

STATE OF MINNESOTA

DEPARTMENT OF ENERGY, PLANNING AND DEVELOPMENT

In the Matter of the Proposed
Adoption of Rules of the Department
of Energy, Planning and Development
Governing State Petroleum Product
Set-Aside Program, 6 MCAR
§§ 2.0108-2.0116.

STATEMENT
OF NEED AND
REASONABLENESS

INTRODUCTION

In its 1981 session, the Minnesota Legislature established the state set-aside program. Minn. Stat. § 116H.095. Proposed temporary rules were published in the State Register on September 7, 1981 (6 S.R. 347-53). These rules became effective on October 26, 1981, and were published on November 23, 1981 (6 S.R. 1021-22).

During the 1982 session, the Legislature amended section 116H.095. Minn. Laws 1982, ch. 563, §§ 5, 6. The changes are reflected in 6 MCAR § 2.0113.

RULES

The format used in preparing this Statement of Need and Reasonableness is that a discussion of the need for and reasonableness of each rule follows its number and heading.

6 MCAR § 2.0108 Authority

This rule sets out the statutory authority and requirement for promulgating these rules.

6 MCAR § 2.0109 Purpose

This rule is necessary for interested parties to know the reason for the rules and the purpose of the set-aside program. The rule paraphrases the purpose of the program as stated in subdivision 1 of Minn. Stat. § 116H.095.

6 MCAR § 2.0110 Definitions

A. Applicability. The department included in this rule definitions of terms which are used often in the rules but which might not be understood by the reader, and terms which are used as a shorthand expression of a larger concept.

B. Agriculture. This definition is necessary because: agricultural activities are an important and vital part of the State's economy; they use considerable amounts of petroleum; and the purpose of the program is to minimize the adverse impacts of shortages of petroleum. It is reasonable to specifically describe the activities which can qualify for relief since the term agriculture is broad. It is reasonable to incorporate portions of the Standard Industrial Classification Manual by reference in the definition because it contains standardized definitions in sufficient detail and is available to interested parties at public libraries.

1. Included activities. This exhaustive list is reasonable and necessary to ensure that the department does not arbitrarily exclude a legitimate food producing and processing activity from program eligibility. It is also reasonable to use this list because the now-defunct federal set-aside program used it and in the past applicants used it in set-aside applications.

2. Excluded activities. It is necessary and reasonable to exclude the listed activities because they do not satisfy the purpose of the program to mitigate hardships on essential segments of the economy. They cannot be viewed that way because, as non-food producing, they are not necessary to sustain life.

C. Assignment. This definition is necessary because the word defined expresses an essential concept used frequently in the rules.

D. Average product use. This definition is needed and reasonable because it establishes a measurement of historical consumption for comparison use in the evaluation of applications.

E. Board. This definition is necessary to explain a shorthand term that appears in the rules.

F. Cargo and freight handling. This definition is necessary because it defines one of the activities included in essential services (addressed in rule 6 MCAR § 2.0110 N) and given first priority treatment in 6 MCAR § 2.0113. It is reasonable because the criterion is accepted in the industry and was used under previous federal rules.

G. Commissioner. This definition is necessary to identify the person responsible for the administration of the set-aside program and especially for the appeals process established in 6 MCAR § 2.0115.

H. Current month requirement. This definition is reasonable in view of the program purpose because it links an applicant's requirement to actual supply needs.

I. Decision. This definition is necessary to identify a term used in 6 MCAR § 2.0115.

J. Department. This definition is necessary to identify the short term used in the rules to refer to the state department charged with implementing and administering the set-aside program.

K. Emergency services. This definition is necessary to explain a term used in the first priority evaluation criteria of 6 MCAR § 2.0113. The list of activities included in the definition is generally accepted by governmental entities as a complete list of the activities necessary for the preservation of health and safety.

L. End user. This definition is necessary to clarify a term used throughout the rules to describe the ultimate recipient of state set-aside product.

M. Energy production. This definition is necessary to clarify a term included in the definition of "essential services" in 6 MCAR § 2.0110 N. The exclusion of electrical utilities who have access to power pool electrical energy is reasonable because no true hardship exists in that case when petroleum is in short supply.

N. Essential services. This definition is necessary and reasonable as a specification of the type of activity considered and used in the application of the evaluation criteria. Essential services are priority uses of set-aside product.

