1-1010-5244-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PETROLEUM TANK RELEASE COMPENSATION BOARD

In the Matter of the Proposed
Rules Governing Ineligible Costs,
Minn. Rule Part 2890.0080.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on Friday, February 22, 1991, at 9:00 a.m., in the Large Hearing Room, First Floor, Department of Commerce, 133 East 7th Street in the City of St. Paul, Minnesota.

This report is part of a rulemaking proceeding pursuant to Minn. Stat. §§ 14.131 to 14.20 to determine whether the Petroleum Tank Release Compensation Board ("Petrofund Board") has fulfilled all relevant substantive and procedural requirements of law, to determine whether the proposed rule amendment is needed and reasonable, to determine whether the Board has statutory authority to adopt the rules and to determine whether or not the amendments, if modified, are substantially different from those originally proposed.

Members of the agency panel appearing at the hearing included: Susan Bergh, Executive Director of the Petrofund Board and Kenneth Raschke, Assistant Attorney General, representing the Board.

Approximately 20 persons attended the hearing and nine signed the registration sheet. Seven written comments were submitted by members of the public. The Board submitted seventeen exhibits.

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.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Board makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

FINDINGS OF FACT

1. On January 4, 1991, the Board filed the following documents with the Chief Administrative Law Judge pursuant to Minn. Rule 1400.0300, subp. 1a:

(a) A draft of a Notice of Hearing (Board Ex. D).
(b) An Order for Hearing (Board Ex. E).
(c) A copy of the proposed rule amendment (Board Ex. F).
(d) A Statement of Need and Reasonableness (Board Ex. G); and
(e) A statement of the number of persons expected to attend the hearing and of the length of the agency presentation. (Board Ex. B).

2. On January 9, 1991, the Board filed the following documents:

(a) An amended Statement of Need and Reasonableness (Board Ex. I).
(b) A copy of the Board's resolution authorizing the Executive Director to initiate the proceeding (Board Ex. I); and
(c) A statement concerning additional notice given by the Board (Board Ex. I).

3. On January 22, 1991, the Notice of Hearing and the proposed rule amendments were published in the State Register at 15 State Register 1625. (Board Ex. N).

4. On January 9, 1991, the Board mailed the Notice of Hearing to all persons or associations who had registered their names with the Board for the purpose of receiving such notice (Board Ex. L).

5. On January 30, 1991, the Board filed the following documents with the Administrative Law Judge:

(a) Affidavit of Mailing the Notice to all persons on the agency's list (Board Ex. L).
(b) The agency's certification that its mailing list was accurate and complete (Board Ex. L).
(c) The names of the people composing the agency panel at the hearing (Board Ex. K).
(d) The Notice of Hearing as mailed (Board Ex. M), and
(e) A copy of the State Register containing the proposed rule amendment and Notice of Hearing (Board Ex. N).

The documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing.

6. At the hearing, the Board filed its Affidavit of Mailing of the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules on January 11, 1991. (Board Ex. O).

7. Not all documents were timely filed; however, no requests were made to inspect the documents. Therefore, no prejudice occurred and the late filing does not constitute a defect in this proceeding.

8. The period for submission of written comments and statements from the public remained open through Thursday, March 14, 1991, at 4:30 p.m., 20 calendar days after the hearing. The record remained open for an additional

three working days through March 19, 1991, at 4:30 p.m. for responses to earlier submissions.

Nature of the Proposed Rule Amendments

9. The two amendments proposed are both to Minn. Rule 2890.0080 and consist of the material underlined below:

> 2890.0080 INELIGIBLE COSTS.
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> All costs associated with actions that do not minimize, eliminate, or clean up a release to protect the public health and welfare or the environment are ineligible costs. Ineligible costs include, but are not limited to, any costs related to the permanent repair or replacement of a tank, upgrading tanks, removal of tanks, loss of income, attorney's fees, permanent relocation of residents, decreased property values, reimbursement for the responsible person's own time spent in planning and administering a corrective action plan, aesthetic improvements, or any work performed that is not in compliance with safety codes including but not limited to Occupational Safety and Health Administration requirements, well codes, and fire codes. Other ineligible costs include corrective action costs which are covered under an insurance or other contract for initial and supplemental applications received by the board after the effective date of this part.

