STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of Proposed Adoption of Permanent Rules Relating to State-Aid Operations, Minn. Rules, Pts. 8820.0100 to 8820.9970.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on January 10, 1991, at 1:00 p.m. and again at 7:00 p.m. in Meeting Room No. 2, Crow Wing County Social Services Building, Fourth and Laurel Streets, Brainerd, Minnesota. The hearing was recessed and continued on January 22, 1991, at 9:00 a.m. in the Band Room of the Saint Paul Capitol Hill Armory, 600 Cedar Street, 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 Department of Transportation (MDOT) 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 MDOT after initial publication are impermissible, substantial changes.

Donald Mueting, Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the MDOT at both hearings. The MDOT's hearing panel consisted of Dennis Carlson, Director of State Aid, Roy Hanson, Assistant State Aid Engineer, and Julie Skallman, State Aid Plans Engineer.

Fifty-five persons attended the hearings in Brainerd. Forty-two persons signed the hearing register. The hearing was reconvened in St. Paul on January 22, 1991, pursuant to the MDOT's Order for Hearing. Forty-five persons attended the St. Paul hearing. Thirty-eight persons signed that hearing register. Both hearings 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 for twenty calendar days following the date of the St. Paul hearing, to February 11, 1991. 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 February 14, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The MDOT submitted written comments responding to matters discussed at the hearings and proposing further amendments to the rules.

The MDOT must wait at least five working days before the agency takes any final action on the rule(s); 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 MDOT of actions which will correct the defects and the MDOT 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 MDOT may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alterative, if the MDOT 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 MDOT 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 MDOT may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the MDOT makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing 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 MDOT files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On July 9, 1990, a copy of the proposed rules were published at 15 State Register 46. The rules were originally intended to be adopted through the non-controversial rulemaking procedures of the Administrative Procedure Act (APA), but over twenty-five requests for public hearing were received by the MDOT.

2. On October 10, 1990, the MDOT 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 proposed Order for Hearing;
(c) the Notice of Hearing proposed to be issued;
(d) the Statement of Need and Reasonableness (SONAR);

(e) a copy of the Notice of Intent to Solicit Outside opinion with copies of all comments received from interested parties;
(f) a copy of the State Register containing the proposed rules; and,
(g) a chronological summary of all steps taken to that date in the MDOT's rulemaking process.

3. On December 5, 1990, the MDOT filed the Order for Hearing with the Office of Administrative Hearings (OAH).

4. On December 5, 1990, the MDOT mailed the Notice of Hearing to all persons and associations who had registered their names with the MDOT for the purpose of receiving such notice.

5. On December 10, 1990, a Notice of Hearing referencing the prior publication of the proposed rules was published at 15 State Register 1354.

6. On December 12, 1990, the MDOT filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a copy of the State Register containing the Notice of Hearing.
(c) the Agency's certification that its mailing list was accurate and complete; and,
(d) the Affidavit of Mailing the Notice to all persons on the MDOT's mailing list.

Nature of the Proposed Rules and Statutory Authority.

7. In 1959, the Minnesota Legislature created the County State-Aid Highway (CSAH) system pursuant to Minn. Stat. § 162.01. The Minnesota Department of Transportation is authorized under Minn. Stat. § 162.02 to promulgate rules to administer the CSAH system. The rules promulgated for that purpose in 1984 are being modified by this rulemaking proceeding. These proposed rules establish a number of definitions for terms used throughout the process and make substantive changes in the terms of participation in the CSAH system. The Administrative Law Judge concludes that the MDOT has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

8. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The proposed rules only affect small businesses through the definition of "force account agreement" discussed below at Finding 12. The MDOT maintains that it considered any possible affect on small businesses and there would be no substantive impact on small businesses. See SONAR, at 2. No small businesses claimed an adverse impact would result from the operation of these rules. The MDOT has met the requirements of Minn. Stat. § 14.115, subd. 2 to consider methods of reducing the impact of the rules on small businesses.

