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OAH 11-0500-22182-1
Governor's Tracking No. AR 1027

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF ANIMAL HEALTH

In the Matter of the Proposed Adoption
by the Board of Animal Health of New Rules
Governing Animal Health, Minnesota Rules
Chapter 1721; and the Proposed Repeal of
Existing Rules Governing Animal Health,
Minnesota Rules Chapters 1700, 1705, 1710,
1715, 1719, and 1720

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Barbara L. Neilson conducted a hearing in this rulemaking proceeding commencing at 10:30 a.m. on September 20, 2012, at the Rivers Edge Convention Center in St. Cloud, Minnesota. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies 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 made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one or when ordered by the agency. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Beth S. Thompson, J.D., D.V.M., Senior Veterinarian for the Board of Animal Health, represented the Board of Animal Health (the Board) at the hearing. The members of the Board's hearing panel included the Board's Executive Director and State Veterinarian Dr. William Hartmann, and Board Assistant Directors Drs. Paul Anderson, Kris Petrini, Dale Lauer, and Stacy Schwabenlander. Approximately 30 individuals attended the hearing.

The Board received written comments on the proposed rules prior to the hearing. After the hearing, the Administrative Law Judge kept the administrative record open for

¹ Minn. Stat. §§ 14.131 through 14.20. Unless otherwise specified, all references to Minnesota Statutes are to the 2010 version.

an additional twenty calendar days, until October 10, 2012, to allow interested persons and the Board to submit written comments. Thereafter, the record remained open for an additional five business days, until Wednesday, October 17, 2012, to allow interested persons and the Board to file a written response to any comments received during the initial comment period.² Three written comments were received after the hearing and considered during the rulemaking process, along with one response from the Board. To aid the public in participating in this matter, comments were posted on the Board's website shortly after they were received. The hearing record closed for all purposes on October 17, 2012.³

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Board may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

² See Minn. Stat. § 14.15, subd. 1.

³ The Chief Administrative Law Judge extended the time period for issuance of the Administrative Law Judge's Report on this rule.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

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

FINDINGS OF FACT

Nature of the Proposed Rules

1. The Board of Animal Health is directed by statute to protect the health of Minnesota domestic animals and carry out the provisions of Chapter 35 of the Minnesota Statutes.⁴

2. The Board's current rules are contained in Minnesota Rules Chapter 1700. Parts 1700.0100 through 1700.5300 of the current rules pertain to the importation and/or quarantine of various types of animals, including cattle, dogs and cats, sheep and goats, horses, swine, poultry, livestock and poultry, birds and household pets, and cervidae. Parts 1705.0010 through 1705.2750 relate to diseases of domestic animals, including anthrax bovine brucellosis in cattle, bovine paratuberculosis, rabies, scabies, swine brucellosis, goat brucellosis, goat tuberculosis, Aleutian disease of mink, pseudorabies control and eradication, and scrapie control and eradication. Parts 1710.1300 through 1710.1530 address diseases of poultry. Parts 1715.0005 through 1715.1480 concern livestock exhibitions and markets, including public exhibition of livestock and poultry, entrance requirements for livestock and poultry originating in Minnesota, entrance requirements for livestock and poultry originating outside Minnesota, sale of livestock at auction markets, consignment, community, and other sales, state-federal approved markets for swine, state-federal approved markets for cattle, and public stockyards. Parts 1719.0100 through 1719.4250 relate to the handling of animal carcasses. Finally, Parts 1720.0320 through 1720.1740 contain miscellaneous provisions pertaining to the cleaning and disinfecting of vehicles used as carriers, the sale and distribution of biological products and antigens, the licensing of institutions to procure impounded animals, the feeding of garbage to livestock and poultry, the isolation and quarantine of livestock and poultry for infectious and dangerous communicable diseases, the issuance of official identification tags and brands, the movement of livestock from slaughtering establishments to points in Minnesota, the maintenance, operation and inspection of kennels and dealers, and the identification of slaughter cattle and slaughter swine.

3. In this rulemaking proceeding, the Board proposes to repeal all of its current rules and instead adopt a new Chapter 1721. The Board points out that its current rules were adopted and amended on numerous occasions over a period of approximately 100

⁴ Minn. Stat. § 35.03.

years, and contends it is necessary and reasonable to amend them to ensure they meet the needs of current programs for disease control and animal health. The Board asserts that the provisions in the current rules that are still relevant are preserved in the new Chapter 1721, and new language is added to cover topics not currently addressed.⁵ The proposed new Chapter will contain general provisions, as well as more specific provisions relating to Livestock Concentration Points; Cattle and Bison; Pigs; Horses; Poultry; Deer and Elk; Sheep and Goats; Dogs, Cats and Ferrets; Anthrax; Rabies Prevention and Control; Feeding Garbage to Livestock; Biologics; and Carcass Disposal. The Board asserts that the proposed rules will eliminate obsolete or confusing language, clarify and generalize the Board's authority to control or eradicate diseases rather than tying its authority to specific diseases, and consolidate all of the rules into a new Chapter that is organized and written in a way that is easier to read and understand.⁶ The Board also proposes to add new rule provisions relating to topics that are not addressed in the current rules.⁷

4. According to the Board, significant changes in the proposed rules include (1) requiring identification of breeding cattle prior to importation, intrastate movement, exhibition and sale; (2) requiring a permit prior to importation of breeding cattle; (3) reducing restrictions on the use of Johne's Disease vaccine in cattle; (4) prohibiting importation of feral swine; (5) requiring live bird markets to be permitted, inspected, cleaned, disinfected and tested for avian influenza; (6) establishing requirements for intrastate movement of farmed deer and elk; (7) increasing chronic wasting disease surveillance requirements to five years for importation of deer and elk; and (8) establishing that the Board may require testing or vaccination of animals when necessary for purposes of disease prevention, control, and eradication.⁸

Rulemaking Legal Standards

5. Under Minnesota law, one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts.⁹ In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.¹⁰ The Board prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of facts in support of the proposed rules. The SONAR was supplemented by comments made by staff and witnesses who spoke on behalf of the Board at the public hearing, and by the Board's written post-hearing submissions.

⁵ Statement of Need and Reasonableness at 2.

⁶ Dual Notice at 1; Statement of Need and Reasonableness at 2, 12; Proposed Rules, 37 State Reg. 97 (July 23, 2012).

⁷ *Id.*

⁸ *Id.*

⁹ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100. Unless otherwise specified, all references to Minnesota Rules are to the 2011 version.

¹⁰ *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. V. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

6. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.¹¹ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.¹² A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.¹³ 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."¹⁴

7. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the 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.¹⁵

8. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Board complied with the rule adoption procedure, whether the proposed rules grant undue discretion, whether the Board has statutory authority to adopt the rules, whether the rules are unconstitutional or illegal, whether the rules involve an undue delegation of authority to another entity, or whether the proposed language is not a rule.¹⁶

9. Because the Board suggested changes to the proposed rules after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. 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.¹⁷

10. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether

¹¹ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

¹² *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹³ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

¹⁴ *Manufactured Hous. Inst. V. Petterson*, 347 N.W.2d at 244.

¹⁵ *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

¹⁶ Minn. R. 1400.2100.

¹⁷ Minn. Stat. §14.05, subd. 2(b).

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.¹⁸

Procedural Requirements of Chapter 14

11. The Minnesota Administrative Procedure Act¹⁹ and the rules of the Office of Administrative Hearings²⁰ set forth certain procedural requirements that are to be followed during agency rulemaking.

12. By letter dated July 28, 2011, the Board requested that the Office of Administrative Hearings review and approve its Additional Notice Plan for publishing a Request for Comments. By letter dated August 4, 2011, Administrative Law Judge Eric L. Lipman approved the Additional Notice Plan.²¹

13. On August 8, 2011, the Board published a Request for Comments on Possible Amendment to Rules Governing Animal Health in the State Register. The Request for Comments was published at 36 State Reg. 83.²²

14. On March 26, 2012, the Board provided a copy of the proposed rules and the Statement of Need and Reasonableness (SONAR) to the Commissioner of Agriculture.²³

15. On March 27, 2012, the Board asked the Commissioner of the Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.²⁴

16. In a memorandum dated April 26, 2012, Alisha Cowell, Executive Budget Officer for Minnesota Management & Budget, noted that she had reviewed the Board's proposed rule amendments and SONAR and had concluded that the proposed rule revisions will have no fiscal impact on local units of government.²⁵

17. On June 26, 2012, the Board filed a proposed Dual Notice of its intent to adopt the rules without a public hearing unless 25 or more persons request a hearing, and its intent to adopt the rules with a public hearing if a sufficient number of persons requested a hearing with the Office of Administrative Hearings. The Board also filed a copy of the proposed rules and a draft of the SONAR.

¹⁸ Minn. Stat. § 14.05, subd. 2I.

¹⁹ The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-14.47.

²⁰ The OAH rules governing rulemaking proceedings are set forth in Minnesota Rules part 1400.2000 through 1400.2240.

²¹ Ex. Q.

²² Ex. A.

²³ Ex. J.

²⁴ Ex. N

²⁵ *Id.*

18. On July 3, 2012, Administrative Law Judge Barbara Neilson approved the Board's Additional Notice Plan. The Dual Notice of Hearing was also approved, contingent upon the Board making certain revisions to its language.

19. On July 9, 2012, the Board electronically sent a copy of the SONAR to the Legislative Reference Library as required by law.²⁶

20. On July 9, 2012, the Board mailed copies of the Dual Notice and the SONAR to the Chairs and Ranking Minority Members of the Senate and House Agriculture Committees.²⁷

21. On July 18, 2012, the Board mailed the Dual Notice to all persons and associations on its Rulemaking List. On the same date, the Board also gave notice in accordance with the Additional Notice Plan and published the proposed rules, the SONAR, and the Dual Notice on the Board's website.²⁸ Upon receiving updated mailing information for persons and groups noted in the Additional Notice Plan, the Board made changes and forwarded copies of the Dual Notice and the proposed rules to the corrected addresses.²⁹

22. On July 23, 2012, the Board published the Dual Notice in the State Register at 37 State Reg. 97.³⁰

23. More than 25 persons requested that a hearing be held on the proposed rules.³¹

24. On September 10, 2012, the Board notified all persons who had requested a hearing that a hearing would, in fact, be held.³²

25. The hearing on the proposed rules was held on September 20, 2012, in St. Cloud, Minnesota. During the hearing, the following documents were received into the hearing record:

- A. the Request for Comments as published in the State Register on August 8, 2011 (36 State Reg. 83),³³
- B. a copy of the proposed rules dated March 13, 2012, including the Revisor's approval;³⁴
- C. a copy of the SONAR;³⁵

²⁶ Ex. D.

²⁷ Ex. K.

²⁸ Ex. F.

²⁹ Ex. I.

³⁰ Ex. E.

³¹ See Ex. G.

³² Ex. M.

³³ Ex. A.

³⁴ Ex. B.

- D. the Certificate of Mailing a copy of the SONAR to the Legislative Reference Library on July 9, 2012;³⁶
- E. a copy of the Board's Dual Notice as published in the State Register on July 23, 2012 (37 State Reg. 97);³⁷
- F. a Certificate attesting to the accuracy of the Board's mailing list and attesting that the Dual Notice was sent to all persons and associations on the Board's rulemaking list and all individuals and organizations identified in the Additional Notice Plan;³⁸
- G. a copy of the letter of transmittal and email message sent to individuals and organizations regarding the proposed rules;³⁹
- H. copies of written comments received by the Board from members of the public prior to the public hearing and, in some instances, the Board's responses;⁴⁰
- I. a certificate attesting that representatives of the Board met with the Commissioner of Agriculture on March 26, 2012, and gave the Commissioner a copy of the proposed rules and the SONAR;⁴¹
- J. certificates attesting that the Dual Notice and SONAR were mailed to the Chairs and Ranking Minority Members of the Senate and House Agriculture Committees, along with a copy of the transmittal letters;⁴²
- K. a copy of 77 Fed. Reg. 35542-35571 (June 13, 2012) (U.S. Department of Agriculture, Animal and Plant Health Inspection Service interim final rules relating to Chronic Wasting Disease Herd Certification Program and Interstate Movement of Farmed or Captive Deer, Elk, and Moose, 9 C.F.R. Parts 55 and 81);⁴³
- L. a copy of the April 26, 2012, memorandum from Alisha Cowell, Executive Budget Officer for Minnesota Management & Budget, regarding the fiscal impact and benefits of the proposed rules with respect to local governments;⁴⁴

³⁵ Ex. C.
³⁶ Ex. D.
³⁷ Ex. E.
³⁸ Exs. F, I.
³⁹ Ex. F.
⁴⁰ Exs. G, H.
⁴¹ Ex. J.
⁴² Ex. K.
⁴³ Ex. L.
⁴⁴ Ex. N.

- M. a certificate relating to an Authorizing Resolution adopted at a September 8, 2010, meeting of the Board;⁴⁵
- N. a certificate attesting that the Board mailed the Request for Comments to identified individuals and organizations on August 5, 2011;⁴⁶
- O. a copy of an August 4, 2011, letter from Judge Lipman approving the Board's Additional Notice Plan;⁴⁷
- P. a copy of the Board's additional proposed changes to the proposed rules, along with a summary of the changes;⁴⁸ and
- Q. a copy of the "Compendium of Animal Rabies Prevention and Control, 2011" issued by the National Association of State Public Health Veterinarians, Inc.⁴⁹

26. Minn. Stat. § 14.116 requires that agencies send a copy of the notice of intent to adopt rules and a copy of the SONAR to the chairs and ranking minority party members of "the legislative policy *and budget* committees with jurisdiction over the subject matter of the proposed rules." (Emphasis added.) Based upon the information included in Exhibit K, it appears that the Board notified the chairs and ranking minority party members of the Senate and House Agriculture Committees but did not notify the Finance Committees of either house. The Board thereby failed to fully satisfy the procedural requirements set forth in Minn. Stat. § 14.116. There is no evidence that this failure deprived any person or entity of an opportunity to participate meaningfully in the rulemaking process. As a result, the Administrative Law Judge concludes that the procedural flaw is a harmless error that should be disregarded. The Administrative Law Judge finds that the Board has met the other procedural requirements imposed by applicable law and rules.

Additional Notice

27. Minn. Stat. §§ 14.131 and 14.23 require that the SONAR contain a description of the Board's efforts to provide additional notice to persons who may be affected by the proposed rules. In its SONAR, the Board identified more than 65 organizations, associations, and entities to which it would provide notice of the proposed rules. The list included a broad variety of interested parties, such as poultry farmers, livestock organizations, dairy associations, animal welfare groups, veterinary professionals, elk breeders, deer hunters, zoo keepers, public agencies, and others. On July 3, 2012, the Administrative Law Judge approved the Board's additional notice plan. During the rulemaking proceeding, the Board certified that it had sent the

⁴⁵ Ex. O.

⁴⁶ Ex. P.

⁴⁷ Ex. Q.

⁴⁸ Exs. R, S.

⁴⁹ Ex. T.

proposed rules and SONAR to the individuals and organizations identified in the Additional Notice Plan.⁵⁰

28. The Administrative Law Judge finds that the Board has fulfilled its additional notice requirements.

Statutory Authority

29. The Board relies upon Minn. Stat. § 35.03 as the source of its statutory authority to adopt these rules. That provision states, in relevant part:

The board shall protect the health of Minnesota domestic animals and carry out the provisions of this chapter. The board shall make rules necessary to protect the health of domestic animals.

30. The Administrative Law Judge concludes that the Board has statutory authority to adopt the proposed rules.

Impact on Farming Operations

31. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

32. In its SONAR, the Board acknowledged that the rules affect farming operations, and indicated that its Notice Plan included notifying the Commissioner of Agriculture.⁵¹ The Board also certified that it had met with the Commissioner of Agriculture on March 26, 2012, and provided copies of the proposed rules and SONAR to him.⁵² Moreover, the rulemaking hearing was held in St. Cloud, which is located in the midst of an agricultural area.

33. The Board provided proper notice to the Commissioner of Agriculture under Minn. Stat. § 14.111 and held the public hearing in an agricultural area. Accordingly, the Administrative Law Judge concludes that the Board has adequately complied with Minn. Stat. § 14.14.

Regulatory Analysis in the SONAR

34. The version of Minn. Stat. § 14.131 relevant to this rulemaking proceeding requires an agency adopting rules to consider seven factors in its Statement of Need

⁵⁰ Ex. F.

⁵¹ SONAR at 10.

⁵² Ex. J.

and Reasonableness.⁵³ Each of these factors, and the Board's analysis, are discussed below.

