6-2200-12162-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Proposed Amendments to Rules Governing Animal Feedlots and Storage, Transportation, and Utilization of Animal Manure, Minn. Rule 7001.0020 and 7002.0210 to 7002.0280 and Chapter 7020.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Public hearings concerning these rule amendments were held by Administrative Law Judge Allan W. Klein on the following schedule:

January 24	Little Canada	10:00 a.m.
January 25	Alexandria	1:00 p.m. & 6:00 p.m.
January 26	Crookston	2:00 p.m. & 6:00 p.m.
January 31	Nisswa	1:00 p.m. & 6:00 p.m.
February 1	Willmar	1:00 p.m. & 6:00 p.m.
February 2	Hadley	1:00 p.m. & 6:00 p.m.
February 3	New Ulm	1:00 p.m. & 6:00 p.m.
February 7	Lewiston	1:00 p.m. & 6:00 p.m.
February 8	Owatonna	1:00 p.m. & 6:00 p.m.
February 9	Collegeville	1:00 p.m. & 6:00 p.m.
February 10	Little Canada	1:00 p.m.
February 11	Little Canada	10:00 a.m.
February 14	St. Paul	10:00 a.m.

Over 2,600 individuals attended these hearings, and the transcript of the hearings is over 2,500 pages long.

These hearings and this Report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The hearings are intended to allow the Agency and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and determine what changes might be appropriate. The legislature has designed the rulemaking process to ensure that state agencies

[1] Minn. Stat. §§ 14.131 through 14.20 (1998).

have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the Agency has made after the proposed rules were initially published do not result in them being substantially different from what the Agency originally proposed.

Rick Cool, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2127, appeared on behalf of the Agency. The Agency staff members who appeared at various hearings changed, depending upon the location of the hearing, but generally included Gary Pulford, the Agency's feedlot team manager, Ron Leaf, a senior engineer, Dave Wall, a hydrologist, Dr. Joe Schimmel, an educator, Chris Lucke, a staff engineer, Jim Sullivan, the acting air quality feedlot project leader, Myrna Halbach, the lead implementation manager for the feedlot rules, and Robert McCarron, an economist.

Over 2,600 persons attended the hearings. The hearings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearings ended, the Administrative Law Judge kept the administrative record open for 20 calendar days, until March 6, 2000, to allow interested persons and the Agency an opportunity to submit written comments. During this initial comment period the Administrative Law Judge received over 1,000 written comments from interested persons and the Agency. Following the initial comment period, Minnesota law[2] required that the hearing record remain open for another five business days, to March 13, to allow interested parties and the Agency to respond to any written comments. Several reply comments were received. The Agency made comments in both periods and proposed numerous changes to the rules. The hearing record closed for all purposes on March 13, 2000. Several comments were received after the final closing of the record. Those comments were not considered in the writing of this Report.

After the record closed on March 13, the legislature passed, and the Governor signed, a law which substantially impacts these rules.[3] This new law has been included in the analysis of the rules contained in this Report. The details of this inclusion are set forth in the Memorandum at the end of this Report.

NOTICE

The Agency must make this Report available for review by anyone who wishes to review it for at least five working days before the Agency takes any final action on the proposed rules.

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[2] Minn. Stat. § 14.15, subd. 1 (1998).

[3] Laws of Minnesota 2000, Chapter 435, which became effective on April 25, 2000.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Agency of actions which will correct the defects and the Agency 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 Agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Agency does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Coordinating Commission for the Commission's advice and comment.

If the Agency elects to adopt the actions suggested by 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 Agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Agency makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it 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 Agency 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.

Pursuant to a special statute applicable to these rules,[4] the amendments must be submitted to the members of legislative policy and finance committees with jurisdiction over agriculture and the environment prior to final adoption. The rules cannot become effective until 90 days after the proposed rules are submitted to the members. Finally, the Governor then has 14 days to review the proposed rules and has the authority to veto all, or a severable portion, of them.[5]

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

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[4] Minn. Stat. § 116.07, subd. 7(i) (1999).
[5] Minn. Stat. § 14.05, subd. 6 (1999).

FINDINGS OF FACT

Procedural Requirements

1. MPCA published a Request for Comments in the State Register on four different occasions: May 1, 1995 (19 S.R. 2168);[6] July 3, 1995 (20 S.R. 16);[7] July 31, 1995 (20 S.R. 206);[8] and August 31, 1998 (23 S.R. 542).[9]

(a) May 1, 1995, Request for Comments: This notice requested opinions and information from the public to assist the MPCA in preparing rule amendments. The notice indicated that the MPCA was working closely with the Feedlot and Manure Management Advisory Committee (FMMAC), whose formation was required by the 1994 legislature. The legislative objective for the FMMAC was to "identify needs, goals and suggested policies for research, monitoring, and regulatory activities regarding feedlot and manure management."[10] The agency noted that the FMMAC had created several Task Forces including: Land Application and Manure; Alternative Methods for Treatment of Feedlot Runoff; and Earthen Basins. Several organizations represented on the FMMAC were listed in the notice. The agency also indicated that it did not intend to create a separate advisory task force for the proposed rule amendments.

(b) July 3, 1995, Request for Comments: This notice reiterated much of the information in the May 1, 1995 notice, but also listed several groups likely to be affected by the proposed rule amendments. The notice indicated that the agency was particularly interested in receiving comments and information on several rule amendment subjects being considered by the MPCA and issues that were raised by the public during the previous solicitation for comments.

(c) July 31, 1995, Request for Comments: The primary purpose of this notice was to inform the public that the July 3, 1995 solicitation request[11] inadvertently failed to cite all the rule parts proposed to be amended. The July 3, 1995 notice referred only to rule parts 7020.0100 – 7020.0900. The agency, however,

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[6] Ex. 3a. At the time this notification was published it was called "Notice of Intent to Solicit Outside Information or Opinions" on the proposed rules. These notices were later changed to "Request for Comments" on planned agency rules.
[7] Ex. 3b. *See supra* note 2.
[8] Ex. 3c. *See supra* note 2.
[9] Ex. 3d.
[10] Ex. 3a.
[11] Ex. 3b.

indicated in the July 31, 1995 notice that it planned on amending all rule parts within chapter 7020 (*i.e.,* 7020.0100 – 7020.1900).

(d) August 31, 1998, Request for Comments: This notice indicated that rule amendments were being planned for rule parts 7001.0020, 7002.031, 7050.0215, and chapter 7020. The agency stated that the amendments being considered to chapter 7020 include: (1) establishing technical standards and requirements for manure management and feedlot construction, and (2) updating the feedlot water quality permitting program.

2. On November 2, 1999, the MPCA requested that the Chief Administrative Law Judge assign an Administrative Law Judge to this rule proceeding and schedule several public hearings across Minnesota.[12] This request was made by the agency prior to its submission under Minn. R. 1400.2080, subp. 5,[13] because of the breadth of this rule proceeding and to allow the agency to resume public outreach efforts.[14] This office complied with the MPCA's request and an Administrative Law Judge was assigned.

3. On November 19, 1999, the MPCA requested review and approval of its Notice of Hearing under Minn. R. part 1400.2080, subp. 5, and filed the following documents with the Administrative Law Judge:

(a) a copy of the proposed rules;

(b) a draft of the Notice of Hearing proposed to be issued; and

(c) a draft of the Statement of Need and Reasonableness (SONAR).

4. The Administrative Law Judge approved the agency's Notice of Hearing on November 23, 1999.[15]

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[12] The agency had hoped to conduct public hearings earlier in 1999. It had tentatively scheduled them in late March 1999 (Letter from Deb Olson to Chief Judge Nickolai of 12/14/98) and then in June 1999 (Letter from Deb Olson to Judge Mihalchick of 3/30/99). In both cases, however, the hearings were delayed while the agency and FMMAC debated additional changes. *See* Tr. 794-95.

[13] Minn. R. part 1400.2080, subp. 5 states that an "agency must request to schedule a rule hearing and obtain the judge's approval of any notice of hearing . . . prior to mailing it or publishing it in the State Register . . . . A copy of the proposed rule with a certificate of approval as to form by the revisor of statutes attached, and a draft of or a final copy of the [SONAR] must be filed with a notice submitted for approval."

[14] Letter from Commissioner Studders to Chief Administrative Law Judge Nickolai of 11/2/99.

[15] The agency was notified by telephone that its Notice of Hearing was approved; no letter of approval was sent.

5. On December 16, 1999, the agency mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice.[16]

6. On December 16[17] and 21,[18] 1999, the agency mailed the Notice of Hearing to all persons and groups identified in the Additional Notice plan.

7. The Notice of Hearing and a copy of the proposed rules were published on December 20, 1999, at 24 State Register 848.[19]

8. The agency also mailed a press release to media across Minnesota requesting publication of information regarding the proposed rule amendments and the associated public hearings.[20]

9. Notice about the proposed rule amendments and the related public hearings was published in the following Minnesota agricultural newsletters:

(a) *The Land*, published an advertisement on December 31, 1999 edition, and on January 7, 2000 in its southern edition;[21]

(b) *AgriNews*, published an advertisement on December 30, 1999.[22]

10. On January 24, 2000, the first day of public hearings in this matter, the agency placed the following additional documents into the record:

(a) The proposed rules certified by the Revisor of Statutes on December 1, 1999;[23]
(b) The Statement of Need and Reasonableness (SONAR) (dated December 9, 1999);[24]
(c) The Notice of Hearing as mailed;[25]
(d) Certificate of additional notification by publication of the Notice of Hearing;[26]
(e) Notification letter of the proposed rules to the Commissioner Hugoson, Minnesota Department of Agriculture (dated November 17, 1999);[27]

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[16] Ex. 5. Certificate of mailing Notice of Hearing and certificate of accuracy of the agency's mailing list.
[17] Ex. 6a. Certificate of additional notice given.
[18] Ex. 6b. Certificate of additional notice given.
[19] Ex. 4a.
[20] Ex. 6c. Certificate of additional notification by publishing the notice of hearing.
[21] *Id.*
[22] *Id.*
[23] Ex. 1.
[24] Ex. 2.
[25] Ex. 4b.
[26] Ex. 6c.

(f) Certificate of mailing the Notice of Hearing and the SONAR to the legislature;[28]
(g) Certificate of mailing the SONAR to the Legislative Reference Library and the Legislative Commission;[29]
(h) Notification letter of the proposed rules to Commissioner Tinklenberg, Minnesota Department of Transportation;[30]
(i) Twenty-seven written comments on the proposed rules received by the agency, but not by Administrative Law Judge Allan Klein as of January 21, 2000;[31]
(j) Memorandum from Gordon E. Wegwart, P.E., Assistant Commissioner of MPCA, dated January 21, 2000, regarding proposed additions and modifications to the proposed rules, and the SONAR Errata List;[32]
(k) MPCA set of fact sheets providing general information about the proposed rules;[33] and
(l) Explanation of Permit Requirements for 50 animal units (a.u.) (10 a.u. in shoreland) to 300 a.u.[34]

11. The MPCA has met all of the procedural requirements under the applicable statutes and rules.

History and Nature of the Proposed Rules

12. The State has been regulating animal manure since before the Agency was created. *See* Minn. Stat. § 115.01 – 115.09 (1965). The Agency was created in 1967, and promulgated its first set of rules dealing with animal manure and feedlots in 1971. In 1974, the Agency was authorized by the Environmental Protection Agency to administer the National Pollutant Discharge Elimination System (NPDES) program. In 1979, the Agency repealed its old rules and adopted new rules to control pollution from feedlots. That was the last time that these rules were amended. In 1995, the Agency began an effort to redesign its feedlot program, and these amendments ultimately grew out of that effort.

13. These amendments cover a variety of topics related to feedlots and animal manure. They define registration and permit requirements and procedures, set forth technical standards regarding the location, design, construction, operation and management of feedlots and manure handling facilities, and they also discuss the application of manure to land as fertilizer.

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[27] Ex. 7.
[28] Ex. 8.
[29] Ex. 9.
[30] Ex. 10.
[31] Exs. 11a – 11aa.
[32] Ex. 12.
[33] Ex. 13.
[34] Ex. 14.

14. In the SONAR, the Agency described its efforts to obtain public comment on changes to the 1979 rules, which efforts began in 1995 and continued to the last few months before the hearings.[35] In 1994, the Legislature directed the Commissioners of Agriculture and Pollution Control to establish a Feedlot and Manure Management Advisory Committee, and defined its membership.[36] The very first meeting with affected parties took place in November of 1995, with the Feedlot and Manure Management Advisory Committee (FMMAC).[37] This Committee was established by statute and met, either in whole or in subcommittee, on numerous occasions with Agency staff. The Committee included representatives of industry groups, counties and townships, the Department of Agriculture, University of Minnesota, and various environmental groups.[38] The Committee did not reach consensus on all items, and even a tentative consensus on a number of items fell apart by the time of the hearings.[39]

Statutory Authority

15. The MPCA's statutory authority to develop and adopt the proposed rules is set forth in a number of statutes contained in Minn. Stat. ch. 115 and 116. For example, Minn. Stat. § 115.03, subd. 1, paragraphs (e)(1), (2), (3), (4) and (7), (f) and (g) authorizes and directs the Agency to:

> (e) To adopt, issue, reissue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, rules, schedules of compliance, and stipulation agreements, under such conditions as it may prescribe, in order to prevent, control or abate water pollution, or for the installation or operation of disposal systems or parts thereof, or for other equipment and facilities;
>
> (1) Requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the state resulting in pollution in excess of the applicable pollution standard established under this chapter;
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> (2) Prohibiting or directing the abatement of any discharge of sewage, industrial waste, or other wastes, into any waters of the state or the deposit thereof or the discharge into any municipal disposal system where the same is likely to get into any waters of the state in violation of this chapter and, with respect to the pollution of waters of the state, chapter 116, or standards or rules promulgated or permits issued pursuant thereto, and specifying the schedule of compliance within which such prohibition or abatement must be accomplished;

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[35] SONAR, pp. 265-67 and SONAR Ex. 0-1 through 0-4.
[36] Laws of Minnesota 1994, chapter 619, section 1, now codified at Minn. Stat. § 17.136.
[37] SONAR, Ex. 0-1.
[38] SONAR, Ex. 0-4.
[39] See letter dated March 2, 2000 from Clean Water Action Alliance at p. 3.

