22.3 SUBSTANTIAL DIFFERENCE

The APA provides that "an agency may not modify a proposed rule so that it is *substantially different* from the proposed *rule* in the notice of intent to adopt rules or notice of hearing."[1] It similarly provides that "the proposed rule may be modified [during the rulemaking process] if the modifications are supported by the data and views submitted to the agency and do not result in a *substantially different* rule."[2] The statute, however, also states that an agency may adopt a substantially different rule after satisfying OAH's rule requirements for adopting a substantially different rule.[3] Therefore, when a rule modification is found to be substantially different, the agency does not have to start the rulemaking process over with a new notice of intent to adopt rules, if the agency satisfies OAH rule requirements for adopting a substantially different rule.[4]

22.3.1 Review Process

OAH reviews rules to determine if they are substantially different from those originally proposed. In rulemaking with a hearing, OAH's review is conducted first by the ALJ assigned to the hearing. If the ALJ finds that the rule is substantially different, the ALJ report to that effect goes to the chief ALJ for approval.[5] If the chief ALJ approves the ALJ's finding, the chief ALJ advises the agency what it must do to correct the defect.[6] The agency cannot adopt the rule until it corrects the defect.[7] At this point, the agency has several options. The agency may end the rule proceeding, may start a new rule proceeding to adopt the substantially different rule, may proceed under OAH rules to adopt a substantially different rule, or may modify the rule so that it is no longer substantially different.[8] If the agency starts a new rule proceeding to adopt a substantially different rule, the agency may still adopt the portions of the rules that are not substantially different.[9] The agency must resubmit the rule to the chief ALJ for the determination on whether any modifications correct the defects.[10] Should the agency make any modifications to a rule, the agency must resubmit the rule to the chief ALJ for review.[11] Similarly, if the revisor of statutes requires modifications, common practice is to resubmit the rule to the chief ALJ.

OAH also examines whether the rule is substantially different as part of determining rule legality in rulemaking without a hearing.[12] If a defect in this respect is

1 MINN. STAT. § 14.05, subd. 2 (2014) (emphasis added).
2 *Id.* § 14.24 (emphasis added).
3 *Id.*; MINN. R. 1400.2110 (2013). The OAH rule procedure for the adoption of substantially different rules became effective on February 5, 1996.
4 MINN. STAT. § 14.05, subd. 2 (2014); *see also id.* §§ 14.16, subd. 1, .26, subd. 3(b).
5 *Id.* § 14.15, subd. 3; MINN. R. 1400.2240 (2013).
6 MINN. STAT. § 14.15, subd. 3 (2014).
7 *Id.*; MINN. R. 1400.2240, subp. 7 (2013).
8 MINN. STAT. § 14.16, subd. 2 (2014); MINN. R. 1400.2240, subp. 7 (2013).
9 MINN. R. 1400.2240, subp. 7 (2013).
10 MINN. STAT. § 14.16, subd. 2 (2014).
11 *Id.*, subd. 1.
12 *Id.* § 14.26, subd. 3; MINN. R. 1400.2300, subp. 7 (2013).

found, the ALJ states reasons for the finding in writing and makes recommendations for correcting it, similar to the rule adopted with a hearing.[13]

22.3.2 Criteria for Review

The APA spells out the standard of review for what constitutes a substantially different rule as follows:

> (b) A modification does not make a proposed rule substantially different if:
>
> (1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;
>
> (2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and
>
> (3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.
>
> (c) In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question the following factors must be considered:
>
> (1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;
>
> (2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and
>
> (3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing.[14]

The legislature incorporated these statutory criteria into the APA in 1995 to override conflicting rules on the subject. The criteria require an agency to satisfy a three-part test to adopt a modification. The differences must be within the scope of the rule's original subject matter and in character with the original issues stated in the notice. The differences must also be a logical outgrowth of the original notice and the comments submitted. This approach is similar to what emerged from federal rulemaking case law. Whether there has been substantial change under the federal approach depends on whether the rule as modified is so different that a person who had examined the notice of intent to adopt the rule could not be expected to anticipate that such a subject would be addressed by the rules. The standard also borrows from the "logical outgrowth" test that has evolved in federal case law, particularly that in the District of Columbia circuit.

