22.2 NATURE OF THE FACTUAL PRESENTATION IN SUPPORT OF NEED AND REASONABLENESS

In each rulemaking proceeding, an agency must make a judgment about what amount of documentation in the SONAR will be sufficient to demonstrate the reasonableness of each rule subpart. Among the factors considered by agencies in making this judgment are: (1) the extent of the burden a particular requirement places on the regulated industry; (2) the amount of controversy surrounding a particular requirement; (3) the degree of sophistication and organization of the opposition; and (4) whether the rules are new rules or amendments to existing rules.[1]

An important consideration is what type of "facts" an agency or others in support of a proposed rule must present. The choices include trial-type facts, scientific evidence, legislative facts, statutory interpretation, articulated policy preferences, and mere common sense. Adjudicative or trial-type facts generally are those that answer the questions of who did what, where, when, how, why, and with what motive or intent. Legislative facts are general facts concerning questions of law, policy, and discretion.[2] In the leading Minnesota case on rulemaking, the Minnesota Supreme Court recognized the varying nature of the required factual presentation in noting that it may be necessary for an agency "to make judgments and draw conclusions from 'suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not certifiable as "fact," and the like.'"[3]

Federal case law has generally proceeded along similar lines. The United States Supreme Court stated that where factual determinations were primarily of a judgmental or predictive nature, "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"[4] The Court of Appeals for the District of Columbia also has observed that the absence of firm data may not preclude an agency from adopting rules, since a "quasi-legislative policy judgment," much like that made by Congress, may suffice.[5]

1 *See* MINNESOTA RULEMAKING MANUAL: A REFERENCE BOOK FOR THE PRACTITIONER ch. 4, § 4.4.4, at 32-33 (Patricia Winget et al. eds., 19th ed. 2014), *available at* http://www.health.state.mn.us/rules/manual/2014manual.pdf.

2 St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n, 312 Minn. 250, 259-60, 251 N.W.2d 350, 356-57 (1977); 1 & 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE §§ 7.5, 10.5 (5th ed. 2010); *see also* U.S. v. Gould, 536 F.2d 216, 219-20 (8th Cir. 1976) (discussing the demarcation between adjudicative facts and legislative facts).

3 Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984) (quoting Ethyl Corp. v. E.P.A., 541 F.2d 1, 28 (D.C. Cir.)); *see also* Mammenga v. Dep't of Human Servs., 442 N.W.2d 786, 791 (Minn. 1989) (citing the predecessor to this treatise at § 23.2) ("[T]he rulemaking record varies with the nature of the rule; in some cases a substantial evidentiary record may be needed . . . while in other cases, 'common knowledge' or 'common sense' will suffice.").

4 F.C.C. v. Nat'l Citizens Comm'n for Broad., 436 U.S. 775, 813-14 (1978) (quoting Fed. Power Comm'n v. Transcont'l Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)); *see also* 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 10.6 (5th ed. 2010).

5 Natural Res. Def. Council v. S.E.C., 606 F.2d 1031, 1059 (D.C. Cir. 1979).

The question of what factual presentation an agency must make to support the proposed repeal of an existing rule is presently unresolved. The repeal of a rule is specifically included within the APA's definition of a rule.[6] This means that repealing an existing rule would be subject to all APA requirements, much like the adoption of a new rule. It is at least theoretically possible that an agency might reasonably decide to repeal a rule because it came to a different conclusion, based on a prior rulemaking record that was compiled during the original adoption of the rule. The agency would then only have to explain and justify its policy reversal in the repeal proceeding. Federal case law suggests that an agency must at least present a detailed justification. The United States Supreme Court held that the National Highway Traffic Safety Administration failed to present an adequate basis and explanation for rescinding a regulation requiring passive restraint systems in automobiles because it provided no "reasoned analysis" for its change of course.[7]

