STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Adoption of Rules of the Minnesota Department of Health Relating to Wells and Borings, Licensing and Registration, Permits and Notifications, Well Labels, Minnesota Rules Parts 4725.0100 to 4725.1850 and 4725.6750

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 1, 1990, at 9:30 a.m. in the Minnesota Department of Health Building, 171 Delaware Street Southeast, Minneapolis, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 to hear public comment, to determine whether the Minnesota Department of Health ("the Department") has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Thomas McSteen, Special Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55155, appeared on behalf of the Department at the hearing. The agency panel appearing in support of the proposed rules consisted of James Nye, Supervisor of the Ground Water Quality Control Unit, Department of Health; Ronald Thompson, Senior Hydrologist; and Judith Ball, Environmental Policy Analyst.

Approximately 70 persons attended the hearing. Sixty-three persons signed the hearing register. The Administrative Law Judge received ten agency exhibits and two public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until February 21, 1990, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. On February 26, 1990, the rulemaking record closed for all purposes.

Beyond the oral comments at the hearing, the Administrative Law Judge received eighteen post-hearing written comments from interested

persons. The Department submitted two written responses to matters discussed at the hearing and comments filed during the twenty-day period.

The Department 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 Commissioner of actions which will correct the defects and the Commissioner 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 Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner 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 Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On December 14, 1989, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules as certified by the Revisor of Statutes;
(b) The Statement of Need and Reasonableness;
(c) The Notice of Hearing proposed to be issued; and
(d) The Order for Hearing.

2. On December 20, 1989, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

3. On December 26, 1989, the Notice of Hearing and a copy of the proposed rules were published at 14 State Register 1457.

4. On January 4, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed;
(b) The names of agency personnel who would represent the Department at the hearing, together with the names of any other witnesses solicited by the Agency to appear on its behalf;
(c) A copy of the proposed rules as published in the State Register;
(d) A copy of the Notice of Solicitation of Outside Information published in 14 State Register 292 (August 7, 1989), along with the materials received by the Department in response to the solicitation;
(e) The Affidavit of Mailing the Notice of Hearing to all persons on the Agency's list;
(f) The Department's certification that its mailing list was accurate and complete; and
(g) The Affidavit of Additional Mailing and attached additional mailing list.

These documents were timely filed by the Department pursuant to Minn. Rule 1400.0600.

5. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to February 26, 1990, the date the rulemaking record closed.

6. The period for submission of written comments and statements remained open through February 21, 1990, the comment period having been set during the hearing at twenty calendar days. The record remained open for an additional three working days through February 26, 1990, for responses to filed comments.

Nature and Background of the Proposed Rules

7. The proposed rules set forth requirements relating to the licensing of well contractors and elevator shaft contractors; the licensing of contractors for various aspects of well construction, repair, sealing and well pump installation; the registration of monitoring well contractors; permit and notification procedures for well construction and maintenance; and well identification. These rules are promulgated in conjunction with the Groundwater Protection Act, Minn. Stat. Ch. 103I, which was enacted in 1989.

8. The Department published a Notice to Solicit Outside Opinion in 14 State Register 292 (August 7, 1989), and received responsive comments. The proposed rules were developed with assistance from several groups affected by the rules. The Department held seven three-hour

meetings with three ad hoc task forces to discuss registration and permit issues relating to monitoring wells, licensing for limited well contractors, well notifications, elevator shaft contractor licensing, and elevator shaft permit issues. The Department also held four public meetings with Minnesota well contractors, and worked with the Minnesota Water Well Association on well contractor licensing, notification, and well labelling issues. The proposed rule was reviewed by the fifteen-member Advisory Council on Wells and Borings.

Statutory Authority

9. In its Notice of Hearing, the Department cites Chapter 103I of the Minnesota Statutes, specifically Minn. Stat. § 103I.101, subd. 3 and 5 (1989), as authorizing the Department to adopt the proposed rules. Subdivision 3 of section 103I.101 provides that the Commissioner of Health "shall establish procedures for application, approval, and issuance of permits by rule." Subdivision 5 requires the Commissioner to promulgate rules relating to the issuance of licenses for (1) qualified well contractors, persons modifying or repairing well casings, well screens, or well diameters; (2) persons constructing unconventional wells such as drive points or dug wells; (3) persons sealing wells; and (4) persons installing well pumps or pumping equipment and excavating holes for installing elevator shafts or hydraulic cylinders. Subdivision 5 also requires the Commissioner to adopt rules concerning the issuance of registrations for monitoring well contractors; conditions for examinations and review of applications for licenses and registrations; conditions for revocation and suspension of licenses and registrations; minimum standards for design, location, construction, repair and sealing of wells; systems for reporting on wells drilled and sealed; the modification of fees; standards for the construction, maintenance, sealing, and water quality monitoring of wells in areas of known or suspected contamination; wellhead protection measures; procedures to coordinate collection of well data with other state and local governmental agencies; and criteria and procedures for the submission of information on wells required for geologic and water resource mapping. The cited statutory provisions generally authorize the rules proposed in this proceeding and, unless specifically noted to the contrary in this Report, the rules proposed by the Department are authorized under these statutes.

Small Business Considerations in Rulemaking

10. Minn. Stat. § 14.115, subd. 2 (1988), requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the Statement of Need and Reasonableness supplied by the Department, the effect of the proposed rules on small business was evaluated in light of the methods suggested in that statute. The Department indicated that less stringent compliance requirements could not ensure an adequate level of proficiency for contractors and may result in inadequate protection of the groundwater. The Department believes that the permit and notification requirements of the proposed rules cannot be made less stringent for small businesses since the Department must have the opportunity to inspect all wells at the time of construction.

