

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Proposed
Amendments to Minn. Rules,
Parts 7010.0100 - 7010.0700,
LAW JUDGE
State Noise Standards.

REPORT OF THE
ADMINISTRATIVE

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on November 19, 1985 in Minneapolis and November 21, 1985 in Duluth.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 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, as modified, are substantially different from those originally proposed.

Appearing on behalf of the Agency was Special Assistant Attorney General Jocelyn F. Olson, 1935 West County Road B-2, Roseville, Minnesota 55113. The Agency's sole witness was David Kelso of the Division of Air Quality. The Director and a number of Board members attended the evening hearing on November 19.

Approximately 180 persons signed the hearing register at the Minneapolis hearing and six persons signed the register at the Duluth hearing. There were a large number of people at the Minneapolis hearing that did not sign the register. In both Minneapolis and Duluth, the hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules.

The Agency 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 Agency of actions which will correct the defects and the Agency 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 Agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Agency 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 Agency 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 Agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Agency 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 Agency 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 October 2, 1985, the Agency 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.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On October 14, 1985, a Notice of Hearing and a copy of the proposed rules were published at 10 State Register 16, page 891. Due to a mechanical printing error, some copies of the State Register did not include parts of the rule. On October 16, 1985, the State Register reprinted this entire issue and remailed it. This reprinted version included the text of all of the rule provisions. See, 10 State Register 16R.

3. On October 10, 1985, 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.

4. On November 4, 1985, the Agency 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) An Affidavit of Additional Notice.

- (e) The names of Agency personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following the publication of three Notices of Intent to Solicit Outside Opinion, published on November 26, 1979 (4 S.R. 871), March 10, 1980 (4 S.R. 1480) and March 26, 1984 (8 S.R. 2163).

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing. Although the documents were not filed on time, no person asked to see them nor did any person indicate that they had been prejudiced by the late filing.

5. The record remained open for the submission of comments until December 11, 1985, and for the submission of responses until December 16, 1985. An extension of time to prepare this Report was granted pursuant to Minn. Stat. § 14.15, subd. 2.

Nature of the Proposed Rules

6. These rules are essentially amendments to the Agency's existing noise rules. The original rules were adopted in 1974. In 1979, the Agency published its first Notice of Intent to Solicit Outside Opinion, and work has gone forward on these rules, sporadically, from that date until early 1985.

7. The major changes proposed in these amendments include (1) changing the L/10 and L/50 statistical standards to an L/Eqenergy standard (2) adding a new noise descriptor, L/dn, which relates solely to airport noise; (3) reducing the number of noise area classifications (NACs); and (4) adding new requirements concerning instrumentation and monitoring.

8. The original rules, commonly known as NPC I and 2, were first adopted in 1974. In 1979, the Agency began the process of reviewing them. Work continued through 1980, 1981, 1982, 1983 and 1984. On February 26, 1985, the Agency Board authorized the commencement of a rulemaking proceeding on proposed amendments to the rule. On March 18, 1985, the Agency published notice of its intent to adopt the amendments without a public hearing.

(9 S.R. 2058). However, the Agency received more than 25 requests for a public

hearing on the rule. On September 24, 1985, the Agency's Board withdrew the original proposed amendments and authorized a rulemaking hearing on a revised version of the amendments. It is this revised version which is the subject of this proceeding.

Statutory Authority

9. Minn. Stat. § 14.05, subd. 1, provides that an agency may adopt or amend rules only pursuant to authority delegated by law.

10. Minn. Stat. § 116.07, subd. 4, provides, in relevant part:

Pursuant and subject to provisions of Chapter 14, and the provisions hereof, the Pollution Control Agency may adopt, amend and rescind rules and standards having the force of law for the prevention, abatement, or control of

noise pollution. Any such rule or standard may be of general application through out the state, or may be limited as to times, places, circumstances or conditions in order to make due allowances for variations therein. Without limitation, rules or standards may relate to sources or emissions of noise or noise pollution, . . . or to any other matter relevant to the prevention, abatement, or control of noise pollution.

