

OCT 31 1995



STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
100 Washington Avenue South
Minneapolis, Minnesota 55401-2138

October 30, 1995

Ms. Maryanne Hruby
Legislative Commission to Review
Administrative Rules
55 State Office Building
100 Constitution Avenue
St. Paul, MN 55155

RE: Statement of Need and Reasonableness in the matter of the proposed adoption of Rules of the Office of Administrative Hearings.

Dear Ms. Hruby:

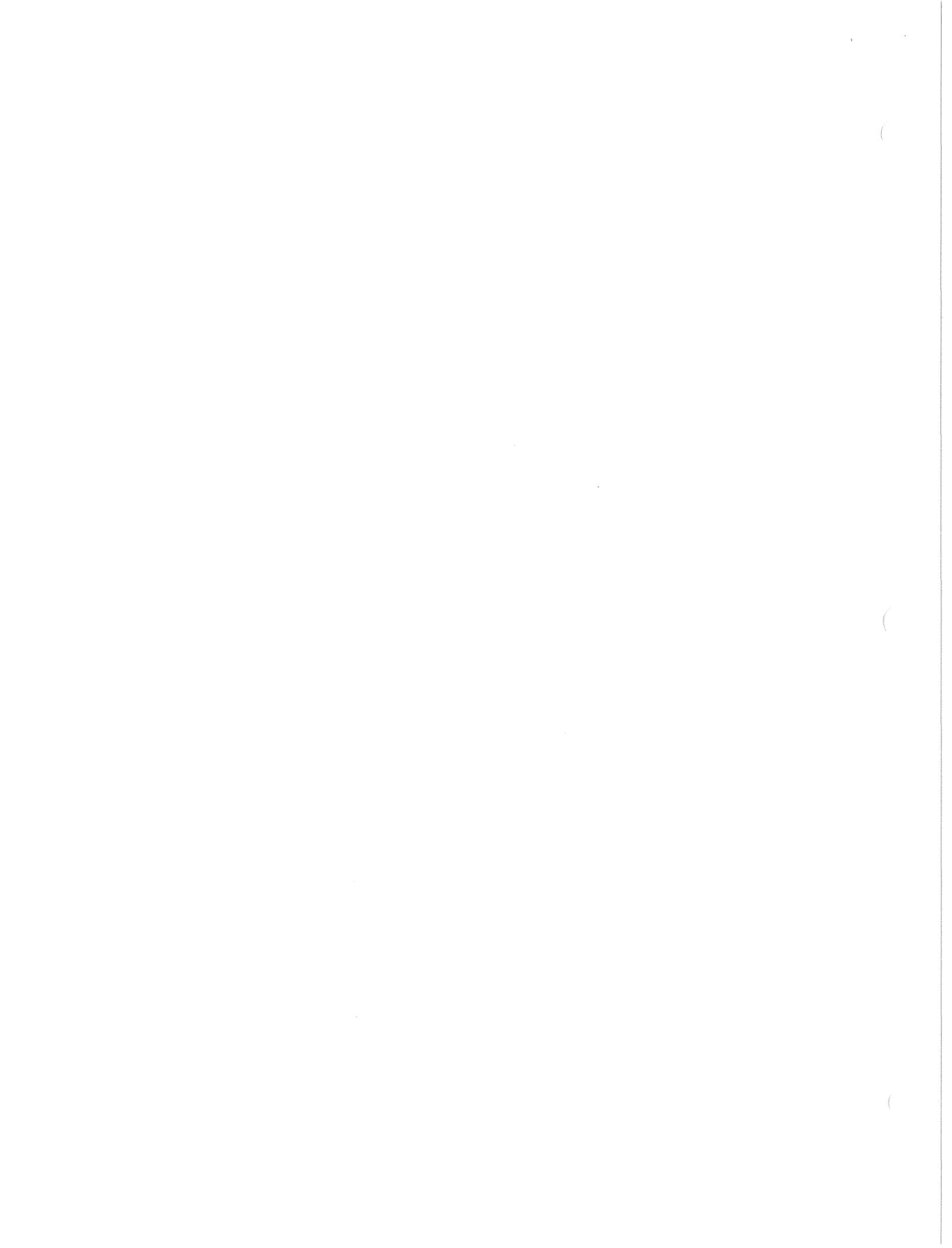
Please find enclosed a copy of the Office of Administrative Hearings' statement of need and reasonableness for the proposed adoption of rules governing rulemaking procedure and review, Minnesota Rules, Parts 1400.2000 to 1400.2560 (Proposed), and a copy of the proposed rules.

If you have any questions regarding the statement of need and reasonableness or the proposed rules, please contact me at the telephone number listed below.

Sincerely,

Mary Beth Gossmann
MARY BETH GOSSMAN
OAH Staff Attorney

Telephone: 612/341-7602



**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

**In the Matter of the Proposed
Adoption of Rules of the Office of
Administrative Hearings Governing
Rulemaking Procedure and Rule
Review, Minnesota Rules Parts
1400.2000 to 1400.2560 (Proposed)**

**STATEMENT OF NEED AND
REASONABLENESS**

Introduction

Legislation passed in 1995 made a number of significant changes in state agency rulemaking. The legislation directed the Office of Administrative Hearings (OAH) both to adopt new rules and to revise the existing Attorney General rules concerning review of rules when no hearing is held. The legislation specifically directed OAH to adopt new rules relating to (1) approval of agency additional notice plans - Minnesota Laws Ch. 233, Art. 2, § 31; (2) a procedure to be followed in determining whether a rule is substantially different, including an expedited procedure for adoption of substantially different rules - Minnesota Laws 1995 Ch. 233, Art. 2, § 31; and (3) the approval of exempt rules - Minnesota Laws 1995 Ch. 233, Art. 2, §§ 27 and 29.

