

Minnesota Pollution Control Agency

STATEMENT OF NEED AND REASONABLENESS

**Proposed Amendment to Rules Governing Solid Waste Management,
Minnesota Rules Chapters 7001 and 7035**

APRIL 22, 2003

TABLE OF CONTENTS

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MINNESOTA POLLUTION CONTROL AGENCY

I.	INTRODUCTION	3
II.	PROCEDURAL HISTORY	4
III.	ALTERNATIVE FORMAT	5
IV.	MPCA'S STATUTORY AUTHORITY	6
V.	REGULATORY ANALYSIS	6
V.	CONSIDERATION OF ECONOMIC FACTORS	11
VI.	IMPACT ON FARMING OPERATIONS	12
VII.	COMMISSIONER OF FINANCE REVIEW OF CHARGES	12
VIII.	NOTIFICATION OF THE COMMISSIONER OF TRANSPORTATION	12
IX.	STATEMENT OF NEED	12
XI.	STATEMENT OF REASONABLENESS	14
XI.	LIST OF AUTHORS, WITNESSES AND APPENDICES	39
C.	Appendices Index	39
XII.	CONCLUSION	40

Appendices (Appendices are available for viewing at the MPCA, call the agency contact person for details)

Appendix A Section 360-1.15 Beneficial Use. New York's state rule for beneficial use of solid waste

Appendix B Draft policy for utilization of solid waste, July 2001

Appendix C Solid Waste Utilization Group Members

Appendix D Advisory Group Meeting Minute

Appendix E ASTSWMO Beneficial Use Survey

Appendix F By-Products Application to Agricultural Land, 1999

Appendix G Beneficial Reuse of Foundry Sand: A Review of State Practices and Regulations, 2002

Minnesota Pollution Control Agency

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Proposed Amendment to Rules Governing Solid Waste Management, Minnesota Rules Chapters 7001 and 7035

I. INTRODUCTION

Under Minn. Stat. § 115A.02, it is the policy of the state of Minnesota to protect the state's land, air, water, and other natural resources and the public health by improving waste management in the state by promoting: (1) reductions in the amount and toxicity of waste generated; (2) separation and recovery of materials and energy from waste; and (3) reduction in indiscriminate dependence on disposal of waste as a management option. Since 1970, the Minnesota Pollution Control Agency (MPCA) has regulated solid waste management activities, with a focus on ensuring that impacts to the environment from land disposal facilities be minimized. In recent years, the MPCA has received questions from persons generating wastes regarding the applicability of the solid waste management rules to projects and plans that involve utilization of materials that traditionally have been disposed of as solid wastes.

As a result of these questions, the MPCA has concluded that it would conserve administrative and regulated community resources and promote reduction and recycling of wastes by modifying the solid waste rules to clarify the area of waste utilization. The rule would be developed to assist persons generating wastes to identify uses for those wastes that are not subject to MPCA solid waste management regulation. The proposed amendments to the rule accomplish this by establishing:

- a procedure by which persons who wish to explore a potential beneficial use can do so through a limited demonstration/research project even if the use is not allowed under present rules or permit conditions;
- a category of “standing” beneficial uses of waste that do not require any regulatory contact or approval;
- a procedure whereby a person proposing a use not in the “standing” category can seek and obtain regulatory approval for that use;
- methods for characterizing the solid waste and the proposed use such that information about the proposed use can be shared with regulators and interested people;
- standards for storage of solid waste prior to its beneficial use; and
- a point in time when the designation of a material as a solid waste is removed and the material is no longer subject to solid waste regulation.

The rule modifications related to demonstration/research projects will also allow limited scale projects to occur for the purpose of obtaining information and data on methods of solid waste management other than utilization. For example, projects under the provisions of this part of the rule may evaluate new landfill designs or solid waste management technologies. The rule changes will provide the MPCA with clearer authority to approve demonstration/research project proposals and provide a more efficient mechanism for exploring new methods of solid waste management than is possible under the current rule.

The proposed rule modifications will also include some technical and housecleaning changes to existing rule, some of which are related to the utilization of solid waste while others are not. The rule modifications add a section allowing emergency management of solid waste and amend portions of the permitting rule, Minn. R. ch. 7001, as appropriate to accommodate the rule amendments and correct some existing errors.

II. PROCEDURAL HISTORY

The rule was developed with consideration given to internal policies used by various MPCA staff, ideas from other states, and input from outside parties who volunteered time to this effort. Several methods were used to obtain internal and external input on the rule revision. The MPCA took the following steps to notify interested parties about the proposed rule revision and to get their input prior to publishing the draft rule in the state register:

1. An internal team made up of MPCA, Minnesota Office of Environmental Assistance (MOEA), and Minnesota Department of Transportation (MNDOT) staff developed a draft policy for utilization of solid waste. This draft policy was used as a starting point for rule development and discussion with interested parties.
2. Visits to regional MPCA offices were held to explain the policy and get input on it from MPCA and MOEA staff.
3. A notice was published in the state register on October 29, 2001, requesting comments on the areas of the solid waste rule that were proposed to be revised. The notice included scheduled dates and times for public informational meetings and a request for volunteers to serve on an advisory group that would work on technical issues related to the rule revisions.
4. The same information that was published in the state register on October 29 was mailed to a list of interested and affected parties. Every attempt was made to reach as many groups and individuals as possible with this mailing. The list included permitted facilities, representatives of organizations interested in solid waste management, county solid waste officers, and others that have requested to be on MPCA's mailing list for rule notifications.
5. An email message was sent to all MPCA and MOEA staff that contained the same information published in the state register. The MOEA forwarded this message to an email distribution list that they maintain that includes county personnel and environmental groups.

6. A web site was developed to provide information to anyone interested in the rule revision (www.pca.state.mn.us/waste/swrules.html). The web site contains all information and minutes from advisory group meetings, drafts of initial rule concepts, a schedule for the rule revision, contact names, and has a mechanism for submitting comments directly to the MPCA rule revision staff.
7. Informational meetings were held in Bemidji, St. Paul, Mankato, and St. Cloud before any rule language was drafted. The purpose was to get broad input on some of the ideas MPCA had for the rule revision and to better understand issues and concerns of interested parties. The MPCA policy described in item 1 was handed out and explained at these meetings.
8. A solid waste utilization advisory group was formed and met six times to discuss concepts of this part of the rule. This group commented on drafts of the rule before the public notice period. All information provided by the advisory group was taken under consideration for the rule revision.
9. Presentations were also given at conferences and meetings, as requested, to share information on the proposed rule revisions.
10. An amended notice was published in the state register on March 3, 2003, requesting comments on the areas of the solid waste rule that were proposed to be revised.
11. The same information that was published in the March 3 state register was mailed to a list of interested and affected parties. Every attempt was made to reach as many groups and individuals as possible with this mailing. The list included permitted facilities, representatives of organizations interested in solid waste management, county solid waste officers, and others that have requested to be on MPCA's mailing list for rule notifications.

The advisory group that was formed to work on utilization of solid waste consisted of representatives from solid waste generators, a non-profit organization, University of Minnesota county extension, consultants, Minnesota Technical Assistance Program, MOEA, and MPCA staff. The purpose of this group was to advise MPCA on methods for regulating utilization of solid waste and also to review and comment on rule drafts prior to public notice. The role of the group was strictly advisory in nature and it was understood that MPCA would make decisions on the final content of the rule.

The MPCA feels that the process used for development of the rule was open and provided many opportunities for those interested in solid waste management to participate and provide input into the revisions.

III. ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness (SONAR) can be made in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Patricia Burford at the Minnesota Pollution Control Agency, REM Division, 520 Lafayette Road, St. Paul, MN, 55155-4194; telephone (651) 296-8745; fax (651) 297-8683; or e-mail pat.burford@pca.state.mn.us. TTY users may call the MPCA at (651) 292-5332 or 1-800-657-3864.

IV. MPCA'S STATUTORY AUTHORITY

The MPCA's statutory authority to adopt and implement these rules is set forth in Minn. Stat. § 116.07, subd. 4 (2000) which provides:

“...Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend, and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, chapter 1046, for the collection, transportation, storage, processing, and disposal of solid waste and the prevention, abatement, or control of water, air, and land pollution which may be related thereto, and the deposit in or on land of any other material that may tend to cause pollution”....

Under this statute, the MPCA has the necessary statutory authority to adopt the proposed rule amendments. All statutory authority was adopted and effective before January 1, 1996, therefore Minn. Stat. § 14.125 does not apply.

(Minnesota Rules, part 1400.2070, subpart 1, item D, requires that if an agency's statutory authority was granted after January 1, 1996, the agency must include in its SONAR the effective date of the agency's statutory authority to adopt the rule).

V. REGULATORY ANALYSIS

Minn. Stat. § 14.131, sets out six factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (6) below quote these factors and then provide the MPCA's response. Paragraphs (7) and (8) address additional requirements listed in Minn. Stat. § 14.131.

In general, the MPCA has chosen to pursue this rule to clarify the regulatory status of materials that traditionally have been disposed of as solid waste, but are now being used. The rule identifies 16 “standing” beneficial uses that require no regulatory contact, and establishes a procedure for approval of uses not listed in this category. The proposed rule will help clarify the regulatory status of solid waste when that solid waste is being used in a certain way, and outline procedures for establishing a regulatory safe-harbor for other potential uses. The phrase regulatory safe-harbor means that the generator and user of a solid waste would not be subject to enforcement for failure to comply with solid waste regulations as long as that material is used consistent with the MPCA beneficial use determination.

By clarifying the regulatory status of utilized wastes, the MPCA hopes to encourage the regulated community to utilize such materials when possible, while conserving administrative resources and bringing consistency to this area of solid waste management. In enacting this rule, the MPCA is bringing the state into line with other states that have enacted rules governing these activities.

1. “A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.”

The classes of persons who will primarily be affected by the proposed rule changes are the generators of solid wastes and MPCA staff, supervisors, and managers who work with regulation of solid waste. Other classes of persons that may be affected are local units of government responsible for regulation of solid wastes, persons that use products that contain solid wastes, and the MOEA staff, supervisors, and managers who work with solid waste management issues.

The proposed changes will primarily benefit persons who generate solid wastes that may be eligible for utilization. The rule will benefit these persons by clarifying when regulatory contact is needed, and by establishing clear procedures and standards that will be applied to utilization projects. The proposed changes will also benefit MPCA by providing more administrative clarity and efficiency, thereby eliminating the amount of administrative time that needs to be spent on standard utilization projects. The rule should benefit the state as a whole by helping to divert solid waste from disposal and by reducing reliance on raw materials.