Fiscal Notice.

9. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice 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 notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules regulate the expenditure of public funds for the benefit of local units of government. The proposed rules will not require expenditures by local governmental units or school districts in excess of $100,000 in either of the two years immediately following adoption, and thus no notice is needed.

Impact on Agricultural Land.

10. 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 the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The evidence presented at the hearing clearly indicated that the impact of the rules would be limited to county highways. While some agricultural land might be included in the right of way for a CSAH highway, the proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Proposed Rule 8820.0100 - Definitions.

11. This proposed rule part consists of definitions for various terms used in the rules. Some of the definitions are composed of entirely new language while other definitions are amended to update existing language. As with the remainder of the proposed rule, only those portions of the rules which require discussion or generated public comment will be discussed in this Report. All other parts of the rules are found to be needed and reasonable.

Subpart 9b. Force Account Agreement.

12. Proposed rule 8820.0100, subpart 9b defines "force account agreement." Such agreements run between the MDOT and a local government to permit the local government to perform construction projects with its own employees (occasionally referred to as "local forces"). The definition of force account agreement incidentally expands the scope of employees to railroad forces and public utility forces. MDOT asserted that the definition is needed and reasonable because some persons had believed that contractors could perform force account work. Brian J. Lokkesmoe, Director of Engineering Operations for the City of Minneapolis, advocated permitting such a practice to render administration and project work more efficient. Payments to contractors are governed by Minn. Rule 8820.1500, subp. 2, and require competitive bidding. The force account agreement permits and encourages flexibility by allowing work to be performed (by the government entities' own employees) without bidding. No substantive change has been proposed to the method of private contracting. Restricting force account agreements to local government employees is needed, reasonable, and consistent with other rule provisions.

13. Notwithstanding the foregoing Finding, the language of subpart 9b is not clear regarding two points. First, if the intent of the definition is to make clear that private contractors are not part of the labor force which may perform work under force account agreements, then the MDOT should define "local forces" as that term appears in Minn. Rule 8820.1500, subp. 4. The comment by Roy Hanson (for Dennis Carlson) is ambiguous as to whether the MDOT is proposing to add a definition of "local forces." If the intent is to add that comment as a definition, MDOT should also include the railroad and utility employees found in the force account agreement definition. An appropriate definition could state:

> "Local Forces" means railroad forces when working on a railroad crossing, utility forces when conducting utility work eligible under a force account agreement, or the employees of a local unit of government needed to perform a specific project for reasons of expertise or necessary expediency.

This suggested definition combines the use of local forces found in the definition of "force account agreement" with the comment defining "local forces" found on page 11 of MDOT's reply letter. The suggested language is clearer and more complete than the definition proposed by MDOT. Either is found to be needed and reasonable. The suggested definition of "local forces" is in response to comments at the hearing and would not constitute a substantial change, if adopted.

14. Subpart 9b also refers to "established item costs." Minn. Rule 8820.1500, subp. 4 refers to "agreed unit prices." Both terms are used in rules regarding force account agreements, but neither term is defined. If these two terms are interchangeable, then the terminology should be identical and only one of the terms, agreed unit prices, should be used. This is because the term "agreed unit prices" is part of the existing rule and is not proposed for change. If the terms are interchangeable, then substitution of "agreed unit prices" for "established item costs" in proposed subpart 9b is found to be needed and reasonable for purposes of clarity, and is found not to be a substantial change.

If the terms "agreed unit prices" and "established item costs" are different, it is suggested that they each be defined separately. A comment is made on pages 10 and 11 of MDOT's reply letter defining "unit price" as "the cost of a single item in the contract or agreement." If the comment defining "unit price" is intended as an addition to the rules, it is found to be needed, reasonable and does not constitute a substantial change. It is found further that it is necessary and reasonable for clarity purposes to define "item costs" or "established item costs" if that concept is different from "unit prices" or "agreed unit prices." Addition of a definition to clarify the separate meaning of "(established) item costs" is found not to constitute a substantial change.