The rules proposed in this proceeding are intended to accomplish that legislative directive and to update both OAH and Attorney General rules concerning rulemaking procedure. The Chief Administrative Law Judge has general rulemaking authority under Minn. Stat. § 14.51 to "adopt rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings, contested case hearings, and workers' compensation hearings, and to govern the conduct of voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services." The new legislation also provided OAH with rulemaking authority for rules adopted without a hearing. Minnesota Laws Ch. 233, Art. 2, § 31. In rewriting existing rules, the goal has been to restate them in plain English; to place the procedural rules in a more chronological order, to simplify the procedure where possible, including establishing similar standards for rules adopted with or without a hearing; and to avoid incorporating statutory language where this can be done while retaining readable rules.

Impact on Agricultural Lands

These proposed rules do not have a direct and substantial adverse impact on agricultural land in Minnesota within the meaning of Minn. Stat. § 14.11, subd. 2. These proposed rules also would not affect farming operations within the meaning of Minnesota Laws 1995 Ch. 233, Art. 1, § 1, and therefore the requirements of that section do not apply to this proceeding.

Impact on Small Business

Minn. Stat. § 14.115 requires agencies proposing new rules which may affect small businesses to consider methods for reducing the impact of the rule on small business. These proposed rules do not affect small business directly. Minn. Stat. § 14.115, subd. 7(b). The rules do not impose compliance or reporting requirements or schedules or deadlines or establish performance standards for small business within the meaning of Minn. Stat. § 14.115, subd. 2. Rather, the rules generally impose uniform requirements upon state agencies in the conduct of their rulemaking function. It is anticipated that the statutory changes to the Administrative Procedure Act, as reflected in these rules, will produce more public notice and more informative statements of need and reasonableness and will therefore promote participation by small business in rulemaking. A statutory objective of the APA is to create a uniform procedure for all state agencies to follow and the creation of exceptions would likely be contrary to the statutory objectives within the meaning of Minn. Stat. § 14.115, subd. 3. Small business organizations such as the NFIB have received preliminary drafts of the proposed rules and are on the Office of Administrative Hearings' rulemaking notice list. See Minn. Stat. § 13.115, subd. 4(c).

Fiscal Impact

Under Minn. Stat. § 14.11, subd. 1, if a rule will require the expenditure of over \$100,000 in either of the two following years by local public bodies, the agency adopting the rule must prepare a written statement estimating the total cost of the rule to all local public bodies. It is not anticipated that this proposed rule will have any fiscal impact on local public bodies. The rules impose procedural requirements upon state agencies, most of which are compelled by statute. They impose no regulatory or other requirements upon local public bodies which would increase costs.

Additional Notice

OAH published a Notice of Solicitation of Comments in the State Register on June 19, 1995, and mailed the Notice to its rulemaking list on June 12, 1995. The Notice requested readers to send in their names to be added to the rulemaking list and advised readers that they could request a draft of the OAH rules. All names received were added to the list as were the names of state agency heads. On June 30, 1995, a draft of the rules was mailed to those on the list and their comments were solicited. Approximately 25 oral and written comments were received and incorporated into September 13, 1995 draft which was also mailed to those on the rulemaking list for comment. Those comments were then incorporated into the final proposed rule. OAH also met with the state inter-agency rule staff group on October 19, 1995, to explain the proposed rules and take comments.

Need and Reasonableness of Specific Provisions

Minn. Stat. § 14.23 requires an agency to prepare a Statement of Need and Reasonableness justifying the proposed rules. A substantial amount of the proposed rule language is presently contained in existing OAH or Attorney General rules. Technically, existing language does not need to be justified again. Minn. Rule

1400.0500, subp. 1. However, this statement generally attempts to justify all of the language proposed. The specific administrative rulemaking justification follows:

1400.2000 - SCOPE

This rule part makes it clear that all rule proceedings under Chapter 14, the Administrative Procedure Act, are governed by these rules. Because of the 1995 changes to Chapter 14, and the reorganization of these rules, it is necessary to point out that all types of rulemaking are subject to these rules.

1400.2010 - DEFINITION

This part sets out several definitions which define words used throughout the rules. Several merely reference the statute while other definitions permit a shorter reference to be used in the Rules in place of longer phrases. They are necessary to avoid repeating unnecessary verbiage throughout the Rules.

1400.2020 - ASSIGNMENT AND DISQUALIFICATION OF JUDGE

This part incorporates two provisions of the prior rules. The first subpart requires the Chief Administrative Law Judge to assign an ALJ upon a request to schedule a rule hearing as is the case under existing Minn. Rule 1400.0300, subp. 1. It also provides for assignment to an ALJ for review of rules that do not go to a hearing. The second two subparts essentially repeat existing language in Minn. Rule 1400.0700. This rule part is needed to provide a starting point for the OAH rule function by assignment of an ALJ, and to set out the process for disqualification of a judge.

1400.2030 - COUNTING TIME AND FILING DOCUMENTS

Subp. 1. Counting Time. This subpart incorporates the method of computing time periods set out in Attorney General Minn. Rule 2010.0800. The subpart is needed in order to establish a definitive method of computing time periods. The subpart also makes it clear that a day means a calendar day unless it is stated as "working days". The counting method is the one commonly employed in legal matters and lends certainty to the computations of time necessary in complying with these rules.

Subp. 2. Paper Size. This subpart requires written submissions to be on standard size paper with a few exceptions. It is a rephrased version of Minn. Rule 1400.0250, subp. 1. It is needed to create uniform and manageable rule records.

Subp. 3. Facsimile Transmission. This subpart is a restatement of existing Minn. Rule 1400.0250, subp. 2. It permits filing by fax, specifies the deadline, and requires a later filing of the original document. The rule recognizes that a large amount of documents are now transmitted by fax.

