STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Rules of the Minnesota Department of Health Relating to Fees for Wells and Borings Authorized Under Minnesota Statutes, chapter 103I Amending Minnesota Rules, Chapter 4725; and Amendments to Minnesota Rules part 4720.0010 Relating to Plan Review for Noncommunity Public Water Supply Systems.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr. on July 8, 1993, at 9:00 a.m. in Room 5, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (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.

Maria Christu, Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Department staff at the hearing. The Department's hearing panel consisted of Patricia Bloomgren, Director of the Department's Division of Environmental Health; Gary Englund, Section Chief for Water Supply and Well Management of the Division of Environmental Health; Dan Wilson, Supervisor of the Well Management Unit; and Jane A. Nelson, Rules Coordinator, Division of Environmental Health.

Twelve of the twenty-four persons attending the hearing signed the hearing register. A number of agency public exhibits were received during the hearing, which continued until all interested persons, groups or associations had an opportunity to be heard. Hundreds of realtors, attorneys, bankers and county officials from all over the state participated in the proceeding by submitting individual written comments.

The record remained open for the submission of written comments until July 28, 1993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, five business days were allowed for the filing of responsive comments. At the close of business on August 4, 1993, the rulemaking record closed for all purposes. The Department and the public submitted post-hearing written comments. At the hearing and in its written comments, the Department proposed further amendments to the rules.

The comment was received after the close of the record. Under Minn. Rule 1400.0900 the rulemaking record closes at the end of the response period. The late comment was consequently not considered in the preparation of this Report.

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 May 5, 1993, 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 May 20, 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 and to those persons and associations receiving discretionary notice. Department Ex. 9.

3. On May 24, 1993, the proposed rules and the Notice of Hearing were published in 17 State Register 2892. Department Ex. 12.

4. On June 10, 1993, 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 May 20, 1993, to all persons on the Department's mailing list and certifying that the Department's mailing list was accurate and complete as of May 18, 1993;

(d) an affidavit stating that additional discretionary notice of the hearing was mailed on May 20, 1993, to Minnesota County Recorders, representatives of the well and boring construction industry, and representatives of the real estate industry;

(e) copies of the Notices of Solicitation of Outside Information or Opinions published in 17 State Register 2107 on March 1, 1993, 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 August 21, 1993, the date the rulemaking record closed. The mailing list was certified as accurate and complete two days before the notice was mailed. The certification should be performed immediately before the mailing to assure that all the persons seeking notice from the Department are on the list. There is no indication that any interested person was omitted from the mailing list as a result of this noncompliance and therefore the noncompliance is a harmless error. This does not constitute a defect in the proposed rules.

Nature of the Proposed Rules

6. Under the wells and borings program established in 1989, the Department was to cover all of its administrative costs by charging appropriate fees for various registrations, permits, and notices. SONAR, at 3. However, the Department has been spending more on administration than it has collected in fees, leading it to conclude that the fee structure must be modified to correct that deficit. This rulemaking would modify some of the fees charged under the program and exempt certain wells from rule requirements. A few technical amendments are also proposed to conform the rules to statutory amendments and changes in other rules.

Statutory Authority

7. In its Notice of Hearing and SONAR, the Department staff cites Minn. Stat. § 103I.101, subdivision 5(7) and Minn. Stat. § 144.122(a) as its statutory authority for the proposed rules. A number of specific fee amounts are set in Minn. Stat. Chap. 103I for various actions under the wells and borings program. Minn. Stat. § 103I.101, subd. 5(7) allows the Commissioner to adopt rules including:

> modification of fees prescribed in this chapter, according to the procedures for setting fees in section 16A.128.

Several hearing participants, including the Faribault County Bar Association, asserted that the Department lacks the statutory authority to increase the fees beyond the amounts set in Chapter 103I. Minn. Stat. § 16A.128, subd. 1 states:

> Agency fees and fee adjustments shall not exceed amounts established by statute. Where amounts are not established by statute, fees shall be established or adjusted as provided in this section. . .

The fees in Chapter 103I which are sought to be modified in this rulemaking are set by that statute, which specifically authorizes subsequent modification. The Department asserts that Minn. Stat. § 16A.128, subd. 1 is a general statute which conflicts with the specific authority granted by Minn. Stat. § 103I.101, subd. 5(7). Where such a conflict exists, the more specific statutory provision prevails. Minn. Stat. § 645.26, subd. 1.

