

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF ANIMAL HEALTH

In the Matter of the Proposed
Amendments to the Rules of the
State Board of Animal Health,
Governing: Control of Pseudorabies -
Parts 1705.2400 to 1705.2530
Importation of Swine - Parts
1700.2590 to 1700.3010.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Bruce D. Campbell on May 8, 1990, at 9:30 a.m. in Room 5, State Office Building, 100 Constitution Avenue, St. Paul, 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 State Board of Animal Health (Board) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

Paul Strandberg, Special Assistant Attorney General, 200 Capitol Office Building, St. Paul, Minnesota 55103, appeared on behalf of the Board at the hearing. The Board's hearing panel included the following Board members or Agency staff: Dr. W. J. Mackey, Assistant Secretary; Dr. Thomas J. Haggerty, Executive Secretary; Dr. John Landman, Pseudorabies Field Coordinator; and, Dr. Robert Pyle, Imports Division.

Twenty persons attended the hearing. Nine persons signed the hearing register. All Board members but one were present. At the hearing, the Administrative Law Judge received Board Exhibits A-V, exclusive of C, and Exhibit Z. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules. The Board initially relied upon the Statement of Need and Reasonableness (SONAR) for its affirmative presentation of facts. Individual members of the panel also provided comment in response to public witnesses. The Board also proposed modifications to the rules as published. The Board stated each proposed change and offered comment in support of the changes. The Board distributed the proposed modifications prior to the hearing and at the hearing. For purposes of convenience, the Board also prepared for the Administrative Law Judge a copy of the proposed rules with modifications interlined on blue stock. The Administrative Law Judge received as Exhibit Z the copy of the proposed rules with modifications interlined on blue stock prepared by the Board.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing or May 29, 1990. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. At the close of business on June 1, 1990, the rulemaking record closed for all purposes. The Administrative Law Judge received three written comments from interested persons during the comment period. The Board submitted a written comment responding to matters discussed at the hearing and in the post-hearing comments.

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 March 19, 1990, the Minnesota State Board of Animal Health (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, with the Board's authorizing Resolution;
- (c) The Notice of Hearing proposed to be issued;
- (d) The Statement of Need and Reasonableness (SONAR);
- (e) A Statement of Additional Notice;
- (f) A Statement of Duration, showing the expected length of the hearing and the anticipated attendance.

2. On April 2, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 2347.

3. On April 8, 1990, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. On that date the Board also gave the additional notice specified in Ex. H. See Ex. K.

4. On April 13, 1990 the Board filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed;
- (b) The Affidavit of Mailing the Notice to all persons on the Board's mailing list; and
- (c) The names of Board personnel who would represent it at the hearing.

5. On April 25, 1990, the Board filed the following documents with the Administrative Law Judge:

- (a) The Agency's certification that its mailing list was accurate and complete;
- (b) The Affidavit of Mailing the Notice of Hearing to the Discretionary Mailing List; and
- (c) A copy of the State Register containing the Notice of Hearing and the proposed rules.

Minnesota Rules part 1400.0600 requires that the documents stated in this Finding be included in the filing made with the Administrative Law Judge at least 25 days prior to the hearing. Failure to comply strictly with the rule doubtless constituted a procedural error. Under the circumstances, however, the Administrative Law Judge finds that error to be harmless, not affecting the ability of the Board to adopt the proposed rules. See, City of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980); See also, Handle With Care v. Department of Human Services, 406 N.W.2d 518 (Minn. 1987).

In determining whether a procedural error is harmless, one must examine the extent to which the Agency deviated from the requirements, whether the deviation was inadvertent, and the potential impact the procedural irregularity could have on public participation in the rulemaking process. Auerbach, Administrative Rulemaking in Minnesota, 63 Minn. L. Rev. 151, 215 (1979); but see, Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 241-42 (Minn. 1980). Here the documents pre-existed the late filing and were maintained in the Agency rule file for public inspection. The failure to include all of the documents in the filing of April 13 was clearly inadvertent. Moreover, no member of the public requested an opportunity to

review, prior to the hearing, the rulemaking file maintained by the Administrative Law Judge. At the hearing, no member of the public complained of prejudice resulting from the Board's failure to comply strictly with Minnesota Rules Part 1400.0600.

6. On May 2, 1990, the Board filed with the Administrative Law Judge an amendment to the Statement of Need and Reasonableness. It dealt with the Board's consideration of the impact of the proposed rules on small businesses. See, Finding 9, infra.

The documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to June 1, 1990, the date the record closed.

Nature of the Proposed Rules.

7. The proposed rules regarding pseudorabies control alter the previously established procedure for reducing the spread of pseudorabies virus (PRV) in swine. The amendments are expected to reduce the spread of PRV by setting isolation, treatment, and movement requirements for swine that are carriers or suspected carriers of the disease. The amendments to the rules relating to the importation of swine conform those rules to the new language in the pseudorabies control rules.

Statutory Authority.

8. In its Statement of Need and Reasonableness (SONAR), the Board relies upon Minn. Stat. § 35.03 (1988) and Minn. Stat. § 35.255 (1988) as authorizing the adoption of the proposed rules. Minn. Stat. § 35.03 authorizes the Board to adopt rules necessary to protect animal health. The Board also has rulemaking authority to "implement a program to control pseudorabies in swine, including pseudorabies testing of breeding swine and restricted movement of feeder pigs." Minn. Stat. § 35.255 (1988). Hence, the Board has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

9. Minn. Stat. § 14.115, subd. 2 (1989), requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the Amendment to its SONAR, filed with the Administrative Law Judge on May 2, 1990, the Board acknowledged that the proposed rules will affect farmers who are within the definition of small businesses. In the Amendment to its SONAR, the Board considered lowering the amount of testing, establishing a less frequent testing schedule, using other surveillance techniques, and exempting small businesses from the rules. The Board concluded that the rules cannot be less rigorous as applied to farmers who are small businesses. Relaxing the rules for farmers who are small businesses will increase the spread of PRV. Reducing the sample populations in the proposed tests would reduce the statistical accuracy of the testing. The Board has adequately considered the impact of the proposed rules on farmers who are within the definition of small businesses. Minn. Stat. § 14.115, subd. 2 (1989).

Minn. Stat. § 14.115, subd. 4 (1988), requires that specific notice of the proposed rules be given to affected small businesses. The additional notice provided by the Board satisfied the requirements of Minn. Stat. § 14.115, subd. 4(b) and (c) (1988). See, Ex. K.

