

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Proposed
Amendments to Rules Governing
Air Quality Permit Fees,
JUDGE
Minn. Rules part 7002.0100.

REPORT OF THE
ADMINISTRATIVE LAW

The above-entitled Matter came on for hearing before Bruce
It Campbell ,
Administrative Law Judge, at 9:30 A.M. on September 1 , 1987, in
the Board Room
of the Minnesota Pollution Control Agency at 520 Lafayette Road,
St. Paul,
Minnesota.

This Report is part of a rulemaking proceeding held
pursuant to Minn.
Stat. 14.01 through 14.28 (1986), to determine whether
the proposed
amendments governing air quality permit fees should be
adopted by the
Minnesota Pollution Control Agency (PCA or Agency).

The Agency was represented by Beverly Conerton, Special
Assistant Attorney
General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota
55155. Members of
the Agency panel appearing at the hearing were Elizabeth
Henderson, J. Michael
Valentine and Ahto Niemioja, Division of Air Quality,
Minnesota Pollution
Control Agency, 520 Lafayette Avenue North, St. Paul, Minnesota 55155.

The hearing register was signed by 11 persons. Four
members of the public
provided oral testimony at the hearing. All persons desiring
to testify were
given an opportunity to do so. The record remained open
through September 21,
1987, for the submission of initial written comments. At the
hearing herein,
the Agency offered PCA Ex. 1-15 as jurisdictional documents.
Public Exhibits
16-25 were also received during the hearing. During the
initial comment
period, which expired on September 21, 1987, the
Administrative Law Judge
received the following timely-filed comments:

Pub. Ex. 26 Outdoors Committee, September 21 , 1 987
Pub. Ex. 27 Pickands Mather, September 21, 1987;
PCA Ex. 28 Minnesota Pollution Control Agency,
 September 21, 1987;
Pub. Ex . 30 J.L. Shiely Company, September 21, 1987.

As authorized by Minn. Stat. 14.15, subd. 1 (1986),
three business days
were allowed for the filing of responsive comments. During
the period for
reply comments, the following submissions were made:

Pub. Ex. 29 Outdoors Committee, September 23, 1987;
Pub. Ex. 31 J.L. Shiely Company, September 24, 1987;
PCA Ex. 32 Minnesota Pollution Control Agency,
 September 24, 1987.

On September 24, 1987, the record of this rulemaking
proceeding finally
closed for all purposes.

The Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

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 findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board 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 defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board 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 Board 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 July 10, 1987, the Agency filed the following documents with the Administrative Law Judge:

- (a) A copy of the proposed rules, with the certification of approval as to form by the Revisor of Statutes.
- (b) A draft Order for Hearing.
- (c) A proposed Notice of Hearing.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) A copy of the Statement of Need and Reasonableness (SONAR).
- (f) A Certificate of the Agency's Authorizing Resolution, executed on behalf of the Executive Director of the Agency, Thomas J. Kalitowski, by Barbara Lindsey Sims.

2. On July 27, 1987, a Notice of Hearing and copy of the proposed amendments to the existing rule were published at 12 State Register 136-138.

3. On July 23, 1987, the Agency mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice. In addition, a copy of the Notice was mailed by the Agency to all persons or entities currently holding an air quality permit under the existing rule.

4. On July 31, 1987, the Agency filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) A photocopy of the pages of the State Register on which the Notice of Hearing and the proposed rule amendments were published.
- (c) The Agency's certification that the mailing list required by Minn. Stat. 14.14, subd. 1a (1986) which was used for the mailing of the Notice was accurate and complete.
- (d) The Affidavit of Mailing of the Notice to all persons on the Agency's mailing list and the mailing list. This mailing list contains a list of all persons currently holding an air quality permit from the Agency. That mailing constitutes additional discretionary notice given pursuant to Minn. Stat. 14.14, subd. 1a (1986).
- (e) Copies of the pages of the State Register on which a Notice of Intent to Solicit Outside Opinion was published. No comments were received from members of the public following publication of the Notice.
- (f) The names of the Agency personnel who would represent the Agency at the hearing.

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

5. The period for submission of written comments remained open -through September 21, 1987, the period having been extended by Order of the Administrative Law Judge to 20 calendar days following the close of the hearing. Pursuant to Minn. Stat. 14.15, subd. I (1986), an additional three business days were allowed for the filing of responsive comments. The record therefore closed on September 24, 1987.

Nature_of Proposed Amendments.

6. The proposed amendments modify Minn. Rule 7002.0100, Air Quality Permit Fee Schedule, by increasing each stated fee a uniform proportional percentage. No change other than that proportional increase in fees is contained in the proposed amendments. The amount of the proportional increase is approximately 60%. All of the oral testimony at the hearing and subsequent written comments would apply equally to all changes in the fee schedule, and none is directed towards an individual change in that schedule.

Notification_to_legislative Committees.

7. Minn. Stat. 16A.128, subd. 2a., which was adopted by laws 1986, C. 436, 2 and which became effective on July 1, 1987, provides:

Procedure. Other fees not fixed by law must be fixed by rule according to chapter 14. Before an agency submits notice to the state register of intent to adopt rules that establish or adjust fees, the agency must send a copy of the notice and the proposed rules to the chairs of the

senate house appropriations committee and
finance committee.

