

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION
DIVISION OF STATE AID FOR LOCAL TRANSPORTATION

In the Matter of the Proposed
Adoption of Rules of the State
Department of Transportation
Governing Natural Preservation
Routes

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Bruce D. Campbell on February 25, 1993 in Brainerd, Minnesota and March 1, 1993 in Arden Hills, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. § § 141.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the proposed rules, as modified, are substantially different from those originally proposed.

Appearing on behalf of the Department of Transportation (Department or Agency) were: Dennis Carlson, State Aid Engineer; Julie Skallman, Assistant State Aid Engineer; Debra Ledvina, Legal Analyst and Rules Process Advisor; and Mark Gieseke, State Aid Plans Engineer. The hearing continued until all interested groups and/or persons had had an opportunity to testify concerning the adoption of the proposed rules.

The record of the proceeding closed on March 29, 1993, with the receipt of the final reply comments. The time for the issuance of this Report was extended in writing by the Chief Administrative Law Judge due to the physical incapacity of the Administrative Law Judge.

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 Agency 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

Procedural Requirements

1. On December 9, 1992, the Department of Transportation (Department) filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.

2. On January 11, 1993, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register pp. 1751-57.

3. On January 7, 1993, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On January 11, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules.
- (f) All materials received following a Notice of Intent to Solicit Outside Opinion published at 16 State Register pp. 2174-75 (March 30, 1993) and a copy of the Notice.
- (g) A copy of the State Register containing a Notice of Intent to Adopt Rules without a public hearing published on October 5, 1992 (17 State Register pp. 705-10) and copies of all the requests for a hearing.

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

5. The period for submission of written comment and statements remained open through March 22, 1993, the period having been extended by Order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on March 29, 1993, the fifth business day following the close of the comment period.

Statutory Authority

6. Statutory authority to adopt the proposed rules is contained in Minn. Stat. § 162.021 (1992), which reads, in pertinent part, as follows:

162.021 NATURAL PRESERVATION ROUTES.

Subdivision 1. Establishment. (a) The commissioner shall establish a natural preservation routes category within the county state-aid highway system.

(b) Natural preservation routes include those routes that possess particular scenic, environmental, or historical characteristics, such as routes along lakes or through forests, wetlands, or flood plains, that would be harmed by construction or reconstruction meeting the engineering standards under section 162.07 or the rules adopted under that section.

(c) The commissioner shall adopt rules establishing minimum construction and reconstruction standards that address public safety and reflect the function, lower traffic volume, and slower speed on natural preservation routes. The rules may not establish standards for natural preservation routes that are higher than the standards for national forest highways within national forests and state park access roads within state parks. Design standards specifying the width of vehicle recovery areas on forest highways, forest and park roads, and on natural preservation routes must minimize harmful environmental impact.

* * *

Compliance with Minn. Stat. §§ 14.11 and 14.155 (1992)

7. The Department has correctly determined that the adoption of these proposed rules will not affect small businesses; will not result in a total expenditure of public monies by local public bodies of more than \$100,000, in either of the two years immediately following adoption; and will not have a direct or substantial adverse impact on agricultural land.

Nature of the Proposed Rules

8. The proposed rules were drafted to comply with the directive contained in Minn. Stat. § 162.021 (1992). The rules contain a definition of "natural preservation route" and set standards for selection, designation procedures, and construction. The rules establish an advisory committee which is appointed by the Commissioner of Transportation to make a recommendation to the Commissioner concerning designation as a natural preservation route. The rules set forth minimum geometric design standards for newly constructed Natural Preservation Routes or the reconstruction of Natural Preservation Routes. It is the intent of the Department to establish standards designed to reduce the impact to the surrounding environment through reduced design speeds, narrower lanes, shoulders, and recovery areas, steeper inslopes, fewer cuts and fills, and reduced contractor working room. The Department has established three levels or "types" of Natural Preservation Routes, each of which has different characteristics and concomitant design standards.

9. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness (SONAR). The Judge will not address those provisions in the following discussion and specifically finds that the need for and reasonableness of the proposed rule amendments not receiving public comment has been demonstrated.¹ Many of the public comments were suggestions of a legislative character designed to improve the rules. As set forth below, some of the concerns raised by the public have been addressed by rule modifications made by the Department at and subsequent to the hearing. The discussion which follows will only address substantive issues of need, reasonableness or statutory authority which the modifications proposed by the Department do not resolve.

Modifications to the Proposed Rules Made by the Department

10. At the time of and subsequent to the hearing, after a review of all the public comment and written submissions, the Department has modified the proposed rules additionally as follows:

A. Modifications made at the hearing:

Minn. Rule 8820.9980, subp. 3.

* * *

<u>New Bridge Width (3)</u>	<u>32</u>	<u>32</u>	<u>36</u>
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* * *

(10) This column may be applied only when the project is both located in a platted area or an area in a detailed development process, and physical restraints are present that prevent reasonable application of another level of these standards.

These modifications were discussed at the hearing and received no negative comments or objections. The Judge finds that the need for and reasonableness of the modifications made at the hearing have been demonstrated and the modifications do not constitute a prohibited substantial change to the rules as proposed.

B. Modifications made subsequent to the hearing:

¹In order for an agency to meet the burden of reasonableness, it must only demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

Part 8820.0100 DEFINITIONS

(New) Subp. 1a. ADT. "ADT" means average daily traffic, which is computed by dividing the total number of vehicles traveling over a segment of roadway in one year divided by 365.