(3) Prohibiting the storage of any liquid or solid substance or other pollutant in a manner which does not reasonably assure proper retention against entry into any waters of the state that would be likely to pollute any waters of the state;
(4) Requiring the construction, installation, maintenance, and operation by any person of any disposal system or any part thereof, or other equipment and facilities, or the reconstruction, alteration, or enlargement of its existing disposal system or any part thereof, or the adoption of other remedial measures to prevent, control or abate any discharge or deposit of sewage, industrial waste or other wastes by any person; . . .
(7) Requiring the owner or operator of any disposal system or any point source to establish and maintain such records, make such reports, install, use, and maintain such monitoring equipment or methods, including where appropriate biological monitoring methods, sample such effluents in accordance with such methods, at such locations, at such intervals, and in such a manner as the agency shall prescribe, and providing such other information as the agency may reasonably require; . . .

(f) To require to be submitted and to approve plans and specifications for disposal systems or point sources, or any part thereof and to inspect the construction thereof for compliance with the approved plans and specifications thereof;
(g) To prescribe and alter rules, not inconsistent with law, for the conduct of the agency and other matters within the scope of the powers granted to and imposed upon it by this chapter and, with respect to pollution of waters of the state, in chapter 116, provided that every rule affecting any other department or agency of the state or any person other than a member or employee of the agency shall be filed with the secretary of state;

Additional authority is set forth in Minn. Stat. § 115.03, subd. 5, which provides:

> Agency authority; National Pollutant Discharge Elimination System. Notwithstanding any other provisions prescribed in or pursuant to this chapter and, with respect to the pollution of waters of the state, in chapter 116, or otherwise, the agency shall have the authority to perform any and all acts minimally necessary including, but not limited to, the establishment and application of standards, procedures, rules, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than the provisions of the Federal

> Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the National Pollutant Discharge Elimination System (NPDES); provided that this provision shall not be construed as a limitation on any powers or duties otherwise residing with the agency pursuant to any provision of law.

More pertinent authority is set forth in Minn. Stat. § 116.07. Subdivision 2 provides for management of manure when it is not used as a fertilizer and persons operating feedlots and dealing with manure may be required to meet other rules established by the agency that address air quality and hazardous waste issues. Subdivision 4 also addresses air quality issues and other matters related to feedlots. It provides, in its second paragraph, for general rulemaking authority and reads, in part, as follows:

> Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the pollution control agency may adopt, amend, and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, chapter 1046, for the collection, transportation, storage, processing, and disposal of solid waste and the prevention, abatement, or control of water, air, and land pollution which may be related thereto, and the deposit in or on land of any other material that may tend to cause pollution . . . Without limitation, rules or standards may relate to collection, transportation, processing, disposal, equipment, location, procedures, methods, systems or techniques or to any other matter relevant to the prevention, abatement or control of water, air and land pollution which may be advised through the control of collection, transportation, processing, and disposal of solid waste and sewage sludge, and the deposit in or on land of any other material that may tend to cause pollution . . . .

Subd. 4d, paragraph (a), provides:

> The agency may collect permit fees in amounts not greater than those necessary to cover the reasonable costs of reviewing and acting upon applications for agency permits and implementing and enforcing the conditions of the permits pursuant to agency rules. Permit fees shall not include the cost of litigation. The agency shall adopt rules under section 16A.1285 establishing a system for charging permit fees collected under this subdivision. The fee schedule must reflect reasonable and routine permitting, implementation, and enforcement costs. The agency may

impose an additional enforcement fee to be collected for a period of up to two years to cover the reasonable costs of implementing and enforcing the conditions of a permit under the rules of the agency. Any money collected under this paragraph shall be deposited in the special revenue account.

The suggestion that these rules are not authorized by the legislature is rebutted by the following provisions of Minn. Stat. § 116.07, subd. 7,[40] as amended, which provides:

> Subd. 7. Counties; processing of applications for animal lot permits. Any Minnesota county board may, by resolution, with approval of the pollution control agency, assume responsibility for processing applications for permits required by the pollution control agency under this section for livestock feedlots, poultry lots or other animal lots. The responsibility for permit application processing, if assumed by a county, may be delegated by the county board to any appropriate county officer or employee.
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> (a) For the purposes of this subdivision, the term "processing" includes:
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> (1) the distribution to applicants of forms provided by the pollution control agency;
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> (2) the receipt and examination of completed application forms, and the certification, in writing, to the pollution control agency either that the animal lot facility for which a permit is sought by an applicant will comply with applicable rules and standards, or, if the facility will not comply, the respects in which a variance would be required for the issuance of a permit; and
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> (3) rendering to applicants, upon request, assistance necessary for the proper completion of an application.
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> (b) For the purposes of this subdivision, the term "processing" may include, at the option of the county board, issuing, denying, modifying, imposing conditions upon, or revoking permits pursuant to the provisions of this section or rules promulgated pursuant to it, subject to review, suspension, and reversal by the pollution control agency. The pollution control agency shall, after written notification, have 15 days to review, suspend, modify, or reverse the issuance of the permit. After this period, the action of the county board is final, subject to appeal as provided in chapter 14.

[40] This statutory section was amended, in part, by the new feedlot law, chapter 435.

(c) For the purpose of administration of rules adopted under this subdivision, the commissioner and the agency may provide exceptions for cases where the owner of a feedlot has specific written plans to close the feedlot within five years. These exceptions include waiving requirements for major capital improvements.

(d) For purposes of this subdivision, a discharge caused by an extraordinary natural event such as a precipitation event of greater magnitude than the 25-year, 24-hour event, tornado, or flood in excess of the 100-year flood is not a "direct discharge of pollutants."

(e) In adopting and enforcing rules under this subdivision, the commissioner shall cooperate closely with other governmental agencies.

(f) The pollution control agency shall work with the Minnesota extension service, the department of agriculture, the board of water and soil resources, producer groups, local units of government, as well as with appropriate federal agencies such as the Natural Resources Conservation Service and the Farm Service Agency, to notify and educate producers of rules under this subdivision at the time the rules are being developed and adopted and at least every two years thereafter.

(g) The pollution control agency shall adopt rules governing the issuance and denial of permits for livestock feedlots, poultry lots or other animal lots pursuant to this section. A feedlot permit is not required for livestock feedlots with more than ten but less than 50 animal units; provided they are not in shoreland areas. These rules apply both to permits issued by counties and to permits issued by the pollution control agency directly.

(h) The pollution control agency shall exercise supervising authority with respect to the processing of animal lot permit applications by a county.

(i) Any new rules or amendments to existing rules proposed under the authority granted in this subdivision or to implement new fees on animal feedlots, must be submitted to the members of legislative policy and finance committees with jurisdiction over agriculture and the environment prior to final adoption. The rules must not become effective until 90 days after the proposed rules are submitted to the members.

(j) Until new rules are adopted that provide for plans for manure storage structures, any plans for a liquid manure storage structure must be prepared or approved by a registered professional engineer or a United States

Department of Agriculture, Natural Resources Conservation Service employee.

(k) A county may adopt by ordinance standards for animal feedlots that are more stringent than standards in pollution control agency rules.

(l) After January 1, 2001, a county that has not accepted delegation of the feedlot permit program must hold a public meeting prior to the agency issuing a feedlot permit for a feedlot facility with 300 or more animal units, unless another public meeting has been held with regard to the feedlot facility to be permitted.

Additional permit authority for some feedlots is set forth in Minn. Stat. § 116.07, subd. 7c, (1998), which reads in part:

Subd. 7c. NPDES permitting requirements.

(a) The agency must issue National Pollutant Discharge Elimination System permits for feedlots with 1,000 animal units or more based on the following schedule:
   (1) for applications received after April 22, 1998, a permit for a newly constructed or expanded animal feedlot with 2,000 or more animal units must be issued as an individual permit;
   (2) for applications received after January 1, 1999, a permit for a newly constructed or expanded animal feedlot with between 1,000 and 2,000 animal units that is identified as a priority by the commissioner, using criteria established under paragraph (e), must be issued as an individual permit; and
   (3) after January 1, 2001, all existing feedlots with 1,000 or more animal units must be issued an individual or general National Pollutant Discharge Elimination System permit.

(b) . . .

(e) By January 1, 1999, the commissioner, in consultation with the feedlot and manure management advisory committee, created under 17.136, and other interested parties must develop criteria for determining whether an individual National Pollutant Discharge Elimination System permit is required under paragraph (a), clause (2), for an animal feedlot with between 1,000 and 2,000 animal units. The criteria must be based on proximity to waters of the state, facility design, and other site-specific environmental factors.

(f) By January 1, 2000, the commissioner, in consultation with the feedlot and manure management advisory committee, created under section 17.136, and other interested parties must

> develop criteria for determining whether an individual National Pollutant Discharge Elimination System permit is required for an existing animal feedlot, under paragraph (a), clause (3). The criteria must be based on violations and other compliance problems at the facility.

Additional statutes relating to the authority of the Agency to act in certain specified subject-matter areas is set forth in other sections of Minn. Stat. ch. 115 and 116, including Minn. stat. § 115.03, subd. 1(a) and 1(b); 115.04; 115.06, subd. 3; 115.07; 116.07, subd. 4a; 116.07, subd. 4d; 116.07, subd. 7a; 116.081; and 116.091. The agency is also the delegated Minnesota state agency to implement and administer the Clean Water Act's NPDES program. Under that delegation, the agency has duties, obligations and authorities under Title 40 Code of Federal Regulations (CFR) part 122, including part 122.23, for the permitting of NPDES-covered sites and facilities and under 40 CFR 412, related to effluent limitation regulations and standards for the specified feedlot categories.

Rulemaking Legal Standards

16. Under Minn. Stat. § 14.14, subd, 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the Agency may rely on scientific facts, legislative facts (namely general facts concerning questions of law, policy and discretion), or they may simply rely on interpretation of a statute, or stated policy preferences.[41] In this proceeding, the Agency prepared a thorough Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Agency primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Agency staff members at the public hearings and in written post-hearing submissions.

17. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[42] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[43] A rule is generally found to be reasonable if it is rationally related to the end sought

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[41] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[42] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

[43] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

to be achieved by the governing statute.[44] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[45] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.[46]

18. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Agency have statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[47] In this matter, the Agency has proposed numerous changes to the rule after the hearings. Therefore, the Administrative Law Judge must also determine if the Agency's new language is substantially different from that which was originally proposed.[48]

19. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1998). The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[49]

20. The recent legislation has directed that certain matters be in the Agency's final rule and that certain matters not be in the rule. The "substantially different" standard does not apply to any issues resolved by the new legislation.

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[44] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minnesota Department of Human Services,* 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[45] *Manufactured Housing Institute*, 347 N.W.2d at 244.
[46] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[47] Minn. R. 1400.2100.
[48] Minn. Stat. § 14.15, subd. 3 (1998).
[49] Minn. Stat. § 14.05, subd. 2 (1998).

Impact on Farming Operations

21. Minn. Stat. § 14.111 (1998), imposes an additional notice requirement when rules are proposed that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

22. In this case, the Department of Agriculture was fully informed of the content of the proposed rules through statutory representation and active participation on the Feedlot and Manure Management Advisory Committee. The Commissioner was given formal notice as well.[50]

Cost and Alternative Assessments in the SONAR

23. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule; and
>
> (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

[50] SONAR Ex. G-5.

24. In addition to those requirements, the Agency has been specially directed to "give due consideration to the establishment, maintenance, operation and expansion of business...industry...and other economic factors...and take or provide for such action as may be reasonable, feasible, and practical under the circumstances." [51]

25. The SONAR includes a lengthy discussion of the analysis that was performed by the Agency to meet the requirements of both of those statutes.[52] The most serious challenge to the adequacy of the agency's compliance came from industry groups and individuals who thought the economic impact analysis presented in the SONAR was inadequate.

26. Professors Bill Lazarus and George Morse from the Department of Applied Economics in the College of Agricultural, Food and Environmental Sciences at the University of Minnesota raised a number of issues with the Agency's economic analysis. Lazarus noted that there are many facilities which are not yet in compliance with the existing rules, and that there will be a large cost for them to get into compliance just with the existing rules. He noted that the agency did not include the costs of compliance with the existing rules when assessing the impact of these amendments. He thought that if the costs are going to be incurred, they should be included in the cost analysis, regardless of whether they relate to the current rules or the proposed amendments.[53]

27. Professor Morse found the Agency's use of the IMPLAN model to be inappropriate, and did not believe that the agency had supported its principal conclusion, which was that the proposed rules would not have a significant impact on the state's economy. However, when asked whether he thought that the proposed rules would have a significant impact on the state's economy, he stated that it was very difficult to tell without making additional studies.[54]

28. In response to these criticisms, the Agency recalculated the cost of the proposed rules and, in addition, it calculated the likely cost of complying with the existing rules in light of the expected rise in "field presence" resulting from adoption of the new rules. It found that the costs of compliance with the existing rules exceeded the cost of compliance with the proposed rules by a wide margin. But even adding the two costs together, the Agency's principal conclusion did not change: that the total cost does not produce noticeable impacts for the state's economy.[55]

29. The Agency defended its use of the IMPLAN model, rather than a different model, on the grounds of practicality. The Agency did not dispute Professor Morse's observation that a different model, if properly fitted with the

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[51] Minn. Stat. § 116.07, subd. 6 (1998).
[52] *See* SONAR at 22-35, and with regard to costs and economics, *see* pp. 232-65.
[53] Transcript, pp. 2389-93.
[54] Transcript, p. 2404.
[55] Agency Initial Response, pp. 116-36.

appropriate data, would be preferable to the IMPLAN model. But gathering the data for such a model would be a daunting task - - in the Agency's words:

> He (Prof. Morse) recommends a list of ten studies needed to get "reasonable accuracy" in input/output analysis. The list is comprehensive, wide-ranging and its results would probably be very interesting. The research agenda is also well beyond the practical means of a state agency. A research agenda of the sort recommended by Prof. Morse probably fits well within the long-range plans of a research-oriented university. The approach Prof. Morse recommends would take months, if not years, and it would cost a great deal. Research of the sort that Prof. Morse recommends is now, and probably always will be, beyond the resources of the MPCA.
>
> Instead of conducting extensive background research, the MPCA estimated specific regulatory compliance costs and compared them with output for the affected economic sectors. There was no case in which estimated direct costs exceeded 0.2 per cent of economic output in an affected sector. Total annual costs, estimated at their greatest extent, were slightly over $4.2 million. Total economic output (1996) in the affected sectors was almost $4 billion. It is not reasonable to expect that such a slight cost increase will have a significant effect on economic output. Given the relative difference between estimated cost and reported economic output, it is impractical and unreasonable to spend a lot of time and resources on refinements in economic impact analysis.
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> * * *
>
> The MPCA maintains that its analytical approach is reasonable. Based on the professional judgment of appropriate MPCA staff members, it appears that further background study would only confirm the initial findings of the SONAR. [56]

30. The Administrative Law Judge concludes that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, and that it has given due consideration to the cost impacts of its proposed rules. Moreover, the appropriate inquiry is the cost of the proposed rules, not the cost of complying with the existing rules. The cost of those existing rules is a cost that will exist, regardless of what happens to these proposed

[56] *Id.* at pp. 116-17.

rules.[57] The focus of the inquiry concerning statutory compliance in this rulemaking proceeding is on the proposed rules.

