

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of the
Proposed Amendments to
the Rules Governing the
JUDGE
Environmental Review
Program, Minn. Rules
pts. 4410.0200 to
4410.7800

REPORT OF
ADMINISTRATIVE LAW

(PART I)

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on October 12, 1988, in St. Paul.

Pursuant to a joint request of the Agency and the groups that had petitioned for the hearing, and in the absence of any objection from any person present, it was agreed that the October 12 hearing would go forward and include testimony on all of the rules, except for two rules affecting pipelines. With regard to those two, the hearing would be continued to November 15. This Report does not deal with those two rules -- it deals with all of the proposed amendments except for those two. A separate Report will be issued dealing with those two.

Appearing on behalf of the staff of the Environmental Quality Board was Eldon G. Kaul, Assistant Attorney General, 520 Lafayette Road, St. Paul, Minnesota 55155. The staff's principal spokesperson was Gregg M. Downing, Coordinator of the Environmental Review Program, Minnesota Environmental Quality Board, 300 Centennial Building, 658 Cedar Street, St. Paul, Minnesota 55155.

Appearing on behalf of the Petitioners for the hearing were Michael J. Ahern, of the firm of Moss & Barnett, Attorneys at Law, 1200 Pillsbury Center,

Minneapolis, Minnesota 55402; Donald B. Crassweller, of the firm of
Donovan,
McCarthy, Crassweller, Larson & Magie, Attorneys at Law, 100 Alworth
Building,
Duluth, Minnesota 55802; and Mary S. Urisko, Attorney at Law, Great
Lakes Gas
Transmission Company, 2100 Buhl Building, Detroit, Michigan 48226.

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 must 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 August 5, 1988, the Board 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, including a Statement of Intent to Publish in the EQB Monitor and mail to an informal list of persons known to be interested in the proposed rule revisions.

2. On August 18, 1988, the Board mailed the Notice of Hearing to all

persons and associations who had registered their names with the for the purpose of receiving such notice, and, in addition, to an informal list of persons known to have an interest in the proposed revisions.

3. On August 29, 1988, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register 440. In addition, on August 22, 1988, the notice of hearing was published in 13 EQB Monitor, Issue 4.

4. On September 15, 1988, the Board 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 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 a Notice of Intent to Solicit Outside Opinion published at 11 State Register 1615, March 9, 1987 and a Notice of Public Forum published at 12 State Register 2794, June 27, 1988.
- (h) The Petitions requesting a formal hearing.

The 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 comment and statements remained open until October 20, 1988. The period for submission of responsive comments remained open until October 25, 1988, at which time the record closed (with regard to all but the two rules discussed more fully below).

Statutory_Authority

6. Minn. Stat. § 116D.04, subd. 2a(a), 4a, 5a, 8 and 9 all contain grants of rulemaking authority affecting these rules. In addition, Minn. Stat. § 116D.045, as amended by Laws of Minnesota 1988, chapter 501, also grants rulemaking authority to the Board which was utilized for these rules. It is concluded that the Agency has demonstrated its statutory authority to adopt the proposed amendments.

General_Background and Overview

7. In 1973, the Legislature adopted the Minnesota Environmental Rights Law, established the Minnesota Environmental Quality Board, and adopted the State Environmental Policy Act. This latter statute, now codified at Minn. Stat. § 116D.01 et seq., calls for the recognition of environmental values by all state agencies and sets forth a procedure for the preparation and use of environmental impact statements. In 1974, the first set of rules governing the environmental review program were adopted. They were substantially revised in 1977, and again in 1982. Minor amendments were made in October 1986. The rules under consideration in this proceeding are, for most

purposes, revisions to the 1982 edition of the rules.

8. The content of the proposed amendments was arrived at after a lengthy and broad-based process for gathering and considering comments from affected entities and persons. After soliciting public comments in early 1987, the Board made preliminary decisions on areas of concern, and then formed three work groups involving staff and outside persons to develop actual language. later, two other ad hoc groups were formed to deal with unforeseen issues. By the time the Notice of Hearing was published in the State Register, the staff believed that it had resolved all of the significant differences of opinion with affected groups, except for the pipeline issue which remains for consideration in the second part of this proceeding. However, the Notice of Hearing did elicit suggestions for additional changes from affected persons, which will be discussed below.

