

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Problem with 30 day comment period

5/9 cH

RULE REVIEW CHECKLIST

File No. 1824
DATE RECEIVED 5-3-91
REVIEW DATE 5-13-91
DUE DATE 5-17-91
(DIS)APPROVED
WITHDRAWN 5-17-91

Docket No. 05.0039.0704
ADOPTED W/O HEARING
EMERGENCY RULE
TO REVISOR ON 5-14-91
REVISOR (DIS)APPROVED 5-21-91
FILED W/SEC. OF STATE
RETURNED TO AGENCY

✓ Rule as adopted (4 copies)

___ Notice to Solicit Outside Information/Opinion (if applicable)
___ Date published in State Register
___ Comments

___ Petition for Adoption of a Rule

✓ Board's Authorizing Resolution
January 9, 1991 Date adopted

___ Proposed Rule
___ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
116.07 subd 3 Statutory Authority
✓ Small Business Statement
NA Expenditure of public money statement
undated Signature

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

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
January 24, 1991 Dated 30/25* days before adoption
___ Notice attached indicates it is attached
___ Copy of rule or summary attached

✓ Publication in State Register
January 28, 1991 Date 30/25* days before adoption

✓ 180-day deadline from:
✓ Effective date of law requiring rule (14.12) (both rules) amendments don't apply not mandatory
✓ end of comment period (§ 14.26) (rules without hearing)
___ effective date of statutory authority (§ 14.29) (emergency rules)

✓ Resolution Adopting
May 3, 1991 Date adopted- meeting held on April 23, 1991

___ Findings of Fact, Conclusions & Order Adopting
April 24, 1991 Date

✓ Written Requests, Submissions or Comments put on old address

✓ Declaration of Attorney
Alan Williams Name of SAAG representing agency

✓ Notice of Submission to Attorney General (if applicable)

✓ Affidavit of Mailing Notice to Attorney General (if applicable)

Rules.ac1

29 day comment period

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules Governing Superfund Administrative Procedures, Parts 7047.0001 - 7047.0007

NOTICE OF WITHDRAWAL FROM CONSIDERATION BY ATTORNEY GENERAL

Please take notice that the Minnesota Pollution Control Agency hereby withdraws the above-captioned rules which were submitted for review to the Attorney General on May 3, 1991. The rules are being withdrawn for correction and resolution of legal concerns.

Charles W. Williams
Commissioner

Dated: May 17, 1991

Stat Authority 116.07 subd 3

Pursuant and subject to the provisions of chapter 14, and the provisions here, the pollution control agency may adopt, amend, and rescind rules governing its own administration and procedure and its staff and employees.

end of comment period stated as Feb 26, 1991 in Notice of Intent

April 23, 1991 Pollution Control met and adopted the resolution - the affadavit is dated May 3, 1991

29 day comment period

DUE: MAY 17th

Alan Willis
6-7347

Minnesota Pollution Control Agency

Proposed Rules Relating to the Minnesota Environmental Response and Liability Act (MERLA) Administrative Procedures

Notice of Intent to Adopt Rules Without a Public Hearing

(1) Notice is hereby given that the Minnesota Pollution Control Agency (Agency) intends to adopt the above-entitled rules without a public hearing following the procedures set forth in the Administrative Procedures Act (Minn. Stat. §§ 14.22 to 14.28 (1990)). The statutory authorities to adopt the rules are set forth in Minn. Stat. §§ 14.06 and 116.07, subd. 3 (1990).

(2) All persons have until 4:30 p.m. on February 26, 1991, to submit comments in support of, or in opposition to, the proposed rules or any part or subpart of the rules. Comment is encouraged.(3) Each comment should identify the portion of the proposed rules addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rules within the comment period.(4) If 25 or more persons submit a written request for a public hearing within the comment period, a public hearing will be held unless a sufficient number of commenters withdraw their requests in writing.(6) Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rules addressed, the reason for the request, and any change proposed.

(7) If a public hearing is required, the Agency will proceed pursuant to Minn. Stat. §§ 14.131 to 14.20 (1990).

Comments should be submitted to:

(5)
Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, Minnesota 55155-3898
(612) 296-7735

(8) The proposed rules may be modified if modifications are supported by data and views submitted to the Agency and if they do not result in substantial changes to the proposed rules as noticed.

(11) The proposed rules, if adopted, will formalize certain administrative procedures currently used by the Agency in administering its Superfund program. The Agency believes that adoption of the proposed rules will ensure systematic and equitable adherence to statutory requirements while protecting the rights and interests of affected parties and the environment. The Agency's primary goal in developing the rules is to expedite initiation of the Superfund site cleanup process through clarification of the respective procedural responsibilities of persons who are or may be responsible for a release or potential release of hazardous substances and of the staff, Commissioner, and Board of the Agency.

(11) The proposed rules are published below. One free copy of the rules is available upon request from Allen Dotson at the address and telephone number stated above.

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

(14) You are hereby advised, pursuant to Minn. Stat. § 14.115 (1990), "Small business considerations in rulemaking," that the proposed rules, if adopted, would not have a significant impact on small businesses, including small farms. Since the proposed rules would formalize current procedures, they would have no appreciable impacts upon small businesses. The proposed rules are not complex, and thus they would not place undue burden on the resources of small businesses. Furthermore, exemption of small businesses from any or all requirements under the proposed rules would conflict with the objectives of Minn. Stat. ch. 115B (MERLA). MERLA makes no distinction between small businesses and other parties who may be responsible for a release or threatened release, and does not authorize the Agency to treat small businesses differently in the administration of MERLA.

(9) If no hearing is required, upon adoption of the rules, the rules and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent form relates to legality. Any

person may request notification of the date of submission of this material to the Attorney General, or to receive a copy of the rule as adopted. Requests shall be submitted to Allen Dotson at the address listed above.

Barbara Lindsey Sims

Acting Commissioner

STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules
Governing Administrative Procedures
Under the Environmental Response and
Liability Act, Minnesota Rules,
Parts 7047.0001 through 7047.0007

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

These rules, as proposed, contain procedures to be followed by the Minnesota Pollution Control Agency (Agency) and its Board in implementing certain provisions of the Minnesota Environmental Response and Liability Act (MERLA), Minnesota Statutes, chapter 115B. These procedures begin with the Commissioner's Notice Letter (notice letter), notifying the recipient that Agency staff intend to recommend that the Board issue a Request for Response Action (RFRA) to the recipient concerning the response actions necessary to address a release or threatened release of hazardous substances, or pollutants or contaminants. The notice letter also provides for a 30 day period within which the recipient may submit additional information for consideration by the Board in determining whether to issue the RFRA.

In addition, the notice letter requests that the recipient indicate his intentions concerning negotiation of a consent order. Depending upon the recipient's response to the notice letter, the RFRA may include a time frame during which Agency staff will attempt to negotiate a consent order. The final procedure is a Determination On Actions Requested (DOAR) which is issued by the Board if it determines that a responsible person will not take response actions in the manner and within the time requested in a RFRA. The proposed rules will make enforceable the administrative procedures currently used by the Agency.

The Agency believes that the proposed rules are necessary to ensure equitable and systematic adherence to statutory requirements, to protect the rights and interests of the affected parties, and to more clearly identify

notice letter recipient, responsible person, Commissioner, and Board responsibilities with regard to the Superfund administrative process. The Agency published a Notice of Intent to Solicit Outside Information regarding the proposed rules in the February 5, 1990, State Register. No data, views, statements, or comments, either oral or written, were received.

II. AGENCY STATUTORY AUTHORITY

The Agency is provided authority to adopt the proposed rules under Minnesota Statutes, section 116.07, subdivision 3 (1990):

> Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend, and rescind rules governing its own administration and procedure and its staff and employees.

The Agency is also provided authority to adopt the rules under Minnesota Statutes, section 14.06. Minnesota Statutes, chapter 14 (1990) requires the Agency to make an affirmative presentation of facts establishing the need for, and the reasonableness of, the rules as proposed. To the extent that need and reasonableness are separate, "need" is interpreted to mean that a problem exists which requires administrative attention. "Reasonableness" concerns the extent to which the solutions proposed by the Agency are appropriate and do not place undue burden on the regulated communities.

III. NEED FOR THE PROPOSED RULES

Rules governing the Agency's administrative procedures under MERLA are needed in order to establish uniform and enforceable schedules and requirements for the decisions and actions of the Commissioner and the Board in implementing certain authorities under MERLA. The adoption of these rules will enable the

Board to deliberate in an orderly manner concerning issuance of RFRAs by assuring that data or information relevant to the deliberations are provided in advance of the date when the Board must decide the matter.

For example, specifying a time frame in the notice letter for submission of additional information enhances the Board's ability to determine in a timely manner whether to issue a RFRA, and to determine whether there will be a time frame for consent order negotiations after issuance of a RFRA. By setting procedural deadlines, the rule provides opportunity for the Agency staff and the Board to examine additional information before the date of the meeting at which the Board is scheduled to consider issuance of a RFRA. Currently, confusion sometimes occurs when new technical or other information is presented to the Board on or near the date of the Board meeting. In such cases, particularly when Agency staff have not had opportunity to examine the information sufficiently to address questions posed by the Board, the Board may find it necessary to delay its determination on issuance of the RFRA until a later meeting. This results in unnecessary delays in scheduling and implementing response actions necessary to protect public health and the environment.

Minnesota Statutes, section 115B.17, subdivision 1 authorizes the Agency "to take any removal or remedial action relating to the [release of a] hazardous substance, or pollutant or contaminant, which the agency deems necessary to protect the public health or welfare or the environment." Before taking such actions under this subdivision, the Agency must take the following steps: 1) request any known responsible person to take response actions (a "RFRA" under the proposed rules), 2) notify the owner of the property on which the release is located (if not a responsible person) that step 1 has been taken, and request the owner's cooperation, and 3) determine that the response actions requested by

the Agency of the responsible persons will not be taken in the manner and within the time requested (a "DOAR" under the proposed rules). (Minnesota Statutes, section 115B.17, subdivision 1(a)(1-3).) Minnesota Statutes, section 115B.18, subdivision 3 also requires the issuance of a RFRA before certain enforcement actions may be brought under 115B.18. These actions are taken by the Agency Board, except when the Commissioner determines that emergency actions are required.

The proposed rules are necessary to establish enforceable procedures by which the Agency will take the steps required in Minnesota Statutes, section 115B.17, subdivision 1(a)(1-3) and 115B.18, subdivision 3. In summary, adoption of the proposed rules would accomplish the following:

1. ensure systematic and equitable adherence to statutory requirements;

2. protect the rights and interests of the affected parties;

3. identify notice letter recipient, responsible person, Commissioner, and Board responsibilities in implementing Minnesota Statutes, sections 115B.17, subdivision 1(a) and 115B.18, subdivision 3;

4. provide and maintain a consistent time frame for implementing Minnesota Statutes, sections 115B.17, subdivision 1(a) and 115B.18, subdivision 3.

IV. REASONABLENESS OF THE PROPOSED RULES

A. Introduction.

The Agency is also required by Minnesota Statutes, chapter 14 to establish the reasonableness of the proposed rules. This involves explanation of why the requirements and standards imposed by the proposed rules are appropriate and do not place undue burden on the regulated communities.

The proposed rules are intended to strike an appropriate balance among the following Agency program goals: 1) to promote understanding of, and promote

adequate opportunities for meaningful participation in, the Superfund process by notice letter recipients and responsible persons, 2) expeditious and clearly articulated schedules for implementation of the process, and 3) to preserve the Agency's authorities to implement response actions in a timely manner. The rules as proposed provide reasonable opportunity for the notice letter recipient, Agency staff, the Commissioner, and the Board to submit and to evaluate data and information relevant to issuance of a RFRA. They provide notice to the public of the process used under MERLA for issuance of notice letters, RFRAs, and DOARs, and for negotiation of consent orders when RFRAs are issues.

