

August 15, 2022

VIA EMAIL ONLY

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**Re: *In the Matter of the the Proposed Rule Amendments Governing
Minnesota Veterans Homes, Minnesota Rules, Chapter 9050
OAH 71-9054-37629; Revisor R-4384***

Dear Parties:

Enclosed and served upon you please find the **ORDER OF CHIEF ADMINISTRATIVE LAW JUDGE ON REQUEST FOR RECONSIDERATION UNDER MINN. R. 1400.2240, SUBP. 4** in the above-entitled matter.

If you have any questions, please contact me at (651) 361-7874, michelle.severson@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



MICHELLE SEVERSON
Legal Assistant

Enclosure

cc: Senator Mary Kiffmeyer
Representative Michael Nelson
Office of the Revisor of Statutes
Legislative Coordinating Commission

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the the Proposed Rule
Amendments Governing Minnesota
Veterans Homes, Minnesota Rules,
Chapter 9050

**ORDER OF CHIEF ADMINISTRATIVE
LAW JUDGE ON REQUEST
FOR RECONSIDERATION UNDER
MINN. R. 1400.2240, SUBP. 4.**

This matter is pending before the Chief Administrative Law Judge upon a request for reconsideration filed by the Minnesota Department of Veterans Affairs (Department or MDVA) pursuant to Minn. R. 1400.2240, subp. 4 (2021). The Department's request for reconsideration was filed on August 8, 2022.

The proposed rules concern the administration of the Minnesota Veterans Homes. The Department seeks reconsideration of the disapproval of its proposed rules and of determinations related to its Additional Notice Plan.

Based upon a review of the Department's submissions and the rulemaking record,

IT IS HEREBY ORDERED:

1. The Department's request for a determination that it complied with its Additional Notice Plan, as approved on September 29, 2021, is **GRANTED**.
2. In all other respects, the Department's Request for Reconsideration is **DENIED**.

Dated: August 15, 2022



JENNY STARR
Chief Administrative Law Judge

MEMORANDUM

I. Procedural Background

On January 31, 2022, Administrative Law Judge Jessica A. Palmer-Denig held a public hearing on the Department's proposed rules governing its operation of the Minnesota Veterans Homes. The hearing record closed on March 1, 2022.

On April 15, 2022, Judge Palmer-Denig issued a Report disapproving the proposed rules based on prejudicial procedural and substantive defects.¹ In a Report dated April 21, 2022, the Chief Administrative Law Judge concurred with Judge Palmer-Denig's findings, the disapproval of the proposed rules, and rescission of the Additional Notice Plan.²

On Monday, August 8, 2022, the MDVA filed a request for reconsideration.³ In making its request, the MDVA asserts:

- (1) its Additional Notice Plan complied with applicable laws;
- (2) it did not misrepresent in its Statement of Need and Reasonableness (SONAR) its engagement with the public during the development of the proposed rules and its efforts to obtain input from stakeholders; and
- (3) its SONAR adequately addressed the items required under Minn. Stat. § 14.131(2), (5) and (7) (2022).

II. Disapproval on Reconsideration

A rule must be disapproved if it was not adopted in compliance with the procedural requirements of Minnesota's laws and rules governing the rulemaking process, or any other law or rule, unless the error must be disregarded as harmless error.⁴ An administrative law judge must disregard a defect in the proceeding due to an agency's failure to satisfy a procedural requirement if the administrative law judge finds that: (1) the defect did not deprive a person or entity of an opportunity to meaningfully participate in the proceeding; or (2) the agency took corrective action to cure the defect so that no person or entity was deprived of such an opportunity.⁵

The arguments made on reconsideration are analyzed below in the order presented by the MDVA. The Chief Administrative Law Judge agrees that the MDVA complied with its Additional Notice Plan, as originally approved. She disagrees, however, with the assertions that the MDVA met its affirmative representations regarding public engagement or that the SONAR adequately addressed the items required under

¹ See Report of the Administrative Law Judge (Apr. 15, 2022).

² See Report of the Chief Administrative Law Judge on Review of Rules (Apr. 21, 2022).

³ Minn. R. 1400.2240, subp. 4 (2021).

