a complete application has been received, the commissioner shall, in a timely manner, provide the board with a written report on the applicant's compliance or noncompliance with MS chapter 18E.04. The report shall include documentation supporting the commissioner's findings.

In addition, the board may, ~~as it deems necessary~~, request additional information from the commissioner or can request participation of agency staff at a board meeting. All responses to requests for information shall be delivered in a timely manner. The board may delegate these powers to its staff.

REVIEW AND DETERMINATION

Review. The board's staff shall review all applications. If the staff determines that the application is incomplete or otherwise deficient, the staff shall promptly advise the applicant of the incompleteness or deficiency. Further processing of the application affected by the deficiency shall be suspended until the applicant has supplied the necessary information or otherwise corrected the deficiency. A complete application and the corresponding report of the commissioner of agriculture constitutes the written record.

Staff Recommendation. After a reimbursement or payment application is complete and the commissioner has provided the information relevant to the application,

the board's staff shall make a recommendation as to the eligibility of the applicant and the costs specified in the application.

Board Determination. The board shall determine the amount of the reimbursement or payment based on the costs it finds are eligible, actually incurred, and reasonable. The determination shall be made on the basis of the written record. The board may also allow supplemental information explaining the application to be presented orally. The board may establish a fair and reasonable limit on time ~~allowed~~ the for oral presentation.

The applicant shall be notified in writing within ten working days of the board's decision. If the board rejects any portion of the request for reimbursement or payment, a statement of the ~~reason or~~ reasons for rejection shall be included with the notification.

ENFORCEMENT.

False Statements, Misrepresentations. Any application for reimbursement or payment containing false statements or misrepresentations shall render the application null and void. Reimbursements or payments based upon false or misleading information shall result in forfeiture of that reimbursemnt or payment, and shall be wholly recoverable through actions under general criminal or civil enforcement authorities by the Office of the Attorney General.

Minnesota Agri-Growth Council, Inc.

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D. J. LEARY
Media Consultant

September 11, 1990

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SEP 12 1990

PLANNING DIVISION

Carol Milligan
Planning Division
Minnesota Department of Agriculture
90 West Plato Boulevard
St. Paul, Minnesota 55107

Dear Ms Milligan,

On September 7, we received a memo from Paul Liemandt regarding the subject of Agricultural Chemical Response draft rules. As the memo does not indicate the date for written comments to be received, we trust that this letter will reach the Department in time to receive consideration by both the Department and the Board.

Page 2, "Reimbursement or Payment of Costs", second paragraph: What are the guidelines or definitions for the terms "adequately addressed" or "public welfare"? In the fourth paragraph, what is the definition or general interpretation going to be for "corrective action plan"? Also, how long will such requirements hold up action on handling the incident or receiving payment for what is done to alleviate the incident?

Page 2, "Eligible Costs", paragraph 4: It appears that the Department may be paid for analyzing soil samples, testing the groundwater and so forth. However, under "ineligible costs" attorney's fees are not permitted. At the same time, when does an attorney's participation come under the heading of a "consultant's discussion" with the parties or a legal discussion with the parties?

Also under "ineligible costs", are the parties involved going to be informed and provided with information to the Occupational Safety and Health Administration requirements, the well codes, the fire codes and all other rules or laws that will be a part of determining what is correct or what should be done to correct an incident situation?

These are the brief comments that we have at this time. We also, however, are concerned that these proposed

rules are perhaps too restrictive to begin with. This is a new area of responsibility and determination and it would seem that the Department and the Board should start by taking a rather slow approach to requirements, considerations and necessary information required before becoming as restrictive and definitive as it appears these proposed rules will be.

We understood that the legislation passed was to be helpful to the Minnesota business participants and to the environment--not to the point of restricting or requiring business to go out of business or leave Minnesota for other locations. We suggest that based upon a very restrictive interpretation of the rules that a good many businesses would be put out of business in Minnesota under these proposed rules.

We appreciate the opportunity to comment. We would appreciate receiving a revised copy of the proposed rules when available.

Sincerely,

Rollin Dennistoun

Rollin M. Dennistoun
Assistant Executive Director

the minnesota project

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Carol Milligan
Planning Division
MDA
90 West Plaato Boulevard
St. Paul, MN 55107

Dear Carole,

I have two comments on the draft rules for the ACRRA Board.

First, I feel eligible costs should include replacement of contaminated wells for affected residents. Victims of a spill should be able to get the same kind of speedy cleanup as the business that caused the accident. In addition, this should include paying for the proper sealing and closure of the polluted well.

Second, I suggest that the compensation should only be available one time for each company or applicant. Reimbursement for a second incident should not be allowed. My feeling is that one accident could happen to anyone. But then a company or farmer should should go to every length possible to prevent such incidents in the future. By eliminating the possibility of a second reimbursement, ag chemical handlers will have a strong incentive to prevent accidents.

Thank you for considering my input.

Sincerely,

Loni Kemp

Loni Kemp

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SEP 14 1990
PLANNING DIVISION

Agricultural Division

CIBA-GEIGY Corporation
P.O. Box 18300
Greensboro, North Carolina 27419
Telephone 919 632 6000

CIBA-GEIGY

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SEP 25 1990

PLANNING DIVISION

September 21, 1990

Ms. Carol Milligan
Planning Division
Minnesota Department of Agriculture
90 West Plato Blvd.
St. Paul, MN 55107

Dear Ms. Milligan:

SUBJECT: ACRRA BOARD - DRAFT RULES

Thank you for providing copies of the subject draft rule outline under cover of the August 28, 1990 memo from Paul Liemandt. The following will provide an initial reaction to the draft. However, these comments should not be interpreted as CIBA-GEIGY's final position on the rule. Subsequent comments may be filed as the rule draft progresses toward the proposal stage. As copies of the final draft become available, please provide copies to this office.