B. Reasonableness of Individual Rules.

The following discussion addresses the specific provisions of the proposed rules and explains why they are reasonable.

Part 7047.0001 SCOPE.

Part 7047.0001 is reasonable because it describes the scope of the proposed rules.

Part 7047.0002 DEFINITIONS.

Part 7047.0002 is reasonable because it provides definitions for terms which might not be clearly understood on the basis of context alone.

Part 7047.0003 COMMISSIONER'S NOTICE LETTER.

Part 7047.0003 describes the general contents and purpose of the Commissioner's Notice Letter, which notifies a person of the Agency staff's intent to recommend that the Board issue a RFRA to the person.

Subparts 1, 2, and 3 require the Commissioner to notify a person that the Agency staff intends to recommend to the Board that it issue a RFRA to the person. The notice must be given at least 45 days in advance of the date upon

which the Board is to consider issuance of a RFRA to the person. If the Board requests that a responsible person take response actions to address a release or a threatened release of a hazardous substance or pollutant or contaminant, the responsible person must determine how to commit its resources (e.g., finances, personnel, etc.) to performing the response actions. Early notification of a person by the Commissioner is beneficial to both the person and the Agency, and is therefore reasonable. The Commissioner's Notice Letter provides time for the recipient to respond to the Agency with any additional information that is relevant to issuance of a RFRA, and to consider its course of action concerning the requested response actions. Early notification also encourages a notice letter recipient to consider a negotiated settlement, if the Board issues a RFRA. Negotiation can provide a responsible person greater participation in planning response actions than it might have under a RFRA.

When issuing a RFRA, the Agency must determine that the person to whom the RFRA is issued is a responsible person with respect to a release or a threatened release. Subpart 3.F. provides for a period of 30 days after receipt of the notice letter during which the recipient may provide Agency staff with additional information relevant to that person's status as a responsible person or other information relevant to issuance of a RFRA (e.g., information on the release). The 30 days within which such information is to be submitted is reasonable. A notice letter will follow a site identification and evaluation process carried out by the Agency which generally provides notice to a person that the Agency is considering the need for possible response actions at the site. The Agency may also have contacted the person concerning the site by issuing a Requirement to Provide Information to the person under Minnesota Statutes, section 115B.17, subdivision 3, by requesting access to the site for

investigation, or by listing the site on the Minnesota Permanent List of Priorities under Minnesota Rules, chapter 7047.

It is reasonable for the Agency to request a written statement regarding the notice letter recipient's interest in entering negotiation of a consent order, as provided in subpart 3.G. This notice of intent provides opportunity for Agency staff to recommend that the proposed RFRA include an appropriate period for consent order negotiation, and for both the Agency and the recipient to begin planning for negotiation.

Subpart 4 states that the Commissioner will review and transmit to the Board additional information received in response to a notice letter, as well as a response to the information. It is reasonable for the Commissioner to submit to the Board a response to the additional information, to aid the Board in effectively evaluating the bearing of the information on issuance of the RFRA.

Part 7047.0004 REQUESTS FOR RESPONSE ACTION (RFRAs).

Part 7047.0004 provides standards for when the Agency Board may accept additional information the notice letter recipient may wish to submit to the Board for consideration with regard to issuance of the RFRA which was not submitted within 30 days after receipt of the notice letter.

Subparts 2 and 3 identify the conditions under which such additional information will be accepted and considered by the Board. Subpart 2 explains the conditions under which the information will be accepted by the Board. Subpart 3 describes how the Board will proceed after accepting additional information.

The Board recognizes the rights of notice letter recipients and responsible persons to comment on actions taken by the Agency in fulfilling its statutory mandates. The Commissioner's notice letter augments this right by formally

providing an opportunity to supply additional information in advance of the meeting at which the Board is scheduled to consider the RFRA. The proposed rules provide a time frame within which notice letter recipients must submit additional information, and the conditions under which it will be accepted in order to encourage timely and orderly presentation and consideration of such information and to avoid delay in Board issuance of RFRAs needed to protect public health and the environment.

Subpart 4 explains requirements which must be met by Agency staff in submitting information not included or referenced in the notice letter to the Board for consideration in determining whether to issue a RFRA. Subpart 4 is reasonable because it requires that notice of staff submission of such information be provided to the notice letter recipient, and it provides opportunity for the recipient to respond to such information.

Subpart 5 briefly explains the scope of the RFRA. Subpart 6 states that RFRAs, including schedules for response actions, are effective upon issuance. These subparts are reasonable because they seek to promote understanding of the RFRA process.

Issuance of RFRAs under this part fulfills the requirements of Minnesota Statutes, sections 115B.17, subdivision 1(a)(3), and 115B.18, subdivision 3. It is reasonable to provide notice to the public and to responsible persons concerning the effect of the Agency Board's action in issuing a RFRA.

Part 7047.0005 CONSENT ORDERS.

Subpart 1 explains the conditions under which the Board will or will not provide a time frame for consent order negotiations in a RFRA. It also states that the Agency is not required to negotiate a consent order outside any such time frame. Subpart 2 establishes the scope of consent order negotiations.

Subpart 3 explains that a consent order executed after issuance of a RFRA will govern implementation of response actions by a responsible person, instead of the RFRA. Subparts 1, 2, and 3 are reasonable and necessary because they provide incentives to negotiate consent orders in good faith, while ensuring that response actions proceed expeditiously.

Part 7047.0006 DETERMINATIONS ON ACTIONS REQUESTED (DOARs).

Part 7047.0006, subpart 1, provides that the Commissioner will determine whether a responsible person has taken the response actions requested in the RFRA or whether it has made reasonable progress in completing the response actions. If the Commissioner determines that the responsible person will not take requested response actions in the manner and within the time specified in the RFRA, the Commissioner will request that the Board issue a DOAR to the responsible person. Minnesota Statutes, section 115B.17, subdivision 1(a)(3) requires that the Agency make such a determination, before it may take or compel performance of response actions which it deems reasonable and necessary to protect the public health or welfare or the environment. Issuance of DOARs to all known responsible persons fulfills the prerequisite of Minnesota Statutes, section 115B.17, subdivision 1(a)(3) for the Agency to take actions under Minnesota Statutes, section 115B.17, subdivision 1(a). In issuing a DOAR, the Board may also request, or authorize the Commissioner to request, the Attorney General to bring a legal action to compel performance of response actions requested in a RFRA or to impose civil penalties under Minnesota Statutes, section 115B.18.

Part 7047.0007 ATTORNEY GENERAL AUTHORITY NOT AFFECTED.

Part 7047.0007 provides that the proposed rules do not create any new requirements or prerequisites for the Attorney General to bring court action

against a responsible person under Minnesota Statutes, section 115B.18. Before the Attorney General may bring an action against a responsible person to compel performance or seek civil penalties under Minnesota Statutes, section 115B.18, subdivision 1 or 2, a RFRA must be issued as provided in section 115B.18, subdivision 3. Part 7047.0004, subpart 1 recognizes that a RFRA issued pursuant to part 7047.0003 constitutes this prerequisite to legal action. Part 7047.0007 makes clear that no other provisions of the proposed rules limit the authority of the Attorney General to bring legal actions under MERLA. For example, the Board will generally issue a DOAR and will request, or authorize the Commissioner to request, the Attorney General to bring legal actions under Minnesota Statutes, sections 115B.17, subdivision 6, and 115B.18, subdivisions 1 and 2, before such actions are brought. However, MERLA does not require the Board to take these steps before the Attorney General brings an action in court. In addition, issuance of a RFRA may not be required before the Attorney General may bring an action to recover expenses incurred by the Agency under Minnesota Statutes, section 115B.17, subdivision 6. Part 7047.0007 is reasonable because it provides notice to responsible persons that the exercise of authority by the Attorney General to bring legal actions under MERLA may not be limited by the procedural requirements imposed on the Agency by these rules.

V. CONSIDERATION OF POSSIBLE IMPACTS ON SMALL BUSINESSES

Minnesota Statutes, section 14.115, subdivision 2 (1990) requires the Agency when proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

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

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

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

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

Minnesota Statutes, section 14.115, subdivision 3 directs an agency to "incorporate into the proposed rule or amendment any of the methods specified under subdivision 2 (above) that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis for the proposed rulemaking."

The proposed rules would not have particular impact on small businesses as defined in Minnesota Statutes, section 14.115, subdivision 1 (1990). The rules establish time frames for persons who may be responsible for a release under MERLA to provide information that they want the Agency Board to consider in determining whether to issue a RFRA. The rules do not require such persons to provide any information, but only to comply with time requirements if they elect to do so. The proposed rules are not complex and do not place an undue burden on the financial and personnel resources of small businesses. Establishing less stringent time standards on small businesses is not consistent with providing all persons similarly affected by MERLA an equal opportunity to provide information to the Agency.

Furthermore, exemption (item e) of small businesses from any or all requirements under the proposed rules would conflict with the objectives of Minnesota Statutes, chapter 115B (MERLA) which defines those parties who are responsible for releases of hazardous substances or pollutants or contaminants and imposes liability on those persons for the cost of cleaning up such releases. MERLA makes no distinction between small businesses and other parties who may be responsible for a release, and does not authorize the Agency to treat

small businesses differently in the administration of MERLA. In addition, any different treatment in the issuance of RFRAs or DOARs would complicate and delay the implementation of response actions needed to protect public health and the environment.

VI. CONSIDERATION OF ECONOMIC FACTORS

In exercising its powers, the Agency is required by Minnesota Statutes, section 116.07, subdivision 6 (1990) to give due consideration to certain economic factors. The statute states that:

> In exercising all its powers the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

The Agency has interpreted this requirement to mean that, in determining whether or not proposed rules or amendments are feasible or practicable, it must consider the economic impacts, if any, of the proposed rules.

Since the proposed rules formalize and make enforceable current procedures with which the business community is already familiar, it is expected that adoption of the rules will have no calculable economic impacts. Furthermore, these rules implement a statute which is intended to encourage or require persons responsible for releases of hazardous substances or pollutants or contaminants to take cleanup actions at their own expense and to use state funds for cleanup only if responsible persons do not take requested actions. The fundamental judgment concerning who should bear the costs and economic burden of cleaning up releases of hazardous waste has been made by the legislature in enacting MERLA. The proposed rules provide procedures to implement the statutory scheme.

VII. CONSIDERATION OF POSSIBLE IMPACTS ON AGRICULTURAL LANDS

The Agency is required by Minnesota Statutes, section 14.11, subdivision 2 (1990) to consider the impacts of proposed rules on agricultural lands:

> If the Agency proposing the adoption of the rule determines that the rules may have a direct and substantial adverse impact on agricultural land in the state, the Agency shall comply with the requirements of sections 17.80 to 17.84.

The definition of adverse impact which applies in this case is:

> "Action which adversely affects" means any of the following actions taken in respect to agricultural land which have or would have the effect of substantially restricting the agricultural use of the land: (1) acquisition for a nonagricultural use except acquisition for any unit of the outdoor recreation system described in section 86A.05, other than a trail described in subdivision 4 of that section; (2) granting of a permit, license, franchise or other official authorization for nonagricultural use; (3) lease of state-owned land for nonagricultural use except for mineral exploration or mining; or (4) granting or loaning of state funds for purposes which are not consistent with agricultural use.

Minnesota Statutes, section 17.81, subdivision 2 (1990).