8. The Agency submitted its Notice of and Order for Hearing herein to the State Register sometime subsequent to July 1, 1987 and before the publication of the Notice of Hearing in the State Register on July 27, 1987. The Agency did not send a copy of the Notice and a copy of the proposed amendment to the Chairperson, of either the House Appropriations Committee or Senate Finance Committee as required by Minn. Stat. 16A.128, subd. 2a. (1986). The record does not indicate that the Senate Finance Committee or the House Appropriations Committee has ever received a copy of the Notice and the proposed rule amendments.

9. The Outdoors Committee, in Pub. Ex. 26 and 29, argues that the failure to provide the Notice and a copy of the proposed amendment is an incurable procedural defect, requiring a re-noticing of the hearing. The Agency argues that the receipt by the two Legislative committees of a copy of PCA Ex. 3, dated June 11, 1987, is substantial compliance with the statutory requirement. PCA Ex. 32. In the alternative, the Agency suggests that the defect be corrected by allowing the Legislative Committees to supplement the existing rulemaking record with comments. PCA Ex. 32.

10. It is not clear that Minnesota has adopted a substantial compliance exception to statutory rulemaking requirements. Johnson Bros. Wholesale Liquor v. NovaK, 295 N.W.2d 238, 242 (Minn. 1980); Handle With Care Inc. v. Department of Human Services, 393 N.W.2d 421, 424-425 (Minn.App. 1986), reversed on other grounds Handle with Care v. Department of Human Services 406 N.W.2d 518 (Minn. 1987). Even if that doctrine were available, however, the document upon which the Agency relies, PCA Ex. 3, does not establish substantial compliance with Minn. Stat. 16A.128, subd. 2a. (1986). PCA Ex. 3 is a memorandum from the Commissioner of Finance to the Executive Director of the Minnesota Pollution Control Agency regarding methods of calculating fee

revisions to provide direction to the Agency in formulating a proposal . PCA
Ex . 3, at most, apprised the Legislative Committees that the Agency was considering a revision to its permit schedule. It does not indicate the stage of development of the revision or, even, that the Agency will finally commence a rulemaking to accomplish a revision. Under such circumstances, at most, it alerted the Committees and their staffs, that the matter was being considered by the Agency. Unless the Administrative Law Judge were to place some undefined duty of inquiry upon the Committees, PCA Ex. 3 would not substitute for the filing required by Minn. Stat. 16A.128, subd. 2a. (1986). A number of agencies consider revisions to fees and, presumably, do so without that consideration resulting in proposed rule amendments. Placing such a duty upon the Legislative committees is neither reasonable, nor in accordance with the literal language of the statute. Undeniably, one purpose of the statute was to avoid such diverse investigation by the Committees. Hence, the Administrative Law Judge finds that the Agency has not substantially complied with the statute, either prior to the hearing or subsequently. The failure to comply with Minn. Stat. 16A.128, subd . 2a. (1986), is a unremedied procedural irregularity.

11. Having determined that the failure to comply with Minn. Stat. 16A.128, subd. 2a. (1986), constitutes a procedural irregularity, it must be determined whether that irregularity is subject to correction or whether it is jurisdictional, requiring a re-noticing of the hearing. The Agency suggests that the Administrative Law Judge allow an additional comment period

during which members of the Committees may file additional comments, presumably, for review by the Administrative Law Judge. PCA Ex. 32, pn 2. The record of a rulemaking proceeding, however, closes after the comment periods authorized by Minn. Stat. 14.15, subd. I (1986) See, Minn. Stat. 14.14, subd. 2a.; 14.15, subd. 1, 2 ; 14.45 (1986). Hence, the Administrative Law Judge is without statutory authority to accept additional substantive comments upon which he may rely in determining compliance with statutory requirements and need and reasonableness.

12. The Agency's request for an opportunity to obtain Legislative comments could be construed as a request that it be directed to obtain a written statement from the Chairpersons of each of the two Committees that the Legislature had no interest in participating in this rulemaking and, hence, any failure to follow statutory procedure was harmless error. PCA Ex. 32, p. 2. Presumably, under that suggestion, any comment other than an expression of disinterest in participating would result in the finding of a jurisdictional defect and a re-noticing of the hearing.

13. There is general language in several decisions of the Minnesota court suggesting that the absence of demonstrated prejudice to persons entitled to participate in a governmental proceeding is material in judging compliance with procedural requirements. See, city of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980). See also, Handle With Care, Department of Human Services, 406 N.W.2d 518 (Minn. 1987). The elements of that test have been articulated by several commentators. Auerbach, Administrative Rulemaking in Minnesota, 63 Minn. L. Rev. 151, 215 (1979), quoting, Bonfield, The Iowa Administrative Procedure Act; Background, Construction, Applicability, Public Access to Agency Law the Rulemaking Process, 60 Iowa L. Rev. 781, 834 (1975). As previously indicated, however, the Minnesota court has not clearly recognized the doctrine of substantial compliance in a rulemaking context. Wurtele, supra, involved a governmental action where substantial compliance

was a recognized tenant of the applicable law. Handle With Care supra, merely holds that the Legislature did not intend the requirement of a study to be a precondition to rulemaking; it did not involve an issue of substantial compliance.