Although the Board considered the impact of the proposed rules on farmers within the definition of small businesses, it could be suggested that the failure to include that analysis in the original SONAR resulted in a procedural defect. Minn. Stat. § 14.115, subd. 1 was amended in 1989 to include specifically farming operations of a stated size within the definition of small businesses. Subdivision 2 of that section requires specific consideration of relaxed standards in the SONAR for affected small businesses. Minn. Stat. § 14.131 (1988), requires that the SONAR be prepared and available for public inspection prior to the publication of a Notice and Order for Hearing.

For the reasons stated at Finding 5, supra, the Administrative Law Judge finds this error to be harmless. Clearly, the failure to include small business considerations in the original SONAR was the result of inadvertence. The Board was simply unaware of the recent statutory amendment.

Minn. Stat. §§ 14.115, subd. 2, and 14.131 (1989) accomplish two purposes. Requiring an inclusion of small business impact in the SONAR is meant to ensure that an agency seriously considers how such adverse impact might be lessened, consistent with the ends the rules are designed to achieve. The requirement also gives a reasonable opportunity for the public to comment at the hearing on the issue.

In this case the Board has given serious consideration to the impact of its proposed rules on farmers who qualify as small businesses. See, Ex. G. The Board concluded that because of the nature of the rules, disease control, a relaxation of standards or testing frequency would be counterproductive. Where such change could be made, however, without jeopardizing effective disease control, the Board accommodated the concerns of small herd owners. See, 1705.2480, Subp. 1(B), 1705.2480, Subp. 3. Hence, the record clearly demonstrates that the Board has been sensitive to the concerns of smaller swine farmers, consistent with the purposes of the rules.

In this case the public was not prejudiced by the failure to include small business considerations in the original SONAR. No person reviewed the original SONAR on file with the Agency or requested a copy of the document from the Board. The only person who requested a copy of the SONAR from the Office of Administrative Hearings also received a copy of the Amendment to SONAR the same day the request for the SONAR was made. That person appeared at the hearing and testified in favor of relaxed standards for small pork producers. He did not assert any prejudice from the failure to include consideration of the impact on small businesses in the original SONAR. No member of the public requested additional time to respond to the Amendment to the SONAR or any different relief at the hearing, even though the issue was specifically raised by the Administrative Law Judge.

Although the Administrative Law Judge has found a sufficient, substantial compliance with Minn. Stat. § § 14.115, subd. 2, 14.131 (1989), that

determination is limited to the peculiar facts of this proceeding where the record establishes a complete lack of prejudice and the content of the rules involves a subject matter, disease control, that does not lend itself to accommodations based on the size of operations subject to the proposed rules.

Fiscal Note.

10. Minn. Stat. § 14.11, subd. 1 (1988), requires the preparation of a fiscal note when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The note must include an estimate of the total cost to local public bodies for a two-year period. Although public funds will be expended for the control of PRV, the proposed rules only dictate what actions will be taken should state and federal funds be made available. The rules will not require any expenditures by local governmental units or school districts.

Impact on Agricultural Land.

11. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state". While the proposed rules do require that particular distances between infected and uninfected swine be observed, this is not a substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

1705.2400 - Definitions.

12. Rule 1705.2400 amends four subparts of the existing rule and adds three new definitional subparts. Each subpart defines a term used in the proposed rules.

13. Subpart 3 of Rule 1705.2400 as initially adopted was intended to define the term "Breeding herd" to make clear that, for purposes of blood testing, new swine must be in the herd for at least 60 days. The subpart was amended by the Board at the hearing. See, Ex. Z. The new language added by the Board clearly states that, for the purposes of blood testing, new swine must be in the herd for at least 60 days. The reference to a 60-day period was contained in the subpart as initially published. The reference was included, however, in the context of defining what swine are members of a breeding herd. The modification made by the Board at the hearing clarifies that swine become part of a breeding herd upon arrival, not 60 days after arrival. This change only clarifies the intent of the rule as originally adopted.

It is necessary for application of the rules to define the term "Breeding herd" since particular provisions apply to swine included within that term. The period selected for purposes of blood testing in the rule as initially adopted, 60 days, is reasonable as applied to the normal Minnesota swine-farming operation. Since the change to the existing rule made by the Board at the hearing merely clarifies the existing rule, the modification does not constitute a prohibited substantial change. Minn. Rules pt. 1400.1100, subp.

2 (1988); City of Morton v. Minnesota Pollution Control Agency, 437 N.W.2d 741 (Minn. App. 1989).

14. The Board, at the hearing, also added a sentence to subpart 3 of part 1705.2400 providing that the terms "swine", "pigs" and "hogs" are used in the rules interchangeably. Since the rules do contain those alternative terms for swine, it is both necessary and reasonable that the Board state, for purposes of clarification, that the terms have the same meaning. Since the sentence added by the Board at the hearing equating the terms "swine", "pigs" and "hogs" only clarifies the existing rules without changing any material provision, the addition of that sentence does not constitute a prohibited substantial change. Minn. Rules pt. 1400.1100, subp. 2 (1988); City of Morton v. Minnesota Pollution Control Agency, *supra*.

Since the sentence added by the Board equating the terms "swine", "pigs" and "hogs" is not particular to the term "Breeding herd" but has general application throughout the rules, the Board may consider making this sentence a separate subpart. Inclusion of the provision in the definition of "Breeding herd" is not, however, a defect. The restatement of the last proposed sentence of subpart 3 in a separate subpart would not constitute a prohibited substantial change.

15. Subpart 5A of part 1705.2400 is amended to include a "Stage III area" in the definition of "low-prevalence pseudorabies area". As a consequence of the amendment to subpart 5A, the definition of "low-prevalence pseudorabies area" is entirely changed. In redefining the term "low-prevalence pseudorabies area" as a Stage III area, the Board merely conforms the definition in the PRV rule to the standards of the national pseudorabies eradication program. The State is participating with the federal government in a joint pseudorabies eradication program. The federal program states minimal guidelines and includes five stages of pseudorabies control, designated Stages I through V inclusive. See, Ex. U. The new definition is consistent with the federal provision published by the United States Department of Agriculture, Exhibit U, p. 13. The new definition is needed to accomplish the goal contained in part 1705.2472, subp. 3a. That goal is to allow the Northern Zone to be declared a Stage III pseudorabies area. Hence, the amendment to subpart 5a of part 1705.2400 is both needed and reasonable.