The legislature has set agricultural land policies which guide administrative agencies' rulemaking efforts, and determination of adverse impact:

> It is the policy of the state to preserve agricultural land and conserve its long-term use for the production of food and other agricultural products by:
>
> (a) Protection of agricultural land and certain parcels of open space land from conversion to other uses;
>
> (b) Conservation and enhancement of soil and water resources to ensure their long-term quality and productivity;
>
> (c) Encouragement of planned growth and development of urban and rural areas to ensure the most effective use of agricultural land, resources and capital; and
>
> (d) Fostering of ownership and operation of agricultural land by resident farmers.

Minnesota Statutes, section 17.80, subdivision 1 (1990).

As stated above, the proposed rules establish procedures for providing notice and information regarding certain actions by the Agency to implement MERLA. The proposed rules have no discernible adverse impacts on agricultural lands. Therefore, the provisions of Minnesota Statutes, sections 17.80 to 17.84 are not applicable.

VIII. CONCLUSIONS

In this document and its exhibits, the Agency presents information establishing the need for, and the reasonableness of, the proposed rules governing Superfund administrative procedures. This document constitutes the Agency's "Statement of Need and Reasonableness" for the proposed rules.

Based on the foregoing, the proposed Minnesota Rules, parts 7047.0001 to 7047.0007 are both necessary and reasonable.

Dated: 12-18-90

Barbara Lindsey Sims
for Gerald L. Willet
Commissioner

STATE OF MINNESOTA

OFFICE MEMORANDUM

DEPARTMENT: ATTORNEY GENERAL

DATE: May 17, 1991

TO: PATTY NOLTE
Public Finance Division

FROM: BEVERLY CONERTON BC
Special Assistant
Attorney General

PHONE: 6-6087

SUBJECT: **Proposed Superfund Administrative Procedure Rules**

Enclosed and sent to you by fax and interoffice mail is the Notice of Withdrawal from Consideration by the Attorney General of the above-referenced proposed rules.

I discussed this with Charlene Hatcher yesterday and she suggested sending the Notice to you since she would be out of the office today.

BC:jlm:AY6

Enc.

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Rules Governing Superfund
Administrative Procedures,
Parts 7047.0001 - 7047.0007

NOTICE OF WITHDRAWAL FROM CONSIDERATION BY ATTORNEY GENERAL

Please take notice that the Minnesota Pollution Control Agency hereby withdraws the above-captioned rules which were submitted for review to the Attorney General on May 3, 1991. The rules are being withdrawn for correction and resolution of legal concerns.

Charles W. Williams
Commissioner

Dated: May 17, 1991

SAMPLE

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the ~~Emergency~~ Rule Amendments Relating to the Small Business Procurement Program

NOTICE OF WITHDRAWAL FROM CONSIDERATION BY ATTORNEY GENERAL

Please take notice that the Department of Administration hereby withdraws the above-captioned ~~emergency~~ rule for consideration by the Attorney General on September 26, 1990. The ~~emergency~~ rule will be resubmitted to the Attorney General's Office after correction and resolution of the legal concerns.

Sandra J. Hale

SANDRA J. HALE
Commissioner of Administration

Dated: September 26, 1990.

** TRANSMIT CONFIRMATION REPORT **

Journal No.	:	015
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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

GOVERNMENT SERVICES SECTION
525 PARK STREET
SUITE 500
ST. PAUL, MN 55103
TELEPHONE: (612) 297-2040
FACSIMILE: (612) 297-2576

FACSIMILE TRANSMISSION

MINNESOTA ATTORNEY GENERAL'S OFFICE
Government Services Section
500 Capitol Office Building
525 Park Street
St. Paul, Minnesota 55103
Telephone: (612) 297-2040
Facsimile: (612) 297-2576

Date: 5-15-91

Time: _____

TO: Bev Connerton

FAX NUMBER: 297-4139

FROM: Charlene Hatcher (296-9422)

NUMBER OF PAGES (INCLUDING THIS PAGE): _____

MESSAGE: As you requested.

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STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules Governing Administrative Procedures Under the Environmental Response and Liability Act, Minn. Rules Parts 7047.0001 Through 7047.0007

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

STATE OF MINNESOTA)
ss.
COUNTY OF RAMSEY)

Allen Dotson, being duly sworn says:

I hereby certify that the list of persons and associations who have requested, pursuant to Minn. Stat. §§ 14.14, subd. 1a and 14.22 (1990), that their names be placed on the Minnesota Pollution Control Agency's rulemaking mailing list is accurate, complete, and current as of this 24th day of January 1991.

That on the 24th day of January 1991, at the city of St. Paul, county of Ramsey, state of Minnesota, I mailed the attached Notice of Intent to Adopt Rules Without a Public Hearing by depositing in the state of Minnesota Central Mail System or in the United States mail for first class mailing a copy thereof, with postage prepaid, to all persons and associations on the aforementioned mailing list.

Allen Dotson

Subscribed and sworn to before me
this 24th day of January 1991.

Jodi D. Rasmusse
Notary Public

JODI D. RASMUSSEN
NOTARY PUBLIC — MINNESOTA
RAMSEY COUNTY
My commission expires 10-23-94

CERTIFICATE OF AGENCY'S AUTHORIZING RESOLUTION

I, Barbara Lindsey Sims, do hereby certify that I am the Acting Commissioner of the Minnesota Pollution Control Agency, an agency duly authorized under the laws of the state of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Minnesota Pollution Control Agency duly and properly called and held on the 18th day of December 1990, that quorum was present at said meeting, that majority of those present voted for the resolution and that said resolution will be set forth in the minutes of said meeting and has not been rescinded or modified:

BE IT RESOLVED, that the Commissioner of the Minnesota Pollution Control Agency (Agency) is hereby granted authority to sign and to give notice of the Agency's intent to adopt, without a public hearing, the attached proposed rules governing Superfund administrative procedures (Minn. Rules pts. 7047.0001 through 7047.0007), to all persons who have registered their names with the Agency for that purpose, and to publish the notice and the rules in the State Register, and to perform any acts incidental thereto, including making any form changes in the rules that the Revisor of Statutes requires the Agency to make in order to obtain the Revisor's certification as required by Minn. Stat. § 14.07, subd. 2 (1990).

BE IT FURTHER RESOLVED, that in the event a public hearing becomes necessary, the Commissioner is hereby granted the authority to call a hearing for the purpose of promulgating said rules, as well as to perform any and all acts incidental thereto, including but not limited to, signing an Order for and notice of hearing, as well as acting as the Agency's representative at all hearings.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 9th day of January, 1990.

Barbara Lindsey Sims

Barbara Lindsey Sims
Acting Commissioner

Ground Water & Solid Waste Division
Program Development Section

File Name

Sub File Name

STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules
Governing Superfund Administrative
Procedures, Parts 7047.0001 To 7047.0007

FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER ADOPTING RULES

The above-entitled matter came on for decision before the Minnesota Pollution Control Agency (MPCA) on the 23rd day of April 1991. After affording all interested persons opportunity to present written and oral data, statements, and arguments to the MPCA, in accordance with statutory requirements regarding the adoption of noncontroversial rules, after considering the Statement of Need and Reasonableness, after considering all of the evidence adduced upon the record, files and proceedings herein, the MPCA, being fully advised in the premises, hereby adopts the following Findings of Facts, Conclusions, and Order:

FINDINGS OF FACT

1. Notice of the MPCA's intent to adopt the above proposed rules without a public hearing was published in the State Register on January 28, 1991 (15 S.R. 1672), and was sent by mail to all persons on the list maintained by the MPCA pursuant to Minn. Stat. §§ 14.14, subd. 1 (a) and 14.22 (1990) on January 24, 1991.

2. The Statement of Need and Reasonableness was prepared prior to mailing and publication of the notice and was made available to the public.

3. All persons were given the opportunity to submit comments on the rules for 30 days after notice of proposed rulemaking. The 30-day comment period, as set out in the January 28, 1991, notice in the State Register, expired on February 26, 1991.

4. During the comment period the MPCA received three requests for a public hearing. Therefore, the MPCA did not receive requests for a public hearing from 25 or more persons which were not withdrawn.

5. The MPCA received one oral request for notice of submission of the adopted rules to the Attorney General.

6. During the comment period the MPCA received six written comment letters (Ashland Petroleum Company; Braun Intertec Environmental, Inc.; Faegre & Benson; George A. Hormel & Company; Olmsted County, Minnesota; Oppenheimer, Wolff & Donnelly). The MPCA staff responded to the commenters by letter dated March 15, 1991. At the March 26, 1991, meeting of the MPCA Board, MPCA staff requested that the Board adopt the rules as proposed, without modifications. Following appearances by commenters and their clients, the Board deferred its consideration of adoption of the rules, and requested that staff meet with commenters to seek resolution of specific issues raised during the meeting. The MPCA staff met with the commenters on April 2, 1991. The MPCA finds that the following modifications to the proposed rules are supported by the data and views submitted to the MPCA in this proceeding.

a. Part 7047.0003, subpart 2 - Mailing requirements for the Commissioner's Notice Letter (notice letter). The proposed rules are modified to provide that the Commissioner will send the notice letter at least 80 days before the date upon which the Board is scheduled to consider issuing the RFRA. This modification of the proposed rules is necessary to ensure that the notice letter mailing provisions are consistent with the modification provided in item b. below, concerning the length of the period provided by the rules to recipients for response to the notice letter.

b. Part 7047, subpart 3, item F - Contents of notice letter. The proposed rules are modified to provide for a 60-day (rather than a 30-day) period for response to the notice letter. This modification is supported by written comments received by the the MPCA (Ashland Petroleum Company; Braun Intertec Environmental, Inc.; Faegre & Benson; Olmsted County, Minnesota; and Oppenheimer, Wolff & Donnelly) that a 30-day response period would be insufficient.

c. Part 7047.0004, subpart 2 - Acceptance of additional information. The proposed rules are modified to provide for an extension to the notice letter response period if the Board defers action on a RFRA. This modification is supported by written comments received by the MPCA (Braun Intertec Environmental, Inc.; Faegre & Benson; Olmsted County, Minnesota; and Oppenheimer, Wolff & Donnelly) which state that the proposed rules provided insufficient time to respond to a notice letter and that MPCA staff could enjoy an undue advantage in submitting additional information to the Board. This provision is incorporated as a new "subpart 4"; proposed subparts 4-6 have been re-numbered accordingly.

d. Part 7047.0005, subpart 2 - Scope of consent order. This subpart has been deleted from the proposed rules. The MPCA finds that deletion of this language provides an acceptable means to address the concerns of commenters while protecting the interests of the MPCA in negotiations of consent orders. The modification supported by written comments submitted during the comment period (Braun Intertec Environmental, Inc.; Faegre & Benson; George A. Hormel & Company; Olmsted County, Minnesota; and Oppenheimer, Wolff & Donnelly), stating that the deleted provision would unduly inhibit or restrict the negotiation of consent orders in Superfund matters.

7. The MPCA finds that the modifications to the proposed rules as described in paragraph 6 above, do not result in any substantial change in the rules as proposed for the following reasons. The modifications regarding the time for recipients of a notice letter to submit information to the MPCA do not change the process provided in the original rule by which the MPCA Commissioner provides notice of Board action on a RFRA and the recipients of such notice may respond to the letter. The modifications merely extend the period provided in the proposed rules during which this process will take place. The deletion of the subpart limiting the scope of consent orders negotiated after issuance of a RFRA will leave intact the status quo with respect to negotiation of such consent orders. The modification does not change the negotiating positions of any party from current practice. The MPCA staff and the MPCA Board currently are not subject to any limitation on the scope of such negotiations. The scope of consent order negotiations and agreements is a matter that may properly be left to the discretion of the MPCA with the advice of the Attorney General's Office.

