

Chapter 22. Need and Reasonableness and Substantial Difference

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22.1 Introduction

Except for expedited, exempt, and obsolete rulemaking, the Administrative Procedure Act requires that an agency proposing permanent rules make an “affirmative presentation of facts establishing the need for and reasonableness of the proposed rule”¹ When the legislature imposed this requirement in 1975, a hearing was required for all permanent rulemaking.² But while the APA now provides the flexibility of rulemaking without a hearing, the APA still imposes this same affirmative-presentation requirement.³

State agencies make their full affirmative presentation in the Statement of Need and Reasonableness (SONAR),⁴ even when a hearing is conducted.⁵ The agency can then forego a lengthy oral presentation by introducing the statement as an exhibit at the hearing.⁶ In making its affirmative presentation, an agency may also rely on facts presented by others during the rulemaking proceeding.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 Court of Administrative Hearings (CAH first required a written SONAR in its procedural rules adopted in 1976.⁸ The legislature later added the SONAR requirement for rulemaking, both with and without a hearing.⁹ Whether the agency has established both need and reasonableness during

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

² 1975 Minn. Laws, ch. 380, sec. 2.

³ Minn. Stat. § 14.26, subd. 1.

⁴ *Id.* § 14.131. The SONAR must be made available for public review, must be prepared according to CAH rules, 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 § 17.3.

⁵ See *id.* § 14.14, subd. 2a.

⁶ Minn. R. 1400.2220, subp. 3; 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 when written document was available as a handout at and throughout the hearing).

⁷ Minn. Stat. § 14.14, subd. 2.

⁸ Before 1976, agencies were required to provide a less comprehensive posthearing statement of need.

⁹ See Minn. Stat. §§ 14.131, .23.

its rulemaking proceeding is determined by CAH's legal review.¹⁰

22.1.1 Rulemaking with a Hearing

In rulemaking with a hearing, the APA directs the administrative law judge 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.¹¹ The agency must also summarize in its SONAR the facts and argument that it intends to present at the hearing and must state how the evidence rationally relates to the choice of action taken.¹²

If the chief ALJ approves a finding of the ALJ that the agency failed to demonstrate the need for or reasonableness of a proposed rule, the chief ALJ must suggest actions to correct the defect. When an agency's need for or reasonableness of a proposed rule has been disapproved, an agency has three main options: correct the defects, withdraw the portion of the rule cited as a defect (as long as the withdrawn rule would not make the rule substantially different), or withdraw the entire rule if not correcting the defect would make the rule substantially different.

But an agency also has a fourth option and may choose not to follow the actions suggested by the chief ALJ. If the agency forgoes the suggested action, then the agency must submit the proposed rule to the Legislative Coordinating Commission and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment.¹³ The agency must then wait up to 60 days to receive the commission's or committees' advice before adopting the rule. The advice of the commission and committees, however, is not binding on the agency, and the agency may then proceed to adopt the rule as proposed. Yet this fourth option is rare, and an agency usually withdraws the entire rule.¹⁴

22.1.2 Rulemaking without a Hearing

Likewise, in the course of the ALJ's review of rules adopted without a hearing, the ALJ must determine whether "the record demonstrates a rational basis for the need for and

¹⁰ *Id.* §§ 14.14, subd. 2a, 14.26, subd. 3.

¹¹ *Id.* § 14.50(iii).

¹² Minn. R. 1400.2070, subp. 1 ; see *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 405-06 (Minn. 1992) (finding Department of Commerce's SONAR failed to summarize the evidence and argument that the department advanced at the hearing, but upholding the rule as properly adopted "despite the minor defects in rulemaking procedure" since the defects were not prejudicial to the petitioner).

¹³ Minn. Stat. § 14.15, subd. 4 . For a discussion of the LCC's role, see § 25.

¹⁴ The author is unaware of an agency adopting a rule with a defect of need or reasonableness. Doing so could leave the agency vulnerable to a legal challenge under Minn. Stat. §§ 14.44, .45. For a good example of why agencies don't proceed to adopt a rule with a need or reasonableness defect, see OAH 80-9003-34519, *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice River* (Jan. 11, 2018).

reasonableness of the proposed rule.”¹⁵ As with a hearing, if the chief ALJ 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.¹⁶

22.1.3 Unique Procedure for Defects on Need or Reasonableness

The role of the chief ALJ in regard to defects relating to need and reasonableness is quite different from a finding of a defect in regard to legality, substantial difference, or APA procedural violations. For example, 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 have been corrected or the agency has satisfied the rule requirements for adopting a substantially different rule.¹⁷

But an 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.