However, this general - specific - conflict principle of statutory construction applies only when one law is general and another specific and then only when there is a specific irreconcilable conflict between the provisions of both statutes. That is manifestly not the case here.

Minn. Stat. § 103.I gives the Department the general authority to modify fees in that Chapter "according to the procedures for setting fees in section 16.A.128." 16.A.128 allows for downward adjustments of existing statutory fees and establishment of new ones, detailing modification procedures. 103.I is not a specific exception to general authority in 16.A.128 and there is no explicit contradiction between those two sections. Indeed, 103.I explicitly incorporates the limitations of 16.A.128 by reference. 16.A.128 allows executive branch departments and agencies very broad discretion in imposing service-specific taxes, as long as "adjustments shall not exceed amounts established by statute."

Department staff urges the Commissioner to ignore this unequivocal statutory language and adopt its interpretation of what it asserts the Legislature really intended. This proposal is contrary to the prime directive of statutory construction in Minn. Stat. § 645.16 that the language of the law should never be ignored in pursuing its alleged spirit.

> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing its spirit.

In order to adopt the staff interpretation, the Commissioner would also have to ignore another fundamental tenet of statutory construction in Minn. Stat. § 645.16, that wherever possible, laws should be construed to give effect to all of their stated provisions. She is asked to adopt an interpretation that would give no effect to the unambiguous stipulation that fee adjustments must be made "according to the procedures for setting fees in section 16A.128" and the unambiguous requirmemt of that section that "fee adjustments shall not exceed amounts established by statute."

It is clear throughout Chapter 645 (the provisions of the statutes detailing how the Legislature intends its statutes to be interpreted) that it is error to speculate on "legislative intent" unless there is language in the statute which is ambiguous. As discussed above, there is no ambiguity or potential double meaning here.

However, assuming arguendo, that the words the Legislature used were argueably patently obfuscated, Chapter 645 would then require examination of the "legislative history" and the "facts and circumstances" surrounding the adoption of the legislation, to ascertain Legislature's actual "intent". There is no evidence in this record with regard to either the legislative history or the other circumstances of adoption of Chapter 103 I which would corroborate the alleged intent of the Legislature to authorize what is proposed.

The staff representatives at the hearing contended that the proposed changes would be consistent with legislative intent and that several individual legislators endorsed their interpretation of the statutes, supporting this effort to exceed the explicit statutory fee limits in these administrative rules. These staff representatives promised to supply specific documentation of alleged meetings, including supporting memoranda identifying the specific legislators and other "legislative history" with their written post-hearing comments, but nothing was submitted other than allusion to some discussions regarding a recent draft of a bill that was never introduced which would have specifically precluded this proceeding in some unspecified fashion.

The staff representatives also have not pointed to any particular circumstances surrounding the adoption of Chapter 103I which would support their proposed interpretation. The statute was adopted in part to explicitly resolve conflicts over how program costs should be apportioned among several competing interests who were concerned about avoiding or minimizing increased taxes. Well contractors sought to avoid increased license application, renewal, examination, machinery and other fees. Major developers convinced legislators to put a lid on their exposure for fees for projects involving more than 10 dewatering wells. Real estate interests voiced their concerns which were repeated in this proceeding over escalating taxation of property transfers.

Legislators did not duck this conflict by adopting a statute that was silent on fees, leaving it to the Department to establish and adjust fees pursuant to 16A.128 which allows agencies to set fees "where amounts are not established by statute . . . ." Legislators also did not adopt an arguable

exception to 16A.128 by omitting any mention of this uniform provision, substituting authority to increase fees "under the provisions of Chapter 14" (the rulemaking statute) as they have done elsewhere. Instead, the circumstances surrounding the adoption of the disputed legislation relevant to this inquiry are legislators: (1) biting the bullet; (2) setting specific fees; and (3) enacting specific language incorporating a uniform law prohibiting upward revisions of such amounts when particular amounts are set in statutes.

The other statutory provision cited generally authorizes the Department to set fees in programs it licenses. This provision, Minn. Stat. § 144.122(a), does not authorize modification of fees set by statute. The Department asserts that both Minn. Stat. §§ 16A.128 and 144.122(a) have been found to authorize fee modifications in other rulemakings. See In the Matter of the Proposed Adoption of Health Maintenance Organization Fees, OAH No. 6-0900-5272-1 (Report issued April 17, 1991); In the Matter of the Proposed Rules Governing Health Maintenance Organizations, OAH No. 8-0900-3156-1 (Report issued March 31, 1989). In those prior rulemakings, the fees modified were set by statute and the modification provision reads:

> The commissioner may adjust the renewal fee in rule under the provisions of chapter 14.