⁴ Minn. Stat. § 14.15, subd. 5 (2022); Minn. R. 1400.2100(A) (2021).

⁵ Minn. Stat. § 14.15, subd. 5.

Minn. Stat. § 14.131(2), (5) and (7). Neither of these errors are harmless. As a result, the MDVA's request for reconsideration on those two issues is denied.

A. The MDVA complied with its Additional Notice Plan.

Minn. Stat. § 14.14, subd. 1a(a) (2022), requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or through other means of communication.⁶ This notice is referred to as “additional notice” and is detailed by an agency in its additional notice plan. Minn. Stat. § 14.131 (2022) requires that an agency include a description of its efforts to provide additional notice in its SONAR. Alternatively, the agency must detail why additional notification efforts were not made.⁷

An agency may request approval of its additional notice plan by an administrative law judge prior to service.⁸ The Department requested approval of its Additional Notice Plan in this proceeding, and the Administrative Law Judge granted approval on September 29, 2021.⁹

According to its approved Additional Notice Plan, the Department was to provide, by email or U.S. Mail, a copy of the Dual Notice, SONAR, and proposed rules to the identified specific groups and organizations.¹⁰ However, during the rulemaking proceeding, the Department submitted a Certification of Giving Additional Notice, in which it certified only that it provided notice by sending an email with a hyperlink to the Dual Notice.¹¹ The Department did not attach a copy of the transmittal email; it only attached a list of the email addresses for the specific groups.¹² The Administrative Law Judge determined that the Department did not show that it complied with its approved Additional Notice Plan.

In its Request for Reconsideration, the Department states that it did, in fact, send copies of the Dual Notice, SONAR, and proposed rules, consistent with its Additional Notice Plan, and that its certification was incorrect.¹³ The Department submitted copies of letters and emails substantiating these assertions, which were not previously offered.¹⁴ The Department requests that the statement regarding sending only an email with a hyperlink be considered harmless error, as no persons were deprived of an opportunity to participate in the rulemaking as a result.¹⁵

⁶ Minn. Stat. § 14.14, subd. 1a(a).

⁷ Minn. Stat. § 14.131.

⁸ Minn. R. 1400.2060 (2021).

⁹ Order on Request for Review and Approval of Additional Notice Plan and Notice of Intent to Adopt Rules Without a Hearing (Sept. 29, 2021).

¹⁰ *See id.*

¹¹ *See* Ex. H1 at 1.

¹² *Id.* at 7.

¹³ Request for Reconsideration at 2-3.

¹⁴ *Id.* at 3, Attach. 3.

¹⁵ *Id.* at 3.

The Chief Administrative Law Judge determines that the Department has now clarified its compliance with its Additional Notice Plan, as originally approved by the Administrative Law Judge.

B. The MDVA did not meet its affirmative representations regarding public engagement.

Under Minnesota’s Administrative Procedure Act (APA), an agency must prepare a SONAR in support of proposed rules.¹⁶ The SONAR “must be sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules.”¹⁷

Further, the agency proposing rules must make “an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule and fulfilling any relevant substantive or procedural requirements imposed on the agency by law or rule.”¹⁸ The affirmative presentation must include information about the agency’s efforts to engage the public in the development of its proposed rules.¹⁹

These requirements – both the SONAR itself and the affirmative presentation of the facts contained therein and presented at the public hearing – relate to several of the APA’s purposes, including increasing public accountability of administrative agencies, increasing public access to governmental information, and increasing public participation in the formulation of administrative rules, among others.²⁰

1. MDVA’s SONAR

The MDVA’s SONAR contained a section related to “public participation and stakeholder involvement.”²¹ In that section, the MDVA made the following, affirmative representations:

The MDVA conducted outreach activities while developing these rule amendments. This was done in part to comply with the requirements of Minnesota’s rulemaking process, but also to notify, engage, and inform potentially interested parties about this rulemaking and solicit their input on the MDVA’s proposal to amend the rules. This section describes the MDVA’s public outreach efforts and the steps it took to develop and solicit input on the rule amendments.

. . .