Moreover, even adopting lack of prejudice as the test of whether a procedural defect is correctable, does not support the Agency position. The statute provides that the required information be made available at a particular time, in a particular way to two identified committees of the Legislature. Reasonably, that filing would be available not only to the two individual Committee Chairpersons, but to their staff, other members of the two Committees and, even, other members of the Legislature who might wish to be apprised of developments in agency fee rulemaking. Rationally, Legislative interest in fee-related rulemaking could vary significantly with the fee involved. The Agency has not relied on any portion of the legislative history of Minn. Stat. 16A.128, subd. 2a. (1986), which would justify a conclusion that the Chairpersons of the two Committees were the intended sole beneficiaries of the statute. Given the plain language of the provision, the Administrative Law Judge must conclude that affording the two Chairpersons an opportunity to express a retroactive disinterest in this proceeding would not affirmatively establish the absence of prejudice.

Nor is it clear, if this solution were adopted, &at each Chairperson would enter into the record. The possibilities range from a lack of a personal interest to an expression of a lack of interest on the part of anyone

to participate who may have been the beneficiary of such notice. It is inconceivable how the identified individuals could speak for other members of their Committees, unidentified members of the Legislature or members of the public .

It should also be noted that the amendments herein raise existing fees by 60%, that the initial fee schedule was legally adopted without a public hearing and has been the subject of controversy since its adoption, and the Agency contends that questions relating to need and reasonableness cannot be examined in this rulemaking proceeding. See Findings 25 - 28 , infra. Under such circumstances, fashioning in extra-record substitute for a statutorily required notice is doubly objectionable.

It could be argued that, since the statute provides no express penalty for a failure to accomplish the required filing, it is only informational and not a jurisdictional prerequisite to rulemaking. See generally *Handle with care v. Department of Human Services*, 406 N.W.2d 518 (Minn. 1987). In that case, however, the requirement of performing an administrative study was not expressly lied to the Agency's rulemaking authority and specific legislative history stated a contrary Legislative intent. In this proceeding no such specific Legislative intent has been demonstrated and the purpose of the filing is to facilitate participation in the rulemaking. the timing of the required notice, prior to the submission of rules to the State Register, indicates an intent to provide interested legislators, at least, with an opportunity to contact the Agency prior to the commencement of the proceedings and participate in the hearing process, if noticed. Nor, can the filing be characterized as only informational. When the Legislature has intended that a filing with Legislative Committees be for informational purposes only in the context of rulemaking, it has clearly so provided. see, Laws of 1977 C. 453,

The Administrative Law Judge equates the procedural defect with a failure to provide adequate notice. At least in situations where the beneficiary of such notice is unidentifiable, a failure to give the required notice is jurisdictional. In re Wilmarth Line of C.U. Project, 299 N.W.2d 731 (Minn. 1980), appeal after remand., 380 N.W.2d 127 (1986). The Administrative Law Judge finds, therefore, that the failure to make the filing with the Chairpersons of the House Appropriations Committee and Senate Finance Committee required by Minn. Stat. 16A.128, subd. 2a. (1986) is a procedural defect which is jurisdictional, that is, not subject to remedy. The rulemaking proceeding must be recommenced.

15. Since the finding of a jurisdictional defect by the Administrative Law Judge is reviewable at both the administrative level and in the courts, the Administrative Law Judge will make Findings regarding the other issues raised in this proceeding. Any further Findings however, presume an integral existing record. They will have no effect unless a reviewing authority determines that the procedural defect is curable and the remedy required is strictly implemented.

Small Business Considerations.

16. Minn. Stat. 14.115, subd. 2 (1986), requires the Agency, when proposing rules which affect small businesses, to consider methods for reducing the resulting impact on them. Since some of the entities required to pay air quality permit fees are small businesses, as statutorily defined, an

increase in the permit fee will have a financial impact upon them. Several members of the public stated that the Agency has given insufficient consideration to the impact of both the initial rule and the proposed amendment on small businesses. Pub. Ex. 26, p. 4; Pub. Ex. 29, p. 2. The Outdoors Committee argues that the level of fee imposed by the rule depends upon the annual potential emissions of two pollutants - particulates, and SO2 - and there is no necessary correlation between the size of a business and the annual level of the specified pollutants emitted. Pub. Ex. 26, p. 2. Small businesses might be major emission sources and a large company may emit few, if any, of the specified air pollutants.

17. The Agency considered the methods suggested in the statute for reducing impact on small businesses when the initial rules were adopted. PCA Ex. 28, p. 3. It determined that the initial permit fee structure, which distinguished between major and non-major sources of air emissions in the amount of fees required, appropriately on small businesses. PCA Ex. 28, p. 3; PCA Ex. 32, p. 5. Most small businesses are non-major sources. It is discussed at Findings 25 -- 28, infra, the Administrative Law Judge may not reexamine that decision in this rulemaking proceeding.

18. In this proceeding, the Agency has once again examined the impact of permit fee schedule on small businesses, as defined in Minn. Stat. S 14.115 (1986). SONAR, pp. 6-7. It considered the methods for reducing the impact of its rule amendments on small businesses specified in the statute.

