MPCA EXHIBIT 8

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

Withdrawal of Previously Proposed Amendment of Agency Procedural Rules 6 MCAR §§4.3003, 4.3005 M., 4.3010, and 4.3013, and Newly Proposed Amendments to 6 MCAR §§4.3003, 4.3005 M., 4.3010, and 4.3013

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

On September 13, 1982, the Minnesota Pollution Control Agency published in the State Register notice of its intent to adopt amendments to its procedural rules Minn. Rules MPCA 1-4 and 6-13 without a public hearing. (7 S.R. 312 as corrected by Errata published at 7 S.R. 506 (October 4, 1982).) During the public comment period the Agency received more than seven requests for hearing on the amendments proposed as 6 MCAR §§4.3003, 4.3005 M., and 4.3013. On October 26, 1982, the Agency adopted a resolution to hold a rulemaking hearing on those three rules listed and on 6 MCAR §4.3010 E. The Agency's resolution also adopted the remainder of the rules.

The remainder of the rules became effective on December 28, 1982, five working days after the notice of their adoption was published in the State Register (7 S.R. 957, December 20, 1982).

Prior to the scheduling of a public hearing on the remaining four portions of the proposed rule amendments, the Agency held two meetings with interested persons to discuss the amendments. As a result of these meetings, changes were proposed to be made to the amendments. On February 22, 1983, the Agency withdrew the

previously proposed rule amendments and proposed new amendments to 6 MCAR §§4.3003, 4.3005 M., 4.3010 E., and 4.3013, which amendments are the subject of this hearing. The amendments proposed at this time are made with reference to the rules as shown at 7 S.R. 957 (December 20, 1982).

II. NEED FOR AND REASONABLENESS OF PROPOSED AMENDMENTS TO 6 MCAR §4.3003.

6 MCAR §4.3003 is entitled "Duty of candor." This rule establishes that it is the duty of each person, including members, employees and agency, to act in good faith and with complete truthfulness, accuracy, disclosure, and candor. The last sentence of the rule provides: "Any violation of the aforesaid duty shall be cause for imposition of sanctions as provided in MPCA 11." The Agency proposes to delete this last sentence. This change is needed and reasonable because MPCA 11 has now been repealed (see proposed repeal at 7 S.R. 312, September 13, 1982, adopted at 7 S.R. 957, December 20, 1982). The deletion of this sentence will not remove any of the Agency's authority to enforce the rule. Violations of 6 MCAR §4.3003 can be addressed through the impositions of sanctions provided by Minn. Stat. §115.071 (1982), which provides:

> The provisions of Chapters 115 and 116 and all regulations, standards, orders, stipulation agreements, schedules of compliance, and permits adopted or issued by the agency . . . may be enforced by any one or any combination of the following: criminal prosecution; action to recover civil penalties; injunction; action to compel performance; or other appropriate action, in accordance with the provisions of said chapters and this section.

III. NEED FOR AND REASONABLENESS OF PROPOSED AMENDMENTS TO 6 MCAR §4.3005 M.

6 MCAR §4.3005 M. is entitled "Decisions at open meetings." The Agency proposes to make two types of changes in this rule.

First, the Agency proposes to change the references in this rule from "chairman" to "chairperson." This is needed and reasonable because it is desirable to make the rule gender-neutral.

Second, the Agency proposes to delete the portion of the rule which allows the Agency to make decisions by telephone poll or other appropriate means.

The Agency reexamined the telephone poll provisions of the rule after it received several comments from the public. These comments expressed opposition to this decision-making procedure on the grounds that it was written so broadly as to allow important Agency decisions to be made without public input. Some persons commented that the rule violates the Open Meeting Law, Minn. Stat. §471.705 (1982). While the Agency does not believe that the conduct of a telephone poll violates the Open Meeting Law, the comments received did cause the Agency to reexamine the need for the telephone poll procedure.

The Agency reviewed its records to determine the types of decisions that have been made in the past by telephone poll and found that they have been ministerial in nature. They have involved situations where the Agency has been under a deadline to take a given action by a certain date, where no Agency meeting is

scheduled to take place prior to the deadline, and where the calling of a special meeting is not practical under the circumstances. The types of decisions which have the potential in the future to require a telephone poll procedure are as follows:

1. amendment of a contract to which the Agency is a party for the sole purpose of extending a date within the contract;

2. execution of a contract to undertake cleanup of a pollutant discharge or spill where the responsible party cannot be identified or where the responsible party refuses to undertake adequate cleanup;

3. authorization to the Director to initiate the holding of a contested case hearing;

4. authorization to the Director to file on behalf of the Agency a petition to intervene as a party in an administrative proceeding held by another agency of the state or of the United States or to request the attorney general to bring an appeal of a decision reached in such an administrative proceeding; and

5. authorization to the Director to request the attorney general to bring an action in court seeking a temporary restraining order or temporary injunction.