1400.2040 - PETITION FOR RULEMAKING

This rule is a restatement and simplification of existing Minn. Rule 2010.0600. Minn. Stat. § 14.09 as amended requires OAH to adopt a rule setting out the form of a Petition for Rulemaking. This rule incorporates a form set out at part 1400.2500. Rather than restating the statutory requirements for a response, the rule refers the reader to it. This rule is required by statute. It is needed to indicate who the petition must be filed with and the agency response requirements.

1400.2050 - REQUEST FOR COMMENTS ON PLANNED RULE

Minn. Stat. § 14.101 is a new statute adopted in 1995 which was effective earlier this year. This rule alerts the reader to that new requirement and is needed to refer the reader to a recommended form contained at the end of these rules.

1400.2060 - APPROVAL OF NOTICE PLAN

Subpart 1. Optional approval. The 1995 legislation directed OAH to adopt a rule which permits agencies to obtain advanced approval from OAH of its notice plans for rulemaking. This subpart makes it clear that this prior approval is optional and indicates the scope of the rule.

Subpart 2. Filing. This subpart advises agencies what must be filed in order to obtain approval of a notice plan. For notice plans associated with a Request for Comments on a Planned Rule (Subp. 2A), a description of the notice plan must be filed as well as a draft of the Request for Comments and a brief explanation of why the notice plan complies with statute. The rule requires filing of the proposed Request for Comments in order to permit the ALJ to have some understanding of what additional notice is appropriate. The Request for Comments should describe the subject matter of the rule and who might be affected. This information will assist the ALJ in approving the notice plan. For the same reason, it is also reasonable to require the agency to explain why its plan is consistent with the statutory requirements for such notices.

For notice plans associated with rulemaking procedures (subp. 2B.) the rule requires filing of the proposed rule, the proposed notice, as well as an explanation of why the agency believes the notice plan complies with the applicable statute. The rule also requires a filing of a draft of or a final copy of the Statement of Need and Reasonableness. Several agencies have expressed concern that this document might not be finalized at the time the advance approval is sought. The document is necessary to provide information to the ALJ concerning the nature of the rule and who might be affected. This information is necessary to make a decision on the adequacy of the notice plan. Likewise, the rule itself, the proposed notice and the agency explanation will provide facts necessary to support approval

Subp. 3. Review. This subpart is necessary to set a deadline by which the judge must review and approve or disapprove the notice plan. The relatively short time period of five working days for review is reasonable since it is necessary to have a prompt review. This prior approval takes place before rulemaking is initiated and must be done promptly.

Subp. 4. Approval and Disapproval. This subpart indicates that an approved notice plan is a final determination by OAH. In order for advanced notice approval to be beneficial and to meet the legislative intent of providing certainty of the adequacy of notice early in the process, it is reasonable and necessary that that determination cannot be reviewed again later in the rulemaking process. This subpart also provides for a revision of the notice plan upon disapproval and a second review within a five working-day period.

1400.2070 - STATEMENT OF NEED AND REASONABLENESS

Subp. 1. General Content. This rule creates one set of guidelines for a Statement of Need and Reasonableness (SONAR) whether the rules are adopted with or without a hearing. This subpart incorporates the general requirements for SONARs contained in existing rules Minn. Rule 1400.0500, subps. 1 and 2, and Minn. Rule 2010.0700. The subpart sets out the general purpose of the statement of need, namely to explain why the rule is necessary and why the rule proposed is a reasonable approach for meeting the need. The subpart incorporates the substantive requirements of the prior rule, but attempts to state the requirements more clearly. The subpart also adds the requirement that the effective date of the agency's statutory authority to adopt the rule be stated for authority granted after January 1, 1996. This will permit a check on compliance with the new statutory requirement that rulemaking be initiated within 18 months of the effective date of the law authorizing rules.

Subp. 2. Specific Requirements. This subpart refers to the specific requirements set out in statute which must be included in a SONAR, both for rules adopted after a public hearing and for those adopted without a public hearing. The requirements in the statute are not restated in this rule in order to minimize repeating statutory language in the rules. The new legislation requires several items to be included in the Statement of Need "to the extent the agency, through reasonable effort, can ascertain this information". Therefore, subp. 2C. requires an agency to explain what effort it made to obtain any information that it states it could not ascertain through reasonable effort. This requirement is intended to be a check against a situation in which an agency might simply avoid the statutory requirements by declaring without explanation that it could not ascertain the information. Such a requirement is reasonable in order to ensure that the legislative intent, of providing this additional information to the public, is followed. Other individual agency statutes require specific items to be included in the Statement of Need and subp. 2D. notes this possibility and includes some examples applicable to individual agencies.

Subp. 3. Timing. This subpart reminds the agency that its Statement of Need must be in final form before the agency publishes or mails its notice. The wording of this subpart is intended to permit an agency to delay finalizing its Statement of Need until publication in the State Register. This is reasonable since it will not delay providing the Statement to the public. The subpart also reminds an agency it must send a copy of the SONAR to the LCRAR.

1400.2080 - NOTICE OF PROPOSED RULE.

Subp. 1. General Content. This rule incorporates the existing requirements in Minn. Rule 1400.0300, subp. 1aC., Minn. Rule 1400.0400 and Minn. Rule 2010.0300G. This subpart explains the organization of the rule and also references the forms provided for agency use which comport with this rule.