In general, CIBA-GEIGY applauds the Board's and the Department's efforts in advancing the proposal. Many in industry view the Minnesota ACRRA approach as a reasonable and viable tool toward creating sufficient incentives that lead to a high degree of voluntary compliance with timely incident reporting.

The following offers comment on the concepts outlined in the draft. Please note the absence of comment on a section should not be viewed as supportive unless so stated.

BOARD CHAIR AND VICE-CHAIR

The term of the chair and vice-chair should be two (2) years rather than one (1). Often it takes at least a year for a new chair, particularly if that individual is a new member, to become familiar enough with the system. A one (1) year term is too disruptive to the administration and to interested persons who are involved with the Board. A degree of

Board (chair) predictability is necessary and is usually not achieved until some time has elapsed. It is suggested that the chair and vice-chair serve for two (2) years with eligibility to succeed themselves for one additional two year period only.

REIMBURSEMENT OR PAYMENT OF COSTS

If one of the objectives of the ACRRA program rules is to encourage timely reporting of incidents, the "conditions" placed on an eligible person to "seek and report any and all other cost coverage or recovery before making an application for reimbursement or payment" can create a major disincentive. A reading of the statute fails to show this implied ability-to-pay as a condition for reimbursement. However, for a cash payment (assumed to be direct payment through the Board to persons providing services in response to an incident), that is not a reimbursement but an actual payment, such information can be requested. A definition for "payment" is needed to clarify this point and to ensure that reporting disincentives are not inadvertently created.

ELIGIBLE COSTS

The section generally appears reasonable. However, as a goal for the future, the Commissioner and the Board's staff should study the feasibility of developing a model "corrective action plan," much like an emergency response plan, that if followed, would virtually guarantee reimbursement. Such a plan could drastically reduce the workload on the Board and its staff and further foster voluntary compliance among the eligible parties. Certain incidents may, of course, have to be handled on a case-by-case basis but such a goal should be set by the Board.

Clean-up of incidents can involve a number of actions as listed in the draft. In situ methods are apparently ruled out by the proposal particularly with the ineligibility of costs associated with alternative sources of drinking water. Back siphonage into a well may provide a case in point. Admittedly, reimbursement eligibility may be only partial if an anti-siphon device was not in place, but some provision should be made to provide recognition of clean-up to include the providing of alternative drinking water and in situ methods during the interim.

INELIGIBLE COSTS

It seems totally inconsistent for the Board to adopt rules on one hand that are designed to create environmental responsibility through reimbursements and payments and, then, to "nix" one of the most important health considerations, that of providing alternative drinking water. The key to this inconsistency may be found in the addition of modifiers that address the providing of temporary alternative drinking water and not a new well or city water mainly funded by ACRRA. Part of the model clean-up plan (see ELIGIBLE COSTS Comments) could involve the providing by a responsible party, a temporary source of drinking water for which the eligible person could apply for reimbursement from ACRRA.

Costs of product replacement should also be ineligible.

Adjustments in the amounts of reimbursement should be tied to actual reimbursements, not just coverage, as there can be a very real difference, particularly with insurance between policy limits (coverage) and actual pay-out.

The Commissioner should be in a position to order temporary supplies of drinking water and/or provide such temporary supplies in cases where an incident results in exceedance of a health risk limit. The public welfare is of utmost importance in this regard. Therefore, the rules should permit reimbursement or payment for temporary alternative drinking water supplies in cases where the HRL has been exceeded or is reasonably expected to be exceeded.

APPLICATION PROCESS

The definition for "payment" is needed as previously stated. Eligibility for "payment" versus reimbursement should not be connected in any way. The Application Process requiring submission of financial statements, etc., should not prejudice the Board on questions of reimbursement except as the combined totals of payment plus reimbursement approach statutory limits.

REVIEW AND DETERMINATION

The Review and Determination concepts appear reasonable with one exception. There is a need for an appeal process whereby an applicant aggrieved by a decision of the Board or recommendation of the staff can appeal. If this process is

provided in some other statute or rule, it should be cited in these rules. The "oral" provision of Board Determination subpart should clearly state the applicant and/or the staff can provide additional information orally.

Thank you very much for the opportunity to comment.

Sincerely,

Charles G. Rock

Charles G. Rock
Manager
State Government Relations

L502AM0921CR

cc: Mr. Bill Bulger (MDA)
Mr. Paul Liemandt (MDA)
Mr. Paul Rhein (ACRRA, Chair)

Carol Milligan

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OCT 0 2 1990

PLANNING DIVISION

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September 27, 1990

Mr. Paul Liemandt
Compliance & Enforcement Chief
Minnesota Department of Agriculture
Agronomy Services Division
90 West Plato Boulevard
St. Paul, Minnesota 55107

RE: Proposed Changes to Agricultural Chemical Response Compensation Board Draft Rules

Dear Mr. Liemandt:

As a follow-up to our September 24, 1990, meeting at your office regarding the above rules, enclosed is a copy of our suggested revisions. I greatly appreciate your willingness to schedule a meeting on such short notice.

