Chapter 22. Need and Reasonableness and Substantial Difference

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22.1 Introduction

The Administrative Procedure Act (APA) requires that an agency engaged in rulemaking with a hearing make an "affirmative presentation of facts establishing the need for and reasonableness of the proposed rule" at the public hearing.[1] When the legislature imposed this requirement in 1975, a hearing was required for all permanent rulemaking.[2] The APA adds the flexibility of rulemaking without a hearing under certain circumstances but imposes this same affirmative-presentation requirement whether the agency is adopting rules with or without a hearing.[3]

In making its affirmative presentation, the statute specifically permits the agency to rely on facts presented by others during the rulemaking proceeding.[4] State agencies now make their full affirmative presentation in the *statement of need and reasonableness* (SONAR),[5] even when a hearing is conducted.[6] The agency can then forego a lengthy oral presentation by introducing the statement as an exhibit at the hearing.[7]

The legislature's impetus for the major changes in 1975 was a legislative perception that certain state agencies had not given adequate consideration to public comments in their rulemaking and had not adequately supported the proposed rules in the record. The Office of Administrative Hearings (OAH) first required a detailed written SONAR in OAH's procedural rules that were adopted in 1976.[8] The legislature later added the SONAR requirement to the statute for rulemaking, both with and without a hearing.[9] Exempt and expedited rules,

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[1] Minn. Stat. § 14.14, subd. 2 (2014); *Boedingheimer v. Lake Country Transp.*, 485 N.W. 2d 917, 922 (Minn. 1992).

[2] 1975 Minn. Laws, ch. 380, § 2, at 1287.

[3] Minn. Stat. § 14.26, subd. 1 (2014).

[4] *Id.* § 14.14, subd. 2.

[5] *Id.* § 14.131. The SONAR must be made available for public review, must be prepared under rules adopted by the chief ALJ, and must describe the classes of persons likely affected, probable costs, alternatives, and an assessment of the rules "cumulative effect" with other federal and state regulations. *Id.* For further discussion of the SONAR, see § 17.2 of this text (drafting the SONAR).

[6] *See* Minn. Stat. § 14.14, subd. 2a (2014).

[7] Minn. R. 1400.2220, subp. 3 (2013); *see also City of Morton v. Minn. Pollution Control Agency*, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989) (citing MINN. R. 1400.0500 (1989) and the predecessor to this treatise at § 23.1) (finding affirmative presentation of facts requirement satisfied where written document was available as a handout at and throughout the hearing).

[8] Before 1976, agencies were required to provide a less comprehensive post-hearing statement of need.

[9] *See* Minn. Stat. §§ 14.131, .23 (2014).

however, can be adopted without a SONAR.[10] The question of whether the agency has established both need and reasonableness during its rulemaking proceeding is determined by OAH's review.[11]

In rulemaking with a hearing, the APA directs the administrative law judge (ALJ) to take notice of the degree to which the agency has demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.[12] The agency is also required to summarize the facts and argument that it intends to present at the hearing in its SONAR and must state how the evidence rationally relates to the choice of action taken.[13] If the chief ALJ approves a finding of the ALJ that the agency failed to demonstrate the need for and reasonableness of a proposed rule, the chief ALJ must suggest actions to correct the defect. The agency may correct the defects as suggested or decline to do so. If the agency chooses not to follow the actions suggested by the chief ALJ, then it must submit the proposed rule to the Legislative Coordinating Commission (LCC) and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment.[14] The agency must then wait up to sixty days to receive the commission's or committees' advice before adopting the rule. The advice of the commission, however, is not binding on the agency, and the agency may then proceed to adopt the rule as proposed.

The role of the chief ALJ in regard to defects relating to need and reasonableness is quite different in effect from a finding of a defect in regard to legality, substantial difference or procedural violations of the APA. If the chief ALJ approves a finding of a defect regarding legality, substantial difference, or the substantive and procedural requirements of law, including legality and statutory authority, then the agency cannot adopt the rule until the defects found by the chief ALJ have been corrected or the agency has satisfied the rule requirements for the adoption of a substantially different rule.[15] As noted above, the agency may decline to follow a suggested action related to a need or reasonableness defect. This difference in approach is presumably a legislative recognition that determinations of need or reasonableness might verge on policy choices that are more properly within the final authority of the agency itself.

