

7-3900-8217-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SERVICE

In the Matter of Proposed Rules
Relating to Weights and Measures
Inspection Fees, Minn. Rules Part
7602.0100

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on October 20 and October 25, 1993 at the Department of Public Service in St. Paul.

This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable and whether or not the rules, if modified, are substantially different from those proposed originally.

The Department of Public Service (Agency, DPS) was represented at the hearing by Assistant Attorney General Julia E. Anderson, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, Michael F. Blacik, Director of the Weights and Measures Division, and Jonathan R. Hall, Administrative Rules Writer for the DPS.

Approximately ten persons attended each hearing. Three members of the public spoke on October 20 and two members of the public spoke on October 25.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of Public Service makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to

final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On July 6, 1993, the Department of Public Service published a Notice of Intent to Adopt Rules Without a Public Hearing in this matter at 18 S.R. 29.

2. On July 28, 1993, the Department had received written requests from more than 25 persons for a public hearing on these proposed rules. Pursuant to Minn. Stat. § 14.25, the Department initiated this hearing procedure.

3. On August 26, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.

4. On August 27, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (b) The Statement of Need and Reasonableness.
- (c) A Statement indicating the Department would not be providing discretionary additional public notice of the proposed rules as authorized by Minn. Stat. § 14.14, subd. 1a.
- (d) A Statement that the Department had submitted a copy of the Notice and Proposed Rules to the Chairs of the Senate Finance and House Appropriations Committees as required by Minn. Stat. § 16A.128, subd. 2a.

It is noted that Minn. Stat. § 16.128 was repealed effective July 1, 1993. However, at the time of the submissions to the legislators noted, June 16, 1993, the statute was still in effect. It is found that the Department's submissions to the Committee Chairs were appropriate and correct procedure at the time, prior to the publication of the proposed rules in the State Register on July 6, 1993.

5. On September 20, 1993, a Notice of Hearing for the October 20, 1993 rule hearing was published at 18 S.R. 893.

6. On September 24, 1993, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

7. Minn. Stat. § 14.14, subd. 1a requires that the persons who register for that purpose with an agency be given notice of a rule hearing at least 30 days in advance. As noted in the previous Finding, the Agency did not provide that notice by mail until 26 days prior to hearing. Accordingly, an additional hearing date was scheduled for October 25, 1993. All persons mailed a Notice of Hearing on September 24, 1993 were notified of the additional hearing by mail on September 30, 1993. The Notice of Additional Hearing Date was published in the State Register on October 18, 1993 at 18 S.R. 1129.

8. It is found that the Department, by providing an additional hearing date on October 25, 1993, satisfied the requirement of Minn. Stat. § 14.14, subd. 1a that it give notice within 30 days prior to the hearing of its intention to adopt rules to all persons on its list by United States mail. Notice was mailed to all such persons on September 24, 1993. The same persons were notified of the additional hearing date on September 30, 1993 by means of a notice specifying that it was a supplement to the notice mailed to them on September 24. The two notices, taken in combination, constitute sufficient notice under the statute because they gave interested persons notice of the pending hearing with all due dispatch and notified them of an additional hearing date timed more than 30 days after the original notice was mailed. The Department's argument that these facts constitute, in effect, a "total notice" period greater than 30 days is well taken.

9. Minn. Stat. § 14.15, subd. 5 provides:

Harmless Errors. The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds:

(1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or

(2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

It is found that the failure of the DPS to mail the Notice of

Hearing to persons on its list within 30 days of the date of the hearing did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The first notice, with a copy of the proposed rules attached, was mailed 26 days in advance of the first hearing date and 31 days in advance of the second hearing date. All persons on the list had 25 days' notice of the second opportunity to present evidence. The Administrative Law Judge was not notified of a claim of prejudice to anyone as a result of the procedural defect. There is no evidence that the failure to provide 30-days' initial notice by mail to persons on the Department's list deprived any person or entity of an opportunity to participate meaningfully in the rulemaking process. It is so found because all comments made pursuant to the initial Notice of Intent to adopt rules on July 6, 1993 were admitted to the record, all persons who made a written request for a public hearing were represented by Craig Sallstrom of the Minnesota Plant Food and Chemicals Association on both public hearing dates (the written requests for a hearing were in the form of a petition signed by 26 persons and submitted under a cover letter from the Minnesota Plant Food and Chemicals Association signed by Mr. Sallstrom), no persons other than those noted in the preceding clause requested a public hearing and notice of the hearing was published in the State Register more than 30 days in advance of the first hearing date.