Proposed Rule 8820.0600 - Selection of Routes.

15. Item A of rule 8820.0600 is amended by the proposed rules to exclude former municipal state aid street mileage in cities whose population fell

below 5,000 in the 1980 federal census from the total mileage limit in a CSAH. MDOT maintains that the change renders the rule consistent with a recent amendment to Minn. Stat. § 162.09, subd. 4. SONAR, at 3. The only other change alters the minimum and maximum widths of one way streets which are chargeable to the municipal state-aid system. No one objected to the changes and they are found to be needed and reasonable.

Proposed Rule 8820.0700 - Selection Criteria.

16. No comments were made regarding proposed rule 8820.0700. Most of the changes in that rule are to improve the style of the rule's language. However, the MDOT added the word "may" to subparts 2 and 3, which set forth some of the selection criteria. Using "may" rather than "shall" can be a defect in rule language since no restraint is imposed on the decision-maker's discretion. In this instance, however, the discretion granted to the Commissioner by the rule is only a reflection of the discretion the Commissioner is granted by the CSAH statute. The use of the word "may" in subparts 2 and 3 is found to be needed and reasonable to apportion limited resources between equally deserving requests for state-aid. The use of "may" in the subparts noted does not constitute a defect.

Proposed Rule 8820.0800 - Route Designations.

17. Subpart 1 of proposed rule 8820.0800 only makes stylistic alterations to the existing rule. Subpart 3 is composed of entirely new language which sets the computation for paybacks of state-aid funding when CSAH highways are removed from the system. No commentators objected to the payback provision. The new language is found to be needed and reasonable to establish equitable distribution of CSAH money where some mileage is removed from the system, after improvements have been made with CSAH funds.

Proposed Rule 8820.1000 - Money Needs and Apportionment Determination.

18. Subparts 2 and 3 of proposed rule 8820.1000 make stylistic alterations to the existing rule. None of the changes received critical comment. However, the initial language of subpart 2 is awkward. One might replace "must be considered as eligible for inclusion in the estimate of total needs," with "is eligible for inclusion in the estimate of total needs." If there is no substantive effect from making that change, the Administrative Law Judge suggests that the latter language be adopted in the rule. Both the new language and the proposed changes are found to be needed and reasonable. The change suggested in subpart 2 does not constitute a substantial change.

Proposed Rule 8820.1400 - Maintenance, Construction, and Turnback Accounts; State-Aid Payments.

19. Proposed rule 8820.1400 reflects many of the statutory requirements on distribution of state-aid funds. MDOT noted that, in subpart 3, the word "payment" had been used where "allotment" would be more appropriate. In its post-hearing comment, MDOT proposed replacing "payment" with "allotment" to ensure that local governments are not burdened with the need to continually request relief from MDOT. The new language is found to be needed and reasonable. The change made in subpart 3 does not constitute a substantial change.

Proposed Rule 8820.1800 - Transfers for Hardship or Other Local Use.

20. All but one of the changes proposed for subparts 1 and 2 make insubstantial or stylistic alterations in the existing rule. All such changes are found to be needed and reasonable. In addition, a good cause requirement is added to subpart 1. The location of the requirement renders the subpart unclear as to what the good cause is being shown for and to whom. With the discretion delegated to the Commissioner under the CSAH, any good cause requirement will serve only as a check on the Commissioner's discretion to make a hardship transfer. The best way to establish such a check is to make the requirement for good cause an explicit prerequisite to the granting of a hardship transfer. It is suggested that the following language, if inserted after the first sentence of subpart 1, accomplishes that goal:

> Approval shall be granted only if the county board or governing body demonstrates to the commissioner that the request is made for good cause.