The Petrofund Board, created by Minnesota Chapter 115C, administers a fund which may be used to partially reimburse persons who take corrective action to clean up leaks and spills of petroleum from underground storage tanks. The fund is created by a fee imposed on the use of petroleum tanks. The rule being amended sets out costs which are ineligible for reimbursement. The amendments add two new ineligible costs, namely, costs for the removal of tanks, and costs covered by insurance.

Statutory Authority

10. The Board cites Minn. Stat. § 115C.07, subd. 3(a) as statutory authority for its rulemaking. That subdivision states:

> The board shall adopt rules regarding its practices and procedures, the form and procedure for applications for compensation from the fund, procedures for investigation of claims and specifying the costs that are eligible for reimbursement from the fund.

The statute specifically establishes statutory authority to adopt or amend a rule regarding ineligible costs.

Small Business Considerations in Rulemaking

11. In its Statement of Need and Reasonableness (Board Ex. I) the Board states that the proposed exclusion of insurance costs does not affect the small business in rulemaking criteria of compliance standards or reporting requirements. It suggests that few small businesses presently have petroleum liability coverage due to its unavailability and that, at any rate, the only effect of the insurance amendment would be to prevent a double recovery by an insured. The Board also argues that an exemption for small business would not be feasible or consistent with the statutory purpose furthered by the proposed amendment.

The Federated Mutual Insurance Company ("Federated"), the major writer of pollution liability insurance in Minnesota, argued, however, that when the Petrofund was created Federated had 550 pollution policies in force in Minnesota, 95% of which were issued to small businesses. Federated argues that the insurance coverage amendment directly affects small businesses because it will mean that insurance coverage will be unavailable to them and points out that small businesses are most in need of the benefit of a professionally managed clean up and the prompt payment of expenses. (Public Ex. A., p. 17-18).

Minn. Stat. § 14.115, subd. 2, requires an agency to document in its Statement of Need its consideration of how the effect on small business can be minimized. The Board has documented its reasoning in this regard. The statute also provides that the methods set out in subd. 2 need not be adopted if they would be contrary to the statutory objectives upon which the rule is based. In this case the methods set out in the statute do not relate to the nature of this amendment except for the possibility of exemption. It is difficult to see how small business can be exempted from the amendment if the rule and the Act are to be effective. Although Federated suggests that the Board has not properly considered small business considerations, the agency is only required to provide a reasonable rationale for not exempting small business and has done so. Federated argues that small businesses are disproportionately affected by the proposed rule. (Public Ex. G., p. 12). While this may be a policy reason for not adopting the rule, it seems clear that exempting small business would render the amendment ineffective and is therefore not feasible.

The "Removal of Tanks" Amendment

12. The addition of removal of tanks as an ineligible cost is mandated by specific legislation adopted in 1990. Minn. Laws 1990, Ch. 501, § 5. The amendment merely incorporates the new statutory requirement. No one opposed this amendment. It is needed and reasonable.

The "Costs Covered by Insurance" Amendment

13. Petroleum tank owners are eligible for reimbursement from the Petrofund if they cooperate with the clean-up of a tank leak. However, the reimbursement is subject to reduction for failure to meet certain requirements as to tank operation, leak reporting and clean-up. Minn. Stat. § 115C.09, subd. 2(c). The Board is charged with determining what costs are "actually

incurred" by an applicant and whether the costs are "reasonable". Minn. Stat. § 115C.09, subd. 3. The initial Petrofund legislation was passed in 1987. During 1988 the Board adopted a policy (outside the rulemaking process) that it would not reimburse costs for corrective action which were paid by insurance. (Public Ex. A-11) The decision was made after information was received from the insurance industry, including Federated, as to how "coordinated" insurance coverage might be written. The industry indicated that it did not feel that it could write a policy which would simply make its coverage excess to the Petrofund, because of uncertainty as to what was actually covered by the Petrofund. Instead it seeks to write a policy which would provide full pollution coverage for an insured, with the insured also being reimbursed by the Petrofund. The Petrofund payment would then be returned to the insurance company. Federated estimates that it would be able to reduce its premiums for such a policy by 60% over its present standard policy, which assumes no Petrofund reimbursement would be made to an insured. (Public Ex. A, p. 15).