Scope of this Report

31. Thousands of separate comments were received in writing and through testimony at the public hearings. These commentators have suggested numerous problems with the proposed rules, and proposed numerous changes to the rules. This Report is limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. The Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been read, indexed, and considered. Moreover, 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 Agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Administrative Law Judge also finds that all provisions not specifically discussed below are authorized by statute and there are no other problems that would prevent the adoption of those rules.

32. The Agency made numerous changes to its proposed rules in response to the public comments. Where changes are made to the rules after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[58] Not all the changes will be discussed individually. The Administrative Law Judge finds that modifications made by the Agency which are not specifically discussed below are justified by the record as being needed and reasonable, and that these changes do not result in a substantially different rule.

MAJOR ISSUES

Pastures

33. The inclusion of rules concerning pastures into a set of rules entitled "Feedlots" led many people to believe that the Agency did not understand the difference between the two, and that it was going to treat them both in the same way. Many small beef operations, dairy operations, horse operations,

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[57] The Administrative Law Judge is skeptical of the assertion that the adoption of these proposed rules will result in enough of an increase in "field presence" to make any meaningful change in the rate of compliance with the existing rules. In fact, the more relaxed compliance schedules in the proposed rules will delay the expenditures needed to come into compliance with the old rules. All of this further convinces the ALJ that the relevant inquiry is the cost of the proposed rules, not the cost of the existing rules. Finally, all of this has become academic in light of the adoption of the new law with its more relaxed standards.

[58] Minn. Stat. § 14.05, subd. 3.

sheep operations, and others thought it ridiculous to even talk of the two types of lands in the same breath, and they let the Agency know it.

34. The proposed rules[59] would have placed three new requirements on pastures. First of all, pastures would have to be registered with the Commissioner or delegated county. Secondly, the use of temporary supplemental feeding devices ("feed bunks") in pastures would have been prohibited within 300 feet of protected waters, protected wetlands, and certain intermittent streams and ditches. Finally, pasture owners would have to control animal access to certain DNR-designated lakes. This did not necessarily mean that fences would have to be built around the lakes – there were other NRCS practice standards that could be followed in lieu of fencing.

35. Public comment on these pasture rules indicated widespread confusion and frustration. After the hearings, the Agency decided that its attempts to impose those restrictions on pastures were having more negative impacts than positive ones, and the Agency decided to withdraw all of its proposed rules relating to pastures. As the Agency stated:

> The MPCA believes that the number of questions raised relevant to pasture operations and how the proposed rules will approach implementation indicate that another look at pastures is needed. Thus, the MPCA proposes that it will return the rule focus on pastures to that provided in the existing rules. This means that pasture operations will not be required to register but that pastures developing feedlot conditions will be treated as feedlots. Additionally, the establishment of best management practices on individual pasture operations will continue as a voluntary effort between the livestock producer and the local soil and water conservation district or other regulatory authority where no water pollution violations exist. The MPCA will continue to work with pasture owners on a case-by-case basis, as it has done under the current rules, to prevent and abate any water quality standard violations (e.g., Minn. R. ch. 7050 and 7060) that may be created by poor pasture management practices. This re-examination will provide the MPCA, livestock producers, and others time to review the entire pasture situation and consider the need for rules that more clearly establish conditions that protect the environment but do not reduce the flexibility in managing a pasture operation.[60]

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[59] The term "proposed rules" will refer to the rules as published in the State Register and as distributed to persons at the hearings. In the upper left-hand corner of the proposed rules packet is a date "12/01/99". In contrast, the term "final rules" will refer to the proposed rules as amended by the Agency in its initial comments of March 6 and its final comments of March 13.

[60] Agency Initial Response, pp. 11-12.

36. The recent feedlot bill[61] directed the Agency to remove from the proposed rules:

> Restrictions on the pasturing of animals, including winter feeding areas that comply with Minnesota Statutes, § 116.07, subd. 7, paragraph (o).[62]

The inclusion of winter feeding areas refers to another provision of the bill, which provides as follows:

> For the purposes of feedlot permitting, manure that is land applied, or a manure stockpile that is managed according to agency rule, must not be considered a discharge into waters of the state, unless the discharge is to waters of the state, as defined by section 103G.005, subd. 17, except type 1 or 2 wetlands, as defined in section 103G.005, subd. 17(b), and does not meet discharge standards established for feedlots under agency rule.[63]

Essentially, the legislature has directed the agency to remove restrictions on pasturing of animals, including winter feeding areas so long as they do not discharge into waters of the state (except type 1 or 2 wetlands) and meet the discharge standards established for feedlots.

37. The Administrative Law Judge believes that the legislature's action, coupled with the changes already proposed by the Agency, effectively terminates any attempts to increase the regulation of pastures by these proposed rules.[64]

Land Application of Manure

38. The existing rules are very brief concerning land application requirements. Existing part 7020.0400, subp. 3 states that animal manure "shall be applied at rates not exceeding local agricultural crop nutrient requirements except where allowed by permit." The existing rules also require, under part 7020.0500, that all feedlot permit applications include a manure management plan that describe "manure handling and application techniques and acreage available for manure application." The proposed rules, on the other hand, were far more detailed and specific. They required manure nutrient testing, limitations on application rates, a detailed manure management plan, soil testing, record keeping requirements, limitations on the application of manure in special protection areas (including areas near open tile intakes, sinkholes, mines,

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[61] Laws of Minnesota 2000, ch. 435.
[62] Feedlot Bill, § 10(b)(1).
[63] Feedlot Bill, Minn. Stat. § 4.
[64] How the legislation affects the Agency's existing statutory and regulatory authority over problem pastures is beyond the scope of this Report.

quarries and wells). Despite the fact that most of these proposals were hammered out by a specialized task force and were reviewed by FMMAC, virtually every one of the provisions drew criticism.[65]

39. The most common criticism of these requirements was the difficulty that small producers would have in complying with them. It was not so much that any one of the proposals was too complex, but rather that the combination of them required more time and effort than small producers could afford to give them. The time and expense of testing manure, preparing application plans, and keeping all of the records required by the rule seemed tremendously burdensome, especially to small operations that may have only one or two people who sandwiched in farm work with other employment. As a producer from Mabel stated:

> The recordkeeping requirements of hauling and maintaining manure and stockpiles, I think, are very unreasonable. In our operation, we haul manure about six days of the week all year long, and that manure can be from maybe ten different locations and ten different analyses. I don't know what the requirements are, if we have to keep track of how much we put on a field for the total of the year or whether it's every day, we have to keep track of it. It's going to be a nightmare and it's just going to increase the labor required in order to run the operation. I guess no matter what the regulations are, whether they're attainable or not, it all comes down to whatever you've got to do, there is a cost involved, no matter what you have to do, and university recommendations and all everything you read, everybody has to keep cutting costs, keep cutting costs in order to be profitable. This is not one way to cut costs. It will increase the cost no matter what is done.[66]

40. In response to numerous similar comments, the Agency changed the rules to lessen the requirements for smaller feedlots, those capable of holding fewer than 300 animal units and manure storage areas capable of holding manure produced by fewer than 300 animal units. They left the initial proposals essentially intact for larger facilities. The Agency justified this change by pointing out that the majority of manure being spread onto crop land is from operations with over 300 animal units. Since there is limited technical assistance to help write comprehensive plans, if the level of planning and recordkeeping for smaller facilities was reduced, a greater percentage of them would be able to develop their own plans and recordkeeping without the need for off-farm assistance. However, the driving force behind the Agency's original proposals, protecting drinking water and surface water, prompted the Agency to maintain

[65] The history of their development is set forth in the SONAR, at pp. 197-99.
[66] Tr. 1600-01.

the original proposals in situations where manure was being applied to a drinking water supply management area where the aquifer is vulnerable.

41. The numerous criticisms surrounding the requirements for a manure management plan and recordkeeping requirements are only partially eliminated by the Agency's loosening of the requirements for smaller facilities. There are many midsized and larger facilities who also objected to the whole concept of required plans and required recordkeeping. The complaints varied, but they can be boiled down to the ideas that (1) the government shouldn't be telling me how much manure to put on my land because I know it best, and (2) the only reason they want the records kept is to catch me if I do something wrong.

42. The legislature addressed a number of these land application issues in the feedlot bill. With regard to manure management plans, they determined that beginning January 1, 2005, if a feedlot has a capacity of 300 animal units or more but does not have an updated manure management plan, then only a certified private manure applicator or a commercial animal waste technician may apply its animal waste. But any person may become certified after three hours of training. And the requirement for a manure management plan would only apply in the case of a feedlot requiring a permit. The legislature further directed the Agency to allow any nutrient management that is consistent with guidelines, definitions, or recommendations published by the University of Minnesota or another land grant college in a contiguous state. Finally, the legislature provided that the Agency could not require the regulation of process-generated wastewater, unless it contained manure. These changes, taken together resolve most of the issues which had arisen in connection with land application of manure. There were a few issues, however, which still remain.

43. Subpart 6 regulates the application of manure in special protection areas. Special protection areas are, in turn, defined as land within 300 feet of (a) protected waters and protected wetlands as identified on DNR maps; and (b) intermittent streams and ditches identified on USGS quadrangle maps, except for drainage ditches with berms and segments of intermittent streams which are grassed waterways. First, the rule would have prohibited the application of manure to frozen or snow-covered soils in these areas. Then, when the land was not frozen or snow covered, the rule would have required that specifed precautions be taken when applying manure in these special protection areas.

44. A number of commentators urged that the size of this special protection area was too big, and would be hard to live with. There were a number of suggestions to modify it.[67] In response, the Agency pointed to

[67] For example, the Carlton County Soil and Water Conservation District, and the Carlton County Board of Commissioners, both urged that the restriction against applying manure to frozen or snow-covered soils should only apply within 300 feet of lakes and streams on the DNR maps, as well as types 3, 4 and 5 wetlands. Manure could thus be spread, even in winter time, within

scientific research papers which demonstrated that 300 feet was a good generalization for the distance needed to allow necessary filtering of wastes[68]. The Agency admitted that site specific circumstances could vary the appropriateness of this number, and in its final changes, the Agency did add an option for owners to use other procedures which met a number of standards to provide "an equal degree of water quality protection."[69]

45. The Administrative Law Judge concludes that the Agency has demonstrated the need for and reasonableness of its land application rules, including prohibitions limiting manure application in special protection areas. Particularly in light of the expansion of the time allowed for short-term stockpiles (which is both in the Agency's final rules and in the new law), the prohibition against spreading during the winter should not be the hardship that commentators feared when the time period for short-term stockpiling was more limited. The scientific studies do support the Agency's limitations during the rest of the year.[70]

Compliance Schedules for Water Quality Discharge Standards

46. One of the long-term goals of the Agency's feedlot program is to limit discharges to surface waters to 25 milligrams per liter of five-day biochemical oxygen demand (BOD_5).[71] This goal (which is the same numeric goal that many municipalities must meet in the discharge of their wastewater) is not being met by thousands of feedlots around the state, although the Agency has no detailed numbers on this point. Most commonly, these are open lots with manure-contaminated runoff. Under the current rules, such a facility would have two years or less to come into compliance. For a variety of reasons, including costs, lack of technical assistance, and lack of enforcement, these facilities continue to discharge. The Agency wanted to find some set of realistic incentives that would cause these facilities to at least begin to get into compliance. The Agency initially proposed a two-step process, whereby such a facility would register, and submit a certification agreeing to comply with a number of conditions. The certification would provide a conditional waiver of civil penalties for past violations resulting from the open lot runoff and failure to apply for a permit, so long as the owner complied with the restrictions in the rule. The restrictions proposed by the Agency would require the owner to install diversions and install vegetative buffer areas or filter strips, or take other measures that can be demonstrated to achieve a 50 percent or greater reduction in discharge of phosphorus and BOD_5 loading. Initially, this "first step" was to be accomplished

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300 feet of type 1 and 2 wetlands, as well as within 300 feet of intermittent streams and ditches. *See* letter dated February 8, 2000 from Merrill Loy, Chair, Carlton County SWCD and Resolution No. 00-016 adopted by Carlton County Board on February 8, 2000.

[68] Agency Initial Response, pp. 108 – 111.

[69] Agency Final Response, pp. 44 – 45.

[70] *See* SONAR Ex. L-2.

[71] This limitation, and other effluent limitations applicable to feedlots, are set forth in Minn. Rules ch. 7050, with particular reference to part 7050.0215.

by October 1, 2003. It was to be followed by complete compliance with the 25 milligram per liter BOD_5 rule by October 1, 2009.[72]

47. During the hearing process, a number of persons suggested that the 2003 date was unrealistic in light of the limited technical and financial assistance available to smaller facilities. For example, Dave Preisler, Executive Director of the Minnesota Pork Producers Association, stated as follows:

> I would also like to speak in favor of some sections on allowing greater compliance leverage or leeway for facilities that are less than 300 animal units, and I really am proud of you for doing that. I think it will help a lot if we try to implement some of this. The only suggestion that I would make is that after talking with producers and county officials and engineers, that the first deadline, the 2003, in order to achieve the 50 percent reduction on those facilities, may be a little too aggressive to actually be achieved from the standpoint of the number of professionals that are out in the field to make that actually happen. I would suggest that you move that to 2004. I'm not suggesting you change the end date of 2009, but I think that one extra year there would get you a much better job because you need to remember that if we stick with these rules and registration doesn't start until 2001, you're only going to have two years to identify, much less than get to all of them. I think that is really going to put a squeeze on them.[73]

Similarly, Gene Hugoson, Commissioner of Agriculture, made the following comments:

> Our concern with these sections is that the proposed rules would require approximately 1,000 basin upgrades (for feedlots for 300-1,000 animal units) and 7,000 partial measures to control runoff. Even in the unlikely scenario that the runoff control measures do not require engineering assistance, there are simply not enough available engineers to design the required basin upgrades within this period. Given the current number of engineers available to Minnesota farmers, these upgrades would take approximately an additional two years beyond the time allowed in the rules to design and complete. Thus, we believe 2005 is a more reasonable and achievable goal.

[72] Proposed Rule 7020.2003, subps. 4-6.
[73] Transcript, p. 2171.