This language is suggested to clarify both the impact of the good cause requirement and who bears the burden of showing good cause. If the language suggested above is adopted by MDOT, the phrase "for good cause shown" should be removed from the first sentence of subpart 1. The language proposed by MDOT, while unclear, is not so impermissibly vague as to constitute a defect. The use of the either the original language or the suggested language is found to be needed and reasonable. The new language suggested in this finding would not constitute a substantial change, if adopted.

Proposed Rule 8820.2300 - Turnback Accounts.

21. The changes proposed for this rule part make insubstantial or stylistic alterations in the existing rule. All such changes are found to be needed and reasonable. Patrick B. Murphy, P.E., Director of Public Works for Hennepin County, suggested that the mill rates of taxation for the local government's contribution of funds for road and bridge purposes be modified to take into account the loss of tax base through the fiscal disparities program and from tax increment financing. MDOT is not changing the established mill rates as part of these rules. Rather, the rule is being conformed to a change in state law. See, Minn. Stat. § 162.081, subd. 4. Altering the mill rate as requested is a matter best considered by the Legislature, not MDOT.

Proposed Rule 8820.2500 - Minimum State-Aid Standards.

22. Proposed rule 8820.2500 sets forth which standards apply to each type of CSAH highway. Since the objections to the state-aid standards centered on particular standards, those objections will be discussed in subsequent Findings. The changes to this rule part conform the new rule citations to the changes arising from this proceeding and make clear that the standards apply to both new construction and reconstruction. This dual application of the standards has been MDOT practice. Several objections were made to the right of way requirements of subpart 3. Those commentators believe that enough land is taken for highways and the total should not be expanded. Subpart 3 does not expand the minimums already set for right of way. However, it does add the recovery area to the design for which right of

way must be obtained. The recovery area debate is dealt with in a subsequent Finding. The inclusion of recovery areas in the minimum right of way required under these rules is found to be needed and reasonable.

Proposed Rule 8820.3100 - General State-Aid Limitations.

Subpart 2 - Lighting Hazardous Areas.

23. MDOT maintains that changes proposed to rule part 8820.3100 are for the purpose of clarifying the existing rule. In its SONAR, MDOT states the need for changing this subpart is the confusion which presently exists in interpreting it among the persons affected by the subpart. However, comments at the rule hearing pointed out that the language proposed for subpart 2 is unclear. Subpart 2 sets forth standards for determining whether lighting of hazardous areas is an eligible expense on a CSAH project. MDOT has not modified its proposed language. The language proposed for this part and published in the State Register is unclear to the level of constituting a defect in the proposed rules. Subpart 2C is found to be unreasonable, since that item is worded to refer to required documentation, not hazardous locations at which lighting may be funded through the CSAH system. It is the Department's intent to list the locations for which it may authorize funding, and subpart 2C, as proposed, fails to do that. To cure this defect and add clarity to this provision, the Administrative Law Judge suggests that proposed rule 8820.3100, subpart 2 read as follows:

> The cost of lighting of locations at which accidents are likely to occur or are otherwise hazardous is an eligible expense if that lighting:
>
> (a) meets one or more of the following criteria:
> 1. is intended for four or more lanes (complete cost eligible);
> 2. is intended for lighting intersections; or,
> 3. is a cost incidental to the necessary revision or relocation of existing lighting facilities on reconstruction projects; and,
> (b) is not an additional location where lighting would normally have been installed by the county or urban municipality.
>
> For funding of additional locations, lighting expenses are eligible only to the extent that the county or urban municipality has furnished traffic information or other needed data to support its request.

The Administrative Law Judge recommends that the language set out in this Finding be used in place of the original subpart to the extent that the new text conveys the intent of MDOT in proposing the rule. While the defect may be corrected by making no change to the existing rule, such a course would retain language that is unclear. The language proposed in this Finding is found to be needed and reasonable and does not constitute a substantial change.

Subpart 6 - Right of Way.