13 MINN. STAT. § 14.26, subd. 3(a) (2014); MINN. R. 1400.2300, subp. 6 (2013).

14 MINN. STAT. § 14.05, subd. 2(b), (c) (2014).

The analysis set out in the federal cases is that the purpose of giving the public a chance to comment on proposed rules is to facilitate change in the proposed rules that will improve them.[15] Where the change between the proposed and finally adopted rule is important, the District of Columbia circuit has said that the question for the court is whether the final rule is a "logical outgrowth" of the rule originally proposed.[16] In the final analysis, whether the final rule is a logical outgrowth of that proposed and whether, therefore, the original rulemaking notice was sufficient will depend on the facts of the case and how well the notice given serves the policies underlying the notice requirement.[17] These policies follow three principles. First, rulemaking is improved by exposing proposed regulations to diverse public comment. Second, an opportunity to be heard is required as a matter of fairness to affected parties. Third, the quality of judicial review is enhanced by giving the public an opportunity to place evidence in the record objecting to the rule.[18]

The third prong of the APA test for substantial difference is whether the original notice provided fair warning that the modified rule might result. In making this determination, the ALJ is directed to consider three factors: 1) the extent to which affected persons would have understood that their interests could be affected, 2) the extent the subject matter or issues are different, and 3) the extent to which the effects of the rule differ.[19] These three factors make up the substantial difference test stated in the 2010 Revised Model State Administrative Procedure Act.[20] In the Minnesota APA the factors are to be considered in interpreting one of three statutory tests. The use of the language "the extent to which" in the three factors seems to imply a flexible rather than a rigid interpretation of the "fair warning" criteria.

In considering the difference in subject matter as a factor, the standard incorporates the "same subject" concept. This concept, often described in terms similar to the logical outgrowth test that developed from federal case law, finds its origins in the case law and statutes of other states.[21] In *City of Morton v. Minnesota Pollution Control Agency*,[22] the court of appeals noted its earlier statement in *Minnesota Association of*

15 *See* Am. Fed'n of Labor v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985); Trans-Pac. Freight Conference v. Fed. Mar. Comm'n, 650 F.2d 1235, 1249 (D.C. Cir. 1980).

16 *Am. Fed'n of Labor*, 757 F.2d at 338; Chocolate Mfrs. Ass'n of U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985); United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980); S. Terminal Corp. v. E.P.A., 504 F.2d 646, 659 (1st Cir. 1974).

17 *Chocolate Mfrs. Ass'n of U.S.*, 755 F.2d at 1105; Small Refiner Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506, 547 (D.C. Cir. 1983).

18 *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547.

19 MINN. STAT. § 14.05, subd. 2(c) (2014).

20 REVISED MODEL STATE ADMIN. PROCEDURES ACT § 308 (2010) ("An agency may not adopt a rule that differs from the rule proposed in the notice of proposed rulemaking unless the final rule is a logical outgrowth of the rule proposed in the noticed."). The comment to this provision of the Model Act indicates that the Minnesota law was its inspiration.

21 *See, e.g.*, ALASKA STAT. § 44.62.200(b) (Supp. 2014); Chevron U.S.A. v. LeResche, 663 P.2d 923, 929 (Ala. 1983); W. Oil & Gas Ass'n v. Air Resource Bd., 37 Cal. 3d 502, 526-27, 691 P.2d 606, 621, 208 Cal. Rptr. 850, 865 (1984); Bassett v. State Fish & Wildlife Comm'n, 27 Or. App. 639, 556 P.2d 1382, 1384 (1976); State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 801 (Tex. Ct. App. 1982); Am. Bankers v. Div. of Consumer Counsel, 220 Va. 773, 790-91, 263 S.E.2d 867, 877 (1980).