A question sometimes arises in rulemaking proceedings about what burden the agency must bear for need and reasonableness when it amends existing rules. Amendments of rules are specifically included within the statutory definition of a rule. Therefore, an agency must show that amendments are needed and reasonable by an affirmative presentation of facts. However, under an OAH rule, the agency is not required to demonstrate the reasonableness of existing rule subsections that are not affected by the proposed amendments even though the existing rules may be in close proximity to the amendments.[8]

22.2.1 Demonstrating the Reasonableness of a Proposed Rule

The APA does not define *reasonableness*. OAH's adopted rules, which govern review of rules adopted without a public hearing, provide some guidance about the meaning of need and reasonableness. The rules direct an agency, in preparing its SONAR, to "explain the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need."[9] *Reasonableness* has not been specifically interpreted in Minnesota case law, insofar as the term is used in the APA to shape the agency's presentation in support of a rule.[10] The Minnesota Supreme Court, however, has long held that on judicial review, rules must be reasonable to be valid.[11] Minnesota case law also has equated an unreasonable rule with an arbitrary rule.[12] The Minnesota Court of Appeals has held that a rule is reasonable, on

6 MINN. STAT. § 14.02, subd. 4 (2014).

7 Motor Vehicle Mfg. Ass'n v. State Farm Mut., 463 U.S. 29, 34 (1983).

8 MINN. R. 1400.2070, subp. 1 (2013).

9 *Id.*

10 *But see* Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984) (finding "no *reasoned* determination" where commission provided "no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments").

11 Lee v. Delmont, 228 Minn. 101, 110, 114-115, 36 N.W.2d 530, 537, 539 (1949); Juster Bros. v. Christgau, 214 Minn. 108, 118, 7 N.W.2d, 501, 507 (1943); *In re* Application of Q Petroleum, 498 N.W. 2d 772, 777 (Minn. Ct. App. 1993).

12 *In re* Hansen, 275 N.W.2d 790, 793 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950); Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W. 2d 100, 103

judicial review, if it is rationally related to the end sought to be achieved by the statute.[13] The court of appeals also has stated that the reasonableness of a rule is viewed toward the end sought to be achieved, and not in light of its application to a particular party.[14]

The United States Supreme Court held that an agency must have a reasonable ground or basis for the exercise of its judgment in promulgating rules.[15] The Court also has required that an agency articulate a rational connection between the facts found and the choice made in rulemaking.[16] In an often-cited decision, the Eighth Circuit Court of Appeals defined arbitrary or unreasonable agency action as "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case."[17]

Other state courts also have addressed reasonableness, holding that an unreasonable rule is one without rational justification[18] or that rules must be within the bounds of reason.[19] Another common approach to reasonableness is the holding that where reasonable minds might well be divided on the wisdom of an administrative action, the action is conclusive.[20]

In *Manufactured Housing Institute v. Pettersen*,[21] the Minnesota Supreme Court held that the commissioner of health's adoption of a rule that set a maximum ambient

(Minn. Ct. App. 1991); City of Morton v. Minn. Pollution Control Agency, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989) (finding rule setting two-percent cap on grant amendments for unanticipated site conditions was not arbitrary; deferring to agency expertise in determining how to best allocate grant resources).