The Agency concluded that it was appropriate to maintain the existing fee relationship between non-major and major sources with smaller fees or no fees imposed on non-major sources. PCA Ex. 32, p. 5; SONAR, p. 7. The fee amount relationship between non-major and major sources will remain substantially the same under the proposed fee revisions. PCA Ex. 32, p. 5. Minn. Stat. 14.115 (1986), does not require that the Agency adopt any particular solution to minimize the impact of its proposals on small businesses. If small businesses did not pay a proportionately increased amount for their air emission permits, that deficit would have to be recovered from other permit holders.

Since the Administrative Law Judge may not reexamine the Agency's initial decision to distinguish only between non-major and major sources of specified pollutants to determine the permit fee, uniformly proportional increases for all I permits are fair to all permittees. Findings 25 - 28, infra.

The Outdoors Committee does not suggest that preferring small businesses over larger ones is required, or even appropriate, under Minn. Stat. 14.115, subd. 2 (1986).

19. The Administrative Law Judge, therefore, finds that the Agency has complied with Minn. Stat. 14.115, subd. 2 (1986), by giving appropriate consideration to methods for reducing the impact of its amendments on small businesses. SONAR, pp. 6-7; PCA Ex. 28, p. 3; PCA Ex. 32, p. 5.

Consideration of Economic Factors.

20. The Agency must by give due consideration to economic factors in the exercise of its authority and the promulgation of rules. Minn. Stat. 116.07, subd. 6 (1986). Pickands Mather suggests that an increase of approximately 60% is not appropriate given existing economic conditions. Pub. Ex. 27, p. 1. That commentator suggests that the Agency must demonstrate its attempts to reduce costs. Pub. Ex. 27, p. 1. The Agency must, however, recover from its permittees the direct and indirect costs of regulation. See

Findings 29 - 32, infra. The Agency has no discretion in the total amount to be recovered from permit holders. The Agency collects fees under Minn. Rules Part 7001.0011, subp. 5 from approximately 550 air emission facilities each year. Annual fees will amount to approximately 66% or \$552,000 of the \$831,383 total special revenue appropriation for the 1987-1989 state biennium. The remaining \$279,383 for the biennium will come from various other fees associated with approximately 1400 permit actions to be conducted over the biennium. SONAR, p. 8. The Agency has a statutory responsibility to develop, implement and monitor an air quality permit program. It must recover the direct and indirect costs of that effort from permit holders, except as limited by statute. The Agency cannot eliminate its oversight responsibilities or defer collecting the costs of oversight from permit holders. SONAR, p. 8. The Agency could only reduce the amount to be collected by eliminating inefficiencies or unnecessary costs in its current air quality permit program. There is no evidence in the record that the spending on behalf of the Agency for air quality permit oversight is in any way unnecessary, inefficient or otherwise inappropriate. The Administrative Law Judge finds that the Agency has given due consideration to available information as to the economic impacts that would result from the amendments to its existing rules. Minn. Stat. 116.07, subd. 6 (1986).

Statutory Authority.

21. The Agency's statutory authority to adopt the proposed rule amendments is contained in Minn. Stat. 116.07, subd. 4d. (1986), which provides:

The agency may collect permit fees in amounts not greater than those necessary to cover the reasonable costs of reviewing and acting upon applications for agency permits and implementing and enforcing the conditions of permits

pursuant to agency rules. Permit fees shall not include the costs of litigation. The agency shall adopt rules under sections 16A.128 establishing the amounts and methods of collection of any permit fees collected under this subdivision. Any money collected under -Lb!; subdivision shall be deposited in the special revenue fund.

22. The Agency adopted Minn. Rules Parts 7002.0010 - 7002.0110 in accordance with Minn. Stat. 16A.128 (1986), as required by Minn. Stat. 116.07, subd. 4d. (1986). Minn. Stat. 16A.128, subd. 1a. (1986), requires fees to be reviewed and, if necessary, adjusted:

Unless the commissioner determines that the fee must be lower, fees must be set or fee adjustments must be made so He total fees nearly equal the sum of the appropriation for the accounts plus the agency's general support costs, statewide indirect costs, and attorney general costs attributable to the fee function.

23. No member of the public questioned the statutory authority of the Agency to adopt rules relating to air quality permit fees.

24. As a consequence of Findings 21 - 23, supra, the Agency has statutory authority to adopt amendments to its air quality permit fee rules.

Scope of Review for Need and Reasonableness.

25. Minn. Stat. 14.14, subd. 2 (1986), requires the Agency to establish the need for and reasonableness of the rule amendments. A number of public witnesses stated, both at the hearing herein and in subsequent written comments, that the Agency should justify the need for and reasonableness of not only the fee increases, but also the existing fee structure which is based on potential Emissions of two pollutants and has only two fee classes. See, e.g., Pub. Ex. 26, pp. 2-3; Pub. Ex. 29, p. 1; Pub. Ex. 31, pp. 1-3, and attachments; Tr. 45-47; Tr. 54-55. In summary, the argument is that since the PCA did not hold a public hearing when the initial fee structure was adopted, the reasonableness of the existing fee structure has never been reviewed independently. They request the Administrative Law Judge to consider the need for and reasonableness of the fee structure contained in the original rulemaking and carried forward in the proposed amendments. Several witnesses described the confusion and asserted misinformation extant at the time of the original rulemaking, their inability to determine the number of requests required to force a public hearing on the initial fee schedule and the financial disincentives to perfecting a judicial appeal. Pub. Ex. 26, pp. 2-3; Pub. Ex. 29, p. 1; Pub. Ex. 31, pp. 1-5; Jr. 16-18.