16. Subpart 8a of part 1705.2400 substitutes a definition of "Approved premises" for the former term "Quarantined feedlot". Use of the word "quarantined" in the former definition caused unnecessary concern amongst nearby swine herd owners and the public generally. A change in the terminology associated with the status of the site will reduce needless anxiety with no offsetting detriment. Hence, substitution of the term "Approved premises" for the term "Quarantined feedlot" in this subpart and throughout the proposed rules is both needed and reasonable.

In the rule as originally published, the definition contained in subpart 8A referenced the term "light weight butcher hogs". At the hearing, the Board proposed to replace the word "butcher" with the word "market" as modifying the

word "hogs" contained in line 4 of subpart 8A. Again, this change was made strictly for purposes of clarification. The change was made to conform the language of the rule with commonly understood industry terminology. Since the modification was made only for purposes of clarification with no substantive effect on the provision as initially published, the modification does not constitute a prohibited substantial change. Addition of the phrase "light weight market hogs" to the definition of "Approved premises" expands the kind of quarantined swine that may be sold out of approved premises. This expansion will not increase the risk of exposing non-quarantined swine to PRV. Since addition of light weight market hogs to the definition will assist producers without increasing the risk of exposure to PRV, the definition contained in subpart 8A, as amended at the hearing, is both needed and reasonable.

17. Subpart 9 of part 1705.2400 amends the definition of "Quarantined herd" to include within the definition any herd subject to testing which the owner refuses to test. No public testimony at the hearing or subsequent public comments objected to the inclusion of such herds within the definition of a quarantined herd. This provision is needed and reasonable to prevent persons from resisting testing procedures and moving infected swine throughout the State, thereby increasing the risk of the spread of pseudorabies.

18. Subpart 13 defines "official random sample test" as blood testing of a stated number of each segregated group of swine at a particular site. The number of swine required for an adequate sample under subpart 13 varies with the size of the herd. A definition of official random sample test is necessary, since the USDA National Standards require either a test of all breeding swine or an official random sample test. The number of swine required for an adequate sample, as contained in the rule, is identical to the standards for random sample testing contained in the USDA National Standard. See, Exhibit U, p. 3.

At the hearing, a public witness recommended a reduction of the number of swine to be tested within each herd size. This change would lower the expense associated with the official random sample testing by reducing the number of swine tested. The Board declined to follow the suggestion because the expense saving would be marginal and the numbers contained in subpart 13 are identical to the USDA National Standard. Hence, the proposed definition of "official random sample test" is needed and reasonable.

At the hearing, the Board modified the definition to substitute for the phrase "all parities" the phrase "each parity". A parity is a generation of offspring. The change was made only to clarify the rule without affecting its substantive provisions. The change made to subpart 13 at the hearing was, therefore, not a prohibited substantial change. Minn. Rules pt. 1400.1100, subp. 2 (1988); City of Morton v. Minnesota Pollution Control Agency, supra.

19. Subpart 14 defines the term "official pseudorabies herd cleanup plan". The definition is virtually identical to the federal definition. A definition of the phrase "official pseudorabies herd cleanup plan" is necessary because that term is used in the pseudorabies rules. The definition contained in subpart 14 is reasonable because it conforms to the USDA National Standard definition of that term and its content is formulated with the consent of all involved parties; the herd owner; his or her veterinary practitioner; and the Board.

20. Subpart 15 defines the term "Breeding swine sales center". A definition of the term is necessary because it is used in part 1705.2480, subp. 9 of the proposed rules. The definition is reasonable because it is the common sense definition of the term that is understood in the pork producing industry.

Part 1705.2430 - Infected Herd Quarantine and Disposal Procedures.

21. Subpart 3 of part 1705.2430 requires that quarantined swine be disposed of through either of the procedures established under Items A or B. The amendments to subpart 3 occurring prior to Items A and B merely clarify the scope of the rule. The substitution of the word "swine" for the word "livestock" and the phrase "a quarantined" for the word "infected" merely improves the readability of the rule and conforms Rule 1705.2430 to the definition of "quarantined herd" contained in part 1705.2400, subp. 9. Hence, these amendments to the initial portion of the subpart are both needed and reasonable.

22. Item B of subpart 3 of the existing rules has been modified to eliminate gaps in the limitations on movement of feeder pigs from a quarantined herd. The amendment is needed and reasonable since it protects against pseudorabies when contract feeding at an approved premises is involved.

At the hearing, the Board made the following grammatical changes to item B: the word "an" was inserted before the phrase "approved premises"; and the phrase "and must be" was inserted after the phrase "approved premises" and before the word "accompanied" in line 3. Since the changes proposed at the hearing are only grammatical corrections to item B, not affecting the substance of the rule as initially proposed, they do not constitute prohibited substantial changes. Minn. Rules pt. 1400.1100, subp. 2 (1988); City of Morton v. Minnesota Pollution Control Agency, supra.

23. The proposed rule adds an item C to subpart 3 of part 1705.2430 which permits the sale of a quarantined herd to a new owner if the buyer agrees to keep the herd at its existing location and to execute a herd cleanup plan. The addition of item C is needed so that persons leaving the swine production business have an alternative to selling the entire herd for slaughter. If such a sale were required, the true value of the herd would rarely be recovered. The addition of item C to subpart 3 of 1705.2430 is reasonable because adding this alternative to avoid hardship does not increase the risk of exposure to pseudorabies. No member of the public commented at the hearing or in subsequent filings on the addition of item C to this subpart. Hence, the addition of item C to subpart 3 is both needed and reasonable.

24. The final paragraph of subpart C has been modified in the proposed rule to conform the language of the subpart to the new definition of "approved premises" and to incorporate a reference to item C, as discussed in Finding 23, supra. The modifications to the last paragraph of subpart 3 are both needed and reasonable to conform this paragraph to the definition of "approved premises" previously found needed and reasonable and to accommodate the inclusion of item C in subpart 3.

25. Subpart 4 of part 1705.2430 is a new subpart that permits movement of quarantined swine when the following conditions are met:

- (a) Movement is otherwise allowable under the rules;
- (b) The prior approval of the district veterinarian has been obtained;
- (c) The herd is subject to an official cleanup plan;
- (d) All of the swine moved have been vaccinated, except for those swine subject to an approved offspring segregation plan;
- (e) The new location is quarantined;
- (f) The new location is under the same restrictions as the original quarantined premises;
- (g) The new location is not in the Northern Zone; and
- (h) The new location is not within two miles of a qualified or controlled vaccinated herd.