22.1.4. Notice to Legislative Reference Library

An agency must provide a copy of the SONAR to the legislative reference library when mailing or emailing the rulemaking notice of intent to adopt rules to those who have registered to receive notice of rulemaking proceedings.¹⁸

22.2 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 proposed rule. In making this judgment, an agency considers the following main factors:

- a. the extent of the burden a particular requirement places on the regulated party;
- b. the amount of controversy surrounding a particular requirement;
- c. the degree of sophistication and organization of the opposition; and
- d. whether the rules are new rules or amendments to existing rules.

¹⁵ Minn. Stat. § 14.26, subd. 3. An administrative law judge is assigned by the chief administrative law judge to review rules in which no hearing is required. Before 1996, this review was conducted by the Office of the Attorney General.

¹⁶ *Id.* subd. 3(c).

¹⁷ *Id.* §§ 14.15, subd. 3, .26, subd. 3(b).

¹⁸ *Id.* §§ 14.131, .23.

An important consideration is what type of facts an agency or others in support of a proposed rule must present. These facts can be 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.¹⁹

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.’”²⁰

Federal case law has generally proceeded along similar lines. For example, the United States Supreme Court stated that when 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.’”²¹ Similarly, a federal appellate court 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.²²

A question sometimes arises in rulemaking proceedings about what burden the agency must bear for need and reasonableness when it amends existing rules. Yet the answer is simple: Because amendments of rules are specifically included within the statutory definition of a rule, an agency must show that amendments are needed and reasonable by an affirmative presentation of facts. But the agency is not required to demonstrate the reasonableness of existing rules that are unaffected by the proposed amendments.²³

22.2.1 Demonstrating the Reasonableness of a Proposed Rule

The APA does not define *reasonableness*, though CAH rules provide some guidance. For example, the rules direct an agency, when preparing its SONAR, to “explain the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable

¹⁹ *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350, 356-57 (Minn. 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).

²⁰ *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. 1976)); 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) (“The 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.”).

²¹ *F.C.C. v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978) (quoting *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); see also 2 Richard J. Pierce, *Administrative Law Treatise* § 10.6.

²² *Natural Res. Def. Council v. S.E.C.*, 606 F.2d 1031, 1059 (D.C. Cir. 1979).

²³ Minn. R. 1400.2070, subp. 1.

solution for meeting the need.”²⁴ And although *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 rule²⁵—the Minnesota Supreme Court has long held that on judicial review, rules must be reasonable to be valid.²⁶ Minnesota case law has also equated an unreasonable rule with an arbitrary rule.²⁷ For example, the Minnesota Court of Appeals has held that a rule is reasonable if it is rationally related to the end sought to be achieved by the statute²⁸ and stated that a rule’s reasonableness is viewed toward the end sought to be achieved and not in light of its application to a particular party.²⁹

On the federal level, the Supreme Court has held that an agency must have a reasonable ground or basis for exercising its judgment in adopting rules.³⁰ The Supreme Court has also required that an agency articulate a rational connection between the facts found and the choice made in rulemaking.³¹ 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.”³²

²⁴ *Id.*

²⁵ *But see Pettersen*, 347 N.W.2d at 246 (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”).

²⁶ *Lee v. Delmont*, 36 N.W.2d 530, 537, 539 (Minn. 1949); *Juster Bros. v. Christgau*, 7 N.W.2d 501, 507 (Minn. 1943); *In re Application of Q Petroleum*, 498 N.W. 2d 772, 777 (Minn. Ct. App. 1993).

²⁷ *In re Hansen*, 275 N.W.2d 790, 793 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991); *Morton*, 437 N.W.2d at 748 (finding rule setting 2% cap on grant amendments for unanticipated site conditions was not arbitrary; deferring to agency expertise in determining how to best allocate grant resources).

²⁸ *Mammenga*, 442 N.W.2d at 789-90 (finding rule itself is unreasonable and therefore invalid when 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 rule violation 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 when 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: 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 promulgated rule is tested against the purpose of the statute it implements.”); *Broen Mem’l Home v. Minn. Dep’t of Human Servs.*, 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 Advert. 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”).

²⁹ *Broen*, 364 N.W.2d at 440.

³⁰ *Am. Trucking Ass’n v. United States*, 344 U.S. 298, 314-15 (1953).

³¹ *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

³² *Greenhill v. Bailey*, 519 F.2d 5, 10 n.12 (8th Cir. 1975).

Other state courts have also addressed reasonableness, holding that an unreasonable rule is one without rational justification³³ or that rules must be within the bounds of reason.³⁴ Another common approach to reasonableness is the holding that while reasonable minds might well be divided on the wisdom of an administrative action, the action is conclusive.³⁵

And in Minnesota,³⁶ 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:

There 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.³⁷

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. Instead, the choice made by the agency among possible alternative standards must only be one that a rational person could have made.³⁸ This is because a determination by an ALJ or a court that a more reasonable alternative should be adopted would invade the agency's policy-making discretion.

