Administrative Rulemaking in Minnesota

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* Professor and Dean, University of Minnesota Law School. I wish to thank my colleagues Daniel J. Gifford and David S. Weissbrodt for their helpful criticisms of a draft of this Article.
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I. INTRODUCTION

At a recent meeting of the Minnesota Governor's cabinet, a number of state department and agency heads expressed dissatisfaction with Minnesota's existing rulemaking process.1 There are good grounds for dissatisfaction. The rulemaking process prescribed by the Minnesota Administrative Procedure Act (MAPA)2 is unnecessarily complicated, cumbersome, costly, and time-consuming. It scatters authority and responsibility and discourages rulemaking, without which there can be no effective and efficient administration of state government. Before an agency rule can become effective as law under MAPA, the following steps must have been taken:

   —If the agency wishes to obtain any outside views, even before proposing the adoption of a rule, it must afford all interested persons the opportunity to present their views on the subject of concern.
   —If the proposed rule will have its primary effect on Spanish-speaking people, it must be submitted to the Council on Affairs of Spanish-speaking people for review and recommendation before its publication as a proposed rule.
   —If the agency decides to propose a rule, it must notify the public of its intention, hold a public hearing, and afford all affected interests an opportunity to participate.
   —The Chief Hearing Examiner, head of an independent State Office of Hearing Examiners, must assign a hearing examiner to conduct the public hearing.
   —Within a specified time after the end of the public hearing and the close of the "hearing record," the hearing examiner who conducted the hearing must submit a written report to the agency, setting forth the examiner's findings of fact, conclusions, and recommendations.
   —The hearing examiner's report must be made available to all


affected persons requesting it before the agency acts finally on the rule.

—The agency’s final rule must be submitted to the Chief Hearing Examiner so that he may determine whether a new public hearing is required because the final rule is “substantially different” from the proposed rule, or because the agency failed to comply with MAPA’s rulemaking procedures.

—The final rule must be submitted, together with the “complete hearing record,” to the Attorney General for review as to “form and legality.”

—If the Attorney General approves the rule, he must file it promptly in the Office of the Secretary of State. The agency must then submit the rule to the Commissioner of Administration for publication in the State Register.

—A rule approved by the Attorney General and filed in the Office of the Secretary of State has the force and effect of law five working days (or more if required by statute or specified in the rule) after its publication in the State Register.³

—If the Attorney General disapproves the rule, he must state his reasons in writing; the rule may not then be filed with the Office of the Secretary of State or published in the State Register.

—A rule that has become effective is subject to review and suspension by the Legislative Commission to Review Administrative Rules.

—A rule that has become effective is also subject to review by the appropriate district court and, ultimately, the Minnesota Supreme Court.

It has been estimated that it takes a minimum of 234 days to promulgate a set of simple rules requiring no more than a day of public hearing,⁴ and then only if the Chief Hearing Examiner and the Attorney General determine that the final agency rules are not “substantially different” from the proposed rules, and the final rules are approved by the Attorney General on initial submission.

3. A period of five days is prescribed by Minnesota Statutes, section 15.0412(4) (Supp. 1977), but Minnesota Statutes, section 15.0413(1) (1976), provides that a rule shall become effective twenty calendar days after its publication in the State Register (unless a later date is required by statute or specified in the rule). The Revisor of Statutes is aware of the discrepancy between the two provisions and will call it to the attention of the next Legislature.

In the meantime, the five-day provision controls because it was enacted by Act of June 2, 1977, ch. 443, § 2, 1977 Minn. Laws 1217, whereas the twenty-day provision in Minnesota Statutes, section 15.0413(1) (1976) was enacted earlier. When two statutes passed at different sessions of the Legislature are irreconcilable, the later provision prevails over the earlier. Id. § 645.26(4).

4. See note 293 infra.
Unlike the Federal Administrative Procedure Act (FAPA), MAPA does not distinguish between informal or notice-and-comment rulemaking and formal or on-the-record rulemaking and impose different procedural requirements for each type of rulemaking. All rulemaking subject to MAPA—except the adoption of temporary rules—is treated alike, in the sense that the same procedural requirements must be met: those of on-the-record rather than notice-and-comment rulemaking.

This Article analyzes and evaluates the rulemaking provisions of MAPA and compares them with those of the Revised Model State Administrative Procedure Act (Revised Model Act) and the Iowa Administrative Procedure Act (IAPA). In my judgment, the existing rulemaking provisions of MAPA should be scrapped. The rulemaking provisions of both the Revised Model Act and IAPA are much preferable to those of MAPA. Minnesota would do well to follow the IAPA, except in certain respects that will be noted.