The Department determined that the annual renewal of licenses and registrations gives adequate notice for individuals to plan for meeting deadlines in order to comply with licensing and registration requirements. Because the only performance standard set forth in the proposed rules is the well identification provision, and the well label is provided by the Department and two alternatives are set forth in the rules for the other required information to be added, the Department concluded that it was not reasonable to develop any other identification standard for small businesses. Finally, the Department determined that exemption of small businesses from these rules is inappropriate since small businesses and customers of small businesses should be afforded the same public health protection as other individuals. The Department thus has met the requirements of Minn. Stat. § 14.115, subd. 2, with respect to the impact of the proposed rules on small businesses.

Fiscal Note

11. Minn. Stat. § 14.11, subd. 1, requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rule. The Department asserts that no public funds are required to be spent under the proposed rules unless the local unit of government employes a well contractor as its representative to perform activities requiring licensure or registration. In that event, the local unit of government may be required to pay continuing education costs. All of the other fees relating to licensing and registration are required by Chapter 103I of the Minnesota Statutes. Chapter 103I exempts local units of government from the fees required for permits and notifications. Because the proposed rules will not require an expenditure of funds amounting to $100,000 per year by a local public body, the Administrative Law Judge finds that this statute does not apply to the proposed rules.

Impact on Agricultural Land

12. Minn. Stat. § 14.11, subd. 2, requires proposers of rules that may have a "direct and substantial adverse impact on agricultural land in this state" to comply with the requirements of Minn. Stat. § § 17.80 through 17.84. Because the proposed rules do not have a direct and substantial impact on agricultural land, this provision is inapplicable.

Substantive Provisions

13. The proposed rules consist of 33 pages of new material and modifications to existing rules. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because many sections of the proposed rules were not opposed and were adequately supported by the Statement of Need and Reasonableness, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the provisions that are not discussed in this Report

have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

Proposed Rule 4725.0100 -- Definitions

14. Proposed Rule 4715.0100 establishes definitions for use in interpreting the proposed rules. Subpart 24c defines "dewatering well" as a nonpotable well used to lower groundwater levels to allow for construction or use of underground space. The proposed rules, as modified following the hearing, provide that the definition of "dewatering well" does not include excavations of 25 feet or less in depth for temporary dewatering during construction or wells used to lower groundwater levels for control or removal of groundwater contamination. After the hearing, the Department modified the proposed rules to delete item (B) of subpart 24c. That provision would have excluded from the definition of "dewatering well" uncased holes or excavations 25 feet or less in depth in the bottom of an open trench used for temporary dewatering during construction. The language of item (B) was vague and contrary to the intent of Minn. Stat. § 103I.005, subd. 21(1). Subdivision 21(1) merely exempts from regulation an excavation for temporary dewatering that is up to 25 feet in depth; it does not purport to exempt an excavation that is up to 25 feet deep which is made from within another excavation. Although Minn. Stat. § 103I.005, subd. 21(1) also does not require that wells used to reduce groundwater contamination be excluded from the definition of "dewatering well," the Department's proposed rules do not exempt that type of well from regulation. Rather, the Department includes this type of well within the definition of "well" set forth in subpart 51 of the Part 4725.0100, and is regulating it as such.

The Administrative Law Judge finds that subpart 24c, as modified, is needed and reasonable to clarify the definition of dewatering well as used in the statute. The potential need for modification of the rule was discussed at the hearing. The deletion of item (B) of the original version of the rules conforms the proposed rule to the authorizing statute and is not a substantial change from the rules as originally proposed. The Department properly declined to accept the suggestions of David Hammargren, an attorney with the law firm of Christoffel & Elliot who was appearing on behalf of Northern Dewartering, Inc., and other general contractors involved in underground construction, and Mervyn Mindess, Registered Monitoring Well Contractor, that the definition of dewatering well be modified to exclude excavations less than 50 feet in depth, since a statutory amendment would be required before the Department would have the authority to promulgate such a rule.

After the hearing, the Department modified the Definitions section of the proposed rules to delete Subpart 26b, which defined the phrase "drive point well." The Department's modification was made in response to comments that the terms used in the definition were confusing because the terms "sand points" and "well points" are not standard within the industry. The Department notes that "drive point well" is defined in Minn. Stat. § 103I.005, subd. 5. The modification clarifies the rule and does not constitute a substantial change.

In response to a comment by Mervyn Mindess of Twin City Testing, the Department has proposed to modify the rules by adding a definition of "petroleum bulk storage site." Minn. Stat. § 103I.208, subd. 2(5) provides for reduced fees for monitoring wells used as leak detection devices at petroleum bulk storage sites excluding tank farms, but does not define "petroleum bulk storage site" or "tank farm." The proposed rules, as modified by the Department, would define the term "petroleum bulk storage site" in subpart 31a to mean "a property on which petroleum products are stored for sale and excludes pipeline terminals and refineries." This modification clarifies which petroleum storage areas are entitled to the reduced fee established by Minn. Stat. § 103I.208, subd. 2(5). The proposed definition establishes the broadest interpretation consistent with the statute. The Department has shown that the definition is needed and reasonable to clarify the scope of the statutory fee provision, and the modification does not constitute a substantial change in the proposed rules.

The Department has proposed that the definition of "piezometer" originally set forth in subpart 31a of the proposed rules appear instead in subpart 31b, and has modified the provision to further clarify the devices that are excluded from the definition. As modified, "piezometer" is defined in the proposed rules to mean "an environmental bore hole used to measure water levels or gound water pressure surfaces. Piezometer does not include devices used to sample, monitor, remediate or measure pore water pressure in the vadose zone or above a water bearing layer." (New language underlined.) Several individuals urged the Department to clarify this definition, and the language incorporated in the definition was suggested by Donald L. Jakes, Supervisor of the Ground Water Unit of the Minnesota Pollution Control Agency. This modification to the proposed rules clarifies which devices will be deemed to be encompassed within the definition of piezometer. The proposed rule, as modified, has been shown to be needed and reasonable to define a term that is used in the statute. The modification does not constitute a substantial change.