35. The first factor requires "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." In its SONAR, the Board indicated that the proposed rule will affect Minnesota residents who are involved in livestock production and people who own or care for other types of domestic animals and those individuals will bear the costs of fulfilling the requirements in the proposed rules. If testing or vaccination is required to control or eradicate animal diseases, the Board noted that owners will have to bear the expense unless state or federal funds are available. The Board emphasized that these individuals will also benefit from the proposed rules where efforts to control or eradicate animal diseases are successful, since the animals will be protected from infection and animals and animal products will be able to move within the state and to points outside the state.⁵⁴

36. The second factor requires consideration of "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." In the SONAR, the Board stated that the proposed rules will not have any effect on state revenues. According to the Board, most of the requirements in the proposed rules have been pulled from current rules, and the costs of implementation and enforcement for the Board or other agencies will not change.⁵⁵ For the portions of the proposed rules that reflect significant changes, the Board identified the following costs to the Board for implementation and enforcement:

- Mandatory identification of breeding cattle prior to importation, movement from the farm of origin, exhibition and sale: Although this requirement will increase enforcement costs for the Board for a short period of time following initial implementation, the Board estimated that the probable cost to the Board will be small. The Board indicated that cattle producers will have to be informed of the new requirements and some enforcement activity will be necessary until the new protocol is well established. Once the requirement has been in place for a period of time, the Board does not anticipate a significant increase in costs for enforcement. The Board stated that there will be no costs to other agencies.
- Required permit prior to importation of breeding cattle: The Board stated in the SONAR that there will be increased costs to the Board for taking calls and issuing permit numbers to veterinarians from other states, and estimated that the increased administrative costs will be approximately equal to one full-time equivalent office and administrative specialist during the first year following implementation, and that the increased cost for enforcement during the first year

⁵³ The statute was amended effective August 1, 2012, to include an eighth factor requiring "an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule." See 2012 Laws of Minn., Chapter 238, Section 2.

⁵⁴ SONAR at 3.

⁵⁵ SONAR at 4.

will be approximately equal to one full-time equivalent agricultural specialist. The Board anticipates that the cost of enforcement will decrease once cattle producers become accustomed to the new protocol, and projects that the overall cost to the Board will be relatively small. The Board stated that there will be no costs to other agencies

- Reducing restrictions on the use of Johne's Disease vaccine: The Board stated that this proposed change will not increase costs for the Board or any other governmental unit.
- Prohibition on importation of feral swine: The Board estimated that the probable costs for implementation and enforcement of this prohibition will be insignificant.
- Mandatory permit, inspection, cleaning and disinfection, and testing for avian influenza: The Board projected that the probable cost to the Board for implementation and enforcement of these requirements will be significant. The Board stated that the requirement for a permit to operate a live bird market will increase administrative costs for the Board slightly, and estimated that it will incur increased inspection costs for these facilities equal to .5 full-time equivalent agricultural specialist a year.
- Restrictions on intrastate movement of farmed deer and elk and importation of deer and elk: The Board projected that the probable costs to the Board of these new restrictions in the proposed rules will be insignificant.
- Requirements for testing or vaccination of animals when necessary for purposes of disease prevention, control, and eradication: The Board acknowledged in the SONAR that these costs could be significant and, if all animals in some category of livestock were required to be tested or vaccinated, the resulting record-keeping and enforcement could require the full-time attention of all Board employees for a period of time. The Board noted that the costs could vary widely depending on the species and the disease. It also stated that mandatory testing or vaccination of large numbers of animals would only be implemented if it was the only effective protocol for protecting the health of Minnesota livestock populations.

In each instance, the Board stated that there should be no costs to agencies other than the Board associated with the proposed rules.⁵⁶

37. The third factor requires "a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule." The Board stated in the SONAR that it "has determined that there are no less costly or

⁵⁶ SONAR at 4-5.

intrusive methods for achieving the purpose of the proposed rules," without further explanation.⁵⁷

38. The fourth factor requires "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." The Board stated in its SONAR that it "has determined that there are no alternative methods to consider for achieving the purpose of the proposed rule," without further explanation.⁵⁸

39. The fifth factor specifies that the agency must assess "the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals." In the SONAR, the Board stated that, for the most part, the requirements in the proposed rules were extracted from current rules and would not affect the costs of governmental units, businesses or individuals.⁵⁹ For the portions of the proposed rules that reflect significant changes, the Board provided the following estimates of the cost of compliance:

- Mandatory identification of breeding cattle prior to importation, movement from the farm of origin, exhibition and sale: The Board estimated that the probable cost of complying with this requirement will be small. The Board indicated that cattle producers will experience increased costs and labor involved with applying official identification to all breeding cattle that move from the farm of origin, but noted that official USDA metal ear tags can be obtained at no charge, can be applied to cattle quickly and easily, and will result in minimal labor costs. The Board also indicated that ear tags can be obtained by producers without involving a veterinarian under new federal regulations.
- Required permit prior to importation of breeding cattle: The Board stated in the SONAR that the probable cost of complying with this requirement will be insignificant for Minnesota cattle producers. When breeding cattle are imported into Minnesota, the veterinarian from another state who issues the certificate of veterinary inspection will call the Board and receive a permit number. The Board indicated that the reason for permits is to capture specific information on breeding cattle before they arrive in Minnesota.
- Reducing restrictions on the use of Johne's Disease vaccine: The Board stated that this proposed change will result in a cost savings for cattle producers who wish to vaccinate their herds, since they will no longer be required to test their herds for tuberculosis prior to initiating a vaccination program. The Board noted that producers who have herds where Johne's Disease is a significant problem will be able to vaccinate their cattle and save production costs.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.*

⁵⁹ *Id.*

- Prohibition on importation of feral swine: The Board estimated that the probable costs of complying with this prohibition will be insignificant for Minnesota swine producers.
- Mandatory permit, inspection, cleaning and disinfection, and testing for avian influenza: The Board projected that the probable cost of complying with these new requirements will be significant for both the Board and the operators of live bird markets. As noted above, the Board estimated that it will incur increased inspection costs for these facilities equal to .5 full-time equivalent agricultural specialist per year. The Board indicated the cost of removing all poultry from live bird markets for a 24-hour period at least once every 30 days and thoroughly cleaning and disinfecting the facility will not result in increased costs for most Minnesota live bird markets since they have already implemented this protocol. The Board stated that a few of the live bird markets will experience increased cost for supplies, labor, and lost revenue for down time. The Board acknowledged that testing for avian influenza will increase costs for live bird market operators, and that they will incur increased costs for labor and laboratory fees unless state or federal funds are available.
- Restrictions on intrastate movement of farmed deer and elk and importation of deer and elk: The Board projected that the probable cost of complying with these new restrictions in the proposed rules will be insignificant for Minnesota deer and elk producers, the Board, and other Minnesota governmental units.
- Requirements for testing or vaccination of animals when necessary for purposes of disease prevention, control, and eradication: The Board acknowledged in the SONAR that the probable cost of complying with these requirements could be significant for livestock producers and the Board. The Board emphasized that the costs for testing and vaccination could vary from a few cents to several dollars per test depending on the species and the disease. While there may be federal or state funding to cover the costs of testing and vaccination in some instances, in other cases the cost may have to be borne entirely by the producer. The Board reiterated that, if all animals in some category of livestock were required to be tested or vaccinated, the full-time attention of all Board employees may be consumed for a period of time. The Board again emphasized that mandatory testing or vaccination of large numbers of animals would only be implemented if it was the only effective protocol for protecting the health of Minnesota livestock populations.⁶⁰

40. The sixth factor requires a description of "the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals." In the SONAR, the Board noted that most of the requirements in the proposed rules are also present in its current

⁶⁰ *Id.* at 5-6.

rules. With respect to the significant changes in the rules, the Board assessed the cost and consequences of not adopting those provisions as follows:

- **Mandatory identification of breeding cattle prior to importation, movement from the farm of origin, exhibition and sale:** If these requirements are not adopted, the Board stated in the SONAR that it will not be able to trace the movement of animals and its ability to control and eradicate diseases will be severely impaired, resulting in significant costs and consequences for Minnesota cattle producers. If eradication efforts fail, the Board indicated that other states may refuse to accept Minnesota cattle and animal products, costing cattle producers many millions of dollars.
- **Required permit prior to importation of breeding cattle:** The Board stated in the SONAR that, if this requirement is not adopted, the Board's ability to follow the movements of cattle as they enter the state would be severely impaired, along with its ability to quickly identify and eliminate tuberculosis and other diseases before they spread.
- **Reducing restrictions on the use of Johne's Disease vaccine:** The Board stated that, if the proposed rules are not adopted, fewer cattle producers whose herds are infected with Johne's Disease will be able to use the vaccine, breeding animals from infected herds will be lost prematurely, and production costs will rise.
- **Prohibition on importation of feral swine:** The Board indicated in the SONAR that, if this prohibition is not adopted, there is a significant risk that pseudorabies or swine brucellosis carried by feral swine in the southeastern part of the United States could be reintroduced into the Minnesota swine population, potentially causing exports of pigs and pork from Minnesota to be stopped and the Minnesota swine industry to collapse.
- **Mandatory permit, inspection, cleaning and disinfection, and testing for avian influenza:** If these requirements are not adopted, the Board indicated that it will be less able to detect and control the spread of poultry diseases, particularly avian influenza. The Board pointed out that avian influenza is a devastating disease in poultry which can also infect humans under certain conditions. If chicken or turkey flocks are confirmed to have active avian influenza (H7 or H9), the Board indicated that some markets for interstate and international trade will be closed or restricted, and poultry producers may lose millions of dollars due to lost sales.
- **Restrictions on intrastate movement of farmed deer and elk and importation of deer and elk:** If these restrictions are not adopted, the Board indicated that deer and elk from herds that fail to maintain required surveillance levels for Chronic Wasting Disease would be allowed to move from herd to herd within Minnesota, exposing others and leading to the restriction or closing of interstate and international trade and the loss of millions of dollars to producers. The

Board further noted that, if the increased restrictions for importation of deer and elk are not adopted, the rules of the Board will not be consistent with federal requirements, other states will not accept Minnesota deer and elk, and the value of Minnesota animals would drop significantly.

- Requirements for testing or vaccination of animals when necessary for purposes of disease prevention, control, and eradication: The Board contended that failure to adopt these requirements would lead to a severe impairment of the Board's ability to control and eradicate livestock diseases. The Board asserted that, in some cases, testing or vaccination of large numbers of animals may be the only effective way to achieve these goals, citing the example of pseudorabies in swine. The Board indicated that the spread of many diseases can be stopped or controlled with vaccines, and the Board's ability to respond to livestock disease incidents may depend on the ability to require the use of vaccines.⁶¹

41. The seventh and final factor requires "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." In the SONAR, the Board stated that the proposed rules "are consistent with and, in some parts, are more restrictive than existing federal regulations," without further explanation.⁶²

42. The Administrative Law Judge concludes that the Board has failed to demonstrate that it adequately considered the seventh regulatory factor. That factor calls for a specific analysis of the need and reasonableness of each difference between state and federal law. The Board has made no attempt to explain where the proposed rules differ from federal requirements or provide its rationale for those differences. Based upon the SONAR, it also appears that the Board made only a minimal and conclusory effort to consider the third and fourth regulatory factors (relating to whether there are less costly or less intrusive methods to achieve the purposes of the proposed rules, and a description of alternative methods that were considered and reasons why they were rejected). These are procedural defects in this rulemaking proceeding.

43. Under Minn. Stat. 14.15, subd. 5, the Administrative Law Judge must disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the Administrative Law Judge finds that "the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process." In the current situation, it does not appear that the Board's failure to provide a more detailed explanation of the third, fourth, and seventh factor deprived any person or entity of an opportunity to participate in a meaningful fashion in this rulemaking proceeding. Accordingly, the Administrative Law Judge finds that the shortcomings in the Board's regulatory analysis are harmless errors within the meaning of Minn. Stat. § 14.15, subd. 5.

44. The Administrative Law Judge finds that the Board has otherwise complied with the seven-factor analysis required by Minn. Stat. § 14.131.

⁶¹ *Id.* at 6-7.

⁶² *Id.* at 8.

Performance-Based Regulation

45. The Administrative Procedure Act also requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.⁶³ A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁶⁴

46. In its SONAR, the Board indicated that the proposed rule amendments were developed with the goal of designing programs for the control and eradication of animal diseases with the most flexibility for Minnesota regulatory officials, livestock producers, and animal owners. The Board asserted that the proposed rules will enable the Board to implement effective animal disease control programs at the least cost possible to the producer. It further contended that the proposed rules provide flexibility within a standard framework for disease control that is performance-based and as noninvasive as possible. The Board stated that flexibility is important because every animal disease is unique and every control and eradication program must be based on the epidemiology of the disease. It contends that the proposed rules "provide regulatory authority to the Board to fulfill its mission, but allow enough flexibility to administer disease control programs with compassion and respect for livestock producers and animal owners."⁶⁵

47. Although the discussion of this topic in the SONAR lacked specificity and ideally would have included additional discussion of provisions of the proposed rules that reflect flexibility for the regulated parties, the Administrative Law Judge finds that the Board has minimally met the requirements set forth in § 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Consultation with the Commissioner of Management and Budget

48. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government." In its SONAR, the Board indicated that the fiscal impact and benefits of the proposed rules on local governments will not be significant. Local animal control and law enforcement officials will continue to be responsible for the enforcement of part 1721.0580 of the proposed rules, dealing with management of animals that bite humans. The Board noted that this is also the case under current rule parts 1705.1151 and 1705.1152. According to the SONAR, the regulation of animals that bite humans is less prescriptive under the proposed rules and will lessen the burden of enforcement on local authorities.⁶⁶

⁶³ Minn. Stat. § 14.131.

⁶⁴ Minn. Stat. § 14.002.

⁶⁵ SONAR at 8.

⁶⁶ SONAR at 10.

49. By letter dated March 27, 2012, the Board requested that Minnesota Management and Budget conduct a review of the proposed rule amendments under Minn. Stat. § 14.131. In a response dated April 26, 2012, Alisha Cowell, Executive Budget Officer with Minnesota Management and Budget, noted that "Local units of government would not incur costs from complying with the proposed amendments, as the Board would have sole responsibility over the implementation and enforcement of the rule changes." Accordingly, Ms. Cowell concluded that the proposed rule revisions will have no fiscal impact on local units of government.⁶⁷

50. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131.

Compliance Costs for Small Businesses and Cities

51. Under Minn. Stat. § 14.127, the Board must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

52. In its SONAR, the Board stated that it had determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small business or small city. The Board noted that in no instance in the past has the cost of control or eradication of various diseases it has encountered exceeded \$25,000 for any small business or small city in any given year.⁶⁸

53. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Adoption or Amendment of Local Ordinances

54. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶⁹

55. The Board determined that no local government will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board emphasized that, with the exception of managing animals that bite humans, the proposed rules are implemented and enforced by the Board. According to the Board, enforcement by local governments of the animal bite provisions contained in part

⁶⁷ Ex. N; SONAR at 10.

⁶⁸ SONAR at 11.

⁶⁹ Minn. Stat. § 14.128, subd. 1.

1721.0580 of the proposed rules will not necessitate the adoption or amendment of any ordinance or other regulation.⁷⁰

56. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

Analysis of the Proposed Rules

57. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined; it will not include a detailed discussion of each rule part. The Administrative Law Judge finds that the Board has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Prehearing Comments

58. After the proposed rules were published in the State Register on August 8, 2011, the Board received approximately 58 requests that a hearing be held on the proposed rules and a petition opposing the proposed rules signed by 36 individuals. Don Schiefelbein, President of the Minnesota State Cattlemen's Association, and 21 members of the Association urged the Board to clarify the provisions relating to on-farm recordkeeping of breeding cattle; veterinary inspection certificates for breeding cattle; identification obligations for breeding animals; the Board's authority to enter a farm to inspect records and assign a premise number; and the enforcement process and penalties for those found to be in non-compliance. The Cattlemen's Association also asked for assurances that these requirements do not apply to feeder cattle.⁷¹

59. The Minnesota Farm Bureau Federation noted that it supported the Board's efforts to amend its rules, but requested one or more public hearings. The Federation raised many of the same concerns as the Minnesota State Cattlemen's Association. It also asked that the rules assure that specific business information obtained by the Board would be treated as proprietary business information and not be available in the public domain.⁷²

60. The Minnesota Farmers Union asked for a hearing regarding the proposed rules, and also asked the Board to consider postponing the rule and consider holding informational sessions with various farm groups. The Union indicated that it opposed a mandatory premises and animal identification program and instead supported the implementation of a voluntary system that would ensure size equity, producer's confidentiality, and limited cost to producers. Among the Union's concerns were the amount of time required for a producer to keep records; the type of identification and

⁷⁰ SONAR at 10.