As our industry representatives indicated on Monday, these proposals serve two primary objectives. First, they clearly separate the reimbursement of response costs incurred by eligible persons from the direct payment of corrective action costs by the Board. Secondly, language changes are included that authorize an eligible person to designate another person as their agent to receive reimbursement.

We believe that permitting insurers to be designated as agents by eligible persons is essential if a viable, private insurance marketplace is ever to develop in this area. The following additional advantages would also be achieved:

1. Insurer involvement would offer claims management expertise which should promote the A.C.R.R.A. goal of cost controls.

2. Insurer involvement would limit the number of times the Board would have to consider reimbursement requests.

3. Insurer involvement would provide a responsible person with funds to effect a clean-up without having to borrow money from a bank.

Our industry is available to provide whatever information you and the A.C.R.R.A. Board request to assist in the evaluation of our proposed revisions.

Sincerely,

Robert D. Johnson,
Executive Vice President

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD RULES

Suggested Changes

1. Page 2. REIMBURSEMENT OR PAYMENT OF COSTS

General. Each eligible person who has taken corrective action and has incurred ~~reimbursable~~ eligible costs on or after July 1, 1989, may apply to the board for partial reimbursement or payment of eligible costs.

Conditions. A reimbursement or payment may not be made unless the board determines that the commissioner of agriculture has determined that the corrective action had adequately addressed, or when complete will adequately address, the incident in terms of public health, welfare, and the environment.

A reimbursement may not be made prior to the applicant receiving a commissioner of agriculture approval for their corrective action plan.

An eligible person who complied with corrective action orders and reported the incident as required by chapters 18B, 18C and 18D can apply for reimbursement of eligible costs. An eligible person seeking reimbursement may designate another person as their agent to receive reimbursement.

An eligible person who provides the board with evidence that they are unable to pay additional corrective action costs may apply for direct payment of eligible costs. The eligible person must have reported the incident as required in chapters 18B, 18C and 18D and continue to assume responsibility for carrying out corrective action orders to receive direct payment.

An eligible person must first seek and report to the board any and all other cost coverage or recovery before making an application for ~~reimbursement~~ direct payment from the agricultural chemical response and reimbursement account.

Multiple Eligible Persons. If there is more than one eligible person who incurs reimbursable costs for a single incident or for a single corrective action, each eligible person must apply separately to the board. ~~for reimbursement.~~ Not more than the maximum ~~reimburseable~~ amounts under MS Chapter 18E Chapter 18E may be reimbursed or paid for corrective action costs associated with a single incident site, regardless of the number of persons eligible for reimbursement or payment.

2. Page 2. ELIGIBLE COSTS
Documentation of Reasonableness
Add as an alternative:

Evidence of a negotiated price contract;

3. Page 3. INELIGIBLE COSTS

~~Corrective action costs which are covered or payable under an insurance or other contract are ineligible costs.~~ Costs incurred in response to requests or orders issued under authorities contained in MS Chapters 115B or federal CERCLA are ineligible costs.

4. Page 4. APPLICATION PROCESS
Note:
The financial information requested for direct payment is quite extensive. Many if not most small companies do not have financial statements prepared as requested in the rules. Financial statements and tax returns should be alternatives for proving hardship. Inserting the word "or" after the section on income tax returns would clarify this section.

5. Page 5. APPLICATION PROCESS
Time of Application

If there are not sufficient funds to pay or reimburse all applicants, the board shall establish a priority system for hearing requests for payment or reimbursement. The priority system shall be based primarily on department incident response site priorities, taking into account the health and welfare of the public, the effects on the environment, and the commissioner of agricultures incident response case load and staff resources.

6. Page 5. APPLICATION PROCESS
Subsequent Application

Subsequent Application. An eligible person who has already obtained partial reimbursement, or payment, from the board and who has incurred additional or continuing costs due to the same incident may reapply if;

The amount of the person's original reimbursement or payment was less than the maximum allowed under chapter 18E.04, and

The total reimbursements and payments to an all eligible persons for an the incident ~~shall~~ does not exceed the maximum allowed under chapter 18E.04. ~~regardless of the number of applications for reimbursement submitted by the eligible person or person.~~

The ~~eligible~~ costs submitted on a subsequent application are not eligible if related to any new incidents at the site.

The eligible person must offer adequate evidence that all past ~~reimbursements or~~ direct payments have been properly applied towards commissioner of agriculture-approved corrective action costs.

An eligible person making a request for reimbursement, or payment, of additional costs may do so in the following manner:

Request for ~~payment~~ reimbursement shall be considered by the board ~~only once in any calendar year~~ no more than once every 12 months if the additional costs incurred are $5000 or less;

Requests for ~~payment~~ reimbursement of additional costs incurred of $5000 or greater shall be considered by the board at ~~every other~~ any regular board meeting. The board, or the board's staff, shall notify an eligible person requesting additional ~~payments~~ reimbursement when the next regular board meeting is to be held when such requests shall be considered.

Request for direct payment can be made at any regular board meeting.

MINNESOTA
PLANT FOOD AND CHEMICALS ASSOCIATION
1821 UNIVERSITY AVE. • ROOM 253 • ST. PAUL, MN. 55104 • (612) 644-6235

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October 5, 1990

Carol Milligan
Planning Division
MN Department of Agriculture
90 West Plato Blvd.
St. Paul, MN 55107

RE: Agricultural Chemical Response Compensation Board Draft Rules (H: Rules 4)

The following are comments by the Minnesota Plant Food & Chemicals Association (MPFCA) and our 615 member firms and individuals providing fertilizer and ag chemicals to farmer producers throughout the state.