Costs to generators of solid wastes should not change significantly due to rule requirements. The rule requires a generator to evaluate the characteristics of a waste before it is used, unless it is a “standing” use. The costs imposed by the rule should be similar to those that most generators would incur evaluating the solid waste’s value as a product regardless of the existence of the rule. Based on information available to the agency, however, not all generators currently evaluate the benefits and environmental impacts of using their wastes prior to use and, for those generators, costs associated with utilization may increase or discourage them from pursuing utilization as a management option.

2. “The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.”

The rule is intended to reduce regulatory barriers to utilization of solid wastes. Removing these barriers will help MPCA, MOEA, and generators expand utilization of solid waste in the state while at the same time ensuring that human health and the environment are protected. Increased utilization of solid waste supports the waste management hierarchy that promotes pollution prevention. By taking solid wastes out of the waste stream, the capacity of disposal facilities will be reserved for wastes that have no other feasible management options.

Presently, MPCA staff that work on solid waste management, spend between five to ten percent of their time on review of solid waste utilization projects. The MPCA anticipates that the time staff will spend will decrease with regard to projects that are identified as “standing” beneficial uses by the rule. However, the MPCA staff may spend additional

time approving demonstration/research projects and making case-specific beneficial use determinations for uses of solid wastes not on the “standing” beneficial use list. The MPCA believes that spending administrative time on these activities represents a better use of public resources.

The rules should not have a significant impact on state revenue because many of the beneficial uses addressed in the rule already occur today. However, to the extent that the rule encourages new uses for solid waste in lieu of disposal, less revenue will be generated by solid waste management taxes and fees that are currently imposed on land disposal of waste. However, to the extent that the long-term costs related to solid waste disposal are avoided by the rule, the state should incur fewer costs as well.

3. “A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.”

One alternative to the proposed rules is to continue the current system, under which individual MPCA staff use their administrative discretion or rely on informal and unpromulgated MPCA policies in determining the appropriate regulatory response to a utilization proposal. Although this method avoids the cost of adopting this rule, it does not represent any saving for the regulated community, and indeed would appear to involve increased costs over the proposed rule.

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

The only alternative that was seriously considered to the proposed rule was the continued use of policy and guidance rather than development and implementation of the proposed rule. Prior to the decision to modify the rule, the MPCA was attempting to coordinate the development of a policy that would assure a consistent approach to review of utilization proposals. The use of policy and guidance rather than rules was not considered a good option. The use of policies and guidance has led to questions about MPCA’s authority and responsibility to review and approve or permit utilization proposals, inconsistent outcomes, and ineffective and inefficient methods for managing problem situations (policies cannot be enforced).

Because MPCA review was already part of the policies being used and considered in lieu of the rule, it was not anticipated that costs would be increased significantly if rules were developed. It was generally felt that rules were needed to establish clear authority for the MPCA and to resolve some of the issues surrounding utilization of solid wastes.

5. “The probable costs of complying with the proposed rule.”

When determining the cost of the proposed rule, it is appropriate to consider the cost of the system in the proposed rule to the system in place for determining the regulatory status of utilization projects today. The MPCA expects that the cost to generators will

decrease under the proposed rule. To the extent that the proposed rule encourages the utilization of solid wastes by providing a regulatory safe-harbor for such uses, the MPCA anticipates that solid waste generators will save money by utilizing wastes that otherwise would have been disposed of at a disposal facility.

Most generators of solid waste consider cost to be an important factor when selecting options for its management. It is expected that utilization of solid wastes will reduce costs for management of any given solid waste because of the higher costs associated with land disposal, incineration, long term monitoring, management, and closure of disposal facilities.

The environmental cost savings from encouraging utilization are more difficult to measure but are important. By encouraging and clarifying the regulatory status of utilization, the agency anticipates that there will be environmental benefits that result from substituting solid wastes for raw materials, i.e., reduced emissions to land, air, and water that occur when obtaining, processing, and transporting raw materials.

The costs of the proposed rule will be born by the generators that want to utilize their wastes as products. The costs will primarily be associated with development of the beneficial use proposals required for submittal to the MPCA for review. The costs associated with development of the proposal should not be looked at as additional costs for generators, because the information that the MPCA is requiring should be developed for any type of product prior to marketing. Also, the costs to a generator associated with utilization are optional, since they can continue to dispose of their solid wastes if they choose to.

6. “An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.”

Federal rules do not address utilization of solid wastes. This has resulted in inconsistencies between states in how solid waste utilization is managed and regulated. There is a need to address solid waste utilization at the state level because generators of solid wastes continue to dispose of waste due to ambiguity and misunderstandings about regulatory requirements. The lack of clear regulation has become a barrier to utilization of some solid wastes. The U.S. Environmental Protection Agency (EPA), states, solid waste generators, and other interested parties have been meeting in an attempt to identify and remove barriers to solid waste utilization. The MPCA does not anticipate that this rulemaking will be contrary to federal policy, should it be developed. The MPCA’s approach in this rule is consistent with other states that have adopted regulations in this area, for example, Wisconsin and New York.

The EPA is currently developing rules for research, development, and demonstration permits for solid waste management. This rule will be part of 40 CFR part 258. The federal rule as drafted will require permits for research, development, and demonstration projects at subtitle D facilities. It is important that Minnesota’s rule does not conflict with

the standards and requirements for permitting at the federal level. Because of this, the proposed rule uses general language and references to federal rules and does not provide exemptions for permitting when required by federal rule.

7. “Describe how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Minnesota statutes, section 14.002 states:

“the legislature finds that some regulatory rules and programs have become over prescriptive and inflexible, thereby increasing costs to the state, local governments, and the regulated community and decreasing the effectiveness of the regulatory program. Therefore, whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulatory party and the agency in meeting those goals.”

The rule as proposed is performance based. The standards proposed require that utilization proposals show that use of the solid waste will be protective of human health and the environment. These are very broad environmental performance standards that can be achieved in many ways. This type of approach is necessary because the rule would become quickly outdated if it concentrated only on standards for known uses of solid wastes at the time of rule development. This approach also allows the agency to use the most up-to-date information and evaluation techniques, as they become available. It will provide opportunities for innovation and places responsibility for the development of management practices that are protective of human health and the environment on the generator.

8. Additional Notification

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

On October 26, 2001, the MPCA published in the *State Register Volume 26, Number 19* a notice requesting comments on this planned rulemaking. The same notice as published in the *State Register* was also placed on the MPCA’s Public Notice web site. On March 3, 2003, an amended notice requesting comments on this planned rulemaking was published in the *State Register Volume 26, Number 36*. This amended notice was published after it was decided to separate the original proposed rule revisions into separate rule making activities which changed the focus and some of the issues for this rule making. This notice was also placed the MPCA’s Public Notice web site.

The MPCA intends to send a copy of the Notice of Intent to Adopt and the proposed rule amendments to the following people and organizations:

1. All parties who have registered with the MPCA for the purpose of receiving notice of rule proceedings as required by Minn. Stat. § 14.14, subdivision 1a;
2. All staff, managers, and supervisors of the MPCA and MOEA;
3. All individuals and representatives of associations that we have on file as interested and affected parties; and
4. The chairs and ranking minority party members of the legislative policy and budget committees, with jurisdiction over the subject matter of the proposed rule amendments, will receive a copy of the proposed rule amendments, SONAR, and notice as required Minn. Stat. § 14.116. This statute also states that if the mailing of the notice is within two years of the effective date of the law granting the agency authority to adopt the proposed rules, the agency must make reasonable efforts to send a copy of the notice and SONAR to all sitting house and senate legislators who were chief authors of the bill granting the rulemaking. This does not apply because there is no new law requiring the MPCA to adopt these rules.

In addition, a copy of the notice, proposed rule amendments and SONAR will be posted on the MPCA's Public Notice web site at (www.pca.state.mn.us/news.index.html).

The MPCA believes its regular means of notice as required Minn. Stat. § 14.14, subd. 1a, including publication in the *State Register* and on the MPCA's Public Notice web page will have adequately placed other persons regulated by these rules on notice of this rulemaking.

V. CONSIDERATION OF ECONOMIC FACTORS

Minn. Stat. § 116.07, subd. 6 states:

“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 there from, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.”

It is not anticipated that the proposed rule will have negative impacts on the economy. The focus of the rule is narrow. It focuses on the beneficial use of solid wastes in the state of Minnesota. Many of the beneficial uses of solid wastes that will be allowed to take place without regulatory oversight are currently taking place. The proposed rule will remove some of the regulatory barriers to beneficial use of solid waste that have been identified during the rule revision process.

It is possible that replacing raw materials with solid wastes could create competition for the same markets. It is difficult for the MPCA to make a statement on the type of economic impact this may have in the state.

VI. IMPACT ON FARMING OPERATIONS

Minn. Stat. § 14.111, is inapplicable because the proposed rule amendments do not affect farming operations.

VII. COMMISSIONER OF FINANCE REVIEW OF CHARGES

Minn. Stat. § 16A.1285, requires the an agency include it its SONAR a discussion of any fiscal and policy concerns raised during the review process for rules setting, adjusting, or establishing regulatory, licensure, or other charges for goods and services. The requirements of Minn. Stat.

§ 16A.1285 are inapplicable because the proposed rules do not impose any departmental charges or fees.

VIII. NOTIFICATION OF THE COMMISSIONER OF TRANSPORTATION

Minn. Stat. § 174.05, requires the MPCA to inform the Commissioner of Transportation of all rulemakings that concern transportation, and requires the Commissioner of Transportation to prepare a written review of the rules. The MPCA believes that the proposed amendments will not impact Department of Transportation activities or transportation concerns; therefore the Department of Transportation was not notified of this rulemaking.

IX. STATEMENT OF NEED

Minnesota Statutes, Chapter 14, requires the MPCA to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the MPCA must not be arbitrary or capricious. However, to the extent that need and reasonableness are separate, “need” has come to mean that a problem exists that requires administrative attention, and “reasonableness” means that the solution proposed by the MPCA is appropriate. The need for the rule is described below.

The current solid waste rules were developed to regulate disposal of solid wastes. At the time of rule development it was not anticipated that utilization of solid wastes would cause management problems or result in confusion surrounding the point in time a waste is no longer regulated. However, in fact MPCA staff has frequently been asked to make decisions about when a solid waste may be used and what level of regulation the use is subject to. In general, it has been MPCA’s policy that when a solid waste is “beneficially used,” it is not subject to regulation. The question then becomes what is a “beneficial use” and who defines this term? When do certain aspects of the beneficial use require regulation (e.g., storage prior to its use)? Does the MPCA have the authority to make these determinations and limit or regulate the actual use of solid wastes?