⁷¹ See, e.g., letter from Don Schiefelbein (Aug. 15, 2012) (included in Ex. G).

⁷² Letter from Kevin Paap (Aug. 23, 2012) (included in Ex. G).

cost involved; the possible grouping of animals under one identification number as opposed to individual; what penalties would be imposed for non-compliance; the reason for authorizing the Board to enter property; and the impact on producers working on meeting growing local foods demand.⁷³

61. The Minnesota Milk Producers Association supported the Board's effort to update its rules but raised several concerns. It urged the Board to treat information provided to the Board regarding herd size and location as "trade secret" or "proprietary" business information to the extent possible, unless a need for publication arises due to non-compliance with the rules or an outbreak of disease occurs which necessitates disclosure of information regarding the location and size of an operation. It also asked the Board to ensure that forms that set forth the various responsibilities for the import and export of animals are prepared in advance of the effective date of the rules to minimize the paperwork burden on producers. Finally, the Association asked that dealers be held accountable for proper identification of animals bought and sold in accordance with the Board's "official identification" standards.⁷⁴

62. The Minnesota Livestock Marketing Association raised several substantive issues that it contended should be addressed in public hearings. It asserted that several portions of the rules needed to be clarified included designated official ear tags; the "confusing" definition of "herd"; the reason for limiting cattle originating from a farm of origin in an "adjacent" state versus permitting interstate movement from "any state when consigned to state/federal livestock markets; and assurances that the requirements do not apply to feeder cattle."⁷⁵

63. Sixteen individuals submitted letters complaining that there was a lack of clarity and too much generalization in the proposed rules relating to animal identification, quarantine and isolation, vaccination, testing, cleaning and disinfection, disease control zones, distribution of official ear tags, records, and information on livestock locations and livestock records. The letters did not provide any further explanation of the writers' concerns.⁷⁶

64. The Minnesota Deer Breeders Association provided the Board with a petition signed by 36 members generally noting that they opposed the proposed rule changes relating to farmed cervidae, without setting forth their specific objections.⁷⁷

65. Nancy Minion, who runs a non-profit dog and cat rescue organization, and Ann Olson, Executive Director of Animal Folks Minnesota, filed lengthy comments prior to the hearing.⁷⁸ Their comments will be discussed below in the Part-by-Part Analysis.

⁷³ Letter from Doug Peterson (Aug. 20, 2012) (included in Ex. G).

⁷⁴ Letter from Bob Lefebvre ((Aug. 20, 2012) (included in Ex. G).

⁷⁵ Letter from Minnesota Livestock Marketing Association (Aug. 21, 2012) (included in Ex. G).

⁷⁶ See, e.g., Letter from Josh Rolfson (undated) (included in Ex. G).

⁷⁷ Email from Lynne Osterman (Aug. 27, 2012) and attached petition (included in Ex. G).

⁷⁸ Letter from Nancy Minion (Aug. 20, 2012); Letter from Ann Olson (Aug. 23, 2012) (both included in Ex. G).

Comments Made During and After the Hearing by the Agency and Members of the Public

66. During the Agency Presentation at the rulemaking hearing, the Board proposed making several additional amendments to the proposed rules. The changes that were substantive in nature are discussed in the Part-by-Part Analysis below.

67. During the rulemaking hearing, several individuals and organizations expressed concerns about some of the proposed rules, including Gary Olson of the Minnesota Deer Breeders Association; Thom Petersen of the Minnesota Farmers Union; Denny Niess, who owns a deer farm and hunting preserve and also appeared on behalf of the North American Deer Elk Farm Association; and Joe Martin of the Minnesota State Cattleman's Association. These comments will be discussed in the Part-by-Part Analysis below. Mr. Olson, Mr. Petersen, James Byrne of the Minnesota Elk Breeders Association, and Brenda Hartkopf, an elk producer, expressed appreciation to the Board for seeking their input on the proposed rules and for proposing modifications in response to their concerns. Three written comments—from the Minnesota Deer Breeders Association, the Minnesota Elk Breeders Association, and Brenda Hartkopf of Splendor Ridge Elk—were received during the comment period following the hearing. To the extent relevant, these comments will be discussed below.

68. For the most part, the Board did not provide specific responses to the comments made by members of the public during the rulemaking proceeding. In its written post-hearing comment, the Board filed a letter in which it simply noted that it had reviewed the comments and did not wish to modify the proposed rules in any way, without further explanation.⁷⁹

69. The failure of the Board to provide a more detailed discussion of the concerns raised by members of the public and the reasons why it chose not to modify the proposed rules in response to those concerns appears to be at odds with the underlying purposes of the Minnesota Administrative Procedure Act to “increase public participation in the formulation of administrative rules” and “to increase public accountability of administrative agencies.”⁸⁰ Typically, “[t]he agency should attempt to address all material issues raised by interested parties . . . , either by oral answers to questions or in written submissions after the close of the record.”⁸¹ The Administrative Law Judge urges the Board to continue to consider all of the public comments that were filed pertaining to the proposed rules and, if deemed appropriate, make further modifications to the rules.

⁷⁹ Letter from B. Thompson (Oct. 12, 2012).

⁸⁰ Minn. Stat. § 14.001(2) and (5).

⁸¹ G. Beck, M.B. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure* § 20.4.3 (2d ed. 1998).

Part-by-Part Analysis of Proposed Rules

1. General Provisions (Minn. R. 1721.0010 – 1721.0070)

70. At the time of the hearing, the Board proposed several changes to the language of Subparts 2, 3, 5, and 6 of this portion of the proposed rules. The proposed modifications are discussed below.

Part 1721.0010 - Definitions

71. The definition of "breeding cattle" contained in Subpart 5 of part 1721.0010 is amended in the proposed rules to exclude "heifers of beef breed less than 18 months of age maintained for feeding purposes;" "bulls under ten months of age maintained for feeding purposes;" and "steers and spayed heifers." The Board noted in the SONAR that the definition was amended "so that people who feed young bull calves less than 10 months of age do not have to meet the requirements for official identification or testing of breeding cattle." The Board indicated that "[e]xcluding young bulls is reasonable if they are fed only for purposes of slaughter" and such animals "pose a negligible risk for disease spread because they are generally kept as a group and are slaughtered at less than 24 months of age." In contrast, the Board indicated that breeding cattle are usually kept for many years, are often moved multiple times, and pose a greater risk for spreading disease.⁸²

72. The Administrative Law Judge concludes that the proposed rule has been shown to be needed and reasonable to differentiate between breeding cattle and feeder cattle.

Part 1721.0020 – Control of Animal Diseases

Subpart 1 – Animal identification

73. Subpart 1 of the proposed rules states, "The Board may require official identification of livestock for the purpose of disease control or recording the movement of animals." In the SONAR, the Board indicated that it is preferable to generalize its authority to require animal identification where necessary to control disease or record the movement of animals rather than following the approach taken in the existing Board rules, in which the authority of the Board is linked to specific disease control programs or regulations for importation, exhibition or sale of animals. According to the Board, it is reasonable to describe its authority in broader terms because animal identification is a key element for any disease control or eradication program. The Board noted that animals must be identified before there can be a determination of whether they are infected with a certain disease, and that it is also necessary to identify animals in order to follow their movements between locations and determine which animals may have been exposed to a disease.⁸³

⁸² SONAR at 12.

⁸³ SONAR at 13.

74. The Minnesota State Cattlemen's Association, the Minnesota Farm Bureau Federation, and the Minnesota Livestock Marketing Association urged that feeder cattle be explicitly excluded from this rule provision.⁸⁴ The Board did not propose a further modification to the proposed rules or provide a specific response to this suggestion.

75. The Board's SONAR has provided an adequate explanation of the need for and reasonableness of this portion of the proposed rule, and the rule falls within the broad authority the Legislature has given to the Board to adopt rules "necessary to protect the health of domestic animals." While the proposed rule is not defective due to its failure to exempt feeder cattle, the Administrative Law Judge encourages the Board to consider this suggestion and, if deemed appropriate, make further revisions to this rule provision.

76. A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.⁸⁵ Discretionary power may be delegated to administrative officers "[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers."⁸⁶ Subpart 1 merely indicates that the Board "may" require official identification of livestock "for the purpose of disease control or recording the movement of animals." It does not set forth any criteria to guide the Board in making that determination. As a result, Subpart 1 is defective because it grants unfettered discretion to the agency to require official identification of livestock. To cure this defect, the Administrative Law Judge recommends that the language of Subpart 1 be modified to include language similar to the following:

The board shall require official identification of livestock when it is necessary to control or eradicate disease, follow the movement of livestock between locations, or determine which animals have been exposed to disease.

77. The proposed rule, if modified as suggested, has been shown to be needed and reasonable to ensure that the Board has the ability to take essential steps to control or eradicate disease. The modification to correct the defect follows the rationale set forth in the SONAR and does not render the rule substantially different from the rule as originally proposed.

⁸⁴ Comments of Joe Martin at Hearing (Sept. 20, 2012).

⁸⁵ *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

⁸⁶ *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); accord *Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

Subpart 2 – Quarantine and isolation

78. At the hearing, the Board proposed to modify Subpart 2 of the proposed rules as follows:

Subp. 2. **Quarantine and isolation.** ~~When so ordered by the board, livestock affected with, exposed to, or showing clinical signs of an infectious, contagious, or communicable disease must be quarantined and isolated from all other unexposed livestock until the board releases the quarantine.~~ The board may quarantine and require isolation of any domestic animal infected with, exposed to or which shows clinical signs of a contagious or infectious dangerous disease if it is necessary to protect the health of the domestic animals of the state. No person except the owner, attendants, or agent of the board shall enter any enclosures where quarantined and isolated livestock are being kept without prior approval of the board.

In the SONAR, the Board indicated that this subpart was extracted from existing rule parts 1720.1030 and 1720.1040, with wording changes for clarification.⁸⁷

79. As revised, Subpart 2 merely indicates that the Board "may" quarantine and require isolation of animals under certain circumstances. For the reasons discussed in Finding 76 above, this grant of unfettered discretion to the Board constitutes a defect in the proposed rules. In order to correct the defect, the Administrative Law Judge recommends that the word "shall" be substituted for "may."

80. Subpart 2, as modified by the Board at the hearing and with the correction to remove the defect suggested above, has been shown to be needed and reasonable to clarify the conditions under which the Board will exercise its authority to quarantine and require isolation of animals. The rule as finally proposed for adoption is not substantially different than the rule as originally published in the State Register.

Subpart 3 - Vaccination

81. At the hearing, the Board proposed to modify Subpart 3 as follows:

Subp. 3 **Vaccination.** In addition to the requirements in this chapter or Minnesota Statutes, chapter 35, the board may require vaccination of animals for purposes of disease prevention, control, and eradication if it is necessary to protect the health of the domestic animals of the state. Such action can be taken only on the affirmative vote of all five board members at a regularly scheduled meeting of the board. Vaccination of animals is to be performed at the owner's expense unless state or federal funds are available for this purpose.

82. In its SONAR, the Board indicated that this portion of the proposed rules is needed and reasonable because vaccination of animals to prevent the spread of

⁸⁷ SONAR at 13.

disease is critical to the success of many disease control programs. For example, the Board indicated that the vaccination of pigs played a key role in the eradication of pseudorabies from Minnesota swine in 2002. The Board also asserted that vaccination is a valuable tool in the control and eradication of foot-and-mouth disease.⁸⁸ The Board proposed the further revision at the hearing in order to make it clear that the Board will not require vaccination unless it is necessary to protect the health of Minnesota domestic animals. The Board also wished to clarify that such an action can only be taken on the affirmative vote of all five board members.⁸⁹

83. As revised, Subpart 3 states that the Board "may" require vaccination of animals if it is necessary to protect the health of domestic animals in Minnesota. For the reasons discussed in Finding 76 above, this grant of unfettered discretion to the Board constitutes a defect in the proposed rules. In order to correct the defect, the Administrative Law Judge recommends that the word "shall" be substituted for "may."

84. Subpart 3, as modified by the Board at the hearing and with the correction to remove the defect suggested above, has been shown to be needed and reasonable to clarify the conditions under which the Board will exercise its authority to require vaccination of animals. The rule as finally proposed for adoption is not substantially different than the rule as originally published in the State Register.

Subpart 4 – Cleaning and disinfection

85. As proposed, Subpart 4 permits the Board to require the cleaning and disinfecting of premises or vehicles when deemed necessary to control the transmission of diseases. In the SONAR, the Board pointed out that premises as well as vehicles used to move livestock can be contaminated with disease-causing organisms that can persist for long periods of time in the environment. Failure to properly clean and disinfect these vehicles and premises may lead to animals becoming infected with disease and undermine the Board's disease control programs.⁹⁰

86. As proposed, Subpart 4 merely states that the Board "may" require the cleaning and disinfecting of premises or vehicles in a manner approved by the Board when necessary to control the dissemination and transmission of diseases. For the reasons discussed in Finding 76 above, this grant of unfettered discretion to the Board constitutes a defect in the proposed rules. In order to correct the defect, the Administrative Law Judge recommends that the word "shall" be substituted for "may."

87. Subpart 4, as modified by the Board at the hearing and with the correction to remove the defect suggested above, has been shown to be needed and reasonable to clarify the conditions under which the Board will exercise its authority to require cleaning and disinfection of premises and vehicles to control or prevent the transmission of disease. The rule as finally proposed for adoption is not substantially different than the rule as originally published in the State Register.

⁸⁸ SONAR at 13.

⁸⁹ Ex. S.

⁹⁰ SONAR at 13.

Subpart 5 - Testing

88. At the hearing, the Board proposed modifying Subpart 5 of the proposed rules as follows:

Subp. 5. **Testing.** In addition to the requirements in this chapter or Minnesota Statutes, Chapter 35, the Board may require testing of animals to determine if the animals are infected with a disease agent if it is necessary to protect the health of the domestic animals of the state. Such action can be taken only on the affirmative vote of all five board members at a regularly scheduled meeting of the board. The board may require tests to be performed by or under the direct supervision of an accredited veterinarian. All required tests must be completed by a date determined by the board. The owner is responsible for assembling, handling, and restraining the animals so they can be tested. Required tests must be performed at the owner's expense unless state or federal funds are available for this purpose.

89. In its SONAR, the Board asserted that it is necessary to generalize its authority to require testing of livestock to determine if they are infected with a disease. The Board noted that, under existing rules, its testing authority is connected to regulations for importation, exhibition or sale, or a specific disease control program. The Board argues that it is reasonable to generalize its authority because testing is the cornerstone of all disease control or eradication programs.⁹¹ At the hearing, the Board indicated that the modification to the subpart was added in order to make it clear that testing beyond that already required in rule or in Chapter 35 of the Minnesota Statutes will not be mandated unless it is necessary to protect the health of the domestic animals in the state.⁹²

90. Subpart 5 of the proposed rules, as modified, states that the Board "may" require testing of animals to determine if they are infected with a disease agent, and the Board "may" require tests to be performed by or under the direct supervision of an accredited veterinarian. For the reasons discussed in Finding 76, this grant of unfettered discretion to the Board constitutes a defect in the proposed rules. In order to correct the defect, the Administrative Law Judge recommends that the word "may" be replaced with "shall."

91. Subpart 5, as modified by the Board at the hearing and with the correction to remove the defect suggested above, has been shown to be needed and reasonable to clarify the conditions under which the Board will exercise its authority to require testing of livestock. The rule as finally proposed for adoption is not substantially different than the rule as originally published in the State Register.

⁹¹ SONAR at 13.

⁹² Ex. S.

Subpart 6 – Disease control zones

92. At the hearing, the Board proposed modifying Subpart 6 as follows:

Subp. 6. Disease control zones. In addition to the requirements in this chapter or Minnesota Statutes, chapter 35, the board may designate disease control zones and determine their size and location if it is necessary to protect the health of the domestic animals of the state. Such action can be taken only on the affirmative vote of all five board members at a regularly scheduled meeting of the board. Within a disease control zone, the board may require owners of livestock to:

- A. report personal contact information and location of all livestock to the board;
- B. obtain a permit or movement certificate from the board prior to movement of livestock onto or off any premises;
- C. submit complete inventories of all livestock to the board as requested; and
- D. complete and follow the recommendations of the wildlife risk assessment conducted in a manner approved by the board.

93. In the SONAR, the Board asserted that it was necessary to generalize its authority to designate disease control zones and determine their size and location. The Board contends that the proposed rule provides an appropriate framework that will enable the Board to effectively implement disease control programs with respect to both livestock and wildlife. It noted that this technique has been used effectively for the control and eradication of tuberculosis in northwestern Minnesota, as well as for the control of avian influenza in central Minnesota and chronic wasting disease in southeastern Minnesota. The Board contends it is reasonable to establish this authority in a general format so that it can be used to control any disease, including diseases that are not currently prevalent in the United States.⁹³

94. For the reasons discussed in Finding 76, the use of the word "may" in the first sentence of Subpart 6 invests undue discretion in the Board and constitutes a defect in the proposed rules. To correct this defect, the word "shall" should be substituted for "may."

