

STATE OF MINNESOTA  
POLLUTION CONTROL AGENCY

In The Matter of Proposed  
Amendments to the Air Quality  
Offset Rules, Minn. Rules Part  
7005.3040, subp. 1 and subp. 2a.

STATEMENT OF NEED  
AND  
REASONABLENESS

**I. INTRODUCTION**

The Minnesota Pollution Control Agency (MPCA) is proposing to adopt amendments to the Air Quality Offset Rules, Minn. Rules Part 7005.3040, subp. 1 and subp. 2a. The Offset Rules set forth the procedure for trading emission credits between affected sources in nonattainment areas. Part D of the U.S. Clean Air Act requires states to adopt programs for permitting persons to expand or construct emission sources in areas not meeting ambient air quality standards. The U.S. Environmental Protection Agency (EPA) has adopted regulations to implement the provisions of the Clean Air Act regarding offset programs which are found in 40 CFR Part 51, Subpart I and Appendix S. In order to be approvable by the EPA as part of the State Implementation Plan (SIP), the State of Minnesota's offset program must meet the requirements specified in these regulations.

On January 25, 1993, the MPCA published a Notice of Intent to Solicit Outside Information in preparing to propose amendments to the rules.

**II. STATEMENT OF AGENCY'S STATUTORY AUTHORITY**

The MPCA's statutory authority to adopt the rule amendments is set forth in Minn. Stat. § 116.07, subd. 4 (1990). It provides:

that 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 prevention, abatement, or control of air pollution. Any such rule or standard may be of general application throughout the state, or may be limited as to times, places, circumstances, or conditions in order to make due allowances for variations therein. Without limitations, rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement or control of air pollution.

Under this statute the MPCA has the necessary statutory authority to adopt the proposed rule amendments.

### III. STATEMENT OF NEED

Minn. Stat. sections 14.14, subd. 2, and 14.23 (1990) require the MPCA to make an affirmative presentation of facts establishing the need for and the reasonableness of the proposed amended rules. In general terms, this means that the MPCA must set forth the reasons for proposing rules and the reason 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 which requires administrative attention, and reasonableness means that the solution proposed by the MPCA is a proper one. The need for the changes to Minn. Rules pt. 7005.3040, subp. 1 and subp. 2a is discussed below.

Under the Clean Air Act authorities, EPA has imposed a construction ban in Minnesota's nonattainment areas because Minnesota does not have an approved permitting program for new sources locating in a nonattainment area. The ban

means that no major new source or major modification can be built in a nonattainment area if the new major source of modification emits a pollutant for which the area in which it is located is nonattainment, unless a plan is submitted to and approved by EPA showing that the source will not interfere with attainment of air quality standards as stated in 40 CFR Section 52.24(a).

"Major" refers to amount of air pollution generated by the source, not the physical size of the facility. The "growth program" is a necessary part of any SIP. Because Minnesota does not have an approved Offset Rule, it does not have approved SIP. Therefore, the construction ban of 40 CFR Section 52.24 (a) applies in Minnesota.

In August of 1992, the MPCA Air Quality Division (AQD) submitted a SIP revision to incorporate amendments to Minn. Rules pts. 7005.3010 to 7005.3060, Offset Rule, governing the air quality permit program for the growth or expansion of industry in nonattainment areas in Minnesota to meet Part D Title I of the Clean Air Act. This SIP revision included state rulemaking actions that incorporate 40 CFR Part 51, Appendix S, with revisions recommended by EPA, into Minnesota rules. On September 18, 1992, EPA Region V contacted the MPCA and indicated that they had two concerns regarding clarity of language in the amended Offset Rule. In order to correct this the MPCA is proposing three modifications to Minn. Rules pt. 7005.3040, subp. 1 and subp. 2a, to clarify language at EPA's request.

If adopted by the MPCA and approved by the EPA, the amended Offset Rule (i.e. Minn. Rules parts 7005.3020 through 7005.3040) would establish the necessary growth program and eliminate the no growth sanction currently in effect in Minnesota's nonattainment areas.

#### IV. STATEMENT OF REASONABLENESS

The MPCA is required by Minn. Stat. ch. 14 to make an affirmative presentation of facts establishing the reasonableness of the proposed rule amendments. Reasonableness is the opposite of arbitrariness and capriciousness. It means that there is a rational basis for the MPCA's proposed action. The reasonableness of the proposed rule amendments is discussed below.

##### A. REASONABLENESS OF THE RULE AS A WHOLE

The following discussion provides an explanation and justification of the provisions of the rule amendments as a whole. The purpose of this section of the Statement is to demonstrate that the amendments are a reasonable approach to meeting the need identified in the Statement of Need.

As discussed in the Statement of Need, the MPCA has a need to address the fact that the existing Offset Rule is not approvable by EPA. The Minnesota Part D SIP currently fails to meet all of the requirements of the 1990 Clean Air Act Amendments pertaining to Part D, Section 173, therefore a construction ban has been imposed under 40 CFR section 52.24(a).