O. Fuel coordinator. This definition is necessary so that interested persons can understand the selection and role of these persons who play a key role in the administration of the set-aside program set up in the rules.

P. Government services. This definition is necessary to specify the type of activity included in this term as it is used in applying the evaluation criteria of 6 MCAR § 2.0113. The list of activities includes the services the government must provide even in times of emergency.

Q. Middle distillates. This definition is the generally accepted definition for the term used in the rules. It duplicates statutory language. Minn. Stat. § 116H.095, subd. 3(a).

R. Motor gasoline. This definition is the generally accepted definition for the term used in the rules. It duplicates statutory language. Minn. Stat. § 116H.095, subd. 3(b).

S. Office. This definition is necessary to indicate to interested parties the entity that is responsible for the general administration of the program.

T. Officer. This definition is necessary in order to indicate to interested parties the person principally responsible for authorizing the release of state set-aside product.

U. Order. This definition is necessary to explain a term that appears several times in the rules. It is reasonable to allow the issuance of orders by telephone because of the emergency nature of the program so long as any telephone order is followed by written documentation.

V. Passenger transportation. This definition is necessary to specify the types of activities included in this term as it is used in the eligibility criteria of 6 MCAR § 2.0113.

W. Person. This definition is needed to clarify to interested persons the meaning of this term as it is used throughout the rules.

X. Plant protection. This definition is necessary to specify the type of activity that is included in this term as it is used in the eligibility criteria of 6 MCAR § 2.0113. .

Y. Postal service. This definition is necessary to specify the type of activity that is included in this term as it is used in the eligibility criteria of 6 MCAR § 2.0113.

Z. Prime supplier. This definition is necessary to clarify to interested persons the meaning of a term essential to the implementation of the rules. It is the prime suppliers who must allocate the petroleum products subject to state set-aside orders. The rule repeats the statutory definition of the term. Minn. Stat. § 116H.095, subd. 3(c).

AA. Prime supplier's representative. This definition is necessary to identify to interested parties the person responsible for acting on behalf of the prime supplier regarding the program.

BB. Retail outlet. This definition is necessary to specifically define a term as it is used in the rules.

CC. Sanitation services. This definition is necessary to specify the type of activity that is included in this term used in the eligibility criteria of 6 MCAR § 2.0113.

DD. Service. This definition is necessary to explain a term used in 6 MCAR §§ 2.0115 and 2.0116.

EE. Shortfall. This definition is necessary to clarify for interested parties the meaning of this general term as it is used in the rules.

FF. State. This definition is necessary to explicitly state the meaning of this shorthand term used throughout the rules.

GG. State set-aside. This definition is necessary to fully explain a term vital to the comprehension of the rules since they regulate a program defined by the term. The definition is reasonable as a statement of the concept as developed in the predecessor federal programs. It is also a duplication of statutory language in Minn. Stat. § 116H.095, subd. 3(d).

HH. Supplier. This definition is necessary to indicate to interested persons the meaning of a term essential to these rules.

II. Wholesale purchaser - consumer and
JJ. Wholesale purchaser - reseller.

These definitions are necessary to distinguish the two types of applicants eligible for participation in the set-aside program, as set out in 6 MCAR § 2.0112.

2.0111 Prime supplier's obligations

A. Monthly reports. The monthly reports covered by this rule are required by the enabling statute, Minn. Stat. § 116H.095, subds. 5 and 7. The information in the reports is necessary to determine each prime supplier's monthly state set-aside obligation. The requirement is reasonable because it is a continuation of a longstanding obligation.

1. The list of products to be included is reasonable because information on them is already being provided to the office. This list corresponds to the products reported by prime suppliers on the Federal Energy Information Administration's form 25. The information is vital to the office's ability to monitor short-term supplies as provided for in Minn. Stat. §§ 116H.095, subd. 7, and

116H.10. In view of this responsibility, it is necessary that the office continue to receive this information.

2. The requirement for a standard form is reasonable and necessary to ensure reporting consistency.

B. Prime supplier's representative. This rule is necessary to ensure prompt communication with the office on behalf of a prime supplier with regard to the state set-aside program. It is reasonable to require each prime supplier to designate a representative so the office will know whom to contact on set-aside matters. The requirement is also expressed in Minn. Stat. § 116H.095, subd. 6.