8. The MPCA adopts the Statement of Need and Reasonableness, in its entirety, as the factual basis for the proposed rules. The MPCA hereby incorporates the Statement of Need and Reasonableness into these findings.

9. For comments other than those addressed by modifications explained above, the MPCA adopts the responses to comments received on the proposed rules that are set forth in the letter from MPCA staff to the commenters dated March 15, 1991.

10. The above-captioned rules are needed and reasonable.

CONCLUSIONS

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

2. The MPCA published and served due, timely, and adequate notice of the intent to adopt the rules without a public hearing.

3. All relevant legal and procedural requirements of statute and rule have been complied with.

4. All modifications to the proposed rules are supported by the data and views submitted to the MPCA.

ORDER

NOW, THEREFORE, IT IS ORDERED, that the attached Minn. Rules Parts 7047.0001 to 7047.0007 governing Superfund Administrative Procedures are adopted pursuant to the authority vested in the MPCA by Minn. Stat. §§ 14.06 and 116.07, subd. 3 (1990).

MINNESOTA POLLUTION CONTROL AGENCY

Dated: 4/24/91

Charles W. Williams
Commissioner

CERTIFICATE OF AGENCY'S AUTHORIZING RESOLUTION

I, Charles W. Williams, do hereby certify that I am the Commissioner of the Minnesota Pollution Control Agency, an agency duly authorized under the laws of the state of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Minnesota Pollution Control Agency duly and properly called and held on the 23rd day of April 1991, that quorum was present at said meeting, that majority of those present voted for the resolution and that said resolution will be set forth in the minutes of said meeting and has not been rescinded or modified:

BE IT RESOLVED, that the Minnesota Pollution Control Agency hereby approves and adopts the attached rules governing Superfund administrative procedures, Minn. Rules Parts 7047.0001 to 7047.0007, pursuant to the authorities vested in the Minnesota Pollution Control Agency by Minn. Stat. §§ 14.06 and 116.07, subd. 3 (1990).

BE IT FURTHER RESOLVED, that prior to publishing the rules as adopted in the State Register, the Commissioner is authorized to make any form changes to the rules that the Revisor of Statutes requires the Minnesota Pollution Control Agency to make in order to obtain the Revisor's Certification required by Minn. Stat. § 14.07, subd. 2 (1990).

BE IT FURTHER RESOLVED, that the Minnesota Pollution Control Agency adopts the attached Findings of Fact, Conclusions, and Order Adopting Rules and that the Commissioner is hereby authorized to sign the above-mentioned document on behalf of the Minnesota Pollution Control Agency and to perform the necessary acts to provide that the rules shall have the force and effect of law.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 3rd. day of May, 1991.

Charles W. Williams
Commissioner

Pollution Control Agency

Adopted Permanent Rules Relating to the Minnesota Environmental Response and Liability Act

Rules as Adopted

7047.0001 SCOPE.

Parts 7047.0001 to 7047.0007 apply to the procedures the commissioner and the board of the Minnesota Pollution Control Agency use in issuing requests for response action and determinations on actions requested to persons responsible for releases or threatened releases of hazardous substances or pollutants or contaminants under the Minnesota Environmental Response and Liability Act, Minnesota Statutes, chapter 115B, and to negotiate with responsible persons concerning response actions requested by the board in a request for response action. Parts 7047.0001 to 7047.0007 do not apply to emergency removal actions which may be taken by the commissioner under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (b), and they do not restrict the authority of the board or the commissioner to take actions under Minnesota Statutes, section 115B.17, subdivision 2.

7047.0002 DEFINITIONS.

Subpart 1. **Scope.** As used in parts 7047.0001 to 7047.0007, the following terms have the meanings given them in this part unless the context in which the term is used clearly requires otherwise.

Subp. 2. **Agency.** "Agency" means the Minnesota Pollution Control Agency.

Subp. 3. **Board.** "Board" means the citizen board of the agency established under Minnesota Statutes, section 116.02.

Subp. 4. **Commissioner.** "Commissioner" means the commissioner of the agency.

Subp. 5. **Commissioner's notice letter or notice letter.** "Commissioner's notice letter" or "notice letter" means a letter

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from the commissioner informing a person of the intent of the agency staff to recommend that the board issue a request for response action to the person.

Subp. 6. **Consent order.** "Consent order" means a response order by consent that is a legally enforceable contract between the agency and one or more responsible persons governing the implementation of response actions to address a release or threatened release of a hazardous substance or pollutant or contaminant, and related matters, including reimbursement of agency expenses recoverable under Minnesota Statutes, section 115B.17, subdivision 6.

Subp. 7. **Determination on actions requested or DOAR.** "Determination on actions requested" or "DOAR" means a written determination issued by the board pursuant to Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a), clause (3) that a responsible person will not take response actions requested in a request for response action in the manner and within the time requested.

Subp. 8. **Hazardous substance.** "Hazardous substance" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 8.

Subp. 9. **Person.** "Person" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 12.

Subp. 10. **Pollutant or contaminant.** "Pollutant or contaminant" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 13.

Subp. 11. **Release.** "Release" means a release of a hazardous substance or pollutant or contaminant as defined in Minnesota Statutes, section 115B.02, subdivision 15.

Subp. 12. **Request for response action or RFRA.** "Request for response action" or "RFRA" means a written document issued to a responsible person by the board pursuant to Minnesota Statutes, sections 115B.17, subdivision 1, paragraph (a), and 115B.18, subdivision 3, requesting the responsible person to take response actions deemed by the board to be reasonable and necessary to protect the public health or welfare or the

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environment with respect to a release or a threatened release.

Subp. 13. **Response.** "Response" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 18.

Subp. 14. **Responsible person.** "Responsible person" means a person identified in a RFRA or DOAR as a person who is responsible for a release or a threatened release under the terms of Minnesota Statutes, section 115B.03.

7047.0003 COMMISSIONER'S NOTICE LETTER.

Subpart 1. **Notification.** Before the agency staff recommend to the board that it issue a RFRA to a person, the commissioner shall send a letter notifying the person that the agency staff intend to recommend issuance of the RFRA.

Subp. 2. **Mailing requirements.** The commissioner shall send the notice letter by certified mail, return receipt requested, at least ~~45~~ 80 days before the date upon which the board is scheduled to consider issuing the RFRA.

Subp. 3. **Contents of notice letter.** The notice letter shall contain the following:

A. notification that the agency staff intend to recommend that the board issue a RFRA to the recipient of the notice letter;

B. a brief explanation of the agency's authority to issue the RFRA;

C. a summary of the statutory determinations that the board must make in order to issue a RFRA;

D. a brief summary of the history of the site of the release or threatened release;

E. a brief explanation of the basis upon which the agency staff intend to recommend that the board make the statutory determinations necessary to issue the RFRA;

F. notification that the recipient has ~~30~~ 60 days from the date of receipt of the notice letter in which to submit to the commissioner, in writing, any additional information that the recipient wishes the board to consider in deciding whether to issue the RFRA; and

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G. a request that the recipient submit, within ~~30~~ 60 days of receipt of the notice letter, a brief written statement of intent to enter or not to enter into negotiation of a consent order, or an explanation of the recipient's uncertainty concerning consent order negotiations.

Subp. 4. **Examination of additional information.** If the recipient of a notice letter submits information relevant to the issuance of the RFRA within ~~30~~ 60 days after receipt of the notice letter, the commissioner shall review the information and submit it, together with the commissioner's response, to the board.

7047.0004 REQUESTS FOR RESPONSE ACTIONS.

Subpart 1. **Effect of RFRAs.** Issuance of RFRAs to known responsible persons constitutes the action by the board required under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a), clause (1) as a prerequisite to taking removal or remedial action under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a). Issuance of a RFRA to a responsible person also constitutes the action authorized by Minnesota Statutes, section 115B.18, subdivision 3.

Subp. 2. **Acceptance of additional information.** At the board meeting when issuance of the RFRA is considered, the board shall not accept or consider information relevant to issuance of the RFRA submitted by the recipient of a notice letter if the information was not provided to the commissioner within ~~30~~ 60 days after the date of receipt of the notice letter, unless the board determines that the person submitting it has clearly shown that:

A. the information or data was discovered or obtained after the end of the ~~30-day~~ 60-day period;

B. the information could not have been discovered or obtained by reasonable effort of the person within the ~~30-day~~ 60-day period; and

C. the information was submitted to the commissioner and the board as soon as practicable after it was discovered or

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obtained, but, at a minimum, within the time required by part 7000.1500, subpart 1.

Subp. 3. **Consideration of additional information.** If the board accepts additional information presented by the person as provided in subpart 2, the board shall either:

A. act on the RFRA giving due consideration to the information and any response by agency staff; or

B. defer action on the RFRA until the next regularly scheduled board meeting or another date certain as determined by the board.

Subp. 4. **Additional information when action deferred.** Notwithstanding the provisions of subpart 2, if the board defers action on a RFRA for any reason, the recipient of a notice letter shall have until the end of the 20th day before the board meeting to which action has been deferred to submit any additional information to the commissioner regarding the decision of whether to issue the RFRA. Acceptance or consideration of information not provided to the commissioner by the 20th day before the board meeting shall be subject to the provisions of subpart 2.

Subp. 5. **Staff presentation of additional information.** At the board meeting when issuance of a RFRA is considered, the agency staff may present information to the board as the basis for recommending issuance of a RFRA that was not included or referenced in the notice letter, and the person to whom the RFRA is to apply may present information relevant to respond to the agency staff's information, if the following requirements are met:

A. the additional information presented by the agency staff has been included or referenced in the staff memorandum prepared for the board as the basis for the staff recommendation; and

B. the agency staff have notified the person that additional information has been included or referenced in the staff memorandum and make the memorandum available to the person within the time provided in part 7000.0500, subpart 11.

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Subp. 5~~.~~ 6. **Scope of RFRA.** In addition to meeting the requirements of Minnesota Statutes, sections 115B.17, subdivision 1, paragraph (a), and 115B.18, subdivision 3, the RFRA shall include the following components:

A. reference to issuance of the notice letter; and

B. a time frame for consent order negotiations if required under part 7047.0005.

Subp. 6~~.~~ 7. **RFRA effective upon issuance.** The RFRA, including the schedule for response actions, is effective upon issuance.

7047.0005 CONSENT ORDERS.

Subpart 1. **Consent order negotiations.** If the recipient of a notice letter has notified the commissioner in writing within 30 days of receipt of the notice letter that the recipient intends to negotiate a consent order or that the recipient is uncertain regarding negotiations, the board shall specify a time frame in the RFRA during which the agency staff shall negotiate a consent order. If the recipient has notified the commissioner in writing within 30 days of receipt of the notice letter that the recipient does not intend to enter into consent order negotiations or has failed to notify the commissioner within that period, the board will not include a time frame for negotiating a consent order in the RFRA. If the time frame specified in a RFRA has expired without execution by the responsible person of a consent order that the agency staff agree to recommend to the board for its approval, or if no time frame has been specified in a RFRA, the agency staff are not required to negotiate a consent order.

Subp. 2. ~~**Scope of consent order.** A consent order negotiated after issuance of a RFRA must provide for a scope of response actions substantially equivalent to that requested in the RFRA or for those response actions remaining to be implemented when the consent order is executed.~~

~~Subp. 3.~~ **Execution of consent order.** If a consent order is executed by the agency and a responsible person after

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issuance of a RFRA, the consent order, instead of the RFRA, shall govern the response actions to be taken by the responsible person.

7047.0006 DETERMINATION ON ACTIONS REQUESTED.

Subpart 1. **Issuance of a DOAR.** If the commissioner determines that a responsible person will not take the response actions requested in a RFRA in the manner and within the time requested, the commissioner shall request that the board issue a DOAR with respect to the responsible person.