95. As modified by the Board at the hearing and as corrected to cure the defect noted by the Administrative Law Judge, Subpart 6 has been shown to be needed and reasonable. The language modifications do not cause the rule to be substantially different from the rule as originally proposed.

⁹³ SONAR at 14.

Subpart 7 – Disease reporting

96. Subpart 7 of the proposed rules states, "A person who knows or reasonably suspects that an animal is infected with a disease listed on the board's reportable animal diseases list must report that knowledge or suspicion to the board." In its SONAR, the Board indicated that, because new diseases become important to Minnesota animal owners at a sometimes rapid pace, it is necessary and reasonable for the Board to maintain a published list of reportable diseases instead of attempting to incorporate each new disease into its rules.⁹⁴

97. A rule must, however, be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.⁹⁵ Subpart 7 does not identify where the regulated public may find the Board's list of reportable diseases or specify how quickly a report must be made. This vagueness constitutes a defect in the language of the proposed rule. Moreover, the failure to require the immediate reporting of this information is also contrary to Minn. Stat. § 35.06, which requires that "[a] person who knows or reasonably suspects that a contagious or infectious disease exists in a domestic animal shall immediately notify the board." To cure these defects, the Administrative Law Judge suggests that Subpart 7 be revised in as follows:

A person who knows or reasonably suspects that an animal is infected with a disease listed on the board's reportable animal diseases list must immediately report that knowledge or suspicion to the board. The board's reportable animal diseases list is available at mn.gov/bah/board/rules/reportable-diseases.html or [identify other locations if possible]. Reports shall be made by calling the board at 651-296-2942, the district veterinarian [identify resource for finding name and telephone number], or the Minnesota duty officer at 1-800-422-0798.

98. Proposed subpart 7, as modified to correct the defects, has been shown to be needed and reasonable to ensure prompt reporting of an ever-changing list of infectious diseases. Inclusion of the recommended language to correct the defects will not result in rule that is substantially different from the rule as originally proposed.

Subpart 8 – Reporting test results

99. Subpart 8 of the proposed rules requires that a person or entity that performs a test to determine if an animal is infected with a disease agent listed on the Board's reportable animal diseases list must report the test results to the Board within 10 days from the date the test results are known.

100. There was no discussion of this subpart in the SONAR issued by the Board. At the hearing, the Board noted that it was primarily relying upon the SONAR as its affirmative presentation of fact in support of the proposed rules. Subpart 8 was not discussed at the hearing or in any comments filed by the Board or members of the

⁹⁴ SONAR at 14.

⁹⁵ *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

public. Under the circumstances, the Board has failed to establish the need for or reasonableness of this provision by an affirmative presentation of fact, as required by the Minnesota Administrative Procedure Act. In addition, this subpart appears to be contrary to the directive in Minn. Stat. § 35.06 that requires *immediate* notification to the Board if a person knows or reasonably suspects that contagious or infectious disease exists in a domestic animal. Accordingly, the Administrative Law Judge finds that Subpart 8 is defective. To cure the defect, this subpart should be deleted from the proposed rules.

Part 1721.0034 – Official Back Tags

101. Subpart 3 of Part 1721.0034 states that “[a] person who applies official back tags must maintain records as required by the board.” While this language is not defective, the Administrative Law Judge suggests that the Board consider setting forth the specific types of records to be maintained, similar to the approach followed in part 1721.0030, subpart 4 (describing records to be maintained by persons who apply official ear tags to livestock). Such a modification would clarify the rule and would not result in a rule that is substantially different from the rule as originally proposed.

Part 1721.0040 – Certificates of Veterinary Inspection

102. As proposed, this part requires that certificates of veterinary inspection be submitted to the Board within 14 days after they are issued and that the certificate must contain certain information. Item C indicates that the certificate must include “official identification for each animal if required.” In the SONAR, the Board asserted that it is reasonable and necessary to include a general provision discussing certificates of veterinary inspection in the proposed rules to avoid the fragmented discussions of this subject that appear in the Board’s current rules. The Board also indicated that the proposed rule ensures that requirements for certificates of veterinary inspection are consistent with those set forth by the United States Department of Agriculture in 9 C.F.R. parts 1-199.⁹⁶

103. Ann Olson, Executive Director of Animal Folks MN, filed a comment prior to the rulemaking hearing in which she suggested that the phrase “if required” be deleted from Item C because it is unclear who would require the identification. In order to facilitate the Board’s ability to track where the animal originated, where it was delivered, and by whom, Ms. Olson also recommended that the Board not allow P.O. boxes to be used as an address and require that the carrier’s name and address be included. She further suggested that the Board require the animal’s birthdate to be placed on the form rather than its age in weeks, to minimize the possibility of errors; state what penalty will be imposed if the form is not submitted within 14 days; and provide a warning describing the criminal or civil penalties for falsifying data or providing false data to a veterinarian.⁹⁷

⁹⁶ SONAR at 14.

⁹⁷ Letter from Ann Olson at 3 (Aug. 23, 2012).

104. The Board did not respond to these comments or make any changes in the proposed rules. While the proposed rules have been shown to be needed and reasonable and are not rendered defective by virtue of their failure to incorporate Ms. Olson's suggestions, the Administrative Law Judge urges the Board to consider her comments and, if deemed appropriate, propose further revisions to the proposed rules.

Part 1721.0060 – Information on Livestock Locations

105. During the rulemaking hearing, the Board proposed additional modifications to this part of the proposed rules. As modified, the rule states:

The board may visit any farm in the state to identify premises where animals are kept and ~~register the premises in the board's database so that the board can implement programs to protect the health of the domestic animals of the state.~~ Information collected by the board pursuant to this part is classified as private or nonpublic under Minnesota Statutes 13.643 Subd. 6. Registration information may include:

- ~~A. names, addresses and telephone numbers of the owners or managers;~~
- ~~B. the geographical location of premises where animals are kept;~~
- ~~C. the number and type of animals kept on the premises; and~~
- ~~D. any other information determined by the board to be necessary for the law enforcement process or the protection of public or animal health or safety.~~

106. According to the SONAR, the ability to maintain current and accurate information on livestock operations is critical to the ability of the Board to respond to disease emergencies and control or eradicate animal diseases. The Board indicated that "[t]his type of information has been collected by the Board during every disease control program it has ever implemented, but the authority to do so has never been clearly stated." It contends that, "[w]hen the Board is challenged regarding its authority to visit and collect information on livestock operations, the proposed rules will clarify the need and reasonableness of this critical activity." The SONAR further indicated that information gathered by the board on livestock operations is classified as private or nonpublic under Minn. Stat. § 13.643, subd. 6, and that "information such as names, addresses, locations and identification numbers of premises and animals may only be shared with other persons, agencies or the public if it is necessary to aid in the law-enforcement process or to protect public or animal health."⁹⁸

107. The Board stated that the revisions proposed at the hearing are designed to clarify why it needs to identify where animals are kept and how the information will be protected. In response to several comments received prior to the hearing, the Board included an assurance in the rule that information collected by the Board on the location

⁹⁸ SONAR at 15.

of animals is protected under the Minnesota Government Data Practices Act, Minn. Stat. § 13.643, subd. 6.⁹⁹

108. Joe Martin of the Minnesota State Cattlemen's Association questioned whether there is statutory authority for this portion of the proposed rules.¹⁰⁰ The Board responded that it would rely on the discussion in its SONAR regarding its statutory authority.¹⁰¹

109. As the Board points out in its SONAR, Minn. Stat. § 35.03 specifies that the Board "shall protect the health of Minnesota domestic animals and carry out the provisions of this chapter [Chapter 35]" and that the Board "shall make rules necessary to protect the health of domestic animals." However, Minn. Stat. § 35.90, which addresses the Board's general inspection authority, is somewhat narrower in scope. That statute states, "Except as otherwise specifically provided, the Board of Animal Health and the board's agents, upon issuance of a notice of inspection, must be granted access at reasonable times to sites where the board has reason to believe a violation of this chapter is occurring or has occurred." Minn. Stat. § 35.91 specifies that "[v]iolation of a rule adopted under this chapter or an order made under the authority of this chapter is a violation of this chapter."

110. The first sentence of the proposed rule states that the Board "may visit any farm in the state to identify where animals are kept" Because this language merely acknowledges the obvious fact that the Board may decide to visit farms for the purposes stated in the rule, the provision does not amount to a rule because it is not an "agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."¹⁰² It is evident from the discussion contained in the SONAR that the Board intends to rely on the language of the proposed rule as evidence that it must be granted access to farms when its authority to do so is challenged by individuals in the state. However, Minn. Stat. § 35.90 does not give the Board such broad authority. That statute makes it clear that the Board only has a right to access sites *at reasonable times* where the Board *has reason to believe a violation of Chapter 35 or Board rules is occurring and has issued a notice of inspection*. The Legislature has not granted the Board comprehensive authority to "visit" farms merely to gather information about where animals are kept. Because the provision does not amount to a rule, and because the Board lacks statutory authority to require access to farms for the purposes stated in the proposed rule, the Administrative Law Judge concludes that the first sentence of the proposed rule is defective. To cure the defect, the Board must delete this sentence from the proposed rule. Because the second sentence of the proposed rule merely reiterates the language set forth in the Minnesota Government Data Practices Act, and there is no reason to include it if the first sentence is deleted, the Administrative Law Judge recommends that the second sentence be withdrawn.

⁹⁹ Ex. S.

¹⁰⁰ Comments of J. Martin at Hearing (Sept. 20, 2012).

¹⁰¹ Comments of Beth Thompson at Hearing (Sept. 20, 2012).

¹⁰² Minn. Stat. § 14.02, subd. 4 (defining "rule" for purposes of the Minnesota Administrative Procedure Act).

2. Livestock Concentration Points (Minn. R. 1721.0080 – 1721.0110)

Part 1721.0090 – Community Sales

Subpart 1 - Permits

111. Subpart 1 generally requires individuals to obtain an annual or single sale permit from the Board before operating or conducting a community sale of livestock in Minnesota.

112. As proposed, Item D states, “The board may refuse to grant or may revoke an annual or single sale permit when the applicant or permit holder has violated the laws or the rules of the board.” For the reasons discussed in Finding 76 above, the statement that the Board “may” take adverse action constitutes a defect in the proposed rules because it provides unfettered discretion to the Board. In addition, Item D is inconsistent with due process principles because it appears to authorize the Board to revoke or deny a permit where an individual has violated applicable laws or rules without providing prior written notice and without informing the individual of a hearing process or other recourse that is available. Although the Board is authorized by Minn. Stat. § 35.93, subd. 2, to “revoke, suspend, or refuse to renew a permit, license, or certification if a person violates this chapter,” the statute specifies that the Board must first provide “written notice and hearing.”¹⁰³ Section 35.93 does not describe the particular hearing process required. One option available to address the due process defect would be to specify that an individual adversely affected by the Board’s initial decision has the right to request a contested case hearing under the Minnesota Administrative Procedure Act.¹⁰⁴ Accordingly, the Administrative Law Judge recommends that Item D be revised along the following lines to cure the defects in the proposed rule:

Violations of Minnesota Statutes Chapter 35 or Board rules by an applicant or permit holder shall constitute grounds for the Board to deny an application for an annual or single sale permit or to revoke such a permit. The Board shall notify the applicant or permit holder of his or her right to appeal the Board’s initial determination under the procedures of the Minnesota Administrative Procedure Act, Minnesota Statutes, Chapter 14 [or describe other process].

113. Item E of Subpart 1 states, “Prior to issuance of a permit, the sales premises may be inspected by a representative of the board” For the reasons discussed in Finding 76, this language accords the agency unfettered discretion and is defective. To correct this defect, the Administrative Law Judge recommends that Item E

¹⁰³ Minn. Stat. § 35.93, subd. 2.

¹⁰⁴ Minn. Stat. § 35.155, subd. 9, explicitly states that “[a] person raising farmed cervidae that is aggrieved with any decision regarding the farmed cervidae may request a contested case hearing under chapter 14.” Chapter 35 otherwise appears to be silent regarding the applicability of Chapter 14. The Board’s current rules also do not mention Chapter 14.

be revised to state: "Prior to issuance of a permit, the sales premises shall be subject to inspection by a representative of the Board to determine compliance with subparts 3 and 4."

114. Proposed Subpart 1, as modified to correct the defects, has been shown to be needed and reasonable to clarify the requirements for sale of livestock. Inclusion of the recommended language to correct the defects will not result in a rule that is substantially different from the rule as originally proposed.

Subpart 6 – Responsibilities of the official veterinarian

115. Item H of Subpart 6 states that one of the duties of the official veterinarian is to "remove official slaughter back tags when requested and ensure animals are identified as required and eligible for nonslaughter sale in accordance with subpart 9, item B." However, Subpart 9, item B simply states that "all official tag numbers for each animal [must be] recorded on a form approved by the board" and does not address eligibility for nonslaughter sale. Because the need for and reasonableness of the inclusion of this reference has not been shown, there is a defect in the proposed rule. To correct this defect, the Board should delete the reference to Subpart 9, item B, and insert the correct cross-reference.

Subpart 8 – Affidavits required for breeding cattle sold for slaughter

116. At the hearing, the Board further revised Subpart 8 to refer to "state-federal approved livestock auction markets" (defined in part 1721.0010, subp. 42, as a designated premises approved by the Board and the USDA to conduct regularly scheduled livestock sales in accordance with 9 C.F.R. part 71) in order to allow breeding cattle sold for slaughter to move to such markets, as well as slaughter establishments and slaughter-only handling facilities.

117. Subpart 8, as modified by the Board at the hearing, has been shown to be needed and reasonable. The modification proposed by the Board does not constitute a substantial change.

Subpart 9 – Removal of official slaughter back tags from slaughter cattle

118. As originally proposed, Subpart 9 prohibited the removal of official back tags from slaughter cattle unless the official veterinarian examined the cattle, completed slaughter tag removal form, and ensured that "each animal is identified by an official ear tag." At the hearing, the latter phrase was modified to simply require the veterinarian to ensure that "each animal is officially identified." The Board stated that it made this modification in order to allow the removal of back tags when animals are identified with any other form of official identification, including another back tag.¹⁰⁵

119. Subpart 9, as modified by the Board at the hearing, has been shown to be needed and reasonable to ensure consistency within the proposed rules. The

¹⁰⁵ Ex. S.

modification proposed by the Board does not render the rule as finally proposed for adoption substantially different from the rule as originally proposed.

Part 1721.0100 – Public Exhibition

120. Subpart 3 of the proposed rules relates to the responsibilities of exhibition managers. Item B states that the exhibition manager shall “comply with all *reasonable* orders of the board or the official veterinarian pertaining to the sanitation of the premises and the health status of all livestock exhibited.”¹⁰⁶ The reference to “reasonable” orders appears in the Board’s current rule from which this rule was derived. While this language does not constitute a defect in the rule, the Administrative Law Judge suggests that the Board delete the word “reasonable” to avoid the implication that exhibition managers are free to ignore orders they believe to be unreasonable and more clearly place them on notice that they will be expected to comply with all orders of the Board and the official veterinarian. The suggested modification will not result in a substantially different rule.

3. Cattle and Bison (Minn. R. 1721.0120 – 1721.0175)

Part 1721.0130 – Importation of Cattle

Subpart 1 – Requirement for official identification

Subpart 2 – Requirement for certificate of veterinary inspection

Subpart 6 - Requirement for an import permit

121. As originally proposed, Subparts 1, 2, and 6 stated that the only cattle consigned to a state-federal approved livestock auction market that would be exempt from the requirements for official identification, certificates of veterinary inspection, and import permits would be cattle originating from a farm of origin “in an adjacent state.” The SONAR does not discuss the reason for this limitation.

122. Prior to the hearing, the Minnesota Livestock Marketing Association questioned why the original proposal was limited to cattle originating from a farm of origin in an adjacent state rather than permitting interstate movement from any state.¹⁰⁷

123. At the hearing, the Board proposed that the phrase “in an adjacent state” be deleted from Subparts 1, 2, and 6. It indicated that this language was being modified to allow importation of cattle from a farm of origin in any state to a state-federal approved livestock auction market without certificates of veterinary inspection, official identification or import permits.¹⁰⁸

124. The modifications proposed by the Board to Subparts 1, 2, and 6 were made in response to prehearing comments made by interested parties. The proposed rule, as modified, is needed and reasonable, and the modification does not cause the

¹⁰⁶ Emphasis added.