> Similarly, completion of the final open lot runoff corrective measures and the additional approximately 2,500 basin upgrades will be hindered by lack of sufficient available engineering assistance.
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> * * *
>
> We propose that the timeline for implementing feedlot runoff and basin corrective measures be extended by two years. We also question whether the 2009 deadline for implementing final corrective measures is feasible without major changes in the availability of engineering assistance, construction capacity, and financing. . . .[74]

48. The Board of Water and Soil Resources, an active participant in the process of delivering cost-share assistance and technical assistance to operators, provided data that illustrates the problem of trying to deal with so many non-compliant feedlots given the limitations of financing and technical assistance. They propose an alternative way of dealing with the problem:

> Because of limited private and public capabilities to implement pollution abatement at small feedlots, the associated investment and workload must be spread over a number of years. In addition, because the number of small feedlots in Minnesota continues to decline and feedlot pollution hazards can vary substantially for different feedlots, it makes good sense to prioritize pollution abatement efforts based on site-specific situations rather than general size and type categories. Existing government programs and experience have shown that feedlot pollution abatement prioritization and assistance is most effectively accomplished at the local level . . . .[75]

The Board proposed that each delegated county would submit to the Agency, for review and approval, a delegation agreement whereby the county would establish scheduled goals for bringing existing feedlot operations into compliance considering the following criteria:

> (a) the pollution hazard at feedlot operations, including sensitivity of affected natural resources;
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> (b) feedlot owner intent to continue feedlot operations;

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[74] Letter dated March 6, 2000 from Gene Hugoson, Commissioner of Agriculture.
[75] Letter dated February 18, 2000 from Ronald D. Harnack, Executive Director, Minnesota Board of Water and Soil Resources.

(c) cost and benefit of pollution abatement;

(d) availability of private and public financial recourses, including cost-share grants and low-interest loans, for feedlot pollution abatement;

(e) availability of technical and administrative assistance; and

(f) availability of construction contractors and materials.

In a subsequent letter, the Board suggested that having compliance schedule goals in county delegation agreements would enable the workload and investment to be spread out over a ten-year compliance period, rather than breaking it up into two separate periods as the Agency had proposed. The Board believed that this would allow counties to better match technical and financial assistance with county feedlot incentives and local water plan priorities. By doing so, the Board believed the schedules could create incentives for counties to provide coordinated local leadership for effective and efficient feedlot pollution abatement.[76] Most importantly, it would allow the counties to prioritize the allocation of limited resources.

49. The Administrative Law Judge believes that there is merit to the Board's proposal. Since most of the cost-share funding and technical assistance is provided at a county level (at least for the delegated counties), it does make sense to allow counties to set priorities for these limited resources. The Administrative Law Judge cannot say that the Agency's proposal is unreasonable, but he urges the Agency to keep the concept behind the Board's proposal in mind when drafting its final rule.[77]

50. Before the public hearings even started, the Agency noted a typographical error in the rules as published. The error occurs in proposed Rule 7020.2003, subp. 5, where the word "and" was inadvertently inserted in place of the word "or". The Agency prepared a hand-out (SONAR Ex. 12) which explained the error and discussed its impact. At the start of each of the hearings, the Agency announced the availability of the handout, and noted the error. The Administrative Law Judge finds that the methodology used by the Agency to alert

[76] Letter dated March 13, 2000 from Harnack.

[77] The Administrative Law Judge is not knowledgeable enough about the actual administration of cost-share and technical assistance programs to provide any guidance to the Agency as to how, specifically, it should implement the Board's proposal. Nor is the ALJ knowledgeable enough about the day-to-day administration to properly evaluate the impacts of the new law on this issue. However, he recommends that the Agency avoid adopting a rule which prevents local priorities from being reflected in the cost-share and technical assistance decisions. It is not clear that the Agency's proposed rule would have that negative effect, but it is suggested that the Agency review its proposal in light of that concern.

the public to the error was reasonable, and the rule may be adopted with the correction.

51. The new law recognizes the Agency's overall approach, but mandates the use of the 2005/2010 compliance dates.[78] However, that does not preclude the Agency from allowing (and encouraging) counties to prioritize within those dates.

Animal Units

52. The basic way in which the EPA and MPCA calculate the size of an operation is by the number of "animal units" involved. Certain animal unit thresholds affect the type of permit an owner must obtain which, in turn, may affect fees or processing requirements. The number of animal units also determine whether or not an exemption from all or part of the rules is available, whether a simplified procedure is available, whether certain reports must be submitted and records maintained, etc. In short, the concept of animal units is a fundamental building block in the overall regulatory scheme, on both the federal and the state levels.

53. During the hearings and in post-hearing comments, an important issue arose because the proposed rules were not always clear concerning whether or not an animal unit limitation referred to the number of the animals actually at a feedlot at any given time, or whether it referred to the capacity of the feedlot. For example, if a producer built a barn to house slaughter steers, which was designed to hold 350, but for financial reasons he decided that he could only stock it with 250 and was going to maintain that population for three or four years, is he under 300 animal units, or over? Prior to the Agency's initial comments and proposals to clarify this issue, it was unclear from reading the rule which number (250 or 350) applied.[79] When the questions arose at the hearings, the Agency uniformly answered that the animal unit limitations applied to the *capacity* of the particular facility or operation, not the *actual number* of animals there at any one time. As many of the commentators noted, actual numbers are constantly changing with births, deaths, animals coming in and animals going out. The Agency stated that it was always their intent that capacity would be the measuring tool, not actual bodies.

54. In response to these questions, the Agency has proposed to add a reference to "capacity" at numerous placed throughout the rule where a particular number of animal units is used.[80] This will clarify the issue and avoid confusion that could arise from a casual reading of the rules. It does not create a rule

[78] Chapter 435, section 10 (d)(5).
[79] *See*, for example, Comments of Nancy Barsness, Tr. 186-87; Gerald Bachmeier, Tr. 302-04; Dale Lueck, Tr. 616-17; Jim Kuhl, Tr. 1723-26; and Robert Mensch, Tr. 2505.
[80] Agency Initial Responses, at pp. 13-19.

which is substantially different from the rule as originally proposed, and it is necessary and reasonable that the rule be clarified on such an important point.[81]

55. The legislature answered many of the other debates which arose at the hearings concerning the appropriate number to be assigned to various kinds of animals. The legislature provided specific numbers to be assigned to specific animals.[82]

Short-Term Stockpiling of Manure

56. The Agency initially proposed that short-term manure stockpile sites must have the manure removed within 180 calendar days from the initial establishment of the site. If weather or soil conditions prohibited land application of the manure within that 180-day period, then the owner could extend up to an additional 180 days if he submitted an extension notification form to the Agency or the delegated county. The rule also had prohibitions against immediate re-use of the same stockpile site, and prohibitions against stockpiles too close to water bodies, sink holes, ditches, wells, or similar places.

57. During the hearings, and in writing, there were numerous complaints about the 180-day period. The most common complaint was that 180 days was just too short a time given the variability of Minnesota's winter season, and the need to coordinate land application work with a variety of other time demands and crop schedules.[83] In response to these comments, the Agency changed the rule so that a short-term stockpile could remain for 360 days, but that no extensions would be granted.[84] Later, the legislature directed the Agency to allow a short-term stockpile site for 365 days.[85]

58. Some producers also questioned the requirement that once manure was removed from a short-term stockpile, that same site could not be used during the calendar year before or after the year of removal, and that a vegetative cover must be established on the site for at least one full growing season prior to re-use. These restrictions caused problems for producers who cleaned their barns more often than once a year, and whose practice was to push the manure out the barn door into a stockpile, and then land apply it at some later time. Producers who cleaned their barns often using such a system would never be able to comply because a vegetative cover would never have enough time to get established. For some poultry operations, for example, heavy equipment and semi-tractor/trailers are driven back and forth over the area near the barn door, and it gets compacted to the point where vegetation will not grow

[81] The legislature adopted the capacity standard in the new act. See Chapter 435, sec. 2, subd. 1, and secs. 11 and 12.
[82] Chapter 435, § 3.
[83] *See*, for example, Comments of Don Becker, Tr. 765-68 and Randy Hagen, Tr. 257-59.
[84] *See* Agency Initial Responses, at pp. 87-89.
[85] Chapter 435, section 10(d)(7).

easily.[86] In response to these comments, the Agency added a provision, but placed some limitations on its use. The Agency provided that a vegetative cover must be established on the site for at least one full growing season prior to re-use of the short-term stockpile site, except for sites where manure is stockpiled for less than ten days no more than six times per year if they are located not more than 150 feet from an animal holding area from which the manure was removed. The Agency explained that given other provisions in the rule which still apply to this kind of a facility, and given the fact that the manure is stockpiled there for less than ten days, the risk for significant environmental impact is low, yet it permits the normal operations of these facilities to continue with minimal disruption. Later, the legislature directed the Agency to include a provision allowing reuse of an area if manure was stockpiled there for less than ten days and the site is not used for more than six times in a calendar year.[87]

59. One of the other safeguards built into the rule is that no short-term stockpiling may occur within 100 feet of any private water supply or abandoned well. The Minnesota Department of Health urged that the term "abandoned well" be replaced with the term "unused-unsealed well", which is the term that the Department of Health uses to specify wells that need to be properly sealed.[88] The Agency has agreed to make this change.

60. The Minnesota State Cattlemen's Association prepared a lengthy list of desired changes to the rules, which was submitted into the record by hundreds of persons who attached it to their own comment letters. They had a number of suggestions for this proposed rule. First of all, they urged that there be no difference between temporary manure stockpiles (subpart 2) and permanent manure stockpiles (subpart 4), and that all stockpiles should be treated according to the same standards, which would be those that were originally proposed for temporary stockpiles. They proposed deletion of the maximum allowable size, and deletion of the 180-day time requirement discussed above. They also favored deleting the recordkeeping requirement. Minnesota Center for Environmental Advocacy, on the other hand, argued for greater public access for stockpile records, and urged that instead of merely requiring owners to retain records on site, the records should be filed with the state or county authority.[89]

61. In the SONAR, the Agency justified the difference between short-term and permanent stockpile requirements in terms of the additional risk for environmental harm. The longer a stockpile is exposed to rainfall and snow melt, the more runoff it will produce. The longer manure is allowed to sit on bare ground, the greater the amount of infiltration. If a stockpile is to remain exposed

[86] Comments of Ralph Michaelson, Gold'n Plump Poultry, at Tr. 1869-72 and Letter dated March 6, 2000 from Minnesota Milk Producers Association, at pp. 5-7.
[87] Chapter 435, section 10(d)(10).
[88] Letter dated February 2, 2000 from Patricia Bloomgren, Minnesota Department of Health.
[89] Letter dated January 19, 2000 from Kris Sigford and Mark TenEyck. This comment was made in the context of a general argument in favor of greater public access to records.

to the elements indefinitely, then it is appropriate, the Agency claims, that it be constructed on a pad with a liner and a runoff containment system.[90]

62. The proposed rule and the final rule both contain a limitation on the amount of manure which can be stored in a short-term stockpile. They provide:

> The size of a short-term stockpile must not exceed a volume based on the agronomic needs of the crops on 320 acres of fields and must not exceed the agronomic needs of the crops on the tract of land on which the stockpile is to be applied. The agronomic needs of the crops must comply with the application rates in part 7020.2225.

The Minnesota State Cattlemen's Association challenged the basis for this limitation, stating that it should be deleted because it took away the ability to properly apply manure, and the amount of manure that can be stored in a proper non-polluting stockpile should not be set by the MPCA, as it will force producers to consider application of manure simply to reduce the size of the stockpile, rather than when and at what rate of nutrient is needed in the field.[91]

63. The SONAR asserts that the Agency has observed stockpiles up to one-quarter mile long, and had considered limiting stockpiles to a "footprint" of 10,000 square feet. But the need for a payloader or similar equipment to maximize the amount of manure that could be stored in a given square foot limitation led the Agency to reject that approach in favor of the 320-acre or less number.

64. The Administrative Law Judge concludes that the Agency has demonstrated the need for and reasonableness of its 320-acre proposal. The idea of having a number of smaller stockpiles, rather than one very large one, "diversifies" the risk of ground water infiltration. Especially given the fact that the length of time that the stockpile can remain in one place has now been extended, it makes even more sense to spread the risk by limiting the amount that can be kept in one place.

Vagueness and Excessive Discretion

65. Proposed Rule part 7020.0350 is the rule relating to the registration program. It defines who must register, when they must register, and what data must be provided in the registration form. Subparts 3 and 4 define the registration procedures, and subpart 1 lists the data required. The data required by subpart 1 is generally straightforward except for the last item, which drew criticism. Item K in the laundry list requires the disclosure of:

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[90] SONAR, at pp. 180 and 190.

[91] Minnesota State Cattlemen's Association form letter, at p. 3.

> Additional information needed to evaluate high priority environmental issues related to animal feedlots and manure storage areas.

Proposed part 7020.050, subp. 4A(12) has a similar requirement for permit applications.

At the hearing, Lowell Ranum, a small sheep producer in Beltrami County, indicated that he didn't know what would be required as a "high priority environmental issue".[92] After the hearing, the Minnesota Pork Producers Association filed a comment urging that the item be deleted from the list. They argued that it was totally subjective and its interpretation would be under the sole control of the administrative agencies. They thought that allowing the registration form to be continually changed and modified would create confusion as to whether registration requirements had been met or not. They feared that keeping the provision in the rule would allow the administering bodies to find all registration applications permanently incomplete.[93]

66. In response to these criticisms, the Agency noted that there would be a registration form, and that the Agency intended to work closely with the Board of Water and Soil Resources to maintain consistency between the registration form and the feedlot inventory guide, because the level II inventory may be used in place of the registration form. As a practical matter, the Agency stated it would not be modifying the registration form frequently, and that FMMAC would have input into the form.

67. The Administrative Law Judge finds that the rule is defective in that it grants the Agency excessive discretion. In order to cure this defect, it is recommended that the Agency delete item K from the registration list and item 12 from the permit list.

68. Subpart 5 of the registration rule provides as follows:

> Owners of animal feedlots and manure storage areas who do not register in accordance with subparts 1 to 4 are subject to a penalty.

This provision drew criticism as being too vague.[94] In response, the Agency stated that the provision was added to the rule at the suggestion of some FMMAC members just to notify owners about potential ramifications if they fail to register. The Agency defended the lack of specificity in the rule by stating that

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[92] Transcript, at p. 631.
[93] Letter dated March 6, 2000 from Minnesota Pork Producers Association.
[94] Testimony of Stuart Frazeur of Canby, Tr. at p. 1183; Gary Lee, East Polk Soil and Water Conservation District and Polk County Feedlot Officer, Tr. 375; Ted Reichmann of Pope County, Tr. 128. Numerous persons also submitted written objections to the phrase.

there are numerous tools which the Agency can use in the event of rule violations and that it needed to maintain discretion to select the particular penalty based upon the circumstances unique to each situation.[95]

69. The Administrative Law Judge concludes that this rule is impermissibly vague. Various statutes grant the Agency authority to take various enforcement actions against persons who violate rules. The Agency cannot grant itself any more enforcement authority by rule than it already has. Therefore, this is not an empowering type of rule. Instead, it is a rule designed to notify persons that something might happen to them if they fail to register. But without specifying with greater detail what might happen, the rule cannot be adopted. In order to cure this defect, the Administrative Law Judge recommends that the Agency withdraw subpart 5. In the alternative, the Agency could be more specific by specifying statutory references or other means of identifying what kind of penalties are possible.