The Department also proposes to add a new subpart 49a, which would define "unconventional well" as a "dug well, drive point well, or dewatering well." The addition of this definition was suggested by several commentators because Minn. Stat. Ch. 103I uses the term "unconventional well" without defining it, and the absence of a definition could cause confusion. The definition proposed by the Department includes the two types of unconventional wells specified in Minn. Stat. § 103I.101, subd. 2(2) (drive point wells and dug wells), and adds dewatering wells. The Department asserts that dewatering wells have unique characteristics which render it appropriate to denote them "unconventional." The Department's definition of "unconventional well" is needed, reasonable and not a substantial change.

At the hearing on this matter, several commentators objected to the definition of "well pump or pumping equipment" contained in subpart 51a since it could, in conjunction with Minn. Rule 4725.0500, prohibit anyone other than a licensed pump installer from drawing samples from monitoring wells with portable equipment or from removing water during the drilling,

monitoring or repair process. The Department addressed this concern after the hearing by adding additional language to exclude "water sampling devices which are installed in a monitoring well to obtain a water sample and which are then removed after the sample is collected" and "devices used in the construction or rehabilitation of a well to construct or develop the well." The modification clarifies the rule and is needed and reasonable. The changes were suggested during the hearing and are not substantial changes.

Definitions were requested by commentators for the terms "aquifer," "cased well," "environmental bore hole," and "confining layer." The Department declined to incorporate the requested definitions in the rules. The Department has not rendered the proposed rules unreasonable by declining to adopt these definitions.

Proposed Rule 4725.0400 -- Variances

15. This proposed rule modifies the existing variance provision to refer to "variance" requests rather than "modification" requests, the "commissioner" rather than the "administrative authority" and "well or boring" rather than "well." The proposed rule makes other minor changes in the wording of this provision, and deletes the last sentence of the rule part, which has been set forth in another part of the proposed rules. David Hammargren objected to the way in which variance requests had been handled in the past, particularly with respect to the length of time taken by the Department to process such requests, and suggested that specific standards be set to govern the Commissioner's review of variance requests. The Department indicates in its response to these comments that the Commissioner is guided by Chapter 103I of the Minnesota Statutes and by Part 4725 of the Minnesota Rules in reaching decisions concerning variance requests. In this particular situation, a case-by-case approach to granting variance requests is appropriate. By definition, a variance is requested because the planned well does not meet the Department's rules. In such a situation, the Commissioner must decide whether it is possible to both protect groundwater from contamination and permit the nonconforming well to be drilled. The Commissioner's decision will inevitably involve a consideration of the facts peculiar to each case, rendering it difficult a promulgate a viable set of specific standards that would govern the review process. Imposing criteria other than those found in Minn. Stat. Ch. 103I would unduly restrict the Commissioner's discretion in permitting safe but nonconforming wells to be drilled. The manner in which variance requests have been handled in the past does not affect the need for or reasonableness of the rule. The Administrative Law Judge finds that the Department has shown that proposed rule 4725.0400 is needed and reasonable.

Proposed Rule 4725.0450 -- Licensing and Registration.

Subpart 1 - Wells; Vertical Heat Exchangers; Groundwater Thermal Exchange Devices

16. In response to comments that the use of the term "unconventional well" in item (A) of subpart 1 of the proposed rules was unclear, the

Department modified item (A) to refer to the need for a license or registration for one who wishes to "construct, repair or seal a well, monitoring well, piezometer, environmental bore hole, or unconventional well including a dewatering well, dug well and drive point well." The proposed rule as modified has been shown to be needed and reasonable to clarify the meaning of the term "unconventional well" in this subpart, and is not a substantial change from the rules as originally proposed.

Subpart 3 - Well Pumps and Pumping Equipment

17. Subpart 3 of the proposed rules originally provided that, "[a]fter July 1, 1990, a person may not install a well pump or pumping equipment in a well without holding a well contractor license or a limited well contractor license to install a well pump or pumping equipment . . . ." Several persons were concerned that subpart 3 would intrude upon the traditional functions of plumbers and plumbing contractors and that monitoring well contractors who did not hold well contractor or limited well contractor licenses would be unable to install and remove pumps for obtaining samples from monitor wells. The Department stated that it did not intend that interpretation of the proposed rule and modified the language of the proposed rule to permit plumbers, plumbing contractors, and monitoring well contractors to continue to do work that they are licensed or registered to do. As modified, the rule would read as follows:

> After July 1, 1990, a person may not install a well pump or pumping equipment without holding a well contractor license or limited well contractor license to install a well pump or pumping equipment as required by Minnesota Statutes, chapter 103I. Nothing in this subpart shall prohibit a monitoring well contractor from installing a well pump or pumping equipment in a monitoring well, or a limited unconventional well contractor from installing a well pump or pumping equipment in an unconventional well. Nothing in this subpart shall prohibit a licensed plumber or plumbing contractor from installing water pressure tanks not attached to the well casing, water storage tanks, or installing and servicing pressure water service lines from the source of supply, in accordance with the applicable law.

The rule, as amended, is needed and reasonable to clarify the circumstances under which well contractor or limited well contractor licenses will be needed. The modification is not a substantial change.

Proposed Rule 4725.0500 - Qualifications for Contractor License or Registration

18. Minn. Stat. § 103I.501(b) authorizes the Commissioner to examine and license well contractors, limited well contractors, and elevator shaft contractors, and to examine and register monitoring well

contractors. The distinction between licensing and registration appears in the existing Department rules which were promulgated prior to this proceeding. See Minn. Rules 4725.0500 through 4725.1300 and 4725.1850.

Minn. Stat. § 103I.541, subd. 1, requires that, after December 31, 1990, a person seeking initial registration as a monitoring well contractor must meet examination and experience requirements adopted by the Commissioner by rule. Chapter 103I thus provides clear statutory authority for the Department to impose experience and examination requirements on monitoring well contractors.