The Board added condition (a) and the exception to condition (d) at the hearing. Under the previous rule, under particular conditions, a quarantined herd that outgrew its home quarantined premises was allowed to move to what was termed an "extension herd". Such movements caused concern among neighboring herd owners adjacent to the new location. The Board, in subpart 4, has placed reasonable restrictions on such moves designed to prevent the spread of pseudorabies and to satisfy the concerns of neighboring producers. The location restrictions, requirement for vaccination and herd cleanup provisions were requested by the producing industry and do not put an undue hardship on the quarantined herd owner. Hence, subpart 4 is both needed and reasonable. The changes noted above to subpart 4, added by the Board at the hearing are technical changes necessary to reconcile subpart 4 with other provisions of the rules. They were added only for purposes of clarification without affecting the substance of the rule. Hence, the two changes to subpart 4 added by the Board at the hearing do not constitute prohibited substantial changes.

Rule 1705.2434 - Approved Premises Procedures

26. Subpart 1 of part 1705.2434 has been amended by deleting the phrase "a quarantined feedlot" and inserting the phrase "approved premises". This amendment to the rule is both needed and reasonable to make the language of this section consistent with the definition contained in subpart 8a of part 1705.2400. See, Finding 16, supra. At the hearing, the Board proposed to amend subpart 1 by inserting the phrase "the Board's representative" after the word "provide" and before the word "access" in line 4. The purpose of the amendment was to clarify that the Board's representative, usually a district veterinarian, must be given access to the feedlot and the required records. The existing language of the subpart only required that access be given; it did

not state who was entitled to access. The effect of the proposed change, therefore, only clarifies the subpart and does not affect the substance of the rule as originally adopted. The amendments to the initial paragraph of subpart 1, part 1705.2434 are, therefore, both needed and reasonable. Since the change to subpart 1 proposed by the Board at the hearing only clarified the existing rule without affecting its substance, it did not constitute a prohibited substantial change.

27. Subpart 2 of part 1705.2434 expands the prohibition against establishing approved premises. Under the prior rule, approved premises could be established in any portion of the State not included within the Northern Zone. Subpart 2 prohibits an approved premises from being established in any county declared to be within Stage III of the National Pseudorabies Eradication Program or at a location within a two-mile radius of an existing qualified or controlled vaccinated herd. The additional restrictions imposed on establishing approved premises protect progress made in controlling PRV on a county-by-county basis.

A representative of the Minnesota Pork Producers Association (MPPA) objected to the subpart because an infected herd initiating cleanup is not protected from having a quarantined herd move within two miles of its cleanup location. In its post-hearing comment, the Board agreed with the MPPA and proposed to add to the end of subpart 2 the following language "or a swine herd in the process of becoming a qualified herd".

Subpart 2, as amended at the hearing, is both needed and reasonable to protect progress made in controlling the spread of pseudorabies on a county basis and on the basis of proximity to an existing qualified or controlled vaccinated herd. The change proposed by the Board in its post-hearing comments does not go to a new subject matter, is responsive to public comment and does not pose a substantial burden on neighboring producers. Hence, the amendment to subpart 2 proposed by the Board in its post-hearing comments does not constitute a prohibited substantial change. Minn. Rules pt. 1400.1100, subp. 2 (1988); City of Morton v. Minnesota Pollution Control Agency, *supra*.

28. In subparts 3 and 4, the phrase "approved premises" is substituted for the phrase "quarantined feedlot". These changes are both needed and reasonable to conform the language of the subparts to the new definition contained in subpart 8a of part 1705.2400. See, Finding 16, *supra*.

29. Subpart 5 of part 1705.2434 substitutes a grandfather provision applying to approved premises legally established within two miles of a herd that subsequently becomes a qualified or controlled vaccinated herd for the former provisions of the rule which anticipated a gradual phaseout of such approved premises. Since the approved premises were in operation prior to the establishment of a qualified or controlled vaccinated herd within two miles of the approved premises, subpart 5 is both necessary and reasonable to allow continued operations which were legally established. Although the more effective solution for the control of PVR would be to prohibit the continued operation of approved premises when a qualified or controlled vaccinated herd becomes established within a two-mile radius of that location, the cost involved to the affected operator would be prohibitively high. Hence, the grandfather provision contained in subpart 5 of part 1705.2434 is both needed and reasonable as a compromise solution to protect legally established operations.

Part 1705.2440 - Release of Quarantine.

30. Under subpart 1 of part 1705.2440, a swine herd quarantine release may be accomplished by any method specified in items A-D. The initial change to this subpart is contained in item B. Item B, which relates to testing and removal, has been completely replaced with new language. The amendment to Item B is needed and reasonable to conform this item to the USDA National Standard for quarantine release. Exhibit U, p. 21.

At the hearing, the Board proposed additional amendments to Item B of subpart 1. The Board added the phrase "or area" after the word "state" and before the word "is" in line 8 of subitem B(1). This addition is necessary and reasonable to conform the language of this item to the rest of the rule. Portions of the State may be at different stages of PRV eradication. Adding the phrase "or area" to this subitem permits needed flexibility in the application of the rule. Subitem B(2) was modified at the hearing to include the phrase "from the herd" after the word "removed" and before the word "and" in line 3 of subitem B(2). This amendment only increases the readability and clarity of this subitem without affecting its substance. In the second paragraph of subitem B(2), the Board determined that a new paragraph should begin with the last word of line 3 of the final paragraph of subitem B(2). This grammatical change has no effect on the substance of the provision. Finally, the Board added the word "official" before the word "the" and the word "random" in line 4 of the final paragraph of subitem B(1) and substituted the phrase "after the quarantine is released" for the word "later" from the final line of subitem B(2). These additions are merely grammatical or clarifying amendments which do not affect the substance of the subitem, as initially published. Hence, the amendments to subitem B(2) do not constitute prohibited substantial changes.

Part 1705.2460 - Intrastate Movement of Breeding Swine.

31. In the second line of subpart 1 to part 1705.2460, the proposed rule includes the language "or move for contract farrowing" as a limitation on the intrastate movement of breeding swine unaccompanied by an appropriate health certificate or test chart. This change is both needed and reasonable to remove a gap in the prohibition against moving breeding swine. The effect of adding the phrase noted above will be to remove a situation which can result in the spread of pseudorabies.