Floodplain Restrictions and the Red River of the North

70. In general, no new animal feedlot or manure storage area may be constructed within a floodplain. The only exception is that one may be constructed in the Red River of the North floodplain if it is a minimum of 1,000 feet from the river's ordinary high water mark. Similarly, an existing feedlot or manure storage area located in a floodplain may not expand, except if it is in the Red River of the North floodplain and is a minimum of 1,000 feet from the river's ordinary high water mark.

In the SONAR, the Agency explained that the exceptions for the Red River of the North floodplain were included because it is unique. The SONAR states:

> The floodplain lies in the dried lake bed of glacial Lake Agassiz, and therefore, has very subtle slopes and generally very little change in topography. This flatness tends to exacerbate flooding since there is only a very shallow gradient to promote runoff of snow melt and precipitation, slowing drainage. There is no topography to constrain flooding, which results in water spreading out over a very wide area. This results in a gradual flooding of large tracts of land. Because such a large area is affected when flooding occurs in this area, the Red River is closely monitored and warnings about flooding are given well in advance of the actual flooding events. This allows residents within the floodplain to take precautions before the flooding event occurs.

* * *

[95] Agency Initial Response, at pp. 37-38.

> Because of the large amount of area encompassed by the flooding, and the difference in the nature of the flooding events in the area, it is reasonable to exempt the Red River of the North from this locational requirement. The selection of 1,000 feet is consistent with the typical floodplain zone or shoreland setbacks for a lake.
>
> * * *
>
> The floodplain is estimated to extend nearly 100 miles from the ordinary high water mark. Given the size of the Red River floodplain, it would be reasonable (sic) to prohibit expansion within this area.[96]

71. At the hearings and in written comments, the exemptions for the Red River of the North floodplain drew little comment, but the comments that were made were criticisms from individuals and organizations. A Roseau County producer stated:

> As widely known, the flood waters in the Red River of the North floodplain can be very uncontrollable and [it] easily spills out of its banks, becoming several miles wide. The topography of the land in most of this area is very flat and overflowing rivers and streams can engulf huge areas of land and turn them into temporary lakes . . . . In my 20 years on this farm, I have experienced a minimum of seven flooding events that exceed the ordinary high water mark. This is an accident waiting to happen as it did in the Carolinas last year. I think this entire rule should be thrown out and the same rule should apply throughout the state.[97]

The Minnesota Lakes Association noted that flooding is a common event in the northwest corner of the State, and if feedlots are to be allowed in the floodplain, they should be required to be surrounded by ring dikes or similar protective devices, to protect them against a 100-year flood.[98]

The Department of Natural Resources labeled the MPCA's proposed exception "unsatisfactory", explaining:

> The OHW of the Red River is the top of the banks, and it is normal for the river to be out of its banks. We strongly recommend that this exception to the location restrictions be

[96] SONAR, pp. 144, 146.
[97] Letter dated January 26, 2000 from Thomas C. Johnson.
[98] Tr. pp. 2526-27, and letter dated February 11, 2000 from Minnesota Lakes Association.

> removed, or that any facility located in the floodplain be protected by ring dikes. We believe this would be supported by the Red River Valley farm community, as it is common practice now, and its importance was realized in the 1997 flood.[99]

The Federal Emergency Management Agency, which administers the national flood insurance program and produces maps outlining various flood events, stated as follows:

> While our regulations found in 44 § C.F.R. do not specifically address health and safety issues from animal feedlot operations in the floodplain, we recognize that contamination from these operations can be significant during flooding events. In the Red River of the North, a 1,000-foot setback from the ordinary high water mark does not guarantee that the feedlot will be out of the 100-year floodplain. The question is not *if* this area will flood but *when*. As part of our agency's mission to reduce the loss of life and property from flooding, we recommend that the 100-year floodplain standard [be] used to prohibit expansion of feedlots.[100]

The Board of Soil and Water Resources, which plays a significant role in the delivery of cost-share assistance and technical assistance, noted that the Red River of the North floods large areas quite frequently, and recommended that both proposed exemptions be amended by adding the following condition to them:

> . . . and ring dikes or other measures are constructed that enable the feedlot to meet applicable discharge standards for floods up to that corresponding to the definition of "floodplain".[101]

72. The Minnesota Center for Environmental Advocacy attacked the reasonableness of the exemption for the Red River of the North, presenting evidence which demonstrates that when it does flood, the proposed restriction of 1,000 feet from the ordinary high water mark is virtually meaningless. MCEA also presented evidence demonstrating that ring dikes have been successfully used there to protect farmsteads and other farm projects.[102] MCEA also supplied copies of e-mail correspondence between MPCA staff people discussing the Red

[99] Letter dated January 18, 2000 from Department of Natural Resources.
[100] Letter dated March 8, 2000 from Federal Emergency Management Agency, Region V.
[101] Letter dated February 18, 2000 from Ronald D. Harnack.
[102] Appended to the MCEA's letter of March 6 were photographs of the Red River Valley taken from the website of the U.S. Army Corps of Engineers. These photographs, taken in April of 1997, demonstrate the tremendous size of the flooded area, but also demonstrate the effectiveness of ring dikes.

River exemption and the proposals for ring dikes. The regional director in Detroit Lakes wrote:

> For us to allow feedlots, including structures or manure pits to be built in the floodplain of the Red River does not make any sense to me. There are plenty of places to put feedlots up here without putting them in locations where they are going to be damaged by flood water and also contribute additional contaminants during times of flooding. We should not be allowing these structures to be placed without at least protecting them with ring dikes. The DNR and local watershed districts have been actively cost-sharing with landowners to build ring dikes around existing farm operations that are in the floodplain. To allow new construction to occur without the minimum of a ring dike seems counter-productive to me. In addition, a large number of organizations participated in a mediation process that resulted in a formal agreement for future water management and natural resource management for the Red Basin. The formal agreement was signed by a large number of organizations including U.S. Army COE, USFWS, DNR, BWSR, PCA and the local watershed districts. Our local legislative folks for the Basin have heralded this agreement as the future of watershed management. In that agreement, the goals include providing 100-year protection for rural farmsteads including agricultural infrastructure like barns and pits. The purpose is to reduce future flood damages by forcing wise developments in floodplain areas. To allow feedlot developments other than open pasture operations in floodplain areas of the Red River Basin doesn't make any sense. If you need any detailed cost estimates for ring dikes, John Linc Stein at DNR Waters can provide you with some good estimates for their ring dike cost-share program.[103]

MCEA is concerned about the risk of water contamination in the event of a flood in the Red River Valley. Along with photographs of the 1997 flood there, MCEA also introduced photographs from a 1999 flood of the Neuse River in North Carolina. That flood inundated numerous hog, turkey and chicken facilities, and newspaper reports and photographs from that flood demonstrate the seriousness of what can occur. North Carolina newspapers used terms such as "environmental disaster", "public health disaster", "environmental nightmare", and similar phrases to describe the contamination that occurred from flooded lagoons and drowned animals. The photographs from North Carolina show

[103] E-mail dated March 1, 2000 from Jeff Lewis to various MPCA staff people, attached to MCEA letter of March 13.

hundreds of dead pigs and numerous flooded barns and lagoons. Some of these facilities have obvious plumes of waste coming from them.

73. In response to these criticisms, the Agency decided not to make any change in its proposed exemption for the Red River of the North. The Agency reasoned:

> The costs and implications [of requiring ring dikes] could be significant and have not been considered in the drafting of the proposed rules. The cost implications are reflected in the fact that much of the cost-shared dollars in the Red River Valley are used for site protection often in the form of ring dikes. Given the significant costs and implications associated with the suggestion, the agency is not prepared to add this requirement to the proposed rule. The agency believes such a specific requirement would be unreasonable in an area where the floodplain extends 15 to 20 miles. This requirement can and should be considered on a project specific, case-by-case basis for new or expanded facilities in these areas.[104]

74. After the Agency decided to reject the ring dike proposal in favor of a case-by-case permitting decision, the legislature adopted a provision which raises questions about the extent to which the Agency can rely on its preferred method of case-by-case review. Section 4 of chapter 435 provides, in part:

> After the proposed rules . . . are finally adopted, the agency may not impose additional conditions as a part of a feedlot permit, unless specifically required by law or agreed to by the feedlot operator.

75. Based on all of the facts in the record, the Administrative Law Judge does not believe that the Agency has demonstrated a rational basis for exempting the Red River floodplain. The two reasons stated in the SONAR, that the floodplain is huge and people have warning of when floods are coming, do not adequately support an exemption. What kind of precautions can a feedlot owner make, as a practical matter, if he receives warning that a flood is coming? Can ring dikes be constructed quickly? Is there adequate construction equipment to serve all those who would want to build dikes? Presumably, some of the livestock could be moved out of the floodplain area if there was adequate transportation equipment and a location to take them. But what about the manure in lagoons or stockpiles? There are no facts in the record to answer these questions, so that the Administrative Law Judge cannot conclude that the Agency did have a rational basis for the exemption. The mere fact that the

[104] Agency Initial Response, p. 69.

floodplain is huge, and a large number of people would be affected does not provide a rational basis for the exemption.

76. In order to cure this defect, the Agency must remove the exemption for both new facilities and expanding facilities. In the alternative, the Agency may challenge this finding of unreasonableness by following the procedures of Minn. Stat. § 14.15, subd. 4.[105]

Generic Environmental Impact Statement (GEIS)

77. Numerous persons suggested that these rules should not be adopted at this time, but rather should wait for the completion of the Generic Environmental Impact Statement which is currently being prepared.

The GEIS is a statewide study intended to provide an examination of the facts about the environmental, economic, health and social effects of animal agriculture in Minnesota. It was authorized and funded by the 1998 Minnesota legislature[106] That legislation charged the Environmental Quality Board with preparing a GEIS "to examine the long-term effects of the livestock industry as it exists and as it is changing on the economy, environment, and way of life of Minnesota and its citizens." It is estimated to end up costing between $3 and $5 million, and it will not be completed until at least 2001.[107]

78. The Agency responded to criticisms by acknowledging that the GEIS will be valuable, but that much of the material necessary for these rules (which have been in process since 1995) is already known. The Agency also pointed out that:

> 1. Facility owners with existing pollution problems at their sites need defined parameters in order to develop and use management plans that address the problems in accordance with standards. These standards help producers get the financial assistance needed to environmentally improve their facilities.
>
> 2. Facility owners looking to locate in Minnesota need a defined set of standards by which they might develop not only design and construction plans but also business plans without further delays or uncertainties . . . .

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[105] The Administrative Law Judge agrees with the Agency that requiring ring dikes without giving people an opportunity to comment on that proposal would constitute a substantially different rule. *See* Memorandum, section III. The Agency might want to consider following the procedures in Minn. Rule pt. 1400.2100.

[106] Laws of Minnesota 1998, chapter 366, section 86.

[107] *See* "The Generic Environmental Impact Statement on Animal Agriculture", a fact sheet published by the MEQB in February of 1999 and included in the record as MPCA Post-Hearing Response, Attachment 1.

> 3. Where pollution hazards exist, the MPCA has an obligation to require a change in operation or facility design to correct the problem . . . and
>
> 4. The proposed rules represent the efforts of many producer groups, individuals, local government staff, state agency staff and the MPCA staff . . . . While the GEIS process can and has provided a significant amount of information . . . it is important to start to move forward with rules that reflect today's agricultural practices, many of which have changed greatly since the last rule revision in 1978.[108]

The Agency also noted that the goal of the GEIS is to understand issues, but not to provide specific solutions. These rules, on the other hand, have been oriented towards providing more detailed, specific technical standards than have existed in the past.

79. The Administrative Law Judge believes that the Agency has demonstrated the reasonableness of its proceeding ahead with these rules without awaiting the outcome of the GEIS. While it would have been helpful to have the GEIS completed, it is not critical to proceeding at this time. If the GEIS reveals errors or omissions in these rules, the Agency can proceed to correct them based on the new knowledge available.

Ownership Disclosure and Public Notification

Newspaper Publication

80. Under the statute in effect at the time of the hearings, a person who applied for a permit to construct or expand a feedlot with a capacity of 500 animal units or more was required to provide notice to each resident and each owner of real property within 5,000 feet of the perimeter of the proposed feedlot, either by first-class mail, in person, or by newspaper publication.[109]

81. In the rules as originally proposed, the Agency detailed the contents of the notice, but required publication in a newspaper of general circulation. This requirement remained the same in the final rules.

82. The Minnesota Farm Bureau made the following comment:

> This section of the proposed rule should mirror Minnesota Statutes 116.07, subd. 7a. The Agency should not be allowed to rewrite a statute through the rulemaking process.

[108] Agency Initial Response, at pp. 5-6.
[109] Minn. Stat. § 116.07, subd. 7a (1999).

> The proposed new language imposes additional requirements in the notification process and eliminates the option of notification in person or by mail. We recommend using existing language in statute (116.07, subd. 7a) in this section.[110]

In the new feedlot bill, the legislature specifically required that the rules must "allow direct notification of a feedlot permit application in lieu of the newspaper notification as provided in Minnesota Statutes § 116.07, subd. 7a."[111]

83. The Administrative Law Judge concludes that where the legislature has specified that a person may use one of three methods, the Agency cannot restrict a person to using only one of them without conflicting with the statute.[112] In the SONAR, the Agency argues that there have been problems with the other two methods, and that there would be less confusion if everyone were required to publish in the newspaper.[113] That may true, but the argument must be presented to the legislature with a request that the legislature change both the old statute and the new one. The Agency's proposed rule conflicts with both the old statute and the new feedlot bill. In order to correct this defect, the rule must be amended to allow for the three methods set forth in section 116.07, subd. 7a.

Contents of the Notice

84. In the rule as proposed, the agency required that the notice state "the names of the owners or the legal name of the facility", along with other information about the facility.[114]

85. A number of persons, including Clean Water Action Alliance[115] and Nancy Barsness, a Pope County producer and township planning and zoning consultant[116] urged that there be publication of more information. However, the legislature has mandated, in the new feedlot bill, the maximum amount of information which the Agency can require in the newspaper notification. The Agency cannot go beyond that list, and therefore the reasonableness of not requiring the publication of additional information is moot.