1. **BOARD MEETINGS: TIME, PLACE, NOTICE** - The MPFCA suggests adding language to address how the Board will notify affected persons and the public about meetings.

We suggest adding the following language to this section:

> **"Notice of meetings** -- The chairperson shall give any interested person the same notice of time and place of meeting as given to Board members. A copy of the proposed agenda for a meeting may serve as notice of a meeting if it includes the date, time and place of the meeting.
>
> **"Notice of agenda** -- The chairperson shall mail a copy of the agenda for the meeting at least ten days prior to the regular meeting for which the agenda items have been prepared to 1) each Board member, 2) each party to a proceeding upon which the board is scheduled to act at that meeting, and 3) to those persons who request notice of the board's agenda. The agenda for a special meeting must be available for public inspection at the MN Dept. of Ag offices as far in advance of the special meeting as is reasonably possible."

REASONS: The public, and the parties requesting reimbursement need to be notified of the Board's meetings and actions. By including these provisions, the Board has spelled out how notification will occur and thereby eliminate possible misunderstandings.

continued on next page ...

2. **CONDUCT OF MEETINGS** - The MPFCA suggests adding the following language:

> **"Open Meetings** -- All regular and special meetings of the Board shall be open to the public, and all decisions of the Board shall be made at such meetings.
>
> **"Public Participation** -- Upon request made prior to a regular or special Board meeting, any person who desires to present a statement on a matter which is on the agenda for that meeting shall be afforded an opportunity to present a statement to the Board at the meeting, provided that written statements are submitted at least five days prior to the meeting. Any person present at a regular or special meeting may present an oral statement on agenda matter, within such limits of time as the chairperson may establish. The Board shall allow additional time in which to respond for any person adversely affected by any oral or written statement submitted at a meeting."

REASONS: The public and parties affected by the decisions of the Board need a procedure which will allow them access to the Board. These two provisions provide that access and a procedure to follow when such situations arise.

3. **REIMBURSEMENT OR PAYMENT OF COSTS** -

A. In the first paragraph (General) the term "partial" is used in reference to reimbursement. The MPFCA recommends deleting the term "partial".

REASON: Parties will simply be applying for reimbursement and the Board will decide whether reimbursement will be in full or in part. Additionally, the term partial reimbursement may be confused with the wording in MN Statute 18E.04, subd. 4 relating specifically to partial reimbursement of the fund.

B. After the first paragraph (General), the MPFCA recommends adding a paragraph to briefly define the terms and describe the difference between the two methods of obtaining funds for cleanup (reimbursement or payment). Also suggest that the remaining sections of the rules differentiate between payment and reimbursement procedures of the fund.

REASON: This addition would make the subsequent portions of the rule easier to understand by differentiating the options.

C. The MPFCA suggests that the existing second paragraph (Conditions) be reexamined for content and consistency with Minnesota Statutes 18E.04. This provision should be reworked to include the four conditions as outlined in the statute. These four conditions are: 1) In the case of an emergency accident, the person shall take all reasonable actions to minimize and clean up the incident as subsequently approved by the commissioner, 2) when the incident is small in size and nature, the commissioner may simply make a reasonable

request for cleanup rather than press a full-blown corrective action order procedure, 3) require the person to comply with corrective action orders <u>if</u> issued by the commissioner and 4) requires person to report the incident. The MPFCA also requests that the phrase "adequately addressed public health and welfare" be deleted and incorporate "unreasonable adverse effects on the environment" into this section.

<u>REASONS:</u> This provision must be consistent with the statute and understood clearly by all persons involved.

D. The conditions portion includes reference to a corrective action plan.

MPFCA recommends that the term be defined or deleted.

<u>REASON:</u> The statute refers to corrective actions or orders, and the rules should be consistent with statute.

4. **<u>ELIGIBLE COSTS</u>** - In the second paragraph on page 3, the proposal refers to removal, treatment or disposal of surface or subsurface contamination.

The MPFCA requests additional language to clarify that, in cases where contaminants are detected in ground water and/or drinking water, the ACRRA fund will not be used to fund cleanup unless it is directly traced to an eligible party. This language could be added into the ineligible costs section.

<u>REASON:</u> "Natural contaminants (Nitrates) may be present independent of man-made incidents. Because of the nature of the fund, and the limited amount available for reimbursement, it is imperative that the monies are used in cases where an incident has been reported and can be directly traced to the source (identified).

5. **<u>INELIGIBLE COSTS</u>** - In general, the MPFCA suggests the Board limit its list of ineligible costs to those which will **<u>never</u>** be allowed for reimbursement or payment. At this point, it may be wiser not to list ineligible costs where a consensus does not exist on what are ineligible costs. The board would then decide on eligibility on a case by case basis.

<u>REASONS:</u> As the Board deals with reimbursement requests and some real cases, it can more judiciously determine what costs will be eligible and what are not.

Surveying our members, the MPFCA finds that there is no a clear consensus on whether to include or exclude reimbursement of costs for the following:

A. Costs related to repair or replacement of ag chemical facility structures or equipment.

B. Attorney's fees.

C. Costs for rental or lease of property used for corrective action purposes.

D. Costs for third party review of proposed investigative and corrective action or work plans.

6. APPLICATION PROCESS - PAGE 4

These proposed rules should include wording per statute that requires a response within 30 days of submitting the application.