Public Comments and Analysis

9. Minn. Rule pt. 4410.0200 (72), in its existing form, contains a definition of "related action", which essentially provides a definition for a later rule, Part 4410.1700, subp. 8. Both are proposed for repeal in this proceeding. The latter rule directs that when two or more projects are related actions, then their cumulative potential effect on the environment must be considered in determining whether an EIS is required. The first rule provides a definition of "related action" which contains criteria to determine when two or more projects are related.

10. An adverse comment was received from Mundt & Associates, a law firm in Duluth. They urged that the definition (and implicitly the substantive rule) not be deleted because the deletion would weaken an agency's authority to review adverse environmental consequences of multiple projects. The staff, however, believes that in order to understand the impact of this proposed deletion, it is necessary to also understand that a new concept is being added in this proceeding, which is that of "connected actions". The staff views it as a substitute for "related actions". They believe it provides a more logical way to deal with multiple projects that may pose significant environmental impacts. The difference between the two is that "connected actions" include two or more projects where one directly induces the other, where one is a prerequisite for the other, or where neither is justified by itself. They believe this is broader than "related actions", which is limited to multiple projects that will affect the Same geographic area that are planned to occur at the same time, or multiple projects where one will induce the other. The staff agrees that if the proposed change is made, the possibility of reviewing two or more independent projects which occur at the same time in the same area will be lessened. This does not bother them, however, because to the best of the staff's knowledge, there has never been a case where independent projects

were forced to be reviewed an one project solely as a result of this definition. Moreover, there is a problem of fairness associated with the concept because it depends upon a somewhat arbitrary and fortuitous triggering mechanism based upon the time that the first project is approved, and the time that the second is submitted. The staff also believes that an existing rule (Part 4410.1000, subp. 3) allows an RGU to prepare an LAW whenever it finds that "because of the nature or location of a proposed project, the project may have potential for significant environmental effects". The staff believes that this rule provides adequate authority to jointly consider projects which may have cumulative impacts. Finally, for the situation where there is anticipated residential and commercial development in a given area, cumulative impacts of all anticipated development can be reviewed under the proposed Alternative Urban Areawide Review Process, Part 4410.3110. This process is a substitute for EAWs or FISs which would otherwise be required for specific projects within an area, and was aimed at providing a more comprehensive review process for urban and suburban development situations. Designed to occur earlier in the process of planning development than the traditional EAW/EIS process, it is hoped to have a greater influence on the design of development and avoid impacts, rather than merely mitigating them. The staff believes that this alternative process would cover many of the cases that may be caught under the old "related actions" definition, but cover them in a better manner than before.

11. The Administrative Law Judge accepts the staff's rationale as providing a justification for eliminating the definition and substantive rule

relating to "related actions". Only time can tell whether the staff is correct in assuming that the various safeguards discussed above will provide the same (or better) protection afforded by the "related actions" definition.

The staff has presented a rational justification for its position.

12. Minn. Rule pt. 4410.0200, subp. 84a is a new rule which provides a definition of "sports or entertainment facility", and gives examples, which include sports stadiums or arenas, racetracks, concert halls, theaters, facilities for pageants or festivals, fairgrounds, and others. The proposed definition relates to mandatory EAW and EIS categories (Parts 4410.4300, subp. 32 and 4410.4400, subp. 22, respectively) which require review in the case of construction of a new sports or entertainment facility designed to accommodate attendance over certain thresholds, or the expansion of an existing sports or entertainment facility by that amount.

13. The City of Bloomington suggested that the proposed definition could include events not held in a permanent structure, such as "Mid-summer" or "Riverfest".