In addition to public notice in the Minnesota *State Register* of the Request for Comments on its possible amendments to rules governing the

¹⁶ Minn. R. 1400.2070, subp. 1 (2021).

¹⁷ *Id.*

¹⁸ Minn. Stat. § 14.14, subd. 2 (2022).

¹⁹ Minn. Stat. § 14.14, subd. 1a(a), 14.131.

²⁰ Minn. Stat. § 14.001(2), (5) (2022).

²¹ Exhibit (Ex.) D at 7.

Minnesota Veterans Homes, the MDVA has communicated with specific groups about amending the rules. These groups include the Minnesota Elder Bar of Minnesota, the Minnesota Veterans Home Family Council-Minneapolis, and the Minnesota Department of Human Services, The Office of Ombudsman for Long-Term Care. As requested, the MDVA will ensure that these groups receive the draft rules when they become available.²²

2. Public Response

During the public hearing, commenters challenged these affirmative representations. For example, one commenter described the MDVA's representations in its SONAR as "plainly false."²³ Another contended the agency was "[m]isleading veterans and the public."²⁴

The Office of Ombudsman for Long Term Care (OOLTC) filed written comments and testified at the public hearing.²⁵ It maintained that it had not been asked for input during the development of the rules, stating:

[W]e were listed as an involved stakeholder in the SONAR but were not involved in the drafting of these . . . rules, nor invited, to our knowledge, to give any input. In fact, despite our regional representatives repeatedly asking about the proposed rules and what was contained in them beyond the little bit that's found in the public register, we were not made aware of any of the proposed changes until the posting of the rules.²⁶

Other organizations that provide services to older Minnesotans around the state asserted that there had not been stakeholder involvement in the development of the rules. These comments came from the Central Minnesota Council on Aging;²⁷ Dancing Sky Area Agency on Aging;²⁸ Trellis;²⁹ the Arrowhead Area Agency on Aging;³⁰ and the Southeastern Minnesota Area Agency on Aging,³¹ as well as the Minnesota Elder Justice Center,³² and the Minnesota Chapter of the National Academy of Elder Law Attorneys.³³

The Elder Law Section of the Minnesota State Bar Association (MSBA) strongly contested that it had been consulted during the development of the proposed rules. The Elder Law Section initially filed a comment stating that:

²² *Id.*

²³ Comment of Lauren Fink (Nov. 19, 2021).

²⁴ Comment of Cathryn D. Reher (Nov. 19, 2021).

²⁵ Comment of Cheryl Hennen at 55 (Nov. 19, 2021); Public Hearing Transcript (Tr.) at 67-68 (Maisie Blaine).

²⁶ Tr. at 67 (M. Blaine).

²⁷ eComment of Lori Vrolson (Nov. 22, 2021).

²⁸ eComment of Darla Waldner (Nov. 22, 2021).

²⁹ eComment of Dawn Simonson (Nov. 22, 2021).

³⁰ eComment of Kristi Kane (Nov. 23, 2021); eComment of Brenda Shafer-Pellinen (Nov. 23, 2021).

³¹ eComment of Laurie Bownell (Nov. 23, 2021).

³² Comment of Sean Burke (Nov. 23, 2021).

³³ Comment of Jill Sauber (Nov. 18, 2021).

MDVA did not communicate with the Elder Law Section of the MSBA regarding amending the rules nor did MDVA ensure that the Elder Law Section received a draft of the rules. Neither past nor present Chairs of the Elder Law Section or the Legislative Committee of the Elder Law Section received communication from MDVA regarding the proposed rules and no substantive process was utilized to engage Elder Law Section feedback. Therefore, the Elder Law Section objects to the misleading statement made by the MDVA and any implications that such proposed changes to the rules reflect input from and/or notification to the Elder Law Section.³⁴

The Elder Law Section subsequently submitted the sworn affidavit of Section Chair Amber Hildebrandt, in which she stated: “There have been statements made by the MDVA in the documents and at the hearing that interested parties and stakeholders were consulted during the amendment process. I believe this is a material misrepresentation.”³⁵ She went on to note that the Elder Law Section’s Governing Council polled its membership to determine whether any of its members had been contacted by the MDVA, and “of the 21 council members in attendance, including the prior 2 chairs, it was confirmed that no representatives for the Section received communications about or drafts of the proposed amendments in advance of publication on October 18, 2021.”³⁶