32. Item B of subpart 1 to part 1705.2460 inserts the word "official" before the word "pseudorabies" in line 1 of that item. The proposed rule also adds a strong recommendation that breeding swine purchased be isolated for 14 days and then subjected to a negative pseudorabies test prior to their introduction into a herd. The the word "official" only designates the test to be given. It is for purposes of clarification only and does not affect the substance of the existing rule. Hence, that change is both needed and reasonable.

The "strong recommendation" contained in item B of subpart 1 is not within the statutory definition of a rule. Minn. Stat. § 14.02, subd. 4 (1988), defines a rule as ". . . every agency statement of general applicability and future effect" Pursuant to Minn. Stat. § 14.38, subd. 1 (1988), every properly promulgated rule has the force and effect of law. It is impossible to give a strong recommendation the force and effect of law or term it a binding statement of general applicability and future effect. Since the recommendation contained in item B of subpart 1 is in conflict with the statutory definition of a rule, it may not be included in the Board's pseudorabies rules and the Judge specifically finds a defect.

It could be argued that, since the recommendation is unenforceable, it does no harm to include that provision in the proposed rules. It may also serve a purpose of public education. However, the Administrative Law Judge finds that the public education function could be accomplished by including the recommendation in Board publications or instructional material, apart from the proposed rules. As to the argument that its inclusion does no harm, the public may be confused or misled by the inclusion of the recommendation in the rules. The public may conclude that there is some sanction for failure to comply with the recommendation. Moreover, only confusion can result from the Board including nonrule material in the official text of its rules.

To correct the defect, the Board must remove from item B, subpart 1 of part 1705.2460, the following sentence: "It is strongly recommended that any breeding swine purchased be isolated for 14 days and then pass a negative test prior to their introduction into the herd."

33. Subpart 9 of part 1705.2460 permits the sale of vaccinated hogs to another owner without a negative test for PRV if the buyer maintains the hogs on the same premises, accepts a quarantine and signs an approved herd cleanup plan. The current rule makes it illegal to sell vaccinated breeding swine except to slaughter. This is because they often carry a vaccination blood titer. This condition causes hardship to certain producers. The change proposed in subpart 9 allows the sale of vaccinated breeding swine under conditions designed to control the spread of pseudorabies. The conditions imposed are essentially the same conditions for the sale of a quarantined feeder pig herd in proposed Rule 1705.2430, subp 3C, which has been found to be needed and reasonable. See, Finding 23, supra. Since the provision avoids hardship to pork producers and yet controls the spread of pseudorabies, it is needed and reasonable.

Part 1705.2472 - Control and Eradication of Pseudorabies

34. In the initial portion of subpart 2 of part 1705.2472, the Board struck language from the existing rule and provided that there must be compliance with the feeder swine movement regulations of the rules when feeder swine are moved for any purpose from the premises of origin. The amendment was necessary to eliminate any ability of producers to move feeder pigs without any testing. To accomplish the containment of pseudorabies, it is both needed and reasonable that feeder pigs moved for any purpose be from known clean sources where there has been compliance with the feeder swine movement regulations contained in subpart 2.

35. In the rules as initially published, the Board made no change in subitem 3 of subpart 2 of part 1705.2472. At the hearing, the Board suggested an amendment to subpart 2F(3) which eased the restrictions on moving breeder swine into the Northern Zone. See, Exhibit Z, p. 7. The proposed change would permit breeder swine to be moved into the Northern Zone if the animals originate from a qualified herd or from a nonquarantined herd if they had a negative PRV test within the last 30 days. Subpart 2F(3) of the existing rule only relates to movements of monitored feeder pigs into the Northern Zone.

The program for the eradication of pseudorabies established by the Board in the past several years divided the State into a Northern and Southern Zone. The Northern Zone has been freer of pseudorabies than the Southern Zone. It is the intent of the rules to restrict swine movements into the Northern Zone to maintain its virtual disease-free status. The purpose of subpart 2F(3) was, then, to state the types of swine movements to the Northern Zone that would be allowed. Other provisions of the rules, however, make the movement of breeding swine into the Northern Zone possible only if the animals are from a qualified herd or have had a negative PRV test. Hence, the change to subpart 2F(3) proposed by the Board at the hearing merely clarifies existing restrictions without adding additional substantive provisions. Further, it makes the restrictions stated in subpart 2F(3) on the movement of breeding swine into the Northern Zone the equivalent of the restrictions on the movement of feeder pigs into that zone. Since the change to subpart 2F(3) only clarifies existing restrictions and specifically equates the treatment of monitored feeder pigs and breeding swine as to movements into the Northern Zone, it is both needed and reasonable. Finally, since the change to subpart 2F(3) proposed by the Board at the hearing imposes no additional substantive limitation on swine movement but only clarifies existing restrictions, the proposed modification is not a prohibited substantial change. Minnesota Rules part 1400.1100, subp. 2 (1988); City of Morton v. Minnesota Pollution Control Agency, 437 N.W.2d 741 (Minn. App. 1989).

36. Subpart 3 of part 1705.2472 amends the existing rule by mandating participation in the National Pseudorabies Eradication Program. This subpart clarifies how the Northern Zone can become a Stage III area. To achieve such a Stage III status, the subpart requires herd cleanup plans to be submitted to the Board for all quarantined herds located in the Northern Zone. Additionally, a system of surveillance must be implemented on an annual basis. The provisions of subpart 3 mirror the USDA National Standards. Exhibit U, p. 13. No public commentator objected to subpart 3 of part 1705.2472. Subpart 3 is found to be both necessary and reasonable.

At the hearing, the Board eliminated redundant language from line 2 of subpart 3. See Ex. Z, p. 8, line 2. Since the change has no substantive effect and improves the readability of the rules, it is both necessary and reasonable. Since the change has no substantive impact on the rule as initially proposed, it is not a prohibited substantial change.

Part 1705.2474 - Pseudorabies Monitored Herd Procedures.

37. In the sixth line of subpart 1, the Board eliminated the requirement that the representative sample of the breeding herd tested must include all herd boars. In the experience of the industry, testing all herd boars was not

necessary in testing a representative sample of the breeding herd. It resulted in expense to the producer without having a substantive impact on the control of pseudorabies. Hence, elimination of the stated language is both necessary and reasonable.