REASON: Persons need to renew the status of their application in order that the arrangements can be made to get the job completed.

7. OTHER COMMENTS

A. The MPFCA suggests adding the following section:

"Right to Appeal.

If a request for reimbursement or payment is denied, the person may appeal the decision as a contested case hearing under Chapter 14."

REASON: It is common practice to allow for an appeal process in most rules promulgated by state agencies. Also, this same wording is included in the Petro Fund rules.

B. The MPFCA suggests adding wording or a section outlining the procedures for handling an incident that involves ag chemicals covered under ACRRA and other hazardous substances found at the incident site during investigation and clean up.

REASON: It is likely that an incident will be discovered that could contain some substances not paying into the ACRRA fund. The question of how this cleanup will be handled and who will be reimbursed for which expenses should be answered now in the rules before it happens.

C. The MPFCA suggests adding wording or a section to address how transportation incidents will be handled. Is the board going to reimburse or not for products that are not used or sold in the state, even though they are traveling though the state and are a registered product.

REASON: This amounts to a fairness issue. Products that are not paying the fees should not be eligible for reimbursement or payment under ACRRA.

D. The MPFCA suggests adding a section that would exclude incidents involving sanitizers and disinfectants from being eligible for reimbursement or payment.

REASON: The law specifically excludes sanitizers and disinfectants from paying into the ACRRA fund. As such, they should not be eligible for reimbursement or payment.

Thank you for the opportunity to provide these comments.

If you need additional information or have any questions, please contact us.

Sincerely,

Craig Sallstrom
Executive Director

CC. Paul Rhein
Harlan More
Bob Minks
Paul Liemandt

SF-00006-05 (4/86)

DEPARTMENT : **ATTORNEY GENERAL/Bremer**

STATE OF MINNESOTA

Office Memorandum

DATE : October 29, 1990

OCT 31 1990

TO : **PAUL LIEMANDT**
Executive Director, Agricultural
Chemical Response Compensation Board

FROM : **CAROLYN HAM** CH
Special Assistant
Attorney General

PHONE : 6-7861

SUBJECT : **COMMENTS RECEIVED FROM MARK HANSON REGARDING OUR PROPOSED RULES**

I have read Mr. Hanson's letter of October 22, 1990 and I have several comments on it. I will comment on his proposals in the order they appear in the letter.

1. PURPOSE OF THE FUND.

I recommend that you ignore this comment. Obviously, Mr. Hanson is just trying to emphasize his point that this fund is set up to reimburse for any costs incurred by responsible parties without any overseeing by the Board. I think the Board would be overstepping its bounds in stating the purpose of the fund since the Legislature chose not to.

2. CORRECTIVE ACTION DESIGN.

I'm not familiar with the Department of Agriculture's guidance documents so I'm not sure if there is any confusion between the remedial investigation report and the corrective action design. Perhaps Dave can better address this concern. As I understand the procedures proposed by the Department of Agriculture, remedial investigation costs will be covered under the fund. In fact, it seems to me that our section on eligible costs makes it clear that these costs are reimbursable. I do not recommend any changes in the rules regarding this issue.

3. CONDITIONS FOR PAYMENT.

Mr. Hanson may have a valid concern regarding our statutory authority to require the Commissioner to determine that the corrective action has adequately addressed the incident. I do not think that there is a significant difference in practical terms between the Commissioner's determination that a corrective action has adequately addressed the incident and in showing that the eligible person has complied with any reasonable requests for corrective actions issued by the Commissioner. We may want to alter

the language of this rule so that it more closely parallels the statute. Ultimately, it seems to me, the phrases mean the same thing because if the Commissioner determines that the corrective action has not adequately addressed the incident as to eliminate unreasonable adverse affects on the environment it is clear that the Commissioner will order further corrective action.

4. INSURANCE COSTS.

I do not recommend a change in the requirement that a person seek and report to the Board the insurance coverage available. While it is true that it may be difficult to immediately ascertain whether or not insurance coverage is available, I think that we should certainly encourage all eligible persons to make such inquiries. Moreover, it seems to me the eligible person has every incentive to determine whether old insurance policies would cover the release since insurance could conceivably cover the portion of costs that the fund will not reimburse.

5. APPROVAL OF PAYMENTS CONTINGENT ON COMMISSIONER'S APPROVAL FOR ADDITIONAL CORRECTIVE ACTIONS.

I'm not sure what Mr. Hanson's problem is with the language on page 4, lines 4 and 5 of the proposed rules. However, I thought it might make it more clear if we added the word, "necessary" to the sentence. The rule would then read, "A payment would not be made before the applicant receives the Commissioner's approval for additional necessary corrective actions."

6. MULTIPLE ELIGIBLE PERSONS.

I agree with Mr. Hanson's comment that the who on page 4, line 7 be deleted.

7. ELIGIBLE COSTS.

Mr. Hanson has a good point that eligible costs are not defined in the statute. Perhaps we should have a definition section defining eligible costs as costs that minimize, eliminate or clean-up an incident and are reasonable and necessary.

8. BIDDING.

After our cost containment meeting of last week, I think it is clear that the bidding process is very important and I would disregard this comment.