Minn. Stat. § 62D.211.

Under the Health Maintenance Organization (HMO) fee provisions, the Department is authorized to use Chapter 14 rulemaking to modify fees. Minn. Stat. § 144.122(a) further supports the statutory authority of the Department to conduct a general rulemaking regarding HMO fees. The general authority for HMO fee revision arises out of both Minn. Stat. §§ 62D.211 and 144.122(a). The existence of the additional authority is significant because the general fee setting authority in Minn. Stat. § 62D.211 is broader than that in Minn. Stat. § 16A.128, and could have affected the outcome in that rulemaking by demonstrating a general legislative intent to recoup the Department's total program costs in general fee setting rulemakings.

The statutory authority for modifying fees under the wells and borings program, Minn. Stat. § 103I.101, subd. 5(7), requires that the Department use a specific statutory mechanism for adopting fees. That specific mechanism is Minn. Stat. § 16A.128. The maximum increase in fees under that statute is the difference between the legislative appropriation and the costs of the fee function. The provisions of Minn. Stat. § 144.122(a) are less stringent than those of Minn. Stat. § 16A.128. Since the Legislature has directed in 103I that the Department follow the specific method of modifying statutorily set fees in 16A.128, a different, less stringent method cannot be substituted. The effect of recent legislative changes will be discussed at the appropriate findings, below.

The Department has documented its statutory authority to promulgate fee rules under Minn. Stat. § 103I.101, subd. 5(7). The Department also has general statutory rulemaking authority for the wells and borings program under Minn. Stat. § 144.122(a). The Department has not documented its statutory authority to "exceed amounts established by statute" contrary to Minn. Stat. § 16A.128. Four potential ways of correcting this defect are enumerated below in Finding 20.

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. The Department concluded that increases in fees which would be paid by small businesses would be passed on to customers. The only businesses which would not be significantly affected by the fee increases are large businesses owning property on which a well or boring is drilled. In its SONAR, the Department asserted that the proposed rules do not affect the existing reporting, procedural, or scheduling requirements. Design standards and procedural requirements are not being altered by the proposed rules. Exempting small businesses from the fee increases is possible, but that would defeat the need to raise adequate revenue. 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., except for part 4725.035, subpart 6G, discussed below in Finding 15.

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. A number of County Recorders objected to the increased fee for filing a well disclosure form. That fee is not paid by the County Recorder. Rather, the County Recorder receives a $2.50 fee out of the overall filing fee. The Department is specifically prohibited from charging fees to the State or local units of government, directly or indirectly, by Minn. Stat. § 103I.112.

Several commentators urged that the County Recorder fee be increased commensurate with the filing fee increase. The Department concluded that it had no statutory authority to make a commensurate adjustment in the county share, because the splitting of the filing fee was established by the statute. The changes to the proposed rule would substantially increase the notification and error correction costs to County Recorders. Most of their costs are however, already present under the existing rule. At least partial payment for those costs is provided for in Minn. Stat. § 103I.235, subd. 1(i). The Department is not required to prepare a fiscal notice with respect to the proposed rules, based on this record.

On the other hand, if revised rules are noticed for a renewed hearing, the rulemaking process would be helped if staff would specifically respond to the detailed alleged increases contained in county post-hearing comments, in its revised SONAR. It would also be helpful if that discussion could expand on why staff contends that Minn. Stat. §§ 16A.128 and 103I.101, subd. 5(7) authorize adjustments that exceed amounts set in statute but do not authorized commensurate adjustments in the local adminstrative share set in the same statute.

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 March, 1993. No information or opinions were received by the Department before the hearing notice in this matter was published.

Substantive Provisions

12. 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 facts. 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. It is found 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 4720.0010 - Water Supply and Sewerage Systems

13. Minnesota rule 4720.0010 is amended in the proposed rules to exempt wells installed or materially altered to provide water to an noncommunity or nontransient noncommunity water supply. The exemption removes the need for filing prior plans for relatively simple water systems. The Department has discovered that such well owners are usually incapable of meeting the filing requirements. SONAR, at 6. On-site inspection of such wells has been used by the Department to take the place of plan filing. Id. Supplies to churches or businesses are examples of such wells.