22 437 N.W.2d 741 (Minn. Ct. App. 1989).

Homes for the Aging v. Department of Human Services[23] that the rulemaking procedure contemplates modification of proposed rule. In *City of Morton* the Minnesota Court of Appeals held that a rule concerning grant amendments for increased construction costs resulting from unknown site conditions in municipal waste-water treatment facility projects was not substantially changed during the rulemaking process.[24] The change in the rule had been available to the public throughout the hearing yet no one submitted public comment concerning it.[25] The court observed that the amended rule did not affect classes of persons not represented at the hearing and that the subject matter of both the proposed and amended rules (grant amendments) was the same.[26]

The Minnesota Supreme Court discussed the issue of substantial difference in *Minnesota League of Credit Unions v. Minnesota Department of Commerce.*[27] It determined that the Department of Commerce's adoption of the ALJ's recommended changes to a rule part was not a substantial change, but rather narrowed and clarified the original proposed rules. The court stated that both the proposed rule and the adopted version accomplished the same goal. The court also noted that petitioners' counsel submitted several memoranda of law voicing all arguments raised in the matter before the record closed. This submission demonstrated that the petitioners were reasonably able to comment on the subject matter of the proposed rules, which was not fundamentally different in effect from the adopted rule.

The Minnesota Court of Appeals found that adding criteria for a waiver was not a substantial change. The court observed that the rulemaking procedures expressly contemplate modifications of proposed rules and, therefore, not all parts of the final rule need to have been discussed in the SONAR.[28]

22.3.3 Adopting a Substantially Different Rule

In 1995, the legislature directed OAH to adopt a rule that provides an expedited procedure for adopting rules found to be substantially different by the chief ALJ.[29] The OAH rule states that an agency may adopt a substantially different rule if it provides adequate notice to those persons or groups involved in the rule proceeding. The agency must mail each person or group that made a written or oral comment during the rule proceeding or registered at the rule hearing a copy of the substantially different rule, a statement that tells the person or group that: (1) the chief judge found the rule to be substantially different, (2) explains the agency's reasons for modifying the rule, (3) tells

23 385 N.W.2d 65, 68 (Minn. Ct. App. 1989).

24 437 N.W.2d at 746-48.

25 *Id.* at 745.

26 *Id.* at 747-48.

27 486 N.W.2d 399, 407 (Minn. 1992).

28 *Minnesota Ass'n of Homes for the Aging*, 385 N.W.2d at 68-69; s*ee also* Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W.2d 100, 106 (Minn. Ct. App. 1991) (finding change to rule part does not raise a new subject matter but, rather, restores part of the procedure followed before the proposed amendments); *City of Morton*, 437 N.W.2d at 747-48 (the MPCA's revision of a proposed rule for a water waste treatment facility did not constitute substantial change).

29 1995 MINN. LAWS, ch. 233, art. 2, § 31, at 2104 (amending MINN. STAT. § 14.51); *see* MINN. STAT. § 14.51 (2014).

the person that the agency must accept written comments for 15 days, and (4) gives the date the comment period ends.[30]

After considering the comments that it received on the substantially different rule, the agency submits the rule and a copy of the notice and comments it received to the chief ALJ for review. The chief ALJ reviews the filings and determines whether the substantially different modifications to the rule are based on comments or evidence in the record and, whether, in light of the nature of the substantially different modifications and the course of the rule proceeding, it would not be fair to affected persons to allow the agency to adopt the modification without initiating a new rule proceeding. If approved, the agency may adopt the substantially different rule. If the substantially different rule is not approved, the agency may not adopt the rule without starting a new rule proceeding.[31]

30 MINN. R. 1400.2110, subp. 2 (2013).
31 *Id.*, subps. 3-6.