9. INELIGIBLE COSTS.

Mr. Hanson raises some valid points as to the Board's authority to determine what are ineligible costs. Unfortunately, the language of Minn. Stat. § 18E.04, subd. 1(c) does not contain the same language as the PetroFund Board's language. The Petro Broad has express authority to determine what are eligible costs. However, I do think we can still have this section in our rules. We

will just need to be clear in stating what our authority is to determine ineligible costs in our statement of need and reasonableness.

The Board is directed to reimburse "reasonable and necessary costs incurred by the eligible person in taking corrective action." The Board is then directed to adopt rules regarding its practices and procedures and procedures for "determining eligibility for . . .reimbursement". I think that this general authority is sufficient to allow the Board to determine what are ineligible costs. Basically, we are saying in the rules that ineligible costs are costs that do not minimize, eliminate or clean-up an incident. This definition is clear from the statute. The statute does not allow reimbursement of costs that are not taken pursuant to a corrective action. The Board is making a determination that the ineligible costs listed under Rule 1512.0800 do not minimize, eliminate or clean-up an incident. We are merely listing these costs so that an eligible person will have prior warning that these costs are not considered part of a corrective action plan.

In addition, the Board has the responsibility to reimburse only reasonable and necessary costs. While it might be argued that attorney's fees and costs for third party review of proposed action may actually minimize, eliminate or clean-up an incident, I think the Board can still make a determination that these are not necessary for the corrective action plan. Similarly, the Board is making an advance determination that it is not reasonable to perform work that is out of compliance with safety codes.

It may be that we want to separate out which are ineligible costs due to the fact that they do not minimize, eliminate or clean-up an incident from those ineligible costs that we do not consider reasonable or necessary.

Similarly, we may want to add extra language to our rule regarding the costs covered by insurance. We might want to say "corrective action costs covered or payable under an insurance or other contract are ineligible costs because they are not considered to be costs incurred by the eligible person."

Finally, I think that Mr. Hanson's comments regarding orders issued under Minn. Stat. ch. 15B or Fed. Cercla are off the mark. I would recommend putting in the statement of need and reasonableness that it is clear that the intent of Chapter 18E is to cover only incidences under chapters 18B, 18C and 18D. The support for this statement comes from Minn. Stat. 18E.03, subd. 2(1) which permits money from the fund to be used to pay for the Commissioner's responses to incidences under chapters 18B, 18C and 18D that are not eligible for payment under section 115B.20. Moreover, Minn. Stat. § 18E.04, subd. 2(4) states that reimbursement cannot occur unless the incident was reported as required in chapter 18B, 18C and 18D. Therefore, I think the Board is justified in assuming that the statutory intent of this fund is to cover only incidences under 18B, 18C and 18D.

10. CERTIFICATION.

I think that Mr. Hanson is splitting hairs with this comment. Obviously, if the MDA approves the subsequent modification, then the Board is not going to have any problem with any corrective action taken pursuant to that modification. A more fundamental question is the question of whether or not we can require a plan to be submitted or followed under the statute.

11. WRITTEN RECORD.

Mr. Hanson's comment is an obvious one. The Board will consider all evidence it hears. If it will make him feel better, we can certainly add that the record will include both the written and oral comments presented at the meeting. I would not add that the Commissioner's written report will be submitted to the responsible party in the rules. While I assume that we will indeed provide each responsible party with the Commissioner's site report prior to the meeting, I don't think it needs to be part of our rules.

I have also included my comments on your proposed Statement of Need and Reasonableness.

CH:lf/.del

Department of Agriculture

Proposed Permanent Rules Relating to Agricultural Chemical Response Compensation Board

Rules as Proposed (all new material)

AGRICULTURAL CHEMICAL RESPONSE COMPENSATION BOARD RULES

1512.0100 DEFINITIONS.

Subpart 1. **Scope.** The definitions in this part and Minnesota Statutes, chapter 18B, 18C, 18D, or 18E apply to parts 1512.0100 to 1512.1100.

Subp. 2. **Corrective action design.** "Corrective action design" means a description of the actions necessary to investigate, minimize, or clean up an incident.

Subp. 3. **Eligible costs.** "Eligible costs" means costs that minimize, eliminate, or cleanup an incident and are reasonable and necessary.

1512.0200 BOARD MEETINGS.

Subpart 1. **Regular meetings.** At least six regular meetings of the board must be scheduled a year. A scheduled meeting may be canceled if there is insufficient business.

Subp. 2. **Special meetings.** A special meeting of the board may be called by the chair or by written request of three board members.

1512.0300 BOARD CHAIR AND VICE-CHAIR.

A chair and vice-chair of the board must be elected by the board. Both positions must be elected at the first official meeting of the board on or after July 1, 1990. The chair shall preside at regular and special meetings, or the vice-chair in the absence of the chair, and the person chairing a meeting shall perform all duties assigned by the board.

The chair and vice-chair must be members of the board and may not be either the commissioner of agriculture or the commissioner of commerce.

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The term of the chair and vice-chair is one year, beginning January 1, 1991.

1512.0400 CONDUCT OF MEETINGS.

Subpart 1. **Quorum.** A quorum consists of three board members.

Subp. 2. **Minutes.** Meetings must be tape recorded and minutes subsequently prepared by the board's staff.

Subp. 3. **Parliamentary procedure.** Except as specifically provided by statute or negotiation, Robert's Rules of Order govern questions that may arise at a meeting of the board.

1512.0500 CONFLICT OF INTEREST.

A member of the board who has a direct or indirect financial or employment interest relating to a matter before the board, which interest is reasonably likely to affect impartiality of judgment in the matter, shall make known the interest and shall refrain from participating in or voting upon the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote.