Subp. 12a. Natural preservation . . . environmental, pastoral, or historical . . . may include, but are not limited to, roads along

Part 8820.4000 REQUEST TO COUNTY BOARD

Any person . . . within 60 days. ~~The commissioner may~~ In order to designate . . . route ~~only after receipt of~~, the Commissioner must receive a board.

Part 8820.4010 CHARACTERISTICS . . .

Subp. 1. Selection . . . environmental, pastoral, or historical . . . such, but not exclusively, as routes . . .

Part 8820.4030 ADVISORY COMMITTEE

Subp. 1. Appointment and Membership.

The Commissioner shall . . . which the county exists. ~~The advisory committee . . . to the commissioner.~~ No elected or appointed

Subpart 2. Operating Procedure. The Advisory Committee shall meet on call from the Commissioner at which time they shall elect a chairperson and establish their own procedures to investigate the designation proposals.

The Committee shall consider:

A. The economic, social, safety and environmental impacts which may result from the designation or denial of the designation;

B. The magnitude of the effects on adjacent lands and the value of the characteristics identified in 8820.4020, subpart 2;

C. The number of persons, either residents or the traveling public, affected by designation or denial of designation;

D. The present and future use of adjacent lands;

E. Safety considerations as they apply to pedestrians, bicyclists, motoring public, and fire, police, and emergency units; and

F. Other related issues as may be pertinent to the roadway that have been identified from information submitted in 8820.4020, Subpart 2.

Subpart 3. Recommendation. The Committee, after considering all data pertinent to the requested designation, shall recommend to the Commissioner approval or disapproval of the request.

Part 8820.4040 DESIGNATION . . .

Following . . . route.

The Commissioner shall base the decision on the criteria in part 8820.4030, subpart 2, and shall notify the political subdivision in writing of the decision. If the request is denied, a written explanation will be included with this notification.

Part 8820.4060 GEOMETRIC STANDARDS

The standards . . . routes.

In the case of reconstruction, the designer shall, to the greatest extent possible, preserve the existing profile, alignment, and cross section. In doing so, the designer shall consider, to the extent practical, include in the design landscaping, . . .

Part 8820.4070 RECONSTRUCTION . . .

A county . . . alternatives.

Prior to project approval, the County Engineer shall provide evidence to the State Aid Engineer that the concerns raised at the public meeting have been addressed or incorporated into the project. Spot maintenance . . .

Part 8820.4090 REMOVAL . . .

A county board . . . from the roadway.

The Commissioner shall base the decision on the criteria in part 8820.4030, subpart 2, and shall notify the political subdivision in writing of the decision. A written explanation will be included with this notification.

Part 8820.9980 MINIMUM . . .

Subp. 1. Type I . . .

The terms "MPH" or "FT" have been added to the numbers, where appropriate.

(1) Applies to . . . inslope, in accordance with 8820.4060.

* * *

(6) Ditch depths and widths ~~should~~ shall be . . . snow storage when a standard ditch would negatively impact the surroundings.

(7) The designer ~~should~~ shall specify . . .

(8) If the route . . . these locations ~~could-be considered~~ is acceptable.

Subp. 2. Type II . . .

The terms "MPH" or "FT" have been added to the numbers, where appropriate.

(1) Applies to . . . the inslope in accordance with 8820.4060.

* * *

(5) The designer . . . at these locations ~~could-be considered~~ is acceptable.

(6) Ditch depths and widths ~~should~~ shall be kept . . . snow storage when a standard ditch would negatively impact the surroundings.

(7) The designer ~~should~~ shall specify . . .

* * *

Subp. 3. Type III . . .

The terms "MPH" or "FT" have been added to the numbers, where appropriate. Also amended as stated in A.

(1) Applies to . . . the inslope in accordance with 8820.4060.

* * *

(5) The designer . . . at these locations ~~could-be considered~~ is acceptable.

(6) Ditch depths . . . ~~should~~ shall be kept . . . snow storage when a standard ditch would negatively impact the surroundings.

(7) The designer ~~should~~ shall specify . . .

(8) stricken and replaced by new (10) set forth above in A.

* * *

Part 8820.9985 MINIMUM . . .

The term "FT" is added to the numbers.

The modifications proposed at the hearing and in the Reply Comments of the Agency both address comments raised by the public and clarify the nature and intent of the proposed rules. The Judge finds that none of these modifications constitute a prohibited substantial change. The Agency has also demonstrated the need for and reasonableness of these proposed modifications.

Discussion of the Proposed Rules

11. Several county traffic engineers commented and testified in support of the adoption of the proposed rules as a workable compromise between concerns related to environmental protection and traffic safety. In their opinion, the design standards stated in the rules represented minimums from which no further downward departure should be authorized in the interests of public safety. Comments, Dale D. Wegner, Jr., Pope County Highway Engineer, March 3, 1993; Comments, Michael T. Sheehan, Olmsted County Engineer, February 26, 1993; Testimony of Richard Hansen, St. Louis County Engineer, Brainerd Public Hearing; Testimony of David Heyer, Becker County Highway Engineer, Brainerd Public Hearing; Testimony of John Walkup, Aitkin County Engineer, Brainerd Public Hearing. The county engineers noted provided general support for the proposed rules as a workable compromise without offering factual information to support the need for or reasonableness of any specific portion of the proposed rules. The Judge accepts these comments and testimony as representing the opinions of the named county engineers that the design standards contained in the proposed rules, as regards NPR, are needed and reasonable.