Subp. 2. **Effect of DOAR.** Issuance of a DOAR to known responsible persons constitutes the action required under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a), clause (3) as a prerequisite to taking removal or remedial action under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a). A DOAR may include a finding by the agency that a responsible person has failed to take response actions or to make reasonable progress in completing response actions requested in a RFRA, for the purpose of authorizing the commissioner to request the attorney general to commence legal action against the responsible person under Minnesota Statutes, section 115B.18, subdivision 1 or 2.

7047.0007 AUTHORITY OF ATTORNEY GENERAL NOT LIMITED.

Except to the extent that issuance of a RFRA is required before an action may be brought under Minnesota Statutes, section 115B.18, subdivision 1 or 2, nothing in parts 7047.0001 to 7047.0007 shall be interpreted to limit or set any condition upon the commencement of any legal action which the attorney general is authorized to bring under Minnesota Statutes, chapter 115B.

Approved
by Revisor _____

COUNTY OF Olmsted

THE COURTHOUSE
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RECEIVED
FEB 28 91
MPCA, Ground Water
& Solid Waste Div.

February 26, 1991

Mr. Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, MN 55155-3898

Re: Proposed Permanent Rules 7047.0001-.0007
relating to the MERLA

Dear Mr. Dotson:

Please accept these comments sent via FAX transmittal this date and followed up by U.S. Mail. These comments are provided on behalf of Olmsted County, a political subdivision of the State of Minnesota.

First of all, Olmsted County concurs in the comments previously submitted by Attorney Robert E. Cattanach in his letter to you. I would, however, like to underscore a few points.

The 30 day response time for PRP's to respond to the Commissioner's notice letter is unreasonably short. The position that the PRP takes before the Board is important and is worthy of sufficient time to be done well. PRP's which happen also to be governmental entities need additional time to take into account that not all governmental entities meet often enough to be able to formulate a position and then to authorize its staff to present that position, all within 30 days.

Furthermore, a rule which bars presentation of evidence to the Board not included in the PRP's initial response presents an unfair advantage to PCA staff - especially if staff asserts a time limit which also prohibits inclusion in materials to go to the Board which are not sent to the agency 2-3 weeks in advance of the Board's meeting to consider the RFRA request.

The decision whether to try to negotiate a consent order is also critical - made even more so by the fact that current law prohibits a political subdivision from "counting" towards its liability limit sums spent on remedial action prior to issuance of a RFRA. (See Minn. Stat. §115B.04, Subd. 4(c)). So, unless the law is changed (and there is currently pending an attempt to do so), a political subdivision must also decide whether to forego negotiations in favor of a quicker RFRA decision and a possible earlier start to remediation of a site. This is potentially a significant economic and political decision - one that taxes the 30 day limit proposed.

Limiting PCA staff's ability to negotiate a consent order to one that is substantially equivalent to the RFRA is ill-defined and possibly not even meaningful. Olmsted County's experience was that the time frames for tasks as found in the RFRA were unrealistically short. For example, if "substantially equivalent" binds PCA staff to the timelines proposed in the RFRA, the entire remediation process starts off with the inherent problem of inadequate timelines, which can only be compounded as the process moves along. The negotiations must be more meaningful than a "take it or leave it" proposition.

While the proposed rules do not discuss how much time is to be given to negotiating a consent order, that aspect cannot be overlooked. Olmsted County's experience was that both the RP's (there were only 2) and the PCA staff wanted a meaningful consent order. Even meeting frequently to discuss issues and language and, further, making liberal use of FAX machines and word processors, we were barely able to finish the task within the time allowed.

The rules which are proposed, while seemingly straightforward, simply have too many far reaching effects to be adopted without a public hearing. Olmsted County requests such a public hearing.

Very truly yours,

Robert W. McIntosh

Robert McIntosh
Assistant Olmsted County Attorney

pr

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MPCA, Ground Water
& Solid Waste Div.

February 26, 1991

Mr. Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, MN 55155-3898

Re: Proposed Permanent Rules 7047.0001-0007 relating to the Minnesota Environmental Response and Liability Act.

Dear Mr. Dotson:

Please accept this comment and request for a public hearing regarding proposed rules 7047.0001-0007 relating to the Minnesota Environmental Response and Liability Act (MERLA) pursuant to a notice of proposed rulemaking published in the State Register on January 28, 1991. We submit this comment on behalf of named and unnamed clients. In particular, we have reviewed the Proposed Rules with BMC Industries, Inc., Control Data Corporation, and IBM Corporation, and they join in submitting this comment.

We support the Agency's effort to formalize the notice process in administering the state Superfund; however, we oppose portions of the proposed rules on the ground that they create serious due process concerns. Specifically, the proposed rules limit unfairly and unrealistically the ability of potentially responsible parties ("PRP"s) to prepare an adequate response to a Commissioner's notice letter and to present argument at any hearing at which issuance of a Request for Response Action ("RFRA") is considered. In addition, we urge the Agency to clarify certain ambiguities in the proposed rules concerning the Agency's discretion to negotiate a settlement and the effect of the rules on a contested case hearing before an Administrative Law Judge ("ALJ"). Following are our specific comments.

1. The 30-day response period is unworkably short.

Under Proposed Rule 7047.0004 subp. 2. a PRP must respond with all of its information within 30 days of receiving a notice letter unless the PRP discovers new information after the 30-day period that could not have been discovered by reasonable effort within the 30-day period. A PRP must also decide within the 30-day period whether to negotiate. Under the proposed rule, the PRP will be

barred from presenting any additional information after the 30 day period. This is fundamentally unfair. In many cases, the issues addressed by a notice letter are highly complex, technical problems that require extensive investigation, testing, and analysis. It is often impracticable even to obtain the results of testing and analysis within the 30-day period.

Even if results can be obtained, it may be impracticable to analyze the implications of the data and to determine the appropriate response within the 30-day period. A PRP may, at the end of the 30-day period, be forced to take an unnecessarily adverse position without sufficient information or time for reflection. This will work to the disadvantage of all parties. Given sufficient time to develop information, both the Agency and the PRP may come to agree on the appropriate action. Without sufficient time, PRP's may be forced to take an unnecessarily adverse position merely to preserve their rights. In addition, the short period creates incentives to perform inadequate testing and analysis.

Arguably, the PRP will be able to offer the more developed analysis after the 30-day period, as information that "could not have been reasonably discovered," but there will be inevitable and unnecessary disputes over what is "reasonable." We recognize the need to prevent delay and "stonewalling," but there is a legitimate need to have adequate time to prepare a considered and well-supported response. A minimum of a 90-day period should be allowed, with discretion to extend the time limit for unusually complex or difficult issues.

2. <u>The Agency has an unfair, one-sided power to present additional information to the Board without any showing comparable to that imposed on PRPs.</u>

Under Proposed Rule 7047.0004 subp. 4, the Agency may present new information to the Board for any reason or no reason, but PRPs are barred from the same privilege. In addition to the Agency's one-sided privilege of framing issues, the Agency may give itself long time periods in which to develop its arguments while holding the PRP to an unreasonably short response schedule. Under current Rule 7000.0500, the Agency may after lengthy investigation send a notice letter and require a PRP's response within 30 days. The Agency may then develop a reply to the response over a period of months and then schedule a hearing that gives the PRP only 10 days, or even only 2 days in case of a special meeting, to submit a sur-reply.

In the worst case, the Agency may vote to simply waive the requirement that the PRP get any advance notice of the Agency's new information. The Agency may thus determine the issues, adding issues and proof at will, while the PRP can not raise new issues or proof, and must make its response in an unreasonably short period of time. This certainly raises due process concerns.

We prefer that both sides retain the privilege of bringing up any relevant information as it is developed. At a minimum, fundamental fairness requires that the Agency be constrained by the same limits as the PRP. If the subpart is retained, it should also allow a PRP to submit any new information to the Agency up to and during the hearing subject only to the notice period provided by current Rule 7000.0500.

3. <u>The Proposed Rules should state explicitly that they do not limit the evidence or argument that may be presented before an Administrative Law Judge at a contested case hearing.</u>

Under current practice, a PRP is entitled to request a contested case hearing before an ALJ regarding the Board's decision to issue an RFRA. The hearing is <u>de novo</u>. The Proposed Rules should make clear that nothing in them limits the information or argument that may be presented to the ALJ at a contested case hearing.

4. <u>The Agency should have flexibility in negotiating a consent order.</u>

Under Proposed Rule 7047.0005 subp. 2 the Agency has no discretion to enter into a consent order that differs from the RFRA. The negotiation is simply a question of whether the PRP will capitulate without the formality of a DOAR. There may be negotiations in which there is an acceptable alternative to the action requested in the RFRA. Under the proposed rule, the Agency will be unable to pursue this alternative. The Agency should retain discretion to enter into a consent order that is not "equivalent" to the RFRA; the language of 7047.0005 subpart 2 should be changed to state a consent order must be acceptable to the board as meeting appropriate elements of the RFRA.

5. <u>The Proposed Rules should clarify certain ambiguities with regard to the negotiation of consent orders.</u>

Proposed Rule 7047.0005 subp. 1 states: "If the time frame [for negotiation] specified in a RFRA has expired . . . the agency staff are not required to negotiate a consent order." This implies that the Agency will not issue a DOAR during the negotiating period; however, some ambiguity exists. It should be made explicit that no DOAR will issue during the time period set for negotiations.

Additionally, the Proposed Rule does not address the length of the time period to be set for negotiation. While a flexible approach may be appropriate, PRPs need a guarantee of some reasonable, minimum time period in order to make an informed response to a notice letter. A standard should be set for the length of the negotiation period; e.g., the period shall be at least (90) days but may be longer if appropriate.

Thank you for your attention. Please feel free to call me if you have any questions or concerns.

OPPENHEIMER, WOLFF & DONNELLY

By 
Robert E. Cattanach

cc: Jake M. Holdreith

cc: BMC Industries, Inc.
Control Data Corporation
IBM Corporation

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FEB 26 91
MPCA, Ground Water & Solid Waste Div.

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FACSIMILE 336-3026

SUITE 1150, 8400 TOWER
8400 NORMANDALE LAKE BOULEVARD
BLOOMINGTON, MINNESOTA 55437-1076
612/921-2200
FACSIMILE 921-2244

10 EASTCHEAP
LONDON EC3M 1ET, ENGLAND
44/71-623-6163
FACSIMILE 623-3227

2500 REPUBLIC PLAZA
370 SEVENTEENTH STREET
DENVER, COLORADO 80202-4004
303/592-5900
FACSIMILE 592-5693

SUITE 500
1140 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036-4001
202/728-0952
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EUROPEAN COMMUNITY COUNSEL
PAUL EGERTON-VERNON
44/5-344-5543
FACSIMILE 344-2703

400 CAPITAL SQUARE
400 LOCUST STREET
DES MOINES, IOWA 50309-2335
515/248-9000
FACSIMILE 248-9010

February 26, 1991

Mr. Allen Dotson
Minnesota Pollution Control Agency
Groundwater and Solid Waste Division
520 Lafayette Road
St. Paul, MN 55155-3898

VIA HAND DELIVERY

RE: Minnesota Pollution Control Agency's
Proposed Permanent Rules Parts 7047.001 - 0007
Relating to Issuance of Requests for Response Action
Under the Minnesota Environmental Response and
Liability Act

Dear Mr. Dotson:

We represent IBM Corporation. The purposes of this letter are (1) to request a public hearing on the above-referenced proposed rules relating to issuance of requests for response actions ("RFRA's") under the Minnesota Environmental Response and Liability Act, pursuant to a Notice of Proposed Rule Making published in the State Register on January 28, 1991, and (2) to provide you with our comments concerning those proposed permanent rules.