¹⁰⁷ Letter from Minnesota Livestock Marketing Association (Aug. 21, 2012) (included in Ex. G).

¹⁰⁸ Ex. S.

rule as finally proposed for adoption to be significantly different from the rule as originally proposed.

Part 1721.0140 – Intrastate Movement

125. Subpart 1 of Part 1721.0140 requires that breeding cattle, rodeo cattle, and all cattle for exhibition must be officially identified upon movement from the herd to another location, with the exception of cattle that are consigned to a state or state-federal approved livestock auction market; cattle moving directly to a state or federally inspected slaughtering establishment; or cattle moving directly to a slaughter-only handling facility. Subparts 2 and 3 require that records pertaining to the acquisition and disposition of such cattle must be retained for five years, and sets forth information that must be included in the records. Subpart 4 is derived from existing Board rules parts 1720.1680 to 1720.1700). It requires that livestock dealers, livestock market operators, slaughter-only handling facility operators, and slaughtering establishment operators officially identify all breeding cattle moving directly to slaughter unless the animals are already identified with an official back tag, and maintain records containing information about the back tag number, date of application, name and address of the person who owned or controlled the herd, and whether the animal was of beef or dairy type.

126. In the SONAR, the Board asserted that the program to eradicate bovine tuberculosis in Minnesota has highlighted the need to require official identification of all breeding cattle prior to movement from a Minnesota cattle herd to another location. The Board contended that official identification of cattle is the only way to ensure that the Board can track such animals as they move from place to place and control cattle diseases when they occur. According to the Board, recent cases of bovine tuberculosis and brucellosis have spurred a movement in all states to require official identification of breeding cattle prior to movement. The Board asserted that the record-keeping requirements are also needed and reasonable to enable the Board to track cattle and implement effective disease control programs.¹⁰⁹

127. During the hearing, the Board proposed the following modifications to the language of Subpart 3:

Subp. 3. Contents of records. Records required by subpart 2 must include:

- A. date of the transaction;
- B. number of animals included in each transaction;
- C. species, breed, age, and class of animal;
- D. names and addresses of the persons or entity entities from whom the animals were acquired and to whom the animals were sent to;

¹⁰⁹ SONAR at 18.

- E. the official identification number of each animal ~~required to be identified~~ head of breeding cattle, rodeo cattle, and all cattle for exhibition correlated with the names and addresses of the persons or entity entities from whom the animals were acquired and to whom they the animals were sent;
- F. back tag numbers, if required; and
- G. certificates of veterinary inspection, if required.

The Board indicated that this modification in the language had been made to clarify that individual identification numbers must be recorded for breeding cattle, rodeo cattle, and all cattle for exhibition, and that there is no requirement in the proposed rules for official identification of feeder cattle or the recording of identification tags for feeder cattle.¹¹⁰

128. Thom Petersen of the Minnesota Farmers Union expressed concern during the rulemaking hearing regarding this rule part. He indicated that the MFU supports a voluntary rather than mandatory identification system. He contended that smaller producers are concerned about the requirement in the rules that records be kept when animals move between farms for breeding purposes, and Amish and Mennonite members of the MFU have philosophical concerns regarding this requirement. He further stated that members of the Union are generally concerned about how the requirement will be implemented and what types of fines will be imposed.¹¹¹ The Board did not modify the rules or provide a specific response to MFU's concerns.

129. Joe Martin of the Minnesota State Cattlemen's Association questioned whether there is statutory authority for this portion of the proposed rules.¹¹² The Board responded that it would rely on the discussion in its SONAR regarding its statutory authority.¹¹³

130. The Legislature has granted the Board authority to "make rules necessary to protect the health of domestic animals." The Administrative Law Judge concludes that the Board has authority to adopt the proposed rule and that requiring official identification of breeding cattle, rodeo cattle, and all cattle for exhibition (with certain exceptions) is a needed and reasonable approach that can be of significant assistance in tracking animal movement and controlling or eradicating disease. While the Board is encouraged to consider the public comments and further modify the proposed rules if warranted, its failure to incorporate the suggestions in the rules does not amount to a defect.

¹¹⁰ Ex. S.

¹¹¹ Comments of Thom Petersen at Hearing (Sept. 20, 2012).

¹¹² Comments of J. Martin at Hearing (Sept. 20, 2012).

¹¹³ Comments of B. Thompson at Hearing (Sept. 20, 2012).

Part 1721.0160 – Community Sales

131. This part of the proposed rules requires official identification of all breeding cattle prior to the time they are sold at a community sale and requires the buyer of breeding cattle for slaughter at a community sale to sign an affidavit of slaughter.

132. During the hearing, the Board proposed to modify Subpart 2 as follows:

Subp. 2. Requirement for affidavits of slaughter. A buyer of breeding cattle for slaughter in the community sale must sign an affidavit of slaughter that ~~designates the location where the animals will be slaughtered and~~ certifies that the cattle will be moved directly from the community sale to a state-federal approved livestock auction market, a slaughter-only handling facility or to a designated slaughter establishment with no diversion to farm or ranch.

133. The Board has shown that the proposed rule, as modified, is needed and reasonable to assist the Board in tracking breeding cattle as they move from place to place and control diseases that occur. The modification proposed by the Board does not constitute a substantial change in the rule.

4. Pigs (Minn. R. 1721.0180 – 1721.0220)

Part 1721.0180 - Definitions

134. Subpart 2 of the proposed rules defines "swine production system" as "a swine production enterprise that consists of multiple sites of production such as sow herds, nursery herds, and finishing herds between which swine move while remaining under the control of a single owner or a group of contractually connected owners." The definition indicates that the term does not include slaughter plants or livestock markets.

135. Thom Petersen of the Minnesota Farmers Union indicated that some members of the Union had expressed confusion about what was meant to be encompassed in this definition.¹¹⁴ He did not provide a detailed explanation regarding what aspects of the definition were found to be confusing. The Board did not propose a further modification of the proposed rule or a specific response to this comment. Under the circumstances, the Administrative Law Judge does not find the definition to be defective.

Part 1721.0190 – Importation of Swine

136. At the hearing, the Board modified the language of Subpart 2, Item B. As modified, the proposed rule would require that swine imported into Minnesota must be officially identified and accompanied by a certificate of veterinary inspection issued by an accredited veterinarian except for:

¹¹⁴ Comments of T. Petersen at Hearing (Sept. 20, 2012).

- A. swine which move under an approved swine production system health plan;
- B. swine consigned to a state-federal approved livestock market which moved directly from the farm of origin ~~in an adjacent state~~; or
- C. swine moving directly to slaughter at a slaughtering establishment under federal inspection.

137. The Board indicated that the modification was intended to allow importation of swine from a farm of origin in any state to a state-federal approved livestock auction market without certificates of veterinary inspection, official identification, or import permits.¹¹⁵

138. This modification is consistent with the modification made to part 1721.0130 (relating to importation of cattle). It does not result in a rule that is substantially different from the rule as originally proposed.

5. Horses (Minn. R. 1721.0230 – 1721.0260)

Part 1721.0230 - Definitions

139. At the hearing, the Board sought to clarify the language of the definition of "official EIA [equine infectious anemia] test" contained in Subpart 7. As modified, the rule would specify that "Official EIA test" means the Coggins test or "other test for EIA approved by the board. ~~USDA conducted at a USDA approved laboratory.~~" No one objected to this modification. The modification appears to afford more flexibility to those regulated by the proposed rule and does not result in a substantially changed rule.

Part 1721.0240 – Importation of Horses

140. As originally proposed, Subpart 3 stated, "If a blood sample has been drawn but there is insufficient time to obtain the laboratory results of the EIA test prior to the importation, a permit for the importation of horses without final laboratory results may be obtained from the board if the veterinarian requesting the permits agrees to promptly submit the laboratory results to the board."

141. At the hearing, the Board deleted Subpart 3 from the proposed rules. The Board contends that Subpart 3 is no longer needed because most EIA laboratories now use an ELISA test for EIA which can be completed within minutes of sample collection.¹¹⁶

142. The deletion of Subpart 3 has been shown to be needed and reasonable. The modification does not result in a rule that is substantially different from the rule as originally proposed.

¹¹⁵ Ex. S.

¹¹⁶ Ex. S.

Part 1721.0260 – Equine Infectious Anemia (EIA)

143. Subpart 2 of the proposed rule addresses EIA quarantine procedures. Item C states, "Quarantines on exposed horses *may* be released when all exposed horses on a premises are tested and found negative for EIA at least 45 days following the last known exposure."¹¹⁷ For the reasons set forth in Finding 76, the use of "may" confers excessive discretion and constitutes a defect in the proposed rules. To correct this defect, the Administrative Law Judge recommends that the Board replace the word "may" with "shall." The suggested modification does not produce a substantial change in the proposed rule.

6. Poultry (Minn. R. 1721.0270 – 1721.0360)

Part 1721.0270 - Definitions

144. The Administrative Law Judge suggests that the Board consider clarifying in subpart 10 that the National Poultry Improvement Plan and Auxiliary Provisions set forth in 9 C.F.R. parts 56, 145, 146, and 147, is incorporated by reference in the rules.¹¹⁸

Part 1721.0280 – Importation of Hatching Eggs, Poultry, and Ratites

145. During the hearing, the Board proposed additional modifications to Subpart 2. As finally proposed for adoption, Subpart 2 states:

Subp. 2. **Import permit.** An import permit must be obtained from the board prior to importation of hatching eggs, poultry, or ratites into the state. The application for the permit must be endorsed by the official state animal health agency of the state or country of origin and indicate that the requirements of this part have been met.

The Board indicated that this revision was proposed in order to clarify that import permits may be endorsed by any official animal health agency, including those in other countries.¹¹⁹

146. Subpart 8 of the proposed rules indicates that only new or cleaned and disinfected poultry boxes or containers "may" be used to ship baby poultry into the state. While the language is not defective as used in this context, the Administrative Law Judge recommends that the Board consider replacing the word "may" with "shall."

147. Part 1721.0280, as modified at the hearing, has been shown to be needed and reasonable to implement importation requirements. The revision to Subpart 2 proposed by the Board at the hearing and the modification to Subpart 8 suggested by

¹¹⁷ Emphasis added.

¹¹⁸ See Minn. Stat. § 14.07, subd. 4.

¹¹⁹ Ex. S.

the Administrative Law Judge do not result in a rule that is substantially different from the rule as originally proposed.

Part 1721.0290 – Poultry Dealers

148. Subpart 2 of the proposed rules states that all hatching eggs, poultry, and ratites acquired by Minnesota poultry dealers “must be accompanied by a certificate or test chart approved by the board” While the language is not defective, the Administrative Law Judge suggests that the Board clarify the provision by including a cross reference to part 1721.0280, subpart 3. This modification would not constitute a substantial change.

7. Deer and Elk (Minn. R. 1721.0370 – 1721.0420)

149. In the SONAR, the Board indicated that an active farmed cervidae advisory committee was involved in all aspects of the development of this portion of the proposed rules. The advisory committee consisted of representatives from the Board, the Department of Natural Resources, the Department of Agriculture, the Elk Breeders Association, the Deer Breeders Association, the University of Minnesota, the Veterinary Services branch of the United States Department of Agriculture, the Department of Health, the Deer Hunters Association, the Reindeer Association, and other interested parties. According to the SONAR, there was a consensus among committee members that the proposed rules for farmed cervidae were needed and reasonable.¹²⁰

Part 1721.0370 - Definitions

150. Subpart 5 defines “CWD certified herd” to mean “a farmed cervidae herd that is enrolled in a CWD herd certification program approved by the board and has reached level 6 herd status.” While this language is not defective as proposed, the Administrative Law Judge recommends that a cross reference be included in this subpart to part 1721.0420, Subpart 1, Item F, where the various levels of herd status are discussed.

151. The definition of “CWD contaminated premises” contained in Subpart 6, Items A and B, indicates that a premises “may” be categorized as having minimal environmental contamination or “may” be categorized as having moderate to severe environmental contamination under certain circumstances, and that the minimal environmental contamination category “may” be used in certain instances. For the reasons discussed in Finding 76 above, this language is defective. To correct the defect, the Administrative Law Judge recommends that the word “shall” be substituted for the word “may.” This modification will not render the rule substantially different from the rule as originally proposed.

152. During the hearing, the Board proposed to modify the definition of “official CWD test” contained in Subpart 10. The Board proposes to delete the reference to

¹²⁰ SONAR at 23.

tests "approved by APHIS and conducted in a laboratory approved by APHIS"¹²¹ that was contained in the rule as originally proposed, and instead define the term to mean "any test for the diagnosis of CWD approved by the board." The Board did not provide any further explanation of the reason for this change, but it appears that the modification will allow additional flexibility in determining which tests will be acceptable. The proposed modification will not render the rule substantially different from the rule as originally proposed.

153. Gary Olson, the Director of the Minnesota Deer Breeders Association, requested that subpart 10 specify that a brain stem test will be considered one of the official tests for CWD.¹²² The Board did not specifically respond to this suggestion or incorporate the suggested language in its revision of Subpart 10. Subpart 10 is not defective by virtue of its failure to list the specific tests that are currently approved by the Board, and it is logical to allow the Board some flexibility to add or subtract tests from its approved list as more effective tests become available. The Administrative Law Judge suggests that the rule indicate where members of the public can find the current list of approved CWD tests.

Part 1721.0380 – General Requirements

Subpart 2 - Registration

154. Minnesota Statutes, section 35.155, subd. 10, prohibits the possession of live cervidae in Minnesota unless the person is registered with the Board and meets all the requirements for farmed cervidae set forth in section 35.155.

155. Subpart 2 of the proposed rules sets forth various requirements relating to registration of farmed cervidae. Among other things, subpart 2 indicates that "[t]he registered status of a farmed cervidae herd may be canceled at any time if the owner fails to comply with this part or fails to pay a civil penalty assessed by the board pursuant to Minnesota Statutes, section 35.95, for failure to comply with the requirements of this part." In the SONAR, the Board contends that the proposed rule is reasonable because it sets forth necessary procedures for the Board to implement an effective registration program for farmed cervidae.¹²³

156. The Administrative Law Judge finds that the statement that the Board "may" cancel the registered status of a farmed cervidae herd at any time constitutes a defect in the proposed rules because, as discussed in Finding 76, it provides unfettered discretion to the Board. In addition, the proposed rule is defective because it is inconsistent with general due process principles and the specific guarantees contained in Minn. Stat. § 35.155, subd. 9.¹²⁴ The proposed rule implies that the Board is

¹²¹ APHIS is defined in part 1721.0010, subp. 3, to mean the Animal and Plant Health Inspection Service, which is a division of the U.S. Department of Agriculture.

¹²² Comments of G. Olson at Hearing (Sept. 20, 2012).

¹²³ SONAR at 23.

¹²⁴ The APHIS rules also specify that herd owners may appeal the cancellation of enrollment of a herd or loss or suspension of herd status after being informed of the reasons for the action and indicate that rules

authorized to cancel the registered status of a herd "at any time" it determines that the owner has violated the specified laws or rules without providing an appeal or hearing process. However, Minn. Stat. § 35.155, subd. 9, explicitly states that "[a] person raising farmed cervidae that is aggrieved with any decision regarding the farmed cervidae may request a contested case hearing under chapter 14." To correct these defects, the Administrative Law Judge recommends that the last sentence in subpart 2 be revised as follows:

The failure of the owner to comply with this part or to pay a civil penalty assessed by the board pursuant to Minnesota Statutes, section 35.95, for failure to comply with the requirements of this part shall constitute grounds for the Board to cancel the registered status of a farmed cervidae herd. In accordance with Minnesota Statutes Section 35.155, subd. 9, the Board shall notify the herd owner of his or her right to request a contested case hearing regarding the Board's determination under the procedures of the Minnesota Administrative Procedure Act, Minnesota Statutes, Chapter 14.

The proposed rule, as modified to correct the defect, is needed and reasonable to set forth the steps that must be followed to register a herd of farmed cervidae with the Board and ensure that there is a consistent registration protocol. The modification does not result in a rule that is substantially different from the rule as originally proposed.

Subpart 3 - Inspections

157. Minn. Stat. § 35.155, subd. 7, authorizes the Commissioner of Agriculture and the Board to inspect farmed cervidae, farmed cervidae facilities, and farmed cervidae records. Subpart 3 of the proposed rule adds additional inspection requirements relating to new farmed cervidae facilities and on-going annual inspections.

158. Subpart 3 states that the Board "may" inspect farmed cervidae, facilities, and records, and "may" conduct a prestocking inspection of new farmed cervidae facilities. For the reasons discussed in Finding 76, this language confers excessive discretion on the Board and is defective. To correct the defect, the Administrative Law Judge recommends that the first sentence of subpart 3 be revised to state, "A representative of the board shall be permitted to inspect farmed cervidae, farmed cervidae facilities, and farmed cervidae records," and the third sentence be revised to state, "A representative of the board shall be permitted to conduct a prestocking inspection" The suggested modifications will not result in a substantial change in the rules.