After identifying the situations where a telephone poll might

be needed the Agency analyzed whether the situation could be effectively addressed in some other manner than a telephone poll. The Agency determined that some of these situations can be avoided by better advanced planning and by administrative actions which can be initiated by the Director. Pursuant to Minn. Stat. §15.06 (1982), the Agency has the option to make a formal delegation to the Director of some of its ministerial decision-making authority, including the actions listed above. Therefore the Agency has determined that the telephone poll provisions of the rule are not necessary. Therefore this proposed deletion is needed and reasonable.

IV. NEED FOR AND REASONABLENESS OF PROPOSED AMENDMENTS TO 6 MCAR §4.3010.

The Agency proposes to add a new section to 6 MCAR §4.3010, the rule relating to the conduct of contested cases. This proposed section, to be codified as §4.3010 E. (the existing section E. and the sections thereafter are proposed to be relettered accordingly) provides:

> Ex parte communication. During the pendency of a contested case, beginning at the time that the agency initiates the contested case hearing and ending upon final disposition of the contested case, no agency member may communicate with or accept a communication from any person concerning the subject matter of the contested case hearing except under the following conditions:
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> 1. if the communication is in writing, copies of the communication must have been sent to all parties to the matter and to all other agency members; or

2. if the communication is oral, it must take place at a public meeting after reasonable notice of the time and place of the meeting has been given to all parties and to all other agency members.

This provision is needed because once a contested case hearing has been ordered, the Agency members will function in the same manner as judges, and all possibilities for the decisionmakers to become biased on the matter must be avoided. It is also necessary because receipt of ex parte communications must be avoided by Agency members due to the potential for violating the Minnesota Administrative Procedure Act (APA) and both the United States and Minnesota Constitutions.

Although the APA does not expressly prohibit ex parte communications, certain of its provisions prohibit them by implication. 1/ Minn. Stat. §14.60, subd. 2 (1982) prohibits the Agency from considering factual information or evidence in the determination of the case unless it is part of the record. Likewise, Minn. Stat. §14.62, subd. 1 (1982) requires the

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1/ In the federal system, agency decisionmakers are prohibited by statute from making or receiving outside contacts relevant to the merits of any agency proceeding. 5 U.S.C. §557(d) prohibits agency decisionmakers from being involved in any ex parte communication "beginning at such time as the agency may designate, but in no case . . . later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge it will be noticed, inwhich case the prohibitions shall apply beginning at the time of his acquisition of such knowledge." 5 U.S.C. §557(d)(1)(E).

Agency's decision to be based on the record. Thus, factual information or evidence obtained through ex parte communications must not be considered by the Agency in making a decision, as that information is outside the record. The APA also contains several provisions that guarantee parties the right to know about and rebut evidence that is to be considered. Minn. Stat. §14.60, subd. 3 (1982) provides parties with the right of cross-examination of evidence. Likewise, Minn. Stat. §14.60, subd. 4 (1982) requires the Agency to notify parties of facts for which administrative notice will be taken and provides parties with an opportunity to contest the facts so noticed. Receipt of ex parte communications would be contrary to these rights.

Both the United States and Minnesota Constitutions prohibit the deprivation of any person of life, liberty, or property without "due process of law." Inherent in the concept of due process is the concept of "fundamental fairness." Ex parte contacts may violate principles of fundamental fairness and, hence, the constitutional protection of due process. See, e.g., Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182, Crosby-Ironton, 285 N.W.2d 667 (Minn. 1979). (Respondent claimed lack of due process by reason of ex parte contacts by the appellant's representative with the arbitrator. While the Court did not decide the case on that issue, the Court noted that "[a]ny case reaching the court

involving review of arbitration awards where ex parte contacts are made, orally or in writing, in regard to the issue under dispute, without notifying all other parties to the dispute, will raise a strong presumption of fraud or other undue means. . ." Id. at 670.)

The proposed rule is reasonable because it promotes fairness by ensuring that all parties have access to the decision makers on an equal basis. It allows communications to be made if all of the Agency members and all of the parties to the case are given an opportunity to know the contents of the communication. However, it should be emphasized that communications received must not include information which is outside the hearing record.

The proposed rule is reasonable for the further reason that it is consistent with other Minnesota rules relating to ex parte communications, specifically the rules of the Office of Administrative Hearings, the rules of the Cable Communications Board, and the rules of the Waste Management Board. The rules are also consistent with the requirements imposed upon both attorneys and judges by the Code of Professional Responsibility and the Code of Judicial Conduct.

