## 24.6 THE RECORD FOR JUDICIAL REVIEW

The Minnesota Supreme Court has held that the record for judicial review in a preenforcement challenge is restricted to the record made before the administrative agency during the rulemaking proceedings.[1] Upon the filing of the petition with the court of appeals, the agency must produce the record, together with an itemized list of its contents, of the rulemaking proceeding within 30 days.[2] If considerable time has elapsed before the petition is filed, there may be a problem for the agency in assembling the record and preparing a transcript of the agency proceedings. A resolution of this difficulty may require clarification by the legislature or by rules adopted by the appellate courts.

The content of the official rulemaking record is set out in the APA.[3] Generally, this record will include the various notices of the agency, the tape recording or transcript of the public hearing if one was held, the comments received, the documentary exhibits, the statement of need and reasonableness, and the order adopting the rule of the agency, as well as the rule itself. If the rule is being challenged on the grounds that the statutory procedures for its adoption were not followed, the record may need to be more complete than if the challenge is limited to another ground.

Ordinarily, the record may not be supplemented with new material on appeal. The APA provides that the official rulemaking record constitutes the exclusive record with respect to judicial review.[4] The Minnesota Supreme Court has noted, however, that "[c]onceivably, instances might arise where an irregularity might, in fairness, require supplementation or clarification of the rulemaking record."[5]

In appropriate cases the parties may stipulate to an abbreviated, more manageable record. There is an express statutory procedure for preparing the record in a contested case. Section 14.66 of the APA provides for stipulations for a shortened record and for sanctions for anyone who unreasonably refuses to cooperate and adds that "[t]he court may require or permit subsequent corrections or additions to the record when deemed desirable." But there is no longer a district court involved to resolve disputes about the record, and the court of appeals, as an appellate body, should not

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1 Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 240-41 (Minn. 1984); *see also* Minn. League of Credit Unions v. Minn. Dep't of Commerce, 486 N.W.2d 399, 407 (Minn. 1992) (finding late submissions should not have been made part of the record, but since the memorandum did not raise any new issues there was no prejudice to the parties); Mammenga v. Dep't of Human Servs., 442 N.W.2d 786, 791 (Minn. 1989) (the rulemaking record varies with the nature of the rule; here the record was adequate); Rocco Altobelli v. Dept. of Commerce, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (holding review of rule's validity must be confined to "the record made in the agency proceeding"); Minn. Educ. Ass'n v. Minn. State Bd. of Educ., 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (limiting court's review in a pre-enforcement action to the administrative record); City of Morton v. Minn. Pollution Control Agency, 437 N.W. 2d 741, 748 (Minn. Ct. App. 1989) (finding written handout available at public hearing was part of rulemaking record); Minn. Ass'n of Homes for the Aging v. Dep't of Human Serv., 385 N.W.2d 65, 68-69 (Minn. Ct. App. 1986) (finding discussion noted in the post-hearing comment part of the rulemaking record). For a discussion of what is the record in rulemaking under the federal APA, see 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 7.4, at 309 (3d ed. 1994 & Supp. 1997).

2 MINN. R. CIV. APP. P. 114.03, subd. 2.

3 MINN. STAT. § 14.365 (2014); *see* MINN. R. CIV. APP. P. 114.03, subd. 1.

4 *Id.*

5 *Manufactured Hous. Inst.*, 347 N.W.2d at 241 n.1.

have to concern itself with resolving these disputes. The solution would be to remand to the district court for the county in which the agency has its principal office for resolution of any disputes about the making of the record or for the taking of evidence to supplement the record if an allegation of procedural irregularities is raised. While there is no express statutory authorization for this procedure, it is analogous to the procedure followed in a contested case for supplementing the record.[6]

[6] *See* MINN. STAT. § 14.68 (2014) (directing for contested cases, for alleged irregularities in procedure not shown in record, "the Court of Appeals may transfer the case to the district court").