Because the present rule provides no guidance, these questions have been dealt with inconsistently among staff at the MPCA and have resulted in confusion for regulated parties. There have been inconsistencies in making beneficial use determinations and also in the types of controls placed on the end use of the solid waste. In some cases solid waste permits have been issued for the processing and use of a solid waste, while in others a letter has been issued approving the end use. There are also instances where generators have been required to do research studies to provide information before a determination would be made. These inconsistencies have resulted in frustration for MPCA staff and regulated parties and the need for a rule that provides more clarity surrounding MPCA's authority and role in solid waste utilization.

The policies used by the MPCA have never been reviewed by the public or by outside parties. This has made the process by which decisions are made about beneficial use unclear for those outside of the system. Individual MPCA staff has different opinions on how solid waste utilization should be regulated and inconsistent messages and policies have been created as a result. There is a need to provide a clear understanding of the decision-making processes used by the MPCA in order to make it fair and consistent for all parties involved.

There is also a need to clarify the MPCA's expectations of generators and processors of solid wastes. The MPCA is most concerned about cases where the claimed "use" of a solid waste is merely disposal. The MPCA is concerned about persons using a solid waste in quantities that exceed those actually necessary or beneficial for the project, and claiming that a solid waste is being beneficially used when no verifiable benefit can be determined other than the benefit of cheaply disposing of a waste. These purported uses pose a threat to the environment, but MPCA has had difficulty in resolving these types of problems, as the present rule does not address them.

The rule amendment is also needed to close a loophole in the current rule that has resulted in regulatory difficulty in addressing stored solid waste. The current rule contains an exemption from the storage standards for solid wastes stored prior to beneficial use or reuse. This exemption has resulted in generators of solid wastes making false claims that stored solid waste will be used at some future point in time and, in some instance, has never been moved or used. This exemption has made compliance determinations difficult and time consuming. There is a need to remove this exemption and put in place standards that are reasonable for storage of solid waste prior to beneficial use.

The rule is needed to ensure that generators have clarity about the regulatory status of their proposed use. Generators of solid waste continue to ask the MPCA to make determinations on whether their proposed uses of solid wastes are beneficial or not because generators want protection from being in violation of state rules for solid waste management. The existing rule does not explicitly state when solid wastes are no longer subject to regulation as a solid waste. The proposed rule is needed to clarify when a material is no longer regulated as a solid waste. This clarification is needed in order to promote use of wastes and provide a regulatory safe-harbor for generators.

The rule is needed because it sets out the information necessary for the MPCA to make determinations on whether a solid waste use is beneficial or not. In the past, requests have been made of the MPCA to make this type of determination without adequate information. In the past, individual MPCA staff has requested different levels of information before making a regulatory determination. The proposed rule is needed so that all generators are subject to the same information requirements, and so that the MPCA has clear authority to request certain types of information before acting on a proposal.

The rule is needed because current rules do not provide a mechanism for the MPCA to allow persons to engage in a limited study of a solid waste management technique not allowed under current rules or permit. The current rules do not have provisions that allow demonstration or research projects to occur without obtaining variances from the rule or going through permitting, both processes that require significant expenditure of generator and administrative resources. In most instances in the past, the MPCA has allowed these types of projects to occur outside of the rule by issuing approval letters or by exercising its compliance discretion.

There are some changes to the existing rule being proposed for the purpose of correcting citation errors or changes. Clauses that provide the commissioner with the authority to wave certain requirements during times of emergency were added. This type of authority is needed to address quick actions that are sometimes necessary during natural disasters or other emergencies.

An exemption to permitting was added for management of solid wastes discovered at sites that are being remediated under the regulatory control of the MPCA. This clause is needed to eliminate administrative requirements that do not provide additional protection for human health and the environment.

There is also a rule modification related to disposal of sewage sludge in land disposal facilities. The current rule incorrectly cites references to rules which have been rescinded and replaced by a new rule. The current rule also unnecessarily prohibits disposal of sewage sludges that have not been treated to significantly reduce pathogens in land disposal facilities. The rule changes proposed address these issues and correct rule citations.

XI. STATEMENT OF REASONABLENESS

Minn. Stat. ch. 14 requires the MPCA to explain the facts establishing the reasonableness of the proposed rule amendments. “Reasonableness” means that there is a rational basis for the MPCA’s proposed action. The reasonableness of the proposed rules is explained in this section. This section is broken into two main parts: A. Reasonableness as a whole; and B. Reasonableness of the individual rule parts.

A. Reasonableness of the Proposed Rule Amendments as a Whole

The reasonableness portion of the SONAR provides the discussion and background on why and how certain provision of the proposed rules were established. This part discusses the reasonableness of the proposed rules as a whole. The reasonableness of specific requirements is discussed under part B.

The purpose of the proposed rule is to clarify the regulatory requirements for beneficial uses of solid wastes. It contains criteria for making beneficial use determinations, storage standards for solid wastes stored prior to their use, and submittal requirements for making beneficial use determinations. The proposed rule establishes a regulatory safe-harbor for generators and users of solid wastes by clarifying when a use is beneficial and no longer subject to regulation as a solid waste.

The present system of using policies has resulted in a process that is not open to the public for discussion and regulatory controls that are not understood or consistently applied. The proposed rule will contain criteria that must be met in order for use of a solid waste to be considered beneficial. It will contain a list of standing beneficial uses and a process that allows submittal of information to the MPCA to make case-specific beneficial use determinations. The proposed rule is a reasonable approach to resolving the issues surrounding beneficial use of solid wastes.

It is reasonable to set criteria in rule that establishes when use of a solid waste is beneficial. The proposed rule establishes these criteria. This will help to reduce the current subjectivity of making decisions about whether a proposed use of a solid waste is beneficial or not. It is reasonable to expect decisions on whether the use of a solid waste is beneficial or not to have a basis that is clarified by rule. It is also reasonable for generators and end users of solid wastes to expect that each proposal submitted for a beneficial use determination will be reviewed and compared against the same standards. This is difficult to accomplish through policy.

The proposed rule includes requirements for submittal of information to the MPCA for making beneficial use determinations. It is reasonable to have these requirements, so that MPCA staff has complete and standard information that allows beneficial use determinations to be made with adequate information. Currently, submittals to the MPCA contain different types of information. Some proposals are complete, while others do not contain the information necessary to make any type of valid determination. These submittal requirements are also reasonable, because it provides proposers with assurance that their competitors are also required to develop and submit the same type of information. This addresses issues of fairness.

Storage standards are reasonable so that solid waste will be stored in a manner that is protective of human health and the environment regardless of its end use. The current exemption from storage standards for solid wastes stored prior to use or reuse is not reasonable, since it does not make sense to allow solid wastes to be stored inappropriately. It is reasonable to establish standards for storage specifically for solid wastes stored prior to beneficial use, since the standards used for storage related to

disposal are not flexible. Use of storage standards for disposal would result in unnecessary costs to the owner of the storage facility.

It is reasonable for the MPCA to provide a framework for identifying when use of a solid waste is beneficial and identify when it is no longer subject to regulation. This provides clear direction and protection for solid waste generators that, under existing rule, are not sure when they are no longer subject to solid waste regulation.

Allowing and establishing procedures for conducting demonstration and research projects is also reasonable. For most projects, the proposed rule allows for use of a signed agreement that outlines conditions of the project that the MPCA and the proposer of the project have agreed to and provides regulatory oversight for the project. These agreements will be used in lieu of requiring persons who wish to conduct the research to obtain variances and permit amendments. This is a reasonable approach, since it is in the best interest of the state and its citizens to provide an efficient manner for conducting and evaluating new and potentially better solid waste management options. Federal rules are currently being established for research projects and will require that the MPCA issue permits for certain types of research projects. The proposed rules have, therefore, been drafted in a manner that will provide compliance with the federal requirements once promulgated and requires permits for projects when required by federal standards. This is a reasonable approach, since the federal rule is not yet final.

B. Reasonableness of individual sections of rule.

This section addresses the reasonableness of each rule part and attempts to answer questions about what each rule requirement is intended to do, why it is needed, and why it is reasonable. Some rule parts are obvious as far as their need and reasonableness and therefore are only explained briefly, while others are explained in more detail for future rule interpretation.

7001.0020 SCOPE.

Item A. The removal of the requirement to obtain a permit for utilization of solid waste is reasonable because the proposed revisions to Chapter 7035 will not require permitting for this activity. It is also necessary to eliminate the conflicting language between part 7001.0020 and 7001.3050. The current language in part 7001.0020 requires permitting procedures to be followed for utilization of solid waste; however, in part 7001.3050, utilization is not listed as an activity for which a solid waste permit is needed. This conflicting language has resulted in confusion as to whether a solid waste permit is required for utilization of solid waste.

Under the proposed changes to chapter 7035, permits will not be required for utilization of solid waste when a beneficial use determination has been provided in accordance with Chapter 7035. It is also reasonable to change the language in parts 7001.0020 and 7001.3050 to remove the ambiguity in the current rule.

7001.3050 PERMIT REQUIREMENTS.

Subpart 2. Exclusions. This subpart was reformatted for easier reading. It was also modified to include additional exceptions to solid waste permit requirements. The amendment to this part is necessary in order to clarify when a solid waste management permit is required.

Item B. This item is provided as an exception to permitting for demonstration/research projects. This exception is reasonable because these projects are intended to be short-term and because the MPCA wants demonstration/research projects to proceed in the most efficient manner possible. The MPCA believes that a signed agreement is the best method for regulating these activities. It is reasonable to allow this exception to facilitate the evaluation of new methods for managing solid wastes. The exception to this exception is where a permit may be required under federal rule. This is reasonable, since the MPCA does not have the authority to provide an exception to permitting if it violates federal requirements.

Item C. This item is necessary in order to clarify that beneficial use of a solid waste does not require a solid waste management permit when done in accordance with 7035.2860. This is reasonable because once a solid waste is placed in commerce or beneficially used, it is no longer considered a solid waste and no longer subject to regulation.

Item D. This item provides an exception to permitting for solid wastes stored prior to their beneficial use. This exception is necessary because the proposed rule establishes storage facility standards that will apply uniformly to all facilities storing waste prior to beneficial use, making permits unnecessary.

Item E. This proposed exception was drafted to address administrative procedures for management of solid waste discovered during investigation of sites being remediated under the regulatory authority of the MPCA. Solid waste is often discovered during site remediation. In some cases, the presence and location of the solid waste are not a threat to the environment and it can be left in place. As long as the solid waste is not moved, a solid waste permit is not required under current rule. However, if the discovered solid waste is moved for consolidation or better management on the same property, the current rule triggers the need for a solid waste management permit.

This exemption from permitting is reasonable, because the goals of the solid waste management program can be met without a permit under the auspices of the MPCA's remediation programs. Conditions can be established to ensure that the consolidated waste is properly capped, monitored and managed. This exemption from permitting will save the MPCA time and administrative costs of issuing a permit.

