Minnesota Pollution Control Agency

December 11, 1995

Ms. Maryanne Hruby, Executive Director
Legislative Commission to Review Administrative Rules
State Office Building, Room 55
100 Constitution Avenue
St. Paul, Minnesota 55155

Dear Ms. Hruby:

Re: Supplement Statement of Need and Reasonableness (SONAR) for Proposed Amendments to Rules Governing Chapters, 7002, 7005, 7007 and 7019.

Enclosed for your review is a copy of the Supplement Statement of Need and Reasonableness (SONAR) for the above-proposed rule amendments. The original SONAR was sent to you on October 9, 1995, (copy of letter attached) as required by Minn. Stat. § 14.131 (1994). Since the time I sent you the original SONAR, the Minnesota Pollution Control Agency made a minor change to the rule that required the Supplement SONAR. The rule and Notice of Intent to Adopt was published in the *State Register* on December 11, 1995. If you have any questions please call me at (612)296-7712.

Sincerely,

Norma L. Coleman

Norma L. Coleman
Administrative Rulemaking Coordinator
Program Development Section
Air Quality Division

NLC:gr

Enclosure

Minnesota Pollution Control Agency

October 9, 1995

Ms. Maryanne Hruby, Executive Director
Legislative Commission to Review Administrative Rules
State Office Building, Room 55
100 Constitution Avenue
St. Paul, Minnesota 55155

Dear Ms. Hruby:

Re: Statement of Need and Reasonableness for Proposed Amendments to Minn. R. chs. 7002, 7005, 7007, and 7019 Governing Air Emission Fees, Definitions, Permit Requirements, Notification and Emission Inventory Requirements.

Enclosed for your review is a copy of the Statement of Need and Reasonableness for above proposed rule amendments as required by Minn. Stat. § 14.115, subd. 8 (1994). If you have any questions, please contact me at (612) 296-7712.

Sincerely,

Norma L. Coleman

Norma L. Coleman
Administrative Rulemaking Coordinator
Air Quality Division
Program Development Section

NLC:lmg

Enclosure

STATE OF MINNESOTA

POLLUTION CONTROL AGENCY

In the Matter of Proposed Rules Governing: (1) Air Emission Permit Fees and Air Emission Fees for Sources with Registration Permits; (2) Air Quality Division (AQD) Definitions and Abbreviations; (3) Air Emission Permits, Permit Contents; and (4) Shutdown and Breakdown Notification Requirements and Emission Inventory Reporting Requirements; Amending Minn. R. Chs. 7002, 7005, 7007, and 7019

SUPPLEMENT STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

This document supplements the Statement of Need and Reasonableness (SONAR) dated July 24, 1995, which explains the proposed amendments in this rulemaking. The SONAR explains that the Minnesota Pollution Control Agency (MPCA) is amending its air quality permit fee rule to count total suspended particulates (otherwise referred to as particulate matter (PM)) when calculating its target fee. The primary reason for this action identified in the SONAR is to meet the funding requirements of Title V of the Clean Air Act (CAA). The CAA and regulations of the U.S. Environmental Protection Agency (EPA) establish a presumptively adequate minimum level of funding for state permitting programs. This presumptively adequate level of funding is based on multiplying $25 (adjusted for inflation) by each ton of regulated pollutant emitted in the state (with a 4,000 ton cap per facility). Until recently, EPA had interpreted the CAA and its rules to include PM as one of the regulated pollutants that should be counted in calculating the presumptive minimum. However, in October, the EPA changed this interpretation and no longer requires PM to be counted.

While the MPCA proposed to include PM in calculating its target fee primarily in response to EPA's requirement that we do so in order to receive final approval of our permit program, this amendment was also a needed and reasonable way to achieve the level of funding required by state and federal law. This supplemental SONAR explains why the proposed rule amendment is still needed and reasonable, and why the MPCA proposes to adopt it as drafted, despite the change in federal policy.

II. STATEMENT OF REASONABLENESS

A. EPA's Changed Interpretation of "Regulated Air Pollutant"

The EPA has produced two memoranda intended to clarify the definition of the term "regulated air pollutant:" "Definition of Regulated Air Pollutant for Purposes of Title V" dated April 26, 1993, and "Definition of Regulated Air Pollutant for Particulate Matter for Purposes of Title V" dated October 16, 1995.