The ability of the Commissioner to impose an experience requirement for licensure of well contractors, limited well contractors, and elevator shaft contractors is not explicitly stated in Minn. Stat. Ch. 103I. The Commissioner is, however, implicitly authorized by the statute to apply experience requirements to the various categories of licensees. The statutory provisions governing each license type require that an application be filed with the Commissioner stating "the applicant's qualfications for the license." Minn. Stat. §§ 103I.525, subd. 1 (well contractor); 103I.531, subd. 1 (limited well contractor); 103I.533, subd. 1 (limited well sealing contractor); and, 103I.535, subd. 1 (elevator shaft contractor). The language is identical in each provision. Moreover, the failure of Chapter 103I to overrule the existing Departmental rule requiring three years of experience for well contractors (see Minn. Rule 4725.0500) provides further support for the Commissioner's authority to retain and/or modify experience requirements for licensure. The Administrative Law Judge thus finds that the Department has statutory authority to impose an experience requirement on all licensure and registration categories. The need for and reasonableness of the specific experience requirements proposed by the Department will be discussed below.

Subpart 2 - Well Contractor

19. In subpart 2, the Department has increased the experience requirement for well contractors from three years (as set forth in the existing rule) to four years. In its Statement of Need and Reasonableness, the Department asserts that the increase is "based on the premise that well contractors are licensed to perform all of the activities permitted under all the limited licenses, the elevator shaft contractor license and the monitoring well contractor registration and would therefore need a longer period to become proficient." The type of experience required has also been changed to reflect the new requirement for pump installation and repair, and to permit persons with experience in construction of large diameter wells to qualify under certain circumstances. The Minnesota Water Well Association supports these changes in the existing rules. The statutory scheme places great responsibility for supervision and training on licensed well contractors, and the increase in the experience requirement will help to ensure that well contractors are equipped to carry out these responsibilities. The Department has demonstrated that subpart 2 of the proposed rules is needed and reasonable.

Subpart 3 - Monitoring Well Contractor

20. This subpart establishes a two-part requirement for registration as a monitoring well contractor. The first requirement is that the applicant be a professional engineer, a certified hydrologist or hydrogeologist, or a certified geologist. The second requirement is that the applicant have three years of experience, which must include experience in design or field supervision or actual construction of 50 monitoring wells, piezometers, or environmental bore holes. A year of experience is defined as a year during which the applicant worked at least 500 hours in the construction, repair and sealing of monitoring wells, piezometers, or environmental bore holes. Thus, the time required to obtain one year of experience toward a monitoring well contractor registration is approximately one-half the time required to obtain one year of experience toward a well contractor license.

In response to comments made at the hearing, the Department modified the original version of this subpart to include a more complete description of the tasks which a monitoring well contractor is authorized to perform. Subpart 3, as modified, provides that "[a] person may register as a monitoring well contractor to construct, repair, and seal monitoring wells install pumps in monitoring wells and construct and seal environmental bore holes, if the person meets the requirements in items A to C." The modification proposed by the Department is needed and reasonable to define the scope of work which a monitoring well contractor may perform and does not constitute a substantial change. The Administrative Law Judge does suggest, however, that the Department consider inserting a comma after the phrase "construct, repair, and seal monitoring wells" in order to further clarify the rule. Such a revision would not constitute a substantial change.

Several individuals commented that the three year experience requirement was too stringent, that the 500 hours of experience required per year was excessive, that the requirement that applicants have experience in field supervision would be difficult to satisfy, and that the requirements should be adjusted to permit soil scientists to qualify. The Department declined to modify the proposed rule in response to these comments. The Department indicated that the experience requirements are necessary to ensure proficiency in all of the areas covered by the registration. The Department stressed that the 500-hour requirement is a relatively low requirement when compared to experience requirements for other licenses, that the three-year requirement provides the applicant with an opportunity to work with more wells and borings, and that the field supervision requirement is necessary to ensure that the applicant has had sufficient practical experience. The Administrative Law Judge finds that this subpart, as modified, is in accordance with the provisions of Minn. Stat. § 103I.205, subd. 4(b), and is needed and reasonable to establish standards for the registration of monitoring well contractors.

Subpart 4 - Limited Well Contractor

21. In subpart 4, the Department requires that an individual possess a well contractor license or a separate limited well contractor license in order to:

A. construct, repair, and seal unconventional wells, drive point wells, dug wells, or dewatering wells;
B. install or repair well screens or pitless units or adaptors and well casings from the pitless unit or adaptor to the upper termination of the well casing; or
C. install a well pump or pumping equipment.

When the proposed rule is compared to the authorizing statute, it is clear that the proposed rule grants more authority to the holder of a limited well contractor license than is permitted by the statute. Minn. Stat. § 103I.205, subd. 4, states in pertinent part:

> Subd. 4. License required.
> (a) Except as provided in paragraph (b), (c), (d), or (e), a person may not drill, construct, or repair a well unless the person has a well contractor's license in possession.
>
> . . . .
>
> (c) A person may do the following work with a limited well contractor's license in possession:
> (1) modify or repair well casings or well screens;
> (2) construct drive point wells; or
> (3) install well pumps or pumping equipment.

Minn. Stat. § 103I.205, subd. 4(a), clearly requires a well contractor's license for all drilling, construction and repair of wells unless otherwise provided by subd 4(b), (c), (d), or (e). Subparagraph (c) of subdivision 4 of the statute is the only item that addresses the work that can be performed by a limited well contractor.