11. In addition to the above-quoted language from subdivision 4, Minn. Stat. § 116.07, subd. 2, provides a directive to the Agency, which reads, in part, as follows:

The Pollution Control Agency shall also adopt standards describing the maximum levels of noise in terms of sound pressure level which may occur in the outdoor atmosphere, recognizing that due to variable factors, no single standard of sound pressure is applicable to all areas of the state. Such standards shall give due consideration to such factors as the intensity of noises, the types of noises, the frequency with which noises recur, the time period for which noises continue, the times of day during which noises occur, and such other factors as could affect the extent to which noises may be injurious to human health or welfare . . . or could interfere unreasonably with the enjoyment of life or property. In adopting standards, the Pollution Control Agency . . . shall take into consideration . . . existing physical conditions, zoning classifications, . . . and the fact that a standard which may be proper in an essentially residential area of the state, may not be proper as to a highly developed industrial area of the state. Such noise standards shall be premised upon scientific knowledge as well as effects based on technically substantiated criteria and commonly accepted practices.

12. The Agency does have adequate statutory authority to justify the adoption of the rules as proposed.

Section-by-Section Analysis

13. Most of the attention at the hearing, and in written comments, focused on a few of the rules proposed for amendment. A number of the rules received no comments. This Report will focus on those rules which drew the most comment or which contain problems. A rule which is not discussed below is hereby found to be supported by adequate statutory authority, and justified by the Agency as being both needed and reasonable.

14. Proposed rule 7010.0010 involves incorporations by reference. In the Agency's first post-hearing submission (Ex. 76), the Agency made a number of corrections based upon comments from the public and to accommodate changes in another rule. None of these are substantial changes, and all of them have been justified as deserving of adoption.

15. Proposed rule Pt. 7010.0020 [hereafter, the first four digits will be omitted], containing definitions, drew a few comments. The Agency has accepted some, but rejected others. The Administrative Law Judge has reviewed the comments, and the Agency's responses, and in each case finds that the Agency has justified its definitions, including those proposed to be changed in Exhibits 76 and 77, as both needed and reasonable.

16. A question arose as to whether the Metropolitan Airports Commission was within the definition of "person". TR. 2-25-26 (transcript references are to volume and page; this one is to volume 2, pages 25 and 26]. The Administrative Law Judge agrees with the Agency's position that the definition is sufficiently broad to include the MAC.

17. Proposed rule .0030 is one of the two or three crucial rules at issue in this proceeding. It contains two parts. The first is a straightforward provision stating that "no person may violate the standards established . . . unless exempted. . .". It was the second portion of the rule which drew the comment. That portion, as originally proposed, reads as follows:

Any municipality having authority to regulate land use shall take all reasonable measures within its jurisdiction to prevent the establishment of land use activities listed in noise area classification (NAC) I in any location where the standards established in part 7010.0040 are being or will be exceeded.

This drew comments from the League of Minnesota Cities (Ex. 19) and numerous individual municipalities. The Agency's goal in proposing the language was to force municipalities to consider noise in their land use planning activities. As an Agency representative explained, if a county built a highway "in the middle of nowhere", which complied with all standards at the time it was built, but some years later a residential subdivision was placed right next to the highway and persons who bought houses in the subdivision complained about the noise, who is responsible for that problem? The goal of this rule is to have the municipalities consider the existence of noise when taking land use

actions, such as zoning. See, generally, TR. 2-173, TR.3-25, and Ex. 76 at p. 6.

A number of commentators, feared that the language selected would cover not only the problem illustrated above, but might also cover a situation where after the residential subdivision was built and inhabited, an event occurred (such as the location of a new shopping mall at one end of the road) which dramatically increased the traffic on the highway to the point where the noise standards were violated even though there was no violation at the time the subdivision was approved. To deal with this problem, the Agency has proposed a change in the language. The new language would provide that the municipalities must take reasonable measures to prevent the establishment of land use activities in any location where the standards will be violated "immediately upon establishment of the land use." In other words, the time for determining whether or not the rule would be violated is limited. A violation some years in the future would not be included within the rule. Ex. 76, p. 10.

It is found that the Agency has justified the adoption of this revised language as a reasonable long-term solution to reducing the occurrence of incompatible land uses. The rule does not provide an absolute prohibition against allowing such incompatibilities; instead, it directs a municipality to "take all reasonable measures within its jurisdiction" to prevent the incompatibility. It does not mean, as suggested by some commentators, that land abutting an airport (and presumably, therefore, subject to noise in excess of allowed limits) must be left vacant. The municipality could, for example, permit the land to be developed so long as certain specified conditions were met (such as special insulation, year-round climate control, etc., as set forth in proposed rule 7010.0050, subp. 3).