No commentator objected to the exemption being added to proposed rule 4720.0010. In its post-hearing comment, the Department further altered rule part 4720.0010 to eliminate any conflict of jurisdiction with the Minnesota Pollution Control Agency. No commentator objected to this latter change. The rule part is needed and reasonable as modified. The change to the rule part does not constitute a substantial change.

Proposed Rule 4725.0350 - Fees Applicable to this Chapter

14. All new language is proposed in part 4725.0350 to modify the fee structure of the wells and borings program. The fees were originally set in statute at the following amounts:

Examination Application Fee	$ 50.00
License or Registration Fee	
(Well Contractor)	250.00
(all others)	50.00
Late Renewal Fee (additional)	10.00
Well Notification Fee (per well)	50.00
Permit Fee	50.00
(>10 dewatering wells)	500.00
(>10 unused dewatering wells)	250.00
(Dewatering Well Maintenance Permit)	25.00
Drilling Machine Registration Fee	50.00
Pump Hoist Registration Fee	50.00
Well Disclosure Fee	10.00
Variance Fee	100.00

The fees proposed by rule are as follows:

Examination Application Fee	$ 50.00
License or Registration Fee	
(Well Contractor)	50.00
(all others)	50.00
Late Renewal Fee (additional)	50.00
Well Notification Fee (per well)	100.00
Permit Fee	100.00
(>10 dewatering wells)	500.00
(>10 unused dewatering wells)	250.00
(Dewatering Well Maintenance Permit)	100.00
Drilling Machine Registration Fee	50.00
Pump Hoist Registration Fee	50.00
Well Disclosure Fee	20.00
Variance Fee	100.00

The Department supported these fees as necessary to eliminate the deficit in the wells and borings program. Under the existing fee structure, the deficit in fiscal 1992 was $966,000; the projected deficit in fiscal 1993 is $1,156,000. SONAR, at 14 (Table 5). Estimates of the anticipated revenue from the modified fees show the following surpluses:

1994	$ 60,000
1995	82,000
1996	19,000

By 1997, the program is projected to run a deficit of $46,000 and in 1998 a deficit of $114,000 is projected. Id. The Department's estimate has the wells and borings program fee revenue essentially balancing over the period from 1994 to 1998.

15. Only two fees were commented upon in this rulemaking. The first involved proposed part 4725.035, subpart 6.G. relating to the statutory maximum fee for projects with more than 10 dewatering wells. The existing rule repeats the statutory fee of $50.00 per well with a maximum fee of $500.00 for projects with 10 or more wells. The rules as originally proposed raised the $50.00 fee per well to $100.00, but (apparently inadvertently) failed to increase the maximum fee for 10 or more wells to $1,000.00. As proposed, the fee for a project with 7 wells would have been $700.00, 8 wells $800.00, etc., while a project with 10 or more wells would pay a fee of only $500.00. This was called to the attention of staff representatives who promised to propose a correction in their final post-hearing written comments.

The proposed amendments in those final comments did not change the 10 plus well maximum fee from $500 to $1,000.00. Instead, the staff proposed reducing the statutory maximum of 10 or more wells to 5 or more wells.

This proposal would significantly shift proposed increased administrative costs from larger projects to smaller projects. The fees for a project with 4 wells would double (from the current $200.00 to $400.00) while the fees for a project with 9 wells would increase only roughly 10% (from the current $450.00 to $500.00).

The proposed amendment would be a "substantial change" from the rules as proposed in the notice of Hearing, as that term is defined in Minn. Rule 1400.1100, subp. 2. It would be "a major substantive change that was not raised by the original notice of hearing in such a way as to invite reaction at the hearing . . ." Reducing the maximum fee for multiple well dewatering projects from 10 plus wells to five plus wells is a new idea that was not raised at the hearing or in its public notice. The proposal also "results in a rule fundamentally different in effect from that contained in the notice of hearing." The rule noticed for hearing would have increased fees equally for all projects of less than 10 dewatering wells - doubling them. The proposed amendment would double fees for projects of less than 6 wells and establish a sliding scale increase for projects of 6 or more wells. The rule noticed for hearing would have increased fees for a 9-well project by $450.00 to $900.00. The proposed amendment would reduce that increase to $50.00 Projects with 9 wells or 10 wells or 15 or more wells would pay the same $500.00 fee as a 5-well project.