The tasks set forth in subpart 4(A) of the proposed rules would give limited well contractors far broader authority than that permitted by the statute. Subdivision 4(c)(2) of the statute only authorizes limited well contractors to construct "drive point wells"; it makes no mention of unconventional wells, dug wells, or dewatering wells. The Department has made no showing that the latter wells fall within the definition of "drive point wells." Because subdivision 4(c) also does not authorize limited well contractors to repair or seal any of the wells listed in the proposed rule, the inclusion of that work in the proposed rule is also improper. Subdivision 4(a) empowers full well contractors to repair wells except as otherwise provided, and Minn. Stat. § 103I.301, sub. 1(c), requires that wells must be sealed by a well contractor or a limited well sealing contractor. As a result, item (A) of the proposed rules exceeds the scope of the statute except with respect to the language authorizing the construction of drive point wells.

Therefore, with the exception of the reference to the construction of drive point wells, item (A) of subpart 4 is in direct conflict with Minn. Stat. § 103I.205, subd. 4(c). This conflict constitutes a defect in subpart 4. See, e.g., Buhs v. State, 306 N.W.2d 127 (Minn. 1981); Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979). This defect may be corrected by deleting subpart 4(A) in its entirety or by rewriting item (A) to conform to the statute. The mere deletion of item (A) from this subpart of the proposed rules would not affect the authority of a limited well contractor to construct drive point wells since that authority is derived from the statute. If the Department wishes to retain subpart 4(A), the Administrative Law Judge suggests that the defect may be corrected by rewriting the provision as follows: "A. construct drive point wells."

The Administrative Law Judge finds that the proposed rule, as rewritten above or with the deletion of item (A), has been shown to be needed, reasonable, and in accordance with statutory authority. The change recommended to cure the defect in subpart 4(A) brings the provision into conformity with the authorizing statute and would not constitute a substantial change.

As discussed above, the statute does not authorize a limited well contractor to seal wells. The reference to the sealing of wells which was contained in subpart 4(A) of the proposed rules thus has been deleted from the rewritten version suggested above. As an alternative approach, the Department may, by rule, provide that the same experience and examination requirements apply to applicants for limited well contractor licenses and limited well sealing contractor licenses. Under this approach, the Department would, in effect, grant two licenses based upon the same examination and experience criteria. Such an approach would be consistent with the statutory scheme established by Minn. Stat. § 103I.205, subd. 4, since the statute provides that, with the exception of sealing wells, the two licensing categories may perform the same tasks. The addition of the following language to the proposed rules would accomplish this end:

> Subp. 4a. Limited Well Contractor and Limited Well Sealing Contractor Licenses. An applicant who receives a limited well contractor license shall also receive a limited well sealing contractor license.

This new language, if adopted by the Department, will cure the defect found in the preceeding paragraph with respect to the inclusion of well sealing in subpart 4(A) of the proposed rules. The new provision would comply with Chapter 103I and would not constitute a substantial change. If the Department chooses to add the new subpart, it could also modify the language of subpart 4 to include the following new item (D): "D. seal wells."

The finding of a defect with respect to this proposed rule has broad implications. The hearing in this matter was premised upon the assumption that contractors who obtained limited well contractor licenses could construct dewatering wells. Much of the discussion at the hearing and written comments received before and after the hearing focused upon the appropriateness of this licensure requirement, with representatives of the construction dewatering industry arguing that a separate category of limited well contractor license should be developed to encompass dewatering contractors given their unique equipment and operations, and contending that the experience requirements applicable to the limited well contractor license were not reasonable when applied to dewatering contractors. Because the statute implicitly requires that dewatering wells be constructed by individuals holding full well contractor licenses, it is no longer appropriate to render findings concerning the reasonableness of the limited well contractor provisions with respect to contractors engaged in construction dewatering. The Judge understands that the Department has introduced a bill before the State Legislature which will create a class of licensure strictly for construction dewaterers. Absent an amendment to Chapter 103I, the Administrative Law Judge does not see any alternative approach which the Department may take to meet the needs of construction dewaterers.

Subpart 5 - Limited Well Contractor Qualifications for Unconventional Wells

22. Subpart 5 establishes a three-year experience requirement for applicants for a limited well contractor license. Pursuant to the proposed rules, one year of experience for this license would consist of a year in which the applicant drilled five unconventional wells and worked for a minimum of 1,000 hours constructing, repairing, or sealing unconventional wells and installing pumps in unconventional wells. Although sealing wells is not within the statutory scope of limited well contractor's licenses, the Department is not required to delete the reference to sealing wells from the experience requirement. The Department may choose to credit that experience toward satisfaction of the applicant's experience requirement since it is bears a significant relationship to the authorized activities of the license holder.

As originally proposed, subpart 5 required that an applicant whose experience involves the construction of dug wells or drive point wells must have gained the experience under a licensed well contractor or a limited well contractor licensed to construct, repair, and seal unconventional wells. After the hearing, the Department modified this provision to refer to "unconventional wells" rather than "dug wells or drive point wells." This modification makes the language of the rule internally consistent and does not constitute a substantial change.

Several individuals (primarily representatives of the construction dewatering industry) questioned the reasonableness of the experience requirements proposed in subpart 5. The comments at the hearing focused upon the three-year experience prerequisite and (because there are currently no licensed limited well contractors) the rationale for the

requirement that the experience be gained under the supervision of a licensed well contractor. Many commentators argued that an experience requirement was not appropriate for construction dewaterers, since the work they perform is fundamentally different from potable water well drilling. As discussed in Finding 21 above, it is not appropriate to rule on the reasonableness issues with respect to dewaterers since Chapter 103I requires that dewaterering wells be constructed by contractors holding a full well contractor license.

With respect to the general concerns regarding the experience standards for limited well contractors, the Department emphasized that the three-year experience requirement, although admittedly extensive, is less than that required for the full well contractor license and does not have to accrue during consecutive years. The Department also stressed that it is important to retain the requirement that the experience be gained under the supervision of a licensed well contractor. Because the limited well contractor license will authorize the licensee to install drive point and dug wells used for potable supplies, the Department argues that it is reasonable to require experience under the supervision of licensed water well contractors as a prerequisite to such licensure. The experience requirement has been shown to be needed and reasonable to ensure that limited well contractors will have sufficient experience to conduct well construction and repair within their license authority and to provide adequate protection of the groundwater.