86. The legislature allowed the Agency to require both (1) the name of the owner or owners, and (2) the name of the facility. The legislature did not require that both items be published, but the legislature allowed it. Therefore, the

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[110] Letter dated March 6, 2000 from Minnesota Farm Bureau Federation.
[111] *Id.*, at sec. 10(d)(6).
[112] United Hardware Distrib. Co. v. Commissioner, 284 N.W.2d 820, 822 (Minn. 1979).
[113] SONAR, at p. 130.
[114] Proposed Rule 7020.2000, subp. 4.
[115] Letter dated March 2, 2000 from Clean Water Action Alliance.
[116] Tr. 181.

question of the need for and reasonableness of the Agency's choice to require only the names of the owners *or* the legal name of the facility is still at issue.[117]

87. The Administrative Law Judge concludes that since the full data will be available to the Agency and the public[118] via the registration form or the application form, the Agency can limit the published notice to including either the full ownership data or the legal name of the facility. The Agency may want to revisit its decision in light of the various changes made by the new legislation, as the record supports the reasonableness of either position.

Ownership Data in Registration and Application Forms

88. The definition of "owner" was also debated during the hearings, and the legislature did not resolve it. The existing rule defines "owner" to include "all persons having possession, control or title to an animal feedlot."[119] The Agency is not proposing to change that definition, other than to add the phrase "or manure storage area" to the end of the existing definition. It has long been the policy of the Office of Administrative Hearings that where the substance of an existing rule is not proposed to be changed, an Agency need not demonstrate the need for and reasonableness of the existing rule.[120] A corollary to that concept is that the existing rule is not "fair game" for criticism from the public or review of need and reasonableness by the Administrative Law Judge. Therefore, those who wanted to change the definition of "owner", either to broaden it or narrow it, will not find their arguments addressed in this Report.[121]

89. Both the registration rule and the permit application rule contain lists of what information must be provided to the Agency (or the designated county) on a registration or application form. The two are worded slightly differently. For purposes of registration, a registrant must provide "name and address of all owners of the animal feedlot, manure storage area, or pasture"[122]

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[117] A related matter is whether or not the Agency can require disclosure of the names and addresses of owners in registration applications or permit applications. That issue is discussed below, but for purposes of the newspaper requirement, it should be assumed that the Agency is requiring disclosure of the names and addresses of all owners in registration forms and permit applications. Therefore, that information will be available to the Agency and the public. The immediate question is whether or not that information should be required to be included in the newspaper notice.

[118] During the hearing the agency acknowledged that the full ownership data provided on registration or permit forms was "public data", and the Agency had to allow it to be inspected and copied upon request. The Agency stated that it did not intentionally publicize the data, but if someone asked for it, the Agency would provide it. Tr. pp. 2123-24.

[119] Minn. Rule pt. 7020.0300, subp. 17.

[120] *See* Minn. Rule p. 1400.2070, subp. 1.

[121] In response to those who wanted to change the definition, the Agency first noted that it was not "fair game", but then went on to state the Agency's position as to why it was needed and reasonable. Persons interested in reading that discussion are directed to the Agency's Final Response, at pages 16-20. Persons interested in seeing the other side of the issue are referred to the letter dated March 6, 2000 from the Minnesota Pork Producers Association.

[122] Proposal for Minn. Rule pt. 7020.0350, subp. 1.

For permits, the Agency's final proposal is that the application must contain "(1) the names and addresses of the owners and the signature of at least one of the owners; [and] (2) the legal name and business address of the facility, if different than the owner . . . ."[123]

A cow-calf producer from the Braham area opposed the requirement that the number of cattle and number of acres and all of the other information be supplied to the Agency when the Agency, in turn, would give it to outsiders. As he stated:

> Data privacy is a big concern to me, and I want to know if that information is going to be shared with . . . . I will use the word "telemarketers", organizations that maybe want to contact me for whatever reason. . . . If that information is valuable to them and you, by law, are required to give it to them, I don't like that.[124]

The Minnesota Pork Producers Association noted the following:

> Elsewhere, the rules require that all owners be listed in permit applications. This onerous requirement has resulted in harassment of farmers who have joined together to develop cooperatives and other entities which own and operate animal production facilities. There is no particular need to know every single possible "owner" involved with a particular operation.[125]

In response to these criticisms, the Agency first of all pointed out that the definition of "owner" is an existing rule. But the Agency went on to point out that it needs to know who the owners are so that it can communicate with them regarding permit or rule compliance issues. The Agency also pointed out that existing law (Minn. Stat. § 115.076, subd. 1(a)(2)) authorizes the Agency to deny a feedlot permit to an applicant who does not possess sufficient expertise and competence to operate the facility. Subdivision 3 allows the Agency to conduct an investigation of an applicant to determine whether to grant or deny a permit. The Agency noted that this statute was recently passed, and the only way that it could perform the function of checking on permit applicants is if, in fact, it knew their names.

90. The Administrative Law Judge believes the Agency has justified the need for and reasonableness of requiring registrant and permit applicants to disclose the actual names and addresses of all the owners.

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[123] Proposal for Minn. Rule p. 7020.0505, subp. 4.
[124] Tr. 2123.
[125] Letter dated March 6, 2000 from Minnesota Pork Producers Association, at p. 7.

91. A different rule relating to ownership is part 7020.2000, subp. 6. This rule would require the following:

> Owners of animal feedlots or manure storage areas that raise livestock that are not owned by them or store manure not produced at their facilities must record and retain on file the names of the livestock or manure source owners for at least the most recent three years.

This was criticized by a custom feeder who feared that a cattle owner might be unwilling to put his cattle in a feed yard if he knew that there was some liability which might flow to him as the result of mismanagement.[126] A similar suggestion came from Robert Mensch and Allan Larson, consulting engineers, who argued that the livestock owner's name "should not be of any concern to MPCA" because the feedlot owner is the one responsible for manure management.[127] The Agency responded that when this issue was discussed at a FMMAC meeting, it was agreed that it would be reasonable to require the feedlot owner to record this information, but it would not be reasonable to require the information to be included in a permit or registration form, as it might require frequent modification. The Agency noted that landowners, feedlot operators, and livestock owners can arrange their responsibilities and liabilities in a variety of ways, but if it becomes necessary, the Agency ought to be able to locate all potentially responsible persons.[128]

92. The Administrative Law Judge concludes that the Agency has demonstrated a rational basis for its proposal for subpart 6, and it may be adopted.

Permits and the Permitting Process

93. The new feedlot bill resolved (or at least delayed) all of the major issues that were raised concerning the Agency's proposed system for registration and permits. However, there are still a few matters that must be resolved.

94. Proposed part 7020.0505, subpart 4(B)(2) requires that an applicant for a feedlot permit for 1,000 animal units or more must submit both an air emission plan and a pollution prevention plan. The air emission plan will be discussed below, under the topic of "Odor", but the pollution prevention plan requires discussion at this point. In the rules as initially proposed, this plan would have required a discussion of "eliminating or reducing toxic pollutants, hazardous substances, and hazardous wastes at animal feedlot or manure storage area operations". In the SONAR, this was explained as covering chemicals or wastes, including pesticide, antifreeze, used oil, as well as household hazardous waste,

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[126] Tr. 979-80.
[127] Letter dated 14 February, 2000 from Robert Mensch and Allan Larson.
[128] *See* SONAR, p. 131 and Agency Initial Response, p. 60.

such as oven cleaners, nail polish remover, etc. The purpose behind requiring the plan is that pollution prevention is the least costly and most environmentally advantageous method for dealing with pollution, and a plan such as this will save money, reduce liability and prevent contamination of natural resources. During the hearing process, this proposed plan was criticized by a number of persons.[129]

95. During the hearing, one of the Agency staff persons indicated that the driving force behind this requirement was the EPA. He stated:

> . . . the pollution plan required for those facilities over 1,000 animal units. That comes about again related to the guidance the EPA federal program is driving the states to get up to speed on, and in their guidance they discussed pollution prevent plans for the larger facilities and that's really what the focus of their program is.[130]

96. When the Agency filed its initial response and proposed changes on March 6, a slightly different view of this proposal emerged. The Agency referred to the testimony of Steve Jann, the NPDES watershed manager for U.S. EPA Region V, who discussed new requirements contained in the USDA/EPA Unified CAFO Strategy which was introduced into the record as SONAR Ex. p. 2.[131] That document requires that comprehensive nutrient management plans (CNMPs) must be developed and incorporated as conditions of NPDES permits. These CNMPs reflect a collection of best management practices that will, in most cases, be necessary to meet the technology or water-quality based effluent limitations in the permits. CNMPs must be implemented as a condition of the NPDES permit. In his testimony, Jann expressed concern about whether the rules accurately reflected this new requirement. He stated:

> Also, this and other parts of the rule need to provide authority for the MPCA to establish best management practices in NPDES permits, beyond those practices presently contemplated in the proposed rule, when numeric effluent limitations are infeasible or the practices are reasonably necessary to achieve the limitations. . . . As I mentioned, under the [Unified] Strategy, the national performance expectation is that all animal feeding operations should develop and implement CNMPs by 2009. From an NPDES perspective, CNMPs are a collection of best management practices necessary to meet the effluent limitations in a permit. They should be developed by a

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[129] *See*, for example, comments of Glenn Graff at Tr. 1099, who questioned the need for the plan, and letter dated March 6, 2000 from the Turkey Store Company, which labeled it "unnecessary paperwork".

[130] Tr. 1103.

[131] Tr. 2177-81.

> person who is certified to prepare the plans. In any written comments we may provide on the rule, or during our review of the NPDES permits that will be issued under either the current or amended rule in the future, EPA will communicate our views, including any recommended or required changes, on the best management practices, including those in the CNMP, that are necessary and appropriate for permitted CAFOs. . . . In view of this difference between the proposed rules and the strategy, EPA recommends revisions to chapter 7020.0505, subp. 4 so the MPCA has authority to collect any additional information needed to determine whether to issue an NPDES permit or establish conditions in the NPDES permit.[132]

97. In response to this criticism, the Agency acknowledge that the chapter 7020 rules did not contain the express terms that would satisfy EPA that all CNMP components are addressed. Therefore, the Agency expanded the coverage of the pollution prevent plan to include "the development and implementation of best management practices necessary to comply with the effluent limitations and conditions of the permit, and other applicable rules."[133] No person commented on this change, including the Turkey Store, which did file detailed comments after the March 6 submission.

98. After all the foregoing had occurred, the legislature directed the Agency to remove the requirement for a pollution prevention plan from the proposed rules.[134] The question arises as to whether this legislative directive also requires the removal of the reference to best management practices inserted into the rule on March 6. While the answer to that question is not clear, the Administrative Law Judge believes that the most likely legislative intent was that the entire provision be removed, both the old pollution prevention plan and the new best management practices provision. *See*, Memorandum, section 1.

CAFOs and the EPA

99. Under Minnesota law, the Agency is authorized to "perform any and all acts minimally necessary, including, but not limited to, the establishment and application of standards, procedures, rules, orders . . . and permit conditions, consistent with, and therefore not less stringent than, the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the State of Minnesota in the National Pollutant Discharge Elimination System (NPDES) . . . ."[135] The Environmental Protection Agency, which administers the Clean Water Act, and the NPDES program, has special provisions for animal

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[132] Tr. 2181-82.
[133] Agency Initial Response, at p. 49.
[134] Chapter 435, section 10(b)(4).
[135] Minn. Stat. § 115.03, subd. 5.

feeding operations (AFOs) and stricter provisions aimed at concentrated animal feeding operations (CAFOs). The basic structure of the Clean Water Act provides that any discharge of animal manure or processed wastewaters from a CAFO is prohibited, except in accordance with an NPDES permit.

100. As of February 11, 2000, 43 states, including Minnesota, had been approved by EPA to administer the NPDES program. Of those 43, 34 states, including South Dakota, Iowa and Wisconsin, have issued, or in the near future plan to issue, NPDES permits to CAFOs. In the view of EPA, Minnesota statutes must grant the MPCA the authority to require that any CAFO which discharges, or proposes to discharge, apply for an NPDES permit.[136]

101. During the period 2000 to 2005, EPA will encourage NPDES-authorized states to place the greatest emphasis on permitting CAFOs with significant manure production. In general, that means CAFOs with more than 1,000 animal units. EPA encourages states to issue general permits for these CAFOs by January 2000. Then, EPA will encourage the states to turn their attention to smaller CAFOs with unacceptable conditions, or those with significant contributors to water quality impairment no later than the end of 2002.

102. The Clean Water Act itself does not define a CAFO. Instead, in 1973, EPA proposed regulations (which were ultimately finalized in 1976) which do define which operations are CAFOs, and which are not, for federal purposes. The federal regulation[137] defines a CAFO as follows:

> Concentrated animal feeding operation means an "animal feeding operation" which meets the criteria in Appendix B of this part, or which the director designates under paragraph (c) of this section.
>
> (c) Case-by-case designation of concentrated animal feeding operations.
>
> (1) The director may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the United States. In making this designation, the director shall consider the following factors . . . .
>
> (2) No animal feeding operation with less than the numbers of animals set forth in Appendix B of this part shall be designated as a concentrated animal feeding operation unless . . . pollutants are discharged.

[136] Testimony of Steve Jann, NPDES Watershed Manager for U.S. EPA, Region 5, at Tr. 2175-77.
[137] Title 40, Code of Federal Regulations, Minn. Stat. § 122.23.

> (3) A permit application shall not be required from a concentrated animal feeding operation designated under this paragraph until the director has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

Therefore, there are two ways in which an animal feeding operation can be designated as a CAFO. The first is if it meets the criteria in Appendix B. The second is if it is designated on a case-by-case basis.

103. Appendix B provides another two ways in which an animal feeding operation can be designated as a CAFO. It can either be a CAFO because (a) more than 1,000 animal units are confined[138] or (b) it can confine more than 300 animal units and meet certain tests concerning actual polluting discharges.

In either case in Appendix B, the following proviso applies:

> Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25-year, 24-hour storm event.

In other words, regardless of the number of animals or the type of discharge system, if an operation discharges only in the event of a 25-year, 24-hour storm event, it is not a CAFO, at least according to a plain reading of the regulation.

104. The Environmental Protection Agency has issued a series of guidance documents and policy memoranda over the years. In December 1995, EPA issued its final guide manual on NPDES regulations for concentrated animal feeding operations.[139] This guide manual did not go into the question of whether a large (greater than 1,000 animal unit) facility that did not discharge had to apply for an NPDES permit or not.