26. The Agency argues that it had no legal obligation, at the time of the initial adoption of an air quality permit fee schedule, to conduct a public hearing and, as a consequence, the Administrative Law Judge cannot consider arguments related to the structure of the existing fee schedule. Rather, he must confine his review to the need for and reasonableness of the proportionate increase in fees over all categories of air quality permits subject to the fee schedule. See, e.g., PCA Ex. 28, pp. 1-2; PCA Ex. 32, pp. 3-4. Moreover, it states that there was a measure of public participation in the development of the original proposal. PCA Ex. 32, pp. 3-4.

27 . Minn. Stat. 14.14, subd. 2 (1986), requires an agency to establish the need for and reasonableness of the rule amendments. Minn. Stat. 14.131 (1986), requires the agency to prepare a Statement of Need and Reasonableness. Rules promulgated pursuant to that statute are found at Minn. Rules 1400, et seq. part 1400.0500 specifies the content and nature of the Statement of Need and Reasonableness which would comport with the statutory requirement. Subpart 1, Item C of the rule qualifies the nature of the agency's burden when it proposes to amend existing rules:

To the extent that an agency is proposing amendments to existing rules, the agency need not demonstrate the need for and reasonableness of existing rules not affected by the proposed amendments.

The Agency has not attempted to modify the original fee structure but has proposed a uniform proportional increase in amounts. The Agency must only justify the increased amounts with a presentation of facts establishing need and reasonableness. Although the Agency might have avoided subsequent controversy by holding a public hearing prior to adopting its initial rules, it was not required to do so by law. Minn. Stat. 16A.128, subd. 2a. (1985). In 1986, the Legislature amended the statute to require the promulgation of rules under the Administrative Procedures Act. Laws of 1986, C. 436. The Administrative Law Judge has carefully reviewed the arguments of members of the public relating to the scope of review for need and

reasonableness. He finds that the Agency acted within the statutory framework existing at that time and there is no basis in this record to depart from the rule of law previously enunciated when only amendments to existing rules are proposed. The comments do contain a number of reasons why limiting the scope of inquiry in this proceeding might be inequitable. The Agency, however, acted within the then existing law, its fee structure was duly adopted and no judicial appeal was perfected. Hence, it is appropriate to limit the scope of review for need and reasonableness in this proceeding to the proportional increase in the air quality permit fees without considering the reasonableness of the existing fee structure.

28. The fear is expressed that no practical forum exists for permit holders to require the Agency to amend the structure of its fee schedule and the reasonableness of the existing schedule will ever remain unreviewed. It will not be presumed, however, that the Agency is acting in bad faith and will not consider comments offered in this proceeding for a future revision of its air quality permit fee schedule. If necessary, a petition could be filed pursuant to Minn. Stat. 14.09 (1986) to hasten consideration of the issue. Should the Agency fail to do so, the Legislative Commission to Review Administrative Rules (LCRAR) null be an inexpensive expedient to require the Agency to reconsider the structure of the fee schedule in a rulemaking proceeding. For a discussion of the authority of the LCRAR see, Beck, Bakken, and Muck, Minnesota Administrative Procedure, C. 26 (Butterworth, 1987).

Need for the proposed Rule Amendment:

29. Minnesota Rules parts 7002.0010 - 7002.0110 became effective on January 21, 1986, in response to the legislative requirement that the Agency collect through permit fees the funds necessary to recover the cost of permit issuance and enforcement. The rules, as initially adopted, were designed to result in revenues of approximately \$270,000. Minn. Stat. 16A.128, subd.

la. (1986) requires Agency fees to be reviewed annually and to be adjusted if collections under the current fee schedule will not cover the applicable appropriation. In 1987, the Legislature increased the total amount that the Agency is required to collect through permit fees. Most of the increase in required recovery results from the Legislature's determination that the indirect costs associated with issuing and monitoring PCA permits must also be recovered from permit holders. The additional items of recovery mandated by the Legislature in 1987 include amounts necessary to match the Special Revenue Appropriation and Salary Supplements hereinafter summarized. In 1987 the Legislature appropriated \$286,400 for each of Fiscal Years 1988 and 1989, or \$572,800, for the 1987-89 biennium in direct salary and fringe benefit costs from the Special Revenue Fund for Permit Fees to the Agency's Air Pollution Control Program. SONAR p. 4. The 1987 Legislature also appropriated \$533,700 for each of Fiscal Years 1988 and 1989, or \$1,067,400 for the 1987-1989 Biennium to the Agency from the Special Revenue Fund for Permit Fees for the purpose of funding indirect costs. SONAR, p. 4.