22.2.2 Demonstrating the Need for a Proposed Rule

In addition to demonstrating reasonableness, the APA requires an agency to demonstrate the need for a proposed rule—this requirement has occasioned less argument during rulemaking proceedings than the requirement that agencies demonstrate reasonableness. This is generally because 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 agency, and the agency must logically determine the need for the rules before beginning rulemaking.³⁹

An agency usually determines whether rules are needed by focusing on whether a

³³ *Sterling Secret Serv. v. Mich. Dep't of State Police*, 20 Mich. App. 502, 514, 174 N.W.2d 298, 306 (Mich. 1969).

³⁴ *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 565 (Iowa 1972).

³⁵ *Rible v. Hughes*, 24 Cal. 2d 437, 445, 150 P.2d 455, 459 (Cal. 1944); *Thomas Bros. v. Secretary of State*, 90 Mich. App. 179, 188, 282 N.W.2d 273, 277 (Mich. 1979) ("If there is any doubt as to the invalidity of a rule in this regard, the rule must be upheld.").

³⁶ *Pettersen*, 347 N.W.2d 238.

³⁷ *Id.* at 246; see also *Minn. Chamber of Commerce*, 469 N.W.2d at 102-03 (discussing application of the arbitrary-and-capricious test under *Pettersen*).

³⁸ *Fed. Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

³⁹ See, e.g., *Pettersen*, 347 N.W.2d at 242.

problem exists that calls for regulation. This determination requires examining the facts and circumstances underlying the agency's proposed action.⁴⁰ In addition, agencies commonly consider the need for statewide uniformity and the adequacy of alternative methods available to address the problem.

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.”⁴¹ The APA similarly provides that “the proposed rule may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a *substantially different* rule”⁴² The statute, however, also states that an agency may adopt a substantially different rule only after satisfying CAH rule requirements for adopting a substantially different rule.⁴³ Under this process, an agency need not restart the rulemaking process with a new notice of intent to adopt rules.

22.3.1 Review Process

As part of its legal review, CAH reviews rules to determine if they are substantially different from those originally proposed. If an agency is found to have modified a rule to be substantially different than proposed, the agency cannot adopt the rule until it corrects the defect.⁴⁴ At this point, the agency has several options:

- a. end the rule proceeding;
- b. start a new rule proceeding to adopt the substantially different rule;
- c. proceed under CAH rules to adopt a substantially different rule; or
- d. modify the rule so that it is no longer substantially different.⁴⁵

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,⁴⁶ and the agency must resubmit the rule to the chief ALJ for them to determine whether any modifications correct the defects.⁴⁷ Should the agency make any modifications to a rule, the agency must resubmit the rule to the chief ALJ for review.⁴⁸

⁴⁰ See *Minn. League of Credit Unions*, 486 N.W.2d at 406.

⁴¹ Minn. Stat. § 14.05, subd. 2 (emphasis added).

⁴² *Id.* § 14.24 (emphasis added).

⁴³ *Id.*; Minn. R. 1400.2110. The CAH rule procedure for adopting substantially different rules became effective February 5, 1996.

⁴⁴ Minn. Stat. § 14.15.

⁴⁵ *Id.* § 14.16, subd. 2; Minn. R. 1400.2240, subp. 7.

⁴⁶ Minn. R. 1400.2240, subp. 7.

⁴⁷ Minn. Stat. § 14.16, subd. 2.

⁴⁸ *Id.*, subd. 1.

22.3.2 Criteria for Review

The APA details the standard of review for what constitutes a substantially different rule. These statutory criteria were incorporated 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. Any modification must be:

- a. within the scope of the rule's original subject matter;
- b. in character with the original issues stated in the notice; and
- c. a logical outgrowth of the original notice and the comments submitted.

It is rare for an ALJ to find that a proposed rule has been modified so as to be substantially different as proposed, even when an agency withdraws most of its proposed amendments.⁴⁹

Minnesota's approach is similar to what emerged from federal rulemaking case law. At the federal level, whether there has been substantial change depends on whether the rule as modified is so different that a person who had examined the rule notice 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 federal cases argue that the purpose of giving the public a chance to comment on proposed rules is to facilitate change in the rules that will improve them.⁵⁰ If the change between the proposed and 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.⁵¹ In the final analysis, whether the final rule is a logical outgrowth of the proposed rules and whether, therefore, the original rulemaking notice was sufficient will depend on the facts of the case and how well the rule notice serves the policies underlying the notice requirement.⁵²

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.⁵³

The third prong of the APA test for substantial difference is whether the original notice provided fair warning that a modified rule might result. In making this determination, the ALJ must consider three factors:

⁴⁹ OAH 65-9013-36457, *In the Matter of the Proposed Rules of the Board of Cosmetologist Examiners Relating to Education, Licensing, and Practice of Cosmetology, Minnesota Rules Chapter 2110* (July 6, 2023); 47 Minn. Reg. 1185 (June 20, 2023).