The staff responded that the City's concern was unwarranted because the definition itself and the examples all include the concept of a "facility" and the substantive rules talk about construction or expansion of a "facility". Under the current rules, such facilities as racetracks, music amphitheaters, basketball arenas, and zoos are all within the same category as the general industrial-commercial-institutional facilities, which have a threshold based on gross floor space. The purpose of the new rules is to provide a more meaningful threshold (based upon number of expected attendees) because floor space is not a reasonable predictor of impacts for facilities like racetracks.

14. The Administrative Law Judge accepts the rationale of the staff. The language of the rule, and the examples, all speak in terms of "facilities", and not "events". The City may be relieved by a statement in the staff's supplementary response to post-notice comments wherein the staff states:

Events held in existing facilities or not requiring the

construction of facilities would not be subject to these mandatory categories. The EQB staff does not consider the erection of temporary tents, stages, music systems, or other similar equipment to constitute the construction of facilities.

There is no need to alter the Proposed language to meet the City's concerns.

15. Proposed Rule Part 4410.2000, subp. 4 was proposed to be amended by the staff in order to make it parallel to Part 4410.1000, subp. 4. The amendment was proposed by the staff at the hearing, and was not published in the State Register, but it is cosmetic and non-substantive, and may be adopted.

16. Proposed Rule 4410.3000, subp. 4 is part of a major rewrite of the rule relating to supplemental EISs. The existing rule provides no procedure for petitioning an RGU to prepare a supplemental EIS. While the existing rule does not contain any prohibition to petitioning, it does not contain any procedure for doing so. Instead, it simply directs the preparation of a final [IS whenever the RGU determines that certain specified conditions have been met.

The rule as proposed contains a totally new section, codified as subpart 4, which provides a procedure whereby any person may request an RGU to prepare a supplementary EIS. It also provides a procedure for the RGU to determine whether to not to grant the request, and requires the RGU to explain its decision either granting or denying the request.

17. The City of Bloomington objected to this proposal because it would only take one person to request the preparation of a EIS supplement, and force the City to respond to the request. The City was concerned that requests might be submitted in bad faith or in a capricious manner. The City proposed that the rule require at least 25 signatures and mailing addresses, as well as a more rigorous set of "contents" in order to be deemed a valid petition. The City pointed out that these are the requirements contained in Part 4410.1100, subps. 1 and 2, which are the rules defining the petition process for an EAW.

18. The EQB staff responded that historically there has never been a problem of frivolous requests, and that it was aware of only one written request ever having been filed. It pointed out that the proposed amendment does nothing to expand or infringe upon the right of anyone to bring to the attention of an RGU a factual situation which may require the preparation of an EIS supplement. What the proposed amendment does require, which has not been required in the past, is for the RGU to respond to the petition. However, it is likely that an RGU would respond even without a rule. So that is not a major change from the past either.

19. The Administrative Law Judge accepts the staff's position because of the absence of any frivolous or capricious problems in the past. If a problem does develop in the future, it is entirely appropriate for the City to request that the rule be amended to avoid such problems, but the staff is justified in resisting the change at this time since there has not been a problem to date.

20. Proposed Rule 4410.3000, subp. 5B is part of the EIS supplement rule

described above. This part directs the RGU to give notice of the preparation of an EIS supplement to all persons who received the final EIS and to persons on the EAW distribution list. The proposed rule also requires publication in the EQB Monitor.

21. The Department of Natural Resources noted that the proposed rule does not require that notice be given to persons requesting that the supplement be prepared. The DNR suggested that it made sense to assure that these persons were notified of the preparation. The Department further proposed that if the staff was concerned about having to send out too many notices (in the event of a petition signed by a very large number of persons, for example) then the staff could add language which allowed for the notice be given to a representative of a group.

The staff accepted the DNR's proposal, and also its suggestion regarding a group representative. It proposes to add language which would require that notice be sent to any person who requested that a supplement be prepared but that if more than one person signed a letter or other document requesting a supplement, the notice need only be given to a representative or to the person whose signature first appears on the document.

22. The Administrative Law Judge accepts the proposed amendment as meeting the DNR's concerns without creating an unreasonable administrative

burden for RGUS. The proposed solution parallels the procedure utilized for the petition process under Part 4410.1100, which allows an RGU to notify a "petitioner's representative" in the case of a petition for an EAW.