30. The Agency divided the amount of the additional item of permit recovery, \$1,067,400, among its three divisions. It determined that the proportional amount of additional recovery for this item required of the Air Quality Division was \$206,000 for the 1987-1989 biennium. SONAR, p. 4. In response to the open appropriation of the Legislature for a salary supplement, the Agency determined that average annual salary and fringe benefit increases have been slightly in excess of 6% over the past four year period. SONAR, p. 5. It therefore apportioned to the Division of Air Quality a total amount for

salary supplement recovery of \$52,583. In determining the level of indirect costs required to be recovered, the Agency used a factor of 36% of the direct costs. This rate is the federal indirect cost rate approved by the Department of Finance for use by the Minnesota Pollution Control Agency. PCA Ex. 28, p.

3. The following table summarizes the appropriations and permit fee collection requirements for the Division of Air Quality, as determined by the Agency:

AIR_QUALITY BIENNIUM	DIVISION	FY 1988	FY 1989
Direct Appropriation		\$ 286,400	\$ 286,400
\$ 572,800			
Indirect Appropriation		103,000	
103,000	206,000		
Salary Supplement			3 5
399	583		
	TOTAL	\$ 406,584	424,799
\$ 831,383			

SONAR, p. 6.

31. The Agency has determined that it will recover from the existing fee schedule approximately \$270,000 during fiscal year 1987. Since the existing fee schedule will recover significantly less than the amount considered necessary to meet the legislative requirement of cost recovery, \$831,383 for the biennium, the Agency determined it was necessary to amend its fee schedule.

32. The Agency is, undoubtedly required by statute to recover from permit holders through air quality permit fees an amount necessary to recover the reasonable direct and indirect costs of issuing and monitoring air quality permits, subject to the limitation of Minn. Stat. 116.07, subd. 4d. (1986). If the Agency's calculation of the amount to be recovered is accepted by the Administrative Law Judge, it has demonstrated a need to adjust existing air quality permit fee amounts.

33. The Outdoors Committee argues that no determination about the need to adjust existing fee levels may be made until after the Commissioner of Finance has performed the annual review of all agency fees required by law to be set by rule mandated by Minn. Stat. 16A.128, subd. 1a. (1986) Pub. Ex. 26, pp.

3-4. The Commissioner (of Finance has, however, reviewed and approved the Agency's proposed fee increase. PCA Ex. 1-3. While it is true that the Department of Finance is, currently, only in the process of completing a total fee review for 1986-87, Agency data will be submitted to the Department of Finance prior to September 30, 1987. PCA Ex. 28, p. 3. For purposes of this rulemaking, the approval and certification by the Commissioner of Finance, acting pursuant to Minn. Stat. 16A.128, should. 1a. (1986), is sufficient. PCA Ex. 28, p. 3.

34. Both the Outdoors Committee and J.L. Shiely Company, in oral and written comments, stated that the Agency was including in its totals costs not authorized by Minn. Stat. 116.07, subd. 4d. (1986). Pub. Ex. 26, pp. 2-3; Pub. Ex. 31, p. 7; Tr. 76. Both commentators argue that the statute limits the Agency to recover from fees the actual costs of reviewing and acting upon applications for Agency permits and implementing and enforcing the conditions of permits pursuant to Agency rules. The Agency has agreed that it seeks to recover from permit holders the costs associated with staff members making determinations about whether a permit is necessary, as well as acting upon

permit applications and enforcing conditions imposed. Tr. 34. Apparently, both commentators interpret Minn. Stat. 116.07, subd. 4d. (1986), to limit recoverable costs to those costs directly resulting from the Agency's action on actual applications for permits and enforcing their conditions. J.L. Shiely Company, at the hearing herein, requested that the Agency document the size of its permit staff, their job duties and the percentage of time spent on permit administration. Jr. 76.

35. The Agency stated that the Legislature has determined the reasonableness of its costs through the appropriations process and the Agency must recover that amount from permit holders. See, Minn. Stat. S 16A.128, subd. 1a. (1986); Laws of 1987, C. 404; Pub. Ex. 28, p. 3; Pub. Ex. 32, p. 4.

3b. The Administrative Law Judge does not accept the limited reading of Minn. Stat. S 116.07, subd. 4d. (1986), suggested by J.L. Shiely Company or the Outdoors Committee. Rather, the statute should be read to allow the PCA to recover from permittees the cost of not only issuing and securing compliance with permits but also determining whether permits are necessary. Tr. 36-37. That interpretation is consistent with a House of Representatives staff determination and the certification by the Commissioner of Finance. Pub. Ex. 26, attachment; PCA Ex. I. Although the Agency did not provide for the record the detailed staff fiscal data requested, it did document to the Legislature at the time of the appropriation, the reasonable costs of its air quality permit program and the Legislature appropriated that amount. F r. 18-19. Moreover, a I I o f th e sta f f f unded by th e approp r i at i on a re d i directly engaged in activities related to permitting and the enforcement of permits. PCA Ex. 32, p. 4; PCA Ex. 28, p. 3. The Administrative Law Judge has no basis for substituting his judgment for that of the Legislature expressed in the appropriations process.

37. Although not questioned at the hearing or in subsequent written comments, authority for including the amount of a salary supplement in the amount to be raised through permit fees is contained in Laws of 1987, C. 404, 43, subd. 1, and Laws of 1986, C. 404, 24, subd. 2.