Additionally, several commenters maintained that they had proactively reached out to the MDVA regarding the development of the proposed rules but had been rebuffed. Among these commenters, one characterized the MDVA’s response as “radio silence.”³⁷ A member of the Elder Law Section noted that, notwithstanding the SONAR’s statement that “the MDVA will ensure that these groups receive the draft rules when they become available,”³⁸ the MDVA did not provide a draft to the Elder Law Section prior to publication of the proposed rules in October 2021, even though the published proposed rules were dated April 2021.³⁹

An email exchange included by the MDVA in its request for reconsideration is consistent with statements made by commenters.⁴⁰ The exchange shows that Cathryn Reher, an elder law attorney, and the MDVA spoke by telephone in October 2018.⁴¹ Ms. Reher requested an opportunity to review the agency’s revisions to the rules.⁴² By email, the MDVA memorialized its response to Ms. Reher’s request:

As I stated in our conversation, the current version of the changes are at the Revisor’s office for review. I am currently finishing up the SONAR and expect to have a copy of the changes and the SONAR for the Governor’s office to review within the next few months. I have brought your request to

³⁴ Comment of Amber Hildebrandt and Susanne Scheller (Nov. 19, 2021).

³⁵ Affidavit (Aff.) of Amber Hildebrandt (Hildebrandt Aff.) at 1 (Feb. 22, 2022).

³⁶ *Id.*

³⁷ Comment of J. Sauber at 2 (Nov. 22, 2021).

³⁸ Ex. D at 7.

³⁹ Tr. at 50-51 (C. Reher).

⁴⁰ Request for Reconsideration at 2, Attachment (Attach.) 1.

⁴¹ *Id.*, Attach. 1.

⁴² *Id.*

jointly review the proposed changes forward to MDVA's leadership team and will let you know how they want to proceed.⁴³

At the rulemaking hearing, Ms. Reher expressed her disappointment in the agency. She noted that Elder Law Section members did not hear from the MDVA about the proposed rules until approximately one month before the proposed rules were published in the *State Register* with the Dual Notice in October 2021 and did not see the rules until they were published.⁴⁴

3. MDVA's Response

In response, the MDVA expressed that it had provided all notifications required by law and that it had made documents associated with the rulemaking available to the public on its website.⁴⁵ In its request for reconsideration, the MDVA adds that it had "informal communications with outside entities" that were "general in nature" because the final draft of the rules was not completed until the rules were ready for publication.⁴⁶ Further, the MDVA states that it communicated with the outside stakeholders it identified in its SONAR, but that "the listed parties had only received confirmation that the MDVA was working on a draft of the rule changes and that they would receive a draft when it became publicly available through publication."⁴⁷

4. Analysis

The MDVA's SONAR describes a substantial commitment to stakeholders and the public. Specifically, the MDVA affirmatively represented that it conducted "outreach activities" to "notify, engage, and inform potentially interested parties . . . and solicit their input."⁴⁸ The SONAR also affirmatively represented that the agency had "communicated with specific groups about amending the rules."⁴⁹ These groups include the "Minnesota Elder Bar of Minnesota, the Minnesota Veterans Home Family Council-Minneapolis, and the Minnesota Department of Human Services, The Office of Ombudsman for Long-Term Care."⁵⁰ The affirmative representations further include that, "[a]s requested, the MDVA will ensure that these groups receive the draft rules when they become available."⁵¹

An affirmation is a pledge equivalent to an oath.⁵² During the more than five years that spanned between its request for comments in January 2016,⁵³ and publication of the

⁴³ *Id.*

⁴⁴ Tr. at 50-51 (C. Reher).

⁴⁵ Department's Response to Public Comments at 4-5 (Feb. 22, 2022).

⁴⁶ *Id.* at 4. Note that the latter part of this assertion is belied by the record. The draft rules submitted in this matter were dated April 2021, and the rules were not published until approximately six months later.

⁴⁷ *Id.* at 5.