Likewise, in the course of his or her review of permanent rules adopted without a hearing, the ALJ must determine whether "the record demonstrates a rational basis for the need for and reasonableness of the proposed rule."[16] As with a hearing, if the chief ALJ

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[10] *Id.* §§ 14.386 (procedure for adopting exempt rules), .389 (expedited process) (requiring "an easily readable and understandable summary of the overall nature and effect of the proposed rule").

[11] *Id.* §§ 14.26, subd. 3, .14, subd. 2a.

[12] *Id.* § 14.50(iii).

[13] Minn. R. 1400.2070, subp. 1 (2013); *see Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W. 2d 399, 405-406 (Minn. 1992) (finding Department of Commerce's SONAR failed to summarize the evidence and argument the Department advanced at the hearing, but upholding the rule as properly promulgated "despite the minor defects in rulemaking procedure" since the defects were not prejudicial to the petitioner).

[14] Minn. Stat. § 14.15, subd. 4 (2014). For a discussion of the role of the LCC, see ch. 25 of this text.

[15] Minn. Stat. §§ 14.15, subd. 3, .26, subd. 3(b) (2014).

[16] *Id.* § 14.26, subd. 3. Presently, as directed by Minn. Stat. § 14.26, an administrative law judge is assigned by the chief administrative law judge to review rules in which no hearing is required. Before 1996, such review was conducted by the Office of the Attorney General.

determines that the need for or reasonableness of the rule has not been established, and if the agency does not elect to follow the suggested actions of the chief ALJ to correct that defect, then the agency must submit the proposed rule to the LCC and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment.[17]

The agencies are also required to provide a copy of the SONAR to the legislative reference library when mailing the notice of hearing to those who have registered to receive notice of rulemaking proceedings.[18]

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.[19]

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.[20] 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.'"[21]

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[17] *Id.* § 14.26, subd. 3(c).

[18] *Id.* §§ 14.131, .23, .14, subd. 1a.

[19] *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.

[20] *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).

[21] *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.").

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.'"[22] 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.[23]

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.[24] 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.[25]

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.[26]

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."[27] *Reasonableness* has not been specifically interpreted in Minnesota case law, insofar as the term is used in the APA to shape the agency's

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[22] *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).

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

[24] Minn. Stat. § 14.02, subd. 4 (2014).

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

[26] Minn. R. 1400.2070, subp. 1 (2013).

[27] *Id.*

presentation in support of a rule.[28] The Minnesota Supreme Court, however, has long held that on judicial review, rules must be reasonable to be valid.[29] Minnesota case law also has equated an unreasonable rule with an arbitrary rule.[30] The Minnesota Court of Appeals has held that a rule is reasonable, on judicial review, if it is rationally related to the end sought to be achieved by the statute.[31] 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.[32]

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.[33] The Court also has required that an agency articulate a rational connection between the facts found and the choice made in rulemaking.[34] 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."[35]

Other state courts also have addressed reasonableness, holding that an unreasonable

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[28] *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").

[29] *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).

[30] *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 (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).

[31] *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").

[32] *Broen*, 364 N.W.2d at 440.

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

[34] *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974).

[35] *Greenhill v. Bailey*, 519 F.2d 5, 10 n.12 (8th Cir. 1975).

rule is one without rational justification[36] or that rules must be within the bounds of reason.[37] 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.[38]

In *Manufactured Housing Institute v. Pettersen,*[39] the Minnesota Supreme Court held that the commissioner of health's adoption of a rule that set a maximum ambient 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."[40]

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.[41] 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.[42] 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

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

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

[38] *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.").

[39] 347 N.W.2d 238 (Minn. 1984).

[40] *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*).

