

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Amendment
to Rules Governing Parks and Trails;
Public Use of State Parks and Other
Recreational Areas, Minnesota Rules,
parts 6100.0100 to 6100.2400

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on December 7, 1998 in St. Paul, Minnesota; on December 8 in Brainerd; on December 16 in Rochester; and on January 28, 1999 in Hibbing. Each hearing session continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.31 to 14.20 (1998), to hear public comment, to determine whether the Minnesota Department of Natural Resources (hereinafter "the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

Steve Masten, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Steve Simmer, Dan Breva, Ron Potter and Emmett Mullin.

The record remained open for the submission of written comments until February 17, 1999. During the initial comment period, the ALJ received numerous written comments from interested persons and the Department. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. During the responsive comment period, interested persons replied to the Department's comments, and the Department replied to written comments. The record closed for all purposes on February 24, 1999.

NOTICE

This Report must be available for review to all interested persons upon request for at least five working days before the Department takes any further action on the proposed amendments. The Department may then adopt a final rule, or modify or withdraw its proposed amendments.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse Finding of this Report, he will advise the Department of actions which will correct the defect and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defect has been corrected.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defect has been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On December 12, 1996, the Department issued a request for comments in connection with these rules. It was published in the State Register on February 24, 1997. Ex. 1.
2. On February 11, 1997, the Department requested approval of a notice plan for the request for comments. The notice plan consisted of mailings to a variety of hunting and fishing organizations, camping and tourism organizations, recreational motor vehicle organizations, other trail user organizations, commercial forest road user organizations, conservation organizations, friends of state park organizations, outdoor interest publications, and others. The notice plan was approved by Administrative Law Judge George Beck on February 13, 1997. Ex. 2.
3. On February 24, 1997, the Department mailed the request for comment to the persons on the approved notice plan. Ex. 3.

4. On December 1, 1997, the Department sent out an update letter to interested persons, indicating that controversy had developed over the use of recreational off-road motor vehicles on state forest lands, and that the Department had decided to conduct a planning process in each region of the state. Ex. 5.

5. On August 27, 1998, the Department requested the scheduling of a hearing and 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 dual Notice of Hearing proposed to be issued.
- c. A draft Statement of Need and Reasonableness (SONAR).
- d. An additional notice plan, which was part of the SONAR. Ex. 11.

6. On September 15, 1998, the Department mailed a copy of the proposed rules and a copy of the SONAR to the Legislative Reference Library. Ex. 8.

7. On September 22, 1998, the Department mailed a copy of the dual notice, the proposed rules, the SONAR and a letter from the Commissioner to legislators as required by Minn. Stat. § 14.116. Ex. 9.

8. On September 22, 1998, a copy of the dual notice, the proposed rules and the SONAR were mailed to all persons on the notice plan as well as all persons and associations on the Agency's rulemaking list (dual notice only). Ex. 12. The original dual notice contained an error, so on October 8 a corrected dual notice was sent to all persons who had received the erroneous one. This corrected notice is in the record as Ex. 12A.

9. On September 29, 1998, the Department issued a news release, announcing the opportunity to request a hearing or submit comments on the proposed rules. The press release directed people to check the Department's web site or the State Register for a copy of the rules, and also offered to make copies available to those who contacted the Department. The press release was sent to over 1,000 interested persons and news outlets. Ex. 13.

10. On October 5, 1998, a copy of the dual notice and the proposed rule was published at 23 State Register 751.

11. In response, the Department received close to 200 requests for hearings and/or comments on the proposed rule. Ex. 14.

12. On November 12, 1998, the Department mailed a copy of the Notice of Hearing to those persons who had requested a hearing. Ex. 15.

13. A number of persons raised concerns about the locations of the hearings originally announced (St. Paul and Brainerd). In response, the Department added a hearing in Rochester. In connection with this, a Notice of Additional Hearing, announcing the hearing to be held in Rochester, was issued on December 2, 1998 and was mailed on that date to all persons who had requested a hearing, regardless of their location. Ex. 17. On December 3, an error was discovered in that notice and a

corrected notice was mailed to the same persons on December 3. A press release was sent to papers in southeast Minnesota on December 2.

14. Interest also developed in having a hearing in the northern part of the state, so on December 29 a Notice of Hearing, announcing an additional hearing in Hibbing, was mailed to all persons who had requested a hearing and were on the mailing list in Exhibit 15. On December 30, a copy of the additional notice was provided to state legislators in the northern part of the state. On January 4, a Notice of Additional Hearing was published in the State Register at 23 State Register 1483. It was also publicized on the DNR website, and a news release was provided to news media throughout northern Minnesota.