1. The proposed 30-day period for submission of information is too short.

The Minnesota Pollution Control Agency staff is required to send a letter notifying a person that the MPCA staff intends to

recommend issuance of a RFRA. Under proposed rule 7047.0004, subp. 2, the recipient of the notice letter must submit additional information to the agency staff within thirty days of the receipt of the notice letter. This thirty day response period is unreasonably short and fundamentally unfair, in that the MPCA staff may have spent months or even years developing the information and the recipient is then required to respond within thirty days or risk losing its right to submit additional information.

Under the rule the recipient would be barred from presenting any additional information after the thirty day period.

The issues involved in these cases typically are complex, both factually and legally require extensive investigation, review and analysis. In many cases, the alleged generation os disposal of hazardous substances occurred years or even decades previously, making it all but impossible to gather information within the proposed 30-day period. Moreover, to the extent that the MPCA staff's determinations are based upon analytical data from a site, the 30-day period is too short to allow adequate time to review and analysis the data or undertake additional analytical work.

Moreover, the proposed rules do not require the MPCA staff to furnish to the recipient all underlying information inits possession on which the proposed RFRA is based. Proposed rule 7047.0004, subp. 3 requires the notice letter to contain "a brief summary of the history of the site of the release or threatened release" and "a brief explanation of the basis upon which the agency staff intends to recommend" the issuance of a RFRA. The rule makes no provision for providing the person with the information, including documentary information records or other sources of information, upon which the MPCA bases its statutory determination. As a practical matter, potentially responsible parties ("PRP") need to examine the underlying data to begin to develop an appropriate response. The rule should be revised to require the MPCA staff to provide the underlying information into the notice letter or to otherwise arrange for the responsible persons to examine the information.

2. <u>The proposed regulations would unnecessarily restrict the flow of information to the Board.</u>

Under proposed rule 7047.0004, subp. 4, the MPCA staff may, in effect, present new information to the board without a showing that the information could reasonably have been obtained prior to the issuance of the notice letter. The only

check on the ability of the staff to present new information to the board is the requirement that the information be "included or referenced" in the staff memorandum prepared for the board and that memorandum be made available prior to ten days before the hearing. Under the proposed rules, a recipient would not be able to bring up new information outside the scope of the agency's reply, no matter how relevant to the original notice letter.

Moreover, it is unclear whether the staff even has to bring the additional information to the attention of the board, no matter how relevant that information may be. Proposed rule 7047.0003, subp. 4 provides that information submitted by the recipient of the notice letter shall be reviewed by the staff. The staff apparently is required to submit the information to the MPCA board, however, only if the staff determines the information is relevant to the issuance of the RFRA. Thus, the staff may control the flow of information to the Board, and no mechanisms are provided for the information to be presented directly to the Board.

Responsible parties should be able, at a minimum, to submit any new information to the MPCA staff or the board.

3. <u>The proposed regulations provide no flexibility in negotiation of consent orders.</u>

Moreover, proposed rule 7047.0003, subp. 3(G), would require the recipient of the notice letter to furnish the staff with a statement whether the recipient will enter into consent order negotiations with the MPCA. Again the thirty day deadline is unreasonably short. It may very well be impractical for the recipient to gather the necessary data, including that in the possession of the MPCA staff, and to determine an appropriate response within a thirty day period. Thus, a recipient may be forced to take a position without sufficient information. Merely to preserve its rights, a recipient may be forced to take an adverse position.

Proposed rule 7047.0005, subp. 2, would remove any discretion of the agency to enter into a consent order different from the terms contained in the RFRA. This provision removes any ability of the staff or the PRP to negotiate a consent order. The only question is whether the PRP will sign without the necessity of the proposed DOAR.

Moreover, to preclude flexibility in the consent order negotiation process is to presuppose the RFRA is was adequately based inlaw and fact, not the least of which is that all

analytical data is correct. Since RFRA's are typically issued early in the process of investigation and remediation of sites, there is a great potential that circumstances may change from those reflected in the RFRA.

Thus, the rule should be changed to provide that the MPCA may negotiate a consent order "consistent with" the RFRA.

Thank you for your attention to these matters. If you have any questions, please feel free to call me.

Very truly yours,

Delmar R. Ehrich

DRE/cmg
cc: Daniel Foley, Chairman, MPCA Board
Commissioner Charles Williams
2577D

1345 Northland Drive
Mendota Heights, Minnesota 55120
Phone 612/683-8700 Fax: 612/683-8888

BRAUN ENVIRONMENTAL SERVICES

Quality Services Since 1957

February 25, 1991

RECEIVED
FEB 28 91
MPCA, Ground Water
& Solid Waste Div.

Mr. Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, MN 55155-3898

Re: PROPOSED PERMANENT RULES RELATING TO THE MINNESOTA ENVIRONMENTAL RESPONSE AND LIABILITY ACT (PROPOSED MINN. RULES PARTS 7047.0001-.0007, 15 S.R. 1673-75)

Dear Mr. Dotson:

The following comments are submitted by Braun Intertec Environmental, Inc., (Braun Intertec) with regard to the above-referenced proposed rules. In general, Braun Intertec supports the concept of the Minnesota Pollution Control Agency (MPCA) adopting rules to govern the process of issuance of a Request for Response Actions (RFRA). We believe that adoption of rules to govern processes surrounding issuance of a RFRA to potentially responsible persons[1] will serve to protect the rights of these parties. The MPCA staff will be required to provide advance notification to potentially responsible persons of the information which the MPCA staff is relying upon to recommend issuance of the RFRA. The potentially responsible person will be allowed to make information available to the staff and the MPCA Board. These rules will also greatly reduce the ability of responsible persons to delay response actions through protracted negotiations with the MPCA. Setting deadlines for negotiation will ensure that the MPCA can take response actions where appropriate should the responsible person fail to do so within a reasonable time.

However, there are three parts of the proposed rules for which we are suggesting modifications. First, we believe that persons notified that they are potentially responsible and to whom the MPCA staff intends to recommend issuance of a RFRA should be provided sufficient time to review their records to find information to show that they are not, in fact, a responsible person. Second, we believe that it is unfair to restrict information which can be brought before the MPCA Board by a potentially responsible person. Finally, we believe that the scope of a Consent Order should not be limited by the staff's prior determination of the needed scope of work. The following comments are submitted to address these concerns.

[1] Although the term "potentially responsible person" does not occur in Minn. Stat. Chapter 115B, I will use it in the sense analogous to its usage under CERCLA to refer to a person to whom the MPCA Board has not yet issued a RFRA.

1. Available time for potentially responsible person to respond.

We support the intent of part 7047.0003 (Commissioner's Notice Letter). However, the time frames set forth within this part may not allow potentially responsible persons to find and evaluate information in their records necessary to show that they are not actually a responsible person. Often, potentially responsible persons are not aware that they may have disposed of hazardous substances at a superfund site. There is no requirement for the MPCA staff to have sent all potentially responsible persons a request for information, and MPCA could rely on third party information to determine that a party is a potentially responsible person.

Thus, the records of the potentially responsible person may not readily show that their wastes did not contain hazardous substances, and these individuals may need time to closely examine their past waste disposal practices. We believe that potentially responsible persons should have the ability to seek expert legal or scientific advice regarding their past activities before issuance of the RFRA. The 30 day time frame in the current proposed rule may not provide adequate time for a potentially responsible person to hire qualified assistance, review records, evaluate the information, summarize the information, and submit it to the MPCA staff.

It is thus our recommendation that proposed Minnesota Rule 7047.0003 be amended as described below:

Amend proposed Subp. 3 by amending Item F. as follows:

> F. notification that the recipient has 30 days from the date of receipt of the notice letter in which to submit to the commissioner, in writing, any additional information that the recipient wishes the board to consider in deciding whether to issue the RFRA, or if the recipient is requesting a 30 day extension to perform further research on the recipient's records, 21 days from the date of receipt of the notice letter to submit the statements referenced in Subpart 5; and

Add a new Subpart 5 as follows:

> Subp. 5. **Request for extension of time.** The recipient of a notice letter shall be granted a single 30 day extension to submit information to the commissioner if the recipient submits to the commissioner within 21 days of receipt of the date of receipt of the notice letter a statement that the recipient has reason to believe that further review of the recipient's files may provide data or information which will show that the recipient is not a responsible person as defined in *Minnesota Statutes*, section 115B.03, and that the recipient has engaged the services of an attorney or an environmental consultant to assist in review and evaluation of the recipient's files.
>
> If the commissioner grants an extension under this subpart, all recipients sent notice letters regarding the same facility and given the same deadline for submittal of information shall be provided the same 30 day extension. Such notice of extension shall be granted within ten days of receipt of the request for extension of time.

2. Limitations on information brought before the Board.

We have concerns over the intent of Part 7047.0004, subparts 2 through 4. It appears that this rule is attempting to impose procedures on the Board's processes of consideration much like those governing lawsuits. As written, the MPCA staff has virtually unlimited time to develop a case against a potentially responsible person, while that person has only the 30 days between the time he is notified of an impending RFRA and completion of the staff Board Item to compile and submit information. Furthermore, the MPCA Board is not a quasi-judicial body which is bound by civil rules of procedure. Given the potential liabilities of potentially responsible persons, it is unfair to limit the information which they can bring before the MPCA Board. The ability of potentially responsible persons to delay proceedings for more than one month through continual submittal of new information is small, given the ability of the Board Chairperson to cut off debate through the Board's rules of procedure. We feel that subparts 2 through 4 could be deleted without damage to the beneficial effects of these rules. However, if MPCA staff is concerned about delays through continuing submittal of information, the rules could be modified as follows:

> Subp. 2. **Acceptance of additional information.** At the board meeting when issuance of the RFRA is first considered, the board shall ~~not~~ accept and consider information relevant to issuance of the RFRA submitted by the recipient of a notice letter if the information ~~was not provided to the commissioner within 30 days after the date of receipt of the notice letter~~ is presented in writing to the board and the commissioner within the time required by part 7000.1500, subpart 1. If the board defers consideration of the matter until a subsequent board meeting, the board shall not thereafter consider additional information submitted by the recipient of a notice letter unless it is submitted in writing to the commissioner more than 21 days prior to the scheduled date of the subsequent board meeting at which the item is considered, unless the board determines that the person submitting it has clearly shown that:
>
> A. the information or data was discovered or obtained after the ~~end of the 30-day period~~ deadline for submittal in subpart 2;
>
> B. the information or data could not have been discovered or obtained by reasonable effort of the person ~~within the 30-day period~~ by the deadline for submittal in subpart 2; and
>
> C. the information was submitted to the commissioner and the board as soon as practicable after it was discovered or obtained, but, at a minimum, within the time required by part 7000.1500, subpart 1.

Delete proposed subpart 3 in its entirety, as it is unnecessary. The Board has the ability to decide how it will act on matters which come before it.

Renumber proposed subpart 4 as subpart 3 and add the following provision after item B.:

> In considering the additional information, the board shall give due consideration to the ability of the person to whom the RFRA is to apply to respond to this additional information or to provide information in response on short notice.

3. Limitations on scope of Consent Order negotiations.

One provision of the rules which is particularly troubling to us is Part 7047.0005, subpart 2. The effect of this section is to grant to MPCA staff the sole authority to determine the scope of work at a superfund site. It has occurred that, during the negotiation process, a responsible person and his technical experts have provided information relating to a site which showed that parts of the MPCA staff's scope of work were unnecessary. This information would not necessarily be available for the MPCA Board's consideration at the time the RFRA is issued. (Furthermore, we believe that the MPCA Board should not be involved in the technical aspects of negotiating the scope of work at a site; rather, this should be the role of the MPCA staff).