12. Several members of the public, in both oral testimony and written submissions, expressed a preference for an earlier version of the proposed rules that were prepared by a Task Force, representative of various interest groups and governmental officials. That proposed draft of rules is contained in the record as Exhibit C. These members of the public supported the draft of the proposed rules prepared by the Task Force because they believed that the draft contained in Exhibit C allowed greater flexibility at the local level and provided greater environmental protection for roadways that might be designated as a Natural Preservation Route (NPR). Hearing Testimony, James McGill, Brainerd Public Hearing; Hearing Testimony, Virginia Anderson, Brainerd Public Hearing; Comments, James McGill, February 25, 1993, pp. 1-2; Comments, Mary Ackerman-Reents, March 3, 1993; Comments, Stuart H. Lane, February 25, 1993; Comments, Charles H. Manlove, M.D., February 26, 1993.

The Agency did not adopt in toto the draft of the proposed rules prepared by the Task Force because the legislation authorizing the promulgation of rules required that specific standards be developed with due consideration for public safety. The Agency concluded that the Task Force draft, while certainly flexible, did not adequately address safety concerns. Reply Comments of the Department of Transportation, March 29, 1993, p. 2. The

Agency is under no obligation to adopt a draft of rules prepared by any advisory group. The statutory responsibility for proposing rules and supporting the need for and reasonableness of those rules, in this case, is on the Commissioner. The Administrative Law Judge will, therefore, discuss those portions of the proposed rules that received public comment and determine whether the Agency has met its burden. The fact that some members of the public prefer an earlier draft of the rules for general and largely unspecified reasons does not authorize the Administrative Law Judge to reject the rules proposed by the Department.

13. Several commentators also suggested that the rules were misguided in not requiring the maintenance of the design of existing "scenic" area roadways. They reasoned that any reconstruction should be specifically justified by the Commissioner on an individual basis after a demonstration by clear and convincing evidence that the redesign or modification was specifically justified by concerns related to safety. Hearing Testimony, Judson Jones, Arden Hills Public Hearing; Comments, Ellen Hawkins, February 26, 1993; Comments, Judson D. Jones, Ex. A, March 22, 1993. In its Reply Comments, the Agency submitted an amendment to proposed Minn. Rule 8820.4060 which requires the designer, to the greatest extent possible, to preserve the existing profile, alignment and cross section in the event of reconstruction of a NPR. The designer is also required to use, to the extent practical, a variety of methods to limit adverse impacts on the environment, consistent with public safety concerns. Proposed Part 8820.4060. The Administrative Law Judge concludes that, with the amendments proposed by the Agency, the rule meets the requirement of Minn. Stat. § 162.021 (1992), by minimizing adverse environmental impact resulting from the reconstruction of an existing roadway, consistent with concerns of public safety.

14. Minn. Rule 8820.4000 states that a person who wishes to begin the process of designating a county state-aid highway as a Natural Preservation Route must direct the request to the local county board. Within 60 days of receipt of the request, the county board, by resolution, must "act on the request" through a resolution addressed to the Commissioner of the Department of Transportation relating to the request. The county board must determine which designation type best fits a particular route. The three designation types are stated in Minn. Rule 8820.4012. Amy T.H. Donlin, in her Comments of March 1, 1993, stated that the rule should require county boards to consider seriously all requests that are submitted and give cause if a proposal is rejected. Ellen Hawkins, in her Comments of February 25, 1993, made a substantially similar statement. Both the Task Force and the Agency determined that a county board would not require any particular incentives to give serious consideration to a request for NPR status for a portion of a road within the county. Moreover, any such exhortation in the proposed rule would be unenforceable. It would not meet the definition of a rule contained in Minn. Stat. § 14.02, subd. 4 (1992).

15. Peter Olin testified at the Arden Hills public hearing that the rules should provide for a public referendum in the event that the county board does not act in the public interest with respect to a NPR request. For the reasons stated by the Agency at page 8 of its Reply Comments of March 29, 1993, the Judge rejects Mr. Olin's requested amendment. The Administrative Law Judge finds that Minn. Rule 8820.4000, as amended, is needed and reasonable.

16. Part 8820.4010 describes three types of Natural Preservation Routes. In subpart 1 of the proposed rules, some general criteria related to the character of a NPR are stated. At the Arden Hills public hearing, Mr. Peter Olin, Director of the Minnesota Arboretum, suggested that a category such as "pastoral" or "agricultural" features be added as a selection criterion. He stated that routes along agricultural settings may possess characteristics which are worthy of NPR status. The Agency, in its Reply Comments, proposed an amendment to 8820.0100, subp. 12a and 8820.4010, subp. 1, to recognize Mr. Olin's concern by including particular "pastoral" features as a criteria for NPR designation. The Department of Natural Resources, in written comments dated February 1, 1993, suggested that subpart 1 of Minn. Rule 8820.4010 be amended to indicate that the examples provided were not meant to be exhaustive. In its Reply Comments, the Agency proposed to amend the subpart by including the language ", but not exclusively," to the subpart and a similar amendment was made to 8820.0100, subp. 12a. In the draft presented to the Administrative Law Judge, that phrase was added to 8820.4010, subp. 1 between the words "such" and "as". The Administrative Law Judge believes that the placement of the phrase as indicated by the Agency is inappropriate. The phrase should be inserted in the same line between the words "as" and "routes". With the appropriate placement of the phrase ", but not exclusively," as indicated, the Administrative Law Judge finds that Minn. Rule 8820.4010, subp. 1, as amended, is needed and reasonable. The definition of an NPR contained in 8820.0100, subp. 12a is also found to be needed and reasonable.