Subp. 2. Contents of All Notices. This rule is organized to state first what must be included in every rule notice and then to indicate in later subparts what must be added for notices without a public hearing and notices with a public hearing. This subpart incorporates the requirements of prior rules. The subpart sets out requirements mandated by statute for all rules and adds new 1995 statutory requirements such as

subp. 2G., which is a new requirement that the agency must advise people of their right to register for notice of future rule proceedings. Additionally, subpart 2E. contains a new requirement that the public be advised that the Statement of Need includes not only a summary of the justification of the proposed rule, but also a statement of who will be affected by the proposed rule and an estimate of the probable cost of the proposed rule. These two requirements repeat, in a general fashion, the new requirements imposed for a SONAR by the 1995 Legislature. Some agency comment prior to this rule proceeding indicated that these issues should not be highlighted since these requirements are imposed only if the agency can ascertain the information through reasonable effort and also because it selects out certain issues from the statutory requirements to the exclusion of others. However, the new SONAR requirements imposed by the Legislature are clearly a significant part of the 1995 amendments. They are intended to benefit the public by letting the public know who will be affected by the proposed rule and what the cost of the rule is, both to the regulated and the agency. Subp. 2E. is intended to alert the public to the availability of this information so that if it is of interest, a SONAR can be requested. Although some agencies commented that not every SONAR may have this information, it seems unlikely that the information concerning who is affected by the rule and what the probable cost of the rule is will be absent from very many SONARs. At any rate, if the information is unavailable, these rules require agencies to explain what effort they made to obtain the information.

Subpart 2F retains existing rule language advising participants that a proposed rule can be modified, but only if it does not become substantially different. Some commenters stated that the notice should advise the public of the possibility of the adoption of a substantially different rule under the process set out as proposed Minn. Rule 1400.2110, as authorized by the 1995 legislation. Changing the contents of the notice concerning substantially different rules is not appropriate since the new procedure is a separate process apart from the rule proceeding which precedes it. While there is a legislative intent to permit an easier process to adopt substantially different rules which arise from a rule proceeding, there does not appear to be an intent to restructure rulemaking so as to encourage participants to propose substantially different rules at the front end of the process. The intent is to retain the general rule that rules cannot change substantially during rulemaking, but to add a process to permit an additional simpler procedure to make substantial changes.

Subp. 3. Additional Contents for a Notice of Intent to Adopt Rules. This subpart repeats existing requirements in statute and the rules of the Attorney General for rule notices without a public hearing. A new requirement in subp. 3D. alerts the public to the possibility of the withdrawal of requests for hearing. This is needed because some members of the public have assumed that a hearing would automatically be held if 25 requests were submitted. Subp. 3E. incorporates new statutory requirements which directs a person requesting a hearing to identify the portion of the rule to which the person objects or to indicate opposition to the entire rule. An important change is contained in subpart 3J. which alerts readers to a change of procedure. Prior to January 1, 1996, comments on the legality of non-hearing rules were directed to the Attorney General's office and were submitted after the agency rulemaking procedure and during the period of the review by the Attorney General.

Under these proposed rules, comments on legality must be submitted during the rule hearing procedure and will be considered by OAH during the post-hearing review. This change is needed in order to permit a quicker review by OAH upon submission of a rule record from an agency. It is a reasonable change because the elimination of a separate time period for comments on legality will not only save time, but does not jeopardize public rights since those comments can be made during the normal comment period. What is crucial is that the public be advised of that change early in the process. That notice is accomplished in this subpart.

Subp. 4. Additional Contents for Notice of Hearing. This subpart restates the existing requirements in statute and rule (Minn. Rule 1400.0300, subp. 1C) for a notice of hearing, but in clearer language. These rules eliminate a separate document called an Order for Hearing. Accordingly, in subp. 4J., the new notice incorporates a statement that a hearing is ordered by the person authorized to initiate the rule hearing proceeding.

Subp. 5. Approval of Notice of Hearing and Dual Notice. This subpart repeats the existing requirements that an ALJ must review and approve a Notice of Hearing or dual notice and advise the agency as to when and where the hearing should be held. Minn. Rule 1400.0300, subp. 2.. It adds the requirement that this must be done within five working days. The subpart also requires submission of a draft or a final copy of the Statement of Need and Reasonableness with the notice. This document is necessary in order to provide the ALJ with background concerning the proposed rule and to permit an informed judgment as to the adequacy of the notice and the proposed hearing locations. The notice also incorporates the existing requirement in Rule 1400.0300, subp. 2, that the ALJ advise the agency as to the location at which and the time during which a hearing should be held so as to allow for participation by all affected interests.

Subp. 6. Timing. This subpart points out the 30 day publication requirement set out in statute for rulemaking. It also clarifies that notices must be mailed at least 33 days before the end of the comment period or the start of the hearing. The 33-day mailing requirement is contained in the existing Attorney General Minn. Rule 2010.0300J. It is reasonable in order to provide persons receiving only mail notice with the full 30-day period in which to submit a comment.

Subp. 7. Affidavit of Mailing and Certificate of Mailing List. This subpart is necessary to alert the agency to the need to prepare the Affidavit of Mailing for the notice and a certificate that the mailing list is current. It refers the reader to a recommended form for this purpose.

1400.2090 - ORDER ADOPTING RULE

This rule is an attempt to simplify existing rule Minn. Rule 2010.0300N. It retains the essential requirements such as a description of the changes in the proposed rule and why they do not make the rules substantially different, as well as the signature of the person authorized to adopt the rule. It cross-references the new procedure for adopting substantially different rules. Proposed rule 1400.2090C. implements the new statutory requirement that the agency disclose the number of persons who requested a hearing and the number who withdrew that request if no hearing was held. The

concept of Findings of Fact or Conclusions contained in the prior rule is deleted as well as statements which the rulemaking record itself ought to answer. A reference is included to the recommended form.

1400.2100 - STANDARD OF REVIEW

This proposed rule is a restatement and revision of Minn. Rule 2010.1000, which is the rule presently used by the Attorney General to review rules without a public hearing. Some of the requirements are more simply stated, usually by incorporating a reference to statute. The substantial change test in the present rule is deleted since this is now contained in statute. Paragraph C. of the proposed rule references the procedure available to an agency for adoption of a substantially different rule. A new provision is included at paragraph H. which implements a new statutory requirement that the ALJ review the withdrawal of hearing requests to ensure that it is consistent with the purposes of the Administrative Procedure Act as set out in statute.