23. Proposed Rule 4410.3110 contains the new concept of an Alternative Urban Areawide Review Process noted earlier. This process is essentially a substitute for the traditional EAW/EIS procedure. The primary limitation on the use of this alternative process is that it can only be used where a comprehensive plan has been adopted. The rule requires the preparation of an environmental analysis document which addresses possible development scenarios, potential impacts from those scenarios, and mitigation measures or procedures necessary to prevent significant impacts. Thereafter, if a residential and commercial development project is proposed that is consistent with the development assumptions and will be implemented in compliance with the terms of the mitigation plan, then an EAW and EIS is not necessary for the project.

24. The City of Bloomington raised a number of questions in connection with this proposed alternative process. Each will be addressed below.

25. First, the City pointed out that the proposed rule fails to designate who the RGU will be. The City proposed that the local unit of government should be identified as the RGU. The staff responded to this proposal by stating that it intended for the local unit of government to be the RGU, and that subpart I of the rule fairly evidences that intent. The Administrative Law Judge understands the staff's reasoning, but finds that the rule would be clearer if the intent were stated more explicitly. While the rule is not defective, it is recommended that an explicit statement which identifies the local unit of government as the RGU be added to the rule.

26. Bloomington's second concern is that it was unclear how the new process differs from the existing generic LIS process. The staff responded that they are, in fact, different in applicability, but not in type. The

staff stated that the new process is intended to review Cumulative impacts of future residential and commercial development in a given geographical area, while the existing generic [IS] process is intended to review impacts of a type of project which may take place at a variety of locations. The staff stated that the process is intended to deal with common geography, while the existing process is intended to deal with common types of projects. The staff intends that this new process would replace past attempts at using the generic FIS process for a limited geographic area, as was done in the Airport South District of the City of Bloomington a few years ago. In that case, the generic LIS process was used because there was no alternative. But if this new process had been in existence then, it would have been used because the FIS focused on a limited geographic area. The staff believes this new process is more suitable for that purpose than is the generic EIS process. The Administrative Law judge finds this to be a reasonable explanation.

21. The third question raised by the City is whether projects that exceed mandatory EAW or EIS thresholds would be required to prepare a project-specific review in areas which had been reviewed pursuant to this alternative. The staff's answer was that there would not need to be a project-specific review if the proposed project was consistent with the assumptions of the comprehensive review and with the mitigation plan. The Administrative law Judge accepts this as pointing out the purpose of this new process - that is, a substitute for the traditional EAW/EIS process.

28. It is the staff's intent that the topics covered in the environmental analysis document would be similar to those covered in the current EAW Worksheet, but not exactly the same. Appended to the Statement of Need and Reasonableness is a recommended list of contents proposed by one of the advisory work groups that helped draft the rules. It follows quite closely the EAW Worksheet, but does expand on certain topics beyond the EAW Worksheet. The rule provides, in subpart 4, as follows:

The EQB chair shall develop a standard list of content and format for the environment analysis document to be used for review under this part. The standard content and format must be similar to that of the EAW, but must provide for a level of analysis comparable to that of an FIS for impacts typical of urban residential and commercial development The EQB chair shall periodically review the standard content and format and make revisions to improve its utility.

29. A question arises as to whether or not this constitutes an illegal rule because it grants too much discretion to the chair in determining the content of the document. Must the content be spelled out in the rule? Minnesota law requires that discretionary power may be delegated to administrative officers only:

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

Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949). Anderson v. Commissioner of Highways, 267 Minn. 308, 126 N.W.2d 778 (1964). However, the Court has also held that a rule need not be entirely precise if there is a need for flexibility in the regulatory process -- if it would be impossible to be more precise under the particular circumstances. Can-Manufacturers Institute v State, 289 N.W.2d 416 (Minn. 1979).