⁴⁸ Ex. D at 7.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Affirmation*, BLACK'S LAW DICTIONARY (7th ed. 1999).

⁵³ Ex. A; Request for Reconsideration at 4. The OOLTC maintains that it did not provide a comment because it never received the Request for Comments in 2016. Comment of Cheryl Hennen at 55 (Nov. 19, 2021).

Dual Notice in October 2021, the MDVA did not engage interested stakeholders about the substance of its rulemaking proposals or solicit their input. The MDVA further did not provide interested stakeholders with a draft of the proposed rules when that draft was available in April 2021.

The MDVA contends that it did have “informal communications with outside entities” that were “general in nature.” But the MDVA statements in its SONAR went beyond informal communications. Specifically, the MDVA affirmatively stated that it “communicated” with specific groups and “conducted outreach activities . . . to develop and solicit input on the rule amendments.” Informal communications that were general in nature do not meet the MDVA’s pledge to develop and solicit input through outreach activities with a list of specific stakeholders.

Next, the MDVA contends that it “did not mislead any entity or individual that it would provide drafted specifics of the proposed rule amendments prior to publication.”⁵⁴ But that is very nearly exactly what it stated in the SONAR: “As requested, the MDVA will ensure that these groups receive the draft rules when they become available.”⁵⁵ The MDVA could have stated that the proposed rules would be provided to interested groups upon publication. It did not do so. Instead, it created an expectation that, “as requested,” a “draft” of the rules would be provided to stakeholder groups when “available.”⁵⁶ The published proposed rules are dated April 2021, showing that the MDVA’s proposed rules were available, at a minimum, six months before publication.

By not following through with the pledges it made, the MDVA frustrated the essential purpose of the SONAR: that it be “sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules.” Interested persons could not fully prepare as they held an expectation, set by the MDVA itself, that the MDVA would solicit their input and would ensure that stakeholders received the draft rules when they became available. This did not occur.

Under the harmless error standard, an administrative law judge must disregard a defect in the proceeding due to an agency’s failure to satisfy a procedural requirement if the administrative law judge finds that: (1) the defect did not deprive a person or entity of an opportunity to meaningfully participate in the proceeding; or (2) the agency took corrective action to cure the defect so that no person or entity was deprived of such an opportunity.⁵⁷

The Chief Administrative Law Judge concludes that the error here is not harmless. The affirmative presentation of facts, particularly about interactions with the public, goes to the heart of several of the APA’s express purposes: to increase public accountability of public agencies; to increase public access to governmental information; and to increase public participation in the formulation of administrative rules.⁵⁸ Here, the defect deprived

⁵⁴ Request for Reconsideration at 4.

⁵⁵ Ex. D at 7.

⁵⁶ *Id.*

⁵⁷ Minn. Stat. § 14.15, subd. 5.

⁵⁸ Minn. Stat. § 14.001(2), (4)-(5) (2022).

stakeholders of the opportunity to meaningfully participate in the MDVA's promised outreach efforts and solicitation of their input. Notice and publication was not sufficient, corrective action to cure that defect.

As a result, the MDVA's request that the disapproval of the rules be set aside is denied.

C. The MDVA did not adequately address the items required under Minn. Stat. § 14.131(2), (5) and (7).

In its SONAR, the agency must discuss the probable costs to itself, other agencies, and affected parties of the implementation and enforcement of the proposed rules and the costs of compliance.⁵⁹ The agency must also assess any differences between the proposed rule and existing federal regulations and provide a "specific analysis of the need for and reasonableness of each difference."⁶⁰

As discussed above, the SONAR "must be sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules."⁶¹ A SONAR is prejudicially deficient "when it does not adequately preview the agency's intentions, evidence, and rationale so as to afford parties the opportunity to meaningfully participate in the rulemaking process."⁶² If an agency's failure to address a procedural requirement causes actual prejudice to the rulemaking process, the rule must be invalidated.⁶³

In its SONAR, the MDVA's discussion of the costs to itself and other agencies arising from the implementation and enforcement of the proposed rules was limited to its assertion that the costs would be "nominal" and "have no impact."⁶⁴ As to the costs of compliance, the MDVA stated:

For the MDVA, other government and nongovernmental entities, the costs of complying with the proposed rules are synonymous with the costs of implementing and enforcing the proposed rules. The costs of complying with the proposed rules are not more than the programmatic costs associated with meeting the rule requirements. The costs of complying with the proposed rules will be no more than the costs of meeting the requirements of the existing rule.⁶⁵

⁵⁹ Minn. Stat. § 14.131(2), (5).