⁵⁰ 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).

⁵¹ *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).

⁵² *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).

⁵³ *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547.

a. the extent to which affected persons would have understood that their interests could be affected;

b. the extent to which the subject matter or issues are different; and

c. the extent to which the effects of the rule differ.⁵⁴

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, finds its origins in the case law and statutes of Minnesota and other states.⁵⁵ For example, in *City of Morton v. Minnesota Pollution Control Agency*,⁵⁶ the Minnesota Court of Appeals noted its earlier statement in *Minnesota Association of Homes for the Aging v. Department of Human Services*⁵⁷ that the rulemaking procedure contemplates modification of a proposed rule. The court of appeals observed that the rulemaking procedures expressly contemplate modifications of proposed rules and, therefore, not all parts of a final rule need to have been discussed in the SONAR (though agencies must still explain the need and reasonableness of modifications).⁵⁸

In *City of Morton*, the court of appeals held that a rule concerning grant amendments for increased construction costs resulting from unknown site conditions in municipal projects for wastewater treatment facilities was not substantially changed during the rulemaking process,⁵⁹ as the change in the rule had been available to the public throughout the hearing, yet no one submitted public comment concerning it.⁶⁰ 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.⁶¹

The Minnesota Supreme Court discussed the issue of substantial difference in *Minnesota League of Credit Unions v. Minnesota Department of Commerce*.⁶² The court determined that the Department of Commerce’s adoption of the ALJ’s recommended changes to a rule part was not a substantial change—rather, it narrowed and clarified the 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

⁵⁴ Minn. Stat. § 14.05, subd. 2(c).

⁵⁵ See, e.g., Alaska Stat. § 44.62.200(b) (Supp. 2014); *Chevron U.S.A. Inc. v. LeResche*, 663 P.2d 923, 929 (Ala. 1983); *W. Oil & Gas Ass’n v. Air Res. Bd.*, 37 Cal. 3d 502, 526-27, 691 P.2d 606, 621 (Cal. 1984); *Bassett v. State Fish & Wildlife Comm’n*, 27 Or. App. 639, 556 P.2d 1382, 1384 (Or. 1976); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 801 (Tex. App. 1982); *Am. Bankers v. Div. of Consumer Counsel*, 220 Va. 773, 790-91, 263 S.E.2d 867, 877 (Va. 1980).

⁵⁶ *Morton*, 437 N.W.2d 741.

⁵⁷ *Minnesota Ass’n of Homes for the Aging v. Dep’t of Human Servs.*, 385 N.W.2d 65, 68 (Minn. Ct. App. 1989).

⁵⁸ *Id.* at 68-69; see also *Minn. Chamber of Commerce*, 469 N.W.2d at 106 (finding change to rule part does not raise a new subject matter but, rather, restores part of the procedure followed before the proposed amendments); *Morton*, 437 N.W.2d at 747-48 (the MPCA’s revision of a proposed rule for a wastewater treatment facility did not constitute substantial change).

⁵⁹ *Morton*, 437 N.W.2d at 746-48.

⁶⁰ *Id.* at 745.

⁶¹ *Id.* at 747-48.

⁶² *Minn. League of Credit Unions*, 486 N.W.2d at 407.

demonstrated that the petitioners were reasonably able to comment on the subject matter of the proposed rules.

22.3.3 Adopting a Substantially Different Rule

As part of the 1995 legislative amendments on substantially different rules, the legislature directed CAH to adopt rules that provide an expedited procedure for adopting rules found to be substantially different.⁶³ The CAH rules state that an agency may adopt a substantially different rule if it provides adequate notice to persons or groups involved in the rule proceeding. The agency must mail or deliver to each person or group that made a written or oral comment during the rule proceeding or that registered at the rule hearing a copy of the substantially different rule and a statement that tells the person or group that:

- a. states that the chief judge found the rule to be substantially different;
- b. explains the agency's reasons for modifying the rule;
- c. tells the person that the agency must accept written comments for 15 days; and
- d. gives the date that the comment period ends.⁶⁴

After considering any comments, the agency must submit 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 be unfair to affected persons to allow the agency to adopt the modifications without initiating a new rule proceeding.

If approved, the agency may adopt the substantially different rule. If the substantially different rule is disapproved, the agency cannot adopt the rule without starting a new rule proceeding.⁶⁵

⁶³ 1995 Minn. Laws, ch. 233, art. 2, sec. 31 (amending Minn. Stat. § 14.51); see Minn. Stat. § 14.51.

⁶⁴ Minn. R. 1400.2110, subp. 2.

⁶⁵ *Id.*, subps. 3-6.