9 MCAR §2.217 G.1. of the Office of Administrative Hearings prohibits the Hearing Examiner in a contested case from having ex parte communications with any person regarding that case:

> Hearing Examiner conduct. The Hearing Examiner shall not communicate, directly or indirectly, in connection

> with any issue of fact or law with any person or party including the agency concerning any pending case, except upon notice and opportunity for all parties to participate.

The proposed rule is consistent with this rule.

4 MCAR §4.015 of the Cable Communications Board provides:

> Ex parte communications. In order to avoid all possibilities of prejudice, real or apparent, to the public interest and to persons involved in proceedings pending before the board, no person who is a party, witness or interceder in any on-the-record proceeding, nor any representative of any such person, shall submit ex parte off-the-record communications to any member of the board or to any employee of the board regarding any matter at issue in such on-the-record proceeding, except as authorized by law; and no board member or any employee shall request or entertain any such ex parte, off-the-record communications. For the purposes of this rule, the term "on-the-record proceedings" means a proceeding required by statute, constitution or published board rule, regulation or order to be decided on the basis of the record of a board hearing; the term "interceder" shall include any person outside the board or other agency.

The proposed rule is consistent with this rule.

6 MCAR §8.013 of the Waste Management Board provides:

> Ex parte communication. No party to a matter for which a hearing has been ordered by the board shall communicate with any board member concerning the matter except in writing, or orally as a part of a presentation at a board meeting. Copies of any written communication shall be sent to all parties to the mattter and to all board members.

The proposed rule is consistent with this rule.

The proposed rule is consistent with the requirements imposed upon attorneys by the Code of Professional Responsibility (Code). Disciplinary Rule 7-110(B) of the Code renders it unethical for attorneys to contact dicisionmakers in a situation that invites

the appearance of impropriety. That disciplinary rule provides:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause pending with a judge or an official before whom the proceeding is pending, except:
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> (1) In the course of official proceedings in the cause.
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> (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
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> (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
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> (4) As otherwise authorized by law.

The reasoning behind the adoption of Disciplinary Rule 7-110 is elaborated in Ethical Consideration 7-35 of the Code, which states:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing examiner should be made only upon adequate notice to opposing counsel, or if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

The proposed rule is consistent with the requirements imposed upon judges by the Code of Judicial Conduct. Canon 3 A(4) of this Code provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

For the reasons stated above, the proposed 6 MCAR §4.3010 E. is needed and reasonable.

V. NEED FOR AND REASONABLENESS OF PROPOSED AMENDMENTS TO 6 MCAR §4.3013

6 MCAR §4.3013 is entitled "Confidential information." The Agency proposes to make four types of changes to the rule. These changes are discussed below.

First, the Agency proposes to make certain stylistic amendments to the rules. The Agency proposes to change the rule so that is gender-neutral. For example, the word "he" is changed to "the director." This is needed and reasonable because it is desirable to make the rules gender-neutral. The Agency also proposes to change references in the rule from "hearing officer" to "hearing examiner." This is needed and reasonable because it conforms the rule to the current terminology of the Administrative Procedure Act.

Second, the Agency proposes to amend 6 MCAR §§4.3013 A. and 4.3013 F. to expand from three calendar days to three working days the number of days notice that must be given before making public

any records which are 1) requested to be certified as confidential or 2) certified as confidential but required by federal law to be released. The purpose of the notice is to give the person who submitted the information an opportunity to withdraw it. Three days notice may not provide a sufficient opportunity to do so, since one or more of those days could fall on a weekend or a holiday. Three working days does provide a sufficient opportunity. Therefore these amendments are needed and reasonable.

Third, the Agency proposes to change the language of 6 MCAR §4.3013 D. to conform it with the requirements of the Government Data Practices Act. The Agency's original rule allowed the person who certified data as confidential to authorize the Agency to release the data. However, Minn. Stat. §13.05 (1982) allows agencies to release data classified as confidential only when a statute permits. Therefore the Agency proposes to change the rule to allow the Agency to release confidential data only when authorized by statute to do so. This amendment is needed and reasonable because it conforms the rule to the current statute.

Fourth, the Agency proposes to change the language of 6 MCAR §4.3013 G. to make it clear that confidential information in a contested case may only be considered by the Agency if that information has been made a part of the record. This result is already required by Minn. Stat. §14.60, subd. 2 (1982), which

requires Agency decisions to be based solely upon the record. Therefore, it is necessary and reasonable to make this clarification.

VI. CONCLUSION

Based on the foregoing, the proposed amendments to Agency Procedural Rules 6 MCAR §§4.3003, 4.3005 M., 4.3010, and 4.3013 are both needed and reasonable.

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Executive Director

Dated: April 11, 1983