The proposed amendment is also fundamentally antithetical to the mandates of Minn. Stat. § 14.115 which requires adaptation of rules to the needs and problems of small businesses. That statue mandates less stringent

fee and other compliance requirements for small businesses, wherever feasible. The proposed amendment would appear to have the opposite impact, establishing progressively less stringent fee schedules for larger businesses executing larger projects.

These defects in the proposed amendment can be cured by reverting to the language proposed in the Notice of Hearing, revising the $500.00 fee for projects of 10 or more wells to read $1,000.00, Note, however that this will not cure the statutory authority defect discussed in Finding 7 or the functional analysis defect discussed in Finding 20. Suggestions for remedying those problems are contained in Finding 20.

16. The other fee which received substantial comment is the increase from $10 to $20 for the well notification fee. The Minnesota County Recorders Association and individual County Recorders from 37 Minnesota counties objected to this change. Several commentators suggested that this requirement would interfere with the smooth functioning of the land title system in Minnesota and perhaps cause harm to property owners who fail to meet the filing requirement. Other commentators expressed their opinion that a 100 per cent increase in the filing fee was unreasonable. Many County Recorders suggested that an increase in the filing fee will cause many land owners to falsely claim that no wells are on the property, since no fee is charged to such property transfers.

17. The Department responded to each of the objections raised to the notification fee increase. The notification requirement arises from statute, not these rules. Problems for property owners from the notification requirement are no more severe with a twenty dollar fee than with a ten dollar fee. Falsely claiming that no wells are on the transferred property to avoid the fee is a problem the Department must wrestle with so long as any fee is charged. Increasing the statutorily mandated fee may further encourage fraudulent filings, but the Department is free to enforce any prohibition against such conduct, as the Department deems prudent. The risk of an increase in fraudulent filings is significant, but does not rise to level of rendering the proposed fee increase unreasonable.

18. The County Recorders unanimously objected to the doubling of the notification fee. They maintained that the amount of the fee increase is unreasonable. Demonstrating that a particular amount of money for a fee is unreasonable is difficult. However, the burden is on the Department to demonstrate that the proposed rule is needed and reasonable. Aggregate totals of the expenses incurred by the Department over the next several years have been introduced into the record. The total amount to be obtained through the proposed fees has been estimated. To the extent that the totals nearly balance over time, the Department has shown that the total amount of the fees sought is reasonable to meet its budget projections.

Proper Method for Fee Calculation

19. While the total amount of all fees is reasonable to meet the anticipated expenses of the Department, the method to determine the appropriateness of any particular fee amount is in controversy. Assuming, for the sake of complete analysis, that Finding 7 could be incorrect and that the Department has authority to increase fees beyond statutory limits; the question remains as to whether particular increases in fees are appropriately limited to the fee function.

Before August 1, 1993, Minn. Stat. 16A.128 established the method to determine the appropriateness of a fee set or adjusted by rule. The formula for calculating the fee amount is:

> so the total fees nearly equal the sum of the appropriations for the accounts plus the agency's general support costs, statewide indirect costs, and attorney general costs attributable to the fee function

Minn. Stat. 16A.128, subd. 1a.

This statute was repealed by Laws of Minnesota 1993, Chapter 192, Section 110(b). The effective date of repeal was August 1, 1993. In the same chapter, Section 56 enacts Minn. Stat. § 16A.1285. That statute defines "department earnings" as "any charge for goods and services and any regulatory, licensure, or other similar charges levied by a state agency ...." Minn. Stat. § 16A.1285, subd. 1. Subdivision 2 of that statute requires the charge for a good or service to "neither significantly over recover or under recover" the cost of providing that good or service. Where agencies set regulatory or license fees in the public interest, the statute permits the agency to "recover, but ... not limited to, the costs involved in the performance and administration of the functions involved." Minn. Stat. § 16A.1285, subd. 2.

Where Minn. Stat. § 16A.128 required a balance sheet approach to demonstrating the appropriate fee amount and limited the amount which could be levied. Minn. Stat. § 16A.1285 sets the cost of performing and administering the functions involved with the fee as the "floor" and allows the fee to go higher. These differences significantly lessen the burden on an agency to demonstrate the basis for a fee from the former to the latter statute.