Subpart 9 - Experience Required in Minnesota

23. Subpart 9 of the proposed rules specifies, inter alia, that an applicant for licensure as a well contractor, limited well contractor, or elevator shaft contractor, or for registration as a monitoring well contractor who comes from a state that has no standards or licensing or registration program, or standards that are less strict than those adopted in Minnesota, must obtain at least one year of experience in Minnesota. Alan Gebhard commented that the requirement that an applicant for a monitoring well registration obtain at least one year of experience in Minnesota is too restrictive. The Department declined to modify the proposed rule. The Department noted that there have been instances in which monitoring well engineers from other states have caused environmental damage after coming into Minnesota with no knowledge of the well law or rules. The Department also stated that Minn. Rules 4725.0100, subp. 15, currently requires that applicants for water well contractor licenses have at least one year of experience in Minnesota, and stressed that it is reasonable to apply the same requirement to applicants for monitoring well contractor registrations in order to protect the groundwater. The Department has demonstrated that this subpart is needed and reasonable to protect the groundwater and thereby further the purposes of Chapter 103I.

Proposed Rule 4725.0700 - Application for Licensure or Registration

24. Proposed rule 4725.0700 sets forth the procedures for applying for licensure or registration. The proposed rule requires an application filing fee of $50.00 for all applications except those for registration

as a monitoring well contractor, and provides that applicants must submit written documentation of experience. The fee provisions contained in the proposed rules were approved by the representative of the Finance Commissioner. David Hammargren commented that even those persons who have been engaged in business for many years would have a difficult time providing written documentation of experience. The Department responded to this comment by modifying the language of this rule part to indicate that written documentation of experience "includes, but is not limited to water well records, construction logs for wells or borings, letters from employers verifying employment, and work reports." The language proposed by the Department provides examples of acceptable documentation and demonstrates that there must be some flexibility in the implementation of the documentation requirement. The proposed rule, as modified, has been shown to be a needed and reasonable specification of the standards to be applied in the application process. The modification to the proposed rule part does not constitute a substantial change.

Proposed Rule 4725.0900 - Council Evaluation of Applicants

25. This provision of the existing rules accords the Advisory Council on Wells and Borings certain responsibilities in the evaluation of license applicants. The provision was to be repealed in the rules as originally proposed based upon the Department's expectation that the Council would not be able to evaluate the very large number of persons who are likely to apply for licenses under the proposed rules. Roger Renner, representing E.H. Renner and Sons, Inc., and the Council, and Norville Peterson, representing the Minnesota Water Well Association, requested that this provision remain in the rules. Lyndon Griffin, representing the Utility Contractors Association, and David Hammargren expressed concerns about the responsibilities of the Council in the examination, suspension and revocation processes.

Rather than delete proposed rule 4725.0900, the Department now proposes to amend the existing language to provide that the Council may conduct oral examination of applicants using standardized examinations developed by the Commissioner in consultation with the Council and that the Council may, upon the request of the Commissioner, provide recommendations regarding appropriate disciplinary actions to be taken. As modified, the proposed rule would read as follows:

> Upon request by the commissioner, the council may conduct oral examinations using a standardized examination developed by the commissioner in consultation with the council. Upon request by the commissioner, the council may also provide recommendations as to the appropriate disciplinary action for licensees and registrants found to be to be [sic] in violation of the provisions of Minnesota Statutes, Chapter 103I and this chapter.

Since the Council acts in an advisory capacity only, the discretion granted by the proposed rule part does not violate the requirement that rules limit discretion. See White Bear Lake Care Center v. Minnesota Department of Human Welfare, 319 N.W.2d 7 (Minn. 1982). The Department has shown that retention of the rule is needed and reasonable. The

modification was fully discussed at the hearing and does not constitute a substantial change. Before adopting the rule, the Department may wish to consider correcting the typographical error contained in the text of the rule.

Proposed Rule 4725.1050 - Fees for Licensure or Registration

26. Proposed rule part 4725.1050 sets fees for the various licenses and registrations provided by the Commissioner under the proposed rules. Several commentators objected to the fees on varying grounds. The fee provisions that have been questioned are taken directly from Chapter 103I. The proposed rule part is needed and reasonable, and the Department obviously lacks authority to modify the fees which have been mandated by statute.

Proposed Rule 4725.1250 - Bonding

27. This provision of the proposed rules implements the bonding requirement which is specifically required by Chapter 103I of the Minnesota Statutes. Several commentators representing monitoring well engineers objected to the proposed rule part, asserting that engineers carry their own liability insurance and urging that this should provide an adequate substitute for the bonding requirement. Other individuals argued that it is unreasonable to require every licensee or registrant to carry a bond rather than simply requiring that the company for which they work carry a bond. Because Chapter 103I specifically sets forth these bonding requirements, the Department is unable to make the requested changes in the provisions of the proposed rules absent an amendment to the statute.

David Hammargren suggested that the proposed rule part clarify that the bond amount is noncumulative from year to year. The Department agreed with this suggestion and has modified proposed rule 4725.1250 to reflect that "[t]he penal sum of the bond is noncumulative and is not to be aggregated every year that the bond is in force." The proposed rule part, as modified, is needed and reasonable. The modification does not constitute a substantial change.

Proposed Rule 4725.1300 - License or Registration Renewal

28. Several individuals questioned the need for annual renewal of licenses and registrations, and complained that the requirement is burdensome. The Department declined to modify the proposed rules, stating that annual renewals have been required by the Department in the past and are very common in other occupations as well. The Department has shown that the proposed rule is needed and reasonable.