C. Nonpublic data. This rule is necessary to inform interested parties that the information collected pursuant to 6 MCAR § 2.0111 will be considered "non-public" as that term is defined in section 15.162, subdivision 5c, of Minnesota Statutes. This is reasonable because the information is used for the analysis of short-term supplies and thus is a part of the legislative requirement of sections 116H.095, subdivision 7, and 116H.10. Since this is the case the data is "non-public" as provided by Minn. Stat. § 15.1682.

2.0112 Applications.

A. Who may apply. This rule is necessary to specify who is eligible to apply directly to the office for set-aside product. Applications are in essence limited to persons supplied directly by a prime supplier. This is how the program operated in the past under both state and federal auspices. The petroleum industry is familiar and comfortable with this procedure. It is reasonable to limit the number of contacts with the office so that requests can be expedited. This strategy is also reasonable since it does not preclude anyone from ultimately receiving set-aside product. The applicants are actually applying on behalf of the end user or ultimate consumer.

B. Form of application. This rule is necessary to ensure that all cases are documented on a monthly basis. Since there is at least one fuel coordinator in each county, applications are reasonably available. Verification by fuel coordinator is reasonable because fuel coordinators are officials of local government who are familiar with the immediate needs of the constituents. They are in a better position to make an initial judgment as to the validity of the alleged hardship than is the state office.

A provision for oral applications is necessary and reasonable to ensure that the office can legitimately respond to extreme emergency situations. It is also reasonable to insist, however, that proper written documentation quickly follow such a request and that non-compliance with this simple request be subject to some future inconvenience.

2.0113 Evaluation criteria

A. Middle distillates. The volume of middle distillates available for state set-aside is set out in Minn. Stat. § 116H.095, subd. 4. It is reasonable to require applicants to state the amount of gallons requested for each category because the total request may involve more than one priority category. Since the program is intended only to mitigate a shortfall arising from a temporary shortage, it is reasonable to require applicants to state why their needs are in excess of contract volumes.

1. First priority middle distillate users are those activities most important to the welfare of the State's populace and economy. This listing of activities is reasonable in light of the purpose of the program as stated in the enabling legislation and 6 MCAR § 2.0109. The meanings of the terms and phrases used to describe first priority uses are given in 6 MCAR § 2.0110.

2. It is necessary to distinguish among types of users. The second priority middle distillate uses category is reasonable because the activities included in it are not affected by a temporary shortage of petroleum products. The list of second priority users is necessary to indicate to interested parties the types of activities that are included in the category.

3. Third priority uses are placed here because all of these activities could be curtailed in the event of a shortage. The first category is necessary to distinguish between Government Services as part of the first priority Essential Services activity and other "non-essential government functions." The listing of the other two third priority users is necessary to indicate to interested parties the type of activity that could be reasonably curtailed.

4. The set-aside program is designed to deal with spot shortages and temporary dislocations of the petroleum market. The priority considerations in those circumstances differ slightly from those during a more severe petroleum supply emergency declared by the Legislature or Executive Council pursuant to section 116H.09. The set-aside program becomes one of several measures usable during such an emergency. This rule acknowledges the obvious, i.e., that the priorities of a declared energy emergency take precedence over the set-aside priorities.

B. Motor gasoline. The appropriate volume subject to set-aside is set out in the enabling statute in section 116H.095, subdivision 4. This rule is necessary to indicate to interested parties that motor gasoline assignment decisions will be based on the criteria listed.

1. Agricultural shortfall. Since the goal of this program is to mitigate the effect of a petroleum shortage on the citizens and economy, the use of set-aside for agriculture is reasonable. A large portion of the State's economy and population are dependent on this sector. All agricultural activities defined in 6 MCAR § 2.0110 B. are included under this criterion.

The rule is necessary to ensure that agricultural users receive product in the event of other suppliers' pull-out or extreme occurrences. In providing this language, the office acknowledges that a situation could exist where an agricultural user would require more than average product use, as defined in 6 MCAR § 2.0110 D.