159. Subpart 3, if modified as suggested, has been shown to be needed and reasonable to clarify the inspections that will occur with respect to new and on-going farmed cervidae premises and specify grounds for cancellation of registered status. The modification to correct the defect does not constitute a substantial change.

of practice concerning the hearing will be adopted by the Administrator. See 77 Fed. Reg. 35568 (June 13, 2012) and 9 C.F.R. § 55.24(c)(1).

Subpart 7 – Removal of wild cervidae

160. Gary Olson, the Director of the Minnesota Deer Breeders Association, expressed concern about the requirement in subpart 7 that wild cervidae found within a farmed cervidae facility "must be disposed of as prescribed by the commissioner of natural resources." He commented that any testing of the animal should be performed by the Board of Animal Health because, if the test comes back positive, it could put the owner's farm in jeopardy.¹²⁵ The Minnesota Deer Breeders Association asserted in its written post-hearing comment that the Minnesota Department of Natural Resources has not tested at the same level as required by the Board when wild deer are discovered at farmed deer operations and indicated that the Association believes that the testing should be done at the same standards applied to farmed deer. The Association suggested that subpart 8 be modified to state, "The wild cervidae must be disposed of as prescribed by the commissioner of natural resources; any testing of the animal shall be conducted by the Board of Animal Health."¹²⁶

161. The Board did not provide a specific response to these suggestions, or propose any modification to the proposed rules. While the failure of the proposed rules to incorporate these suggestions does not amount to a defect, the Administrative Law Judge urges the Board to consider the comments and make further modifications to the rules if deemed appropriate.

Part 1721.0400 – Importation of Farmed Cervidae

162. Subpart 3 of the proposed rules prohibits the importation into the state of live cervidae or (with certain exceptions) cervidae carcasses from a CWD endemic area. These prohibitions are consistent with Minn. Stat. §§ 97A.505, subd. 8, and 35.155, subd. 12.

163. Subpart 3 also states that "[l]ive cervidae must originate from a herd that has been subject to a state, federal, or provincial approved CWD herd certification program and that has reached a status equivalent to level 6 as specified in part 1721.0420." According to Part 1721.0420, Item F of the proposed rules, level 6 is reached when the herd has been under continuous CWD surveillance without evidence of CWD or a determination that the herd has been exposed to CWD for more than 60 months. In its SONAR, the Board notes:

This part is extracted from Minnesota Statutes 35.155, subdivision 12, has been rewritten for clarity, and has been amended to increase CWD surveillance requirements for importation of deer and elk from three to five years. The proposed rules require that imported cervidae must originate from a herd that has reached a status for CWD equivalent to level 6 (five or more years of documented surveillance). This is reasonable because five years of CWD surveillance is now the national standard for interstate movement of farmed cervidae and this requirement is necessary to make

¹²⁵ Comments of Gary Olson at Hearing (Sept. 20, 2012).

¹²⁶ Letter from Minnesota Deer Breeders Association (Oct. 9, 2012).

Minnesota rules consistent with new federal requirements for interstate movement of farmed cervidae in Code of Federal Regulations, Title 9, parts 55 and 81.¹²⁷

164. The federal rules mentioned in the SONAR are the interim final rules relating to the federal CWD Herd Certification Program and Interstate Movement of Farmed or Captive Deer, Elk, and Moose that were adopted by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) effective July 13, 2012. The rules are codified in 9 C.F.R. Parts 55 and 81.¹²⁸ The APHIS rules create a voluntary national CWD Herd Certification Program that is intended to be a cooperative effort between APHIS, State animal health and wildlife agencies, and owners of deer, elk and moose. Owners are encouraged to certify their herds as low risk for CWD by being in continuous compliance with the CWD Herd Certification Program standards. States that participate in the Herd Certification Program must establish programs that are approved by APHIS. The APHIS rules “set mandatory minimum requirements for interstate movement of farmed or captive cervids with respect to CWD” but “will not preempt State and local laws and regulations on CWD in farmed or captive cervids when those laws and regulations are *more* restrictive than the Federal Regulations.”¹²⁹ The only exception has to do with the movement of farmed or captive cervids through a state.¹³⁰ By logical implication, APHIS intends that its rules will preempt *less* restrictive state and local laws and regulations on CWD. Although APHIS solicited further comment from members of the public on the subject of preemption of state and local laws and regulations relating to CWD last June,¹³¹ it does not appear that APHIS has published any further discussion of the issue or any further amendments to its rules.

165. The APHIS regulations specify that “[n]o farmed or captive deer, elk, or moose may be moved interstate” unless it meets certain requirements, including having been enrolled in the CWD Herd Certification Program in a herd that has achieved “certified” status, which is defined to mean five years after initial enrollment.¹³² Because Minn. Stat. § 35.155, subd. 12, imposes a less restrictive, three-year CWD surveillance requirement for importation of deer and elk, it appears that the federal rule preempts state law and rule on that issue. Accordingly, the Board has shown that the portion of the proposed rule requiring that live cervidae must have originated from a herd that has reached a status equivalent to level 6 is needed and reasonable, and that it has proper authority to adopt the rule.

166. Subparts 4 and 5 of the rules as originally proposed addressed brucellosis and tuberculosis testing of imported farmed cervidae. At the hearing, the Board deleted those requirements from the proposed rules because it asserted that the requirements for interstate movement of cervidae with respect to these diseases are adequately

¹²⁷ SONAR at 25-26

¹²⁸ The final interim rules were published in 77 Fed. Reg. 33542 (June 13, 2012) (see Ex. L).

¹²⁹ *Id.* at 35545, 35571 (emphasis added). The rule relating to federal preemption is codified in 9 C.F.R. § 81.6

¹³⁰ *Id.* at 35545, 35570-35571. The exception is codified in 9 C.F.R. § 81.5.

¹³¹ *Id.* at 35542.

¹³² *Id.* at 35568, 35570. The relevant rules appear in 9 C.F.R. § 55.24(a) and 9 C.F.R. § 81.3(a)(1).

specified in the federal regulations promulgated by the U.S. Department of Agriculture. No one objected to this revision of the rules. The Administrative Law Judge finds that the deletion of Subparts 4 and 5 will not result in a substantially different rule under Minn. Stat. § 14.05, subd. 2.

Part 1721.0410 – Intrastate Movement of Farmed Cervidae

167. During the hearing, the Board proposed several modifications to this part of the proposed rules. As finally proposed for adoption, part 1721.0410 states:

Subpart 1. **Movement reports.** Movement of farmed cervidae for any reason from any ~~state premises~~ herd to another location must be reported to the board within 14 days of the movement on forms approved by the board.

Subp. 2. **Movement requirements.** Farmed cervidae moving from any ~~premises~~ herd to another location in the state must:

- A. be identified with an official ear tag;
- B. be accompanied by a farmed cervidae movement report; and
- C. originate from a herd that is registered with the board and has achieved at least level 4 of the CWD herd certification program or move directly to a slaughtering establishment having state or federal inspection.

Subp. 3. **Restraint of animals in transit.** Farmed cervidae that are moved from one location to another for any reason including sale, exhibition, or entertainment, must be restrained at all times in a manner to prevent escape.

Subp. 4. **Restriction on herd additions.** Farmed cervidae may not be moved into a farmed cervidae herd unless the herd is registered with the board and ~~has achieved at least level 4 of the CWD herd certification program.~~

Subp. 5. **Movement into, within, and out of CWD endemic areas.**

- A. Farmed cervidae that originate from a CWD endemic area may not be moved to other locations in the state unless they move directly to a slaughtering establishment having state or federal inspection, or to another location if that movement is determined by the board not to endanger the health of other animals in the state. A shipping permit must be obtained from the board prior to movement of farmed cervidae from a premises located within a CWD endemic area.

- ~~B. Farmed cervidae may not be moved into a CWD endemic area unless they move directly to a slaughtering establishment having state or federal inspection. A shipping permit must be obtained from the board prior to movement of farmed cervidae into a CWD endemic area.~~
- ~~C. Except for cut and wrapped meat, quarters or other portions of meat with no part of the spinal column or head attached, antlers, hides, teeth, finished taxidermy mounts, and antlers attached to skull caps that are cleaned of all brain tissue, farmed cervidae carcasses may not be moved from a CWD endemic area to other locations in the state unless they move directly to a slaughtering establishment having state or federal inspection.~~

168. At the hearing, the Board noted that these modifications to the proposed rules will allow unrestricted movement of cervidae between locations within the same herd; remove the restriction that required CWD Level 4 certification for herd additions; allow cervidae to be added to CWD infected or exposed herds; and allow options for movement of cervidae into and out of CWD endemic areas. The Board provided no further explanation of the reasons for these changes.¹³³

169. The discussion of subpart 4 contained in the SONAR indicated:

The proposed rules specify that farmed cervidae may not be moved into a farmed cervidae herd unless the herd is registered with the Board and has achieved at least level 4 of the CWD herd certification program. This is reasonable because herds that are not registered or that fall below a level 4 of the CWD herd certification program are in violation of Board rules and have not done adequate surveillance for CWD to ensure that the herd is CWD free. Cervidae that are added to a herd that may be infected with CWD could potentially cause the disease to spread and risk the health of other farmed or wild cervidae in the state.¹³⁴

170. The Board did not provide any explanation at the hearing or in its post-hearing submission of the reason why it had decided the level 4 herd certification requirement should be deleted from subpart 4. The Board's failure to demonstrate the need for or reasonableness of the proposed modification constitutes a defect in the proposed rule. To correct the defect, the Administrative Law Judge recommends that the language of Subpart 4 as originally proposed be reinstated.

171. The Board also provided no explanation of its proposed changes to Subpart 5, Items A, B, and C. The rules as originally proposed "completely restrict[ed]"

¹³³ See Ex. S. It does not appear that the APHIS final interim rules prompted any of these changes, since the federal regulations do not themselves restrict intrastate movement. 77 Fed. Reg. 35542, 35558 (June 13, 2012) (Ex. L). APHIS merely requires that states participating in the CWD Herd Certification Program have the authority to restrict the intrastate movement of all CWD-positive, CWD-suspect, and CWD-exposed animals. See 9 C.F.R. § 5523; 77 Fed. Reg. at 35566.

¹³⁴ SONAR at 26-27.

the movement of farmed cervidae into or out of a CWD endemic [area] except for movement directly to slaughter under permit from the Board.” The SONAR indicated that “[t]here is a need to establish restrictions for movement of farmed cervidae into, within, and out of CWD endemic areas in order to prevent the disease from spreading to other farmed cervidae herds or wild cervidae.”¹³⁵ However, without explanation, the Board subsequently proposed to modify Item A to allow farmed cervidae that originate from a CWD endemic area to be moved to a location other than a slaughtering establishment “if that movement is determined by the board not to endanger the health of other animals in the state.” The Board also proposed to delete from Item B the sentence stating that “[f]armed cervidae may not be moved into a CWD endemic area unless they move directly to a slaughtering establishment having state or federal inspection,” and delete Item C in its entirety. The Board’s failure to demonstrate the need for or reasonableness of these proposed modifications constitutes a defect in the proposed rule. To correct this defect, the Administrative Law Judge suggests that the language of Subpart 5, Items A and B as originally proposed be reinstated, and that the wording of Item C be rephrased to parallel the similar requirement for interstate importation of cervidae carcasses set forth in part 1721.0400, subpart 3(B)(2).

172. Finally, to improve the clarity of the rules, the Administrative Law Judge also recommends that the Board consider including a cross-reference to part 1721.0420, Subpart 1, Item F, in Subparts 2(C) and 4 to ensure that those reading the rule will understand what is meant by level 4 of the CWD herd certification program.

173. If the proposed rules are modified as suggested, the rule will not be substantially different from the rule as originally proposed.

Part 1721.0420 - Chronic Wasting Disease (CWD)

Subpart 1 – CWD herd certification program

174. During the hearing, the Board proposed a number of modifications to Subpart 1. Items C, D, and H of Subpart 1 were revised as follows:

C. ~~If When farmed cervidae that are required to have official identification officially identified die or are slaughtered, the owner must report the age, sex, and official identification numbers of the animals to the board within 14 days on forms approved by the board.~~

D. ~~Animals from farmed cervidae herds that are 12 months of age and over that die or are slaughtered must be tested for CWD with an official CWD test. This requirement includes animals that are slaughtered on the premises and animals that are moved to other locations for slaughter purposes. If animals are sold for slaughter purposes to an entity other than a state or federally licensed slaughter establishment, the farmed cervidae~~

¹³⁵ SONAR at 27. The prohibition on interstate importation of cervidae from known CWD endemic areas set forth in Minn. Stat. § 35.155, subd. 12, provides further support for the statements made in the SONAR.

~~herd owner must maintain legal and physical possession of the animals until the animals are slaughtered and samples are collected for official CWD testing. Samples to be tested for CWD must be submitted to a laboratory approved by the board APHIS in accordance with Code of Federal Regulations, title 9, part 55.8, within 14 days of sample collection. Other testing protocols may be used if they are approved by the board and are equally effective for the detection of CWD in farmed cervidae herds. Testing must be completed at owner expense unless state or federal funds are available for this purpose.~~¹³⁶

* * *

~~H. A newly formed herd that is comprised solely of animals obtained from herds already enrolled in the CWD certification program must start at the lowest status of any herd that provided animals for the new herd. The new herd must have an initial status no higher than that assigned to the cervidae kept on the premises within the previous 12 months.~~

175. Denny Niess, who is a deer farmer and owns a hunting preserve, commented on the rules on his own behalf and on behalf of Sean Schaefer, the Executive Director of the North American Deer and Elk Farm Association. Mr. Niess objected to the requirement in Subpart 1, Item D, that all animals from farmed cervidae herds that are 12 months of age and over that die or are slaughtered must be tested for CWD with an official CWD test. He noted that there would be a charge of \$35 per test and asked if animals killed in hunting preserves could be exempted from the testing requirement, since they will not be moved anywhere else.¹³⁷

176. The Minnesota Deer Breeders Association (MDBA) also filed a written comment in which it argued that hunting preserves should not be required to test all animals for CWD, tag all animals, or inventory all animals. The Association emphasized that animals leave hunting preserves only because they have been killed, and there is no risk that these animals will spread disease to animals outside the preserve. The MDBA contended that Minnesota operations are at a serious disadvantage when compared to preserves in other states, which the Association claims operate under fewer rules and at lower cost. According to the MDBA, the deer industry in Minnesota is estimated to be a \$17 million industry, compared to Wisconsin's \$74 million industry (with approximately the same number of farm operations) and Texas's \$600 million industry (with twice the land mass). The MDBA asserted that it is impossible to find, tag, and monitor animals at the level currently required by the rules in the large parcels of land needed to have a fair-chase, free-range herd. It contended that Wisconsin, Ohio, Pennsylvania, Missouri and Iowa merely require testing of a percentage of the animals in the herds within preserves, and that Minnesota is currently the only state requiring 100% testing. The MDBA also maintained that Wisconsin, Ohio,

¹³⁶ In light of the proposed deletion of the reference to APHIS-approved laboratories in Item D, the Administrative Law Judge recommends that the Board also delete the sentence stating, "Other testing protocols may be used if they are approved by the board and are equally effective for the detection of CWD in farmed cervidae herds" since it appears that that sentence is no longer necessary.

¹³⁷ Comments of Denny Niess at Hearing (Sept. 20, 2012).