105. In August of 1999, EPA released a review draft of the "Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations".[140] In this review draft, which is not yet final, EPA made the following statement:

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[138] The Administrative Law Judge admits this is a gross generalization of the actual animal unit numbers set forth in the federal regulation, but for purposes of this discussion, the generalization is satisfactory.
[139] SONAR Ex. p. 1.
[140] SONAR Ex. p. 2.

> AFOs with more than 1,000 AUs produce quantities of manure that can be a risk to water quality and public health. The amount of manure and other waste material generated is so large that a spill while handling manure, a breach of a storage system, or sheet flow from the feedlot area can release large quantities of manure and wastewater into the environment causing major water quality impacts and threatening public health. EPA's position is that most AFOs with more than 1,000 AUs probably have discharged in the past or have a reasonable likelihood to discharge in the future, at less than a 25-year, 24-hour storm event, and therefore are required to apply for and obtain a permit. The NPDES permit regulations [40 C.F.R. § 122, Appendix B(a)] contain an exemption for any AFO from being defined as a CAFO if it discharges only in the event of a 25-year, 24-hour, or larger, storm event. However, to be eligible for the exemption, the facility must demonstrate to the permitting authority that it has not had a discharge. It must also demonstrate that the entire facility is designed, constructed, and operated to contain a storm event of this magnitude in addition to processed wastewater. Facilities that believe that they do not discharge should apply for an NPDES permit and provide technical documentation of no discharge with the permit application.[141]

106. This same concept was echoed in a more recent memo from the EPA's Washington office to EPA Region 4. This memo stated:

> Because of the large volume of manure and wastewater generated by CAFOs with over 1,000 animal units, the NPDES authority should carefully scrutinize any claims by these operations that they have no potential to discharge. The NPDES authority should issue a permit unless it determines that the facility does not discharge or have a potential for future discharges. For example, where a CAFO has had past discharges or does have the potential for future discharges from its feedlot areas, the NPDES authority will issue a permit that contains terms and conditions that address those discharges.[142]

EPA's position on this matter was reaffirmed by the testimony of Steve Jann at the February 11 hearing. Jann stated:

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[141] *Id.* at p. 2-9.

[142] Memorandum dated September 27, 1999 to John H. Hankinson, Jr., Regional Administrator, U.S. EPA Region 4 from J. Charles Fox, Assistant Administrator, Office of Water, Attachment 10 to Agency Initial Responses.

> To obtain and maintain an NPDES program approval, states like Minnesota must possess the requisite legal authority and at all times administer their NPDES program in conformance with the [Clean Water] Act and relevant federal regulations. Among other things, this means that Minnesota's legal authority must prohibit discharges from CAFOs unless authorized by an NPDES permit. It also means Minnesota's legal authority must require CAFOs which discharge or propose to discharge to apply for NPDES permits. . . . If the MPCA determines that a CAFO applicant does not discharge and does not have the potential to discharge, and therefore tentatively determines to deny the application, it must notify the public and provide at least 30 days for comment. These, in summary, are EPA's minimum expectations for the Minnesota NPDES compliance evaluation and permitting program for CAFOs.
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> * * *
>
> Consistent with EPA's position, proposed chapter 7020.0405, subp. 1 would clarify the duty of operations with 1,000 or more animal units to apply for NPDES permits. EPA supports this amendment.[143]

107. As originally proposed, the MPCA's definition of CAFO would have included:

> Animal feedlots and manure storage areas meeting the definition of a CAFO in Code of Federal Regulations, Title 40, Section 122.23, and clarified under Minn. Stat. § 116.07, subd. 7c.

A number of persons criticized this proposed definition as creating confusion, particularly the phrase "and clarified under Minnesota Statutes . . ." because there are differences between the federal rule and the cited state statute, and suggesting that one clarifies the other is not accurate.[144] In response to these criticisms, the Agency proposed to delete the reference to the state statute, leaving the definition to refer solely to the federal rule.

108. The new feedlot law provides that:

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[143] Tr. 2177-79.

[144] *See*, for example, letter dated March 6, 2000 from Minnesota Pork Producers Association, at pages 4-5.

> The agency must issue national pollutant discharge elimination system permits for feedlots with 1,000 animal units or more and that meet the definition of a "concentrated animal feeding operation" in Code of Federal Regulations, Title 40, Section 122.23, based on the following: . . . .[145]

109. There are currently two types of NPDES permits recognized by the U.S. EPA – a general permit, and an individual permit. In Minnesota, there has been no general NPDES permit issued for feedlots. Instead, all the permits issued have been individual ones. The Agency is proposing, however, to create a system whereby the vast majority (roughly 700-750 of a total of 800) NPDES permits would be general permits, and a distinct minority (50 to 100) would be individual permits.[146] The Agency has already drafted a general NPDES permit, and is working with the Feedlot Manure Management Advisory Committee to refine the details of it. The new legislation amended the old version of Minn. Stat. § 116.07, subd. 7c so that now, for feedlots with 1,000 animal units or more that meet the federal rule definition, a general permit must be issued unless they are identified as a priority by the Commissioner using criteria to be developed. If the permit is for a new or expanded feedlot, the criteria shall be based upon proximity to waters of the state, facility design, and other site-specific environmental factors. If it is for an existing feedlot, the priority decision shall be based on factors of violations and other compliance problems at the facility. Notwithstanding those provisions, until January 1, 2001, the Commissioner may issue an individual NPDES permit for a feedlot, but if it does not meet the priority factors noted above, it must be transferred to a general permit. Finally, the law provides that the Commissioner, in consultation with FMMAC and other interested parties, must develop criteria for determining which feedlots are required to apply for and obtain an NPDES permit, and which feedlots are required to apply for and obtain an SDS permit, based upon the actual or potential to discharge.[147]

110. Obviously, there is much work to be done to develop the priority criteria and the permit conversion criteria, not to mention the criteria for determining which feedlots must obtain an NPDES permit and which are required to obtain an SDS permit.

111. The fundamental standard is that a state may be more stringent than the EPA requirements, but it cannot be less stringent. It would appear that "stringency" is determined by looking at the state's overall program, rather than on any specific item-by-item comparison.[148] The record of this rulemaking proceeding does not contain enough information to allow the Administrative Law Judge to say whether the State's program is "stringent enough" for EPA to

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[145] Chapter 435, section 5.
[146] Tr. 1699.
[147] All the foregoing is contained in chapter 435, section 5.
[148] Tr. p. 2217.

continue the State NPDES participation or not.[149] It is entirely possible that EPA's decision will turn upon the criteria to be developed pursuant to the new statute, particularly section 5(h). For now, the Administrative Law Judge finds that the Agency has justified its amended definition of a CAFO.

Odor

112. In the proposed rules, there was only minimal mention of odor. In proposed part 7020.2002, there was an exemption from the State's hydrogen sulfide standard during agitation and pump-out of a liquid manure storage area for a maximum of 17 days per year, if certain conditions were met. Secondly, proposed part 7020.0505, subp. 4(B) required the submission of an air emission plan along with permit applications for feedlots of 1,000 animal units or more. Persons attacked both of these provisions during the hearing process.

Many claimed that the Agency had not done enough to deal with the odor problem and air emissions in the proposed rules,[150] but also there were those who thought that the proposed rules were too burdensome.[151] The Administrative Law Judge is not going to get into the larger policy question of how much odor regulation is appropriate because that is a policy decision which the law leaves to the discretion of the legislature and the Agency.[152] Only in rare situations where an existing rule is unreasonable without some additional material does the Minnesota Administrative Procedure Act require that an agency adopt a rule it had not initially proposed. For example, if an agency proposed an operative rule, but failed to define a critical term, the Administrative Law Judge could declare that the proposed rule was defective unless the agency added the critical definition. But in situations such as the odor rules here, the Administrative Law Judge cannot require the Agency to go beyond what it chooses to do. The ALJ can only review what the Agency has chosen to do to determine whether or not it is needed and reasonable, has statutory authority, etc.

113. In the case of the 17-day exemption, the legislature has essentially resolved the issue.[153] The only issue remaining is whether proposed rule

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[149] See Memorandum, section II.

[150] *See*, for example, testimony and exhibits submitted by Julie Jansen at Tr. 1039 and following, and followup letters from Professor J. Ronald Miner.

[151] See, for example, testimony of Greg Gleichert of the Turkey Store Company and the Minnesota Turkey Growers Association at Tr. 2241 and following, as well as the written submissions from the Turkey Store Company.

[152] Minn. Stat. § 14.09 provides that any person may petition an agency to request the adoption of a rule, and the agency must respond. But unless the petitioner is a local unit of government (*see* section 14.091), a petitioner cannot force an agency to adopt a rule. Even in situations where the legislature has directed an agency to adopt rules, the courts have given agencies great leeway to act. *See* dicta in *Minnesota Agricultural Aircraft Association v. Township of Mantrap*, 498 N.W.2d 40 (Minn. App. 1993). For federal cases interpreting the federal administrative procedure act in circumstances where an agency refuses to promulgate rules, see Beck, *Minnesota Administrative Procedure*, 2d Edition, at section 17.1.2.

[153] Chapter 435, section 6.

7020.2002 is reasonable when it requires an owner to inject or incorporate manure within 24 hours of land application. Several commentators urged that this be explicitly limited to liquid manure[154] The Administrative Law Judge believes that this matter is already taken care of by the presence of the word "liquid" in the lead-in paragraph of the rule. The Agency explained in its initial responses that it had conducted hydrogen sulfide monitoring at a number of facilities, and found that solid manure facilities will not violate the state air quality standard, and thus would rarely need to use the exemption that is the basis of this rule.[155] For these reasons, the Administrative Law Judge believes that it is unnecessary to add the word "liquid" to the rule.

114. The Administrative Law Judge concludes that the Agency has justified the need for and reasonableness of paragraphs b and c, so that they may be added to the rule when it is rewritten to reflect the legislative changes.

115. The other provision of the Agency's proposed rules relating to odor occurred in connection with the permit application for a facility with more than 1,000 animal units, which would require an air emission plan. This plan would describe methods and practices to minimize air emissions, measures to mitigate them in the event of an exceedance of the standard, and a complaint response protocol. The SONAR explained that the Agency's March 1999 report (SONAR Ex. G-3) recommended that further research was needed on a variety of fronts in connection with air emissions from feedlots. The SONAR also noted that the legislative auditor made similar comments regarding additional necessary research. The Agency reasoned that given this state of affairs, it was not reasonable to establish specific control and abatement measures at this time, but rather that large feedlot owners should be required to proactively address the odor issue in their permit applications by providing an air emission plan.[156]

116. Opposition to the air emission plan came from the Turkey Store Company[157] and Golden Oval Eggs.[158] In response, the Agency noted that its proposed rule does not require air quality modeling (which can be expensive), but rather the Agency anticipates a relatively simple, inexpensive plan. The Agency even set forth an outline of a sample response protocol in its final responses.[159]

117. The legislature responded to the Turkey Store Company's concerns by providing that the Agency may not require air emission modeling for a type of livestock system that has not had a hydrogen sulfide emission violation.[160] That

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[154] Stewart Frazeur, Tr. 1186 and letter dated March 3, 2000 from John Schafer and John Biren, Tr. p. 1194-95.
[155] Agency Initial Response, pages 62 and 63, citing SONAR Ex. G-3.
[156] SONAR at p. 103-04.
[157] Tr. p. 2246-48.
[158] Tr. 2366.
[159] Agency Final Responses, at p. 26.
[160] Chapter 435, section 6.

would remove the largest cost concern if, as alleged, no turkey facility has ever had a hydrogen sulfide emission violation in Minnesota.

118. The Agency provided a lengthy response to critics of the air emission plan in its final responses.[161] They will not be repeated at length here, because the Administrative Law Judge finds that the Agency has justified the need for and reasonableness of its proposal to require the largest feedlot operators to prepare an air emission plan.

Livestock Access to Lakes

119. Proposed rule 7020.2015 has three sections, which create three different standards for regulating livestock's access to waters. The first section deals with livestock from CAFOs, and provides that CAFO animals must not be allowed to enter "waters of the state". The second provision deals with non-CAFO feedlots, and requires that by October 1, 2001, animals of a non-CAFO feedlot must be fenced to prohibit entry to a lake classified by the DNR as a natural environment lake, recreational development lake, or general development lake. The third section dealt with pastures, and it relaxed the second section's fencing requirement for pastures, providing that in the case of a pasture, certain NRCS standards could be used to create a plan to control access to lakes.

120. This proposed rule was criticized at virtually every hearing location, particularly as it would have affected pastured animals. Both the Agency and the legislature have now declared that there will not be restrictions on pastured animals, and so the entire third section of the rule dealing with pastured animals has been withdrawn. What remains, however, are the first two sections. Although most of the criticism at the hearings was directed to the restrictions on pasturing, there were still criticisms of the first two sections.

121. The Chair of the Cass County Board wrote the following:

> A rancher who owns 1,000 animal units or more may not allow an animal to enter waters of the state. A man-made livestock pond would be considered waters of the state. Most of these livestock ponds were cost share and designed by USDA NRCS personnel and placed in some part of a watershed. Will we be able to use these watering facilities in the future? Again, one branch of the government is telling us it is all right and another telling it is not.[162]

Robert Mensch and Alan Larsen, consulting engineers, urged that any distinction between CAFOs, non-CAFO feedlots, and pastures should be eliminated and a

[161] Agency Final Response, pp. 23-29.
[162] Letter dated January 18, 2000 from James Demgen, Chair, Cass County Board of Commissioners.

universal standard should be applied to all. The standard they recommend would read as follows:

> Animals must be restricted from access to lakes classified by the DNR as recreation or general development. Restriction of access shall be either by prohibiting entry or controlling access to the lake with a plan that conforms to USDA NRCS Natural Range and Pasture Handbook Chapter 5 or MN NRCS Practice Standard Controlled Grazing, Code 528A or Heavy Use Area Protection Code 561.[163]

Mensch and Larsen urged that only two DNR types of lakes should be protected because the third, natural environment lakes, consists of small ponds that are needed for cattle watering. Fencing these ponds would be a large financial burden to producers, and in many cases they would be forced to leave the cattle industry and sell the areas for a housing development, as these areas are in high demand.[164]

In a letter submitted to the Agency before the hearings began, the Minnesota State Cattlemen's Association echoed the concerns later expressed by Mensch and Larsen, but added some additional information:

> We have no problem with restricting animals from recreational development or general development lakes. Our producers have a major problem with natural environment lakes. Many of these are small ponds that are needed for cattle watering. . . . We would request a change to remedy this situation. If natural environment lakes under five acres in size or 15 feet of depth were exempted from this rule, everyone would benefit.[165]

122. A similar point was also made by Kelly Land and Cattle Company, a large landowner in the Marine-on-St. Croix area. As was explained:

> The farm consists of 2,850 acres, 1,150 acres are lakes, wetland and wooded acres. In 1995 we . . . established a rotational grazing system of 55 pastures on the balance of 1,700 acres. We put stock watering ponds in many of the pastures as well as water lines to five pastures. We have four lakes on the property; two of which are about 80 acres each and the other two are between 40 to 60 acres each. There are six pastures adjacent to these lakes from which

[163] Specific objections to Proposed Changes in Chapter 7020 Feedlot Rules dated 14 February, 2000 by Mensch and Larsen.
[164] *Id.*, at p. 3.
[165] Letter dated January 14, 2000 from Roger Gilland, Minnesota State Cattlemen's Association.