14. The Board's policy of not reimbursing costs for insured persons was challenged in court. In Re Application of Crown CoCo, 458 N.W.2d 132 (Minn. Ct. App. 1990). The Court of Appeals found that the Board's policy was an invalid rule which could not be enforced unless the agency complied with APA rulemaking procedures. 458 N.W.2d at 136-138. This rulemaking proceeding responds to the court's decision. Crown also challenged the Board's statutory authority to adopt such a policy, but the court held that the Board "had the statutory authority to determine whether insured costs are eligible for reimbursement from the fund." 458 N.W.2d at 136. In response to Crown's assertion that the policy violated its right to equal protection, the court held that the policy was a classification which was rationally related to a legitimate government objective as expressed in Chapter 115C.

The court specifically observed that:

> The record contains at least two rational bases supporting the Petrofund's denial of reimbursement to responsible persons who are already insured. First, to reimburse persons who are already insured would result in either a double recovery by persons responsible for the clean-up, on their insurers, who may collect premiums and be reimbursed by the Board.
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> Second, as the Board notes, the Act was intended to provide an incentive to responsible persons to clean up releases of petroleum into the environment. No such incentive is necessary where the responsible persons are already insured for damage. In light of the limited funds available to reimburse responsible persons, we agree that the Petrofund Board's classification bears a rational relationship to the purpose of the Act. 458 N.W.2d at 138.

Legislative Intent

15. In this proceeding Federated asserts that the Board has exceeded its statutory authority in the proposed rule amendment because it is inconsistent

with the enabling legislation. City of Morton v. Pollution Control Agency, 437 N.W.2d 741, 746 (Minn. Ct. App. 1989). Generally, a rule may not conflict with the legislative intent behind a statute, Can Manufacturers Institute v. State, 289 N.W.2d 416, 424 (Minn. 1979) nor may it conflict with the purpose of the program it implements. Buhs v. State Dept. of Public Welfare, 306 N.W.2d 127, 131 (Minn. 1981). Although the Board asserts that the Court of Appeals has already found statutory authority, the APA requires that the Board again document its statutory authority in this proceeding. Minn. Stat. § 14.50(i). Additionally, the challenge here is not only to the Board's general statutory authority to adopt a rule about insurance coverage but also as to whether this rule is consistent with the intent of the Legislature. The Crown CoCo decision did not address the latter argument specifically.

16. The purpose of the Act is to promote the timely detection and clean-up of underground storage tank leaks. Federated argues that an equally important purpose of the Act was to make insurance more available and affordable for tank owners. It submitted in the record portions of the legislative history from both 1987, 1989, and 1990 concerning the original enactment of and the amendment of the Minnesota Petroleum Tank Release Clean up Act. It argues that not reimbursing costs covered by insurance is directly contrary to this legislative history. (Public Ex. A-6). A review of that legislative history indicates that the subject of insurance was on the minds of the legislators involved and of the witnesses testifying at the hearings. It was the unavailability of pollution liability insurance in the market place at an affordable premium which led to this legislation. There seems little doubt based on this record, however, that the fund was established because the insurance industry was abandoning the field. Representative Knuth described the Petrofund as a self-insurance program. (Public Ex. A-6 (5-7-87)). It is clear throughout the legislative history that legislators and others hoped that the insurance industry might be motivated to provide a liability policy which would cover costs incurred in excess of that recoverable from the Petrofund. Although this was the expectation of 1987, the 1990 legislative history makes it clear that this type of policy was never written because the insurance industry felt that it was unable to be certain as to what costs would actually be covered by the Petrofund.1/ As a result of the continued unavailability of insurance coverage, the 1990 Legislature raised the Petrofund maximum to $1 million which was the level to be required by the Federal EPA.