17. In subparts 2, 3 and 4 of Minn. Rule 8820.4010, a description is given of Type I, Type II and Type III, Natural Preservation Routes. Mayor Jon Kroschel, in his Comments at the Arden Hills public hearing, stated that the designation of separate "types" of NPRs with different design characteristics associated with each type is inappropriate. He believed that each NPR should be separately designed on a site-specific basis. Minn. Stat. § 162.021 (1992), however, requires the Commissioner to adopt rules setting design standards that protect the roadway's characteristics while also safeguarding public safety. To fulfill the statutory mandate, the adoption of separate general categories with associated design specifications is both needed and reasonable.

18. The Becker County Engineer, David Heyer, in his comments of February 24, 1993, suggests that a Type I NPR be limited to no more than 100 vehicles per day in traffic volume. Such limited traffic would be required, in his opinion, because the design standard for a Type I NPR has a 3:1 inslope. It is his opinion that a 3:1 inslope is considered a nonrecoverable slope by an errant vehicle. Such an inslope would only be appropriate if limited traffic is moving at very slow speeds. Subpart 2 of Minn. Rule 8820.4010 currently describes a Type I NPR as having "very low volumes with leisurely driving speeds". The Administrative Law Judge finds that the description of the traffic volumes associated with a Type I Natural Preservation Route is sufficiently stated in subpart 2 of Minn. Rule 8820.4010 without amendment or reference to a specific ADT.

19. Several commentators stated that the reference in subpart 2 and in subpart 3 of Minn. Rule 8820.4010 to Average Daily Traffic, as defined by the proposed amendment to Minn. Rule 8820.0100, subp. 12a, is entirely inappropriate. Donald Grotz, in his written comments of March 1, 1993, states that the use of a 750-vehicle per day reference with respect to a Type III

classification ensures that no NPR will be established in the seven-county metropolitan area. That ADT suggested cap does, however, make 85% of the county state-aid routes in Minnesota eligible for NPR status. Jon Kroschel, Mayor of Afton, commented at the Arden Hills hearing that reference to ADT should be totally eliminated because future road design and speed limits will determine future traffic volume, not past usage. In its Reply Comments, the Department states that it believes, as did the Task Force, that some ADT advisory level is appropriate for the county board in considering the initial request for designation and the selection of the appropriate category, at least as regards a Type II or Type III NPR. Moreover, the rules do provide that no single factor, including ADT, is a basis for rejecting a proposed designation. Finally, with respect to future usage being the primary criterion in selecting the appropriate NPR classification, the Agency correctly states that the purpose of the rules is to maintain the characteristics of a roadway, not change the characteristics by encouraging or discouraging future use.

20. The Washington County Board, in its Comments of February 23, 1993, suggests that Minn. Rule 8820.4010, subp. 1, 2, 3 and 4 be amended by inclusion of a criterion related to the selection of the appropriate type of NPR which reflects measures to reduce traffic volumes. The lower the traffic volumes, the lower the type of NPR that can be selected. The purpose of an NPR, however, is primarily to preserve existing scenic areas, not change their character by reducing ADT. The projected traffic the county should report under Minn. Rule 8820.4020, subp. 2F may be higher or lower than present traffic. Department Reply Comments, March 29, 1993, p. 4. The Administrative Law Judge finds that Minn. Rule 8820.4010, subp. 2, subp. 3, and subp. 4, are needed and reasonable.

21. Minn. Rule 8820.4020, states the requirements for route designation proposals. Subpart 2 of the rule states the information that the county board must provide to the Commissioner with its resolution on the proposal. Ellen Hawkins, in her Comments of February 25, 1993, states that the extensive filings required of the county board would discourage NPR designation. She also asserts that the required submissions do not specifically require material that "would necessarily argue for" a route's NPR designation. In its Reply Comments, the Agency states that the county engineers represented on the Task Force and county engineers generally have not objected to the specificity of the information required to be presented by Minn. Rule 8820.4020, subp. 2. Most of the information requested is typically prepared for a project regardless of whether it is a NPR or not. James McGill, in his Comments of February 25, 1993, states that items K and J of Minn. Rule 8820.4020, subp. 2, would be overly burdensome and hinder applications for NPR designation. Item K does not require the completion of any additional information or steps, it merely requires the submission of whatever environmental documentation may have already been completed. Item J, a preliminary cost estimate of the alternatives considered, is readily available on a "cost per mile" basis and is generally needed by the county for other planning purposes. Agency Reply Comments, March 29, 1993, p. 2. The Administrative Law Judge finds that Minn. Rule 8820.4020 is needed and reasonable.

22. Minn. Rule 8820.4030 relates to the Advisory Committee. The provision requires the Commissioner to appoint an advisory committee of seven members within each construction district. The rule specifies the makeup of the advisory committee. It also states the responsibility of the advisory

committee to make a recommendation to the Commissioner, based on stated criteria, on each county board submittal. The rule specifies that no elected or appointed official that represents a political subdivision requesting the designation or any public member residing in that county may serve on the advisory committee. The appointment of an advisory committee for each construction district, as an intermediate step in the designation of a NPR, is mandated by Minn. Stat. § 162.021, subd. 5 (b) (1992). The major addition to the requirement of the statute in the proposed rule is that it prohibits a public official whose jurisdiction has requested the designation and members of the public residing in the county involved from serving on the committee.