This exemption to permitting does not apply to situations where solid wastes discovered at a remediation site are removed and disposed of on another property. This exemption applies only to waste discovered during site investigation and remediation that will be

disposed on the same property where it was discovered. This exception does not allow wastes from other properties to be brought to the site for disposal.

Item F. This item was added to provide the commissioner with the authority to suspend requirements for solid waste permitting during emergency situations. This item is reasonable because waste generated from emergencies such as tornados and floods needs to be managed immediately, and often exceeds limits placed on existing facilities. As a result, the MPCA needs to allow the development of waste management facilities for transfer and disposal of the waste before permitting procedural requirements, including local government and public notice, can be met. The emergency permitting exemption requires that a permit application be submitted within 90 days. This is reasonable because, within 90 days, it should be possible for the facility owner/operator to develop the plans and other documents necessary for a permit application.

7035.0300 DEFINITIONS

Definitions were added to this part as necessary for understanding and using the rule amendments.

Subpart 7a. Beneficial use determination. This term is used to identify when the MPCA has made a decision that the proposed use is a bona fide use and meets the criteria in 7035.2860 subpart 2. This term is reasonable because it has become a common term used by other states and industries when referring to decisions made by regulatory agencies as to whether a specific use of a waste is beneficial or not. It is reasonable to define this term so that its use in the rule is clear.

Subpart 9a. By-product lime. It is reasonable to define this term to ensure its consistent use and understanding. This term is explained by the definition. By-product limes come from a variety of sources and are waste products. The term by-product lime is used to refer to a class of wastes because they have common characteristics.

Subpart 14a. Coal combustion slag. It is reasonable to define this term to ensure its consistent use and understanding. This term is explained by its definition. The definition ensures that other waste products from coal combustion are not confused with coal combustion slag.

Subpart 31a. Demonstration/research project. This definition is provided to clarify what the MPCA is referring to in part 7035.0450. The definition is reasonable because it ensures consistent understanding of the term as used in the rule.

Subpart 87a. Recyclable material. This definition is largely based on the definition of “recyclable material” found in Minn. Stat. § 115A.03. However, the proposed definition includes materials separated from industrial solid wastes and demolition and construction debris. It is reasonable to include materials separated from wastes other than mixed municipal waste in this term as used in this rule because there is no reason to distinguish recyclable materials based on origin.

Subpart 87b. Recycling. This definition is taken directly from Minn. Stat. § 115A.03 and is placed in the rule for reference purposes. It is reasonable to include this definition for the convenience of those using the rule.

Subpart 96a. Secondary materials market. This is a term is used in the recycling and re-use industry. It is reasonable to define this term to ensure understanding of what is being referenced in the rule. The definition is intended to cover a wide variety of commercial activities involving recyclable materials.

Subpart 111b. Unadulterated wood. This term is defined to clarify that only wood that has been harvested and left untreated or not allowed to come into contact with chemicals (paints, varnishes, preservatives, resins, etc.) is considered “unadulterated wood.” This is reasonable because chemical additions or coatings on wood will affect reuse applications.

7035.0350 SOLID WASTE MANAGEMENT HIERARCHY.

It is reasonable to include this provision to explain the legislative policy regarding solid waste management in the state of Minnesota and to provide a context for the rules. The legislative policy of the state is to promote pollution prevention, waste reduction, and recycling. The MPCA intends that this rule be interpreted to promote this policy. The MPCA does not intend that this clause be given direct regulatory effect, i.e., to dictate solid waste management options of regulated parties, but rather to send a message that MPCA intends to promote projects through this rule that are consistent with legislative policy.

7035.0400 GENERAL REQUIREMENTS.

Subpart 1. General. This section reflects some changes that are needed for reasons unrelated to the utilization portion of this rule. A clause was added that gives the commissioner authority to give exemptions from this chapter in emergency situations such as natural disasters. Tornados and floods result in the sudden generation of large amounts of solid waste. If existing facilities are not adequate to handle the waste, there is a need to allow management options, including the unpermitted development of a land disposal facility, not provided for under the rule. Current rules allow the Commissioner the authority to waive rule requirements to allow the expeditious handling of spilled materials in an emergency. It is reasonable to expand this authority to include emergency powers related to solid waste management. The drafted provision is consistent with the existing exemption provisions in other rules.

Subpart 2. State and local responsibilities. This subpart was moved within this section and redrafted to emphasize the authority of local units of government regarding solid waste regulation. Although local governmental authority exists without this statement, the MPCA finds that it is reasonable to emphasize this authority to remind regulated parties that they must meet local ordinance requirements, even if MPCA rules do not require regulatory contact or approval by the MPCA.

7035.0450 DEMONSTRATION/RESEARCH PROJECTS.

Subpart 1. General. This subpart explains that this part establishes a regulatory framework for conducting demonstration/research projects for all types of solid waste management. It also gives the commissioner authority to allow temporary noncompliance with permit and rule requirements for the purpose of obtaining data and other information that may be useful for improving solid waste management in the state. Under current rule, it is difficult for the MPCA and regulated parties to research new technologies and methods of solid waste management. Because these are temporary projects, the costs associated with obtaining variances or permit amendments necessary to stay in compliance during the project have encouraged regulated parties and the MPCA to work around the rule in an attempt to obtain valuable information. MPCA staff has used approval letters and other means that are not clearly authorized by rule to allow these projects to proceed in a reasonable time period. The proposed rule will fulfill the need for a more sensible approach to facilitate collection of information on alternatives for solid waste management than is currently authorized by rule.

This rule part also clarifies that the commissioner does not have the authority to allow non-compliance with federal rules or standards. This clarification is necessary to ensure the state does not step outside of its delegated regulatory authority. It also clarifies that there are standards other than 7035 which must be met. It is reasonable to include this language to ensure there is no confusion over the state's intentions to require compliance with federal standards during demonstration/research projects.

The proposed language does not contain specific citations to federal rules, because rules for research/demonstration projects are currently being drafted by the Environmental Protection Agency and are not yet promulgated. The federal rules are due to be promulgated some time during 2003; therefore, it is prudent to anticipate the need to include language that will ensure compliance with the federal standards once they become final.

It is reasonable to encourage innovative methods of solid waste management, including methods for beneficial use of solid wastes. Although the MPCA anticipates that one of the most common applications of this authority will be projects that evaluate beneficial uses of solid waste, the MPCA intends that demonstration/research projects will also be used to evaluate other types of solid waste management.

Demonstration/research projects are not intended to be used for on-going methods of solid waste management, i.e., as a means to avoid permitting, obtaining variances, or making necessary rule changes. However, this approval can be used to allow the MPCA to obtain information and background data necessary to allow permanent or larger scale operations to occur. This part is useful for collection of information needed for preparing case-specific beneficial use determination proposals in accordance with 7035.2860, subpart 5.

This subpart also describes the commissioner's authority to allow temporary non-compliance with solid waste management rules or permits in order to collect information and data that will be valuable to the state. Experience has shown that obtaining variances or permits can be time consuming and expensive for the regulated party and bear a high administrative cost for the MPCA. The Commissioner has, in the past, exercised administrative enforcement discretion to allow such projects to take place. This rule

replaces the exercise of that enforcement discretion into a structured context. Creating the structure for such projects in this rule is reasonable because it protects the interests of all parties-- including the public which in the past has not had any opportunity to review these projects.

This subpart also explains that completion of a demonstration/research project does not require the MPCA to take any action. This is reasonable because completion of a project does not necessarily mean that the information and data obtained will show that the management option under review should be allowed on a full scale. There may be cases that the results of the demonstration/research project do not provide definitive information and additional data collection will be needed. If the demonstration/research project provides adequate information, the MPCA will review any applications made for permits, variances, or beneficial use determinations in the same manner as other applications. If rule changes are necessary in order to allow the project to be implemented on a larger or more permanent scale, then this will be taken into consideration by the MPCA when reviewing the need to modify its rules.

Subpart 2. Information submittal. The information required in this part is reasonable because it is the information necessary to determine whether the project has clear goals and objectives and whether the project will generate the data and information that will answer questions about the solid waste management option. These submittal requirements are reasonable because the agency does not want to allow projects to take place that do not have clearly defined goals or that do not provide meaningful and useful information when completed.

Items A through I. These items detail the information that must be included in demonstration/research project proposals. The items are reasonable because this information is commonly needed and used to design research studies. The information required will be used by the agency to evaluate whether the demonstration/research project is designed to collect the information necessary to evaluate the effectiveness and feasibility of the solid waste management option being studied.

Having the specific items listed provides proposers with a better understanding of what is involved in development and implementation of a demonstration/research project and will result in proposals that have addressed the questions that MPCA has about the project. The information is reasonable because it will be used by the MPCA to place appropriate limits on the scope of the project in terms of its time, location, and quantity of solid waste involved. Such limits are reasonable to ensure that the project is well thought out, does not expand beyond what is necessary, and does not pose a threat to the environment.

Items J and K. These items are included to ensure that potentially affected persons have an opportunity to comment about the project before it is approved by the MPCA. Such notice is reasonable because these temporary projects will not go through a formal public notice process, yet may have the potential to affect local units of government or the public. While public participation and input into a project is less critical when the project is temporary, the MPCA believes it is important that interested parties have the opportunity to provide input on demonstration/research projects. Interested parties may bring information to the attention of the MPCA that the project reviewer does not know about or have access to. Local governmental units may have regulatory requirements that apply even though state

requirements are suspended.

The rule places responsibility for notification on the proposer. This is a reasonable approach because it is the proposer that stands to gain from the project and will have the best idea as to who might be interested in or affected by the project. It is a reasonable approach, because it provides an opportunity for public participation in the project in a way that is more efficient and less costly for the MPCA than standard public noticing procedures. It also allows the public to become aware of the proposed project earlier in the process, since the notification must be done prior to submittal to the MPCA. Although, not stated in the rule, in cases where a permit will be issued for the project, standard public noticing procedures will be followed as required by current rule for all solid waste permits.

Item L. This item addresses the need to comply with federal requirements for submittal when a project is regulated by federal rule and requires a permit. This is reasonable because, the project proposer must comply with state and federal requirements and state rules must be written in a manner that does not contradict federal requirements. Once the federal rules are promulgated for research, development, and demonstration projects, the permitting submittal requirements will be available for the proposer.