17. There is no indication in the legislative history, with one possible exception, that the Legislature intended that insured responsible persons should be permitted to recover costs from the Petrofund. The only exception is the testimony of Special Assistant Attorney General Barbara Freese in 1989 which mentions two possibilities. (Public Ex. A-6 (4-11-89)). First she acknowledges the possibility that an insurance company might write a policy

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1/ Subsequent to 1987 the insurance industry did propose a liability policy to the Department of Commerce which contemplated reimbursement of the insurance company by the Petrofund. The policy was not approved. The Department favored a "wrap around" policy under which the insurance company would be responsible for any costs not paid by the Petrofund. The insurance industry felt that the risks involved in such a policy were too uncertain. (Public Ex. A-5, p. 3, p. 6).

with a deductible at the level of the Petrofund cap. She stated that the other alternative is that the insurance industry could cover all costs "but because the insurance industry would know that this fund is here to cover most of the first 250 ($250,000), they would be able to provide insurance at a much cheaper premium." In comments submitted in this rulehearing proceeding Ms. Freese stated that she did not believe that her 1989 statement constituted legislative intent. The Petrofund Board's policy of not reimbursing costs covered by insurance had already been established at that point and the 1989 Legislature did not proceed to deal with the insurance question after the PCA and the insurance industry were unable to agree on how to deal with the matter. (Public Ex. F). The legislative history reflects only the hope of those involved in the legislation, including the Service Center Association of Minnesota representing gasoline service stations, that once the Petrofund was established the insurance industry would begin participating in the market again. The record does not support the claim that the Legislature intended that insurance be reimbursed by the Petrofund. (See also T. 39).2/ Nor does it indicate that the Legislature did not intend that this be done, although the extensive discussion of a possibility of a policy in excess of the Petrofund cap indicates that the thinking was more in that direction. It appears that this matter was left to the discretion of the Petrofund Board which gathered information to support a decision in this regard before announcing its policy in 1989. It is concluded that the proposed rule does not conflict with legislative intent within the meaning of the case law set out in Finding of Fact No. 15.

Need and Reasonableness

18. Federated and the American Insurance Association ("AIA") also contend that the Board has not made affirmative presentation of facts establishing the need for and reasonableness of a proposed amendment as required by Minn. Stat. § 14.14, subd. 2. A agency is required to make a reasoned determination in support of its policy choice. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984). An unreasonable rule is generally one which is arbitrary. In re Hansen, 275 N.W.2d 790 (Minn. 1978). A rule is reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985). Where an agency engages in "willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case, its action is unreasonable. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975).

2/ The Court of Appeals, in the Crown CoCo decision, characterized the legislative history of the Act as revealing "that the Legislature did not consider whether insured costs should be reimbursed by the fund. Rather, it was assumed that upon establishment of the Petrofund, insurance companies would be more willing to write policies covering those costs which were not reimbursable by the fund." 458 N.W.2d at 137.

19. The Board advances two arguments in support of its amendment in its statement of need and reasonableness. (Board Ex. I). It argues that the incentive in the Act for cooperation by responsible persons is the possibility of denial of reimbursement. The Board argues that eligible persons with insurance coverage do not need and will not be affected by the incentive of reimbursement since their costs are already covered. The Board also argues that if this reimbursement is allowed either the responsible person will enjoy double recovery or the reimbursement will ultimately go to the insurer for a risk for which the insurance company had already received premiums from the responsible person. The Board argues that since Petrofund money is not unlimited this is a reasonable approach. It notes that the Court of Appeals in Crown CoCo, supra found these reasons to be "rational bases" for the policy advanced. (See Finding of Fact 14). The Board also points out that although Federated states that it would reduce premiums by 60% if insureds are reimbursed, the Board has no authority to enforce such a premium reduction.

20. The AIA argues that the Board has provided no evidence that any double recovery is in fact occurring. (Public Ex., E. p. 2). Federated denies that it would collect or has been collecting premiums for a non-existent risk as alleged by the Board. It has refunded 20% of the premium to insureds who have been granted reimbursement by the Petrofund subsequent to the Crown CoCo decision. (Public Ex. G, p. 9). Federated asserts that the premium was not reduced to 60% because of the Board's past enforcement of its illegal rule. Federated also argues that insured persons have as much if not more incentive to cooperate in the clean-up of tank leaks since there are also potential civil penalties. (Public Ex. A, p. 12). Federated points out that insurance carriers provided professionally managed environmental clean ups for their policyholders so that the purpose of the Act is better met where insurance is present. It also points out that none of the reduced reimbursement awards (due to, e.g., non-cooperation) have been of Federated insureds. (Public Ex. A, p. 13).