18. As originally proposed, the rule's operation was limited to noise area classification 1 (which includes such uses as residential, educational, non-transient housing, and medical facilities providing night time care). A number of commentators asked why the concept of municipal attention to noise should be limited to those uses. TR. 1-140 and Ex. 11 at p. 28.

In response to those comments, the Agency has proposed to expand the scope of the rule to cover not only NAC 1, but also NACs 2 and 3. Ex. 76, p. 9. In the same submission, however, the director also proposed to allow the NAC classification system presently in existence to remain without amendment. The director will be deemed to have been aware of that proposal when making the proposal to add NAC 2 and 3 to the municipal responsibility rule.

The Agency has justified the addition of NAC 2 and 3 to the operation of its proposed rule, and it is found that their addition does not constitute a substantial change.

19. Proposed rule .0040 is the second of the "major" rules proposed for revision in this proceeding. It contains two portions of interest. The first, subpart 2, is the table of noise standards. The second, subpart 3, is

an additional standard relating solely to airport noise.

20. The primary change which the Agency is proposing for the table of noise standards is to change the measurement descriptors from L/10 and L/50 to L/Eq. Put briefly, L/10 and L/50 levels (the ones in the existing rule) require that noise be present for at least six minutes out of an hour (in the case of the L/10) or for at least thirty minutes out of an hour (in the case of the L/50). If a noise is present only for five minutes out of an hour, the present rule treats it as non-existent: it does not matter how loud the noise is, the existing rule is not violated unless the noise is present at least six minutes out of an hour. The L/Eq, on the other hand, does not require that the noise be present for any minimum time. A noise present for only one minute, or two minutes, will be computed in an L/Eq measurement. The L/Eq measurement is based upon the total sound pressure received during a given time, such as one hour, regardless of the length of time that it was actually received. In other words, an L/Eq could be the same for either a very loud sound which lasts only for one minute, or a much quieter sound which lasted for many more minutes. Comparing an L/Eq with an L/10 or L/50 can only be done with an understanding of how the various sounds are measured. The only time that the L/Eq is the same as the L/10 and the L/50 is with a steady noise. An air conditioner, for example, which operates at the same noise level for an entire hour will generate the same figure for an L/Eq as it will

for an L/10 or L/50. If it only operates for 30 minutes, the L/10 and L/50 will be the same, but the L/Eq will be reduced from the first example. If it only operates for ten minutes, the L/10 will remain unchanged, but the L/Eq will be reduced.

There are pros and cons to each kind of measurement descriptor. In addition to the L/% (percent -- meaning any number such as L/10 or 50) and the L/Eq, there is also the L/max, the L/dn, the CNEL and other descriptors. There is no commonly accepted "ideal" form of measurement for all noise sources; each of those listed is the best technique for certain situations. The Agency has chosen the L/Eq for use in these rules. This decision was reached after significant debate and discussion, spread out over a number of meetings of an Agency Board Noise Committee. See, SONAR, pp. 3 and 15. The pros and cons of various measurement techniques are discussed in some detail in Ex. 24 and 28. Choosing from among a number of alternatives, none of which is ideal, is a uniquely legislative function. The Agency has explained why it is moving from the L/% to the L/Eq, and it has adequately justified its proposal to do so.

When moving from one descriptor to another, it is important to understand that the numbers cannot be directly translated. For example, 63 db on an L/10 measurement is not the same as 63 db on an L/Eq measurement. Therefore, once the Agency had determined to move from the L/% system to the L/El system, it was necessary to change the decibel numbers as well. The numbers selected for use in the new L/Eq system were selected in an attempt to be as close as possible to the sound levels permitted under the old L/% system. The Agency attempted, insofar as possible, to keep the same level of protection. However, it is impossible to do so for all noise sources. For most types of noise, the L/Eq falls numerically between the values obtained for the L/10 and the L/50. The existing rules contained, in all cases, a five db difference

between the L/50 and the L/10. Halfway between the two would be 2.5 db. The L/Eqs proposed for adoption in these amendments were set at 3 db above the existing L/50. This represents, as much as can be represented when changing from one system to another, a continuation of the existing levels of protection. But for some types of noise, the change results in either more protection or less protection.