15. Prior to the start of the first hearing, the Department identified five changes which it desired to make to the proposed amendments as published. It distributed copies of the changes (Ex. 19) and an addendum to the SONAR (Ex. 20) at all hearing locations.

16. On February 16, 1999, along with its initial responses to the comments made at the hearing and in writing, the department also filed four further changes and an additional addendum to the SONAR explaining them.

All of the above documents have been available for inspection at the Office of Administrative Hearings from the date of filing.

Standards of Review

17. In a rulemaking proceeding, an administrative law judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts.^[1] An agency need not always support a rule with adjudicative or trial-type facts. It may rely on what are called “legislative facts” — that is, general facts concerning questions of law, policy, and discretion. The agency may also rely on interpretations of statutes and on stated policy preferences.^[2] Here, the Department prepared a SONAR setting out a number of facts, statutory interpretations, and policy preferences to support the proposed rules. It also supplemented information in the SONAR with information presented both at the hearing and in written comments and responses placed in the record after the hearing.

18. Inquiry into whether a rule is reasonable focuses on whether the rulemaking record establishes that it has a rational basis, as opposed to being arbitrary. Minnesota law equates an unreasonable rule with an arbitrary rule.^[3] Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.^[4] On the other hand, a rule is generally considered reasonable if it is rationally related to the end that the governing statute seeks to achieve.^[5]

19. The Minnesota Supreme Court has defined an agency's burden in adopting rules as having to “explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken.”^[6] An agency is entitled to make choices between different approaches as long as its choice is rational. Generally, it is not proper for an administrative law judge to determine which policy alternative might present the “best” approach, since making a judgment like that invades the policy-making discretion of the agency. Rather, the question for an administrative law judge is whether the agency's choice is one that a rational person could have made.^[7]

20. In addition to ascertaining whether proposed rules are necessary and reasonable, an administrative law judge must make other decisions — namely, whether the agency complied with the rule adoption procedure; whether the rule grants undue discretion to the agency; whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another; and whether the proposed language is not a rule.^[8] The SONAR contains information establishing the need for and reasonableness of most of the proposed rules, and the Department's compliance with laws governing the rulemaking process is apparent in most cases. Moreover, the vast majority of provisions drew no unfavorable public comment. For these reasons, the Administrative Law Judge will not discuss every part and subpart of the proposed rules in this report. Rather, he finds that the Department has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report. He also finds that all provisions not specifically discussed are authorized by statute and that there are no other problems that would prevent their adoption.

21. When an agency makes changes to proposed rules after it publishes them in the *State Register*, an administrative law judge must determine if the new language is substantially different from what the agency originally proposed.^[9] The legislature has established standards for determining if the new language is substantially different.^[10]

Nature of the Proposed Rules

22. This rulemaking proceeding involves amendments to the Department's rules governing permissible uses of a variety of state lands. These rules do not attempt to regulate any uses of *privately*-owned property. They only regulate uses of *publicly*-owned property. The existing rules focused primarily on recreational uses of state parks. These amendments update those rules, but make only minor changes. The main focus of these amendments is on the public use of state forest lands. Almost all of the comments during the hearing process were directed at the proposals governing the use of motorized vehicles in state forests, with particular emphasis on three groups of OHVs (off-highway vehicles): ATVs (all-terrain vehicles), OHMs (off-highway motorcycles) and ORVs (off-road vehicles, such as 4 x 4 trucks).

Statutory Authority

23. Due to the variety of different topics covered by these rules, the Department has cited a variety of different statutes as authority for them. Having reviewed the cited statutes, the Administrative Law Judge concludes that the Department does have statutory authority to adopt its proposals.

24. The only substantial question with regard to the Department's statutory authority arises in connection with a prior action: the Department's 1998 classification of state forests. Relying on its authority in Minn. Stat. § 89.002, subd. 1, which directs the Commissioner to "manage the forest resources of state lands under the authority of the commissioner according to the principles of multiple use and sustained yield," and § 84.027, subd. 2, which states that "the commissioner shall have charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state . . .", the Department classified all of the state forests into one of three classes, "managed", "limited", and "closed". This was done through a Commissioner's Order dated September 3, 1998.^[11] The Order provides that the classifications are interim ones until January 1, 2000, but will become final on that date. The purpose of the interim/final process is to evaluate the impacts of the classifications on both the resource and recreation.