On May 27, 1992, the MPCA Board adopted amendments to Minn. Rules pts. 7005.3010 to 7005.3060 (Offset Rule) which incorporates the federal standards of 40 CFR Part 51, Appendix S, modified to meet the requirements of 40 CFR Part 51.165, which establishes standards for approval of SIP's containing offset programs. EPA reviewed the above SIP revision, and indicated they had three concerns regarding the clarity of language and requested the MPCA to make three language clarifications in order to approve Minnesota's SIP revision.

Because it is certain that EPA will approve the three proposed language clarifications, the MPCA's overall approach to this rulemaking is reasonable.

B. REASONABLENESS OF INDIVIDUAL PARTS

Part 7005.3040 CONDITIONS FOR PERMIT.

Part 7005.3040 is amended as follows:

Subpart 1. In general. Unless the requirements of Code of Federal Regulations, title 40, chapter I, part 51, appendix S, as incorporated in subpart 2a, are first satisfied, No person shall commence construction of a major stationary source or major modification in:

A. a nonattainment area; or

B. in an attainment area or unclassifiable area if that major stationary source or major modification would cause or contribute to a violation of a national ambient air quality standard in a nonattainment area as determined by the significance levels established in Code of Federal Regulations, Title 40, Chapter I, Part 51, Appendix S, Part III (1991), ~~. unless the requirements of Code of Federal Regulations, title 40, chapter I, part 51, appendix S, as incorporated in subpart 2a, are first satisfied.~~

This amendment is reasonable because it clarifies which requirements must be satisfied by a person in order to commence construction of a major stationary source or major modification in a nonattainment area or in an attainment area or unclassifiable area. It is reasonable to incorporate the federal standards by reference to avoid inconsistencies between state and federal language and to obtain federal approval. The amendment clarifies that sources must first satisfy the requirements of 40 CFR Part 51, Appendix S before construction is commenced in both nonattainment areas and in attainment areas when the source could adversely impact a nonattainment area. The amendment corrects the grammatical structure of the sentence to convey its originally intended meaning.

**Subp. 2a. Modified Federal Standard.**

Item G. is added to clarify that banking of emission offset credits is not allowed.

G. Code of Federal Regulations, title 40, part 51, appendix S, part IV, section C, (5), (1991), does not apply.

This amendment is reasonable because it clarifies that a source is not allowed to bank emission offset credits. EPA indicated that the language of the Appendix S banking provision was too vague to comply with 40 CFR Section 51.165 or the Clean Air Act. Banking is an optional portion of an offset program, and the loss of the ability to "bank" emissions reductions will affect few Minnesota sources. Because the State has not had an approved offset rule, to date sources have not been able to bank emissions. At EPA's request in the prior amendment to this rule, the ability to bank emissions was deleted. However, the banking provisions were not then listed as a part that does not apply. This amendment adds the banking provisions to the list of the parts of 40 CFR Part 51, Appendix S that EPA did not want applied in Minnesota, and thus assures that the intent of the prior rule amendment is clarified.

#### V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. § 14.115, subd. 2 (1990) requires the MPCA, when proposing rules which may affect small business, to consider the following methods for reducing the impact on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rules.

The proposed amendments will not affect small businesses as defined in Minn. Stat. § 14.115 (1990). As proposed the amended rule only affects major new

sources or major modifications in nonattainment areas. A major stationary source is defined as a stationary source that emits more than 100 tons per year of any pollutant subject to regulation under the Clean Air Act. A major modification is defined as a change that results in a significant net increase of emissions of pollutants from a major stationary source. Because of these definitions, it is unlikely that small businesses will be affected by this rule. However, even if a small business was affected, because the MPCA is adopting this amended rule in response to federal mandate, and a federal rule with identical standards would apply if the MPCA exempted small businesses from compliance, there is nothing that the MPCA could do to change the the applicable standards.

#### VI. CONSIDERATION OF ECONOMIC FACTORS

In exercising its powers, the MPCA is required by Minn. Stat. § 116.07, subd. 6 (1990) to give due consideration to economic factors. The statute provides:

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

In proposing the amended rules governing emission offsets, the MPCA has given due consideration to available information as to any economic impacts the proposed rules would have. The MPCA believes that the offset rule, if approved, would have a positive impact on the economy of the state because it would allow the EPA to lift the construction ban currently imposed. This construction ban will remain in effect until Minnesota submits a revised SIP. An approvable

offset rule is a necessary part of the SIP. Because the offset rule does not mandate any changes to emission limits, the rule will not negatively impact existing businesses.

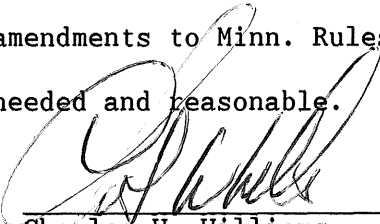
#### VII. AGRICULTURAL LANDS

This proposed rule amendment will not have a direct and substantial adverse impact on agricultural land in the state. See Minn. Stat. § 14.11, subd. 2 (1990).

#### VIII. CONCLUSION

Based on the foregoing, the proposed amendments to Minn. Rules pt. 7005.3040, subp. 1 and subp. 2a are both needed and reasonable.

Dated: 1-26- , 1993

  
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Charles W. Williams  
Commissioner