1400.2110 - PROCEDURE TO ADOPT SUBSTANTIALLY DIFFERENT RULES

Sub. 1. Required Procedure. Minn. Laws 1995 Ch. 233, § 31, directs OAH to adopt rules that provide "An expedited procedure, consistent with § 14.001, (1), (2), (5)," for the adoption of substantially different rules by agencies. Prior to this enactment, the only choice for agencies was not adopting substantially different rules or initiating a new rulemaking proceeding to adopt it. The legislative intent appears to be to permit agencies to adopt substantially different rules developed in the rulemaking process in a more expedited fashion than proceeding through a full rulemaking proceeding. The Legislature specified, however, that whatever procedure is adopted must be consistent with the purposes of the Administrative Procedure Act as stated in Minn. Stat. § 14.001, which includes the goal of providing oversight of powers and duties delegated to agencies and the goal of increasing public accountability of agencies. This seems to suggest that the Legislature intended an abbreviated procedure, but one which ensures public participation. It also suggests that the Legislature did not intend the new procedure to permit circumvention of the APA. This subpart makes it clear that a substantially different rule can be adopted if all procedures in this rule are complied with.

Subp. 2. Notice. The procedure proposed in this rule is initiated by the agency mailing a copy of the substantially different rule to each person or group that commented during the rule proceeding or registered at the rule hearing. These recipients were selected because they are the people most interested in the rule, as documented by their prior participation in the rule proceeding in question. The alternative would be to mail a notice to the agencies' rulemaking list. However, this is the first step in a full rulemaking proceeding, something the Legislature apparently did not intend. Additionally, mailing to the entire rulemaking list is, for many agencies, a substantial cost. The subpart also requires the agency to advise the recipient of the rule that it was found to be substantially different and explain why the agency is modifying the rule. The agency must then accept written comments for 15 days

concerning its modification. Fifteen days should be adequate since commenters will have been following the prior rule proceeding. The procedure proposed then is basically a notice and comment procedure without a right to a hearing. The process does provide for justification by the agency and for public input on the substantially different rule. This is a reasonable amount of process given the legislative goal. A substantial limitation on this process, however, is the requirement, as discussed below, that any substantially different modifications must be based on comments or evidence in the rulemaking record.

Subp. 3. Filing. This subpart directs the agency to submit the documents related to this procedure, as well as written comments received, to the Chief ALJ. It is needed to advise the agency of the next step in this process.

Subp. 4. Review. This subpart establishes the nature of the review of a substantially different rule by the Chief ALJ. First, it must be determined whether the agency has met the requirements of this rule, in other words, whether it has complied with the procedural steps set out in proposed Minn. Rule 1400.2110. Secondly, the Chief ALJ is directed to determine whether the substantially different modifications to the rule are based on comments or evidence in the record. This requirement is an important limitation on the use of this rule. There is no indication that the Legislature intended that agencies adopt substantially different rules which were not based on comments in the rulemaking record. The typical process in a rulemaking proceeding is that public comment will point out the possibility of an improved rule to the agency which might be substantially different from that proposed. The agency would be able to use this rule to adopt that substantially different modification suggested by comment in the record. The Chief ALJ must also determine if the proposed modification complies with the standards of review set out in proposed Minn. Rule 1400.2100. There does not appear to be any legislative intent to exempt substantially different rules from the normal legal review set out in that rule and it is reasonable to provide the same review provided for other rules. Were substantially different rules not subjected to the normal review, it could, in fact, be used as a circumvention of the Administrative Procedure Act.

Finally, the Chief ALJ is required to decide whether it would be unfair to affected persons to allow the agency to adopt the modification under this rule. This requirement is needed in order to meet the concerns of some commenters that this entire procedure might be used to circumvent the Administrative Procedure Act. This requirement would be a check on the unlikely circumstance where an agency might plan ahead of time to adopt a substantially different rule in the course of its rulemaking proceeding, by having material inserted into the rulemaking record. This would not be appropriate since the legislative intent appears to be to permit agencies to modify rules in a more expeditious fashion based upon public comment. Some use of discretion will likely be required in making a judgment as to whether an agency used this part to avoid the normal APA process. The subpart allows the Chief ALJ 10 calendar days to make his decision. Although this period is somewhat longer than others in these proposed rules, it is reasonable since time will be necessary to review the public comments on the proposed modification and to make an informed judgment.

Subp. 5. Rule Adoption. This subpart is necessary because it sets a time period, five working days, after which the agency may adopt the substantially different rule. The time period is the same as that set in statute after the normal rulemaking proceeding.

Subp. 6. Effect of Disapproval. This subpart advises the agency that if a rule is disapproved, an agency's choice is to not adopt it or initiate a new rule proceeding. It is reasonable to advise readers of the consequences of disapproval by the Chief ALJ.

Rulemaking Hearings

1400.2200 - APPLICABILITY

This rule is the first in that set of rules applying to rulemaking hearings. It orients the reader to the scope of these rules and specifies the statutory sections which apply to rule hearing procedures.

1400.2200 - CONDUCT OF HEARING

Subp. 1. Registration of Participants. This rule, for the most part, is a restatement in a clearer fashion of existing Minn. Rule 1400.0800, which governs the conduct of rule hearings. This subpart is a restatement of the existing subpart 2 in plainer English.

Subp. 2. Introduction by Judge. This subpart is a simplification of the existing subpart 3 of 1400.0800. It requires, in fewer words than the prior rule, that the ALJ explain the procedure to those in attendance and how written comments can be submitted. This subpart is needed in order to ensure that those attending the hearing are aware of their procedural rights.

Subp. 3. Agency Presentation. This subpart combines several prior subparts into a simpler statement. It references the following proposed rule part which states, in more detail, the obligations of the agency at the hearing. This subpart also maintains prior Minn. Rule 1400.0500, subp. 2, which sets out a procedure for a recess of the hearing in the event that the agency presents evidence not summarized in its Statement of Need and Reasonableness.