[41] *Fed. Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

[42] *See, e.g., Pettersen*, 347 N.W.2d at 242.

the facts and circumstances underlying the agency's proposed action.[43] 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.[44]

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."[45] 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."[46] 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.[47] 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.[48]

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.[49] If the chief ALJ approves the ALJ's finding, the chief ALJ advises the agency what it must do to correct the defect.[50] The agency cannot adopt the rule until it corrects the defect.[51] 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.[52] 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.[53] The agency must resubmit the rule to the chief ALJ for the

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[43] *See Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W. 2d 399, 406 (Minn. 1992).
[44] Minn. R. 1400.2070, subp. 1 (2013).
[45] Minn. Stat. § 14.05, subd. 2 (2014) (emphasis added).
[46] *Id.* § 14.24 (emphasis added).
[47] *Id.*; Minn. R. 1400.2110 (2013). The OAH rule procedure for the adoption of substantially different rules became effective on February 5, 1996.
[48] Minn. Stat. § 14.05, subd. 2 (2014); *see also id.* §§ 14.16, subd. 1, .26, subd. 3(b).
[49] *Id.* § 14.15, subd. 3; Minn. R. 1400.2240 (2013).
[50] Minn. Stat. § 14.15, subd. 3 (2014).
[51] *Id.*; Minn. R. 1400.2240, subp. 7 (2013).
[52] Minn. Stat. § 14.16, subd. 2 (2014); Minn. R. 1400.2240, subp. 7 (2013).
[53] Minn. R. 1400.2240, subp. 7 (2013).

determination on whether any modifications correct the defects.[54] Should the agency make any modifications to a rule, the agency must resubmit the rule to the chief ALJ for review.[55] 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.[56] If a defect in this respect is found, the ALJ states reasons for the finding in writing and makes recommendations for correcting it, similar to the rule adopted with a hearing.[57]

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.[58]

The legislature incorporated these statutory criteria into the APA in 1995 to override

[54] Minn. Stat. § 14.16, subd. 2 (2014).
[55] *Id.*, subd. 1.
[56] *Id.* § 14.26, subd. 3; Minn. R. 1400.2300, subp. 7 (2013).
[57] Minn. Stat. § 14.26, subd. 3(a) (2014); Minn. R. 1400.2300, subp. 6 (2013).
[58] Minn. Stat. § 14.05, subd. 2(b), (c) (2014).

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.

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.[59] 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.[60] 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.[61] 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.[62]

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.[63] These three factors make up the substantial difference test stated in the 2010 Revised Model State Administrative Procedure Act.[64] 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

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[59] *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).

[60] *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).

[61] *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).

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

[63] Minn. Stat. § 14.05, subd. 2(c) (2014).

[64] 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.

"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.[65] In *City of Morton v. Minnesota Pollution Control Agency*,[66] the court of appeals noted its earlier statement in *Minnesota Association of Homes for the Aging v. Department of Human Services*[67] 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.[68] The change in the rule had been available to the public throughout the hearing yet no one submitted public comment concerning it.[69] 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.[70]

The Minnesota Supreme Court discussed the issue of substantial difference in *Minnesota League of Credit Unions v. Minnesota Department of Commerce.*[71] 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.[72]

22.3.3 Adopting a Substantially Different Rule

In 1995, the legislature directed OAH to adopt a rule that provides an expedited

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[65] *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).

[66] 437 N.W.2d 741 (Minn. Ct. App. 1989).

[67] 385 N.W.2d 65, 68 (Minn. Ct. App. 1989).

[68] 437 N.W.2d at 746-48.

[69] *Id.* at 745.

[70] *Id.* at 747-48.

[71] 486 N.W.2d 399, 407 (Minn. 1992).

[72] *Minnesota Ass'n of Homes for the Aging*, 385 N.W.2d at 68-69; *see 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).

procedure for adopting rules found to be substantially different by the chief ALJ.[73] 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 the person that the agency must accept written comments for 15 days, and (4) gives the date the comment period ends.[74]

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.[75]

[73] 1995 Minn. Laws, ch. 233, art. 2, § 31, at 2104 (amending Minn. Stat. § 14.51); *see* MINN. STAT. § 14.51 (2014).

[74] Minn. R. 1400.2110, subp. 2 (2013).

[75] *Id.*, subps. 3-6.