38. In subpart 1, the Revisor of Statutes erroneously included an item D. It is obvious from a reading of item D that it does not fit either logically or grammatically with the previous items specified or the sense of this subpart. It was the intent of the Board, as enunciated at the hearing, that item D should be an addition to subpart 2 of Rule 1705.2474 and added after item C at page 10 of the current rule. The Board, at the hearing, proposed that this item D be eliminated from subpart 1, where it was erroneously placed, and added to subpart 2 of this rule. The purpose of the proposed rule is merely to allow an additional alternative to a dealer to establish the pseudorabies monitored status of the herd of origin. The amendment is both needed and reasonable in that proof of origin from a Stage III, IV or V area provides protection against the spread of pseudorabies without inconveniencing a seller. The addition of item D only gives a seller an additional method of establishing the pseudorabies monitored status of the herd of origin. The movement of this item into subpart 2 where it belongs both logically and textually merely corrects a mistake of the Revisor of Statutes. As such, it is not a prohibited substantial change.

Part 1705.2476 - Pseudorabies Surveillance and Control of Spread.

39. Subpart 4 of part 1705.2476 requires circle testing only on new qualified or controlled vaccinated herds. The proposed changes to subpart 4 conform the rule to the United States Department of Agriculture's National PRV Program Standards. Exhibit U, p. 13. Hence, the changes in subpart 4 are both needed and reasonable.

40. Subparts 5 and 6 of this part extend the circle testing area from one mile to one and one-half miles as discussed in the previous Finding. Since the change is necessary to conform these rule provisions to the United States Department of Agriculture's National Standards, the amendments to subparts 5 and 6 are both needed and reasonable.

41. Subpart 7 relates to mandatory herd monitoring. The rule as proposed envisioned a phase-in of herd monitoring. In accordance with the previous division of the State into a Northern and Southern Zone, compliance in the Northern Zone was to be achieved by July 1, 1991, with compliance in the Southern Zone to occur by July 1, 1992. The MPPA has taken the position that the monitoring should begin on a statewide basis at the earliest possible date in order to control pseudorabies. At the hearing, the Board accepted the position of the Association and made the following changes: in subitem A, after the word "all" in the first line of that subitem, the word "swine" was inserted before the word "herds" and the words "the Northern Zone" in the same line were deleted and the word "Minnesota" was inserted in lieu thereof. Finally, subitem B, which had proposed a later compliance date in the Southern Zone, was entirely deleted. In light of the deletions proposed by the Board, it would also be appropriate to delete the "A" before the words "By July 1, 1991" in what had been the first line of that subitem. The retention of the "A" serves no purpose and is confusing. Finally, in the twelfth line of

subpart 7, the Board, at the hearing, substituted the word "may" for the word "must".

If pseudorabies infected herds in Minnesota are to be identified and if the National Pseudorabies Eradication Program is to be implemented, herds must be subjected to a monitoring program to identify infected animals. It is also necessary that a compliance schedule be established. The date contained in the proposed rule, as amended, July 1, 1991, was developed in conjunction with the regulated public. Statewide monitoring on a unified basis was adopted by the Board as a consequence of industry comment and the position of the Pseudorabies Advisory Council. In the judgment of the Board, it is possible for all herds within the State to begin an annual herd monitoring program, irrespective of geographic location, by July 1, 1991. There is no evidence in the record that compliance in the Southern Zone could not be achieved by July 1, 1991. An individual in the Southern Zone will incur no additional expense as a result of this change. The same expense will be incurred one year earlier. No member of the public objected to the change in compliance schedule. The Administrative Law Judge, therefore, finds that the compliance schedule contained in subpart 7 is both needed and reasonable.

The change in compliance schedule proposed by the Board at the hearing does not constitute a prohibited substantial change. The rulemaking process contemplates the modification of proposed rules. Minnesota Association of Homes for the Aging v. Department of Human Services, 385 N.W.2d 65, 68 (Minn. App. 1986), pet. for rev. denied (Minn. June 13, 1986). There is no prohibited substantial change when an amendment to a proposed rule does not affect classes of persons not represented at the hearing, does not introduce a new subject matter of significant substantive effect, does not make a major substantive change not raised by the original Notice of Hearing so as to invite reaction and public comment at the hearing, or does not result in a rule fundamentally different from that contained in the Notice of Hearing. Minn. Rule pt. 1400.1100, subp. 2 (1988). The change in the compliance provision involves no consideration enumerated in Minn. Rules pt. 1400.1100, subp. 2 (1988). The proposed change in compliance schedule, therefore, is not a prohibited substantial change. City of Morton v. Minnesota Pollution Control Agency, 437 N.W.2d 741, 746-48 (Minn. App. 1989).

42. Subpart 7 also states that the same hog bleeding schedule must be followed under this subpart as is used in the feeder pig monitoring program required by part 1705.2474, subp. 1, item A. It is necessary to specify the hog bleeding schedule that will be used for purposes of subpart 7. The schedule established in part 1705.2474, subpart 1, item A is a portion of the existing rules and has, therefore, been determined to be both needed and reasonable. Using the same hog bleeding schedule for swine herds in Minnesota as is used in the feeder pig monitoring program is both needed and reasonable.

43. The insertion of the word "may" for the word "must" in the twelfth line of subpart 7 refers to when the bleeding may be discontinued if the area in which the herd is located becomes a Stage III area. The insertion of the word "may" gives the owner freedom to discontinue bleeding the swine if the location of the herd becomes a Stage III area. As previously stated, with the use of the word "must", the owner was required to discontinue bleeding if Stage III area status was achieved. Obviously, an owner may test his or her stock whenever he or she so chooses. Insertion of the word "may" merely reflects

that logical right in the owner. The inclusion of the word "may" in the rule is merely another way of stating that the owner need not continue bleeding his hogs when the area in which the herd is located achieves Stage III status. Inclusion of the word "may" is, therefore, both needed and reasonable and does not constitute a prohibited substantial change.

44. The final provision of subpart 7 provides that an owner who refuses to carry out herd monitoring must have his herd considered infected and quarantined. It is necessary to impose some sanction on an owner who refuses to submit his herd to an annual herd monitoring program. An effective deterrent to the spread of pseudorabies in the event of owner noncooperation is to treat the herd as infected and quarantined. The final provision of subpart 7 is, therefore, both needed and reasonable.