Subpart 3. Agency actions and approval. This part establishes the standards under which agency approval for research/demonstration projects will be given. It is reasonable to state the standard so that project proposers understand the criteria against which all proposals will be judged. The rule establishes two criteria. First, the project will be evaluated based on its potential to impact human health and the environment. It is reasonable for the MPCA to disapprove a project that threatens human health and the environment. The second criterion is the usefulness of the information. It is reasonable for the MPCA to approve projects that are likely to result in the development of useful information. Finally, the rule indicates that the MPCA will give priority to projects that have the potential to prevent pollution or that reduce or utilize solid wastes. This is reasonable because it is consistent with the policy of the state to promote such projects.

The rules provide that if the MPCA approves the demonstration/research project a permit will be issued or an agreement will be prepared by the MPCA for the proposer's signature. A permit will be issued for the demonstration/research project only if a permit is required at the federal level. If a permit is not required, the MPCA will prepare an agreement.

In the past, the MPCA has allowed demonstration/research projects to take place under an informal approval letter. The MPCA believes that it is more reasonable to require a formal document to ensure that the conditions under which the project is taking place are carefully defined and enforceable. This is particularly important where those conditions may include practices at variance from rule or permit conditions.

Any permit issued for demonstration/research projects will follow standard procedures for issuance of solid waste management facility permits. This is reasonable because this rule does not change the procedures for permitting. Which projects require permits will be clarified once the rules are promulgated by EPA for research, development, and demonstration permits.

In cases where an agreement will be used, the rule provides that agreements will be drafted to define what is expected of the proposer during the project. The agreement will include

important elements of the project such as the time period it will occur, quantities of solid waste involved, and reference to proposal elements that need emphasis. It is reasonable to include this information in the agreement to ensure that the MPCA, the proposer, and other interested parties have a clear understanding of what the approved project consists of.

The agreement will also outline consequences of not following the agreed upon terms, which may include enforcement for violation of rules or permit conditions or termination of the agreement. This is reasonable especially as projects can be authorized to proceed despite being at variance from rule or permit conditions. It is only reasonable to allow variance from such conditions if the project proceeds as designed and the MPCA is allowed to enforce those conditions if the project is not conducted in accordance with the agreement. Use of the agreement is also reasonable because it will provide the proposer with documentation that the proposer is temporarily exempt from specific permit or rule standards in accordance with terms of the agreement.

The agreement will clearly state that the project will be terminated in the event that its terms and conditions are not met. The consequence of termination is that the proposer must pursue other formal administrative approvals, such as a variance or permit amendment, if the proposer wants to continue the activity. Because the proposer has administrative options for continuing the activity, it is not necessary for the MPCA to provide additional due process prior to termination of the agreement.

It is possible that the use of an agreement will deter some proposers from submitting requests for demonstration/research projects because of the legal aspects of preparing and signing an agreement. Proposers may wish to obtain legal advice before signing an agreement. However, a signed agreement is reasonable because it assures the proposer that the MPCA supports the project, and gives the proposer legal protection if there is opposition to the project. It is not anticipated that MPCA staff will need legal advice for development of individual agreements. Standard language will be developed with the assistance of an attorney and used in all agreements.

Subpart 4. Termination. This part explains when projects or agreements may be terminated.

Item A. This item explains the reasons that the MPCA would terminate a demonstration/research project or an agreement. It is reasonable to detail these reasons, so that the proposer has a clear understanding of why the MPCA would decide to terminate a project or an agreement.

Item B. The rules do not require the proposer to complete the project. If the project is clearly not succeeding, it would waste the proposer's time and money to be required to complete it. However, if the proposer decides not to complete the project, the proposer must notify the MPCA to ensure that the MPCA knows that the project is terminated and that no further solid waste management activity will be occurring. This provision is necessary because terminated projects may need MPCA follow up to ensure that removal or cleanup of solid wastes or other materials used for the project occurs.

Subpart 5. Final report. The purpose of allowing a demonstration/research project to occur is to obtain information on new methods of solid waste management. It is, therefore, reasonable to require the proposer to submit a final report that will contain this information.

A deadline of six months was placed in the rule to allow for time to summarize and interpret collected data and prepare the final report. The time, six months, is reasonable because it will allow the proposer adequate time to prepare a final report. In some cases reporting prior to project completion will also be required. This will be decided on a project specific basis and included in the agreement or permit conditions. This is reasonable, since some types of demonstration/research projects need more oversight than others.

7035.2535 GENERAL SOLID WASTE MANAGEMENT FACILITY REQUIREMENTS.

Subpart 1. Unacceptable wastes.

Item B. Because of federal and state rule revisions (40 CFR part 503 and MN Rule Chapter 7041) the reference in this item made to “treated by a process to significantly reduce pathogens” (PSRP) no longer explains all of the pathogen reduction options for sewage sludge and septage. The term “Class B” is now the term used to cover pathogen reduction processes and includes PSRP as a subset of the alternatives available for showing that pathogen reduction requirements have been met.

When reviewing the rule to make corrections to references and terms, it became apparent that the current rule language is contradictory. Subpart 1 states that sewage sludge and other sewage containing wastes cannot be land disposed if they are not treated to meet PSRP requirements. Subpart 5, D, (5) states that sewage sludge disposal does not have to be addressed in the industrial solid waste management plan unless it has not been treated by a PSRP process. This implies that untreated sewage sludge can be land disposed if addressed in a management plan and managed to control pathogens. There is also an incorrect rule reference in subpart 5, to chapter 7040 (rescinded).

The proposed change deletes subpart 1. This will allow the industrial solid waste management plan to address how these waste streams must be managed if they are accepted at a land disposal facility. In addition, subpart 5 will remain and reworded to reference the correct rule and use the new term of Class B. These changes will allow a land disposal facility to accept sewage sludge which has been treated to meet the Class B pathogen reduction requirements without needing to address it in the solid waste management plan. It will continue to restrict acceptance of untreated sewage sludges, septage and other sewage containing wastes unless their management addresses how these will be managed in the industrial solid waste management plan.

These changes are reasonable, since the intent of the original language is to control pathogens and prevent exposure to workers. This can be done by treatment of pathogens (Class B) and/or by management of the waste to control exposure (e.g., covering within a certain time period).

7035.2855 SOLID WASTE STORAGE STANDARDS.

This part was modified to remove an exemption from the solid waste storage standard rule for solid wastes stored prior to use or reuse, and to establish standards for solid wastes stored prior to their beneficial use. This amendment is needed because of regulatory problems that have resulted from the exemption.

It is reasonable to establish standards for storage of solid waste prior to beneficial use,

because all solid wastes should be stored in a way that prevents impacts on human health and the environment, regardless of the final destination. The proposed rule has performance-based standards that will allow flexibility on the part of regulated parties. This is reasonable because design of storage for a solid waste that will remain on site for one week will differ from a storage facility that will store solid waste for a year or a storage facility that will store waste intermittently over a period of years.

Subpart 1. Scope. This subpart explains who is required to meet the storage standards. It was reformatted for clarification and to remove the exemption from storage standards for solid wastes that are used or reused. This subpart describes the standards that apply to the storage of solid wastes.

Item A. The intent of this part of the rule is to clearly describe which standards apply when solid wastes are stored prior to beneficial use. This item is necessary to identify which of the rule standards for storage apply to solid wastes stored prior to beneficial use. It is reasonable to have standards that specifically address storage of solid waste prior to beneficial use because of unique management considerations.

This item also clarifies when the storage standards for beneficially used solid waste do not apply. If a solid waste is stored at the same location for reasons other than beneficial use, even if some of the solid wastes stored at the location are beneficially used, different standards apply. This clause is needed to prevent generators from claiming that the standards for storage prior to beneficial use are applicable to their situation when only part of the solid waste at the storage location is beneficially used.

2. Locational requirements.

Item A. This item references the locational standards in 7035.2555 and is not a change in the present storage standards. It is a clarification that the locational standards in 7035.2555 apply to storage of solid waste. It is reasonable to make this reference in order to make the rule more readable and ensure that it is understood that the standards apply to storage facilities.

Item C. The change made to item C is also made for clarification purposes. Because not all storage facilities will have liners in all cases, the language has been changed to say that if a liner is present it must be above the high water table. This change was necessary and reasonable, because the current rule language implies that all storage facilities will have liners.

Subpart 4. Inspection of liners. Item B. A correction was made to the reference in this item. The correct reference is 7035.2635 subpart 4 rather than subpart 3. The term referred to in the current rule under this subpart is an “inspection plan,” however, part 7035.2635, subpart 4 uses the term “inspection schedule.” The term in this subpart was changed to correctly reference “inspection schedule”.

Subpart 7. Storage of solid waste prior to beneficial use. This subpart contains standards and requirements applicable to storing solid waste prior to its beneficial use. The standards are performance-based to allow for the different storage scenarios that occur with solid waste use. Some solid wastes are inert, while others have properties that require special design considerations for storage. Sometimes a solid waste is stored for a short period of time prior to its use and at other times it is stored and used from the same location for

several years. Design standards must match the characteristics of the solid waste to be stored and the proposed management. Design and management considerations must be made based on the potential for contaminants to leach from stored solid waste into the underlying soil and ground water. In addition, contaminated storm water must be controlled to ensure that it does not impact surface waters.

It is reasonable to use performance-based standards because of the many scenarios that exist for storing solid waste prior to beneficial use. For example, stored concrete may only require minimal controls and special conditions to control polluted runoff, while stored food processing waste may require more intensive management to ensure that polluted runoff is not created. Prescriptive standards could be used, but it would be very difficult to draft standards that take all the different storage possibilities into account. It would also be possible to use permits to establish conditions at various facilities. However, since the MPCA does not intend to regulate beneficial use projects through permits, the MPCA believes that it would be most efficient to establish a means of regulation of storage associated with such projects that does not involve permits.

Item A. This item places the responsibility for the proper design and construction of storage facilities on the owners and operators of the storage facilities. The MPCA does not have the resources available to conduct detailed engineering reviews for these types of facilities. As an alternative, the rule requires the facility owner or operator to obtain written certification from a licensed engineer stating that it has been designed and constructed to meet the rule standards. This is a reasonable approach, since the owner and operator are responsible for preventing impacts to human health and the environment from the stored solid waste.

This item also allows the MPCA to determine when this certification is unnecessary. In most cases it is anticipated that the certification will be needed, however, there are instances that storage requirements and management for specific types of solid wastes or beneficial use scenarios are available, making engineering sign off unnecessary. It is reasonable to allow the MPCA this discretion, so that unnecessary costs are not imposed on storage facility owners and operators.

Item B. Solid wastes stored and exposed to the elements have the potential for generating leachate. Any contaminants in this leachate have the potential to migrate into the soil, subsoil, and ground water, or to be carried away by storm water into surface waters. Item B is a standard needed to ensure that a storage facility is designed, constructed, and operated in a manner that protects the environment from these potential problems. The design of the storage facility will be affected by many factors including the quantity of solid waste to be stored at any given time, the characteristics of the solid waste being stored, and the length of time the solid waste will remain in storage. The standard is performance-based and places responsibility for proper design and management on the owners and operators of the storage facility.