24. The new language proposed for subpart 6 would return the receipts from the rental or sale of excess properties obtained with state-aid funds to the local agency's road and bridge account. At the hearing, the Administrative Law Judge questioned whether MDOT has the authority to direct the return of funds to the road and bridge account, as opposed to having the funds go to the general fund of each local agency. The Judge has not found,

nor has any commentator directed the Judge to any statute or existing rule which would limit MDOT's authority in this area. The funds directed by this subpart are limited to those obtained through land acquired with state-aid funds. The subpart is found to be needed and reasonable to protect the limited assets available to the CSAH system.

Subpart 9 - Flexible or Rigid Pavement.

25. Subpart 9 is composed of entirely new language which would limit the percentage of state-aid funds which could be used to finance the initial surfacing of aggregate based roads. Luthard M. Hagen, P.E., Lincoln County Engineer, objected to this subpart as lacking in statutory authority. Mr. Hagen asserted that the subpart restricts the autonomy of local governments contrary to Minn. Stat. § 162.08, subd. 8. That statute states in pertinent part:

> The amount of money to be appropriated by the counties from other funds for use in the ... county state-aid highway system is left to the discretion of the individual county boards. Nothing contained herein shall restrict or prohibit a county board from using money collected from county road and bridge levies to provide, by mutual agreement, financial assistance or services not otherwise prohibited by law to townships and municipalities within its borders.

The subdivision does grant discretion to county boards regarding the spending of road and bridge levies, however, that discretion is limited to money appropriated from outside the CSAH system. To read this subdivision otherwise is to interpret a conflict into the CSAH system of distributing funds. The subpart is needed and reasonable to prioritize the limited money available to each county in the CSAH system.

Subpart 10 - Landscaping.

26. Subpart 10 of proposed rule 8820.3200 is composed of entirely new language which renders eligible the landscaping costs incurred in construction. Those costs are limited to one percent of the total construction allocation. Duane A. Blanck, County Highway Engineer of Crow Wing County suggested that landscaping costs required by federal or state agencies to satisfy condition of an environmental permit be eligible expenses. No information was presented by Mr. Blanck to show that MDOT's proposed treatment of landscaping items was unreasonable. Some landscaping items are specifically identified as normal grading items, and thereby are not included in the limitation. The Administrative Law Judge questioned the use of mulch, since it is located in both the limited and unlimited categories. MDOT explained that the use of mulch determined its status under the proposed rule. The subpart is found to be needed and reasonable, as proposed. The MDOT may choose to adopt Mr. Blanck's language, and that proposed language, if adopted, is found to be needed and reasonable and would not constitute a substantial change.

Proposed Rule 8820.3300 - Variance.

27. Proposed rule 8820.3300 makes only one significant change in the existing rule. The change is to require a resolution from any applicant for a

variance which would hold the State, its agents and employees harmless and indemnifies them from any liability which might arise from claims that the CSAH was negligently designed or constructed. This addition generated a large volume of critical comment. Among those who criticized this addition are the Afton Defense Fund (ADF); Afton Mayor Jon Kroschel; Judson Jones; W.T. McGill; Jane E. McGill; Donald C. Wisniewski, County Engineer of Washington County; and Robert W. Nelson.

28. Commentators presented three arguments against the hold harmless provision. The first is that the State is already immune from liability where variances are concerned and, therefore, the hold harmless provision is unnecessary. In support of that argument, ADF cites Schaeffer v. State, 444 N.W.2d 876 (Minn.App. 1989). The portion of the Court's opinion relied upon by ADF reads:

> The secretary's [of the U.S. Department of Transportation] actions in approving funding are therefore made at the planning level and are immune from suit. [citation omitted]

Schaeffer, 444 N.W.2d, at 882.
While this language might be read to support immunity for MDOT's actions regarding variances, the next sentence states:

> In contrast, the state in this case is directly involved in highway design and construction and thus engages in a number of operational level decisions.