Subp. 4. Opportunity for Questions. This subpart is necessary to set out the rights of those attending the hearing to ask questions. The subpart rephrases subpart 9 of the existing rule and includes the statutory limitation on questions, namely, that they must be material to the evaluation or formulation of the proposed rules. This subpart reasonably provides an opportunity to participants to gain a complete understanding of the proposed rule.

Subp. 5. Opportunity to Present Statements and Evidence. This subpart is needed to make it clear that the public has the opportunity to present comments concerning the proposed rules, either orally or in writing, as a step in the hearing process.

Subp. 6. Questioning by Judge. This subpart restates existing subpart 11. It provides that the ALJ may also ask questions of speakers.

Subp. 7. Further Agency Evidence. This subpart is a restatement in plainer English of the existing subpart 12 of Minn. Rule 1400.0800 and is necessary to indicate the next step in the hearing process.

Subp. 8. Powers of Judge. This subpart is a nearly verbatim restatement of the existing subpart 13. It is needed to clarify the authority of the ALJ in his or her conduct of the hearing in order to promote a fair and expeditious hearing process.

Subp. 9. Court Reporters. This subpart and the following is a simplified restatement of existing Minn. Rule 1400.0950. Rather than restate the provisions concerning court reporters in the statute, the reader is referred to that section.

Subp. 10. Transcript. This subpart explains how a transcript is ordered, paid for and filed. It is a restatement in plainer English of the requirements of existing Rule 1400.0950. It is reasonable to explain the details of this process in rules so that persons interested in a transcript can readily initiate the process of obtaining one.

1400.2220 - AGENCY PRESENTATION AT HEARING.

Subp. 1. Rulemaking Documents. This rule brings together in one place the agency's duties at the hearing. It is a restatement of material contained in the prior rules at Minn. Rule 1400.0500, subp. 3, 1400.0600, and 1400.0800, subps. 6 through 8. This subpart sets out the documents that must be in the hearing record and is restated from existing Rule 1400.0600. The requirement that these documents be filed 25 days before the hearing is eliminated since filing at that time has been shown to be unnecessary based upon the lack of public interest in seeing these documents prior to the hearing.

Purposely eliminated from the documents to be filed are comments responding to the Request for Comments published in the State Register. This is in response to the 1995 repeal of Minn. Stat. § 14.10, which required those comments to be in the rulemaking record. Since responses to the Notice of Solicitation of Outside Opinion often were not relevant to the later rules as published since they were either considered or the rules were modified, it is reasonable not to include them in the rule record. However, these rules require specific notice in the Notice of Rulemaking that they will not be included in the rule record so that a participant is alerted to the fact that they must resubmit a comment during the rulemaking proceeding if it was not considered or acted upon by the agency. This subpart also includes new requirements imposed by the 1995 legislation, such as a copy of the letter showing the agency has sent the Statement of Need and Reasonableness to the LCRAR. Also, if the text of the rule was omitted from the Notice of Hearing, as authorized by the 1995 APA Amendments, the agency must file a copy of the authorization.

Subp. 2. Copies Available. This subpart restates the requirement in existing rules that the agency have copies of the rule and the SONAR available at the hearing. This is necessary to ensure that participants in the hearing are able to understand the rule and the presentations made.

Subp. 3. Showing. This subpart restates the statutory requirement that the agency must make its affirmative presentation of facts in support of the rules at the

hearing. It also restates the existing language in Minn. Rule 1400.0500, subp. 3, that an agency may rely on the SONAR as its presentation at the hearing.

Subp. 4. Agency Representatives Present. This subpart restates the requirement in Minn. Rule 1400.0500, subp. 3, that agency staff familiar with the proposed rule and the SONAR must be available at the hearing to answer questions. This subpart is needed and reasonable so that members of the public interested in asking questions about the operation of or justification for the proposed rule will be able to have their questions answered.

1400.2230 - WRITTEN COMMENTS AFTER HEARING AND CLOSE OF HEARING RECORD

Subp. 1. Written Comments. This rule restates in a clear fashion the chronology and timelines for written comments after the hearing. It is a restatement of existing Minn. Rule 1400.0850 and the first paragraph of Minn. Rule 1400.0900. Additionally, this subpart states that the agency may indicate whether there are rule modifications that it intends to adopt during the initial 5 to 20 day comment period. This sentence is intended to encourage agencies to advise the public during the first comment period of changes it intends to make, rather than wait until the response period described in subpart 2 of this proposed rule. Announcement of rule modifications in the first period may allow commenters to avoid commenting in the response period, or may allow commenters to respond to the nature of the modification made. In either case, fuller public participation is possible if modifications are announced earlier.

Subp. 2. Written Responses. This subpart is a restatement of the existing rule, which reflects the statutory process. In order to distinguish submissions during the five working-day period from earlier comments, they are called responses. This term is consistent with the nature of the five working-day period which, as stated in the proposed rule, is intended to be used only to respond to new information submitted during the prior comment period and is not intended to be used for submitting additional evidence. This subpart again encourages the agency to state whether it is accepting proposed rule modifications so that the ALJ will not need to comment upon changes which the agency has already determined it will make.

Subp. 3. Close of Hearing Record. Because the close of the hearing record is a significant date, this subpart makes it clear that the record is not closed until the end of the five working-day response period.

1400.2240 - ADMINISTRATIVE LAW JUDGE'S REPORT

Subp. 1. Report. This proposed rule is a reorganization and clarification of three existing rules, namely Minn. Rules 1400.1000, 1400.1100, and 1400.1200. This subpart advises the reader that the ALJ Report will normally be available in 30 days unless an extension is granted by the Chief ALJ.

Subp. 2. Standard of Review. This subpart makes it clear that the ALJ or the Chief ALJ will disapprove a rule if it violates the standards for review set out in part

1400.2100. It is reasonable to have a reference to that section in this rule so that it is clear what standards are applied in the ALJ Report.