Thus, Part 7047.0005, subpart 2 unnecessarily constrains the ability of the MPCA staff and the responsible person to negotiate a Consent Order. Removing this section would not permit responsible persons to significantly delay response actions through protracted negotiations. The MPCA staff has the ability to decline to enter into an agreement unacceptable to them and to request the MPCA Board to issue a Determination on Actions Requested (DOAR). We therefore request removal of Part 7047.0005, subpart 2 as proposed.

While the modifications we request would likely not be considered non-substantial, and would therefore require re-noticing of the proposed rules, we believe that they would result in rules which are more fair and provide due process to potentially responsible persons who may be responsible for hundreds of thousands of dollars in response costs. They would also allow the MPCA staff to consider information expeditiously collected by the responsible person and to modify the scope of response actions if this is appropriate.

Please provide us a copy of the board item for the meeting at which this rule will be considered and the final rule as adopted. You may contact me at 683-8725 if you have any questions.

Very Truly Yours,

BRAUN INTERTEC ENVIRONMENTAL, INC.

Stephen D. Riner
Supervisor, Regulatory Assistance Section
Site Assessment Department

Ashland

Ashland Petroleum Company

DIVISION OF ASHLAND OIL, INC.

P. O. BOX 391 • ASHLAND, KENTUCKY 41114 • (606) 329-3333

LAW DEPARTMENT

RECEIVED

FEB 2 5 91

MPCA, Ground Water & Solid Waste Div.

February 19, 1991

Mr. Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, MN 55155-3898

Dear Mr. Dotson:

Re: **Comments: Proposed Permanent Rules Relating to the Minnesota Environmental Response and Liability Act**

Thank you for the opportunity to comment on the proposed RFRA rules.

Many of the sites that will be addressed with RFRA's are complex; they often contain multiple parties with complex factual situations. They also often require an expert's analysis of technical data. It is often believed prudent to try to uncover potentially responsible parties that appear to have vanished or have gone through a name change or merger. For these and a variety of other reasons, considering the seriousness of the RFRA process, Ashland believes that enough time should be allocated to the process so that reliable and meaningful results could be considered and so that the risk of erroneously naming a person as responsible could be effectively managed. Ashland is concerned that the time frames set out in the rules (30 and 45 days) are too compressed to allow for meaningful considerations and to allow for the development of fundamental information, and to allow all concerned to address a situation in a deliberate and professional manner. Ashland therefore comments and proposes that the 30 and 45 day schedules be enlarged to 60 and 90 days, respectively. It is believed that a 60 and a 90 day schedule would provide for the aforementioned objectives while still providing for expeditious and responsible action at a site.

Thank you for your consideration.

Very truly yours,

Robert W. Everett

dlh
l021991

Hormel 100TH ANNIVERSARY

P.O. Box 800
Austin, Minnesota 55912

RECEIVED
FEB 20 91
MPCA, Ground Water
& Solid Waste Div.

February 18, 1991

Writer's Direct Dial Number: (507) 437-5760
Law Department Fax Number: (507) 437-5135

Mr. Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, MN 55155-3898

Re: Proposed Permanent Rules Relating to the Minnesota Environmental Response and Liability Act

Dear Mr. Dotson:

I am writing on behalf of Geo. A. Hormel & Company. I am not sure whether the concern we intend to raise in this letter constitutes a "comment" or a question. Section 7047.0005, subp. 2 of the proposed rules covering requests for responsive action (RFRA's) mandates that "a consent order negotiated after issuance of a RFRA must provide for a scope of response action substantially equivalent to that requested in the RFRA."

Our question is this: if the minimum scope of the consent order is prescribed by regulation, what is being "negotiated" with the "responsible person?" We may be missing something, but to us the proposed rule makes it sound like the "negotiations" are a fait accompli.

I am not certain whether the comments process contemplates responding to specific questions such as this, but we are hopeful that you or someone in your organization will be willing to address our concern. Thank you for your assistance in this matter.

Very truly yours,

JEFFREY M. ETTINGER
Corporate Attorney

mjh

TEL: (507) 437-5611
FAX: (507) 437-5489

Carol A. Eckersen
Workers' Compensation Judge
Office of Administrative Hearings
Workers' Compensation Section
400 Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

Any written material received by the Office of Administrative Hearings 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: 25 January 1990

William G. Brown
Chief Administrative Law Judge
Office of Administrative Hearings

Dated: 26 January 1990

Kenneth B. Peterson
Commissioner
Department of Labor and Industry

Department of Labor and Industry

Labor Standards Division

Notice of Prevailing Wage Determinations for Highway/Heavy and Commercial Projects

On February 1, 1990 the commissioner certified prevailing wage rates for highway/heavy and commercial construction projects in the following Minnesota counties: **AITKIN, BECKER, BELTRAMI, CARLTON, CASS, CLAY, CLEARWATER, COOK, CROW WING, HUBBARD, ITASCA, KITTSON, KOOCHICHING, LAKE, LAKE OF THE WOODS, MAHNOMEN, MARSHALL, NORMAN, OTTERTAIL, PENNINGTON, POLK, REDLAKE, ROSEAU, ST. LOUIS, WADENA, WILKIN.**

A copy of the determined wage rates for Minnesota counties may be obtained by contacting the Minnesota Department of Labor and Industry, Prevailing Wage Section, 443 Lafayette Road, St. Paul, Minnesota 55155. The charges for the cost of copying and mailing are $.50 for the first county and $.30 for any subsequent copies of the same or other counties. The cost for a complete set of the above counties will be $15.00. A sales tax of 6% must be added to all orders.

A check or money order payable to the State of Minnesota must accompany each request.

Ken Peterson, Commissioner
Department of Labor and Industry

Pollution Control Agency

Division of Ground Water and Solid Waste

Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Minnesota Environmental Response and Liability Act Administrative Procedures

NOTICE IS HEREBY GIVEN that the Minnesota Pollution Control Agency (MPCA) is seeking information or opinions from outside sources in preparing to propose the adoption of rules governing procedures of the MPCA Commissioner and Board concerning:

(1) notification to potentially responsible persons of the MPCA Commissioner's intent to ask the MPCA Board to issue Requests For Response Action (RFRA) under the Minnesota Environmental Response and Liability Act (MERLA), *Minnesota Statutes* § 115B.7, subd. 1;

(2) submission of any additional information concerning a person's responsibility under MERLA to the MPCA Commissioner within a specified period of time after the person receives the Commissioner's notice of intent to recommend RFRA issuance; and

(3) consideration to be given by the MPCA Board, in issuing a RFRA, of information not submitted to the Commissioner within the specified time period. The adoption of the rule is authorized by *Minnesota Statutes* § 116.07, subd. 3 (1988), which allows the MPCA to adopt rules governing administration and procedure.

The MPCA seeks information and opinion on adopting into rules the administrative procedure currently used by the MPCA for issuing Commissioner' Notice Letters to potentially responsible persons under MERLA and for considering any additional information supplied by those persons prior to issuance of a RFRA by the MPCA Board. This process was described in a Board Item presented to the MPCA Board on December 20, 1988, entitled "Discussion of The Administrative Process Under The Minnesota Environmental Response And Liability Act." Copies of this Board Item are available from the MPCA upon request.

Interested persons or groups may submit data or views in writing or orally. Written or oral statements or comments should be directed to:

Susan Cedarleaf
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155
Telephone: (612) 296-7735

Oral statements will be received during regular business hours, 8 a.m. to 4 p.m., Monday through Friday.

All statements of information and opinion will be accepted until March 5, 1990. Any written materials received by the MPCA shall become part of the rulemaking record in the event that the rule is adopted.

Gerald L. Willet
Commissioner

Board of Marriage and Family Therapy

Notice of Regular Meetings for 1990

The regular meetings of the Minnesota Board of Marriage and Family Therapy for the year of 1990, shall take place on the third Friday of every month from 8:30 am to 11:30 am. The Board meetings shall take place on the following dates:

February 16, 1990
March 16, 1990
April 20, 1990
May 18, 1990
June 15, 1990
July 20, 1990
August 17, 1990
September 21, 1990
October 19, 1990
November 16, 1990
December 21, 1990

Office of Social Work and Mental Health Boards

Notice of Executive Committee Meetings for 1990

The regular meetings of the Minnesota Office of Social Work & Mental Health Boards Executive Committee for the year of 1990, shall take place on the third Friday of every month at 1:00 pm. The Committee meetings shall take place on the following dates:

February 16, 1990
August 17, 1990
March 16, 1990
April 20, 1990
May 18, 1990
June 15, 1990
July 20, 1990
September 21, 1990
October 19, 1990
November 16, 1990
December 21, 1990

Board of Social Work

Notice of Regular Meetings for 1990

The regular meetings of the Minnesota Board of Social Work for the year of 1990, shall take place on the first Friday of every month at 1:00 pm. The Board meetings shall take place on the following dates:

February 2, 1990
March 2, 1990
April 6, 1990
May 4, 1990
June 1, 1990
July 6, 1990
August 3, 1990
September 7, 1990
October 5, 1990
November 2, 1990
December 7, 1990

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

May 3, 1991

Ms. Martha Casserly
Special Assistant Attorney General
525 Park
St. Paul , Minnesota 55155
Suite 500

Re: In the Matter of the Proposed Rules Governing Superfund Administrative Procedures, Parts 7047.0001-7047.0007.

Dear Ms. Casserly:

On April 23, 1991, the Minnesota Pollution Control Agency adopted the above-cationed rules governing Superfund Administrative Procedures, Parts 7047.0001-7047.0007. Enclosed for your review are the following:

1. Rules as adopted (original and three copies).
2. Findings of Fact, Conclusions and Order Adopting Rules (two copies).
3. Certificate of Resolution Adopting Rules.
4. Notice of Intent to Solicit Outside Opinion (14 S.R. 1970, February 5, 1990).
5. Certificate of Authorizing Resolution.
6. Notice of Intent to Adopt Rules Without of Public Hearing and Rules as Proposed (15 S.R. 1672, January, 28, 1991).
7. Comments received during the comment period.
8. Notice of Intent ot Adopt Rules Without a Public Hearing, as mailed.
9. Affidavit of Mailing the Notice of Intent to Adopt Rule Without a Public Hearing and Certificate of Mailing List.
10. Rules as Proposed.
11. Statement of Need and Reasonableness.
12. Declaration of Counsel.

Equal Opportunity Employer

Printed on Recycled Paper

13. Notice of Submission of Rule Adopted Without Public Hearing to the Attorney General.

14. Affidavit of Mailing of Notice of Submission of Rule Adopted Without Public Hearing to the Attorney General.

Very Truly Yours,

Alan C. Williams
Special Assistant Attorney General

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules
Governing Superfund Administrative
Procedures, Parts 7047.0001-7047.0007

DECLARATION OF COUNSEL

I, Alan C. Williams, Special Assistant Attorney General , do hereby declare that I have examined the above-captioned rules and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules ch. 2010 have been followed. For Attorney General billing purposes, the four-digit docket client code is 0704.

Alan C. Williams
Special Assistant Attorney General

In the Matter of the Proposed Adoption of the Rules of the State Pollution Control Agency Governing Superfund Administrative Procedures, Parts 7047.0001-7047.0007

AFFIDAVIT OF MAILING THE NOTICE OF SUBMISSION OF RULE ADOPTED WITHOUT PUBLIC HEARING TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Allen Dotson, being sworn says:

That on the 3rd day of May, 1991, in the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the attached Notice of Submission to the Attorney General 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 requested notice that the rule in the above-entitled matter has been submitted to the Attorney General.

Allen Dotson
Name

P.C. Project Leader
Title

Subscribed and sworn to before me this 3 day of May, 1991.