Pennsylvania, Missouri and Iowa allow native deer to grow in preserves without tagging or removing those animals when they enter fenced premises. It also maintained that the wooded cover and the large size of hunting preserves can prevent operators from locating every dead deer within the allotted time to collect the required samples. The MDBA argued that making the suggested changes in the proposed rules would benefit the state's economy by allowing Minnesota producers to sell more animals to Minnesota hunting preserves rather than selling them to preserves in other states.¹³⁸

177. Dr. Paul Anderson of the Board responded that Minn. Stat. § 35.155, subd. 11, requires that 100% of animals that die or are slaughtered be tested for CWD. He indicated that 100% testing is required to detect herds infected with the disease, since the disease occurs at a very low level or prevalence.¹³⁹

178. Brenda Hartkopf, an elk producer, stated at the hearing that the proposed rules are well-written and reasonable and safeguard the health of animals while meeting the needs of producers. She supported the testing of all farmed cervidae for CWD, including those harvested from hunting preserves, due to the low incidence of the disease.¹⁴⁰ James Byrne, representing the Minnesota Elk Breeders Association, agreed with Ms. Hartkopf's remarks. He noted during the hearing that his association was highly in favor of the proposed rules and contended that the rules are in line with federal regulations adopted by the U.S. Department of Agriculture.¹⁴¹

179. Minn. Stat. § 35.155, subd. 11(c), specifies that "[a]ll animals from farmed cervidae herds that are over 16 months of age that die or are slaughtered must be tested for chronic wasting disease."¹⁴² "Farmed cervidae" is defined in the statute to mean "cervidae that are (1) raised for any purpose; and (2) registered in a manner approved by the Board of Animal Health."¹⁴³ The state statute thus does not exempt cervidae kept on hunting preserves from its reach. The APHIS rules state that the responsibility of herd owners who enroll in the CWD Herd Certification Program include immediately reporting to an APHIS employee or State representative "all deaths (*including animals killed on premises maintained for hunting and animals sent to slaughter*) of deer, elk, and moose in the herd aged 12 months or older" and making the carcasses of the animals available for tissue sampling and testing."¹⁴⁴ In the SONAR, the Board indicated that the expansion of the testing requirements in the proposed rules to animals that are 12 months of age or older "is reasonable because it makes the requirements for participation in the CWD herd certification program clear to Board officials and to farmed cervidae producers and makes the Minnesota program

¹³⁸ Letter from Minnesota Deer Breeders Association (Oct. 9, 2012).

¹³⁹ Comments of Paul Anderson at Hearing (Sept. 20, 2012).

¹⁴⁰ Comments of Brenda Hartkopf at Hearing (Sept. 20, 2012); Letter from B. Hartkopf (Sept. 28, 2012).

¹⁴¹ Comments of James Byrne at Hearing (Sept. 20, 2012); *see also* Letter from Mark Lucas, President, Minnesota Elk Breeders Association (Sept. 25, 2012).

¹⁴² Emphasis added.

¹⁴³ Minn. Stat. § 35.153, subd. 3.

¹⁴⁴ 77 Fed. Reg. 33542, 33567 (June 13, 2012).

consistent with new federal requirements for CWD herd certification in Code of Federal Regulations, Title 9, part 55, Subpart B."¹⁴⁵

180. The Administrative Law Judge concludes that the Board has proper authority to include hunting preserves within the CWD testing requirement and to extend the testing requirement to farmed cervidae 12 months of age and over.

181. Subpart 1, Item I of the proposed rules states that the CWD surveillance period for a herd must be shortened each time an animal over 12 months of age dies, is slaughtered, escapes, or is lost and is not tested for CWD. Gary Olson of the MDBA suggested that item I be modified to clarify that, if a missing test is the result of a lab error or relates to an animal that escaped due to an act of vandalism, the owner should not be penalized.¹⁴⁶ In its written post-hearing comment, the Minnesota Deer Breeders Association recommended that Item I be revised to include the following language at the end of the rule: "If escapes are from an act of vandalism, it will not be held against the herd owner's status."¹⁴⁷ The Board did not provide a response to these comments or propose further modifications to the rules. The rules are not rendered defective due to their failure to include the suggested revisions; however, the Board is encouraged to consider these remarks and propose further changes to the rules if deemed appropriate.

182. Item J states that, if animals are lost due to natural disaster such as a tornado or flood, the board "may" grant an exception to the requirements of item I. For the reasons set forth in Finding 76 above, the Administrative Law Judge finds that the language of Item J is defective because it invests undue discretion in the agency. To cure this defect, the Administrative Law Judge suggests that Item J be revised in a manner similar to the following:

J. The Board shall grant an exception to the requirements of item I if animals die from anthrax or from another disease where necropsy is contraindicated due to public health risks or if they are lost due to natural disaster such as a tornado or flood.

The suggested revision would not result in a rule that is substantially different from the rule as originally proposed.

183. Item K states, "Herd status may be cancelled at any time if the owner fails to comply with any of the requirements in parts 1721.0370 to 1721.0420." This provision is similar to subpart 2 of part 1721.0380 pertaining to cancellation of "registered status" of a herd, and is defective for the same reasons (see Finding 156 above). The statement in Item K that herd status "may be canceled at any time" constitutes a defect in the proposed rules because it provides unfettered discretion to the Board. In addition, the proposed rule is defective because it is inconsistent with general due process principles and the specific guarantees contained in Minn. Stat. § 35.155, subd. 9. The proposed rule implies that the Board is authorized to cancel herd

¹⁴⁵ SONAR at 27.

¹⁴⁶ Comments of G. Olson at Hearing (Sept. 20, 2012).

¹⁴⁷ Letter from MDBA (Oct. 9, 2012).

status "at any time" it determines that the owner has violated the specified rules, without providing an appeal or hearing process. However, Minn. Stat. § 35.155, subd. 9, explicitly states that "[a] person raising farmed cervidae that is aggrieved with any decision regarding the farmed cervidae may request a contested case hearing under chapter 14."¹⁴⁸ To correct these defects, the Administrative Law Judge recommends that the last sentence in subpart 2 be revised as follows:

The failure of the owner to comply with the requirements in parts 1721.0370 to 1721.0420 shall constitute grounds for the Board to cancel herd status. In accordance with Minnesota Statutes Section 35.155, subd. 9, the Board shall notify the herd owner of his or her right to request a contested case hearing regarding the Board's determination under the procedures of the Minnesota Administrative Procedure Act, Minnesota Statutes, Chapter 14.

184. The proposed rule, if modified as suggested to correct the defects, has been shown to be needed and reasonable to set forth the requirements of the CWD Herd Certification Program. steps that must be followed to register a herd of farmed cervidae with the Board and ensure that there is a consistent registration protocol. The modifications do not result in a rule that is substantially different from the rule as originally proposed.

Subpart 2 – Quarantine procedures

185. Subpart 2 of the proposed rule relates to quarantine procedures that will be used if a farmed cervidae herd is determined to be infected with or exposed to CWD. In the SONAR, the Board maintains that effective management of farmed cervidae herds infected by or exposed to CWD is critical for the protection of the health of both farmed and wild cervidae in Minnesota. It further asserts that this subpart is needed and reasonable to make the requirements for CWD quarantine and quarantine release clear and to ensure that the Minnesota program is consistent with the new APHIS rules for CWD herd certification.¹⁴⁹

186. During the hearing, the Board proposed further revisions to Subpart 2, Items A, C, and D. The proposed modifications are as follows:

- A. Unless a permit is obtained from the board, farmed cervidae may not be moved into or out of a quarantined herd onto or off of premises and perimeter fences 96 inches in height must be maintained around the premises so as to prevent egress of farmed cervidae or ingress of wild cervidae until the quarantine is released. The board may allow farmed cervidae from quarantined herds to be moved under permit directly to a state or federally licensed slaughtering establishment, to an approved

¹⁴⁸ The APHIS rules also specify that herd owners may appeal the loss or suspension of herd status after being informed of the reasons for the action and indicate that rules of practice concerning the hearing will be adopted by the Administrator. See 77 Fed. Reg. 35568 (June 13, 2012) and 9 C.F.R. § 55.24(c)(1).

¹⁴⁹ SONAR at 27.

veterinary diagnostic laboratory, or to another location if that movement is determined by the board not to endanger the health of other animals in the state.

* * *

C. Farmed cervidae herds may be released from quarantine by any of the following methods:

(1) Depopulation. To release a quarantine by depopulation, all cervidae in the herd must be euthanized and tested with an official CWD test. If the premises has no environmental contamination and all CWD tests are negative, the quarantine may be released immediately. If the premises has minimal environmental contamination and ~~all CWD tests are negative~~, the quarantine may be released one year after depopulation and cleaning and disinfection. If the premises has moderate to severe environmental contamination, the quarantine may be released five years after depopulation and cleaning and disinfection;

(2) ~~Test and removal of exposed animals.~~ If a premises has no environmental contamination and all CWD exposed animals on the premises are tested and are found to be CWD negative, the quarantine may be released;

(3) Test for five years. If any animal that dies or is slaughtered from the herd is tested, regardless of age, with an official CWD test for a period of 60 months, and no positive animal is identified, the quarantine may be released; or

(4) Other procedures. Quarantines may be released by procedures in addition to those in subitems (1) to (3) if they are approved by the board and are equally reliable and effective as the other methods in this item.

D. CWD contaminated premises must be cleaned and disinfected prior to quarantine release by a method approved by the board.

~~E. CWD contaminated premises may be restocked with livestock other than cervidae one month after cleaning and disinfection procedures have been completed. If the premises is restocked with livestock other than cervidae, all livestock that die during the quarantine period must be reported by the owner to the board and must immediately be delivered by the owner to the University of Minnesota Veterinary Diagnostic Laboratory for necropsy and determination of the cause of death. Necropsies must be performed at owner expense. A premises may only be restocked with cervidae after the quarantine is released.~~

187. For the reasons discussed in Finding 76, the use of the term “may” in Item C (lines 52.23, 53.3, 53.5, 53.7, 53.11, and 53.14) confers excessive discretion on the Board and constitutes a defect in the rules. To correct the defect, the Administrative Law Judge suggests that the word “shall” be substituted.

188. The modifications proposed by the Board and the suggested revision to correct the defect will not render the rule substantially different from the rule as originally proposed.

Subpart 3 – Determining boundaries of CWD endemic areas in the state

189. Subpart 3 addresses how the Board will determine the boundaries of a CWD endemic area in Minnesota. Under the proposed rules, a CWD endemic area must include all locations within ten miles of a confirmed case of CWD in wild cervidae. The rule states that the Board “may” designate larger geographic areas as part of a CWD endemic area if necessary to prevent the spread of CWD, and “may” exclude individual farmed cervidae herds under certain conditions. For the reasons discussed in Finding 76, the Administrative Law Judge concludes that use of the term “may” constitutes a defect in the rule, and suggests that “shall” be substituted to correct the defect.

190. Mr. Olson suggested that Subpart 3 explicitly state that farmed cervidae herds should be double-fenced to prevent commingling with wild cervidae.¹⁵⁰ The Board did not provide any response to this suggestion or seek to modify the rule to include such a statement. While the failure of the rule to include such a requirement does not amount to a defect, the Board is encouraged to consider Mr. Olson’s suggestion and make a further revision to the proposed rules if warranted.

8. Sheep and Goats (Minn. R. 1721.0430 – 1721.0480)

191. The Administrative Law Judge suggests that Part 1721.0430 include a definition of “scrapie-tagged” and that the Board also consider incorporating by reference the federal definitions of “scrapie-positive,” “suspect,” “high-risk,” and “exposed flock” that are mentioned in Parts 1721.0450 and 1721.0460. The Board should refer to Minn. Stat. § 14.07, subd. 4, for guidance regarding incorporation by reference requirements.

192. To improve the clarity of the rule, the Administrative Law Judge suggests that Part 1721.0440, Subpart 2, item A refer to “records” rather than “normal business records.”

¹⁵⁰ Comments of G. Olson at Hearing (Sept. 20, 2012)

9. Dogs, Cats, and Ferrets (Minn. R. 1721.0490 – 1721.0520)

Part 1721.0500 – Importation of Dogs, Cats, or Ferrets

193. Ann Olson of Animal Folks Minnesota asked the Board to consider requiring that the original breeder of the animal be identified with respect to dogs and cats in order to help track potential disease. Ms. Olson pointed out that brokers currently submit certificates of veterinary inspection under their names only, so it is not possible to determine who originally bred a particular dog or cat. She also suggested that certificates of veterinary inspection be required for intrastate transport of dogs and cats within Minnesota for purposes of sale rather than simply requiring such certificates for interstate sales and transport, because diseases from a breeder or broker facility can just as easily be spread within Minnesota as between Minnesota and another state.¹⁵¹

194. The Board did not provide any response to this comment. While the proposed rules are not defective as written, the Board is encouraged to consider Ms. Olson's comment and further modify the rules if deemed appropriate.

Part 1721.0520 - Kennels

195. The Board's current rules state, in part 1720.1535, that "[a]ll dogs and cats must be treated humanely while in the premises." Nancy Minion, who operates a nonprofit dog and cat rescue organization, questioned why this language was not included in proposed rule 1721.0520. She indicated that she had spoken with Board staff about this issue and was told that the Board does not believe the language should be included in the proposed rules because people must comply with anti-cruelty statutes. Ms. Minion requested that the language be included in the proposed rules because it is in the Board's current rules and because there is a need to remind people that animals must be treated humanely.¹⁵² Animal Folks Minnesota also asked that the provision be retained in the rules so as not to diminish or minimize the importance of treating animals humanely.¹⁵³ The Board did not respond to these suggestions during the rulemaking proceeding. While the rules are not defective due to their failure to include the suggested language, the Board is encouraged to consider these comments and, if deemed appropriate, make modifications to the rules. Inclusion of the suggested language would not render the rules substantially different from the rules as originally proposed.

196. Subpart 2 of the proposed rule requires that "periodic inspections" be made of kennels in accordance with Minn. Stat. § 347.37. That statute, in turn, requires that inspections be held from "time to time." Animal Folks Minnesota suggested that the Board specify that, at a minimum, such inspections will be held annually.¹⁵⁴ The Board did not provide any response to this suggestion. The rule is not defective as written;

¹⁵¹ Letter from Ann Olson (Aug. 23, 2012) at 4 (included in Ex. G).

¹⁵² Letter from Nancy Minion (Aug. 20, 2012), at 1.

¹⁵³ Letter from A. Olson (Aug. 23, 2012), at 4 (included in Ex. G).

¹⁵⁴ *Id.* at 5 (included in Ex. G).

however, the Board is urged to consider the comment and make further revisions to the rule if appropriate.

197. Subpart 6, Item A of the proposed rules states that interior surfaces of indoor confinement areas must be constructed and maintained so that they "provide for rapid drainage." Animal Folks Minnesota pointed out that cage flooring made of wire can provide rapid drainage but can also hurt the paws of animals if the animals are confined too long.¹⁵⁵ The Board did not respond to this comment or propose any additional change to subpart 6, Item A. Although the rule is not found to be defective as written, the Board is encouraged to consider whether additional clarifying language should be proposed.

198. Subpart 6, Item B of the proposed rules, as initially proposed, stated, "Dogs or cats must not be confined by chains." Ms. Minion suggested that the proposed rules be revised to simply indicate a prohibition against the tethering of dogs or cats.¹⁵⁶ Ann Olson of Animal Folks Minnesota similarly asked that the rule include other means of tethering.¹⁵⁷ The Board agreed with these comments and, at the hearing, proposed that the rule be modified as follows: "Dogs or cats must not be confined by chains or by tethering."¹⁵⁸ This subpart of the proposed rule, as modified by the Board, has been shown to be needed and reasonable to avoid injuries that may be sustained when dogs or cats become entangled in restraints. The modification serves to clarify the rule and does not constitute a substantial change from the rule as originally proposed.

199. Subpart 7, Item B of the proposed rules states, "Clean potable water must be made available to all dogs and cats at least twice daily for periods of not less than one hour." Ms. Minion suggested that water be allowed on a free choice basis and that language be included in the proposed rules specifying that snow and ice are not adequate water sources. She indicated that she had been informed by Board staff that the reference to "clean potable water" already makes it clear that snow and ice are not adequate.¹⁵⁹ The Board did not file a further response to Ms. Minion's suggestions and did not make any modification to the language of Item B. The language of Item B is identical to the language in part 1720.1490 of the Board's existing rules. While the proposed rule is not rendered defective by its failure to include the suggested language, the Board is encouraged to consider Ms. Minion's suggestions and, if deemed appropriate, make modifications to the proposed rule.

200. As originally proposed, subpart 8 of the proposed rules specified that each dog and cat in a kennel must be identified "with a numbered tag affixed to the neck by the means of a collar or by other means approved by the board." Ms. Minion recommended expanding the language to include identification attached to the cage or a microchip because very young kittens and puppies can get injured from collars, the fur

¹⁵⁵ *Id.* at 5 (included in Ex. G).

¹⁵⁶ Letter from Nancy Minion (Aug. 20, 2012), at 2 (included in Ex. G).

¹⁵⁷ Letter from A. Olson (Aug. 23, 2012) at 5 (included in Ex. G).

¹⁵⁸ Ex. R at 29; Ex. S at 2.

¹⁵⁹ Letter from N. Minion (Aug. 20, 2012), at 2.

of long-haired dogs and cats can become matted around collars, and kenneled animals may become injured if they become tangled in their collars or those worn by other animals.¹⁶⁰ Animal Folks Minnesota also suggested that other identification devices be allowed, such as cage cards.¹⁶¹ At the hearing, the Board proposed revising the language of subpart 8 in the manner suggested. Subpart 8, as finally proposed, would allow dogs and cats in kennels to be identified with a collar tag, "identification attached to the cage, microchip, or by other means approved by the Board."¹⁶² Subpart 8, as modified, has been shown to be needed and reasonable to ensure proper identification of kenneled animals. The modification was made in response to a comment from an interested member of the public who has experience with animal rescue organizations, serves to clarify the rule, and does not render the rule substantially different from the rule as originally proposed.