A significant issue remains however, as to what statute applies to this rulemaking. Minn. Stat. § 16A.1285 was not adopted until the rulemaking proceeding was underway. Under the canons of statutory construction, the repeal of a law does not affect any proceeding commenced under that law. Minn. Stat. § 645.35. However, that statute also allows that the matter "may be proceeded with and concluded under the provision of the new law, if any, enacted." Id. No standards are set to determine when the former statute should be used or when the new statute should be used.

In essence, three alternatives are presented by the repeal of Minn. Stat. § 16A.128, the adoption of Minn. Stat. § 16A.1285, and the retention of the language in Minn. Stat. § 103I.101, subd. 5(7). The repeal could eliminate the method for the Department to change the fees and thereby vitiate the express authority granted to Department for that purpose. The repeal could be irrelevant, since the express langauge of the authorizing statute (Minn. Stat. § 103I.101, subd. 5(7)) did not change and stands independently of the repealed statute. The new statute (Minn. Stat. § 16A.1285) could be interpreted to replace the old fee-setting statute and thereby replace the citation to Minn. Stat. § 16A.128 in Minn. Stat. § 103I.101, subd. 5(7).

The Department has asserted that it can proceed under either the older or newer statute in adopting its adjusted fees by virtue of Minn. Stat. § 645.35. But a different canon of statutory construction exists which does not

allow the choice of statutory method to be used in this rulemaking. Where a statutory process is included by reference in another statute, each statute has a separate and independent existence. Sutherland Stat. Construction § 23.32. The repeal of the referenced statute does not affect the identical provision in the referencing statute. Id. As discussed in Finding 7, above, Minn. Stat. § 103I.101, subd. 5(7) expressly requires the Department use "the procedures for setting fees in section 16A.128" for modifying the statutory fees in the wells and borings program. That statutory requirement was not amended to reference Minn. Stat. § 16A.1285. Since the reference to Minn. Stat. § 16A.128 stands on its own, there is no basis for using a different method to set the fee

The argument can be made that the repeal of Minn. Stat. § 16A.128 creates an ambiguity in legislative intent, since the legislature may have intended that the repeal affect the fee-setting authority in Minn. Stat. § 103I.101, subd. 5(7). Where statutory language is ambiguous, is must be interpreted to conform with the legislative intent of the statute. To reach the conclusion that Minn. Stat. § 103I.101, subd. 5(7) is ambiguous, one must overlook the plain language of the statute which details the method of changing fees. Since the canons of construction support the independent existence of Minn. Stat. § 16A.128 (when used under Minn. Stat. § 103I.101, subd. 5(7)), there is no basis for concluding that the statute is ambiguous. Thus, the only way to proceed in altering fees set by statute is to use Minn. Stat. § 16A.128. Of course, should the Legislature decide that a different system for fee setting is appropriate, Minn. Stat. § 103I.101, subd. 5(7) can be amended. Until that time, the plain language of the statute requires the use of the fee-setting method detailed in Minn. Stat. § 16A.128.

Demonstration of Fee Basis

20. To support its fee increases, the Department submitted the amounts of its fiscal year 1993 and 1994 appropriations, estimates of the Department's 1995 to 1998 appropriations, and the well management program's expenditures. The Department asserts that it has complied with Minn. Stat. § 16A.128 by submitting figures which:

> "include the agency's support costs, indirect costs and attorney general costs. The proposed fees are intended to approximate this amount. The well programs appropriations (expenditures) are delineated in Table 3 of the Statement of Need and Reasonableness. This cost information is specific and allows the public to adequately assess the reasonableness and need of the proposed fees.

Department Comment, at 5.

The Department contrasted its supporting cost presentation to that made in In the Matter of the Proposed Amendment of Rules of the Department of Labor and Industry, Code Enforcement, Governing Power Piping Systems, OAH Docket No. 4-1900-5083-1 (Report issued January 17, 1991). In that rulemaking, the Department of Labor and Industry (DOLI) proposed to raise the fees used to cover the cost of power piping inspections. The inspection fees were the only fees charged to cover the cost of inspections. DOLI lumped together the

expenses and revenues from its elevator, pipefitting, and boiler inspections. The failure to separate out the revenues and expenses, including particular information on how costs were incurred for the fee function, rendered the proposed fee increase defective. After the rule was found to be defective, DOLI submitted the required information, separated by fee function. The rule was then found to be needed and reasonable on April 10, 1991.