In the Can Manufacturers case, the MPCA had adopted a rule which set forth the factors which it would use in reviewing a package for compliance with a newly adopted statute. The statute was designed to encourage the reduction of materials entering the solid waste stream, and to encourage the reuse and

recycling of materials. The Agency's rule listed the factors which the Agency would consider in approving a package, and went on to state that the decision of whether or not to approve a package would be based upon a finding that the "total positive impacts of the new..... package..... outweigh the total negative impacts in comparison to the existing..... alternatives". There was no indication of what weight would be given to each of the factors listed in the rule. Industry opponents of the rule challenged it in a declaratory judgment action, claiming that it was so vague that it was impossible to predict how the Agency would rule on a particular package. In reaching a decision to uphold the rule, the court went through the rule in some detail, noting that it set forth six "goals" and ten criteria which were to be used in evaluating a package for compliance with the act. The court noted that there

was no indication of what weight would be given to each criterion, and that the relative weights could change for different types of packages. The court held that the rule was not impermissibly vague and did not grant too much discretion to the Agency because the criteria established and the decision-making process set forth in the rule could not have been more precise given the particular regulatory scheme involved. The court also noted that there were various procedural safeguards set forth in the governing statute which would allow a review of the Agency's decision and a "sunset" of an adverse decision if the Legislature failed to extend it.

30. The rule at issue in this MEAB proceeding contemplates that the chair would develop a standard list of contents and format, and then periodically review it for improvements. The rule does not contemplate that the list would change depending on the type of project, or that it would change on a project-by-project basis. Instead, the rule contemplates a relatively static list of contents and format. The staff has appended the work group's recommendations as an example of what is contemplated. There is nothing peculiar about the regulatory process here that would prohibit the staff from creating its standard list and adopting it as a rule. There is no explanation in the Statement of Need and Reasonableness or anywhere else as to why the standard list cannot be set forth in the rule. It is concluded that the rule grants unbridled discretion to the chair, and is thus illegal. Subpart 4 may not be adopted in its current form. In order to cure this defect, the Board must either delete subpart 4 or create a list and add it to the rule. The latter would require republication as it would be a substantial change. Another alternative would be to delete the first and last sentences of the subpart, and also delete the word "standard" from the remaining sentences. The rule, therefore, would not mandate the use of any particular content and format.

31. Part 4410.3600, subp. 2 deals with alternative review. Alternative

review is a concept in the existing rule, which provides that if there is some other governmental process substantially similar to the EAW/EIS process, it may be approved by the EQB as an alternative to the EAW/EIS process. Subpart 2 implements that concept by providing that if the EQB accepts an alternative review process, then projects reviewed under that process are exempt from the EAW/EIS process.

The Board proposed to amend Subpart 2 to provide that even if an alternative process is accepted by the EQB, the EQB still retains its authority to determine the adequacy of the environmental documents that substitute for the FIS in the alternative process. The day before the hearing, it was pointed out to the staff that there was some ambiguity in the wording of that statement, and at the hearing the staff agreed there might be some unintentional ambiguity and proposed a slight modification to eliminate it. Transcript, pp. 28-29. No person objected to the modification and it is found to be needed and reasonable to eliminate any ambiguity in the original language. It is not a substantial change.

32. Another change proposed by the staff occurs in Part 4410.4300, subp. 17. This is part of the mandatory EAW list, dealing particularly with solid waste. All the amendment does is to change the term "solid waste resource recovery facility" to "solid waste energy recovery facility", in order to be consistent with other changes in the rules. The change is non-substantive, and there is no reason why it cannot be adopted.

33. Subpart 19 of that same rule contains the thresholds for residential development EAWS, and Subpart 14 of the next rule contains the thresholds for residential development EISs. In both cases, the staff is proposing to alter the thresholds for requiring an EAW or an EIS from their current levels and to add a new consideration to the threshold: whether or not the proposed development is consistent with the comprehensive plan. For example, under the existing rule, an EAW is required for a residential development of 150 more unattached or 225 or more attached units in a second-class city. Under the amendment proposed by the staff, an EAW would be required for a residential development of 100 unattached or 150 attached units if the City has an adopted comprehensive plan with which the project is inconsistent, but the threshold would be raised to 250 unattached units or 375 attached units if the City has adopted a comprehensive plan with which the project is consistent.