This item requires the owner and operator of the storage facility to manage the storage area in a manner that minimizes the amount of contaminated storm water generated. Diversion of storm water away from the stored solid waste is a practical and reasonable way to reduce the amount of contaminated storm water that will need further management. In the event that contaminated storm water is generated, it must be managed as required by all

applicable state and federal rules.

Storm water collection equipment must be maintained and managed so that there is adequate capacity to catch contaminated storm water when necessary. Depending on the solid waste stored, the collected storm water and residuals may require special management and in some cases may require a permit for disposal or discharge to surface water. It is reasonable to require storm water to be collected and managed in an environmentally acceptable manner and such management is required by state and federal rules.

Item C. This item is necessary to prevent persons from using storage areas to avoid the cost of disposal of solid waste by beneficially using a small portion of the stored solid waste. The storage standards applicable to the storage of waste destined for beneficial use are intended for solid wastes that are actively used and frequently removed. It is reasonable to require that records be maintained to verify that the amount of solid waste stored is not exceeding the quantity actually used.

The time for turnover of solid waste will vary depending on how a solid waste is used. For example, accumulation of enough solid waste for a project may take several months or only a few days. In some cases, the solid waste may be actively delivered and removed from the site on a continuous basis for several years. For this reason, it is not possible to specify a time period for a required rate of turnover and for that reason a performance standard is used. The rule is not vague, however, because it is possible to determine what a reasonable turnover rate is by understanding the end use for a specific solid waste.

The rule does not have a specific limit on the quantity of solid waste that can be stored at any one location or over a given time period. The rule uses the term “reasonable quantity.” This term is open because of the many scenarios that exist for use of solid wastes. Some storage facilities are used to supply one project with solid waste and used only one time. It is also common for storage facilities to be used on a more permanent basis to supply material for multiple projects over an extended period of time. As with the rate of solid waste turnover, a reasonable quantity of solid waste stored at a give location can be determined by understanding the end use and area of distribution for the solid waste.

Item D. The rule establishes a time limit of three years for storage of solid waste prior to its beneficial use. In most cases, the time period during which solid waste will be accumulated prior to its use will be much less. However, for some situations, such as construction projects, it may be necessary to store the solid waste for up to three years prior to use to ensure that an adequate supply of the material is on hand.

This item in conjunction with item C makes it clear that the MPCA will require a storage permit if waste is stored for more than three years without being used. As in item C, the goal is to prevent claims that solid waste is being stored prior to beneficial use when, in fact, it is being disposed. This clause does not prevent solid waste from being stored longer than three years if it is actively being used and records can show that solid waste is not accumulating.

Items E and F. These items require management of particulate matter and nuisance conditions at the storage facility. These are reasonable and necessary requirements to prevent storage facilities from causing hardship to those residing and working in the areas adjacent to a storage facility.

Nuisance conditions (dust, odor, traffic, noise) are very difficult to control through regulation, because individuals have different acceptance levels for nuisances and these conditions are difficult to measure and do not always have verifiable impacts on human health or the environment. As above, the standard established in the proposed rule is essentially performance-based. Although the rule does not specify how compliance is to be achieved, the rule makes it clear that there is an expectation that these conditions are avoided or addressed by the owner or operator. The standard gives the agency a tool to address nuisance issues if a facility's owner or operator is not being responsible to neighbors.

7035.2860 BENEFICIAL USE OF SOLID WASTE.

This part sets up a procedure and framework for determining when a specific management practice for a solid waste is considered a "beneficial use" by the MPCA and no longer subject to regulation under the solid waste rules. This part establishes criteria that need to be met in order for the MPCA to designate a use as beneficial and requires that complete and valid information be provided to the MPCA for making case-specific beneficial use determinations. The proposed rule allows any individual to submit a proposal to the agency for a case-specific beneficial use determination. It is anticipated that, in most cases, the generator of the solid waste will be involved in the beneficial use proposal in some way.

Subpart 1. Applicability. This subpart summarizes the purpose of this part of the rule. In addition, this part requires persons who are not using solid waste in accordance with one of the standing beneficial uses established in this part to obtain a case-specific beneficial use determination under subpart 5 prior to its use.

It is reasonable for the MPCA to require a person to obtain a beneficial use determination because it is not always clear when a management alternative for a solid waste is a beneficial use versus an alternative method of treatment or disposal for the waste. By requiring a user to obtain a beneficial use determination from the MPCA, the generator and users of the solid waste will all be provided with assurance that the MPCA agrees a proposed use is beneficial and, therefore, no longer subject regulation as a solid waste.

Subpart 2. Beneficial use standards. The standards listed under this subpart are needed to clarify what the MPCA considers a "beneficial use" of a solid waste. It provides boundaries for beneficial use and will bring consistency to beneficial use determinations made by the agency. Without these criteria, it is likely that beneficial use determinations would continue to be subjective in nature. The term "beneficial use" can be interpreted to mean many things and the need for criteria became apparent during discussions with MPCA staff and outside parties about what beneficial use means. Establishment of criteria is necessary so that all parties involved understand what the term means within the context of this rule.

Beneficial use standards are also needed to ensure that the beneficial use process is not abused by those who might seek to assert a "use" of the waste that is really a disposal or treatment activity that should be permitted. For example, a person might assert that landfilling is a "beneficial use" of a waste because it fills in land enabling a future use of the surface. Some consider any use that results in saving of landfill space to be "beneficial," while others believe that it is only when a solid waste can be incorporated into

a product that the use is “beneficial.” This subpart attempts to avoid these debates by establishing standards that the MPCA will apply to find a use to be beneficial. This subpart is a reasonable way to resolve issues and disputes about what beneficial use of a solid waste is.

By creating a definition of “beneficial use” the MPCA does not intend to restrict uses of solid waste that might not meet the standard. If the standards are not met, the person proposing the use can still obtain regulatory approval by applying for a permit or obtaining a variance from the solid waste rules as necessary. This subpart should be interpreted as limiting the area in which the MPCA will decline to exercise its regulatory authority. Projects that meet the beneficial use criteria will not be regulated by the MPCA.

Item A. Speculative accumulation of solid waste occurs when solid waste is stored in anticipation that it will have a use or value at some future time while there is no present probable use or market for the solid waste. This subpart is reasonable because it is not a beneficial use to store waste without an actual market for that waste. This provision is not intended to prevent accumulation of solid waste in quantities necessary for its intended use.

This item is reasonable because the agency has experience with the practice of speculative accumulation. In more than one instance, stockpiles of solid wastes have existed for long periods of time and final use has never occurred. This has resulted in threats to the environment, poor public relations, and confused responsibility for disposal of the accumulated solid waste.

Item B. In order to use a solid waste, a regulated party must have adequate information about its characteristics. If the waste has not been characterized, neither the regulated party nor the MPCA can determine whether or not the use is valid or beneficial. Contaminants may be present at concentrations that could be detrimental to human health and the environment or that would impede the use proposed. The characteristics of a solid waste will dictate what it can be used for and how it must be managed prior to its use (e.g., storage design, potential nuisance conditions, etc.). As a result, it is reasonable to require the characteristics of a solid waste be fully understood before a person can assert that a use is beneficial. It is also reasonable to expect the generator to supply this information to the MPCA for making case-specific beneficial use determinations. The rule outlines basic characterization procedures in part 7035.2861.

Item C. In establishing this standard, the MPCA is rejecting the broader concepts of “beneficial use” in favor of a more limited standard. As a result, the MPCA would not agree that any use that avoids disposal is “beneficial.” Instead, the solid waste must be shown to be an effective substitute for another material that would normally be used, or a necessary ingredient in a product. These limits are reasonable because they are protective of the environment. Most environmental threats come from use projects that cannot be distinguished from disposal, i.e., using waste as a fill material.

Item D. Because a solid waste can have constituents that make it more hazardous than an analogous raw material or ingredient, it is reasonable to establish the criteria that the use of a solid waste be protective of human health and the environment. This criteria is intended to eliminate those projects which, although the other beneficial use criteria are met, pose hidden hazards related to the use of waste. It is reasonable for the MPCA to prevent problems from occurring when there is evidence that there may be harm to human health or

the environment if the use is allowed to occur.

Item E. This item is related to ensuring that a use project does not become a cover for disposal of solid waste. It is reasonable to limit the quantities of waste to those actually necessary for any given project to prevent disposal under the guise of use. Raw materials are generally not used in excess because there is a cost associated with using more of the material and there is no sensible reason for using more of a raw material than is actually needed. There are situations, however, where incentives exist to use more of a solid waste than is actually necessary to avoid disposal costs. As stated previously, the MPCA may approve alternative disposal, but not under the exception created by this rule part.

Subpart 3. Solid waste cessation.

This subpart establishes the point at which the MPCA no longer considers a material to be a solid waste and, therefore, no longer subject to regulation. This designation is necessary because it is not reasonable for the MPCA to regulate materials past the point in time that they are used or placed in commerce. However, this subpart makes it clear that, until the point in time that solid waste cessation occurs, the solid waste must be managed in accordance with this chapter.

The decision to designate that solid waste cessation occurs at the time of use or when placed in commerce was made based two consideration. First, it is not practical for the MPCA to regulate a material once it is distributed for use. The MPCA does not have the resources to follow a solid waste throughout its life cycle once it is distributed. Second, the MPCA has authority to regulate “solid waste.” Once a waste is being used, it arguably is no longer subject to the solid waste jurisdiction of the MPCA. The MPCA has the greatest opportunity for preventing problems from occurring by ensuring that a proposed use of a solid waste meets the criteria for a beneficial use under subpart 2 before use actually occurs. Once a beneficial use determination has been made and a material is being distributed for use, it will be difficult for the MPCA to regulate its use in a meaningful way.

Subpart 4. Standing beneficial use determinations.

This subpart lists common uses of solid wastes that are recognized by the MPCA as beneficial. This subpart provides a clear determination from the MPCA that the solid wastes and associated uses are considered beneficial by the MPCA. This listing is provided as an assurance to those parties that generate and use solid wastes that the agency agrees these are beneficial uses and are not subject to regulation as solid wastes.

Providing this list is a reasonable approach. It is not necessary for the MPCA to review and make beneficial use determinations for the same use of a solid waste more than once unless there are unique circumstances surrounding the use. If a waste and use is identified on the list, no MPCA contact or involvement is required. This allows the MPCA to devote staff time to other priority work.