It is found that by mailing a second notice to persons of an additional hearing date 31 days beyond the date of initial mailing of the Notice of Hearing (with a copy of the proposed rules), the DPS took corrective action to cure the procedural error sufficiently such that the error did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

For the above reasons, the Administrative Law Judge finds that the Department's notice period error was harmless error within the meaning of Minn. Stat. § 14.15, subd. 5.

10. On September 24, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) The names of Department of Public Service personnel who would represent the Agency at the hearing.
- (e) A copy of the State Register containing the proposed rules.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

11. The period for submission of written comment and statements remained open through November 8, 1993, the period having been extended by order of the Administrative Law Judge to 14 calendar days following the hearing. The record closed on November 16, 1993, the fifth business day following the close of the comment period.

12. Minn. Laws 1993, Ch. 192, § 56 repealed Minn. Stat. § 16A.128 and replaced it with § 16A.1285. The new statute eliminates the requirement that rules raising money by means of departmental fees be submitted in advance to the Chairs of the House Appropriations and Senate Finance Committees and inserted the following requirement, codified at Minn. Stat. § 16A.1285, subd. 5:

The commissioner of finance shall review and comment on all departmental charges submitted for approval under chapter 14. The commissioner's comments and recommendations must be included in the statement of need and reasonableness and must address any fiscal and policy concerns raised during the review process.

The Department pointed out that it originally published its Notice of Intent to Adopt the Rules Without a Public Hearing in July of 1993, prior to the effective date of the above-quoted requirement. As required under the old

statute, it submitted the rules to the appropriate legislator. The necessity for a public hearing on the rules arose on July 28, 1993, and the new statute took effect on August 1, according to the Department's argument.

13. The Department maintains that it was not required to submit its proposed "departmental charges" (the new statute's term-of-art for fees) for approval by the Commissioner of Finance in this instance because the Statement of Need and Reasonableness (§ 16A.128 required evidence of submission to the legislature be attached to the SONAR) was completed properly under the old statute at the initiation of the process. It argues that imposition of the new requirement to a "pending rulemaking" such as this constitutes an impermissible retroactive application of the statute. The Administrative Law Judge disagrees with this argument, but it is found that the DPS has complied with the requirements of Minn. Stat. § 16A.1285, subd. 5 in any case.

14. The Department's argument outlined in the two preceding Findings is misplaced insofar as it is based on an assumption that Minn. Stat. § 16A.1285 was not effective before August 1, 1993. Minn. Laws 1993, Ch. 192 § 56, codified as Minn. Stat. § 16A.1285, is an appropriations act, effective July 1, 1993 pursuant to Minn. Stat. § 645.02, which reads, in part:

". . .An appropriation act or an act having appropriation items enacted finally at any session of the legislature

takes effect at the beginning of the first day of July next following its final enactment, unless a different date is specified in the act. . ."

No other effective date is specified in Minn. Laws 1993, Chapter 192.

In this connection, it is found that the SONAR available on July 6, 1993, the date of the original Notice of Hearing to Adopt Rules Without a Public Hearing, contained an "approval of fee schedule" document from the Commissioner of Finance that satisfies the review and comment procedure contemplated in Minn. Stat. § 16A.1285, subd. 5.

15. The Department of Finance completed another review and comment on the proposed rules on September 20, 1993 and transmitted the results of the review to the DPS the following day, one day after publication of the Notice of Hearing in the State Register. For the purposes of section 16A.1285, the comments and recommendations of the Commissioner of Finance were included in the Department's Statement of Need and Reasonableness as of September 21. In light of the fact that no one requested a SONAR from the Administrative Law Judge prior the rule hearing and since mailed notice of the hearing or mailed copies of the September 20, 1993 State Register would not have been received by any persons concerned before September 21, it is found that the Department has complied with the requirements of section 16A.1285, subd. 5. Even if not including the comments and recommendations in the SONAR until September 21 is viewed as a procedural error or defect, it found that such failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process within the meaning of Minn. Stat. § 14.15, subd. 5.

Statutory Authority and Nature of the Proposed Rules

16. It is found that Minn. Stat. § 239.06 and Minn. Laws 1993, Ch. 369, § 72, codified as Minn. Stat. § 239.101, grant the Department of Public Service statutory authority to adopt the proposed rules.