23. Ellen Hawkins, in her Comments of February 25, 1993, states that the rule does not specify the selection process for advisory committee members. She is fearful that a "token environmentalist" will be selected to represent the interests of persons desiring NPR status for a proposed route. Appointment of the advisory committee from the groups specified in both the rule and the statute is within the discretion of the Commissioner. There is no evidence in the record that the Commissioner would use his or her appointment power arbitrarily to select individuals with a predisposition either for or against a specific NPR proposal or NPR proposals in general.

24. In two separate comments, the United States Department of Agriculture, Forest Service, requests that the advisory committee include a federal land management agency representative when the NPR traverses federal lands. Comments, Kathleen A. McAllister, Acting Forest Supervisor, March 22, 1993; Comments, Steven T. Eubanks, Forest Supervisor, March 16, 1993. The membership of the advisory committee, is, however, specified by Minn. Stat. § 162.021, subd. 5 (b) (1992). The Commissioner does not have authority under the statute to enlarge membership on the advisory committee appointed in each construction district. It would be appropriate, however, for the advisory committee to advise the federal government of its meetings and encourage the attendance of an appropriate federal official, when they are considering a route that substantially traverses federal land.

25. Amy T.H. Donlin, in her Comments of March 1, 1993, states that the rule does not assure that the committee would include anyone advocating NPR status for the road under consideration. On the contrary, however, the very purpose of the advisory committee under both the statute and the proposed rule is to render an informed, unbiased judgment on the propriety of recommending NPR status for a proposed route.

26. The Washington County Board of Commissioners, in its Comments of February 23, 1993, recommends elimination of the advisory committee. The use of an advisory committee in the process of establishing a NPR designation is required by statute. Minn. Stat. § 162.021, subd. 5 (b) (1992). The Commissioner has no authority to adopt a rule eliminating a step that is required by statute.

27. The Department of Natural Resources, in its Comments of February 1, 1993, states that the rule should provide for a sufficient period of time for persons who represent agencies to seek and present a departmental prospective on proposed routes. In its Reply Comments of March 29, 1993, the Department correctly responded that it was not the intent of the rule to create a DNR approval mechanism for NPR proposals.

28. Mayor Jon Kroschel, in his hearing testimony and written submission, stated that the Department's ban on local elected officials and residents within a county from serving on the advisory committee that considers their NPR proposal is inappropriate. Under the Department's proposal, he suggests, residents of northwestern Minnesota may determine the NPR designation of a road in southeastern Minnesota. In its Reply Comments at page 10, the Department states the reason why members of the public and public officials from the affected county may not serve on the advisory committee. That limitation was added to ensure objectivity. In such a situation, financial concerns and public pressure from the locality will be minimized. The advisory committee ought to be totally objective, biased neither against preservationists or developmentalists. The advisory committee meetings are public and the advisory committee will receive written or oral testimony at its meetings about the position of the local public officials and residents.

29. The Administrative Law Judge finds that Minn. Rule 8820.4030, subp. 1, is needed and reasonable, as amended.

30. In its Reply Comments, the Department added a subpart 2 and 3 to Minn. Rule 8820.4030. Proposed subpart 2 states the criteria to be used by the advisory committee in making a recommendation on a NPR proposal. Subpart 3 states that the committee must consider all of the data pertinent to the requested designation and make a recommendation for approval or disapproval to the Commissioner. The addition of criteria for the recommendation to be made by the advisory committee is both needed and reasonable. In the absence of appropriate criteria, the action of the advisory committee could well be entirely arbitrary. It is also both needed and reasonable to specify that the advisory committee must consider all pertinent data presented to it and make a recommendation to the Commissioner. No adverse public comments on Minn. Rule 8820.4030, subps. 2 and 3, were received. Subparts 2 and 3 are, therefore, needed and reasonable. As previously discussed, the addition of subparts 2 and 3 to Minn. Rule 8820.4030 does not constitute a prohibited substantial change.

31. Minn. Rule 8820.4050 relates to the extent of state aid available. That part provides that landscaping items are eligible for up to two percent of the total construction allocation for the year in which any construction on the Natural Preservation Route is completed. A number of public commentators suggested that the aid for landscaping items should be increased to a maximum of five percent of the total construction allocation. Comments, United States Department of Agriculture, Forest Service, Kathleen A. McAllister, Acting Forest Supervisor, March 18, 1993, pp. 1-2; Comments, United States Department of Agriculture, Forest Service, Steven T. Eubanks, Forest Supervisor, March 16, 1993, p. 2; Comments, James McGill, February 25, 1993, p. 2; Comments, Patricia Larson and Robert J. Larson, February 24, 1993, p. 1; Hearing Testimony, Patricia Larson, Brainerd Public Hearing; Hearing Testimony, James McGill, Brainerd Public Hearing. The five percent maximum was apparently recommended by the Isaac Walton League. Hearing Testimony, James McGill, Brainerd Public Hearing.

The comments assume that the two percent state aid to pay for landscaping items will not be sufficient. In its Reply Comments of March 29, 1993, the Department states that two percent of the total annual construction allocation for use on landscaping for Natural Preservation Route projects will be extremely generous, given the Agency's specialized experience. The Department

also notes that the replacing of top soil, seeding, mulching, fertilizing, all erosion control measures and replacing lost trees at a 2:1 ratio are grading costs, not landscaping. Such costs would then be 100% eligible for state aid funds, without being included in the two percent limitation. The commentators who suggest that a five percent limit is necessary have given their opinion without supporting factual documentation. The Department, on the basis of its experience and expertise in the specific subject matter, concludes that the two percent limit will be more than sufficient. The Administrative Law Judge finds that the Department has established that Minn. Rule 8820.4050 is needed and reasonable.

32. Minn. Rule 8820.4060 states that the portion of the rules related to design criteria apply to Natural Preservation Routes. The same essential statement is made in Minn. Rule 8820.2500, subp. 1. The remaining portion of Rule 8820.4060 had stated that a person designing a NPR should "consider" the use of various measures to protect natural amenities and to limit the impact on the environment, while addressing concerns of public safety. A number of commentators argued that this portion of the proposed rules, when coupled with the design standards contained in Minn. Rule 8820.9980 and Minn. Rule 8820.9985, would not meet the statutory objective of preservation. The argument was made that, as regards an existing roadway, designation as a NPR would virtually require that the roadway be redesigned to the minimum specifications required by the rule, irrespective of existing conditions. Comments, Judson Jones, March 22, 1993; Comments, Amy T.H. Donlin, March 1, 1993; Comments, Ellen Hawkins, February 25, 1993; Comments, James McGill, February 25, 1993, p. 2; Hearing Testimony, James McGill, Brainerd Public Hearing; Hearing Testimony, Judson Jones, Arden Hills Public Hearing. The commentators also state that the rule as drafted did not accomplish the purpose of Minn. Stat. § 161.021, subd. 1 (c) (1992), to minimize the adverse environmental effects of construction in constructing or reconstructing a NPR. As previously discussed, in its Reply Comments, the Department amended Part 8820.4060 by including the following:

In the case, of reconstruction, the designer shall,
to the greatest extent possible, preserve the
existing profile, alignment and cross section.

The designer of the NPR is also required, to the extent practical, to include in the design means of limiting the impact on the environment of reconstruction, while still addressing concerns of public safety. The Administrative Law Judge finds that the amendments proposed by the Department to Part 8820.4060, stating that the design must preserve the profile, alignment and cross section of an existing route to the greatest extent possible, consistent with public safety is an appropriate response to the comments received and is in accordance with Minn. Stat. § 161.021, subd. 1 (c) (1992).

33. One commentator also stated that Part 8820.4060 should be amended by including a statement that the right of way for NPR roads should not exceed 60 feet and construction easements should not exceed 60 feet, without a clear and convincing showing that additional property must be acquired to comply with the minimal standards established for that particular type of natural preservation route. Comments, James McGill, February 25, 1993, p. 2. In its Reply Comments of March 29, 1993, p. 3, the Department states that the existing rules require a 66-foot right of way easement and that the additional

six feet required over that suggested would not have a serious impact on the environment, particularly since most potential natural preservation routes already exist and have a 66-foot right of way. The Department notes that it may be impractical to impose a 60-foot right-of-way corridor because the right of way must include all drainage structures and ditches. The Department also considers Mr. McGill's suggestion that construction easements be limited to 60 feet to be unnecessary. The designer of the reconstruction project is already required to hold environmental impacts to a minimum, and, to obtain easements, cost must be incurred. The Administrative Law Judge finds that Part 8820.4060, as amended, is both needed and reasonable.

34. Minn. Rule 8820.4070 requires specified reconstruction notification and public meetings. Ellen Hawkins, in her Comments of February 25, 1993, states that the rule should specify that communications with the public should use common language, not technical construction terminology. The Department of Natural Resources, in their Comments of February 1, 1993, suggests that Minn. Rule 8820.4070 should be amended to require advisory committee participation in a project under Minn. Rule 8820.4070. The Department, in its Reply Comments of March 29, 1993, p. 11, states that it is beyond the jurisdiction of the Commissioner to dictate the type of language that the county must use in communicating with the public and that requiring sophisticated computer modeling or other visual aids might require equipment not possessed by most counties. The Department also states in its Reply Comments that the advisory committee has no authority over alignments, construction techniques, or other elements of a design or operation of the roadway. Involving an advisory committee in design and construction alternatives, therefore, would serve no purpose. The amendments made to 8820.4060, previously discussed, and the inclusion in Minn. Rule 8820.4070 of the requirement that the county engineer provide to the state aid engineer evidence that the concerns raised at the public hearing have been addressed or incorporated into the project provide sufficient protection to the continued integrity of Natural Preservation Routes. The Administrative Law Judge finds that Minn. Rule 8820.4070, as amended, is needed and reasonable.

35. Minn. Rule 8820.4080 relates to signs. The signs required by the rule must conform to the sign depicted in Minn. Rule 8820.9990. Ellen Hawkins, in her comments of February 26, 1993, states that the rule should include a direction that as few signs as possible be posted on a NPR. The Department does not believe it possible to describe an interval for NPR signs that would be suitable in all instances. The placement of signs on an NPR is best left to the discretion of the local engineer. There is also a financial disincentive to place too many signs. Department Reply Comments, March 29, 1993, p. 11. The Agency has established that Minn. Rule 8820.4080 is both needed and reasonable.

36. Minn. Rule 8820.4090 relates to the removal of a NPR designation. Peter Olin, at the Arden Hills public hearing, suggested that Minn. Rule 8820.4090 be amended to require a combination of the factors listed in the rule before a NPR's designation could be removed. Whether the designation is to be removed requires an exercise in sound discretion by the board, the advisory committee and the Commissioner. The factors to consider are stated in the rule, particularly as regards the Commissioner's decision. The amendment proposed by the Agency after the hearing to this section references the standards contained in amended Part 8820.4030, subp. 2. The Commissioner must also provide an explanation in writing. While a decision to remove the

designation of a NPR will usually involve changes related to more than one factor recognized in the rule, there is no logical necessity that would be true in every case. It is not appropriate, therefore, to require a combination of factors in every case. Minn. Rule 8820.4090, as amended, is found to be needed and reasonable.

37. Minn. Rule 8820.9980 relates to the minimum geometric design standards for Natural Preservation Routes, new or reconstruction. Subpart 1 of that rule applies to Type I Natural Preservation Routes, subpart 2 relates to Type II Natural Preservation Routes and subpart 3 applies to Type III Natural Preservation Routes.

Minn. Rule 8820.9980, subpart 1, specifies the minimum geometric design standards for either a new Type I Natural Preservation Route or the reconstruction of an existing road as a Type I Natural Preservation Route. The design standards stated in subpart 1 will be the design requirements, except as affected by the amendments to Minn. Rule 8820.4060, previously discussed. As already noted, the design standards contained in this subpart, as applicable to a Type I Natural Preservation Route, are the standards which both the Department and the county engineers who testified believe constitute the minimum reasonable design standards consistent with public safety. See, Finding 11, supra.

38. Mayor Jon Kroschel, in his testimony at the Arden Hills public hearing, stated that different design characteristics should not be formulated on the basis of types of Natural Preservation Routes. He stated that each NPR should be constructed on an individual basis to fit the particular environment, with due concern for safety considerations. Minn. Stat. § 162.021, subd. 1 (c) (1992), however, requires the Commissioner to "adopt rules establishing minimum construction and reconstruction standards that address public safety and reflect the function, lower traffic volume, and slower speed on natural preservation routes." Under the statute, the Commissioner is not free to avoid the responsibility for formulating specific construction standards. The adoption of three specific type designations with design specifications for each type is not only required by statute, but will provide appropriate guidance to local engineers in the formulation of design proposals. See, Finding 17, supra.

39. David Heyer, Becker County Highway Engineer, at the Brainerd Public Hearing, testified that the inslope for a Type I NPR should be 4:1 rather than 3:1 for safety reasons. The Department addressed the appropriate inslope at pages 11 and 13 of the Statement of Need and Reasonableness. A 4:1 slope would also exceed the requirements of Minn. Rule 8820.9965, which Minn. Stat. § 162.021, subd. 1 (c) (1992) sets as the allowable maximum.

40. A number of commentators suggested that a paved Type I road should be allowed to be constructed to the design specifications stated in Minn. Rule 8820.9980, subp. 1, for an unpaved road. This approach is advanced as a workable compromise between the position of protectionists and local residents who desire better surfaced roads for year-round driving. Several commentators suggested limiting this accommodation to roads through national forests. Other commentators would apply this accommodation generally. See, e.g., Comments, United States Department of Agriculture, Forest Service, Steven T. Eubanks, Forest Supervisor, March 16, 1993; Comments, United States Department of Agriculture, Forest Service, Kathleen A. McAllister, Acting Forest

Supervisor, March 18, 1993; James McGill, February 25, 1993, p. 3; Comments, Lonnie Pierson Dunbler, February 26, 1993; Comments, Patricia A. Mitchell, March 1, 1993. The Department, in its Reply Comments, p. 3, rejects the suggestion of allowing a paved Type I NPR to be constructed to the standard for an unpaved Type I NPR road. The primary difference between the standards for a paved and unpaved NPR in the Type I category is approximately seven feet of recovery area. The Department recommended a three-foot recovery area for an unpaved Type I road because the absence of a paved surface, in combination with other roadway characteristics of a Type I route, would keep speeds at a minimum level. With such low speeds, the recovery area allowed, three feet, adequately protects safety. When a road is paved, however, speeds will increase. The Department and AASHTO have adopted a minimum standard for a recovery area at ten feet in such circumstances. When the road is paved considerations of safety require that the minimum recovery area be ten feet. It would not be consistent with safety concerns, therefore, to allow a paved Type I NPR to be constructed to the standards for an unpaved Type I NPR.

41. Judson Jones, in his testimony at the Arden Hills public hearing, stated that a 3:1 inslope required by the Type I standard would result in extensive tree cutting, and, around Washington CSAH 21 would result in a significant loss of tree canopy. The Department, in its Reply Comments, p. 5, stated that the amendments it had proposed to the rule, along with appropriate consideration of safety concerns, required the rejection of Mr. Jones' comments.

42. The Department of Agriculture, United States Forest Service, suggests that the design speed for a Type I NPR that is not paved should be 20 miles per hour. Comments, United States Department of Agriculture, Forest Service, Kathleen A. McAllister, Acting Forest Supervisor, March 18, 1993, p. 2; Comments, United States Department of Agriculture, Forest Service, Steven T. Eubanks, Forest Supervisor, March 16, 1993, p. 2. The Judge accepts as reasonable the justification for the 30 mile-per-hour design speed contained in the SONAR. Twenty mile-per-hour design speed is not an acceptable general minimum for roads qualifying as state-aid highways. In extremely unusual situations, the variance procedure could be used.

43. Ellen Hawkins, in her Comments of February 25, 1993, stated that the designers of an NPR should be required to use native plant species where available and that tree canopies should be preserved. The Department, in its Reply Comments, proposed amendments which have been approved by the Administrative Law Judge to respond to these comments of Ms. Hawkins. Ms. Hawkins also suggested that a provision be authorized for well-signed sections of narrower lane widths, if an 11-foot lane would eliminate special rock structures, individual trees of special value or other unique features. As pointed out by the Department in its Reply Comments, such a restriction would be possible by a variance. There is no reason to authorize a departure from the accepted safety standard in all cases by a general rule. Ms. Hawkins also states that seven tons should be the minimum strength for a Type I road, whether paved or not. The rule proposes a design strength of nine tons for a paved Type I NPR. The construction of a nine-ton road, rather than a seven-ton design strength road, does not require additional width, since the added structure is all below the surface of the road. Paved Type I roads are likely to be used by heavy logging trucks in forests, farm vehicles and ordinary commercial traffic. To accommodate such heavier traffic, it is the judgment of the Department, the highway engineers who commented on the

subject, and the Task Force, that a nine-ton design strength is appropriate. The use of a lesser strength road would result in premature road failures. Ms. Hawkins also argues that the standards should specify that roads need not be reconstructed unless specific problems can be proven to exist that cannot be addressed in any way short of reconstruction. The amendments that the Department made to Minn. Rule 8820.4060, previously discussed, respond to Ms. Hawkins' concern.

44. Ms. Hawkins states that this subdivision should also address the uniformity of design issue. In her opinion, variations should be made on a segment-by-segment basis to reflect changes in topography and variations in natural features. The Department has, however, suggested alternative construction techniques to design for sight-specific conditions. The design standards stated by Minn. Rule 8820.9980 also represent minimums. With the amendments to Minn. Rule 8820.4060 proposed by the Department, all possible consideration will be given to designing a project which minimizes adverse environmental impact and maintains the essential character of the route.

45. The Administrative Law Judge finds that Minn. Rule 8820.9980, subp. 1, as amended, is needed and reasonable.

46. The only member of the public that expressed a concern specific to a Type II Natural Preservation Route that has not been previously discussed with respect to a Type I NPR was Ellen Hawkins in her Comments of February 25, 1993. Ms. Hawkins stated that the design speed for Type II routes should be variable. The speeds are variable with a minimum of 30 or 40 miles per hour. The Department also justified its position relative to inslopes and bicycle shoulder widths in the SONAR. Minn. Rule 8820.9980, as amended, is found to be needed and reasonable.

47. Minn. Rule 8820.9980, subp. 3, relates to a Type III NPR. Ellen Hawkins, in her comments of February 25, 1993, states that the design speeds for a Type III NPR should be variable, that a shoulder width of two-four feet with possible bicycle shoulders of four feet should be considered and that an inslope of 3:1 should be allowable. The Department has adequately justified the design specifications for a Type III NPR in the SONAR. The Administrative Law Judge finds that Minn. Rule 8820.9980, subp. 3, is needed and reasonable.

48. Minn. Rule 8820.9985 relates to the resurfacing of an NPR. The Washington County Board of Commissioners, in their comments of February 17, 1993, recommend elimination of the minimum width resurfacing standards imposed by this subsection. The Department has demonstrated the need for and reasonableness of Minn. Rule 8820.9985 in the SONAR. As the Department also indicates in its Reply Comments of March 29, 1993, the 11-foot lanes, two-foot shoulders and 30-miles-per-hour design speed provided for by the proposed rule are bare minimums for a highway meeting the definition of a county state aid highway. The Administrative Law Judge finds that Minn. Rule 8820.9985 is needed and reasonable.

49. Minn. Rule 8820.9990 depicts the route marker to be used on an NPR. The Washington County Board of Commissioners recommended that the route marker depicted in the rule should be accompanied or accentuated by a supplementary sign giving a brief explanation of the purpose of NPR and requesting respect and care of the roadside environment. The Department responded that individual sight-specific signs could not be developed. The Department

indicates that the county could install other message signs, separate from the route marker, to convey additional information to the motorist, as with any other type of route. The Administrative Law Judge does not interpret the comment of the Washington County Board of Commissioners to suggest a sight-specific additional sign. It appears that the County Board is requesting that the Department develop a standard sign which provides some limited general information about the purpose of an NPR and requests special care of the route by the motoring public. While such additional information may be appropriate, the lack of such a supplemental sign does not affect the need for or reasonableness of Minn. Rule 8820.9990. The Administrative Law Judge finds that Minn. Rule 8820.9990 is needed and reasonable as proposed. Should the Department desire, however, to add a provision related to a specific message sign to be posted with the Natural Preservation Route marker, that addition would not constitute a prohibited substantial change.

50. In addition to specific comments regarding portions of the proposed rules, a number of commentators suggested additional provisions to be added to the rules. The Administrative Law Judge has carefully reviewed all of the suggestions for additional provisions and finds that the lack of any or all of the suggested provisions does not affect the need for and reasonableness of the rules as proposed. Some of the suggested additional provisions are contrary to the statute, others are beyond the authority of the Commissioner, and others have been rejected by the Department on the basis of policy considerations.

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

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. The Department 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. The Department 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 Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, subp. 1 and 1400.1100.
6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

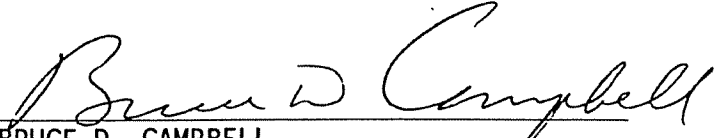
7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed 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, as amended, be adopted consistent with the Findings and Conclusions made above.

Dated this 7th day of May, 1993.



BRUCE D. CAMPBELL
Administrative Law Judge

Reported: Audio-magnetic Recording; No Transcript Prepared.