21. An agency is not necessarily required to present trial type facts in support of its rules. Legislative facts or articulated policy preferences may suffice. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 251 N.W.2d 350, 356-7 (Minn. 1977). The Supreme Court has indicated that the contents of the rulemaking record will vary with nature of the rule. In some cases a substantial evidentiary record may be needed while in others, "common knowledge" or "common sense" will suffice. Mammenga v. Department of Human Services, 442 N.W.2d 786, 791 (Minn. 1989). Accordingly, specific examples of double recovery or unearned premiums may not be required. Rational argument is sufficient. Additionally, it is generally held that a rule is not unreasonable simply because a more reasonable alternative exists or a better policy choice might have been made. An agency may choose among possible alternative policies if the choice is a rational one. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943). An administrative regulation is not arbitrary simply because a court would have picked a different formula than that adopted by the agency. Pitts v. Perluss, 27 Cal. Rptr. 19, 377 P.2d 83, 89, 58 Cal. 2d 824 (1962). If reasonable minds may well be divided as to the wisdom of an administrative board's action, its action is conclusive. Rible v. Hughes, 24 Cal. 2d 437, 445, 150 P.2d 455.

22. A good deal of Federated's argument is to the effect that the

purposes of the Act are better served when insured's costs are reimbursed. (Public Ex. G, p. 3). The record indicates that the professional clean-up paid for by an insurance company is helpful in meeting the goals of the Act especially when a small business is involved. (Public Ex. A-5, A-13). Federated points out that benefits under the "coordinated coverage" it proposes would include not only a professionally managed clean-up but also benefits normally associated with third party claims such as legal defense costs, and the expenses incurred in cleaning up non-Petrofund covered pollution incidents. Federated would also pay all expenses and bear the burden of awaiting Petrofund reimbursement. (Public Ex. A, p. 16-17). The insurance industry's argument in support of its policy preference is certainly rational. Federated states that insureds are reimbursed from similar funds in other states and that premiums for pollution liability policies in those states are substantially lower. The Board is of course obligated to carefully examine this rulemaking record, including all of the evidence submitted by Federated, to ensure that it has made an appropriate policy choice. Nonetheless, the proposed amendment cannot be said to be arbitrary based upon this record. The Board has made rational arguments in support of its proposed rule and has shown that the proposed rule is rationally related to the ends sought to be achieved by the Act. It is not disregarding the facts and circumstances of the matter. Even if Federated's suggested policy is more reasonable, the Board's policy is not necessarily unreasonable in the legal sense.

Equal Protection

23. Federated also asserts that the proposed amendment violates the equal protection clauses of the federal and state constitutions and should be rejected on that ground. An agency does have implied power to formulate necessary classifications within its designated area of regulation. Welsand v. State of Minnesota Railroad and Warehouse Commission, 88 N.W.2d 834, 838 (Minn. 1958). A classification in a rule may be impermissible under the Fourteenth Amendment, however, if it is not rationally related to a legitimate government objective. State by Spannus v. Hopf, 323 N.W.2d 746, 753 (Minn. 1982); REM v. Department of Human Services, 382 N.W.2d 539 (Minn. Ct. App. 1986). Federated argues that the reasons advanced by the Board and discussed above in regard to need and reasonableness, do not demonstrate a rational relationship to the purposes of the Act. As discussed above it argues that reimbursing insureds does promote the purposes of the legislation. The question of equal protection was specifically discussed in Crown CoCo, 458 N.W.2d at 138. The court held that the Board's policy of not reimbursing persons who were insured bears a rational relationship to the purpose of the Act. Federated points out that the court did not have a full rulemaking record before it. The question of legality must be reexamined based upon this rulemaking record, however, the court's determination is instructive whether or not it is precedential. For the reasons set out in Findings of Fact Nos. 16-22, it must be concluded that the Board's exclusion of insured responsible persons from reimbursement has been shown to be rationally related to the purposes of the legislation, namely promoting the clean-up of releases of petroleum into the environment. The Board has articulated a reasonable explanation for treating insureds differently from other applicants.