17. Minn. Rule 7602.0100 is a pre-existing rule that sets the Department's Weights and Measures Inspection Fees. The proposed rules substitute new fee amounts for most of those set in the current rules. They also add a new subpart (Subpart 3. Zone Charges) to cover the extra time and expense involved for certain types of inspections, which charges vary according to the travel distances involved between the inspection sites and the home bases of the Department's inspectors.

18. The new legislation requires the Weights and Measures Division to charge fees to owners for inspecting and testing weights and measures at a level sufficient to cover the amount appropriated for those functions and all related overhead costs.

The 1993 Legislature increased the Division's cost recovery requirement to 100% of the amounts appropriated to the Division and all overhead costs. The DPS determined that its current fee structure was insufficient to recover all costs of the Division, and since all such costs must be recovered by fees, this rule process was initiated in order to set fees at the appropriate levels.

Small Business Considerations

19. Minn. Stat. § 14.115, subd. 1 relates to small business considerations in rulemaking. The statute requires an agency to consider methods for reducing the impact of its rules on small businesses when the agency is proposing rules that may have an effect on small businesses. The statute provides that agencies consider:

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

The proposed rules will impact small businesses. Scale owners typically pass on inspection fee costs to their customers, but the out-of-pocket amounts due for such inspections are increased substantially in terms of percentage of former costs.

20. The Department maintains that its flat-fee system favors small businesses in general because actual inspection costs would otherwise be proportionately higher for business with fewer devices to be inspected. This is because transportation and overhead costs generally do not vary by the number of devices inspected or the size of the establishment. Therefore, a flat-rate system tends to establish a less stringent compliance requirement for small businesses. As to consideration (b) in the preceding Finding, the DPS does not charge a penalty or interest for late payments. Under such a system, small businesses with unstable cash flows are benefited. Compliance and reporting requirements cannot be varied, but the Department has attempted to simplify invoicing and payment requirements. Performance standards cannot be varied and exemptions cannot be granted. The Department documents its consideration of the statutory factors

in its Statement of Need and Reasonableness. It is found that the Department has properly and appropriately considered methods for reducing the impact of its proposed rules on small businesses within the meaning of Minn. Stat. § 14.115, subd. 1.

Need and Reasonableness

21. It is found that the need for the proposed rules is established, as documented in the Department's Statement of Need and Reasonableness (SONAR), by the legislative requirement that the Weights and Measures Division recover 100% of the costs related to inspections. These costs include overhead costs such as general agency support costs, statewide indirect costs and attorney general costs. In order to accomplish this currently, the fees charged under the proposed rules must raise nearly one million dollars on an annual basis. The Department has no discretion. That amount must be raised through inspection fees. No challenge to those facts has been raised on the record, except as noted in subsequent Findings relating to the comments of Craig Sallstrom.

22. It is found that the proposed fees are designed to recover only the costs specifically required by statute. The total amount to be recovered will not exceed the actual amount of providing inspection and testing services for Fiscal Year 1993 or Fiscal Year 1994. The Department established this fact in its SONAR and through explanatory testimony offered at the hearings. It is found that the increased fees proposed in the rules are a reasonable means of meeting the Department's need for recovery of the entire costs, including overhead, of the Weights and Measures Inspection program.

It is found that the proposed fees for inspections specified in the changes proposed for Subparts 1 (flat fees) and 2 (hourly rates) of Minn. Rule 7602.0100 are necessary and reasonable.

23. The Department's new Zone Charge provisions were an item of comment and controversy at the hearing. It was noted by commentators that some of the geographic zones were larger than others, and that inspectors in certain zones lived at locations remote from the geographical center of the zones, which meant that certain scale owners were "punished" by the accident of business location. They did not criticize the concept that fees could depend in part on travel distances for the inspectors, but challenged the Zone Charges on the basis of disparate fees due to non-central home bases of those inspectors.

The Department met this challenge by establishing that its inspectors were based in locations central to the locations of possible inspection sites within their various regions. Moreover, the regional boundaries change with the home location of the various inspectors, always with a view to locating the inspector central to the greatest number of scales. The Administrative Law Judge finds this a rational, reasonable system

that supports the reasonableness of the new Zone Charge subpart of the proposed rules.

It is found that proposed Subpart 3, Zone Charges, is necessary and reasonable.