Subp. 3. Approval. If the ALJ approves the rule, this subpart points out that the agency may then proceed to adopt the rule after waiting at least five working days. Since most of this rule deals with disapproval, it is helpful, as a matter of clarification, to point out what happens when the rule is not disapproved.

Subp. 4. Review by Chief Judge. This subpart restates the requirements in existing rule 1400.1000, subps. 2 and 3. The language in this subpart requires the Chief Judge to explain why he is disapproving the rule and to specifically tell the agency what changes are necessary for approval. This is reasonable in order to expedite the process. This subpart also recognizes the past practice of allowing agencies to request that the Chief ALJ reconsider a disapproval of a rule. This procedure is necessary so that inadvertent mistakes can be easily corrected. Due to the size of some rule records or the complex subject matter, it is possible that a mistake can be made in the Chief ALJ review and it is reasonable to recognize a process which can rectify such mistakes in an efficient way. No standards are provided for this review since the same standards applied in the initial disapproval are again employed.

Subp. 5. New Changes to Rule. This subpart sets up a procedure by which modification of the rules after review by OAH can be considered by the Chief ALJ. Modifications of the rules prior to OAH review can be considered under proposed subparts 3 and 4. However, when an agency seeks to change a rule after OAH review, the subpart requires it to submit the rule showing its changes. It is not required to return the hearing record since this is not usually necessary, but permits the Chief ALJ to request the hearing record. The time period of ten calendar days is retained for a decision by the Chief ALJ.

Subp. 6. Disapproval of Need and Reasonableness. The Administrative Procedure Act provides a separate treatment for a rule in the event that it is disapproved by the Chief ALJ on the grounds it has not been shown to be needed and reasonable. The statute requires agencies to submit the rule to the LCRAR, but it may still proceed to eventually adopt the rule. It is reasonable to note this separate procedure in the rule in order to alert the reader to a different process for this issue.

Subp. 7. Disapproval Based on Substantial Difference. This subpart restates existing rule language which advises the agency that in the event of a finding of substantial difference, it may end the rule proceeding or start a new rule proceeding. Also, however, this subpart now references part 1400.2110 which establishes an expedited procedure for the adoption of substantially different rules as authorized by the 1995 Legislature. This subpart also makes it clear to the agency and the public that an agency may adopt those portions of the rules which are not substantially different.

Subp. 8. Withdrawal of Rule. This subpart is needed to clarify that an agency may withdraw a proposed rule at any time during the rule proceeding. Incorporated into this subpart is the existing practice of reviewing a withdrawal of a portion of the rules under consideration to determine if the withdrawal renders the remaining rules

substantially different. A complete set of rules may be acceptable to a reader of the Notice of Hearing. But if a portion is deleted, such as a subpart limiting the effect on small business, this may create a substantially different and objectionable rule for a small business owner. The subpart requires a demonstration of authority to withdraw the rule. It also directs the OAH to return the record to the agency. Since this option is available to an agency in a rule proceeding, it is needed and reasonable to state it so that participants are aware of this potential event.

Subp. 9. Effect of Disapproval. Under the Administrative Procedure Act, disapproval of a rule or part of a rule is binding on the agency except in regard to the issue of need and reasonableness. This authority is spelled out in the statutes at Minn. Stat. § 14.15, subds. 3 and 4, and § 14.16. This subpart refers the reader to those sections.

Subp. 10. Rule Adoption. This subpart is needed to indicate what steps the agency must take if the rule is approved by OAH. It is directed to obtain the Revisor's approval, to file two copies with the Secretary of State, and then proceed to publish a Notice of Rule Adoption in the State Register. It is reasonable to restate the statutory requirements in order to advise the agency and the public of the steps remaining in the process.

Rules Adopted Without a Public Hearing

1400.2300 - REVIEW OF RULES ADOPTED WITHOUT A PUBLIC HEARING

Subp. 1. Applicability. This is the first of two rules which apply to the rule review process when there is no hearing. This subpart alerts the reader to the scope of this section and refers to the applicable statutory sections.

Subp. 2. Filing. This subpart points out that the agency must file a list of documents set out in the following rule with OAH in order to initiate the review process. It is reasonable to point out this initial step to the agency and the public.

Subp. 3. Review. This subpart implements the new statutory procedure that rules without a hearing are reviewed by OAH. It clarifies that the ALJ must apply the review standards in part 1400.2100. It retains the time period of 14 calendar days for review set out in existing Rule 2010.0800.

Subp. 4. Withdrawal of Rule. This subpart restates the existing Attorney General rule, Minn. Rule 2010.1100, which authorizes an agency to withdraw a rule from review. Restatement of that option in this subpart is needed and reasonable to advise readers of the possibility of this action occurring. The same language included in Minn. Rule 1400.2230, subp. 8, concerning substantial different is again included here for the reasons stated above. It is reasonable to permit withdrawal by an authorized person rather than the agency head since agency head's, especially for multi-member agencies or boards, are sometimes unavailable.

Subp. 5. Approval. This subpart is needed to advise an agency and the public of actions necessary to proceed with adoption if the rule is approved.

Subp. 6. Disapproval. This subpart restates the existing Attorney General rule, Minn. Rule 2010.1200, which requires the reviewer to state what changes are necessary for approval. The 1995 legislation then requires that the ALJ's disapproval be submitted to the Chief ALJ who must approve or disapprove the findings of the ALJ. It is reasonable for the Chief ALJ to be required to state reasons and tell the agency what changes it must make. A ten-day review period, which is less than the ALJ review period, should be adequate and reasonable. This subpart refers the reader to the statute for the effect of disapproval

Subp. 7. Resubmission. This subpart restates the requirements in existing Rule 2010.1300, but with the Chief ALJ as the reviewer. The procedure is simplified. The agency is required to explain what changes it has made in the disapproved rule and why the changes solve the problems identified. The agency is also authorized to request the Chief ALJ to reconsider a prior disapproval. This procedure is necessary to permit the Chief ALJ to correct errors. This subpart is needed and reasonable to set out a simple procedure by which an agency may make changes in the event of disapproval of OAH.