In the April 26, 1993, memorandum, EPA interpreted Title V of the CAA to include PM in the definition of the term "regulated air pollutant." This interpretation was based on the CAA requirement that any pollutant that is regulated under the CAA, included under section 111 of the CAA, is a "regulated pollutant." PM is indeed a pollutant for which limits are established under standards adopted under section 111 of the CAA.

The October 16, 1995, memorandum changes this interpretation for purposes of determining Title V applicability and calculating the target fee (the aggregate fee that is collected from all permitted facilities in Minnesota). The later memorandum states that PM is a surrogate (or indicator) for PM_{10} emissions and is therefore not itself a regulated pollutant. The October 16, 1995, memorandum contradicts the proposed Interim Approval of Minnesota's Operating Permit Program (Federal Register, September 13, 1994, pp. 46948 to 46951) in which EPA stated that Minnesota's rules must be amended to include $PM_{>10}$ in the calculation of the target fee because PM is a "regulated pollutant." The EPA has not formally withdrawn its requirement, despite the October 16, 1995, memorandum, and so Minnesota technically remains subject to the requirement to count $PM_{>10}$ in its target fee calculation in order to achieve final program approval.

B. Federal Law Still Requires Collection of the Increased Fee Target

1. The MPCA Must Collect Enough to Cover Program Costs

Title V of the CAA requires that a state collect annual fees "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this title...," followed by a list of specific program costs that must be covered. 42 U.S.C. § 7661a(b)(3)(A). EPA, in its implementing regulations, similarly requires states to collect fees "that are sufficient to cover the program costs." 40 CFR 70.9(a). As is discussed in the SONAR, the CAA and EPA's implementing regulations establish two methods by which a state may demonstrate that it has adequate funding for its permitting program. The first method is by collecting an aggregate amount equal to $25 (adjusted for inflation since 1989) per ton of regulated pollutant emitted in the state, with a 4,000 ton per pollutant per facility cap. This amount is presumed to be adequate to administer a state program. The second method is to demonstrate that the MPCA can adequately administer the Title V permitting program with less funding. The MPCA has chosen to rely on the $25/ton presumptive minimum amount -- calculated including PM emissions -- because its workload analysis indicated that it would not be able to demonstrate adequate funding with any less.

As discussed above, EPA has now changed what would be considered the presumptive minimum by no longer requiring states to count PM in the calculation. But while the amount EPA would accept as the presumptive minimum has gone down, the MPCA's projection of its future program resource needs have not changed. As its name implies, the $25/ton presumptive minimum is merely a presumption of adequate program funding. The basic requirement under federal law remains to collect adequate fees to cover all program costs. Therefore, the presumption of the adequacy of the $25/ton amount is subject to challenge under EPA regulations. That presumption will be rebutted if the EPA Administrator finds there are serious questions regarding whether the fee schedule is sufficient to cover program costs, in which case the state would be required through a detailed accounting to show the adequacy of its fee target. 40 CFR 70.9(b)(5). The MPCA's analysis of its future program needs show that they in fact would not be met using a presumptive minimum calculated without including PM, putting the state in noncompliance with the CAA and EPA regulations. In order to avoid such noncompliance, the MPCA is choosing to proceed with a method of fee target calculation that counts PM and which better approximates our program needs.

2. The MPCA Needs the Proposed Increase Fees to Cover Program Costs

The MPCA's program needs are described in a memorandum dated August 1, 1994, from Ms. Lisa Thorvig, Air Quality Division Manager to Ms. Ann Glumac, Assistant Commissioner, footnoted in the SONAR, page 8. In this memorandum, Ms. Thorvig says that a workload analysis identified the need for 16 additional AQD staff. The fee increase due to the inclusion of $PM_{>10}$ in the calculation of the target fee would fund approximately 6.5 new positions, leaving the AQD short approximately 9.5 positions needed for the projected obligations. While the AQD has determined that it can, through streamlining and other means, meet program needs without the additional 9.5 positions at this time, it could not meet program needs without the 6.5 positions made possible by this fee rule.

The AQD's needs for the increased funding provided by the proposed amendment is also reflected in the increased appropriation given to the AQD by the legislature. While the MPCA collects funds through fees, those funds are not available for the AQD's use until the legislature appropriates the money back to the AQD. If the legislature believed that the revenues from the fees were not needed immediately by the AQD, it could have chosen not to appropriate those funds, reserving them for the AQD's future use. Therefore, while the AQD's requested appropriation is initially based on projected fee revenues using the $25/ton formula, the AQD must also justify to the legislature that it needs those revenues to cover future program costs.