21. A number of commentators urged that db numbers be varied, some upward, some downward. Each of these comments has been examined, but only one has demonstrated unreasonableness in the Agency's position meriting rejection of the rule.

The Metropolitan Airports Commission urged that the L/Eq 63 measure was unreasonable when applied to the Minneapolis-St. Paul International Airport. Expert, unrebutted testimony presented by the Commission's consultant demonstrated that if the L/Eq 63 standard were applied to the Airport, there would be a dramatic reduction in the volume of traffic allowed, both passenger and freight. This reduction would be on the order of an 85% cut in the number of airport operations over the peak hour, and in no daytime hour could the current (Summer, 1985) level of operations be maintained. Those figures assume that all operations are made with so-called "quiet" equipment, such as the Boeing 757, the DC-10-40, or the MD-80. If any operations included noisier aircraft, then the figures would show an even larger change. No Boeing 727 aircraft would be allowed at all, nor would any jets be allowed to make any nighttime operations. Tr. 1-105-133; Ex. 74.

The Agency did not dispute this data, and acknowledged that it had always recognized the difficulty of the Airport's achieving strict compliance with the standard. Ex.77, p. 9. However, the Agency presented no suggestion of actions which would lead to compliance in the future. It presented no evidence of alternatives to drastic traffic reductions, such as a schedule for compliance with specified milestones. While a specific compliance schedule is not required at this point, what is required (and what was lacking) is evidence that the Agency has considered the factors of feasibility and practicability. Minn. Stat. § 116.07, subd. 6 (1984) contains requirements imposed on the Agency in the exercise of its powers, which includes the adoption of rules. That section requires the Agency to give due consideration to a number of items including ". . . the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic and other economic factors and other material matters affecting the feasibility and practicability of any proposed action . . .". In this rulemaking proceeding, the Agency has failed to present any evidence that it has considered the economic impact of its proposed action as it relates to the dramatic reduction in traffic at the Minneapolis-St. Paul International Airport, including the impact it would have on the economy of the state and its businesses. Nor has the Agency presented any evidence on the feasibility or practicability of enforcing the rules on the MAC.

It is concluded that the Agency has failed to demonstrate the reasonableness of including the Minneapolis-St. Paul International Airport within the scope of subpart 2 of the proposed rules. Additionally, the Agency has failed to comply with the provisions of Minn. Stat. § 116.07, subd. 2 (1984) which is a substantial provision of law. The Agency must fashion language exempting the Airport from the scope of that subpart in order to correct this defect.

22. A different kind of change was proposed by MNDOT in Ex. 30. The issue of concern is not the numbers, nor the descriptors, but rather the time periods. Specifically, MNDOT would like the "daytime" period (with a higher

permissible noise level) to begin at 6:00 a.m., rather than 7:00 a.m. which the Agency has proposed. This issue has been under discussion since 1979.

The possibility of making this change was examined by outside consultants retained by the Agency in 1982 and 1983. They reported that in a 1980 survey taken at the Minnesota State Fair, a sample of 2,924 persons indicated that at 6:00 a.m., 76% of the respondents were still asleep. At 6:30 a.m., 56% of the respondents were still asleep. At 7:00 a.m., only 36% of the respondents were still asleep. Based upon this and other data, the consultants recommended that the night restrictions continue to 7:00 a.m. It is found that the Agency has justified its proposal to retain the nighttime limitations until 7:00 a.m.

23. The issue that attracted the largest amount of attention in this proceeding was the issue of airport noise. The rule that was originally adopted in 1974 did not contain any specific provisions for airport noise. As part of these amendments, the Agency proposed to add a provision in part .0040 which would read as follows:

Subp. 3. Additional Airport Noise Standard. An L/dn of 63, 74 and 85 for NAC 1, 2, 3, respectively, also applies to airports.

This was an attempt to come to grips with the fact that noise generated by airplanes is not steady noise, nor is it noise that typically lasts for any long period of time. Instead, it represents a series of short, but loud episodes. The L/dn is a descriptor which is based on a 24-hour time period. It is used frequently for airport noise in order to reflect the fact that the noise generated at a generally busy time, such as 7:00 a.m. to 8:00 a.m., is at a much higher L/Eq than the noise generated during a not so busy time, such as 11:00 p.m. to midnight.