45. Subpart 8 of part 1705.2476 provides for the institution of mandatory herd cleanup by specified dates. The subpart provides that quarantined herds in the Northern Zone must be subject to an approved herd cleanup plan by July 1, 1991 and quarantined herds in the Southern Zone must be subject to an approved herd cleanup plan by July 1, 1992. It is necessary to establish a schedule for infected herds to be subjected to a program for the cleanup of pseudorabies. The dates contained in this subpart were formulated in conjunction with swine producers and represent realistic dates by which quarantined herds may be subjected to an approved herd cleanup plan. Given the larger number of quarantined herds in the Southern Zone, it is reasonable to establish a stepped compliance schedule. The initial paragraph of subpart 8 is, therefore, both needed and reasonable.

The Administrative Law Judge notes that this portion of the rule makes reference to an "approved herd cleanup plan". The Board is apparently referencing the definition contained in part 1705.2400 of the proposed rules. That definition is titled "official pseudorabies herd cleanup plan". It would be appropriate to use that same term in subpart 8. Using different words when the term is defined may result in confusion.

46. Subpart 8 of part 1705.2476, as initially proposed, stated that the testing required for herd cleanup would be paid for by state or federal funds. The corollary to that provision is that, in the absence of state or federal funds, the owner would not be required to incur the expense of testing. At the hearing, the Board proposed to delete the word "must" in line 5 of the subpart and substitute the word "will". Further, it proposed to strike the period at the end of the subpart and insert the following additional language: "if such funds are available". The result of this change would have been to require the owner to incur the expense of cleanup testing if state and federal funds were not available. The MPPA and several additional commentators objected to the proposed change as potentially imposing a significant financial burden on swine producers. The Board in its post-hearing comments proposed to add the following sentence at the end of subpart B:

If funds are not available, herd cleanup testing shall not be mandated, but may be voluntarily done at the owner's expense.

The change proposed by the Board in its post-hearing comments, essentially, returns the provision to its form as originally proposed. Any mandated testing

must be paid for by federal or state funds. In the absence of state or federal funds, herd cleanup testing would be voluntary if the owner chose to incur the expense. Historically, testing expenses have been defrayed by state or federal funds. Given the amount of expense that may be incurred and the extreme size variation of herds, it is needed and reasonable that cleanup testing be voluntary in the absence of state or federal funds. This provision of subpart 8 is, therefore, both needed and reasonable. The changes to this subpart proposed by the Board both at the hearing and in post-hearing comments do not constitute prohibited substantial changes since they return this subdivision, in essence, to the form in which it was originally proposed.

Part 1705.2480 - Qualified Pseudorabies-Negative Herd Procedures.

47. The qualified pseudorabies-negative herd program is designed to facilitate the sale of breeding swine from known clean herds. Section 1705.2480 requires that a sample of offspring be tested in addition to the breeding swine. Subpart 1 of part 1705.2480 in item B, as originally proposed, required that offspring over four months of age be subject to random sample testing. At the hearing, the phrase "negative random sample test of the offspring over four months of age" was deleted and the following schedule included: 10 head or less -- all must be tested; 11 to 35 head -- 10 must be tested; and 36 or more head -- 30% must be tested up to a maximum of 30 head. Official random sample test is a term defined in subpart 13 of part 1705.2400. Under that definition, a herd with less than 100 head would require the testing of 25 animals. Such a schedule of offspring testing would impose a significant financial burden on smaller herds. The amendment proposed by the Board at the hearing imposes a less onerous schedule and will result in a lessor expense for the owners of smaller herds. It is the consensus of the industry, the Pseudorabies Advisory Council and the Board that the testing schedule proposed in item B of subpart 1 will still protect against the spread of pseudorabies. The specific schedule conforms to the USDA standard relating to a pseudorabies monitored feeder pig heard. See Ex. U, p. g. The amended testing schedule offered by the Board at the hearing is, therefore, both needed and reasonable. Since the amendment imposes a less onerous burden on those subject to the rules and does not go to a different subject matter, it is not a prohibited substantial change. Minn. Rules pt. 1400.1100, subp. 2 (1988); City of Morton v. Pollution Control Agency, supra.

48. Subpart 3 is amended to establish a herd bleeding schedule for the requalification testing of qualified pseudorabies-negative herds. The subpart requires requalification testing of 25% of the breeding herd and a test of the offspring over four months of age every 90 days according to the testing schedule in subpart 1B of part 1705.2480. See, Finding 47, supra. This subpart 3, in item B, establishes an alternative testing schedule under which 10% of the breeding herd is to be tested every 30 days and offspring over four months of age are to be tested according to the schedule established in subpart 1B. It is necessary to establish a schedule for the requalification testing required by the unamended portion of subpart 3. Moreover, it is necessary, as a consequence of part 1705.2480, subp. 1, item B, to include a testing schedule for offspring in determining the continuing status of a qualified pseudorabies-negative herd. The testing schedule established in items A and B of subpart 3 is reasonable because, for the breeding herd, it makes more particular the testing requirement of the unamended portion of subpart 3. With

respect to offspring, it merely reflects the testing requirement found needed and reasonable in Finding 47, supra. At the hearing, the Board amended items A and B, regarding the testing of offspring to substitute for an official random sample test the testing requirement of subpart 1, which has previously found to be needed and reasonable. The amendments by the Board to items A and B of subpart 3 made at the hearing do not constitute prohibited substantial changes. See, Finding 47, supra.

49. The final paragraph of subpart 3 requires that the appropriate percentage of animals on each premises be tested for the requalification as a qualified pseudorabies-negative herd. At the hearing, the Board amended the final paragraph of subpart 3 to insert after the word "herd" and before the word "is" the phrase "and/or offspring". Since a breeding herd may be maintained on more than one premises, it is necessary to consider how the requalification testing mandated by the rule will be applied to separate premises. The rule, as amended at the hearing, is reasonable because it merely applies a percentage factor to each premises. The addition of the phrase "and/or offspring" to this paragraph is reasonable because the rule as amended requires requalification testing of offspring in accordance with the schedule established in subpart 1B. Hence, it is necessary to specify how offspring testing will be accomplished where more than one premises is involved. Applying the appropriate percentage to each separate premises, as applied to offspring, is reasonable for the reason that has been stated with respect to breeding swine. The amendment to the last paragraph of subpart 3 made by the Board at the hearing does not constitute a prohibited substantial change.