38. The amount appropriated in the Special Revenue Fund for the direct costs, including salary and fringe benefits, of Agency staff engaged in air quality permitting activities is \$572,800 for Fiscal Years 1988 and 1989 combined. PCA Ex. 4, Journal of the Senate, p. 5190; PCA Ex. 28, p. 3. Hence, with respect to the direct appropriation for air quality permitting in the Special Revenue Fund, the Legislature has determined that \$572,800 is appropriate for recovery by the Agency in air quality fees.

39. Minn. Stat. 16A.128, subd. 1a. (1986), requires the Agency to recover in fees not only the appropriation for the account specifically but also indirect costs. Indirect costs, as noted in Finding 30, supra, have been determined by multiplying the direct appropriation in the special account by 36%. That percentage is the factor used by the federal government and has been uniformly recognized both by the Agency and the Minnesota Department of Finance as the appropriate factor to determine indirect costs. PCA Ex. 28, p. 3. Use of the 36% factor to determine the proper amount of indirect costs is reasonable.

40. The amount included in the salary supplement portion of the fee calculation, \$52,583, was derived by multiplying the direct cost,

approximately \$572,000, by an annual factor of 6%, which the Agency determined was the average annual increase in salary and fringe benefits over the past four years. SONAR, p. 5. Use of the average annual increase over the past four year period is reasonable.

41. As a consequence of Findings 29 - 40, supra, the Agency has shown a need to recover in air quality permit fees the following: that portion of the direct appropriation from the Special Fund in 1987 which represents costs meeting the requirements of Minn. Stat. 116.07, subd. 4d. (1986), \$572,800; an additional 36% of that amount for recoverable indirect costs; and an additional 12% of the direct costs for the biennium for a salary supplement. PCA Ex. 28, p. 3. The Agency, must, therefore, increase revenues from air quality permit fees from \$270,000 annually to \$406,854 for Fiscal Year 1988 and \$424,799 for Fiscal Year 1989, or \$831,383 for the biennium.

Reasonableness of Amendments-to Fees.

42. As previously discussed, each fee is increased a uniform 60% based on projections that the number of permit holders required to pay fees will not increase markedly. Multiplying the number of existing permit holders required to pay fees by the amount of the amended fees, assuming relative stability in the number of permittees, would result in recovering the amount found necessary in Finding I", supra. The Agency has calculated that the amended fee levels will result in the collection of revenue of \$831,415 for the biennium. PCA Ex. 2. Since the Agency must increase fees by a significant amount, a proportionate increase over all classes of fees spreads the burden of the increase evenly without a disproportionate increase in any single category of fee. A proportionate 60% increase over all categories of fees to raise the amount found necessary is reasonable if the Agency's assumptions in determining the fee levels required to generate the necessary revenue are accurate.

43. Several commentators argued that the actual number of persons who are subject to the air quality fee rules substantially exceeds the existing number of fee-paying permit holders. It is argued that the PCA's asserted failure to identify all installations required to pay fees results in a disproportionately higher fee for those who have been identified. Pub. Ex. 2-7, p. 1; Pub. Ex. 31, p. 5. The PCA collects fees from 532 air emission facilities each year. Pub. Ex. 27, p. 1. This number represents only a fraction of all air emission facilities in Minnesota.

44. The Outdoors Committee sponsored two public exhibits to demonstrate that the Agency has not identified all facilities that should pay permit fees. Pub. Ex. 16 is the first and last page of a ten page computer printout from the Agency, listing the 532 entities required to pay permit fees, as of July 8, 1987. The Agency estimates that, for 1988, there will be approximately 550 fee payers. Tr. 25; SONAR, p. 8.

45. Pub. Ex. 17 is a portion of an Agency-generated computer printout which, in its entirety, includes approximately 2,175 facilities potentially subject to air emission regulations. Jr. 30. Under the column in Pub. Ex. 17 marked "priority" it was the intention of the Agency to include numbers ranging from zero, representing no permitting requirement, to a five, indicating status of facility unknown. A number between 1 and 4 would indicate that fees were required. Of the 2,175 facilities listed in Pub. Ex. 17, approximately 811 have a blank space in the priority column. Tr. 27. The

Outdoors Committee argues that Pub. Ex. 17 shows the Agency has not made a good faith effort to identify facilities required to pay air quality permit fees. Tr. 26-31.

46. The blank spaces in the priority code column for facilities listed in Pub. Ex. 17 should not be interpreted as indicating that they have not been reviewed for compliance with air emission fee payment requirements. The Agency began collecting data on air emission facilities for permitting purposes in approximately 1975, when most air emission permit requirements were adopted. Between 1975 and 1985, the facilities have been visited by permitting staff, who became acquainted with the source's permit requirements. In 1985, when air emission fees were initially adopted, the PCA staff, during the months of July, August and September, made determinations as to which of the facilities on its master list would be required to pay air quality permit fees under the new regulations. Those decisions were based on a large variety of information and included direct contact with the facility when necessary. Pub. Ex. 21, p. 2. The annual fee list has been updated on a monthly basis both by adding permits issued during that month and by an internal annual review prior to actual billing. Pub. Ex. 21, p. 2. A blank in the priority column of Pub. Ex. 17 does not indicate that Agency staff have not made a determination that no permit is required. Eighty to 90% of the 800 facilities with a blank in the priority code column in Pub. Ex. 17 have been determined by Agency staff not to require a permit. Tr. 34. The blanks in the priority column indicate, then, only that the staff has not as yet entered the results of its investigations into the list. Moreover, the Agency is correcting the apparent oversight that initially excluded sand and gravel facilities. Although sand and gravel facilities were not included on the Agency's list when the fee schedule was adopted in 1985, the Agency made a state-wide survey of such facilities. It identified 225 potential facilities

involved in sand and gravel activities. The staff determined that only 37 of the facilities were required to obtain a permit. Agency staff is currently working with the sand and gravel industry to secure compliance with permit requirements. Pub. Ex. 21, p. 2.