Because of this variability, a one-hour descriptor does not accurately describe the total or composite noise produced by an airport. This makes it difficult to evaluate airport noise and to use predictive computer modeling using only an hourly L/Eq.

The Agency proposed to have the new L/dn rule apply to airports along with the L/Eq numbers in the general table. In other words, the L/dn was not a substitute for the L/Eq. Instead, it was in addition to the L/Eq. To avoid violation, both would have to be met.

24. During the hearing, the Agency received an overwhelmingly negative response to its proposal to add the L/dn standard, at least with regard to the numbers selected. While the Metropolitan Airports Commission supported the use of an L/dn as opposed to an L/Eq as a "community goal" (compare TR. 1-131-132 and TR. 1-133), its technical consultant stated that the L/dn numbers proposed by the Agency were improperly derived and were much too high. At the other end of the spectrum, one of the organizers of the South Metro Airport Action Council urged that the entire subpart containing the L/dn be deleted. TR. 1-166-167 and Ex. 61, p. 3. Based upon all the comments on this subpart, the director recommended that the entire subpart be withdrawn. Ex. 76, p. 17.

The Administrative Law Judge finds that the withdrawal of this-rule would not be a substantial change. It is not so integrally related to the

remainder of the rules that the factors in Minn. Rule, part 1400.1100 are triggered.

25. The final major change proposed by the Agency in this proceeding was a redraft of the NACS. The existing rule, Minn. Rule, part 7010.0500 listed some 90 odd different land uses, classifying them into four broad groupings, NAC 1 - NAC 4. However, there were no noise standards in the existing rules for NAC 4.

In this proceeding, the Agency sought to "simplify" this list into a shorter one, while still retaining the essential characteristics of each NAC. As with the L/dn proposal, the Agency received far more criticism than support for this effort, and ultimately determined to withdraw the proposed rule in favor of retaining the existing rule. Ex. 76, p. 19. Again, this would not constitute a substantial change, and is well within an Agency's discretion in responding to public comments.

26. In addition to changing the list of NACS, the Agency also proposed to add language to the existing rule to clarify some questions which had arisen over the past years of working with it. The first such change is made in subpart I of proposed rule 7010.0050, which specifies that land is classified into a NAC based upon the activity at the location of the noise receiver.

There had been some questions as to whether it was the transmitter or receiver which determined the use, and the addition of this sentence makes it clear that it is the receiver. It is found that this addition clarifies the rule, and has been justified as both needed and reasonable.

27. Another change proposed in this proceeding was to take the concept of exceptions, presently contained in part .0700 and move it into the NAC section as subpart 3. In the process, the wording is changed from the existing rule and the scope of the exceptions are broadened. A number of comments were made which generally opposed the concept of any exceptions. The Agency responded to those comments by pointing out that having these exceptions give communities some flexibility in making use of noise-impacted undeveloped land, so long as certain conditions are met. An example of such use is noted at the end of Finding 17, above. Conceptually, it is found that the Agency has justified the need for and reasonableness of the exceptions.

28. A question was raised concerning the use of the word "contiguous" which appears in a number of the exceptions. TR. 1-171 and Ex. 11 at p. 34. In response to the criticisms regarding the use of this word, the director proposed to delete it. It is found that this is not a substantial change, and that the concept of exceptions has been justified as both needed and reasonable, with or without the deletion of the word "contiguous".

29. There was very little comment on rule part .0060, dealing with measurement methodology, other than from Alfonso Perez and NSP.

NSP pointed out that the existing rule (part 7010.0600) explicitly requires that "all measurements shall be made outdoors". The proposed rule does not specify that, other than by implication (a windscreen is required). The Statement of Need and Reasonableness notes the content of the existing rule, but provides no justification for deleting the outdoor requirement. NSP urged that the outdoor language should be explicitly stated in the rule.- Ex. 71, p. 6. The Agency agreed, and recommends that the sentence from the existing rule be retained in subpart I of the proposed rule. The

Administrative Law Judge finds this is not a substantial change, and would improve the rule, although it could be adopted without the addition. With or without the addition, it has been justified as needed and reasonable.