Proposed Rule 4725.1325 - Denial of License or Registration Renewal

29. David Hammargren and Donald Jakes commented that the proposed rules do not establish a procedure under which licensees and registrants would be notified of the denial of a license or registration and apprised

of their appeal rights. The Department declined to incorporate such a provision, stating that the individuals questioning this provision did not provide any examples of situations in which they allege that the Department failed to respond in a timely fashion. The Department also noted that the Minnesota Administrative Procedures Act governs proceedings relating to the denial of a license or registration. See Minn. Stat. § 103I.701, subd. 3. The Administrative Law Judge finds that the Department is not required to incorporate the requested provision in the proposed rules, and that the absence of such a provision does not render the proposed rules unreasonable. The Department may, however, wish to consider including such a provision in the proposed rules in order to inform Department employees and affected individuals outside the Department of the procedures to be followed in the event of a denial of a license or registration. The inclusion of such a provision would not constitute a substantial change.

Proposed Rule 4725.1400 - Licensing or Registration of Partnerships, Corporations, Business Associations, or Government Agencies

30. Many individuals, both at the hearing and in post-hearing comments, objected to the naming of a single representative for businesses or agencies. The Department has modified the language of the rule part to make it clear that more than one individual may represent such entities. Other changes were made in the proposed rule part to clarify the application of the rule in situations where an entity has more than one representative. The proposed rule, as modified, is needed and reasonable to permit partnerships, businesses, and government agencies to comply with the licensing provisions of Minn. Stat. Ch. 103I without undue difficulty. The modifications proposed by the Department were made in response to extensive comments during and after the hearing, and do not constitute a substantial change.

Proposed Rule 4725.1500 - Suspension or Revocation of License or Registration

31. This proposed rule part governs disciplinary actions against licenses or registrations granted under Minn. Stat. Ch. 103I. David Hammargren stated that the one-year required waiting period after the revocation of a license or registration is excessive, and suggested that a six-month period be incorporated in the proposed rules. He also raised questions concerning appeal rights following a revocation and the involvement of the Advisory Council in revocation procedures. The latter questions have been addressed in Findings 25 and 29 above. The Department indicated in response that the one-year waiting period is appropriate given the seriousness of the revocation of a license or registration and that this length of time is consistent with or less restrictive than similar provisions in other licensing programs. After the hearing, the Department modified subpart 2 to conform to the modifications made to proposed rule 4725.0900, discussed at Finding 25 above. The Department has demonstrated that the proposed rule is needed and reasonable to ensure compliance with applicable laws and rules. The modification made to subpart 2 does not constitute a substantial change.

Proposed Rule 4725.1650 - Continuing Education Requirements

32. Proposed rule 4725.1650 requires the successful completion of six contact hours of continuing education per year as a condition of license or registration renewal. David Hammargren suggested that the six-hour requirement was longer than necessary given the relatively slow pace of changes in the industry. The Department noted in its presentation at the hearing that Maryland requires eight hours of continuing education and Wisconsin requires six hours. The Department has shown that a six-hour continuing education requirement is needed and reasonable to keep persons in the well drilling industry apprised of new requirements and developments in this area.

Proposed Rule 4725.1685 - Advisory Council Review of Continuing Education Programs

33. One individual questioned the ability of the Advisory Council to review proposed continuing education programs in a timely fashion. In response to that concern, the Department has modified the proposed rule part to make review of continuing education programs by the Council permissive rather than mandatory. As discussed in Finding 25 above, the placement of such discretion with the Council is not troublesome since the Council does not make the final decision but merely makes a recommendation to the Commissioner. The proposed rule has been shown to be needed and reasonable, and the modification does not constitute a substantial change.

Proposed Rule 4725.1700 - Placement of Decals and License or Registration Number; Proposed Rule 4725.1800 - Drilling Machine and Hoist Registration

34. Under the two proposed subparts, drilling machines and hoists used by a licensee or registrant must be registered with the Department, and the license or registration number of the person engaged in the drilling must be affixed to the machine, together with the year that license or registration was issued or renewed and the type of license held by the licensee or registrant. A $50.00 fee is charged for the registration of machines or hoists. Many commentators objected strongly to these two provisions, asserting that the proposed rules amount to a tax, that annual registration is unnecessary, and that adequate identification is provided by license numbers provided by the Minnesota Department of Transportation. Minn. Stat. § 103I.545 requires the annual registration of drilling machines and hoists, and sets a $50.00 fee for registering each machine. The Department modified proposed rule 4725.1800 to provide, in accordance with the modified language of proposed rule 4725.1400 (discussed at Finding 30, above) that, "[i]n the case of a licensee or registrant with more than one representative, the licensee or registrant may designate one representative to register all of the licensee's or registrant's drilling machines or hoists." The proposed rules comply with Minn. Stat. Ch. 103I and are needed and reasonable. The modification is not a substantial change.

Proposed Rule 4725.1820 - Notification for Construction of Wells

35. Under Minn. Stat. § 103I.205, the owner of the property where a well is to be located must notify the Commissioner of the proposed well, pay a fee, and obtain a permit for the work. The Department made a minor change in proposed rule 4725.1820 in response to comments that were made. The proposed rule, as modified, states that the notification "is valid for one year from the date it is filed." The proposed rule, as modified, is needed and reasonable to clarify the notification procedure. The modification suggested by the Department does not constitute a substantial change.

The provisions of the proposed rules relating to refundability of permit fees, emergency permit procedures, signatories of required documents, and the procedure for reconsideration of permit denials were the most controversial. These comments are discussed below. The Administrative Law Judge finds that the permit procedures not specifically discussed in this Report are needed and reasonable.

Proposed Rule 4725.1836 - Notification and Permit Fees

36. Many commentators objected to the permit process as being too cumbersome to meet the needs of the well drilling industry. For example, several well contractors indicated that it is common for neighbors of customers to spot a drilling rig next door and then request that the driller place a well on their property as well, and stated that the permit process would interfere with their ability to drill these wells while their equipment is in the vicinity. Several individuals also objected to the fact that the permit fee would be nonrefundable, since many wells are not completed for a myriad of reasons.