Schaeffer, 444 N.W.2d, at 882.
The action of the State in Schaeffer was substituting a twisted-end guardrail for the original blunt end design. The Court did not distinguish between design decisions and the actual installation of that safety feature. Similarly, in Nusbaum v. Blue Earth County, 422 N.W.2d 713, 717 (Minn. 1988), the State was held not immune from suit for negligence in authorizing the placement of a speed zone requested by the County. MDOT is correct in considering the possibility of incurring liability for approval of variances where the design change contributes to injuries through an accident. Schaeffer does not stand for the proposition that the State cannot be held liable through its approval of variances.

29. The second argument against the "hold harmless" requirement, advanced by Afton Mayor Jon Kroschel and James W. McGill, suggested that the MDOT should accept liability to aid local governments in achieving the goal of improved CSAH highways, without excessive reliance on the geometric standards set forth in these rules. MDOT asserts that risk of liability should rest with the entity receiving whatever benefit is gained through the requested variance. This treatment of funds is identical to the existing requirement in Minn. Rule 8820.1800, subp. 2 regarding use of CSAH money for other uses in hardship cases. The decision whether to accept liability for uses not strictly in compliance with CSAH standards is a matter of policy and properly left to MDOT's discretion.

30. ADF presents a third argument against the hold harmless provision. ADF maintains that requiring a hold harmless resolution to be adopted prior to considering a variance on its merits infringes on the contested case right

established for unsuccessful variance seekers by Minn. Stat. § 169.02, subd. 3a. This claimed infringement is the basis for ADF's assertion that the hold harmless provision lacks statutory authority. Minn. Stat. § 169.02, subd. 3a grants the right to a contested case hearing to an applicant whose variance request has been denied without a hearing, if the request for the contested case hearing is made within 30 days of the variance denial. The statute does not limit the contested case right to variances denied on their merits. Denial of a variance for any reason, including failure to adopt a hold harmless resolution, triggers the right to a contested case. It is found that the existence of a hold harmless requirement does not infringe on any right granted under Minn. Stat. § 169.02, subd. 3a.

31. ADF suggested that the Commissioner be required to grant requests for variances unless the Commissioner could prove that the variance was not safe. The effect of this proposed change would render variances presumptively proper. Such an outcome is inconsistent with the intent of Minn. Stat. § 162.02, subd. 3a. The Commissioner is vested with the discretion to grant variances, not the responsibility to prohibit only those variances which are undisputably unsafe. Minn. Stat. § 162.02, subd. 3a places the burden of proving a variance to be appropriate on the applicant. The proposed variance provision follows that approach and is needed and reasonable. The hold harmless provision has been shown to be needed and reasonable to carry out the policy decision of the MDOT that any liability arising from variances be borne by the local government benefitting from the variance. It is found that proposed rule 8820.3300 is needed and reasonable.

Proposed Rule 8820.3400 - Advisory Committee on Variances.

32. The change to subpart 2 of proposed rule 8820.3400 would require that at least two members of the advisory committee considering a variance request be elected officials. In its SONAR, MDOT states that this is currently the practice on advisory committees. SONAR, at 7. The City of St. Paul requested that the rule explicitly require the practice be codified in the rules. The Minnesota Department of Natural Resources suggested that it (or the U.S. Fish and Wildlife Service) provide a member for the advisory committee on variances. The intent of that addition is to advocate for outcomes which generate the least impact on environmentally sensitive areas. MDOT declined to make that change. With or without the additional member, the proposed rule is needed and reasonable. Should MDOT choose to add the suggested member, the change would not be a substantial change.