30. The Agency's Board originally approved language which stated that measurement of sound must be "at or within the receiver's property line". This language is taken from the existing rule. The Revisor of Statutes changed the concept to measurement of sound must be "at or within the applicable NAC". Ex. 76 at p. 22. Cooperative Power Association favored this change (Ex. 41), stating that in rural areas, noise should be measured at the residences rather than at the property line, because many rural homes are located well within the property boundaries. The same concept was expressed by the Minnesota Motor Transport Association, which recommended that the phrase: "at the point of human activity which is nearest to the noise source" be amended to read "at the point of usual human activity which is nearest to the noise source". Ex. 63 and 70. The Agency had no preference for one set of words over another. The Administrative Law Judge finds that either concept could be adopted, but that the language proposed by the Revisor is clearer. In addition, while it is not required that the Agency adopt the addition proposed by the Minnesota Motor Transport Association, again it is found that the rule is clearer with the MMTA language than without it, and the Administrative Law Judge recommends that it be added.

31. Alfonso Perez made a number of other comments regarding this part .0060. The Agency has responded to them in Ex. 76, and the Administrative Law Judge agrees with the Agency's disposition of each. He finds that the Agency has justified the proposed rule as both needed and reasonable with the changes noted in Ex. 76, and that none of those changes constitute a substantial change.

32. Part .0070 also deals with measurement methodology, but in this case it deals with attenuation measurements required by the exceptions to the NACs discussed earlier. Both it, and the prior rule, contain discretionary language allowing for methods other than those specified to be used "provided they are approved by the director". In neither case are there any standards to guide the director in granting or denying this approval. The Statement of Need and Reasonableness justifies these grants of discretion in order to accommodate changes in technology and the fact that with regard to the attenuation rule, there is no commonly accepted, standardized procedure for measuring attenuation, and thus the director ought to be allowed to permit any reasonable method to be used. NSP raised the same issue in Ex. 71. In both cases, the Statement of Need and Reasonableness has set forth standards for the exercise of this discretion, but in neither case are those standards set forth in the rule. It is found that without some standard or criterion to guide the director, the approval mechanism contained in both rules is defective because it grants unbridled discretion to the director, which constitutes a violation of substantive law. In order to cure this defect, the Agency must insert some sort of standard into each of the rules. The standard suggested in the Statement of Need and Reasonableness for each of the rules would be an acceptable one for insertion.

33. Proposed rule .0080 deals with variances, setting forth standards to govern their granting and content. The rule contains only slight grammatical changes from the existing variance rule (.0300), and thus is not "fair game" for comment pursuant to Minn. Rule part 1400.0500, subpart. 1.

Small Business Considerations in Rulemaking

34. The Agency has addressed the impact of this rule on small business as required by Minn. Stat. § 14.115. The NAC system does take into account businesses as a whole (both large and small) by setting less stringent standards for areas where land activities are commercial and industrial. However, the standards are designed to be protective of health and welfare, and therefore the size of the business is not relevant. The Agency has complied with the pertinent statute.

Economic Factors

35. Minn. Stat. § 116.07, subd. 6, requires the Agency to give due consideration to economic factors. The Agency has discussed various economic matters in the Statement of Need and Reasonableness, and they will not be repeated here. Except as noted at Finding 21 above (regarding the Airport), the Agency has complied with the pertinent statute.

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

CONCLUSIONS

1. That the Agency gave proper notice of the hearing in this matter.

2. That the Agency has 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.

3. That the Agency 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) (ii), except as noted at Findings 21, 32, and 35

4. That the Agency has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14,50 (iii), except as noted at Finding 21.

5. That the amendments and additions to the proposed rules which were suggested by the Agency 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. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the

Agency 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 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 except where specifically otherwise noted above.

Dated this 21st day of January, 1986.

ALLAN W. KLEIN
Administrative Law Judge

REPORTED: Court Reported, Transcript Prepared
Janet R. Shaddix & Associates and
Reporters Diversified Services

MEMORANDUM

The negative findings regarding the application of the rules to the Airport should not be misinterpreted as closing the door on the ability of the MPCA to address the problem of airport noise. Instead, they are merely an evaluation of the Agency's compliance with certain requirements in this particular rulemaking proceeding. As explained below, the Judge has not made any ruling about the ultimate authority of the Agency to deal with the problem.