25. A number commentators, ranging from the Sierra Club to ATVAM (All Terrain Vehicle Association of Minnesota), objected to this action, and urged that the classification be invalidated until it was subjected to the rulemaking process.

26. The Department responded that not all of its decisions were subject to rulemaking. It makes numerous land management decisions which are not required to go through the rulemaking process. It argued that the rules which directly affect the public – the rules which actually dictate what can and cannot be done within the various

classes of forests – are part of these amendments (Proposed Rule 6100.1950, subp. 1) and that satisfies the requirements of Minn. Stat. § 14.06(a). The Department reasoned that there was a difference between its act of classifying and its prohibition of certain activities in the various classes. It reasoned that the classification itself did not directly affect the rights of the public, but that prohibiting certain uses did directly affect their rights. For that reason, it treated the classification as not being a rule, but it treated the behavior regulations as rules.

27. The Department also raised the issue of whether or not the Administrative Law Judge had authority to do anything about the classification action, because it is not part of the proposed rules. Essentially, the Department was saying that persons who disagreed with the classification would have to appeal the Commissioner's action pursuant to section 14.69 in the context of a contested case enforcement action.^[12]

28. The Administrative Law Judge has determined that he does not have authority to rule on the validity of the Agency's 1998 classification action, and that any such ruling must come from the courts. The Administrative Law Judge's role is limited to deciding whether the Department has demonstrated that it has statutory authority to adopt the rule amendments which it has proposed, rather than whether its prior act of classification should have been done through the rulemaking process. The Administrative Law Judge finds that the Department does have authority to adopt its proposed rules, including the "prohibited uses" rules. The Administrative Law Judge does not offer any opinion on the legitimacy of the Department's 1998 classification action. That will have to be decided by the courts.^[13]

Impact on Farming Operations

29. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The Department asserts that these proposed rules will have no direct or substantial adverse impact on agricultural land, and will not affect farming operations. The Administrative Law Judge agrees, finding that the proposed rule change will not impact farming operations, and thus no additional notice is required.

Cost and Alternative Assessments in SONAR

30. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the cost that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

31. In the SONAR, the Department addressed each of these requirements.^[14] The Administrative Law Judge finds that the Department has complied with the requirements of the statute.

Performance-Based Regulation

32. Minn. Stat. § 14.002 directs all agencies, whenever feasible, to develop rules that emphasize superior achievement in meeting the agencies' regulatory objectives and a maximum flexibility for the regulated public in meeting those goals. The Agency claims that throughout the development of these rules, it sought to describe desired outcomes (such as prohibiting damage to a forest road, or prohibiting erosion or rutting, or prohibiting destroying trees), while leaving it up to the vehicle rider as to how to accomplish that goal. The Administrative Law Judge finds that the Agency has complied with the statute.

Analysis of the Proposed Rules

General

33. This Report will not discuss each and every comment which was made about any of the proposed amendments. Instead, it will focus upon those topics which the Administrative Law Judge believes require attention, either because there is a problem with their adoption or, in some cases, because they were quite controversial. Those portions of the rules not commented on or addressed individually are specifically found the Administrative Law Judge to be needed and reasonable. These provisions are supported by an affirmative presentation of facts, are specifically authorized by statute, and do not create problems that prevent their adoption.

34. As noted in the procedural findings, above, the Department has proposed a total of nine changes to the rules as initially proposed. Where changes are made to a rule after publication in the *State Register*, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.^[15] The standards to determine if the new language is substantially different from that which was originally proposed by the Department are found in Minn. Stat. § 14.05, subd. 2. Any changes made to the language published in the *State Register* and not discussed below are found to not constitute a substantially different rule.

Rule-by-Rule Discussion

35. Proposed Rule 6100.1355 deals with non-motorized use of state lands. As initially proposed, subpart 6, dealing with dog sledding, and subpart 8, dealing with rock climbing, both appeared to significantly restrict those activities to only places where they had been designated or otherwise approved. This led to concerns from a number of commentators, who claimed that such restrictions were totally unnecessary. The Department responded, both at the hearings and in their February 12 response, that it had not intended such a restrictive reading of the proposed language. In order to assure dog sledders and rock climbers of the Department's intentions, the Department proposed to amend both subparts to clarify that such activities are permitted on all forest lands except where posted to prohibit them, and that the restrictive language initially published applied only to state parks, not state forest lands. The Administrative Law Judge does not believe that these changes are substantially different given the standards contained in Minn. Stat. § 14.05, subd. 2, and they may be adopted.