> our livestock are allowed to drink. Because of the large size of these lakes, the livestock do not drink in a concentrated area, but access these lakes over a large area.
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> * * *
>
> We are concerned that with the very slim and sometimes non-existent profit margin in animal agriculture today, that if we are required to fence for several miles around these lakes to force livestock to drink at one spot that the cost will be prohibitive, and we will be forced to develop the property.[166]

It was unclear at the hearing whether this operation had more than 1,000 animal units or not,[167] but given the size of the lakes referenced, it probably does not matter. If they are over 1,000, then they are covered by subpart 1. If they are under 1,000, they are likely covered by subpart 2. Both subparts would require fencing.

123. In the SONAR, the Agency justified its restriction for both CAFO animals and non-CAFO animals in terms of protecting surface water integrity and public health. The Agency noted that the State has established a number of rules to protect its lakes from environmental degradation, such as requiring proper individual sewage treatment within shoreland areas. The Agency reasoned that animal manure also has a very significant potential for impacting surface water, and thus the need to restrict animal access to lakes. The Agency stated that the average dairy cow produces approximately 115 pounds per day of manure which would contribute roughly 0.24 pounds of phosphorus daily. If one pound of phosphorus added to surface water will generate 500 pounds of algae growth, then allowing dairy cows to defecate in a lake will have a significant impact on it.[168] In addition to the phosphorus, human health is threatened when persons swim in, or drink, manure-contaminated water.[169]

The Minnesota Lakes Association wrote about subpart 3, the pasture rule which has since been withdrawn, but the ideas are equally applicable to the subpart 1 and 2 rules which are still proposed:

> There are many local, state and federal programs offered to producers to help assist in paying for fencing and watering. However, these same programs are not available to lakeshore owners for septic system installations or repair . . . . To provide water for cattle fenced out of streams

[166] Letter dated 2 January, 2000 from Maurice Grogan, Kelly Land and Cattle Co.
[167] Tr. pp. 2328 -31.
[168] *See*, generally, pp. 146-47.
[169] *See* SONAR, pp. 16-18.

> and lakes, shallow wells or inexpensive solar battery operated pumps can pump water out of the lake like many lakeshore people use to water lawns. There are even cattle-operated pumps. The threat to water quality and the health of people using the lakes should be more important than allowing the continuation of a practice that has gone on for years at the expense of Minnesota resources. . . .[170]

Attached to the Association's comment was an excerpt from an article which appeared in the MLA Newsletter for March/April of 1999. It described cost-shared fencing programs in Benton, Aitkin and Sherburne Counties. These programs have been jointly sponsored by the Soil and Water Conservation Districts and Watershed Associations.

The Department of Natural Resources agreed that livestock should be prohibited entry to lakes from feedlots for the reasons set forth in the SONAR at pages 146-47.[171]

124. In its Initial Post-Hearing Responses, the Agency distinguished between the subpart 1 restriction on CAFOs and the subpart 2 restriction on non-CAFO feedlots. With regard to the subpart 1 restriction on CAFOs, the Agency explained that EPA has been tightening up on this issue and has determined that if confined animals have direct access to the surface waters, a discharge is presumed. In its initial general NPDES CAFO permit, issued in 1993, EPA Region 6 stated:

> No waters of the U.S. shall come into direct contact with the animals confined on the concentrated animal feeding operation. Fences may be used to restrict such access.[172]

EPA Region 6 is proposing to keep that same prohibition in the reissued permit.[173] EPA Region 10 has included a similar access prohibition in its general NPDES CAFO permit for the state of Idaho. Region 10's permit states:

> No flowing surface waters (e.g., rivers, streams, or other waters of the United States) shall come into direct contact with the animals confined on the CAFO. Fences may be used to restrict such access.[174]

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[170] Letter dated February 11, 2000 from Donna Peterson, Minnesota Lakes Association.
[171] Letter dated January 18, 2000 from Thomas W. Balcom, Department of Natural Resources.
[172] 58 Fed. Reg. 7629 (1993) as cited in Agency Initial Responses at p. 71.
[173] 63 Fed. Reg. 34879 (1998).
[174] 62 Fed. Reg. 20183 (April 25, 1997), as cited in Agency Initial Responses, at p. 71.

Although Steve Jann, the NPDES watershed manager for EPA Region 5, came to Minnesota and testified on various portions of the rules, this topic did not come up in his testimony.

125. The legislature did not address this matter directly (except through its action on the pasture issue). However, the legislature did place limits on the amount of money that a feedlot operator could be required to spend without cost share assistance. The new law provides that unless an upgrade is needed to correct an immediate public health threat, the Agency may not require a feedlot operator to spend more than $3,000 to upgrade an existing feedlot with less than 300 animal units unless cost-share money is available for 75 percent of the cost of the upgrade. The Agency may not require a feedlot operator to spend more than $10,000 to upgrade an existing feedlot with between 300 and 500 animal units, unless cost-share money is available for 75 percent of the cost of the upgrade or $50,000, whichever is less. Finally, the Agency may not require the operator of an existing feedlot with less than 100 animal units to upgrade the feedlot unless cost-share money is available for 75 percent of the cost of the upgrade or the upgrade is needed to correct an immediate public health threat, until the funding proposal for feedlots with a capacity of less than 100 animal units required by the new law has been enacted and funding under the proposal has been made available. The Administrative Law Judge believes that installing fencing to restrict animals from waters would be an "upgrade", although that issue is not totally free from doubt. *See* Memorandum, section I.

126. During the hearings on these rules, many people were critical of the difficulty in understanding them.[175] Because fencing can involve substantial investments of time and money, it is important that the rules be clear as to when it is required, and when it is not. When is a lake part of a feedlot operation, and when is it part of a pasture? The Administrative Law Judge would recommend to the Agency (although he is not requiring it) that the Agency consider adding words to these two subparts that make it clear to readers when fencing is required and when it is not. This may be a situation where it is better to over-explain, rather than under-explain.

127. The Administrative Law Judge concludes that subpart 1, relating to animals from CAFOs, has been justified because it is required by EPA.[176]

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[175] Even Dr. Calvin Alexander, who is no stranger to government agencies and regulations, stated that there were some things he didn't understand, and that he thought rules should be simple enough so that someone with a Ph.D. in hydrogeology could understand them sooner or later. Tr. p. 2287.

[176] The Administrative Law Judge believes, however, that the EPA position is unnecessarily strict in the case of man-made livestock ponds or other small water bodies. The ALJ recommends that the Agency explore with the EPA the extent of its requirement. There was some suggestion that the EPA was in the process of revising its regulations. Perhaps in those revisions it might be possible to provide some sort of common sense *de minimus* exception.

Subpart 2, relating to non-CAFO animals, has also been justified as needed and reasonable. The restrictions here are much less severe than those for CAFO animals because only DNR-classified lakes must be fenced. The Administrative Law Judge, however, also recommends (but does not require) that the Agency consider the Mensch/Larsen/Cattlemen's Association proposals to apply the USDA NRCS practices to smaller lakes. The Cattlemen's Association suggested natural environmental lakes under five acres in size or 15 feet of depth be exempted. The Administrative Law Judge cannot recommend exempting any lake that is less than 15 feet deep, because there are many shallow lakes that are quite large and used by many people. But he believes a case has been made to exempt natural environment lakes that are only five acres in size or less. A combination of the NRCS provisions and a five-acre or less provision should result in savings to producers without diminishing environmental protection. But the Administrative Law Judge can not find the Agency's proposal unreasonable because it has demonstrated a rational basis for its proposal.

Location Restrictions and Expansion Limitations

128. The Minnesota Department of Health, which is charged with protecting drinking water supplies from contamination, submitted a lengthy and detailed list of proposed changes to the rule. Some of these changes would apply to feedlots and liquid manure storage areas throughout the state, and others would only apply in certain situations (such as karst areas).

129. Proposed rule 7020.2005, subp. 1 provides that (with certain exceptions) a new animal feedlot or manure storage area must not be constructed within 100 feet of a private well, or 1,000 feet of a community water supply well or other wells serving a school or child care center that are in a geologic setting according to part 4720.5550.

130. The Department of Health focused on the 1,000-foot setback from certain wells. The Department noted that for some community wells, a well head protection area has been determined, but there are still a number of them where a well head protection area has not yet been determined. The Department of Health has set a goal of completing these determinations for vulnerable wells by May 2003. The Department recommended that in situations where a well head protection has been delineated, the required offset should be changed to a one-year horizontal time of travel in ground water. In situations where a well head protection area has not yet been delineated, then the Department agreed that Agency's 1,000-foot setback was appropriate. The Department based its proposed change on the idea that many wells serve non-municipal systems and do not pump large volumes of water. Their well head protection areas may be less than 1,000 feet, except in the up-gradient direction of ground water flow.[177]

[177] Letter of February 2, 2000 from Patricia Bloomgren, Minnesota Department of Health at p. 3.

CONCLUSIONS

1. That the Minnesota Pollution Control Agency gave proper notice of the hearing in this matter.

2. That the Agency has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. That the Agency 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), except as noted at Findings 67, 69 and 83.

4. That the Agency has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 75.

5. That the amendments and additions to the proposed rules which were suggested by the Agency 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. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 67, 69 and 83.

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

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Minnesota Pollution Control Agency from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 9th day of May 2000.

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Reported: Court Reported, Kirby Kennedy & Associates (13 Volumes)

MEMORANDUM

I.

The Administrative Law Judge wishes to make clear to the Agency and all interested persons that he was not always sure how the legislative enactment of the new feedlot bill was intended to impact the pending rules. In some cases, it is clear, such as when the legislature provided that the rules shall allow a short-term stockpile site for 365 days. That is a clear directive with a clear target (the old 180-day limitation) and a clear result – the rules will be amended to allow short-term stockpile sites for 365 days. But in other cases, the impact of the legislation is less than clear. For example, the rules as initially proposed had required a pollution prevention plan to be filed along with permit applications from feedlots with greater than 1,000 animal units. The Agency later amended that proposal to require not only the pollution prevention plan but also a list of best management practices needed to comply with the effluent limitations and other conditions of the permit. That new provision was simply added on to the same single sentence that required the pollution prevention plan. The legislature then directed the Agency to remove the requirement for a pollution prevention plan. Did the legislature intend to remove just the pollution prevention plan, or did it intend to remove both the plan and the best management practices? That is just one of many questions which are raised by the enactment of the new feedlot law.

The record in this proceeding officially closed on March 13. It was not until early April that the Administrative Law Judge became aware that the legislature was going to be able to agree on the terms of a bill, and it did not pass both houses until mid-April. It was signed on April 24, and took effect on April 25.

When it became apparent that the bill would pass, the Administrative Law Judge considered a number of options. He considered reopening the record to allow interested persons to comment on the impact of the bill on various rule provisions. He also considered writing the Report based on the record as it stood when it closed on March 13 and not incorporating the new bill. Finally, he

decided upon a process of recognizing the bill, incorporating its provisions into the Report whenever possible, but acknowledging that there are uncertainties that the Agency will have to deal with. It is entirely possible that the Administrative Law Judge has not figured out all of the ramifications of the new language on certain provisions. These rules are interconnected and woven together, such that a change in one rule provision often has the effect of changing another one. The Administrative Law Judge might clearly recognize the legislature's actions as affecting the first rule, but might not recognize the impact on the second one.

The ultimate goal of both the Administrative Law Judge and the Agency is to effectuate the legislative intent. Therefore, the Administrative Law Judge wants to make it clear that the Agency should make such changes as it believes are necessary to conform the rules to the new law, even if the Administrative Law Judge did not require a change. Indeed, in order to speed the issuance of this Report, the Administrative Law Judge has not gone through and noted all of the changes required by the new law, even the obvious ones. Instead, he has focused on the issues raised during the hearing process which he thought were not clearly resolved by the new law.

II.

This Report does not attempt to resolve all of the differences between EPA, the Agency, producers and the legislature. The Administrative Law Judge has read newspaper stories which refer to recent (after March 13) correspondence from EPA setting forth EPA's position on various issues. The Administrative Law Judge has not seen that correspondence, nor has he been informed of its contents. Therefore, statements made in this Report should not be taken to reflect any sort of "ruling" on EPA's current position on any issue. The statements in this Report reflect the testimony of Steve Jann and the referenced documents that were introduced into the record before March 13. They do not reflect any more recent EPA pronouncements.

III.

The Administrative Law Judge concluded that the Agency had not demonstrated the reasonableness of exempting the floodplain of the Red River of the North from the prohibitions against new or expanded construction which apply in all other floodplain areas. The solution recommended by DNR, BWSR, MCEA and others was to change the rule so that the exemption would be available if a feedlot were protected by a ring dike or some similar facility. Unfortunately, that change would cause the rule to be "substantially different" from the proposed rule. Minnesota law provides that an agency may not modify a proposed rule so that it is substantially different from the original proposal

unless the agency takes certain steps to notify the public of the proposed change and allow for comment.[179]

The law[180] provides that a modification does not make a proposed rule substantially different if:

> (1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;
>
> (2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and
>
> (3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

The law goes on to provide that looking at that last standard, the "fair warning" standard, the following factors should be considered:

> (1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;
>
> (2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and
>
> (3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or the notice of hearing.

The Administrative Law Judge is concerned about the fact that the subject of ring dikes received very little attention in the public hearings, and the attention which it did get only occurred at public hearings held in the Twin Cities. A review of the transcript from the Crookston hearing, for example, reveals no discussion of ring dikes at all. The Administrative Law Judge cannot say that interested persons had "fair warning" that a requirement of ring dikes would be a possible outcome of the rulemaking proceeding. Therefore, it cannot be adopted without giving the public an opportunity to comment. One option would be for the Agency to follow the provisions in Minn. Rule pt. 1400.2100 to solicit public

[179] Minn. Rule pt. 1400.2100.
[180] Minn. Stat. § 14.05, subd. 2 (1998).

comment. Another option would be for the Agency to ask the legislature to review this finding pursuant to Minn. Stat. § 14.15, subd. 4.

AWK