Proposed Rule 8820.9910 - Geometric Design Standards; Rural Undivided (9); New or Reconstruction.
Proposed Rule 8820.9925 - Geometric Design Standards: Rural Undivided; Resurfacing.
Proposed Rule 8820.9930 - Geometric Design Standards: Suburban; New or Reconstruction.
Proposed Rule 8820.9935 - Geometric Design Standards: Urban; 30 to 35 M.P.H. Design Speed; New or Reconstruction.
Proposed Rule 8820.9940 - Geometric Design Standards: Urban; Greater than 35 M.P.H. Design Speed; New or Reconstruction.
Proposed Rule 8820.9945 - Geometric Design Standards: Urban; Resurfacing.
Proposed Rule 8820.9950 - Urban Roadway Classification.

Proposed Rule 8820.9955 - Vertical Clearances for Underpasses.
Proposed Rule 8820.9960 - Minimum Design Standards for 45-Degree and 60-Degree Diagonal Parking.
Proposed Rule 8820.9965 - Geometric Design Standards: Designated National Forest Highways Within National Forests and State Park Access Roads Within State Parks; New or Reconstruction.
Proposed Rule 8820.9970 - Geometric Design Standards: Designated National Forest Highways Within National Forests and State Park Access Roads Within State Parks; Resurfacing.

33. All of the proposed rules listed above are specific standards to which CSAH highways must be built or repaired. The only exceptions to these standards are CSAH highways for which a variance is obtained. A very large number of commentators objected to some of the specific standards set forth in these items. Since the standards are spread throughout the listed rules, the specific objections will be discussed by objection, not by rule part.

MDOT Position on Standards.

34. The changes and additions to the geometric design standards proposed in these rules serve two basic purposes. First, the MDOT is updating and replacing standards that have changed from the last promulgation of the rules. SONAR, at 7-9. Second, the MDOT is responding to specific requests from users of the rules, such as the State Bridge Engineer. Many of the design standards were approved by the Low Volume Roads Task Force and the Minnesota County Highway Engineers Standards Committee. SONAR, at 8. The standards proposed by MDOT rely upon use of a CSAH highway (measured in average daily traffic, or ADT) to set the lane width, shoulder width, inslope, recovery area, level of traffic speed allowable, surface, design strength, bridge width, and bridge carrying capacity. The categories of ADT range from 0-49 to 1,500 and over. The categories vary depending upon the type of highway at issue. The information sources used to arrive at the specific standards include the MDOT Road Design Manual, Designing Safer Roads (Transportation Research Board 1987), Road Design Guide (AASHTO 1989), A Policy on Geometric Design of Highways and Streets (AASHTO 1984). MDOT's stated goal is to transform unsafe county roads into safer roads which meet the CSAH standards.

Public Comment on Standards.

35. Public comment varied on the proposed standards. Some commentators, including Lee E. Amundson, Steele County Highway Engineer; Willa Shonkwiler-Martin; Richard West, P.E., Otter Tail County Highway Engineer; Fredrick V. Salsbury, Columbia Heights City Engineer; J.W. Schwartz; John A. Cousins, Clay County Engineer; David A. Olsonawski, P.E., Kittson County Engineer; Mike Sheehan, Olmstead County Engineer; Michael C. Wagner, P.E., Nicollet County Highway Engineer; David S. Heyer, P.E., Becker County Highway Engineer; Wayne A. Fingalson, Wright County Engineer; and Douglas J. Weizhaar, P.E., Stearns County Engineer supported the proposed standards as being necessary to build safe highways and improve highways which were patently unsafe. Other commentators, including J.W. McGill, ADF, Virginia Burnett, Raymond S. Raetz, Joan M. Raetz, Robert J. Larson, C. Patricia Larson, Edward M. Mergens, and Byron Hoffman disagreed with the proposed standards. They

expressed the opinion that the standards are too stringent when compared to the location and anticipated use of the highway. These commentators pointed out that CSAH highways can be improved without raising each highway to the geometric standards adopted by MDOT. They emphasized that, by current estimates, to bring every highway up to MDOT's adopted standards would take 128 years. For many motorists on the CSAH system, particularly in rural areas, the present poor condition of some CSAH highways is a source of deep frustration. Those motorists suggested that more highways could be improved to an "acceptable level" than can be brought entirely up to the proposed standard if the funds spent are tailored to the particular needs of the area. ADF and Afton Mayor Jon Kroschel asserted that the local character of some CSAH highways mandated different treatment from the MDOT's proposed standards.