Both the Revised Model Act and IAPA distinguish between the procedures that an agency is required to follow in adopting a rule and the creation of the record on which judicial review of the rule’s validity will be based. Under both the Revised Model Act and IAPA, however, the record for judicial review is to be made in the reviewing court, that is, there is to be a “trial” of the validity of the rule in that court. In my view, this is undesirable. It is also undesirable to have the record consist of the product of the rulemaking proceedings. Accordingly, it is recommended that any person seeking judicial review of a rule should be required first to file a protest against the rule with the agency that promulgated it. That agency would then conduct an “on-the-record” hearing of the protest, limited to the issues raised by it. This hearing could be written or oral, or both, but provision should be made for an oral hearing, with or without cross-examination,


whenever the protesting party showed it to be necessary for an ade-
quate presentation of the protest. Subsequent judicial review would
then be based exclusively on the record made in the course of the
protest proceeding.

II. APPLICABILITY OF PRESCRIBED RULEMAKING
PROCEDURES

The rulemaking procedures prescribed by MAPA govern only
those administrative units of the state that are defined as agencies
by MAPA, and only when they issue statements defined as rules
thereunder.

A. DEFINITION OF "AGENCY"

1. General

MAPA does not define "agency" in all-inclusive terms. The
MAPA definition covers "any state officer, board, commission, bu-
reau, division, department, or tribunal, other than a court, having a
statewide jurisdiction and authorized by law to make rules or to
adjudicate contested cases."9

The limitations written into the definition raise several ques-
tions. Why should a state agency that has no authority to make rules
or adjudicate cases be excluded if it affects the rights of private
parties by "investigating, prosecuting, negotiating, settling, or infor-
mally acting" and there is no special reason for excluding it?10 Why
should a state agency be excluded because it has only a limited geog-
graphical jurisdiction?11

IAPA's general definition is preferable to that in MAPA. IAPA
defines an "agency" in all-encompassing terms to mean "each board,
commission, department, officer or other administrative office or unit
of the state."12

1973).
11. It may be noted that MAPA specifically declares the Capitol Area Architec-
tural and Planning Board to be an "agency" even though it does not have statewide
jurisdiction. MINN. STAT. § 15.0411(2) (Supp. 1977). This provision was added by
During the 1977 legislative session, an unsuccessful attempt was made also to include
the Metropolitan Council, the Metropolitan Airports Commission, the Metropolitan
Transit Commission, and the Metropolitan Waste Control Commission, all of which
do not have statewide jurisdiction. The Attorney General has ruled that the Metropoli-
tan Council is not an "agency," but a political subdivision not covered by MAPA.
12. IOWA CODE § 17A.2(1) (1977). This definition is similar to that in Revised
Model Act § 1(1), which defines an "agency" to mean "each state [board, commis-
2. **Exclusions**

MAPA excludes from the definition of "agency" certain state administrative units. These exclusions are considered in the Appendix to this Article.

B. **DEFINITION OF "RULE"**

1. **General**

Prior to amendment in 1975, section 15.0411(3) of MAPA defined a "rule" to include "every regulation, including the amendment, suspension, or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure . . . ." The term "regulation" was not defined.

It was charged that many agencies circumvented the rulemaking procedures prescribed by MAPA by issuing "bulletins," "guides," "announcements," "memoranda," "manuals," "policy statements," "directives," and "instructions," which, in effect, were "regulations" under other names. In response, the 1975 amendments broadened the definition of "rule" to include "every agency statement of general applicability and future effect, including the amendment, suspension, or repeal thereof, made to implement or make specific the law enforced or administered by it or to govern its organization or procedure." The phrase, "adopted by an agency, whether with or without prior hearing," was deleted to eliminate the intimation that some rules might be promulgated without a prior public hearing.

The general definition of "rule" now contained in MAPA is not as specific as that of the Revised Model Act or IAPA. The Revised Model Act defines "rule" to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency" and includes "the amendment or repeal of a prior rule . . . ."