The MPCA has made every attempt to make this list as comprehensive as possible. In the event that a use for a solid waste is not included in this list, a case-specific beneficial use determination can be applied for under subpart 5. This provides an opportunity to submit the necessary information to the MPCA for making a beneficial use determination. It is anticipated that as the MPCA obtains more information and experience about specific uses of solid wastes, the list of standing beneficial use determinations will be expanded by

amending the rule.

Items A through Q. The solid wastes and the associated uses described by these items were included in this subpart if they are commonly used. In some instances, although the use is not common, the MPCA has a history of regulating the listed use through permitting. Because of this, the MPCA has obtained adequate information and determined that the criteria in subpart 2 are met and therefore no longer needs to collect additional information or regulate the use of the material.

The following items are explained in more detail to provide information on decisions to allow the use of a specific solid waste.

Item D. Latex paints that are no longer useable for purposes of painting can be used as pigmentation in specialty cement. It is reasonable to designate this as a standing beneficial use, because the pigments in the latex paint are similar to those it is replacing.

Item F. Crumb rubber consists of tires that have been processed to remove fabric and metal and then ground to a fine chip. Common uses of crumb rubber are surfacing of walkways, sport playing surfaces, and playgrounds. Crumb rubber is used in applications where it replaces the use of rubber. It is reasonable to place the use of crumb rubber on the list of standing beneficial uses because the material it is replacing is rubber and will be substituted on a one to one basis.

Item G. Tire shreds are used tires that have been cut into various sized pieces. This material has been shown to have to be an effective substitute for conventional aggregate and has some unique properties that make it favorable for use in subgrade road applications. The rule restricts the use of this material by citing statutory requirements for this use and Minnesota Department of Transportation specifications that must be met. It is reasonable for the MPCA to list this material because there is a history of its use and is authorized when done in accordance with the statute.

Item H. Tire chips have certain engineering properties that make their use in certain types of construction applications desirable. Chips are light in weight compared to the aggregates they replace, have unique water holding and movement characteristics, and other physical properties that can be advantageous in construction applications. Tire chips vary in size and the amount of processing they receive based on the final use of the material, but are generally no longer than 12 inches in size. It is reasonable for the MPCA to list the use of tire chips as an aggregate replacement for construction applications. The use of tire chips as general fill is not authorized by this subpart. This restriction is reasonable because the engineering properties of tire chips are not needed in general fill applications and this type of unrestricted use has not been evaluated completely.

Item I. Concrete and brick materials are currently being used widely as replacements for conventional aggregate. This practice is acceptable as long as these materials are not from buildings or structures where they are likely to be contaminated. Although a standard for

contamination is not included in this item, it is reasonable to expect the generator of the material to have knowledge of where and how the concrete or brick was used and whether there is a potential for it to be contaminated. For example, if the concrete is from the floor of a building that was used for vehicle maintenance, it is reasonable to suspect it may be contaminated with waste oil, grease, or solvents.

The MPCA does not expect concrete from structures where contamination is unlikely to be evaluated for contaminants. However, if the concrete is from a building or structure where it is reasonable to believe that contamination may have occurred then the regulated party should make a determination of its contaminant levels prior to its use to ensure that it fits within this standing use category.

Items K. and L. The MPCA has over 15 years (since the mid-1980's) of data regarding the use of coal combustion slag in roofing shingles, ceiling tiles, asphalt products, and as a sand blast agent. The majority of this information has been collected by Xcel Energy (d.b.a. Northern States Power Company) and submitted to the MPCA under permit SW-356. The data shows that this material is very consistent in quality, and that the constituents present in the material are below levels of concern for human health and the environment. Therefore, the MPCA does not believe that this material, when used in this manner, poses a threat to human health or the environment, and that continued regulation of this material for these uses is necessary.

Item M. By-product limes have been land applied for many years for their value as agricultural liming materials. Use of agricultural liming materials is regulated the Minnesota Department of Agriculture (MDA). The department requires annual testing of the lime to determine its effective neutralizing power, which is a measure of its value as a liming material. The MDA does not require testing for contaminants. The focus of the MDA program is on consumer protection. End users of the product are ensured through this program that the product they receive has the claimed value as an agricultural liming material.

By-product limes make up a significant percentage of the agricultural liming materials used in Minnesota (up to 40 percent in some years). The MDA compiles information and requires licensing for the generators and distributors of all agricultural liming materials. The University of Minnesota has developed recommendations for rates of agricultural liming materials on cropped lands. The effects of adjusting the soil pH on nutrient availability and crop yields is well documented.

Infrequently there are contaminants present in a by-product lime that are of concern to human health and the environment. Although a standard for contamination is not included in this item, it is reasonable to expect the generator of the material to have knowledge of the possible contaminants that may be present. For example, some drinking water treatment plants use lime for softening of drinking water. In this process the lime can also remove contaminants from the water such as radium and arsenic. The generator of the by-product lime should be aware of what the water is being treated for and therefore, is in the best position to determine if it is possible that a specific contaminant is present. Each by-

product lime needs evaluation by the generator to determine suitable management practices for the waste.

The MPCA has observed only one facility that has had contaminants at levels in the by-product lime that preclude its use as an agricultural liming material. However, it is important that by-product limes be characterized to ensure that contaminants are not present at levels that may cause concern for their use on agricultural lands. It is reasonable to place this responsibility on the generator.

Item P. The MPCA intends that this standing use category cover many materials that are separated and recovered from mixed municipal, demolition and construction, or other waste streams, and sold or distributed for use in manufactured products. If this item were not included, the MPCA would have to review every manufactured product if a solid waste was used as an ingredient. Such regulatory oversight would stifle markets for waste-based products, not result in any significant protection of the environment, and arguably exceed regulatory authority. To gain perspective on how many uses and products contain solid wastes it is useful to view the following web site that lists uses of solid wastes in products: <http://www.moea.state.mn.us/rpdir/index.cfm>.

Subpart 5. Case-specific beneficial use determinations.

This subpart details submittal requirements necessary for the MPCA to evaluate whether a proposed use of a solid waste is beneficial when it is not listed in the standing beneficial use determinations. It is reasonable to list this information so that solid waste generators and users know the information that the MPCA will need to make the determination. In the past, the MPCA has been asked to make beneficial use determinations with incomplete information. This was due to proposers' lack of understanding about the type of information needed by the MPCA and, in some cases, an unwillingness to supply the necessary information. There were also differences in the types of information requested by different MPCA staff members. Because no standard submittal requirements existed in rule, MPCA staff had no clear authority to require specific information be supplied and there was a reluctance to make beneficial use determinations without a complete understanding of the solid waste and its end use. This reluctance slowed regulatory response.

This subpart lists specific information that the agency needs before it will review a proposal for a beneficial use determination. It is reasonable for the MPCA to expect complete and accurate information before this review is conducted. Requiring complete proposals will allow the agency to develop valuable information about solid waste uses and maintain consistency when making beneficial use determinations.

Items A and B. These items request information that allows the MPCA to understand a specific solid waste's characteristics and its proposed end use. This is basic information and review of the proposal could not proceed without it, therefore making the requirements reasonable. The results of characterization are necessary in order to understand the solid waste's characteristics and also to identify any potential environmental and human health concerns.

Item C. This item is included to gain an understanding of the potential impacts using the solid waste may have on human health and the environment. This evaluation is needed in

order to determine if the beneficial use criteria are being met by the proposed management option. This is reasonable, since the MPCA should not allow uses to occur that can be anticipated to have detrimental impact on human health and the environment.

This item also requests these impacts to be compared to those potentially occurring from other common management options for the solid waste. This type of comparison provides perspective on the risks of the proposed use. A review of the risks for common management options of a solid waste can provide a basis for decision making. It is reasonable to request that this comparison be made so that information can be used for making better decisions about how solid waste should be managed in the state over the long term.

Item D. This item asks for evidence that the solid waste is suitable for its intended use vis a vis industry standards that apply, if any. It is reasonable to ask proposers to consider these standards and to evaluate the waste against them to ensure that the proposed use will be acceptable to the industry. This ensures that the proposed use is a bona fide use.

This item also asks for a comparison of the solid waste with the material it is replacing. It is a common misperception that raw materials pose no risk to human health and the environment, while solid wastes have more risk associated with their use. This is not always the case and is very dependent on the characteristics of the raw material and the solid waste. A waste-based product may have risks similar to a non-waste-based product or differ because of the characteristics of the two materials. It is reasonable for the MPCA to try to identify the differences in risks before approving the substitution of a waste-based material. If the waste-based material has characteristics that would significantly affect the product or use and make such use unsafe, it should not be approved. For example, if a waste is used to make a fertilizer, but that waste contains constituents that would not normally be present in a fertilizer and they are at levels that could pose a risk to human health or the environment, the MPCA would not approve the use.

Item E. The MPCA needs information about waste variability in order to ensure that the potential impacts of the waste were evaluated with valid information. The MPCA also needs to ensure that, if the waste characteristics do vary, the proposer has a method for identifying changes and modifying the process as appropriate. It is reasonable to expect the proposer to sample and analyze the waste, as necessary, to fully understand its characteristics. In most cases, this requires that routine testing be done for a period of time. It is reasonable for the proposer to develop this plan, because they understand how the solid waste is generated and how best to get samples that are representative of the material that will be used.

Item F. In order for a solid waste to be used beneficially, there must be a demand for the product that it will be used in. This item requires the proposer to provide evidence that there is a market for the product. This is reasonable and necessary, because without a market the solid waste will not be used and will become a disposal problem. The documentation requirement is reasonable because the agency has had experiences where claims have been made that a market existed for a given product containing a solid waste that have not been accurate. In these instances, solid wastes have ended up in stockpiles for several years without use of the material. This has occurred even when the solid waste had verifiable beneficial properties. Ensuring that a market exists is basic to the use of any

product and is, therefore, reasonable.

Interested parties have expressed concern that confidential information supplied to the agency on distribution and marketing of a product or solid waste may become public information. Minn. Rule 7000.1300 requires that a person who believes that the information they submit to the MPCA is a trade secret to identify that information as a trade secret when it is submitted. The MPCA will evaluate the information in accordance with the Minnesota Government Data Practices Act and inform the person whether the MPCA agrees that the nonpublic classification applies. If the MPCA agrees, the information will not be made public. If there is disagreement, the person has the option of withdrawing the information; however, without the information the MPCA may be unable to evaluate the use proposal. The rule is flexible allowing the proposer to demonstrate that a market exists in a variety of ways, some of which may avoid the need to submit sensitive information.

Item G. Information on how and where a product will be distributed is needed in order for the agency to gain an understanding of who the interested and affected parties are likely to be. It is reasonable for the MPCA to require this information so that the MPCA can verify the markets for the product and whether appropriate people have been notified about the proposal. It is also reasonable for the MPCA to request this information so that the MPCA can assess potential impacts on human health and the environment.