Particular Objections.

36. The specific standards which received significant criticism are the 12 foot lane, the shoulder width, the 4:1 ratio (horizontal extension to vertical drop), the width of the recovery zone, use of guardrails instead of a recovery zone, and whether resurfacing can be used in lieu of meeting geometric design standards. Many commentators, including Peter E. Boomgarden, Redwood County Highway Engineer; Donald C. Wisniewski, P.E., Washington County Engineer; W.T. McGill; Afton Mayor Jon Kroschel; ADF; Byron Hoffman; and James W. McGill, representing Concerned Citizens for the Reasonable Reconstruction of CSAH #71, introduced many thoughtful and well considered suggestions to alter specific geometric standards contained in the proposed rules. None of the commentators, however, introduced any studies or data to support their alternatives to the proposed standards. The basis for the objections is concern over such issues as protecting ecologically fragile wetlands, restricting the removal of trees, and limiting the amount of land taken for highway purposes. While these are valid concerns, they appear more appropriate for resolution through the variance process on a case-by-case basis, rather than changing the geometric standard. As was conceded by several commentators, the proposed standards appear appropriate where the CSAH traverses farmland or other land which does not demonstrate a need for particular care. MDOT is required to support its proposed rules with specific facts showing the need for and reasonableness of the rules. MDOT is not required to choose the best regulation presented in the rulemaking process, but only support the regulations it has chosen by an affirmative presentation of fact. Manufactured Housing Institute v. Peterson, 347 N.W.2d 238, 246 (Minn. 1984). Without some factual background that demonstrates the proposed standards are unreasonable, the objections cannot prevail. MDOT has demonstrated the factual background for its proposed geometric standards. It is found that the proposed standards are needed and reasonable.

Environmental Policy.

37. A comment was received from the Minnesota Department of Natural Resources (MDNR) asserting that the proposed rules do not adequately incorporate the requirements of Minn. Stat. § 116D, the Minnesota Environmental Policy Act (hereinafter, "the Act"). The Act requires that the "rules ... of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06." Minn. Stat. § 116D.03, subd. 1. The substantive portions of the Act call for interdisciplinary approaches to ensure consideration of environmental issues

and impact statements or worksheets to detail adverse environmental effects prior to carrying out actions. Nothing in the Act requires incorporation of these provisions into the proposed rules. The MDOT is required to operate in accordance with the Act, and all other statutes. No one has suggested that the MDOT will not act in accordance with its statutory responsibilities. Requiring changes in these proposed rules on the basis of the Act is outside the scope of this rulemaking proceeding.

Other Considerations.

38. MDOT asserted that many of the comments submitted dealt with rules not proposed to be changed in this rulemaking proceeding. As counsel for the Department noted at the hearings, Minn. Stat. § 14.09 sets out a petition process by which any person may request an agency to adopt, suspend, amend, or repeal existing rules. This proceeding is confined to consideration of rules proposed for change or addition by the Department, and this report is limited to consideration of those proposals. With the public interest demonstrated in this proceeding, MDOT may wish to consider the comments received in another rulemaking proceeding.

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

CONCLUSIONS

1. The Minnesota Department of Transportation (MDOT) gave proper notice of this rulemaking hearing.

2. The MDOT 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 MDOT 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).

4. The MDOT 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), except as indicated at Finding 23.

5. The additions and amendments to the proposed rules which were suggested by the MDOT 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 defects cited at Conclusion 4 as noted at Finding 23.

7. Due to Conclusions 4 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 MDOT 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 19th day of March, 1991.

Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Gary L. Petersen, Janet Shaddix & Associates
Two volumes