Public Comment

24. Thomas E. Cashman, Executive Vice President of the Northwest Agri- Dealers Association; Bob Zelenka, Executive Director of the Farmers Elevator Association of Minnesota; and Craig Sallstrom, Executive Director of the Minnesota Plant Food and Chemicals Association (MPFCA), all spoke and asked questions of Mr. Blacik at the October 20 hearing. Mr. Zelenka and Mr. Sallstrom returned on October 25 and commented further. All three filed written comments. Their participation constitutes the entirety of public involvement in this matter since the initiation of a hearing process. The Department responded to the concerns raised by each at the hearings and in the comment and response periods after the hearings.

25. Mr. Zelenka was concerned that the "user fee" legislation forming the basis of this rulemaking was enacted in a conference committee at the end of the session without public hearing. The DPS responded that it cannot change or ignore legislative enactments. The Administrative Law Judge agrees, and he is likewise without power to overrule the statute. Zelenka believes that since scale inspections benefit the general public as well as owners of the scales, the costs should be split more equitably. It is found that the statute controls, and the statute mandates 100% recovery from scale owners. Zelenka suggests a reduction in costs by delegating the inspection authority to private vendors. The Division is reluctant to authorize private inspections at this time because of concerns over consistency, accuracy and impartiality. Gone unsaid is the fact that it would also lose business. Such considerations are found to be beyond the scope of this rule proceeding and will not be commented on further by the Administrative Law Judge. Mr. Zelenka also urged the Division to be more careful with its budget.

26. Some of the concerns raised by Mr. Cashman were raised also by Mr. Zelenka and were covered in the preceding Finding. It is noted further the Department responded in part to Mr. Cashman by pointing out that "user fees" for the cost of inspecting weighing and measuring equipment were enacted first by the legislature in 1981. Fees were increased by rulemaking proceedings in 1983 and 1985.

The balance of Cashman's concerns were commented upon in earlier Findings, but the Department's final response to his comments are noteworthy. The Department "flattens" the effect that imposition of specified charges for travel, identification

and inspection, equipment set up and report writing for each inspection (which total varies little according to the size of the establishment or number of scales) would have on smaller businesses by averaging all costs by total estimated inspections in its flat-rate structure. This detailed description/justification establishes further the reasonableness of using different flat fees to cover different types of items tested. In its response to Mr. Cashman's filing, the Department also rebuts convincingly the argument that it contract with private inspectors for the services covered by the proposed fees by showing how some of the methods used to check scales privately are unreliable. It is noted that the subject matter of this suggestion technically is beyond the scope of this proceeding.

Responding further to Cashman, the DPS notes, as to improving the efficiency of the process, that it has redesigned performance standards recently with that goal in mind and specifically to target the performance of individuals who have not performed as effectively as others on the staff. The staff attempts to test all scales annually, not just grain and feed industry scales as alleged by Mr. Cashman, and it is noted by the DPS that only a few scale repair companies are qualified to act as enforcement agents. Again, those considerations are beyond the scope of this proceeding. They are noted here as comments from a representative of the affected public for future consideration by the Department.

27. Mr. Sallstrom testified at length and filed comments on November 8. In this Report, the Administrative Law Judge will deal with his written and oral remarks and the Department's responses to them to the extent they are not covered in preceding Findings related to other public commentators or other preceding Findings. Sallstrom argued that the fee increases exceed increases in the Consumer Price Index (CPI) for the same period. As pointed out by the DPS, Sallstrom's comparison is to a 26.02% rise in the CPI for the last five years, whereas the fees have not increased in eight years. The Department responds further that, even against the 26.02% rise cited by Mr. Sallstrom the average increase for all fees in the proposal is only 23.6% and 18.7% for scales used by his group (fertilizer and agricultural chemical dealers).

28. Mr. Sallstrom offered data to show that flat rate inspection fees exceed hourly rate fees. The Department responded that Sallstrom's calculations of total average amount for inspections were invalid because they do not take into account the time for travel, plus fuel and living expenses (only on-site inspection costs) associated with each inspection. The DPS maintains Sallstrom erred further regarding the comparison with hourly fees by dividing specific inspection fees by the average test time associated with each type of inspection, ignoring again the other costs involved for travel time and expenses outside the inspection. The Administrative Law Judge finds that the Department's response to Mr. Sallstrom's flat rate

v. hourly rate cost comparisons is credible and that Mr. Sallstrom's calculations are based on insufficient data. It is found that the MPFCA's arguments do not affect the reasonableness of the proposed fees.