The 1995 legislative session established the funding for the AQD for fiscal years 1996 and 1997. The budget presented to the legislature and discussed in an April 4, 1995, letter from Ms. Thorvig to Senator Steven Morse, Chair of the Environmental and Natural Resources Finance Division, spoke of the need for increased funding for the AQD to meet increasing program obligations. In approving that budget, which was initially calculated using the $25/ton formula and counting PM, the legislature was recognizing that the AQD needed those funds to meet program obligations.

We note that because the appropriation for the next two fiscal years has already been established at a level that includes PM, and because the current rule requires the MPCA to collect the greater of the amount calculated using the $25/ton formula or its appropriation, deleting the proposed inclusion of PM from the calculation of the target fee would not affect the air emissions fee collected by the AQD in these two years. In other words, the AQD's increased appropriation, based both on the inclusion of PM in the target fee formula and the AQD's increasing program costs, would automatically result in an increased target fee under the existing rule for the next two years, even if the proposed amendments were not adopted.

3. It Is Reasonable to Collect the Necessary Increased Through Inclusion of PM

There are essentially two methods to increase (by rule) the target fee collected by the MPCA: 1) add more pollutants to the list of pollutants included in the calculation of the target fee; and 2) increase the dollar amount by which the number of tons of pollutant reported is multiplied to greater than $25 per ton (adjusted for inflation since 1989). Since $PM_{>10}$ is a pollutant for which limits are established under many New Source Performance Standards under section 111 of the CAA, and is a pollutant of concern for anyone near a large source of $PM_{>10}$, it is reasonable to increase the fee through adding $PM_{>10}$ to the list of pollutants used in the calculation of the target fee. Because $PM_{>10}$ is being added to the target fee, but is not directly subject to a charge/ton under the proposed rule, the increase is spread over all fee payers and will not fall disproportionately upon those that emit $PM_{>10}$, as discussed in the SONAR on pages 15 and 16. The effect is therefore the same as if the dollar amount per ton were increased.

C. State Law Is Not Directly Affected by the Change in Federal Policy

The change in the EPA's interpretation of what is a regulated air pollutant for purposes of calculating the presumptive minimum does not directly effect the state law under which the fees are collected. As is discussed in the SONAR, the MPCA's statutory authority for this rulemaking is found at Minn. Stat. § 116.07, subd. 4d(b) - (e). That subdivision requires the MPCA to adopt fee rules that will result in the collection of at least $25/ton of several listed pollutants, including each pollutant regulated under section 111 of the CAA. Despite EPA's recent re-interpretation of its own rules, PM is indeed one of the pollutants for which limits are established under section 111 of the CAA. EPA's change in interpretation need not automatically translate into a change in how Minnesota interprets its own statute, particularly when the more inclusive reading of the law (including PM as a pollutant regulated under section 111) is at least on its face more reasonable than EPA's newly adopted interpretation. While the MPCA may ultimately decide to interpret state law the same way EPA has interpreted federal law for the sake of program consistency, we consider it prudent to wait to see whether EPA's new interpretation is challenged in court, and whether it withstands such challenge.

Moreover, there is no need for the MPCA to decide at this point whether the state statutory phrase "pollutant regulated under ... section 111 ... of the federal Clean Air Act" requires the MPCA to count PM in calculating the minimum target fee. The statute clearly does require

the MPCA to use the fees to "pay for all direct and indirect reasonable costs" of the program in subdivision 4d(b), and if the MPCA did not collect the increased fees proposed in this rulemaking, it would not be able to meet the obligations identified in the statute. Finally, the statute explicitly allows the MPCA to include in the target fee calculation all pollutants for which the state has adopted a primary state ambient air quality standards. Minnesota has such a standard for PM, at Minn. R. 7009.0080.

D. Conclusion

Despite the fact that the EPA is no longer requiring states to count PM when calculating the presumptive minimum fee, federal law still requires all states to collect fees adequate to cover program costs. The MPCA's anticipated program costs are such that, without the increased fees represented by the proposed amendment, the state would fall short of meeting the federal (and state) statutory requirement of adequate funding. Counting PM when calculating the target fee as the rule proposes to do is a reasonable way of increasing revenues to required minimum levels, and is well within the MPCA's statutory authority.

Dated: 12/8/15

CHARLES W. WILLIAMS
Commissioner