47. As a consequence of Finding 46, supra, the Administrative Law Judge finds that the Agency has reasonably identified the number of entities required to pay air quality permit fees under its rules.

48. Several commentators suggested that the Agency's fee calculations were unreasonable because they projected only insignificant growth in the number of entities required to pay air quality permit fees in 1988, over 198-1. Tr. 24-25; -Fr. 37. The Agency responded that, since it has already identified most entities required to pay permit fees, its projected growth in air quality permit fee payers from 535 to 550 in 1988 is reasonable.

49. Since the Agency has already identified most of the sources that are required to pay permit fees, it is reasonable to anticipate only minor growth in the number of permit holders required to pay fees in 1988.

50. The Agency's activity in identifying new sources is a dynamic process. It can be expected that new facilities will begin, old facilities will be discontinued and the emissions at a particular facility may vary with the specific activities the company wishes to undertake. Tr. 38. Fee payers are protected from continued under-estimation of the number of entities who will be remitting fees. Minn. Stat. 16A.128, subd. 1a. 986) . Over-recovery of fees on a more than sporadic basis would result in an

adjustment to achieve the correct recovery level.

51. Several commentators stated that the classifications contained in the existing rules were unreasonable and, hence, required existing fee payers to pay unreasonable amounts. The Outdoors Committee and Pickands Mather argued that the exemption contained in the rules, which imposes no fee unless emissions of two specified pollutants are potentially at least 50 tons, results in an unreasonable fee to the entities who do pay such fees. Pub. Ex. 26, p. 5; Pub. Ex. 27, p. 1. Other commentators suggested that the current fee structure, which bases the existing fee on the amount of only two pollutants potentially emitted, also results in an unreasonable monetary burden on existing fee payers. Pub. Ex. 30, pp. 1-3; Pub. Ex. 31, pp. 6-7.

52. The Agency did not respond directly to such comments. Rather it stated that the pollutants considered and categories established are parts of the structure of the fee schedule contained in the unamended rule. PCA Ex. 28, p. 2. It contends that the Agency need not establish in this proceeding the reasonableness of the structure of the original fee schedule, adopted by rule in 1986 and never judicially challenged. PCA Ex. 32, p. 5; PCA Ex. 28, p. 2.

53. As a consequence of Findings 25 -- 28, supra, challenges to the reasonableness of the fee schedule established in the existing rule are beyond the scope of review in this rulemaking proceeding. Minn. Rule 1400.0500, subp. 1 (1985).

54. As a consequence of Findings 29 - 53, supra, the Agency has established that the 60% proportional increase in air quality fee levels is

necessary, as a consequence of legislative requirements, and is reasonable, in that it will recover the required amount.

Comments on-Existing Rules.

5 5 . Several commentators provided specific suggestions to the Agency for improvements in the existing air quality permit fee rules. J.L. Shiely Company offered information about the air quality fee rules in Oregon, Michigan, Wisconsin, California and Colorado. Pub. Ex. 18, 22, 30. It also offered information regarding the use of other pollutants for structuring air quality permit fees. Pub. Ex. 31. In addition, many of the comments relating to the reasonableness of the existing rules were also suggestions for changing the underlying fee structure. The Agency responded to these comments by accepting copies of the submissions, but asserting that revisions to the structure of the existing rules were beyond the scope of this rulemaking proceeding. PCA Ex. 28, p. 2; PCA Ex. 32, pp. 5-6.

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

CONCLUSIONS

1. The Minnesota Pollution Control Agency gave proper notice of the hearing in this matter.

2. -The Agency has fulfilled the procedural requirements of Minn. Stat. 14.14 (1986), and all other procedural requirements of law or rule, except as discussed at Findings 7 - 14, supra. As a result of that procedural

irregularity the Agency may not adopt the proposed rule amendment. Rather, it must renotece the hearing herein, after complying with Minn. Stat. 16A.128, subd. 2a. (1986).

3. The Agency 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) (1986), except as stated in Conclusion 2 hereof.

4. if a reviewing authority determines that the procedural defect stated in Conclusion 2, supra, is either subject to remedy or not prejudicial, the Agency 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) (1986).

5. The defect cited in Conclusion 2, supra, is not subject to correction and must result in a re-noticing of the hearing herein after compliance with Minn. Stat. 16A.128, subd. 2a. (1986).

6. Due to Conclusions 2 and 5, supra, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3 (1986).

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

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

RECOMMENDATION

It is hereby recommended that the Agency re-notice a public hearing for the proposed amendments to its air quality permit fee schedule, in accordance with Conclusions 2 and 5, supra, after compliance with the requirements of Minn. Stat. S 16A.128, subd. 2a. (1986). It may not proceed to adopt the proposed rule amendments until that is accomplished.