1512.0600 REIMBURSEMENT OR PAYMENT OF COSTS.

Subpart 1. **General.**

A. An eligible person who has taken corrective action and has incurred costs on or after July 1, 1989, may apply to the board for reimbursement or payment of eligible costs.

B. Reimbursement for eligible costs incurred is only for costs already paid by the eligible person. Reimbursement will not be made without proof that costs have been paid.

C. Payment of eligible costs incurred is only for costs that the eligible person is unable to pay.

Subp. 2. **Conditions.** A reimbursement or payment may not be made unless the board determines that the commissioner of agriculture has determined that the corrective action has adequately addressed, or will adequately address, the incident so as to eliminate unreasonable adverse effects on the environment.

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An eligible person must seek and report to the board any and all other cost coverage or recovery when making an application for reimbursement or payment from the agricultural chemical response and reimbursement account.

A reimbursement may not be made before the applicant receives approval from the commissioner of agriculture for a corrective action design.

A payment may not be made before the applicant receives the commissioner's approval for additional necessary corrective actions.

Subp. 3. **Multiple eligible persons.** If more than one eligible person incurs eligible costs for a single incident or for a single corrective action, each eligible person must apply separately to the board. Not more than the maximum amounts under Minnesota Statutes, chapter 18E, may be reimbursed or paid for corrective action costs associated with a single incident site, regardless of the number of eligible persons.

1512.0700 ELIGIBLE COSTS.

Subpart 1. **Reimbursable or payable corrective actions.** Costs associated with the following corrective actions may be eligible for reimbursement or payment:

A. emergency responses to incidents including, but not limited to, costs incurred that are necessary to abate acute risks to human health, safety, and the environment;

B. incident site hazard control measures including, but not limited to, containment and stabilization of the incident and removal of released material;

C. investigation and source identification including, but not limited to, collecting and analyzing soil samples, testing the groundwater, testing site and adjacent drinking water supplies, structural testing, and engineering and consultant services;

D. development of corrective action design according to requirements of the commissioner of agriculture; and

E. cleanup of incidents including, but not limited

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to, removal, treatment, or disposal of surface or subsurface contamination.

Cleanup must be performed according to a corrective action design, approved by the commissioner of agriculture, except in circumstances where an eligible person takes all reasonable emergency corrective action necessary to minimize and abate an incident and the action is subsequently approved by the commissioner of agriculture.

Subp. 2. **Documentation of reasonableness.** The applicant shall prove the reasonableness of all incurred eligible costs. Upon request of the board or the board's staff, the applicant shall document the reasonableness of any costs included on the reimbursement application, or on any request for payment, by providing one or more of the following:

A. evidence that the work was performed by a person or persons whose services were solicited through a competitive bidding procedure;

B. evidence that the cost is substantially equivalent to that charged by a comparable person or persons in the same geographical area for similar work performed;

C. evidence that only one party was reasonably available to perform the necessary work; or

D. evidence that only one party was reasonably qualified to perform the necessary work.

The board shall reimburse or pay only those costs it determines to be reasonable.

1512.0800 INELIGIBLE COSTS.

All costs associated with actions that do not minimize, eliminate, or clean up an incident are ineligible costs. Ineligible costs include, but are not limited to, costs related to the repair, replacement, or upgrading of agricultural chemical facility structures or equipment, cost of agricultural chemical product replacement, loss of income, attorney's fees, permanent relocation of residents, decreased property values, reimbursement for the eligible person's own time spent in

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planning and administering a corrective action design, costs for third party review of proposed investigative and corrective action or work plans, aesthetic improvements, or any work, except for emergency corrective actions, not in compliance with safety codes including, but not limited to, United States Occupational Safety and Health Administration requirements, well codes, fire codes, and costs for providing alternative sources of drinking water.

Corrective action costs covered or payable under an insurance or other contract are ineligible costs. Corrective action costs covered or payable under an insurance or other contract are ineligible costs because they are not considered to be costs incurred by the eligible person. Costs incurred in response to requests or orders issued to a responsible person under authorities contained in Minnesota Statutes, chapter 115B, or federal CERCLA are ineligible costs.

1512.0900 APPLICATION PROCESS.

Subpart 1. **Request for reimbursement.** A person who wishes to apply for reimbursement from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. summary of the corrective action design and the commissioner of agriculture's approval of the design, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action; and

D. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action; and

E. proof of payment.

Subp. 2. **Request for payment.** A person who wishes to

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apply for payment from the account shall complete, sign, and submit to the board a written application. The application must be on a form prescribed by the board and must contain the following:

A. name of person making the application;

B. description of the site of the incident;

C. completed and signed affidavit summarizing the financial condition of eligible persons, and demonstrating an inability to pay the corrective action cost;

D. copies of federal and state income tax returns for the last two years (corporate, partnership, or individual);

E. monthly, quarterly, and annual financial statements for the last two years, prepared according to generally accepted accounting principles, relating to the financial condition of the applicant applying for payment, including financial statements for any businesses owned or operated by the applicant;

F. a summary of the corrective actions taken, as approved by the commissioner, or a description of emergency corrective action taken and evidence of the commissioner of agriculture's subsequent approval of that action;

G. itemized list of all corrective actions taken; the eligible costs associated with those actions; and the name of the person, contractor, consultant, or engineer who performed the action;

H. information detailing why corrective actions have not been completed or initiated; and

I. evidence sufficient to prove applicant's payment of $1,000 for corrective action costs already incurred.

The board may waive the requirement for submission of all or a portion of the above described financial information, if reasonable and appropriate, upon written request of the applicant.