13 Mammenga v. Dep't of Human Servs., 442 N.W.2d 786, 789-90 (Minn. 1989) (finding rule itself is unreasonable (and therefore invalid) where it fails to comport with substantive due process because it is not rationally related to the objective sought to be achieved); *In re* the Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n, 515 N.W. 2d 604, 606 (Minn. Ct. App. 1994) (concluding Gambling Control Board's rule requiring suspension of an organization's premises permit for a violation of the rule by the organization or its agents is rationally related to maintaining the integrity of, and public confidence in, lawful gambling because it ensures that the public can enter an establishment where there is lawful gambling and be confident that no illegal gambling has been conducted on the premises); *Minn. Chamber of Commerce*, 469 N.W. 2d at 104 (concluding there is a rational connection between the problem identified and the solution proposed); Vang v. Comm'r of Pub. Safety, 432 N.W.2d 203, 207-08 (Minn. Ct. App. 1988) (finding rule requiring cancellation and denial of a driver's license after three alcohol-related driving incidents is reasonable and rationally related to the end sought to be achieved, *i.e.* removing inebriated drivers from the highways); Good Neighbor Care Ctrs., Inc. v. Minn. Dep't of Human Servs., 428 N.W.2d 397, 404 (Minn. Ct. App. 1988) ("The reasonableness of a rule is tested against the purpose of the statute it implements."); Broen Memorial Home v. Minn. Dep't of Human Serv., 364 N.W.2d 436, 440 (Minn. Ct. App. 1985) ("The reasonableness of a rule is viewed toward the end sought to be achieved and not in light of its application to a particular party."); Blocher Outdoor Adver. Co. v. Minn. Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984) (finding rule reasonable where "rationally related to the end sought to be achieved by the act").

14 *Broen*, 364 N.W.2d at 440.

15 Am. Trucking Ass'ns v. United States, 344 U.S. 298, 314-315 (1953).

16 Bowman Transp. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974).

17 Greenhill v. Bailey, 519 F.2d 5, 10 n.12 (8th Cir. 1975).

18 Sterling Secret Serv. v. Mich. Dep't of State Police, 20 Mich. App. 502, 514, 174 N.W.2d 298, 306 (1969).

19 Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 565 (Iowa 1972).

20 Rible v. Hughes, 24 Cal. 2d 437, 445, 150 P.2d 455, 459 (1944); Thomas Bros. v. Secretary of State, 90 Mich. App. 179, 188, 282 N.W.2d 273, 277 (1979) ("If there is any doubt as to the invalidity of a rule in this regard, the rule must be upheld.").

21 347 N.W.2d 238 (Minn. 1984).

formaldehyde level of 0.5 ppm in new housing units was arbitrary and capricious. In describing what the administrative record lacked, the court shed some light on what an agency must demonstrate to support a proposed rule. The court found:

> [T]here is no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments. In short, there has been no *reasoned* determination of why a level of 0.5 ppm was selected."[22]

The court also noted that it was not saying that 0.5 ppm was wrong, but only that it could not tell if it was within the bounds of what is right.

Courts frequently will find that a rule is not unreasonable simply because a more reasonable alternative exists or a better job of drafting might have been done. The choice made by the administrator among possible alternative standards must only be one that a rational person could have made.[23] A determination by an ALJ or a court that a more reasonable alternative should be adopted would invade the policy-making discretion of the agency head.

22.2.2 Demonstrating the Need for a Proposed Rule

The APA also requires an agency to demonstrate the need for a proposed rule. The requirement that agencies demonstrate need has occasioned less argument during rulemaking proceedings than the requirement that agencies demonstrate reasonableness. Often, the legislation authorizing an agency to adopt rules contains a mandate that requires the agency to proceed to rulemaking and thus answers the general question of whether the rules are needed. Sometimes, however, the question of determining the need for the rules is left to the administrator, and the determination must be made before rulemaking is initiated.[24] The question of need is then more directly in controversy during rulemaking.

The question of whether individual rules or rule subsections are needed usually focuses on whether a problem exists that calls for regulation. This determination requires examining the facts and circumstances underlying the agency's proposed action.[25] In addition, agencies commonly consider the need for statewide uniformity and the adequacy of alternative methods available to address the problem. The OAH rules require the agency to explain "the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need" in its SONAR.[26]

22 *Id.* at 246; *see also* Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W. 2d 100, 102-03 (Minn. Ct. App. 1991) (discussing application of the arbitrary and capricious test under *Pettersen*).

23 Fed. Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).

24 *See, e.g., Pettersen*, 347 N.W.2d at 242.

25 *See* Minn. League of Credit Unions v. Minn. Dep't of Commerce, 486 N.W. 2d 399, 406 (Minn. 1992).

26 MINN. R. 1400.2070, subp. 1 (2013).