Subp. 8. Disapproval of need and reasonableness. This subpart sets out separately what occurs when a rule is disapproved on the grounds of need and reasonableness since there are different consequences. The referral to the LCRAR was specifically adopted by the Legislature for review of non-hearing rules in the 1995 legislation. Minn. Laws 1995, Ch. 233, Art. 2, § 24, subd. 3(c).

1400.2310 - DOCUMENTS TO BE FILED

This rule is a simplification of Attorney General Rule 2010.0300 which sets out the documents to be submitted to the Attorney General for rule review. New documents included in this proposed rule are the LCRAR authorization of publication of the rule without text, if this has occurred, and a copy of a letter transmitting a Statement of Need to the LCRAR. Another new requirement is mandated by the 1995 APA amendments and is contained at paragraph K. of the proposed rule. This requires filing of a Notice of Withdrawal of Hearing Request as well as comments received in response to it. Additionally, if a substantially different rule was adopted, the documents associated with that procedure must be filed. This rule is necessary and reasonable in order to advise an agency of what constitutes a complete filing for rule review.

Exempt Rules

1400.2400 - REVIEW OF EXEMPT RULES

Subp. 1. Applicability. The 1995 Amendments to the APA abolished the emergency rulemaking provisions and replaced them with a procedure to adopt "exempt" rules under Minn. Stat. §§ 14.386 and 14.388 (1986). Minn. Stat. § 14.386(c) directs the Chief ALJ to adopt rules relating to the rule approval duties imposed by that statute as well as § 14.388, including rules establishing standards for review. When an agency is specifically exempted from rulemaking by the Legislature, it may proceed with the simplified procedures set out in § 14.386. The rules adopted are effective for only two years. This simplified procedure is also available to agencies under 14.388, even where legislative exemption is absent, in four instances. The agency must establish

that (1) the rules address a serious and immediate threat to the public health, safety or welfare or that (2) they are complying with a court order or federal law. Rules adopted under these two provisions are again only effective for two years. Agencies may also proceed under § 14.388 if they can establish that (3) they are incorporating changes set forth in statutes when no interpretation of law is required or that (4) they are making changes that do not alter the sense, meaning or effect of a rule. The statutory amendments direct OAH to determine whether the agency has provided adequate justification for its use of § 14.388. Rules adopted under these last two provisions are permanent. Subpart 1 states the scope of this proposed rule and references the applicable statutory sections.

Subp. 2. Filing. This subpart advises the agency of what is needed to file with OAH for approval of an exempt rule. The simplified procedure requires only the filing of the rule and, in the case of a rule exempted by the Legislature, a reference to that exemption. In the case of a "good cause" exemption, it is reasonable for the agency to provide an explanation of why they meet the requirements of § 14.388, since OAH must determine whether the agency has provided adequate justification for using the statute. It is necessary to set out the items to be filed in order to promote an expeditious disposition by OAH.

Subp. 3. Review. This subpart sets a review period of 14 calendar days which is the same as review of rules without a hearing. This subpart also establishes a criteria for review, namely the standards in proposed part 1400.2100, with the exception of the requirement of need and reasonableness or a determination of substantial difference. Since these are rules that either have been specifically exempted by the Legislature or are not intended to have policy consequences, those standards do not need to be considered. The subpart also references the statutory requirement that the agency establish its exemption as stated in subpart 2 of the proposed rule.

Subp. 4. Approval and Disapproval. This subpart sets out the steps to be taken in the event of approval, namely, publication in the State Register, and disapproval. In the event of disapproval, it is reasonable to allow an agency to resubmit its filing after it has been advised as to what changes are necessary to obtain approval. The subpart also states the consequence of disapproval. Minn. Stat. § 14.386(a)(2) requires approval in order for the rule to have effect.

Subp. 5. Review by Chief Judge. This subpart permits an agency to ask the Chief ALJ to review a rule disapproved by an ALJ. Minn. Stat. § 14.386(a)(2) requires "the Office of Administrative Hearings" to approve exempt rules. Although initial review is made by an individual ALJ, it is reasonable to permit a review of the ALJ's decisions since the Legislature stated that it was the office rather than the ALJ which should approve the rule. The Chief ALJ is the administrative head of the office.

Mediation

1400.2450 - MEDIATION

This rule is a restatement of the existing the OAH rule, Minn. Rule 1400.1500, which sets up a procedure for mediating rulemaking proceedings. The proposed rule restates the prior rule in a more chronological fashion and employs plain English. The

proposed rule is needed and reasonable in order to encourage mediation of rulemaking proceedings where possible. The 1995 APA Amendments reinforce the legislative support for mediation in rulemaking by requiring that agency rulemaking training include training as to the use of mediation.

1400.2500 - 1400.2560 - RULEMAKING FORMS

These rules set out recommended forms to assist agencies in complying with the foregoing rules. With the exception of Minn. Rule 1400.2500, the Petition for Rulemaking, the forms are recommendations rather than requirements. This means that agencies may modify or add to the forms to suit their own goals as long as they comply with the relevant preceding rule. Because of the complexity of the rulemaking process, and the fact that some agencies only rarely engage in rulemaking, forms are needed and reasonable in order to help participants complete this process in a technically accurate and expeditious manner.

REPEALER

The adoption of these rules includes a repeal of all of the rulemaking rules of the Office of Administrative Hearings since they are all revised in the newly proposed rules. Also deleted are the rulemaking review rules of the Attorney General since its function is transferred to OAH. However, the repeal of the rules of the Attorney General, Minn. Rules Ch. 2010, is not effective until January 1, 1997. The delay in the repealer is necessary because the Attorney General will continue to review rules without a hearing during 1996 if the rulemaking process was initiated before January 1, 1996.