Only complete applications may be accepted by the board and incomplete applications must be returned to the applicant.

Subp. 3. **Time of application.** The board shall hear

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initial requests for reimbursement and payment applications by eligible persons at every regular meeting.

The board shall establish a priority system for hearing requests for payment or reimbursement. The priority system must be based primarily on department incident response site priorities, taking into account the health and welfare of the public, the effects on the environment, and the commissioner of agriculture's incident response case load and staff resources.

Subp. 4. **Subsequent application.**

A. An eligible person who has already obtained partial reimbursement or payment from the board and who has incurred additional or continuing costs due to the same incident may reapply if:

(1) the amount of the person's original reimbursement or payment was less than the maximum allowed under Minnesota Statutes, section 18E.04;

(2) the eligible person offers adequate evidence that all payments have been properly applied towards costs of corrective action approved by the commissioner of agriculture;

(3) the eligible costs submitted on a subsequent application are not related to any new incidents at the site; and

(4) the total reimbursement and payments to all eligible persons for an incident must not exceed the maximum allowed under Minnesota Statutes, section 18E.04.

B. An eligible person may request reimbursement or payment of additional costs at the times indicated in subitems (1) and (2).

(1) Requests for reimbursement may be considered by the board no more than once every 12 months if the additional costs incurred are $5,000 or less.

(2) Requests for reimbursement of additional costs incurred of $5,000 or more may be considered by the board at every other regular board meeting. The board or the board's staff shall notify an eligible person requesting additional payments when the next regular board meeting is to be held at

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which requests will be considered.

(3) Request for direct payment may be made at every other board meeting.

Subp. 6. **Signatures.** An application must be signed as follows:

A. for a corporation, by a principal executive officer of at least the level of vice-president or the duly authorized representative or agent of the executive officer if the representative or agent is responsible for the overall operation of the facility or site that is the subject of the application or a person whom the board of directors designates by means of a corporate resolution; or

B. for a partnership, sole proprietorship, or individual by a general partner, the proprietor, or individual, respectively.

Subp. 7. **Certification.**

A. A person who signs an application for reimbursement or payment shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. I certify that the commissioner of agriculture has approved the corrective actions taken, as described in the approved corrective action design, or as otherwise approved by the commissioner. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge, true, accurate, and complete. I further certify that I have the authority to submit this application on behalf of ....."

B. A person who signs an application for payment shall also make the following certification:

"I certify that if I have submitted invoices for costs

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that remain unpaid that I will pay those invoices within 30 days of receipt of payment from the board. I understand that if I fail to do so, the board may demand return of all or any portion of money paid to me."

C. A person who signs an application for subsequent payment or reimbursement shall also make the following certification:

"I certify that I have complied with the commissioner of agriculture approved corrective action design provisions and the corrective actions were taken as described in that design."

Subp. 8. **Report of commissioner of agriculture.** Upon notification by the board's staff that a complete application has been received, the commissioner shall, in a timely manner, provide the board with a written report on the applicant's compliance or noncompliance with Minnesota Statutes, section 18E.04.

In addition, the board may request additional information from the commissioner or may request participation of agency staff at a board meeting. All responses to requests for information must be delivered in a timely manner. The board may delegate these powers to its staff.

1512.1000 REVIEW AND DETERMINATION.

Subpart 1. **Review.** The board's staff shall review all applications. If the staff determines that the application is incomplete or otherwise deficient, the staff shall promptly advise the applicant of the incompleteness or deficiency. Further processing of the application affected by the deficiency must be suspended until the applicant has supplied the necessary information or otherwise corrected the deficiency. A complete application and the corresponding report of the commissioner of agriculture constitutes the written record. Any supplemental information explaining the application that is presented orally or in writing to the board will also be part of the written

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record.

Subp. 2. **Staff recommendation.** After a reimbursement or payment application is complete and the commissioner has provided the information relevant to the application, the board's staff shall make a recommendation as to the eligibility of the applicant and the costs specified in the application.

Subp. 3. **Board determination.** The board shall determine the amount of the reimbursement or payment based on the costs it finds are eligible, actually incurred, and reasonable. The determination must be made on the basis of the written record. The board may also allow supplemental information explaining the application to be presented in writing or orally. The board may establish a fair and reasonable limit on the time for oral presentation.

The applicant must be notified in writing within 30 days of the board's decision. If the board rejects part of the request for reimbursement or payment, a statement of the reasons for rejection must be included with the notification.

Subp. 4. **Appeal.** If a reimbursement or payment is denied, the eligible person may appeal the decision as a contested case hearing under Minnesota Statutes, chapter 14.

1512.1100 ENFORCEMENT.

An application for reimbursement or payment containing false statements or misrepresentations voids the application. Reimbursements or payments that are made that later are found to have been based upon false or misleading information result in forfeiture of any reimbursement or payment made, and are wholly recoverable through actions under general criminal or civil enforcement authorities by the Office of the Attorney General.

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Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Agricultural Chemical Response Compensation Board

AGENCY: Department of Agriculture

MINNESOTA RULES: Chapter 1512

The attached rules are approved for publication in the State Register

Craig E. Lindeke
Senior Assistant Revisor