The foregoing analysis shows that, under Minn. Stat. § 16A..128, two critical factors must be demonstrated to modify a fee. The first is to identify the fee function. The second is to calculate the amount required under the statutory method. In this case, the Department has implicitly asserted that the "fee function" is to fully fund the wells and borings program. However, that analysis ignores the large number of other fees that are charged for a variety of tasks, permits, and licenses under the wells and borings program. Using the Department's approach, all the other fees could be set at one dollar (or some other nominal amount) and the entire remaining wells and borings budget could be supplied by increasing the notification fee. So long as the revenues and expenditures balanced over time, there would be no basis to challenge such an approach.

In this case, the "fee function" means the portion of the wells and borings program related to handling the notifications received by the Department from the County Recorders. To meet the statutory requirements of Minn. Stat. 16A.128, subd. 1a, the Department must separate out the costs relating to notifications (including indirect and attorney general costs), subtract out any funds appropriated by the Legislature to cover those costs. The remaining total determines the amount of revenue which may be raised by increasing the notification fee.

The information submitted by the Department strongly suggests that the analysis set out in the foregoing paragraph cannot be used to support the notificiation fee increase in this rulemaking. The setting of a $10 notification fee was not originally intended by the Department and that mechanism was used in the fee statute to obtain funding lost through a legislative reduction of other fees.[1] The Department's cost of processing the existing notifications is unlikely to reach $7.50 which is the amount received by the Department per notification at present. The costs cited by County Recorders range from $3.80 (Beltrami County) to $5.00 (Winona County) per notification for the cost of handling.

1/ One could argue that the notification fee set by statute demonstrates that the Legislature intended any future notification fee modification be used to balance the program budget. The Department has pointed out that no statutory requirement exists to use the revenue generated by any fees for any specific costs. Department Comment, at 6. While the Legislature may take that approach with impunity, the Department is required to follow Minn. Stat. § 16A.128 which limits modifications to the costs attributable to the fee function. There is no basis on which to conclude that changes to any particular fee performed by rule are exempt from the requirement that only the cost of the fee function be considered.

The Department has been admirably frank in identifying the cause of the fiscal imbalance in the wells and borings project. That cause, a lack of revenues in the maintenance permit category, poses a difficulty for the Department. Under the uniform statutory scheme for modifying fees for all state agencies, only a failure to cover the costs of the fee function justifies an increase in that particular fee amount. Thus, the Department could support an increase for a category only through increased costs in that specific category, but not for a failure of revenue collection in a different category. Though the difficulty faced by the Department is real and vexatious, the law operates in a fashion incompatible with the Department's proposed solution.

The modification of the notification fee has failed to meet the statutory standards of Minn. Stat. § 16A.128, as required of the Department by Minn. Stat. 103I.101, subd. 5(7). Therefore, the proposed rule increasing the notification fee from $10 to $20 cannot be adopted.

Four options remain open to the Department for curing this defect. The wells and borings program can reduce its functioning costs to fall within the revenue being generated. The Department can seek a modification in its fees in Minn. Stat. Chap. 103I (or an increased appropriation) from the Legislature. The Department can seek an alteration of its authority to modify the statutorily set fees from the requirements of Minn. Stat. § 16A.128 to some other method (e.g. Minn. Stat. §§ 144.122(a) or 16A.1285). The Department can establish a new fee (other than the existing categories whose amounts are set by statute) such as an annual groundwater appropriation fee which would arguably assess costs directly to all of the users served by the protections involved in this program. (Such fees are already collected annually from all major appropriators pursuant to Minn. Stat. § 105.41 and a surcharge should be inexpensive to administer.)

21. Due to the foregoing finding, any fee sought to be increased under Minn. Stat. § 103I.101, subd. 5(7) must have the specific costs of the fee function analyzed to determine if the increase meets the statutory standard. The Department has not performed that analysis for any of the fees to be changed in this proceeding. Therefore, any increase in any fee amount in this rulemaking has failed to comply with the statutory requirements for such increases and is a defect. To correct this defect, the modification of each fee proposed in this rulemaking can be no higher than the existing fee.

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), except as noted at Findings 7, 15, 20 and 21.

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).

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), except as noted in Finding 15.

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusion 3 as noted at Findings 7, 15, 20 and 21.

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

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

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the 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 10TH day of September, 1993.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

Reported: Tape Recorded, No Transcript.