36. By far the most controversial rule in this proceeding is Part 6100.1950, which deals with the permitted uses of motor vehicles and snowmobiles in state forests. It contains a number of different topics within the same rule, and each of them will be dealt with separately.

37. The first topic is set forth in subparts 1 through 4, and codifies the classification system discussed earlier. Subpart 1 defines the three classifications (“managed”, “limited”, and “closed”) and sets forth the allowable uses in each class. Subparts 2 through 4 set forth both the criteria and the procedure to be used when classifying lands into one of those three categories.

38. The whole idea of specifying permitted uses of state forest lands brought forth a vast array of suggestions, ranging from “ban all motorized use” to “allow unregulated use of any motorized vehicle”. The Department’s response, which the Administrative Law Judge endorses, is that the Legislature has directed the Department to manage the forest resources of state forest lands “according to the principles of multiple use and sustained yield”. The term “multiple use” is further defined as:

The principle of forest management by which forest resources are utilized in the combinations that will best meet the needs of the people of the state; including the harmonious and coordinated management of the forest resources, each with the other, without impairment of the productivity of the land and with consideration of the relative values of the resources, and not necessarily the combination

of uses resulting in the greatest economic return or unit output.

Minn. Stat. §§ 89.002 and 89.001, subd. 9.

39. The Commissioner also has broad authority to regulate the use of state forest lands. Minn. Stat. § 84.029, subd. 1 provides as follows:

. . . The commissioner of natural resources may establish, develop, maintain, and operate recreational areas, including but not limited to trails and canoe routes, for the use and enjoyment of the public on any state-owned or leased land under the Commissioner's jurisdiction.

Similarly, Minn. Stat. § 89.031 authorizes the Commissioner to make and enforce all necessary rules for the care and management of state forest lands, and Minn. Stat. § 89.19 empowers the Commissioner to prescribe rules governing the use of forest lands and state forest roads by the public. State forest lands are part of the State's outdoor recreation system, and Minn. Stat. § 86A.06 authorizes the Commissioner to adopt rules relating to units of the outdoor recreation system. Section 86A.05, subd. 7 provides that state forests may be divided into "sub-areas" to permit development and management of specialized outdoor recreation. In short, the Commissioner has ample statutory authority to determine what kinds of recreation, including what kinds of motorized recreation, may take place on state forest lands; he also has ample authority to determine the manner and conditions under which that recreation can occur.

40. There are numerous ways in which the Commissioner could chose to exercise his authority to manage recreation on state forest lands. In this case, he has chosen to establish three classifications of state forest lands, determine which of the classifications is most appropriate for each of the existing state forests, set forth rules which govern public conduct in each of the three classifications, and provide criteria and a procedure for classifying forest lands in the future. Commentators suggested a variety of other methods which the Commissioner could have chosen to exercise his authority, but as noted above at Finding 19, the question to be answered at this point is whether or not the Commissioner's choice has been justified as a reasonable one, meaning whether or not it is a rational choice. The Administrative Law Judge believes that it is a rational choice. The evidence in the record demonstrates that there is a wide diversity of opinions among users with regard to whether or not motorized vehicles pose any sort of a problem at all, and for those who believe that they do pose a problem, there is a diversity of opinion as to how the problem ought to be solved by the exercise of the Commissioner's authority. The Commissioner's choice is supported by the record as being a rational one.

41. One of the elements of the Commissioner's chosen system is establishing criteria to be considered when forest lands are being classified for motor vehicle use. The criteria attempt to balance resource sensitivity and impacts by various uses, consider existing motorized and non-motorized recreational opportunities in the

area, the degree and trend of motorized and non-motorized use in the area, and a number of other concerns. The final criterion is proposed to be “any other factors deemed appropriate by the Commissioner for resource or recreation management or public safety purposes”. Proposed Rule 6100.1950, subp. 2(l). A number of commentators suggested that the criteria were vague and open to a number of interpretations. This last criterion, however, raises the question of unbridled discretion. The law requires that discretionary power may be delegated to administrative officers:

[I]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officer.^[16]

This same standard applies to rules. A commentator has interpreted this to mean the following:

Accordingly, in a rule that grants discretionary authority to the administrative officer, the issue is whether the rule furnishes a “reasonably clear policy or standard of action”. . . . Requiring more specific language to avoid excessive agency discretion assures that the rule will be applied in a consistent manner.^[17]

In this case, the Administrative Law Judge concludes that inclusion of the criterion “any other factors deemed appropriate by the Commissioner . . .” is not sufficiently clear. In order to cure this defect, it should be deleted from the list of factors, or, in the alternative, it should be made more specific so as to provide some clearer guidance regarding what “other factors” can be considered.