201. Subpart 9, Items B and E of the rules as originally proposed would require kennel owners to maintain records showing the name and address of the person from whom a dog or cat three months of age or older was received and the name and address of the person to whom a dog or cat three months of age or older was transferred. Ms. Minion and Animal Folks Minnesota questioned why the three-month age requirement was included in these provisions. Ms. Minion urged that the age limitation be removed from the rule.¹⁶³ The Board agreed and, at the hearing, the Board modified the proposed rules to delete the three-month age requirement.¹⁶⁴ Subpart 9, as modified, has been shown to be needed and reasonable to ensure that records will be kept on dogs and cats of any age. The rule as finally proposed for adoption is not substantially different from the version originally proposed.

202. Subpart 11 of the proposed rules addresses requirements for transportation of dogs and cats. Ms. Minion suggested the inclusion of additional language addressing the length of time an animal can be in transport and the need for exercise, food, water, and temperature control of the vehicle.¹⁶⁵ Animal Folks Minnesota also pointed out that there was no reference in the proposed rules to the need for exercise, water and food during transport of animals and suggested that this would be appropriate especially if dogs or cats are confined and transported for long distances and periods of time.¹⁶⁶ In the SONAR, the Board indicated that this subpart of the proposed rules was extracted from parts 1720.1537 and 1720.1538 of its existing rules, and has been rewritten for clarity without making significant changes to the requirements.¹⁶⁷ The Board did not respond to the public comments or propose any changes to this subpart of the proposed rules. While the Board is urged to consider the suggestions made by Ms. Minion and Animal Folks Minnesota, the Administrative Law

¹⁶⁰ Letter from N. Minion (Aug. 20, 2012), at 2.

¹⁶¹ Letter from A. Olson (Aug. 23, 2012), at 5.

¹⁶² Ex. R at 29; Ex. S at 2.

¹⁶³ Letter from N. Minion (Aug. 20, 2012), at 2; Letter from A. Olson (Aug. 23, 2012), at 5.

¹⁶⁴ Ex. R at 29; Ex. S at 2.

¹⁶⁵ Letter from N. Minion (Aug. 20, 2012), at 3.

¹⁶⁶ Letter from A. Olson (Aug. 23, 2012), at 5.

¹⁶⁷ SONAR at 30.

Judge concludes that the proposed rules are not defective by virtue of their failure to address these additional areas.

203. Subpart 12 of the rules as originally proposed specified:

A dog or cat or cat that has fractures, serious congenital abnormalities, obvious signs of severe parasitism, or infectious disease is unfit for sale or release, other than to the previous owner. A dog or cat determined to be unfit for sale or release must be isolated and treated by a licensed veterinarian or euthanized in a humane manner. If treatment for the conditions brings about a satisfactory recovery to a normal state of health, the animal is fit for release or sale.

204. Ms. Minion expressed concern that the language of the proposed rule would prohibit the release of dogs or cats with any of the noted conditions to nonprofit shelters or rescues for treatment by their veterinarians, and would lead to unnecessary euthanasia by impound kennels.¹⁶⁸ Animal Folks Minnesota also asserted that many rescue organizations and humane societies will pay for medical treatment so that animals are returned to full health and may be sold or adopted, and asked the Board to reconsider the wording of this rule and the definition of "unfit."¹⁶⁹ At the hearing, the Board deleted the restrictions on sales and release of dogs and cats that had previously been set forth in subpart 12 to facilitate the release of an animal in need of extensive veterinary care to an appropriate person or facility.¹⁷⁰ The deletion of subpart 12 is responsive to public comments and does not result in a rule that is substantially different than the rule as originally proposed.

10. Anthrax (Minn. R. 1721.0530)

205. Subpart 3 specifies that no one may necropsy the carcass of any animal dying suddenly if there is anthrax "in the area" unless authorized by the Board. The same language appears in Part 1705.0030 of the Board's current rules. While the language does not rise to the level of a defect in the rule, the Administrative Law Judge recommends that, if possible, the Board clarify what is meant by "in the area."

11. Rabies Prevention and Control (Minn. R. 1721.0540 – 1721.0580)

Part 1721.0540 - Definitions

206. As originally proposed, subpart 2 of the proposed rules included a definition of "approved confinement facility" that indicated that the term meant "a veterinary clinic, a kennel licensed with the board pursuant to Minnesota Statutes, section 347.31, an animal facility owned or operated by a political subdivision of the state, or other facility that has been approved by the board to confine and observe an animal that has bitten a human." Ms. Minion disagreed with this new term and

¹⁶⁸ Letter from N. Minion (Aug. 20, 2012), at 3.

¹⁶⁹ Letter from A. Olson (Aug. 23, 2012), at 5.

¹⁷⁰ Ex. R at 30; Ex. S at 2.

procedure introduced in the proposed rules and argued that it would adversely affect dogs and cats and put them at risk for parasites, disease, and illness if they were required to be taken out of their homes or foster homes and brought to such a facility. She also questioned how "approved confinement facilities" would be selected and whether a list of such facilities would be included on the Board's website.¹⁷¹

207. Ann Olson, Executive Director of Animal Folks MN, also raised concerns about costs associated with mandatory confinement of animals, the increased use of euthanasia because many impounds and other confinement facilities have limited space, and the distress that animals will experience if required to be removed from a home environment and placed in confinement for a lengthy period of time. She expressed hope that the Board had ensured that such confinement facilities were active participants in the proposed rule changes.¹⁷²

208. At the hearing, the Board deleted the definitions of "approved confinement facility" and "confinement" from the proposed rules so that the Board would have no role in approving facilities used for the confinement and observation of animals that bite humans.¹⁷³ The modification of the proposed rules has been shown to be needed and reasonable, and consistent with the responsibilities given to local authorities in such situations. The deletion of the definitions of "approved confinement facility" and "confinement" does not render the rules substantially different from the rule as originally proposed.

Part 1721.0580 – Management of Animals that Bite Humans

209. As originally proposed, Subpart 1 stated that a dog, cat, or ferret that is not currently vaccinated for rabies at the time it bites a person must be confined at an approved confinement facility at the owner's expense unless exempted by local authorities. Ms. Minion objected to this requirement. She questioned the need to remove the animal from its home in all circumstances, pointed out that the animals would risk exposure to other diseases at a shelter, and expressed concern that there would be not be sufficient room in the facilities to hold owned animals. She requested that the language of the rule be reviewed and that a better solution protecting the welfare of both humans and animals be reached.¹⁷⁴

210. At the hearing, the Board made the following modifications to this part of the proposed rule:

Subpart 1. Dogs, cats, and ferrets. A healthy dog, cat, or ferret that bites a human must be kept under confinement and observed for signs suggestive of rabies for ten days, or the animal must be euthanized and tested for rabies. ~~Any illness and the animal must be reported to the Department of Health. If the animal shows signs suggestive of rabies, it~~

¹⁷¹ Letter from N. Minion (Aug. 20, 2012), at 4.

¹⁷² Letter from Ann Olson (Aug. 23, 2012) at 3 (contained in Ex. G).

¹⁷³ Ex. R at 30; Ex. S at 2.

¹⁷⁴ Letter from N. Minion (Aug. 20, 2012), at 4-5.

~~must be euthanized and tested for rabies. An animal that dies or is euthanized during the ten day confinement period must be tested for rabies. A dog, cat, or ferret that is not currently vaccinated for rabies at the time of the bite must be confined at an approved confinement facility at the owner's expense, unless exempted by local authorities. A dog, cat, or ferret that is currently vaccinated for rabies at the time of the bite may be confined in the home or as directed by local authorities. If requested by the Department of Health, a stray or impounded dog, cat, or ferret that bites a human may be euthanized and tested for rabies before the required five-day holding period as specified in part 1721.0520 Subp. 10 or in Minnesota Statutes 346.47.~~

Subp. 2. Other animals. An animal other than a dog, cat or ferret All other animals that bites a human must be managed on a case-by-case basis based on the recommendations of the Department of Health. The animals may be required to be confined in the home, on the owner premises, or at an approved confinement facility and observed for signs suggestive of rabies. If the Department of Health requests a rabies test, the animal must be euthanized and tested for rabies.

Subp. 3. Confinement procedures. An animal under confinement for rabies observation must be restricted in such a way that the animal can always be found and cannot wander away. A dog, cat or ferret that is currently vaccinated for rabies may be confined in the home or as directed by local authorities. A dog, cat, or ferret that is not currently vaccinated for rabies may be required by local authorities to be confined at a veterinary clinic or other secure location at the owner's expense.

Subp. 4. Reporting and Testing. Any illness in an animal that is under confinement and observation for rabies established under this part must be reported to the Department of Health. If the animal shows signs suggestive of rabies, it must be euthanized and tested for rabies. An animal that dies or is euthanized during the confinement period must be tested for rabies.

Subp. 3 5. Enforcement. Local animal control and law enforcement officials are responsible for enforcement of this part.

211. The Board's modifications to this rule part delete the reference to "approved confinement facilities" and the mandatory 10-day confinement of animals that were not vaccinated for rabies at the time of the bite, but allow local authorities the option of requiring such confinement at a veterinary clinic or other secure location at the owner's expense. In the SONAR, the Board pointed out that, "If a confined animal escapes and is lost, the consequences for the person who was bitten by a non-vaccinated dog, cat or ferret are significant. In such cases, the person would almost always be advised to receive post exposure prophylactic treatment for rabies which consists of multiple injections of immunoglobulin and vaccine. Such treatment can be

painful and is very expensive. When animals are properly confined, unnecessary treatments can usually be avoided.”¹⁷⁵ The Board has demonstrated that the proposed rules, as modified, is needed and reasonable to allow appropriate options for the handling of animals who bite a person and clarifying the roles to be played by the Board, the Department of Health, and local animal control and law enforcement officials. The modifications do not render the rule substantially different from the rule as originally proposed.

12. Feeding Garbage to Livestock (1721.0590 – 1721.0660)

212. Subpart 1 of Part 1721.0610 defines “Class A” and “Class B” permits for feeding premises permits. These terms are also used in Part 1721.0650, but without definition. To improve the clarity of the rules, the Administrative Law Judge recommends that a cross-reference be included in the latter rule part to the definitions in Part 1721.0610, or that the definitions of these terms be included in Part 1721.0590. The suggested modifications will not result in a substantial change in the rule.

213. The language of Part 1721.0610, Subpart 2, indicates that the Board “may” deny permit applications or revoke permits if the applicant or permit holder has violated applicable laws and rules. For the reasons discussed in Finding 76 above, the statement that the Board “may” take adverse action constitutes a defect in the proposed rules because it provides unfettered discretion to the Board. In addition, for the reasons discussed in Finding 112 above, Subpart 2 is inconsistent with due process principles because it appears to authorize the Board to revoke or deny a permit where an individual has violated applicable laws or rules without providing prior written notice and without informing the individual of a hearing process or other recourse that is available. Although the Board is authorized by Minn. Stat. § 35.93, subd. 2, to “revoke, suspend, or refuse to renew a permit, license, or certification if a person violates this chapter,” the statute specifies that the Board must first provide “written notice and hearing.”¹⁷⁶ Section 35.93 does not describe the particular hearing process required. One option available to address the due process defect would be to specify that an individual adversely affected by the Board’s initial decision has the right to request a contested case hearing under the Minnesota Administrative Procedure Act.¹⁷⁷ Accordingly, the Administrative Law Judge recommends that Subpart 2 be revised along the following lines to cure the defects in the proposed rule:

Violations of the requirements of parts 1721.0590 to 1721.0660 pertaining to the feeding of garbage to livestock or any requirement specified in parts 1721.0100 to 1721.0740 or Minnesota Statutes, Chapter 35 by an applicant or permit holder shall constitute grounds for the Board to deny

¹⁷⁵ SONAR at 31.

¹⁷⁶ Minn. Stat. § 35.93, subd. 2.

¹⁷⁷ Minn. Stat. § 35.155, subd. 9, explicitly states that “[a] person raising farmed cervidae that is aggrieved with any decision regarding the farmed cervidae may request a contested case hearing under chapter 14.” Chapter 35 otherwise appears to be silent regarding the applicability of Chapter 14. The Board’s current rules also do not mention Chapter 14.

an application for a Class A or Class B permit for feeding premises or to revoke such a permit. The Board shall notify the applicant or permit holder of his or her right to appeal the Board's initial determination under the procedures of the Minnesota Administrative Procedure Act, Minnesota Statutes, Chapter 14 [or describe other process].

214. The proposed rule, if modified as suggested, has been shown to be needed and reasonable to clarify the permit process that will be followed. The modification will not result in a rule that is substantially different from the rule as originally proposed.

13. Biologics (1721.0670 – 1721.0680)

215. Item A of Part 1721.0670 states that certain vaccines "and other vaccines determined by the board to be too dangerous for nonveterinarian use" may be sold or distributed only to veterinarians, pharmacists, or companies that only sell to veterinarians. Similarly, Item B states that certain vaccines and "other vaccines that are restricted by the board for use in a disease control program" may be sold only by veterinarians or by written prescription to nonveterinarians. While this language is not defective, the Administrative Law Judge recommends that this part identify where members of the public can find the Board's list of these vaccines.

216. Item E of Part 1721.0670 states that the Board "may" impose restrictions on the sale, distribution, and use of poultry vaccines if considered necessary to protect the health of livestock and poultry in Minnesota. Item C of Part 1721.0680 contains a similar provision noting that the Board "may" impose restrictions on the sale, distribution, and use of poultry antigens if deemed necessary to protect the health of livestock and poultry in the state. For the reasons discussed in Finding 76 above, this language is defective because it grants excessive discretion to the Board. To correct these defects, the Administrative Law Judge recommends that the word "shall" be substituted for "may."

14. Carcass Disposal (1721.0690 – 1721.0740)

217. Subpart 1, Item A of Part 1721.0720 states that a permit issued for a vehicle used to transport carcasses over public roads "may" be revoked by the Board for noncompliance with parts 1721.0690 to 1721.0740. For the reasons discussed in Finding 76 above, the statement that the Board "may" revoke the permit constitutes a defect in the proposed rules because it provides unfettered discretion to the Board. In addition, for reasons discussed in Findings 112 and 212 above, Item A is inconsistent with due process principles because it appears to authorize the Board to revoke a permit where an individual has violated specified rules without providing prior written notice and without informing the individual of a hearing process or other recourse that is available. Although the Board is authorized by Minn. Stat. § 35.93, subd. 2, to "revoke, suspend, or refuse to renew a permit, license, or certification if a person violates this chapter," the statute specifies that the Board must first provide "written notice and

hearing.”¹⁷⁸ Section 35.93 does not describe the particular hearing process required. One option available to address the due process defect would be to specify that an individual adversely affected by the Board’s initial decision has the right to request a contested case hearing under the Minnesota Administrative Procedure Act.¹⁷⁹ To correct these defects, the Administrative Law Judge recommends that Item A be revised in a manner similar to the following:

Violations of the requirements of parts 1721.0690 to 1721.0740 pertaining to carcass disposal shall constitute grounds for the Board to revoke a permit issued for a vehicle used to transport carcasses over public roads in the state. The Board shall notify the permit holder of his or her right to appeal the Board’s initial determination under the procedures of the Minnesota Administrative Procedure Act, Minnesota Statutes, Chapter 14 [or describe other process].

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

CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The Board 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 in Findings 76, 79, 83, 86, 90, 94, 97, 100, 110, 112, 113, 143, 151, 156, 158, 182, 183, 187, 189, 213, 216, and 217.

3. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii), except as noted in Findings 100, 115, 170, and 171.

4. The amendments to the proposed rules suggested by the Board after publication of the proposed rules in the State Register are not 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.

¹⁷⁸ Minn. Stat. § 35.93, subd. 2.

¹⁷⁹ Minn. Stat. § 35.155, subd. 9, explicitly states that “[a] person raising farmed cervidae that is aggrieved with any decision regarding the farmed cervidae may request a contested case hearing under chapter 14.” Chapter 35 otherwise appears to be silent regarding the applicability of Chapter 14. The Board’s current rules also do not mention Chapter 14.

5. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 2 and 3, as noted in Findings 76, 79, 83, 86, 90, 94, 97, 100, 110, 112, 113, 115, 143, 151, 156, 158, 170, 171, 182, 183, 187, 189, 213, 216, and 217.

6. Due to Conclusions 2 and 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

BARBARA L. NEILSON
Administrative Law Judge

Dated: December 7, 2012