Diane Fox

DIANE FOX
NOTARY PUBLIC — MINNESOTA
RAMSEY COUNTY
My commission expires 2-25-96

STATE OF MINNESOTA

MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed Adoption of the Rules of the State Pollution Control Agency Governing Superfund Administrative Procedures, Parts 7047.0001-7047.0007

NOTICE OF SUBMISSION OF RULE ADOPTED WITHOUT PUBLIC HEARING TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 14.26:

PLEASE TAKE NOTICE that the above-captioned rules as adopted have been submitted to the Office of Attorney General on the date of this notice, May 3, 1991, for review as to legality and form to the extent form relates to legality. The proposed rules, the rules as adopted, all the notices, the Statement of Need and Reasonableness, all written comments and requests of a hearing received, and other required documents also have been submitted to the Attorney General.

The proposed rule which was published in the State Register and made available to the public on January 28, 1991, has been modified. A free copy of the rule as modified as well as the findings of fact, conclusions, and order explaining the modifications and adopting the rules is available upon request from Allen Dotson at (612)296-7735.

The rules must be approved or disapproved by the Attorney General within 14 calendar days of the date of submission to the Attorney General. You may submit written comments to the Attorney General on the legality of the rules. Any written comments must be submitted within eight calendar days of the date of submission of the rules to the Attorney General. Your comments must address only the issue of legality of the rules or the legality of the specific parts or subparts of the rules. The Attorney General standards for review are set forth in Minnesota Rules, part 2010.1000. You may receive a copy of the Attorney General decision upon written request to the Attorney General. Your comments or requests for the decision must be directed to:

The Office of the Attorney General
Public Finance Division
515 Transportation Building
John Ireland Boulevard
Saint Paul, Minnesota 55155
Telephone Number: (612)297-2040

Any written comments submitted to the Attorney General must be submitted simultaneously to:

Allen Dotson
Minnesota Pollution Control Agency
Ground Water and Solid Waste Division
520 Lafayette Road
St. Paul, Minnesota 55155-3898
(612)296-7735

[Name]

Dated: 5/3/91

[Title]

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to the Minnesota Environmental Response and Liability Act

AGENCY: Pollution Control Agency

MINNESOTA RULES: Chapter 7047

The attached rules are approved for publication in the State Register

Carla M. Riehle
Assistant Revisor

Pollution Control Agency

Proposed Permanent Rules Relating to the Minnesota Environmental Response and Liability Act

Rules as Proposed (all new material)

7047.0001 SCOPE.

Parts 7047.0001 to 7047.0007 apply to the procedures the commissioner and the board of the Minnesota Pollution Control Agency use in issuing requests for response action and determinations on actions requested to persons responsible for releases or threatened releases of hazardous substances or pollutants or contaminants under the Minnesota Environmental Response and Liability Act, Minnesota Statutes, chapter 115B, and to negotiate with responsible persons concerning response actions requested by the board in a request for response action. Parts 7047.0001 to 7047.0007 do not apply to emergency removal actions which may be taken by the commissioner under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (b), and they do not restrict the authority of the board or the commissioner to take actions under Minnesota Statutes, section 115B.17, subdivision 2.

7047.0002 DEFINITIONS.

Subpart 1. **Scope.** As used in parts 7047.0001 to 7047.0007, the following terms have the meanings given them in this part unless the context in which the term is used clearly requires otherwise.

Subp. 2. **Agency.** "Agency" means the Minnesota Pollution Control Agency.

Subp. 3. **Board.** "Board" means the citizen board of the agency established under Minnesota Statutes, section 116.02.

Subp. 4. **Commissioner.** "Commissioner" means the commissioner of the agency.

Subp. 5. **Commissioner's notice letter or notice letter.** "Commissioner's notice letter" or "notice letter" means a letter

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from the commissioner informing a person of the intent of the agency staff to recommend that the board issue a request for response action to the person.

Subp. 6. **Consent order.** "Consent order" means a response order by consent that is a legally enforceable contract between the agency and one or more responsible persons governing the implementation of response actions to address a release or threatened release of a hazardous substance or pollutant or contaminant, and related matters, including reimbursement of agency expenses recoverable under Minnesota Statutes, section 115B.17, subdivision 6.

Subp. 7. **Determination on actions requested or DOAR.** "Determination on actions requested" or "DOAR" means a written determination issued by the board pursuant to Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a), clause (3) that a responsible person will not take response actions requested in a request for response action in the manner and within the time requested.

Subp. 8. **Hazardous substance.** "Hazardous substance" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 8.

Subp. 9. **Person.** "Person" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 12.

Subp. 10. **Pollutant or contaminant.** "Pollutant or contaminant" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 13.

Subp. 11. **Release.** "Release" means a release of a hazardous substance or pollutant or contaminant as defined in Minnesota Statutes, section 115B.02, subdivision 15.

Subp. 12. **Request for response action or RFRA.** "Request for response action" or "RFRA" means a written document issued to a responsible person by the board pursuant to Minnesota Statutes, sections 115B.17, subdivision 1, paragraph (a), and 115B.18, subdivision 3, requesting the responsible person to take response actions deemed by the board to be reasonable and necessary to protect the public health or welfare or the

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environment with respect to a release or a threatened release.

Subp. 13. **Response.** "Response" has the meaning given in Minnesota Statutes, section 115B.02, subdivision 18.

Subp. 14. **Responsible person.** "Responsible person" means a person identified in a RFRA or DOAR as a person who is responsible for a release or a threatened release under the terms of Minnesota Statutes, section 115B.03.

7047.0003 COMMISSIONER'S NOTICE LETTER.

Subpart 1. **Notification.** Before the agency staff recommend to the board that it issue a RFRA to a person, the commissioner shall send a letter notifying the person that the agency staff intend to recommend issuance of the RFRA.

Subp. 2. **Mailing requirements.** The commissioner shall send the notice letter by certified mail, return receipt requested, at least 45 days before the date upon which the board is scheduled to consider issuing the RFRA.

Subp. 3. **Contents of notice letter.** The notice letter shall contain the following:

A. notification that the agency staff intend to recommend that the board issue a RFRA to the recipient of the notice letter;

B. a brief explanation of the agency's authority to issue the RFRA;

C. a summary of the statutory determinations that the board must make in order to issue a RFRA;

D. a brief summary of the history of the site of the release or threatened release;

E. a brief explanation of the basis upon which the agency staff intend to recommend that the board make the statutory determinations necessary to issue the RFRA;

F. notification that the recipient has 30 days from the date of receipt of the notice letter in which to submit to the commissioner, in writing, any additional information that the recipient wishes the board to consider in deciding whether to issue the RFRA; and

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G. a request that the recipient submit, within 30 days of receipt of the notice letter, a brief written statement of intent to enter or not to enter into negotiation of a consent order, or an explanation of the recipient's uncertainty concerning consent order negotiations.

Subp. 4. **Examination of additional information.** If the recipient of a notice letter submits information relevant to the issuance of the RFRA within 30 days after receipt of the notice letter, the commissioner shall review the information and submit it, together with the commissioner's response, to the board.

7047.0004 REQUESTS FOR RESPONSE ACTIONS.

Subpart 1. **Effect of RFRAs.** Issuance of RFRAs to known responsible persons constitutes the action by the board required under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a), clause (1) as a prerequisite to taking removal or remedial action under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a). Issuance of a RFRA to a responsible person also constitutes the action authorized by Minnesota Statutes, section 115B.18, subdivision 3.

Subp. 2. **Acceptance of additional information.** At the board meeting when issuance of the RFRA is considered, the board shall not accept or consider information relevant to issuance of the RFRA submitted by the recipient of a notice letter if the information was not provided to the commissioner within 30 days after the date of receipt of the notice letter, unless the board determines that the person submitting it has clearly shown that:

A. the information or data was discovered or obtained after the end of the 30-day period;

B. the information could not have been discovered or obtained by reasonable effort of the person within the 30-day period; and

C. the information was submitted to the commissioner and the board as soon as practicable after it was discovered or obtained, but, at a minimum, within the time required by part 7000.1500, subpart 1.

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Subp. 3. **Consideration of additional information.** If the board accepts additional information presented by the person as provided in subpart 2, the board shall either:

A. act on the RFRA giving due consideration to the information and any response by agency staff; or

B. defer action on the RFRA until the next regularly scheduled board meeting or another date certain as determined by the board.

Subp. 4. **Staff presentation of additional information.** At the board meeting when issuance of a RFRA is considered, the agency staff may present information to the board as the basis for recommending issuance of a RFRA that was not included or referenced in the notice letter, and the person to whom the RFRA is to apply may present information relevant to respond to the agency staff's information, if the following requirements are met:

A. the additional information presented by the agency staff has been included or referenced in the staff memorandum prepared for the board as the basis for the staff recommendation; and

B. the agency staff have notified the person that additional information has been included or referenced in the staff memorandum and make the memorandum available to the person within the time provided in part 7000.0500, subpart 11.

Subp. 5. **Scope of RFRA.** In addition to meeting the requirements of Minnesota Statutes, sections 115B.17, subdivision 1, paragraph (a), and 115B.18, subdivision 3, the RFRA shall include the following components:

A. reference to issuance of the notice letter; and

B. a time frame for consent order negotiations if required under part 7047.0005.

Subp. 6. **RFRA effective upon issuance.** The RFRA, including the schedule for response actions, is effective upon issuance.

7047.0005 CONSENT ORDERS.

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Subpart 1. **Consent order negotiations.** If the recipient of a notice letter has notified the commissioner in writing within 30 days of receipt of the notice letter that the recipient intends to negotiate a consent order or that the recipient is uncertain regarding negotiations, the board shall specify a time frame in the RFRA during which the agency staff shall negotiate a consent order. If the recipient has notified the commissioner in writing within 30 days of receipt of the notice letter that the recipient does not intend to enter into consent order negotiations or has failed to notify the commissioner within that period, the board will not include a time frame for negotiating a consent order in the RFRA. If the time frame specified in a RFRA has expired without execution by the responsible person of a consent order that the agency staff agree to recommend to the board for its approval, or if no time frame has been specified in a RFRA, the agency staff are not required to negotiate a consent order.

Subp. 2. **Scope of consent order.** A consent order negotiated after issuance of a RFRA must provide for a scope of response actions substantially equivalent to that requested in the RFRA or for those response actions remaining to be implemented when the consent order is executed.

Subp. 3. **Execution of consent order.** If a consent order is executed by the agency and a responsible person after issuance of a RFRA, the consent order, instead of the RFRA, shall govern the response actions to be taken by the responsible person.

7047.0006 DETERMINATION ON ACTIONS REQUESTED.

Subpart 1. **Issuance of a DOAR.** If the commissioner determines that a responsible person will not take the response actions requested in a RFRA in the manner and within the time requested, the commissioner shall request that the board issue a DOAR with respect to the responsible person.

Subp. 2. **Effect of DOAR.** Issuance of a DOAR to known responsible persons constitutes the action required under

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Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a), clause (3) as a prerequisite to taking removal or remedial action under Minnesota Statutes, section 115B.17, subdivision 1, paragraph (a). A DOAR may include a finding by the agency that a responsible person has failed to take response actions or to make reasonable progress in completing response actions requested in a RFRA, for the purpose of authorizing the commissioner to request the attorney general to commence legal action against the responsible person under Minnesota Statutes, section 115B.18, subdivision 1 or 2.

7047.0007 AUTHORITY OF ATTORNEY GENERAL NOT LIMITED.

Except to the extent that issuance of a RFRA is required before an action may be brought under Minnesota Statutes, section 115B.18, subdivision 1 or 2, nothing in parts 7047.0001 to 7047.0007 shall be interpreted to limit or set any condition upon the commencement of any legal action which the attorney general is authorized to bring under Minnesota Statutes, chapter 115B.

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