2. Community or area hardship.

a. Supplier pull-out. This rule is necessary to ensure that the program could provide relief from such an occurrence. The office recognizes that a release of state set-aside product for the good of the community may be necessary, but wants to ensure that there is indeed a hardship. It is, therefore, reasonable to require information from the applicant regarding the pullout.

b. Retail outlet closing. As in 2.a. above, this rule is necessary to ensure that genuine hardships are mitigated wherever possible. The certification requirement is reasonable to help ensure that the product is used for its intended purpose.

c. Unusual growth. The rule is necessary to ensure that the program can fully meet its objective. The office recognizes that growth in a particular area could cause a hardship in the event of a temporary petroleum shortage. It is also recognized that the program cannot be a panacea. Thus, the criteria for determining growth as it pertains to an applicant's eligibility for set-aside is reasonable in that it requires the occurrence of one of three measurable occurrences since 1980.

d. Twenty-four hour service. This rule recognizes the important service that all-day businesses render to citizens in an area. In a temporary petroleum shortage the continuation of this service could be vital. The language is reasonable in that the eligibility requirement is based on past availability of this service.

3. Natural disasters. The types of occurrences listed are temporary and unexpected. Since the program is intended to respond to temporary petroleum shortages this criterion is basic to its purpose. The rule is reasonable because it requires the applicant to demonstrate the amount of the shortage that can be attributed to the disaster.

4. Priority vehicles. This rule is necessary to ensure that certain vehicles have priority status should a shortfall exist. The criterion is reasonable for these types of vehicles as they are defined in 6 MCAR § 2.0110.

2.0114 Application processing procedures

A. Investigations and B. Additional information. These rules are necessary and reasonable for the office to ensure the integrity of the program. It is the intention of the office to make every reasonable effort to verify the validity of each applicant's need and that assignments are based strictly on the evaluation criteria contained in 6 MCAR § 2.0113.

C. Processing. This rule is necessary so that applicants are aware of the appropriate time frame, and that the office will respond promptly. In most situations applicants are able to anticipate their supply needs. Thus, a five working day lead time on processing is reasonable. Retail outlets will likely be applying under one of three categories: community or area hardships, natural disaster, or priority vehicles. In the case of priority vehicles, the maximum release possible is the amount of the shortfall. It is the experience of the office that these shortfalls can be anticipated, and that it would be very rare for an outlet to be receiving less than 50 percent of the needed contract volumes. Thus, processing these applications after the 15th of the month is reasonable.

D. Implementation. This rule is necessary so that the prime supplier, applicant, and office are all aware of the procedures and their obligations. It is reasonable for an order to be served on the prime supplier. This step is also necessary to ensure proper communication between the office and the prime supplier. It is necessary to impose the three requirements regarding the order so that misunderstandings between the parties can be minimized. It is reasonable to require the office to state to applicants the reason for a denial.

2.0115 Appeals process

A. Applicability. This rule is necessary so that any person aggrieved by the administration of the program has recourse. The language is also reasonable in that it sets out the steps to be followed in initiating such an appeal.

B. Commissioner's action. The rule is necessary so that the time frame and responses that must be taken by the commissioner are established.

C. State set-aside appeals board. The rule is necessary to identify the members of the board. The composition of the board is reasonable because it includes representatives from a wide variety of constituent-oriented state agencies.

D. Decisions on appeals. Due to the requirement to promptly hear each appeal, this rule is needed for decisions to be made by panels made up of fewer members than the full board.

E. Informal disposition. This rule recognizes that the parties may be able to settle the appeal without the board. It is reasonable and efficient to allow the parties to do so.

2.0116 Hearings

A. Rights of the parties to the hearing. It is necessary and reasonable to establish the basic procedural rights due to each party. Notice to parties is required by rule 6 MCAR § 2.0115. This rule primarily ensures an adequate opportunity to be heard.

B. Rules of evidence. The rule is necessary to limit what the board may consider on appeal. It is also reasonable to allow the parties to rebut facts not part of the evidence presented at the hearing.

C. Public record of the hearing. This rule is needed to specify what is included in the public record for the board to consider.

D. Verbatim record. The requirement that a party requesting a court reporter pay the reporter's fee is reasonable since tape recording is an adequate verbatim record in view of the expected brevity of these processes.

E. Hearing procedure. This rule is necessary to standardize the hearing procedure. It reflects standard administrative hearing procedures - a logical and reasonable progression of proof and argument.

F. Decorum. The inclusion of this rule is reasonable so that the hearing is conducted orderly and in the best interests of the parties.

G. Decision. This rule is necessary to specify when the board must make its decision and what the decision must include. It is reasonable to require the board to state the factual and legal bases for its decisions. The short time limits are reasonable in the emergency circumstances being dealt with.

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DEPARTMENT OF ENERGY PLANNING
AND DEVELOPMENT

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