⁶⁰ Minn. Stat. § 14.131(7).

⁶¹ Minn. R. 1400.2070, subp. 1 .

⁶² *Builders Ass'n of the Twin Cities v. Bd. of Elec.*, 965 N.W.2d 350, 361 (Minn. Ct. App. 2021).

⁶³ See *id.* at 360-61; *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 405-06 (Minn. 1992).

⁶⁴ Ex. D at 62.

⁶⁵ *Id.* at 64.

With regard to conflicts between the proposed rules and federal law, the agency provided no analysis or information in many instances.⁶⁶ During the rulemaking hearing, a commenter made an objection on the record to the MDVA's discussion of required factors under Minn. Stat. § 14.131(2), (5) and (7).⁶⁷ The commenter maintained that the SONAR was procedurally defective.⁶⁸

The Administrative Law Judge concluded that the MDVA's SONAR was defective, and that its failure to discuss information required under Minn. Stat. § 14.131 prevented meaningful participation by the public during the rulemaking. The agency's statement that the costs were nominal and had no impact provided no information as to what the probable costs might be. The statement that the "costs of complying with the proposed rules are not more than the programmatic costs associated with meeting the rule requirements," is a tautology, not a description of the financial impact of the proposed rules. The MDVA's next claim, that the "costs of complying with the proposed rules will be no more than the costs of meeting the requirements of the existing rule," is a step toward the required assessment, but the rulemaking record lacks support for this assertion.

The Administrative Law Judge determined that the MDVA was on notice of the deficiencies, but that it failed to supplement the record during the hearing or post-hearing comment period to include information that would have satisfied its obligations under law. Therefore, the defect could not be overlooked as harmless error.

The MDVA provided additional information about its analysis of costs and federal-law-conflicts in its request for reconsideration. However, this late submission, well after the public comment period ended, does not cure the procedural defects. The MDVA's reconsideration request is based on new facts and argument that were never offered into the rulemaking record. Without an opportunity to review or comment on these facts and arguments during the rulemaking process, the public is prejudiced and denied an opportunity to participate in the formulation of administrative rules.⁶⁹ The time to cure a potentially prejudicial defect is during the rulemaking proceeding; such a defect cannot be cured afterward through the presentation of evidence and analysis that was never provided to the public.⁷⁰

The Administrative Law Judge correctly concluded that the MDVA's analysis of costs and conflicts with federal law were procedurally deficient, caused actual prejudice, and were not cured. Therefore, the Chief Administrative Law Judge again concurs with the disapproval of the rules.

⁶⁶ See Report of Administrative Law Judge at 25-29 (April 15, 2022) (detailing absence of analysis in the SONAR as to conflicts with federal law).

⁶⁷ Tr. at 41 (Suzanne Scheller).

⁶⁸ *Id.*

⁶⁹ Minn. Stat. § 14.001(5).

⁷⁰ This is not an instance in which an agency offers additional information as to a purely legal question and there is no impact on participation by the public.

III. Conclusion

This matter presents unfortunate and unprecedented circumstances. The Chief Administrative Law Judge is empathetic to the challenges of rulemaking especially when rulemaking spans changes in senior leadership. Further, the Chief Administrative Law Judge does not intend to attack the reputation of any public servant or the MDVA; she makes no assumption or conclusion that anyone acted with ill intent. Yet, the special rigors that come with agencies exercising a delegation of law-making authority must be observed.

Having reviewed the Request for Reconsideration, the Chief Administrative Law Judge determines that the MDVA has clarified its compliance with the Additional Notice Plan, as it was previously approved.

Even so, based on the facts and applicable law, the MDVA's request that the rules be approved is **DENIED**.

J. S.