The Department has altered the proposed rule part to meet these concerns. The modification would allow permit applications to be submitted by facsimile transmission and fees to be paid electronically. These procedures should allow for expeditious handling of the permit process. The Department also modified the proposed rules to allow the refund of notification and permit application fees "if written application is received within 30 days of submission of incorrect fees, or if written application is received within one year of notification or issuance of a permit if a well or boring was not completed." The proposed subpart, as amended, is needed and reasonable. The modifications made by the Department respond to comments made during the hearing and do not constitute a substantial change.

Proposed Rule 4725.1838 - Emergency Notifications and Permits

37. Proposed rule 4725.1838 sets forth expedited procedures under which contractors may submit notifications and requests for permits in emergency situations. This provision of the proposed rules engendered substantial critical comment. Several individuals requested that the Department incorporate a less restrictive definition of what circumstances would be deemed to constitute an emergency. In response to

these concerns, the Department modified the proposed rule to clarify what constitutes an emergency. The rule, as modified, adds an additional sentence to the end of the introductory paragraph of 4725.1838 which states as follows:

> Exceptional circumstances include but are not limited to, cases where well failure will leave livestock of persons without drinking water, where inaction presents an imminent threat to contamination of the well, boring, or groundwater, where delay will result in collapse or damage to the well, where delay will result in the endangerment of health or safety such as in an unstable excavation, or where such construction is court ordered.

The examples of exceptional circumstances set forth in the modified provision clarify the provisions of the rule while making it clear that the rule does not purport to provide an exhaustive list of such situations.

Some individuals commented that, given the lack of prior notice to contractors on some types of jobs (such as elevator pits), every job was likely to be an emergency. With the alteration of proposed rule 4725.1836, discussed at Finding 36 above, contractors who often must proceed on short notice may now take advantage of the procedures which have been added for the expeditious submission of notifications and permit applications, and it should not be necessary to handle such situations as emergencies.

Several commentators also suggested that the 72-hour time period for written notifications or permit applications in emergency situations be extended and that the owner's agent be permitted to act for an owner. The Department modified the proposed rule in response to these concerns. Item (C), as modified, provides as follows:

> A written notification or written permit application and the applicable fees must be received by the commissioner within five working days after emergency notification of the start of the construction of a well, or within five working days after the start of construction under an emergency permit for a dewatering well, monitoring well, or elevator shaft. The property owner or property owner's agent is responsible for submitting a written notification and fee. The licensed or registered contractor is responsible for submitting a written permit application and fee.

Item (F) of the proposed rules provides that "[t]he commissioner shall not issue emergency permits to or accept emergency notifications from contractors who violate the emergency notification or permit requirements." Such contractors are not prohibited from obtaining a permit or filing a notification in the usual manner. David Hammargren and Norville Petersen expressed concerns about the reasonableness of this provision. Mr. Petersen suggested that the language contained in item (F) be replaced with a provision making emergency notifications and permits non-refundable in order to discourage abuse of this provision.

The Department declined to make the suggested modification, stating that it believes that the proposed rule is necessary in order to deal with potential abuse of the emergency provision. The Department emphasized that it may not have an opportunity to inspect a well or boring constructed after an emergency notification because of the short notice and rapid completion of some drilling activities. The proposed rule serves to discourage contractors from improperly using the emergency provision to avoid inspection of their wells or borings during the construction phase, and thereby safeguards the protection of the groundwater. The Administrative Law Judge finds that the Department has demonstrated that the proposed rule provides a needed and reasonable method to discourage abuse of the provisions of the proposed rule.

The proposed rule, as modified, thus has been found to be needed and reasonable to apprise well drillers of what constitutes an emergency, to provide adequate time for drillers who encounter an emergency to submit a written application after the emergency has been abated, and to guard against contractor abuse of the emergency provisions. The modifications made by the Department to the rule address concerns raised at the hearing and in written comments and do not make substantial changes in the rules as originally proposed.

Proposed Rule 4725.1845 - Denial of Construction Permit Applications

38. The rule as orginally proposed provided that permit applications could be denied or permits revoked "for any violation of this chapter." David Hammargren objected to the proposed rule on the grounds that it did not provide for an appeal process or state the standards for denial of a permit. The Department responded to this objection in its post-hearing comment of February 26, 1990, by deleting the quoted language and inserting six factors which echo the requirements of Chapter 103I of the Minnesota Statutes. In addition, the Department added a sentence to the proposed rule allowing the Commissioner to reconsider denied applications after they have been revised, corrected and resubmitted. The proposed rule, as modified, is reasonable and necessary to establish standards for the denial of construction permit applications and allow reconsideration of applications. The modifications, although lengthy, are merely restatements of already existing requirements. These modifications do not constitute a substantial change.

Other Comments

39. Steven Gale of STS Consultants commented that engineers should not be licensed as contractors, but rather retain the title of engineer. The Department is not authorized to change the titles of licenses authorized by the statute. The Legislature has established titles for the licenses to be issued and the Department has conformed to the style of title contained in the authorizing statute.

40. Several persons provided comments criticizing various aspects of the proposed rules which are mandated by the authorizing statute, Chapter 103I. This Report does not attempt to address all of these comments. It is evident that the Department has no authority to vary provisions which have been required by law.

41. The Department notified the Commissioner of Finance, pursuant to Minn. Stat. § 16A.128, that fees would be charged pursuant to the

proposed rule. The Commissioner of Finance, through a representative, has approved the proposed fees. The statutory requirements for establishing a fee by rule have been met.

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

CONCLUSIONS

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

2. That the Department 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 Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 21.

4. That the Department 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 Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Finding 21.

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 Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in 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: March 28, 1990.

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge