STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Permanent Rules of the Minnesota Department of Health Relating to Lead Abatement, Minnesota Rules Chapters 4760 and 4761.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on January 19, 1993, at 9:00 a.m. in the Soo Line Conference Room of the Sunwood Inn, Bandana Square, 1010 Bandana Boulevard West, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1990) to hear public comment, determine whether the Minnesota Department of Health ("the Department") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, determine whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

Paul G. Zerby, Special Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Douglas Benson, Coordinator of the Lead Program of the Department's Division of Environmental Health; M. Fredrick Mitchell, Section Chief for Community and Environmental Services of the Division of Environmental Health; and Jane A. Nelson, Rules Coordinator, Division of Environmental Health. Twenty-six persons attended the hearing. Twenty persons signed the hearing register. The Administrative Law Judge received seventeen agency exhibits and two public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until February 8, 1993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five business days were allowed for the filing of responsive comments. At the close of business on February 16, 1992, the rulemaking record closed for all purposes. The Administrative Law Judge received seven post-hearing written comments from interested persons. The Department submitted written comments responding to matters discussed at the hearing and comments filed during the twenty-day period. At the hearing and in its written comments, the Department proposed further amendments to the rules.

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4 (1990), this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alterative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On November 20, 1992, the Department filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules as certified by the Revisor of Statutes;

(b) the proposed Notice of and Order for Hearing;

(c) the Statement of Need and Reasonableness (SONAR); and

(d) a statement of the expected attendance at and duration of the hearing and that additional discretionary notice would be sent to certain persons.

2. On December 3, 1992, 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 and to those persons and associations receiving discretionary notice. Department Ex. 10.

3. On December 7, 1992, the proposed rules and the Notice of Hearing were published in 17 State Register 1383. Department Ex. 12.

4. On December 21, 1992, the Department filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;

(b) a copy of the State Register pages containing the Notice of Hearing and the proposed rules;

(c) an affidavit stating that the Notice of Hearing was mailed on December 3, 1992, to all persons on the Department's mailing list and certifying that the Department's mailing list was accurate and complete as of that date;

(d) an affidavit stating that additional discretionary notice of the hearing was mailed on December 3, 1992, to businesses involved in lead abatement, public utilities, state agencies, and local agencies;

(e) copies of the Notices of Solicitation of Outside Information or Opinions published in 16 State Register 870 on October 7, 1991, together with the materials received by the Department in response to the soliciations; and

(f) the names of agency personnel who would represent the Department at the hearing, and a statement that no other witnesses had been solicited by the Department to appear on its behalf.

5. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to February 16, 1993, the date the rulemaking record closed.

Nature of the Proposed Rules

6. As part of its ongoing mission to protect the health of persons in Minnesota, the Department regulates the allowable content of lead in drinking water, dust, and paint. A soil lead standard was set in 1991 by the Minnesota Pollution Control Agency (MPCA). The proposed rules modify the Departmemt's lead standards, incorporate the MPCA soil lead standard, incorporate soil lead abatement procedures, and establish lead abatement worker licensing and training requirements.

Statutory Authority

7. In its Notice of Hearing and SONAR, the Department cites Minn. Stat. § 144.878, subdivision 2, as amended by Laws of Minnesota 1992, Chapter 513, Article 5, Section 7; Minn. Stat. § 144.878, subd. 5, as adopted in Laws of Minnesota 1992, Chapter 522, Section 22 and Chapter 595, Section 22; Laws of Minnesota 1992, Chapter 522, Section 47, and Chapter 595, Section 28; and Minn. Stat. §§ 144.05 and 144.12 as its statutory authority for the proposed rules. Minn. Stat. § 144.878, subd. 5 provides as follows:

The commissioner shall adopt rules to license abatement contractors; to certify employees of lead abatement

> contractors who perform abatement, and to certify lead abatement trainers who provide lead abatement training for contractors, employees, or other lead abatement trainers. The rules must include standards and procedures for on-the-job training for swab teams. All lead abatement training must include a hands-on component and instruction on the health effects of lead exposure, the use of personal protective equipment, workplace hazards and safety problems, abatement methods and work practices, decontamination procedures, cleanup and waste disposal procedures, lead monitoring and testing methods, and legal rights and responsibilities....

The other statutory provisions cited authorize the transfer of MPCA soil lead rules to the Department's jurisdiction, authorize the Department to charge lead abatement licensing fees, and grant the Department general rulemaking authority. The Administrative Law Judge concludes that the Department has statutory authority to promulgate these rules.

Small Business Considerations in Rulemaking

8. Minn. Stat. § 14.115, subd. 2 (1990), requires that state agencies proposing rules which may affect small businesses must consider methods for reducing adverse impact on those businesses. Most of the contractors who perform lead abatement are small businesses. In its Notice of Hearing and SONAR, the Department asserted that the proposed rules do not affect the existing reporting, procedural, or scheduling requirements. Design standards and procedural requirements, in the Department's opinion, are not being altered by the proposed rules. The Department considered exempting small businesses, but concluded that such an exemption would run contrary to the need to protect public health and the environment as evidenced in Minn. Stat. § 144.878, subd. 2. The Department also noted that licensing lead abatement contractors meets one criterion for federal funding of that abatement. The Department has considered the impact of the proposed rules on small businesses as required by Minn. Stat. § 14.115, subd. 2 (1990), and that statute's requirements have been met in this rulemaking proceeding.

Fiscal Note

9. Minn. Stat. § 14.11, subd. 1 (1990), requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rule. In its Notice of Hearing and SONAR, the Department stated that the proposed rules would not require the expenditure of public money by local public bodies in excess of $100,000 per year during the next two years. The Department noted that the proposed definition of "elevated blood lead level" will increase the number of lead assessments required of local boards of health. The Department asserted that any increased cost results from Minn. Stat. § 144.874, subd. 1, as amended by Laws of Minnesota 1992, Chapter 522, Section 15, and Chapter 595, Section 15, which require local boards of health to conduct residence assessments as recommended by the Centers for Disease Control (CDC). While the proposed rule does define "elevated blood lead level," the requirement that the boards of health spend money arises from the statute. The Department is not required to prepare a fiscal notice with respect to the proposed rules.

Impact on Agricultural Land

10. Minn. Stat. § 14.11, subd. 2 (1990), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1990). Under those statutory provisions, adverse impact is deemed to include acquisition of farmland for a nonagricultural purpose, granting a permit for the nonagricultural use of farmland, the lease of state-owned land for nonagricultural purposes, or granting or loaning state funds for uses incompatible with agriculture. Minn. Stat. § 17.81, subd. 2 (1990). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land, Minn. Stat. § 14.11, subd. 2 (1990), does not apply.

Outside Information Solicited

11. In formulating these proposed rules, the Department published a notice soliciting outside information and opinions in the State Register in October, 1991. No information or opinions were received by the Department before the hearing notice in this matter was published.

Information Received During Reply Period

12. Judy Adams, President of Lead Free Kids, Inc. (LFK), submitted a comment on the last day of the reply period which contained: an U.S. Environmental Protection Agency lead abatement manual used in a training course held February 9-12, 1993, audiotapes of presentations given at that course, suggested changes to the proposed rules, a memorandum on the rulemaking process, samples of "paint and patch" orders, a letter from a resident in a home with lead contamination, and a compilation of statutes. The Department objected to the inclusion of these documents in the rulemaking record under Minn. Stat. § 14.15, subd. 1 which states, in pertinant part:

> Prior to writing the report, the administrative law judge shall allow the agency and interested persons five working days after the submission period ends to respond in writing to any new information submitted. During the five-day period, the agency may indicate in writing whether there are amendments suggested by other persons which the agency is willing to adopt. Additional evidence may not be submitted during this five-day period. The written responses shall be added to the rulemaking record.

On behalf of the Department, Special Assistant Attorney General Paul Zerby objected to the inclusion of LFK's submission in the rulemaking record. Zerby cited Minn. Stat. § 14.15, subd. 1 and Minn. Rule 1400.0850 (which states "additional evidence may not be submitted") as precluding the information submitted by LFK. Jeanne F. Ayers, Director of the Midwest Center for Occupational Health and Safety, objected to LFK's use of the tape recordings, since prior permission was not obtained. Ayers also suggested that abstracts of the tapes misrepresent the positions of the speakers and any speaker mentioned should be given a chance to respond. Placida Venegas of the Hazardous Waste Division of the MPCA maintained that LFK's characterization of her remarks at that seminar were "not fair and inconsistent."

The Judge has examined all of the material submitted and concluded that the bulk of the comment is new information which cannot be included into the record under Minn. Stat. § 14.15, subd. 1 and Minn. Rule 1400.0850. The suggested changes to the rule, the memorandum, the resident letter (Addendum M), and the statutory compilation (Addendum Q) have been included in the rulemaking record, however. The Judge has assessed the content of these items and finds that they respond to information in the record and are properly received during the response period. Any portion of the memoradum citing an addendum excluded as new information has been carefully scrutinized to ensure that the Department, interested persons, or others have not been prejudiced through the inclusion of the memoradum.

Substantive Provisions

13. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Department at the public hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be 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.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute. Any change proposed by the Department from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

Minnesota Rule 4761.0100 - Applicability

14. Minnesota rule 4761.0100 is amended in the proposed rules to clarify that these rules apply to lead abatement of property and playgrounds. To eliminate confusion over whether property owners are exempt, the Department proposed and then modified language specifying:

> In addition to lead abatement contractors and boards of health; this applicability includes, but is not limited to:

A. a property owner who personally performs lead abatement, either under an order to abate or voluntarily, on a residence that the owner occupies; and
B. a tenant who personally performs lead abatement on a residence that the tenant occupies.

The phrase "includes, but is not limited to" is a defect in the proposed rule. Whenever a rule states a definition and then purports to list specific instances of the definition, the rule is at risk of not providing adequate notice of what is covered by the definition. The finally proposed language is ambiguous, for example, as to whether the rules are applicable to a property owner personally performing abatement on a residence that is not owner-occupied. Lead abatement contractors and local boards of health are aware they are covered by these rules when they are performing abatement or issuing abatement orders. However, these contractors or boards also must meet requirements in these rules outside of the functions listed in this rule part. The following language is suggested to correct the defect and remedy any lingering ambiguities:

> Chapter 4761 applies to lead abatement contractors whether or not lead abatement is actually being conducted. Chapter 4761 applies to boards of health whether or not an order for abatement is actually issued. Property owners who personally perform lead abatement are not exempt from Chapter 4761, whether the abatement is performed under an order to abate or voluntarily, and whether the abatement is performed on a residence that the owner occupies. Tenants who personally perform lead abatement on their residence are not exempt from Chapter 4761.

The suggested language corrects the defect found in the rule part and removes ambiguities from the rule language. The suggested language is needed and reasonable and does not constitute a substantial change.

Minnesota Rule 4761.0200 - Definitions

15. A number of subparts in Minnesota Rule 4761.0200 are amended or added in the proposed rules to conform the definitions in the rule to new or altered statutory terms or new terms added to the proposed rules. Only those definitions which received comment will be discussed.

Subpart 5 - Assessment

16. Richard Peter, Director of Environmental Health Services for the Olmstead County Health Service suggested that defining "assessment" as preabatement sampling and analysis of residential property and playgrounds is too limited and should include the diet and other factors which can cause high blood lead levels. The Department declined to change the definition, explaining that the intent of the definition is to trigger the local board's of health examination of localities. What is to be looked at in these localities is set out in the assessment requirements, Minn. Rule 4761.0400. The Department has demonstrated its definition of assessment is needed and reasonable.

Subpart 6 - Bare Soil

17. The Department has amended the existing definition of "bare soil" (which is a cross-reference to another rule chapter) to incorporate the language adopted by the MPCA in its soil lead rules (Chapter 4760). LFK suggested that the language suggested by the administrative law judge in that rulemaking be adopted. The administrative law judge in that rulemaking found the MPCA's definition was shown to be needed and reasonable. The suggested language was merely a perceived improvement, not the correction of a defect. Where another agency has demonstrated a rule to be needed and reasonable, the Department is entitled to choose that same language. Without compelling evidence that the language is defective, the borrowed language is needed and reasonable. Using the same language also eliminates conflict between rules. Subpart 6 has been shown to be needed and reasonable.

Subpart 7a - Child

18. Tom Newcomb, an attorney with the firm of O'Neill, Burke, O'Neill, Leonard & O'Brian, representing the National Paint and Coatings Association (NPCA), suggested that the proposed definition of "child" in subpart 7a include the limitation that the child be no more than age 6. The proposed definition merely cross-references Minn. Stat. § 144.871. The statute contains that limitation. Subpart 7a is needed and reasonable, as proposed.

Subpart 9 - Elevated Blood Lead Level

19. Subpart 9, as presently promulgated, defines the term "elevated blood lead level" as at least 25 micrograms per deciliter (ug/dl) of whole blood. The Department has proposed changing the definition to 10 ug/dl. The statutory action levels for pregnant women is 10 ug/dl, for children under 6 years of age is 20 ug/dl and children under 6 years of age is 15 ug/dl if that level is maintained over 90 days. Minn. Stat. § 144.871, subd. 1. Jim Nordin, Ph.D. pointed out that "elevated blood lead level" is no longer used in the proposed rule. NPCA suggested that the term be defined by reference to statute. Minn. Stat. § 144.871, subd. 6 defines the term only by reference to the CDC guidelines on lead. In such a situation, setting a numerical level in the proposed rule is needed and reasonable. However, the definition is not strictly necessary if the term is not used in the proposed rule. The Judge suggests that the Department examine the transferred rules to determine if the term is used there. In the alternative, the Department could alter the first sentence of Minn. Rule 4761.0400, subp. 2 (lines 17-18) as follows: "lead exposure if a pregnant woman has an elevated blood lead level or if a ...." This modification is not required by the Judge, only suggested. Neither change constitutes a substantial change.

Subpart 12a - Lead Abatement Trainer

20. Gary J. Pechmann with the City of St. Paul's Division of Public Health questioned whether city employees doing nothing more than answering questions from the public about lead abatement would need to meet the requirements governing lead abatement trainers. The Department acknowledged St. Paul's concern and explained that lead abatement trainers are persons whose primary function is to provide education to persons who will work in lead abatement. To clarify the rule, Subpart 12a was modified to add "whose

primary function is to educate" to the definition. As modified, proposed subpart 12a has been shown to be needed and reasonable. The change is not a substantial change.

Subpart 13c - Point-of-Use Device

21. Olmstead County suggested that the Department's definition of "point-of-use device" is too narrow. The commentator suggested that any device processing water be disconnected. The Department declined to change the definition. The suggested change would include any in-home device, no matter how attached to the plumbing. Minn. Rule 4761.0400, subp. 6, as proposed in this rulemaking, requires point of use devices be disconnected or bypassed. With the difficulties inherent in disconnecting built-in devices, defining point-of-use devices as those attached only to the tap has been shown to needed and reasonable.

Minnesota Rule 4761.0300 - Standards

22. Minn. Rule 4761.0300 sets the standards for lead in paint in subpart 1 and drinking water in subpart 3. Both these subparts are amended in the proposed rules. Subpart 1 establishes the lead level in paint using either quantitative chemical analysis or an X-ray flourescence analyzer. The chemical analysis is typically more expensive. The testing process is stuctured so that an X-ray test can be used, but paint that fails that test can be chemically tested to determine if the paint's lead content actually exceeds the 5,000 ppm lead standard. This system was chosen to reduce testing costs while not sacrificing the additional accuracy of the chemical analysis for paint which is near the 5,000 ppm standard. NPCA suggested both tests be required. The Department declined to change the system. The amendment to subpart 1 merely clarifies that quantitative chemical analysis is to be used, and not some other type of laboratory analysis. Subpart 1 is needed and reasonable, as proposed.

23. Subpart 3 sets the standard for lead in drinking water which is 50 ug/l (micrograms per liter). The proposed language sets the new standard at 15 ug/l. Douglas Rovang, Water Division Diretor of Rochester Public Utilities, expressed a concern over the reduction of the lead standard for public water supplies from 50 to 15 ug/l. The Department responded that the EPA standard sets the standard at 15 ug/l, but allows public water supplies to have 10 percent of the samples exceed that standard. Setting the residential standard for lead in drinking water at 15 ug/l conforms with the EPA standard and protects public health. The standard is needed and reasonable.

Minnesota Rule 4761.0400 - Assessment

24. The cornerstone of reducing the blood lead levels of children under six and pregnant women is proper assessment of the source of that lead. Where action levels are met in a protected person's blood, a local board of health is required to conduct assessments of the residential property and any appropriate playground. Minn. Stat. § 144.871, subd. 6 (1992). The testing of bare soil, paint, household dust, and drinking water are covered by subparts 4, 5, 6, 7 and 8. Under the amendment proposed to subpart 1, if a board of health does not locate the probable souces of lead through testing, information must be provided to the affected residents on other sources of lead in a household. The information to be provided is a list of items which

have proven to be lead sources in the past. Commentators differed over whether the list was needed, where it should be located in the rules, and whether other items should be included. The list was adapted from a manual prepared under a contract from the United States Public Health Service. The list appears fairly comprehensive for likely sources of lead in a residence other than soil, dust, drinking water, or paint. The list is only required if the board of health has not identified a lead source through testing of paint, soil, dust, or drinking water. The Department expressly added these items, to replace "one or more probable sources of lead exposure." This new language has the effect of the old language while eliminating any potential ambiguity. The subpart, as modified, is needed and reasonable. The change is similar to that proposed by LFK and does not constitute a substantial change.

25. Dr. Carolyn McKay of the Minneapolis Health Department objected to the potential scope of the assessment required of playgrounds. The rule does not indicate how much of a playground or park must be assessed. The Department indicated that it did not intend to require local boards of health to assess entire parks, but only the area where the affected person was in contact with bare soil. To eliminate the potential confusion in the subpart, the Department added langauge limiting playground testing to bare soil where the child or woman was known to have been. The Department has shown that subpart 1, as modified, is needed and reasonable. The change is not a substantial change.

Subpart 2 - Assessment Required

26. When an assessment is required is set out in subpart 2. The blood lead levels in this provision are set by statute and discussed at Finding 19, above. The other amendments to the subpart authorize boards of health to contract for assessments and exempt testing of materials not subject to a board order to abate or voluntarily abated. Olmstead County suggested that the exemptions be expressed without using the word "not" so often (four times in one sentence). The Department indicated that the wording was designed to accomplish the exemption and that the terms were needed to indicate what was exempt. The Department's language is not so unclear as to constitute a defect, but is is not easy to read. The Judge suggests that the following language be considered to accomplish the exemption:

> Local board of health testing of the following items under subparts 4, 5 and 6 is optional:
>
> A. any materials a property owner has agreed in writing to abate;
>
> B. intact paint not producing dust;
>
> C. any material not subject to an abatement order.

The suggested language accomplishes the intent of the proposed language and uses only half the "nots." Both the proposed language and the suggested language are needed and reasonable. The suggested language is not a substantial change.

The Department modified subpart 2 at the hearing to incorporate a suggestion that the blood sample for testing be taken venously. The intent of the suggestion was to avoid false readings arising from contamination often found in the "fingerstick" method of testing. The modified language allows boards of health to use the inexpensive fingerstick test to screen for elevated blood lead levels and the more expensive (and accurate) test to determine if a costly assessment of the residence and playgrounds is required. The new language is needed and reasonable and not a substantial change.

Anoka County cited a case in which a child had moved to Minnesota from another city, was immediately tested, and a high blood lead level was found. Anoka County maintained that local boards of health should not be required to conduct assessments under circumstances where the lead level is likely to result from matters outside the boards' jurisdiction. The Department responded to this comment by modifying subpart 2 to incorporate the option of a variance under Minn Rules 4717.7000 to 4717.0050. The new language allows boards of health to avoid costly testing where the circumstances warrant a wait-and-see approach. Subpart 2, as modified, is needed and reasonable. The new language arose to resolve a commentator's objection and does not constitute a substantial change.

Subpart 4 - Paint

27. Two changes are proposed to the paint assessment requirement in subpart 4. One change is that only residences built prior to February 27, 1978 must be tested. The other change deletes an ambiguous word regarding paint that must be tested. Anoka County questioned whether the residence construction date language created a conflict within the subpart. The Department responded that the new language removes the identified residences from any paint assessment requirement, since paint manufactured on or after that date did not contain significant amounts of lead. There is no conflict in the rule and the subpart is needed and reasonable as proposed.

Subpart 5 - Dust

28. William H. George, Senior Industrial Hygienist, and Doug Jennings, Lead Chemist, of Twin City Testing, Corporation (Twin City Testing) expressed concern that subparts 5 and 7 did not offer the best quality assurance in testing. Both subparts specify the "University of Minnesota Method" (U of M Method) for determining lead in soil or dust. Twin City Testing urged the adoption of EPA Method 3050 and Method 6010. The commentator asserted that the U of M Method suffered from neutralizing samples and difficulty in calibrating some instrumentation. The Department defended its choice of the U of M Method as having some advantages. Since that portion of subparts 5 and 7 are already promulgated as rules, the Department is not obligated to demonstrate its need and reasonableness. The Department did recognize that the EPA methods are suitable for testing the lead content of dust and soil and modified subparts 5 and 7 accordingly. The new language is needed and reasonable and does not constitute a substantial change.

Subpart 6 - Drinking Water

29. The existing test methodology (incorporated by reference) in subpart 6 is amended in this rulemaking by replacing it with express testing

methods. The amendment requires one liter of cold tap water be collected. The water must have been sitting in the pipes for at least six hours. Any point-of-use device must be disconnected or bypassed to collect the sample. Dr. Nordin objected to collecting a liter of water, and suggested that 250 milliliters (.25 liter) was an adequate amount of water for testing. There is no indication that collecting one liter of water is an undue burden for a person conducting a test. Dr. McKay asserted that it would be impossible to ensure that water had been sitting in the pipes for six hours, particularly in multi-unit dwellings. The Department responded that obtaining a statement from residents that the water has not been used for the established period meets the Department's requirement. The local boards of health must do the best they can to ensure that the six hour standard is met; however, responsibility for compliance is ultimately upon the resident. As a matter of practicality, if water is not normally standing for six hours, it is unlikely to be the source of a person's elevated blood lead level.

Minnesota Rule 4761.0500 - Lead Abatement Methods

30. The scope of Minnesota Rule 4761.0500 is amended by adding "bare soil" to the list of lead sources which must be abated under this rule part. The only other changes to this rule part are the addition of subparts 9-14 which are the present rules on soil lead abatement of the MPCA (Minn. Rule chapter 4760). Those rules were determined to be needed and reasonable in a prior proceeding. The Department has relied upon that prior determination in proposing the rule part for adoption. The MPCA demonstrated that the rule language was needed and reasonable in the original adoption proceeding. The effect of adopting this "new" language in a Department of Health rule is to transfer the existing language without modification. In this case, the Department is not required to demonstrate that the rule is needed and reasonable. Several commentators questioned parts of the rule, but no defects were demonstrated in those parts. The Department explained how it intended to apply the transferred language. Subparts 9-14 have been shown to be needed and reasonable.

Minnesota Rule 4761.0600 - Reassessment

31. After abatement is performed, Minnesota Rule 4761.0600 requires reassessment of the residence or playground. The reassessment provision essentially repeats the assessment requirements, and allows confirmation that the sources of lead have been eliminated. Anoka County suggested that the reassessment be of the aspect (soil, dust, paint, or drinking water) that exceeded the standard not all aspects (soil, dust, paint, and drinking water). The Department agreed and made that change in the amending language to subpart 1. Dr. McKay and Dr. Nordin pointed out that the proposed reassessment sampling method for drinking water in subpart 2 differed from the assessment sampling method. The Department acknowledged that the sampling methods should be the same to ensure abatement has been performed and conformed the two methods. The Department has shown that the reassessment rule, as modified, is needed and reasonable. The modifications are not substantial changes.

Proposed Rule 4761.0710 - Licensing Requirements for Lead Abatement Contractors

32. The former registration requirement for lead abatement contractors has been changed to licensing by Minn. Stat. § 144.876, subd. 1, which is

reflected in the amendment proposed to Minnesota Rule 4761.0700. The requirements lead abatement contractors must meet are set out in proposed rule 4761.0710. An application form, a $100 nonrefundable fee, and certification that an approved lead abatement course has been completed are required by subpart 2. The license is valid for one year, unless revoked. Reapplication requires a $100 fee and proof of completing, at a minimum, a refresher course on lead abatement. Subpart 1 exempts a property owner personally performing abatement on the residence the owner occupies from the licensing requirement. The subpart explicitly requires such owners comply with part 4761.0500 when conducting abatement.

Shawn Otto, President of Fresh Paint, Inc., asserted that the license fee (and certification fees for lead abatement workers) imposed an undue hardship on employers due to high turnover of workers in this area. The license fee has been set to cover the Department's cost in issuing the licenses required by statute. SONAR, at 16. The Department has demonstrated that the fee amount is appropriate. The rules do not require that employers pay the fees for their employees. The employer may choose to reimburse employees at the end of the year, if the employees remain with that employer. Proposed rule 4761.0710 has been shown to be needed and reasonable.

Proposed Rule 4761.0720 - Certification of Lead Abatement Workers

33. Where lead abatement contractors are licensed, Minn. Stat. § 144.876, subd. 1, requires certification of lead abatement workers. The certification process in proposed rule 4761.0720 parallels the licensing process, with an application, a $50 certificate fee, and a course completion requirement. Property owners personally performing abatement on the residence the owner occupies are exempt from the certificate requirement. Subpart 1 explicitly requires that such persons comply with part 4761.0500 when conducting abatement. The certificate fee has been set to cover the Department's cost in issuing the certificates required by statute. Proposed rule 4761.0720 has been shown to be needed and reasonable.

Proposed Rule 4761.0740 - Approval of Lead Abatement Courses

34. Lead abatement contractors, workers, and trainers must complete an approved course to obtain the license or certification required to perform abatement. Proposed rule 4761.0740 establishes a process to qualify courses for use in the certication and licensing of lead abatement personnel. Subpart 1 expressly makes the course given in 1992 sponsored by the Department an approved course. EPA lead abatement courses sponsored by regional lead training centers are also expressly approved.

Subpart 2 allows other course presenters to apply for approval as a qualifying lead abatement course. As originally proposed, a 90-day prior notice of the course was required. LFK suggested that such a long notice period imposed a hardship on the course sponsor. The Department had proposed a 90-day period to allow for out-of-state travel by a staff member to attend the course. Upon consideration, the Department concluded that it is unlikely to receive many out-of-state requests for approval and that 30 days is adequate notice. The Department changed the subpart accordingly.

35. LFK objected to the $100 course approval fee payable to the Department under subpart 2(A). The Department cited Minn. Stat. § 144.876, subd. 1 as support for its fee requirement. That subdivision states, in pertinant part:

> The commissioner shall specify training and testing requirements for licensure and certification and shall charge a fee for the cost of issuing a license or certificate and for training provided by the commissioner.
>
> ...
>
> Fees collected under this subdivision must be set in amounts to be determined by the commissioner to cover but not to exceed the cost of adopting rules under section 144.878, subdivision 5, the costs of licensure, certification, and training, and the costs of enforcing licenses and certificates under this subdivision....

Minn. Stat. § 144.876, subd. 1.

The Commissioner is not directly providing the training approved under subpart 2. However, the Commissioner is authorizing that course and therefore is indirectly providing the training. A fee for course approval is consistent with the legislative intent underpinning the fee-collecting authority granted by Minn. Stat. § 144.876, subd. 1. The Department has shown that its collection of a fee for course approval is needed, reasonable, and statutorily authorized.

36. As originally proposed, courses must be resubmitted for approval at least biennially. At the hearing, the Department proposed that the time for resubmission be changed to "biennially or if the course content is modified." LFK questioned whether the fee was required for each offering of an approved course. The Department added a clarification that the $100 approval application fee was required for initial, renewal, and modification applications. The Department explained that once a course is approved it can be offered as many times as the sponsor chooses, until the course is modified or a biennial approval was due. Subpart 2, as modified, is needed and reasonable. The modifications clarify the rule and ease the burden on the sponsor for prior notice. The modifications are not substantial changes.

37. For a lead abatement course to be approved it must meet the requirements of subpart 3. Item D, as originally proposed, required three days of coursework, with eight hours offered each day, minus breaks and lunch. Raymond Rapp of the International Brotherhood of Painters and Allied Trades suggested flexibility in scheduling the coursework. The Department agreed with the suggestion and modified the item to require 24 hours of coursework, minus breaks and meals, and permits the individual course to be offered over a 30 calendar-day span. Item D, as modified, is needed and reasonable. The modifications do not constitute a substantial change.

38. As originally proposed, item F added an eight hour period to the 24 hours required in item D. The further eight hours are to be spent on practicing use of personal protection equipment, site preparation, lead abatement methods, and cleanup. The additional time would be required of

courses offered as of July 1, 1993. LKF asked whether the eight hours was part of the 24 or was the total time 32 hours. The Department modified item F to clarify that 32 hours total were required and that the item F hours could be done within the 30 calendar day period allowed under item D. The modified item is needed and reasonable. The changes clarify the rule and allow more discretion on the part of the course sponsors. The modifications do not constitute substantial changes.

39. LFK strongly urged that specific courses be explicitly approved in the rules. This would ease the burden on some course sponsors by removing the need for applications and approval. The Department declined to make the suggested change. The only courses the Department does not have either sponsorship of, or approval authority over, are those sponsored by the EPA. The Department justifies its retention of control by citing the rapidly changing nature of the lead abatement field, which makes the potential for course obsolescence an important consideration. Declining to name more specific courses is not a defect in the proposed rules.

Proposed Rule 4761.0760 - Priorities for Response Action for Residential Sites and Playgrounds
Proposed Rule 4761.0780 - Abatement Priority List
Proposed Rule 4761.0790 - Response Action

40. Several commentators questioned the need for establishing priorities among response actions on residential sites. The Department explained that Minn. Stat. § 144.878 required the adoption of these rule parts by the MPCA and now responsibility for administering this statute has been transferred to the Department. These rule parts were originally adopted by the MPCA and those subparts which could be used without any changes were simply renumbered (e.g. Renumberer - 4760.0530, subparts 2 and 3 to 4761.0780, subparts 2 and 3). As discussed in Finding 17, above, the Department need not show particular facts unless a commentator shows the rule may be defective. No commentator has done so. The proposed rule parts on abatement priorities are needed and reasonable.

Proposed Rule 4761.0795 - Local Enforcement

41. Proposed rule 4671.0795 states that these rules do not preclude the authority of any other local unit of government to set lead standards. The Minnesota Environmental Health Association (MEHA) questioned what standards were covered by this rule part. The Department explained that the rule part is intended only to make clear that the legal doctrine of preemption does not apply in the case of lead standards. This means, for example, that if a municipality passes an ordinance setting a more stringent lead standard in soil, these rules do not prevent that ordinance from taking effect. There is no evidence that Minn. Stat. chapter 144 is intended to preempt local government authority. Proposed rule 4761.0795 is needed and reasonable, as proposed.

Other Issues

42. MEHA suggested implementation of the rules be postponed until systematic implementation of the lead standards can be accomplished. The Department cited the history of administrative rules in this area as evidence that an incremental approach is appropriate. Lead has been recognized as an

environmental and health hazard for many decades. The attention given in recent years to the blood lead content of children and pregnant women is evidence that more emphasis is being devoted to the problem. The more stringent standard for lead in drinking water (from 50 ug/l to 15 ug/l) shows that an incremental approach is being taken to reduce the lead hazard. The proposed rules are, for the most part, existing rules transferred from the MPCA to the Department. There has been no showing that postponing the adoption of these rules is needed.

43. The proposed rules emphasize abatement of lead hazards for persons identified as being at risk. MEHA suggested that public education regarding lead hazards is not being addressed. The Department responded that its statutory authority to act was dependent upon blood lead levels and general education was being conducted, consistent with available funding. The proposed rules follow the statutory approach toward the lead problem. The Department has demonstrated that the rules are needed and reasonable. While education is desirable, allocation of resources to accomplish that goal is primarily the responsibility of the Legislature.

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

CONCLUSIONS

1. The Minnesota Department of Health ("the Department") gave proper notice of this rulemaking hearing.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, subds. 1, 1a, and 2 (1991), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50(i) and (ii) (1990).

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) (1990), except as noted at Finding 14.

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 (1990), and Minn. Rules pts. 1400.1000, subp. 1 and 1400.1100 (1991).

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusion 4 as noted at Finding 14.

7. Due to Conclusions 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted in accordance with the Findings and Conclusions in this Report.

Dated this 15 day of March, 1993.

JON L. LUNDE
Administrative Law Judge

Reported: Tape Recorded, No Transcript.