It appears, however, that the MPCA is preempted, by federal law, from exercising the state's police powers so as to affect aircraft operations. The Agency could not, to take a clear example, enact a regulation which placed a nighttime curfew upon the landing or take off of aircraft from the Minneapolis-St. Paul International Airport. See, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) and *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981). The scope of federal preemption against such state regulation is broad. See, for example, *Hiawatha Aviation of Rochester, Inc. v. Minnesota Department of Health*, No. 3-85-481 (Minn. Ct. App. October 18, 1985).

On the other hand, the Metropolitan Airports Commission, as the proprietor

of Minneapolis-St. Paul International Airport, has far greater freedom to impose restrictions designed to reduce airport noise. MAC could, for example, impose a curfew on aircraft take-offs and landings during certain hours. See, National Aviation v. City of Hayward, 418 F.Supp. 417 (N.D. Cal. 1976) and Santa Monica Airport Association v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981). This latter case not only dealt with curfews, but also with the imposition of a maximum noise exposure level of 100 db . The Commission could exercise other, less-intrusive powers, such as basing landing fees on noise generated so as to encourage the airlines to use their quietest aircraft here.

In summary, it appears that the Agency may not directly impose its noise rules, which are grounded in the state's police power, so as to regulate aircraft operations. However, the Metropolitan Airports Commission can impose a variety of rules and restrictions based upon its status as the proprietor of the International Airport. While even the Commission must abide by some

federal preemption, it has far more flexibility than the Agency.

The Commission has asked the Administrative Law Judge to declare the Agency's rule unconstitutional because of preemption. The Agency, on the other hand, has urged the Administrative Law Judge to avoid the constitutional issue and leave it for the judicial branch to decide.

The Administrative Law Judge believes that he does have the authority to deal with the issue of constitutionality when reviewing a proposed rule during a rulemaking proceeding under Chapter 14. See, Department of Environmental Regulation v. Leon County, 344 So.2d 297, 298 (Fla.App. 1977). It is the duty of the Administrative Law Judge to take notice of the degree to which the Agency has "fulfilled all relevant substantive and procedural requirements of law or rule". Minn. Stat. § 14.50. The Agency is required to fulfill any "relevant substantive or procedural requirements imposed on the Agency by law or rule." Minn. Stat. § 14.14, subd. 2. Clearly, it is a violation of substantive law to attempt to adopt an unconstitutional rule.

However, the Administrative Law Judge has intentionally not found any of the rules ultimately proposed for adoption to be unconstitutional. The reason for that is the presumption in favor of the constitutionality of laws (equally applicable to rules) and the concept of judicial restraint (applicable to Administrative Law Judges as well as judicial-branch personnel) to exhaust all avenues of analysis which would support the constitutionality of an enactment.

In this case, the Agency is seeking to amend its existing noise standard. The existing standard is facially applicable to all persons in the state, and the proposed standard is no different in that regard. The fact that there may be situations in which the Agency is constitutionally prohibited from enforcing the standard against specific persons is better left for determination at a later time. The Administrative Law Judge suspects that the Agency cannot enforce its noise standard against the Department of Defense or

the U.S. Air Force. It may be that the Agency cannot enforce its standard against any number of federal agencies in a whole host of situations (having nothing to do with airports or aircraft). Rather than attempt to catalog all of the situations in which the Agency cannot enforce its rule, it is better to await an attempted enforcement action so that the issue of the constitutionality can be fully and properly developed before an appropriate decision maker.

A different situation exists, however, in the case of the reasonableness of the rule as applied to the Commission. The Commission presented testimony, which was unrebutted, to the effect that imposition of the L/Eq 63 standard to the International Airport would result in a number of dramatic consequences. Essentially, the number of aircraft operations (take-offs and landings) would be cut by approximately 85% so long as all aircraft were so-called "quiet" aircraft, such as the 757, DC-10-40, and MD-80. If any noisy aircraft were included in the "mix", the number of operations would be even further restricted. To avoid the imposition of such drastic consequences until there has been some thought given to a reasonable timetable, an examination of alternatives, and time for other entities (such as the Governor's Task Force) to attempt negotiation, it is concluded that the rule is unreasonable as it would be applied to the International Airport. For this reason, the Agency

must add an exemption to the rule governing aircraft operations from the Minneapolis-St. Paul International Airport. The precise wording of that exemption is left to the Agency.

A.W.K.