Item H. This item requests detailed information on the management of a solid waste stored prior to its beneficial use. This information is needed because many of the problems associated with utilization occur during storage. Owners or operators of facilities that store solid waste prior to its beneficial use are not required to obtain a solid waste permit. By requesting this information with the proposal, the MPCA can ensure that the proposer is considering how the storage standards will be met.

Item I. Waste utilization can generate new wastes. It is reasonable for the MPCA to request information about these wastes to gain a better understanding of the full impacts of utilizing the solid waste. By requesting this information, the MPCA ensures that the proposer has considered waste management issues as they relate to the proposed use of solid waste.

Item J. This item requires the proposer to submit verification that local units of government that have authority to regulate the solid waste have been notified of the intent to obtain a beneficial use determination from the MPCA. It is reasonable to require this verification because although this rule may allow solid waste management activities without a permit, it is not intended nor will it preempt local regulations that may apply. It is also reasonable because it ensures that interested local governmental units have an opportunity to comment and discuss the proposed use with the MPCA and the proposer.

Item K. This item requires that the proposer identify those persons that may be affected or are interested in the proposed use of the solid waste. This listing will allow the MPCA to work with the proposer on an appropriate method of notification for these parties which may be implemented as a condition on the beneficial use determination if the project proceeds. The appropriate method of notification will vary depending on distribution methods and also the types of solid wastes involved. For example, if a product will be distributed over a large area through gardening stores and in bags, it would be difficult to

notify every potential customer in the state about the use of the solid waste in the product. In this case, it may be more sensible for the distributor to notify the users of the product through the use of a label. In another situation, if the same product was distributed as a bulk fertilizer in only one county, it may be more appropriate to place a notice in the local newspaper.

Subpart 6. Agency Actions. This subpart describes the actions the agency will take after review of a proposal for a case-specific beneficial use determination. There are three possible actions that the MPCA may take: (1) request additional information; (2) notify the proposer that a beneficial use determination has been made; or (3) deny the request. This part is necessary because it provides the proposer and the MPCA with the outcomes expected once review of the proposal has been completed.

If the proposal was incomplete, the agency will request additional information. If the information does not exist, the proposer will have the option of conducting a demonstration/research project to obtain the missing information. It is reasonable to expect complete information to be submitted in order for a case-specific beneficial use determination to be made. This ensures that all parties that request beneficial use determinations are treated equally and that the MPCA has complete information for making determinations.

If the agency determines that the proposed method of utilization meets the standards for beneficial use, a beneficial use determination will be made and the proposer will be notified in writing. The rule provides that this approval may be made conditional. As in the case of standing beneficial use determinations, it is reasonable for the MPCA to establish conditions on its approval to ensure that the approval is limited to the information presented to the MPCA and other conditions necessary to ensure that unexpected environmental impacts do not occur. The MPCA does not anticipate that these conditions will require regulatory oversight. If regulatory oversight is necessary to ensure protection of human health and the environment, a permit may be a more appropriate method of allowing the proposed use to occur.

If the MPCA determines that the proposal does not meet the criteria for beneficial use, the request for a beneficial use determination will be denied. At that point, the proposer and MPCA will discuss possible options. The proposer would be encouraged to decide whether to drop the proposal, pursue obtaining approval by requesting a permit be issued for the activity, or apply for a variance from the rules. Because these options are available to the proposer, it is reasonable for the MPCA to be able to deny the request for the beneficial use determination without providing a process for formal appeal of this decision.

Subpart 7. Reporting requirements. It is reasonable for the MPCA to require persons who have obtained case-specific beneficial use determinations to report on its use on an annual basis. This information is needed by the MOEA and counties for solid waste planning purposes under Minn. Stat. § 115A.411 and Minn. Stat. § 115A.46. The counties submit reports to the MOEA annually for solid waste activities within their county. The MOEA then compiles the information to provide planning and trend analysis of solid waste management for the state. The information will help develop accurate information for statewide and county planning efforts, trends in waste management, and evaluation of environmental issues (e.g., impacts on greenhouse gas emissions, resource conservation,

land disposal facility capacity, etc.).

The MOEA evaluates the state's progress toward achieving waste abatement goals under state law, and makes recommendations to the legislature on policy matters affecting waste management. This information will be useful for analyzing progress toward meeting state goals and will be helpful in setting new policy regarding beneficial use and waste abatement.

Because counties already collect and summarize information on solid waste management, it is reasonable for the MPCA to require users to provide this information to counties. The beneficial use determination will include information where annual reports should be submitted. The additional information collected will be coordinated with the reporting that the counties already provide to the MOEA. This requirement is reasonable, because the information that will be collected is valuable for the state and the reporting requirements are minimal.

Subpart 8. Modification of a beneficial use determination. This subpart allows the MPCA to modify conditions placed on case-specific beneficial use determinations if necessary. The MPCA will be making decisions on beneficial uses of solid wastes based on the information provided at the time the proposal was submitted for review. It is possible that new information will become available or actual problems will occur that were not anticipated during the proposal review. This may make it necessary for the MPCA to modify conditions placed in the beneficial use determination to ensure that the use does not cause unanticipated impacts to human health or the environment. This requirement is reasonable, because without it a beneficial use determination could not be modified once issued.

Subpart 9. Revocation of a beneficial use determination. This subpart is necessary in the event that the MPCA determines that use of the solid waste should be discontinued. This may be for the protection of human health and the environment or because the MPCA discovers that false or inaccurate information was submitted as part of the proposal.

This provision is reasonable because revocation is limited to when new information is discovered that makes it clear that the project does not meet the criteria for beneficial use, or when the MPCA discovers that conditions of the beneficial use determination are not being followed. As noted above, revocation of a beneficial use determination does not mean that the proposer must stop the activity. Rather, it means that the proposer must obtain other regulatory approval. This subpart requires the commissioner to provide a reasonable amount of time to obtain such an approval or otherwise wind down the operation before termination of the use must occur. This time allowance is reasonable because of the possibility that a person using a waste has made a substantial investment in the process, or needs time to wind down the operation. If the project is causing harm to human health or the environment, however, a "reasonable time" may be quite short to prevent unnecessary harm from continuing.

Subpart 10. Public information. The MPCA wants to provide the public with information on solid waste utilization so that persons interested in utilization can obtain accurate and timely information about uses that the MPCA has approved. In order to do this, the MPCA will update its web site on a regular basis to include all case-specific beneficial use determinations that have been made. This will serve as a means to provide all interested

parties information on beneficial use determinations. It will also save the MPCA time, as there are frequent requests for this type of information. Requesters can be directed to the web site where they can download the information that is posted there. It is reasonable to expect the MPCA to provide this type of information to the public on a continuing basis. It is reasonable to include this public information function in the rule, so that interested persons can be referred from the rule to the website.

7035.2861 CHARACTERIZING SOLID WASTES FOR DEMONSTRATION/RESEARCH PROJECTS AND FOR BENEFICIAL USE.

This part establishes some basic procedures for characterizing solid wastes. Results from characterization of a solid waste are required as part of the proposals submitted for demonstration/research projects and beneficial use determinations.

Subpart 1. Scope. This subpart explains what is covered by this part, and what the MPCA will use the information for. It is reasonable to include a scope so that persons reading the rule have an understanding of what will be covered by this part.

Subpart 2. Characterization procedures.

This subpart outlines basic procedures for characterization of solid wastes. This part is reasonable because it provides generators of solid waste with steps to follow for characterizing their wastes.

Item A. Solid waste by definition is not hazardous waste. It is reasonable to ask that the proposer ensure that the waste they are evaluating is not a hazardous waste. If characterization shows that a waste is hazardous, it is not regulated under this chapter and it cannot be used in a demonstration/research project or be provided with a beneficial use determination.

Item B. This item calls for submittal of a list of chemical constituents that have the potential to be present in the solid waste and explains how this list should be developed. Conducting an evaluation of the processes that generated the solid waste helps to develop this list. The goal of this item is to develop a list of contaminants that are reasonably likely to be present in the solid waste. The person submitting a proposal to the MPCA is responsible for supplying the necessary information so that the MPCA can concur that their contaminant list is adequate.

Item C. Using the information from item B, item C requires the proposer to undertake analysis of the constituents that were identified as potentially present in the solid waste. In addition, it requests that analysis be conducted that provides an understanding of its physical characteristics. Physical and chemical analysis of a solid waste is basic to understanding its characteristics. The physical and chemical characteristics of a solid waste will dictate how it can be stored and managed, identify contaminants of concern, and identify its beneficial properties. It is reasonable to require this analysis to create a complete understanding of the solid waste under review for a demonstration/research project or beneficial use determination.

Subpart 3. Methods of analysis. This subpart establishes acceptable analytical methods to be used for characterization of solid waste. The methods listed are reasonable because they are accepted by the U.S. EPA and are used throughout the United States. The use of certain accepted methods is a reasonable requirement because valid data is necessary to evaluate proposals.

XI. LIST OF AUTHORS, WITNESSES AND APPENDICES

A. Authors

The following MPCA staff participated in the development of this rulemaking.

1. Patricia Burford, Minnesota Pollution Control Agency
2. Kathy Holland-Hanson, Minnesota Pollution Control Agency
3. Scott Fox, Minnesota Pollution Control Agency

B. List of Witnesses

If these rules go to a public hearing, the MPCA anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Ms. Patricia Burford, Soil Scientist II, Regional Environmental Management Division. Ms. Burford is the principal author of the SONAR and will testify on the general need for and reasonableness of the proposed rules.
2. Mr. Scott Fox, Senior Hydrogeologist, Regional Environmental Management Division. Mr. Fox works with solid waste management facilities as a hydrogeologist and has assisted in developing the technical standards for the rule.
3. Ms. Kathy Holland-Hanson, Principal Engineer, Regional Environmental Management Division. Ms. Holland-Hanson works with solid waste management facilities as an Engineer and has assisted in developing the technical standards for the rule.

C. Appendices (Appendices are available for viewing at the MPCA, call the agency contact person for details)

- A. Section 360-1.15 Beneficial Use. New York's state rule for beneficial use of solid waste.
- B. Draft policy for utilization of solid waste, July 2001.
- C. Solid Waste Utilization Advisory Group Members.
- D. Advisory Group Meeting Minutes.
- E. ASTSWMO Beneficial Use Survey.

- F. By-Products Application to Agricultural Land, 1999 (project funded by Legislative Commission on Minnesota Resources).
- G. Beneficial Reuse of Foundry Sand: A Review of State Practices and Regulations. EPA, 2002

XII. CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

Date

Sheryl A. Corrigan
Commissioner