42. Subpart 7 of Part 6100.1950 prohibits the use of a motor vehicle on forest lands off a forest road or trail, with two minor exceptions. It also prohibits the creation of an unauthorized trail on forest lands. These prohibitions would stop the practice of “pioneering” or “cross-country travel” which has been occurring in the past. Many persons objected to any restrictions, claiming that they were not needed (because there had been no showing of damage or conflict with other users) nor were they reasonable (they would prohibit the “practical” uses of vehicles to get to a particular fishing site, berry patch, or other remote location).

43. In response, the Agency stated in its February 16 comments:

The Department’s obligation is to serve a variety of uses. This “multiple use” strategy doesn’t mean that everybody gets to do anything anywhere they want. It means that these many uses are available somewhere within the system. It is essential that conflicting uses are separated.

* * *

No use is without its impacts. The creation of unauthorized trails is addressed in the SONAR. Furthermore, trail creation changes the character of the land. It is not passive or non-intrusive. Such changes reasonably require a resource management decision to be made by the agency. Promiscuous trail creation negates this responsibility and authority.

Both in oral comments and in written submissions, numerous people spoke both for and against this proposed rule. The Administrative Law Judge is convinced that there is no "exactly right" answer to attempting to provide opportunities for both motorized and non-motorized users. However, the record does demonstrate that there is a significant population which desires quietude and peacefulness as part of their outdoors experience. They find their experience to be degraded by the sound of a motorized vehicle, even if they cannot see it. While there are some state forests where it is simply impossible to adequately separate motorized and non-motorized users, there are many others where it is possible, so long as motorized users stay on trails. If they are free to wander throughout the forest at will, there is no way to provide quietude for those who wish it. By strategically planning trails to take advantage of natural features and various other buffering factors, the Department can provide both kinds of experiences in many of the forest lands. The Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of its on-trail rule.

44. Proposed Rule 6100.9150, subp. 7(B) prohibits operation on forest lands in a manner that causes erosion, rutting, or damage to trees or growing crops. The rutting prohibition does not apply to trails that are designated and maintained for motorized use. In its SONAR, the Department suggests that there are low impact riding practices which are part of a national "tread lightly" program which can be used by OHV riders to avoid damaging the resource. The Department recognizes, however, that certain trails which are posted, maintained and repaired for OHV use will be rutted, but the Department intends that they will be repaired. The record contains testimony from persons complaining about damage done to lands (see, for example, Ex. 26, photos from Snake Creek) and letter dated February 7 from Minnesotans for Responsible Recreation, including photos taken from the Arrowhead ATV Club's web site. The Department has demonstrated the need for and reasonableness of its proposed rule.

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

CONCLUSIONS

1. The Minnesota Department of Natural Resources ("Department") gave proper notice of this rulemaking hearing.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated 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) except as noted at Finding 41.

4. 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. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Finding 41.

7. Due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. 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 proposed 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 the record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where otherwise noted above.

Dated this _____ day of March, _____ 1999.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape recorded, no transcript prepared.

^[1] Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100.

^[2] Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989).

^[3] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

^[4] Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975).

^[5] Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

^[6] Manufactured Housing Institute, *supra*, 347 N.W.2d at 244.

^[7] Federal Security Administrator v. Quaker Oats Company, 318 U.S. 2, 233 (1943).

^[8] Minn. Rule 1400.2100.

^[9] Minn. Stat. § 14.15, subd. 3.

^[10] Minn. Stat. § 14.05, subd. 2

^[11] This Order, along with a great deal of data describing the events which led up to it, is part of Appendix D to the SONAR, Ex. 7.

^[12] *See*, Beck, *Minnesota Administrative Procedure*, 2d Ed., § 24.3, at p. 372.

^[13] The same conclusion applies to the questions raised concerning individual classification decisions. Several persons objected to the classification of the Nemadji State Forest, the Richard J. Doerr Memorial Hardwood Forest, and other forests. The legality of those individual classification decisions will have to be reviewed by the courts.

^[14] Ex. 7, pp. 4-6.

^[15] Minn. Stat. § 14.05, subd. 3.

^[16] Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949).

^[17] Beck, *op cit.*, at section 23.4, p. 362.