Vagueness

24. The AIA commented that the chief problem with the proposed rule is the indeterminateness of the phrase "covered by insurance". (Public Ex. E, p. 4). A rule may be so vague as to be unconstitutional if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. In Re Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985). The AIA points out that the question of whether comprehensive general liability policies offer pollution liability coverage is a matter which is being resolved in the courts. AIA is concerned that the proposed rule will force tank owners to a judicial determination of whether they have coverage and thereby delay corrective action. A witness at the hearing also indicated that it is not clear in Minnesota whether or not gradual releases from petroleum tanks are covered under pre-1986 comprehensive general liability policies. (T. 50). The witness provided during the hearing a proposed modification of the Board's amendment which defines insurance and indicates how an applicant may demonstrate the absence of insurance coverage. The proposed modification suggests the type of evidence that may be submitted to the Board to demonstrate an absence of an insurance coverage. (Public Exs. B and C). The Board's proposed amendment is not unconstitutionally vague as it stands. It is as specific as it is practical to be given the situation. Can Manufacturers Institute, supra, 289 N.W.2d at 423. It would require a case by case determination by the Board.

25. In a post-hearing comment the Board observed that the proposed modification does not appear to be a substantial change, but expressed a concern that the modification might require the Board to accept as determinative each of the listed items of evidence and would therefore unduly restrict further inquiry by the Board. (Board Ex. Q). The proposed modification would not constitute a substantial change since it merely elaborates upon the phrase "covered by insurance", it does not go to a new subject matter, nor make a major substantive change, or result in a rule fundamentally different in effect. Minn. Rule 1400.1100. Although the proposed amendment is not vague in the legal sense without the modification, the modification would appear to provide guidance to applicants to help them comply with the proposed amendment. It appears to be more procedural than substantive. The Board should carefully consider the proposed modification for inclusion in its final rule. The Board could of course change any portion which it believed unduly restricted its proper inquiry.

Cut-Off Date

26. As proposed the amendment specifically applies to initial and supplemental applications received by the Board after the effective date of the amendment. Federated argues that the proposed cut-off date is inconsistent with the Act since costs incurred prior to the enactment of the original legislation are not recoverable. It suggests that only costs incurred after the effective date of the amendment should be ineligible. (Public Ex. A, p. 19). The AIA suggested that the proposed rule should be made effective for insurance written after the amendment is effective. It suggests that as proposed the proposed rule is retroactive and argues that the retroactive effective of the rule is permissible only so long as it is reasonable. It states that the Crown CoCo decision has caused parties to reasonably expect reimbursement under an insurance policy. (Public Ex. E, p. 6).

27. Rules may have a retroactive effect where it is clearly stated and the retroactivity is reasonable in the circumstances. Mason v. Farmers Insurance Company, 281 N.W.2d 344, 348 (Minn. 1979); 2 Davis, Administrative Law Treatise (2d Ed.) § 7.23, p. 109. The "future effect" language in the definition of a rule does not prohibit retroactivity. Summit Nursing Home v. United States, 572 F.2d 737 (Ct. of Claims 1978). The Board argues that facing the cut-off date on the date of application is reasonable since that is what the Legislature itself did in disqualifying tank removal costs. It specifically made the date of application the operative cut-off date. Minn. Laws 1990 Ch. 501, §§ 5, 8. The Board argues that it was reasonable for the original legislation to be based upon costs incurred after its effective date since it was the creation of the fund which provided an incentive. It should be noted that the effective date is not necessarily "retroactive" since it is based upon an event occurring after the effective date of the amendment. Nonetheless, to the extent that it is retroactive it appears to be consistent with the legislative intent for the effective date of exclusions from reimbursable costs.

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

CONCLUSIONS

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

2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Board has documented 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. That 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. That 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, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

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

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the 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 consistent with the Findings and Conclusions made above.

Dated this 4th day of April, 1991.

GEORGE A. BECK
Administrative Law Judge