34. The City of Eagan objected to this change because there was no showing that projects which are inconsistent with a comprehensive plan have any greater potential for environmental impacts than projects which are consistent with a plan. The City stated that the Metropolitan Council had required the City to utilize specific, rather than general, land use designations in its comprehensive plan and that it would be penalized by requiring EAWs for more projects than if it had been allowed to use a general land use designation in its comprehensive plan. The City urged that the current rules be retained, but that if consistency with a comprehensive plan is to be a controlling factor, then the threshold should not be lowered below the current numbers.

35. The City of Bloomington also questioned the proposal, stating that if the comprehensive plan is amended, and the amendment is approved, that ought to be sufficient review. This is the very point made by the staff in proposing the increased thresholds that the likelihood of environmental impacts not covered in the comprehensive plan is reduced to the point where the staff is willing to increase the thresholds if the project is consistent

with the plan. While there is certainly a difference between the comprehensive plan and an environmental review document, the likelihood of a substantial environmental impact "slipping by" is reduced to the point where the staff believes it is a reasonable risk to raise the thresholds for conforming projects.

36. The staff explained its proposal in the SONAR by noting that there had been too many unnecessary reviews of residential projects with only minor impacts. Between 1982 and 1986, for example, nearly 24 percent of all the environmental reviews involved residential projects, but less than two percent of these reviews resulted in EISS; in comparison, 12 percent of all reviews involved industrial-commercial institutional projects, but 22 percent of those review resulted in EISSs. The staff believes that if a city has adopted a comprehensive plan, it is better able to cope with new residential developments which are consistent with the plan than is a city without a comprehensive plan or where the project is inconsistent with the plan. The staff believes that it can afford to raise the thresholds for projects which are consistent with plans without harming the environment, but lower the threshold for inconsistent projects without unfairly penalizing cities or developers.

37. The data that would be needed to demonstrate a direct correlation between EAWs resulting in EISSs and consistency with comprehensive plans is not

in the record. However, using the secondary data which is available, the Administrative Law Judge agrees with the staff that some lessening of the current thresholds is justified. The staff's assumption that there is a correlation between environmental impacts and consistency with plans makes sense intuitively and, in the absence of hard data, it will be accepted as a rational basis for the staff's proposal.

38. Proposed Rule 4410.4300, subp. 34 is proposed to be changed to eliminate an ambiguity in the current wording. The rule deals with mandatory EAWs for sports or entertainment facilities, and calls for one in the case of a new facility designed for or expected to accommodate a peak attendance of 5,000 persons. The staff is proposing to amend this so it calls for one where the attendance will be 5,000 or more persons. The difference is the addition of the words "or more". In the context of this rule, those words are assumed, and making them explicit is not a substantial change.

39. Proposed Rule 4410.4400, subp. 13 defines which agency shall be the RGU in the case of solid waste facilities. The rule as published indicated that the PCA would be the RGU for "items A through D", unless the project were located in the seven county metropolitan area, in which case the RGU would be the Metropolitan Council. At the hearing, the Agency noted that there was an error in that rule, as it should have made the PCA the RGU for items "A through E". The staff proposed that change. There was no objection, and the Administrative Law Judge finds that it is a minor correction, and conforms to the logic of the rest of the rule. It is not a substantial change, and there is no reason why it cannot be made.

40. Proposed Rule 4410.4400, subp. 23 provides that the DNR is the RGU for water diversion projects diverting waters outside the State over a certain threshold. The rule refers to "the Department of Natural Resources" rather than "DNR", which is the abbreviation used throughout the rules. The Department requested, and the staff acquiesced, in a change to the acronym DNR. Since this is not a change of any substance, there is no reason why it

cannot be made.

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

CONCLUSIONS

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

2. That the Board 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 Board 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 Finding 30.

4. That the Board 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).

5. That the amendments and additions to the proposed rules which were suggested by the Board 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. I and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Finding 30.

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

8. 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 Board 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:

RFCOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this

8th day of November, 1988.

ALLAN W. KLEIN
Administrative Law Judge

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