50. Subpart 9 of part 1705.2480 is a new subdivision placing qualifications on breed swine sales centers that collect animals from qualified pseudorabies-negative herds. The subpart requires that a breeding swine sales center test 10% of their hog inventory each month with a minimum of 10 animals being tested for pseudorabies each month. Subpart 9 is necessary to establish a method by which breeding swine sales centers can maintain the qualified status of their hog inventory. The percentage of hogs required to be tested each month to qualify the inventory as a PRV-negative herd is sufficient to prevent the spread of pseudorabies in such swine sales centers. Subpart 9 is, therefore, both needed and reasonable.

Part 1705.2500 - Community Notification of Pseudorabies Infection.

51. This part requires the notification of livestock owners within a one-mile radius if a herd becomes infected with PRV or if "approved premises" status is granted. The proposed amendment to the rule replaces the specific 14-day period for notification with a more general statement that such notification must be made following the declaration of a quarantine or approval of approved premises status. Finally, the Board deletes the requirement that the clerk of the township board be notified of the quarantine or approved premises status. For the reasons stated at Finding 16, supra, substituting the phrase "approved premises" for the phrase "quarantine feedlot" is both needed and reasonable.

In the experience of the Board, notification of the township clerk of the affected township proved fruitless. The town clerk or other local official had no familiarity with pseudorabies and would not intervene if they knew that the

disease only affects livestock. Several commentators objected to the deletion of notice to the township clerk. In the absence of such notification, they reasoned that no municipal or county official would be aware of the prevalence of PRV-infected livestock. One public witness suggested that law enforcement personnel be informed when a quarantine had been established or an approved premises status had been granted. Based on the practical experience of the Board with respect to notification of the local township official, it has established that eliminating the requirement of notification to the township clerk is both needed and reasonable.

Part 1700.2800 - Contents of Certificate of Veterinary Inspection.

Part 1700.2850 - Feeder Swine.

52. These two parts of the proposed rule amendments change the word "low prevalence" to "Stage III, IV or V" as describing a "pseudorabies area". As a consequence of the amendment to the definition contained in part 1705.2400, subp. 5a, it is both necessary and reasonable to describe accurately the PRV status of the state or portion of the state involved. The Administrative Law judge notes, however, that the definition contained in Rule 1705.2400, subp. 5a discusses only a Stage III area, equating it to the term "low-prevalence pseudorabies area". Stage IV and V pseudorabies areas are not defined in part 1705.2400, subp. 5a. For purposes of clarity, therefore, it would be appropriate for the Board to insert at the end of the first paragraph of part 1700.2800 a reference to the source that defines a Stage IV or V pseudorabies area. Presumably, that is the federal Pseudorabies Eradication Program.

Part 1700.2900 -- Breeding Swine.

53. This part is amended to add an additional item C. Item C, as initially proposed, required the isolation of imported swine until a negative pseudorabies test was obtained from a stated sample of the animals. The test would be required to be performed between 30 and 60 days following the importation of the swine. The testing sample size contained in the rule as initially proposed is identical to that required for a PRV monitored feeder pig herd established by the USDA Federal Standards and adopted by the Board in Minn. Rules pt. 1705.2474, subp. 1 and Minn. Rules pt. 1700.2590, subp. 4. Exhibit U, p. 4.

A post-hearing comment by a doctor of veterinary medicine suggested that separation rather than isolation of the affected animals would be more appropriate. Several public commentators stated that isolation, as currently accomplished, may subject some herds to increased risk of PRV exposure. Minnesota Pork Producers' Association Letter dated May 25, 1990, p. 3; Responsive Comments of the Board of Animal Health, Letter dated May 31, 1990, p. 1-2; C. Kent Kislingbury, DVM, Letter dated May 14, 1990, p. 2.

In response to the public comments, the Board reasoned that separation would more effectively prevent the spread of the disease than would isolation. It proposed to substitute the two terms in this part. To clarify the meaning of the term "separation", the Board, in its post-hearing comments, proposed the following definition of "separation":

Separation of breeding swine means the maintenance of the swine at least six feet from other swine or divided by solid partitions which will prevent nose-to-nose contact with other swine.

Reply Comments of the Board of Animal Health, May 31, 1990, p. 2.

The addition of item C to part 1700.2900 as modified by the amendments contained in the post-hearing responsive comments of the Board is both needed and reasonable. Separation of the imported swine until testing occurs will accomplish the Board's purpose in preventing the spread of pseudorabies to Minnesota herds. The testing sample size established in item C is consistent with the USDA standard which has already been integrated into portions of the Board's existing rules. The amendments to the proposed rule contained in the Board's post-hearing responsive comments do not constitute prohibited substantial changes. No new subject matter is introduced. Addition of the amendments does not result in a rule which is fundamentally different from the rule as proposed and no party would be prejudiced by the addition of the amendments. Minn. Rule pt. 1400.1100, subp. 2 (1988); City of Morton v. Pollution Control Agency, supra.

54. To the extent that any provision of the amendments to Minn. Rules pts. 1705.2400 - 1705.2530, Control of Pseudorabies, or pts. 1700.2590 - 1700.3010, Importation of Swine, has not been specifically discussed in these Findings, they did not receive public comment. The record of the rulemaking proceeding adequately demonstrates the need for and reasonableness of any such provisions. Any change to any portion of the rules proposed by the Board at the hearing or in their post-hearing responsive comments which is not the subject of a specific Finding in this Report does not constitute a prohibited substantial change.

Other Comments.

55. A public witness suggested that owners and employers of quarantined feedlots be required to know proper procedures to prevent the spread of PRV. The Board declined to add any amendment to the rules to address that concern of the public witness. Instead, the Board intends to establish a program of owner and employee education to achieve voluntary adherence to proper containment practices. The Board's failure to include in its rules a standard for owner and employee PRV education does not render the proposed rules unreasonable.

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

CONCLUSIONS

1. The Minnesota Board of Animal Health gave proper notice of this rulemaking hearing.

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

3. The 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) and (ii), except as noted at Finding 32, supra.

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the 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. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defect cited at Conclusion 3, as noted at Finding 32, supra.

7. Due to Conclusions 3 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

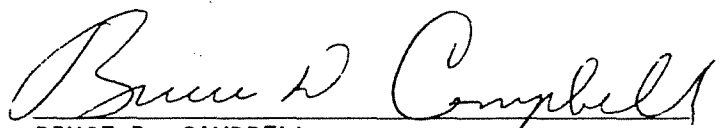
9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the 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:

RECOMMENDATION

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

Dated this 29th day of June, 1990.



BRUCE D. CAMPBELL
Administrative Law Judge

Reported; Tape Recorded; No Transcript Prepared.