29. Mr. Sallstrom offered data intended to prove that the Division's proposed hourly rates exceeded those charged by private firms that repair scales. In response, the Department argued its rates were comparable to or lower than those of private companies. Sallstrom cited one example, for heavy capacity truck scales, where the vendor charged \$48 per hour and discounted the rate by \$5 per hour for prompt payment as opposed to a \$75 per hour charge proposed by the State. The current charge is \$65. The DPS responded with data showing that private vendors charge varying amounts by adding travel mileage rates to their hourly rates. It is found that the data submitted by the MPFCA does not affect the reasonableness of the proposed hourly rates. Comparison with the rates of only one vendor is insufficient data on which to base a conclusion that the Department's hourly fees are too high. Also, a comparison with the rates of private companies is immaterial where the legislature has granted the authority for such inspections to a state agency, has mandated the Agency to collect all direct and overhead costs associated with those inspections, and the fee structure to raise those costs has been reviewed accordingly by the Commissioner of Finance. In light of the legislative enactment and the Department's reluctance to delegate its authority, the Administrative Law Judge is without authority to recommend a reform of the system allowing inspections to be performed by entities charging less than the DPS.

30. It is found that the DPS rebutted convincingly the allegation by the MPFCA that it is charging unequal fees for inspecting similar types of equipment (the example cited is hopper scales v. fertilizer hopper scales) by pointing out in its responsive comments that the Association misinterpreted the data upon which its comparison is based.

With respect to the charge that heavy capacity scale inspections do and will yield revenue that exceeds the expense for that program, Sallstrom points out that the Division today (before the proposed increase) collects 8% more than that part of the program will cost in Fiscal Year 1994 (\$507,000 v. \$469,000) and, if the increase requested is adopted, will collect up to \$650,000. The DPS responded with data indicating these inspections will raise \$585,959 in a given Fiscal Year at the proposed rates. It notes also that the DPS is required by Minn. Stat. § 239.101, subd. 4 to review its fees every six months and that it plans to adopt rules as necessary to adjust fees to reflect costs. The Administrative Law Judge finds that the MPFCA has not presented evidence sufficient to affect the reasonableness of the Department's proposed fees. It is so found because the legislative mandate to raise all program expenses is clear, the fact that one part of the scale inspection program

raises fees that may "subsidize" other parts is not unauthorized in this instance, the legislature has appropriated a certain amount of money to be raised through fees and the Commissioner of Finance has approved the proposed fees.

The Department does not admit directly that it is subsidizing inspections that cannot pay for themselves through the rates charged for heavy capacity scale inspections, but implies it needs to raise money exceeding expenses in this part of the program to recover past deficits. It is noted that the deficit for Fiscal Year 1993 is estimated at \$207,000, leaving an accumulated deficit of \$346,000, and the Fiscal Year 1994 budget includes an additional deficit of \$5,000. It is found that the Department has the discretion to raise its required total through fee adjustments necessary to cover its total expenses without having to match revenues and expenses for inspection of each individual type of device. The fact that it exercises that discretion with a proposal to raise money in excess of expenses for inspection of heavy capacity scales is found not unreasonable in this instance, given the requirement that the total amount raised by all inspections recovers the total cost for all inspections.

31. The MPFCA alleges that proposed flat rate fees are set on the basis of the size and type of scale being inspected, not on the time needed for inspections, as the DPS alleges. In its response, the DPS refuted the Association's basis for this criticism, showing that its data base was insufficient. The Department showed the comparable times for inspections used in the Association's argument is due strictly a statistical anomaly created by the small number of inspections for some of the comparison groups. It also supplied data supporting its assertion that it sets flat rates based in part on the average amount of time for inspections. The Department's response establishes further the reasonableness of the proposed changes to Subpart 1 of the rule.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter, except as noted at Findings 7-9 and Findings 12-15. Any defects in notice referred to in those Findings are harmless error within the meaning of Minn. Stat. § 14.15, subd. 5.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule, except as noted at Findings 7-9 and Findings 12-15. Any procedural defects noted at those Findings are harmless error within the meaning of Minn. Stat. § 14.15, subd. 5.

3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That any Findings which might properly be termed Conclusions are hereby adopted as such.

6. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 16th day of December, 1993.

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Kirby A. Kennedy & Associates
Angela Sauro and Connie Dyke, Reporters□