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15. [Minn. Stat. § 15.0411(3) (1976).](#)
Professor Arthur E. Bonfield explains that IAPA, like the Model Act, eliminated the requirement that the general statement must be "of future effect," because "every statement of general applicability must, almost by definition, have future effect at the time it is first issued." Deletion of this requirement also eliminates a difficulty that can occur when parties rely on a rule that is subsequently declared invalid. In *Addison v. Holly Hill Fruit Products, Inc.* for example, the Supreme Court declared invalid a rule of the Administrator of the Department of Labor's Wage and Hour Division defining the "area of production" within which employees engaged in handling agricultural or horticultural commodities for market were exempt from the wage and hour provisions of the Fair Labor Standards Act of 1938. In such a case, a subsequent rule may be made retroactive, at least to exempt those employees who had been exempt under the invalid rule upon which employers relied. It is not entirely clear whether the new rule, given both retroactive and future effect, would be a statement of "future effect" within the meaning of MAPA. There is no reason why the new rule should not be subject to MAPA's rulemaking procedures. Deletion of the requirement of "future effect" would assure its coverage.

The greater specificity of the Model Act and IAPA is also to be preferred. It is reasonable, however, to read the MAPA definition that a "rule" is a general statement "made to implement or make specific the law enforced or administered by it," as including every statement that, in the language of the Revised Model Act and IAPA, "implements, interprets, or prescribes law or policy." The reason for the latter, more specific, definition is to ensure that every agency statement will be treated as a rule if it declares, recognizes, makes, promulgates, prescribes, implements, interprets, indicates, creates, or authorizes law or policy of general applicability. This is also the purpose of the MAPA definition.

MAPA also defines as a "rule" every agency statement "to govern its organization or procedure." The comparable definition in the Revised Model Act and IAPA includes any statement that "describes the agency's organization, procedure, or practice requirements."
Certainly "procedure" in MAPA may reasonably be read to include "practice requirements."

Finally, the MAPA definition, unlike that of the Revised Model Act or IAPA, includes the "suspension," as well as the amendment or repeal, of a rule. In this respect, the MAPA definition is preferable.

MAPA, IAPA, and the Revised Model Act are alike in that their definitions of "rule" all include interpretative rules, general statements of policy, and rules of agency organization, procedure, and practice. In this respect, all three state acts differ from FAPA, which exempts these agency statements from its rulemaking procedures. The Senate Comparative Print of the bill that became FAPA, dated June, 1945, justified the exemptions as follows:

First, it is desired to encourage the making of such rules. Secondly, [these] types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

A number of these justifications are indeed persuasive. To subject interpretative rules and general statements of policy to the prescribed rulemaking procedures may result in discouraging agencies from issuing such statements. This would greatly disadvantage the public.

One objection that may be raised to the FAPA exemption is that it provides a means of circumventing the prescribed rulemaking procedures because it is difficult to distinguish between "substantive" rules on the one hand and, on the other, "interpretative" rules and "general statements of policy." This has not, however, proven to be a problem under FAPA. The analytic distinction between these categories is clear. The Attorney General's Manual on FAPA offers as a working definition of substantive rules, those "rules, other than organizational or procedural ... issued by an agency pursuant to statutory authority and which implement the statute" and have "the force and effect of law." Professors Hart and Sacks suggest a sharper

27. Id. The "provision for petitions" referred to is found at 5 U.S.C. § 553(e) (1976).
29. Id. at 30.
definition—that a substantive rule (or "legislative rule," as it is often called) is "one without which the statute imposes no duties." To build upon Justice Jackson's striking phrase, it is one that completes the "unfinished law" passed by the legislature.

The Attorney General's Manual defined "interpretative rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." It defined "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." Hart and Sacks telescope the latter two definitions and suggest that an "interpretative rule" is one that states the agency's view of the nature and scope of the duties imposed by the statute (or, it may be added, by a legislative or substantive agency rule), or that announces general agency policy regarding the enforcement or administration of the statute (or, again, of a legislative or substantive agency rule).

There is no difficulty of definition that should stand in the way of subjecting only legislative or substantive rules to the rulemaking procedures prescribed by MAPA. Yet the fact remains that interpretative rules and general statements of policy affect private interests and the general public. The same reasons for public participation in their making apply as in the making of legislative or substantive rules. Professor Kenneth Culp Davis points out that, even on the federal level, the idea is growing that fairness requires that the public be afforded the opportunity to participate in the making of those rules that have substantial impact on private rights and obligations whether or not FAPA mandates such an opportunity.

31. FTC v. Ruberoid Co., 343 U.S. 470, 485 (1952) (Jackson, J., dissenting). It is the author's view that a legislative or substantive rule is also one that alters the duties imposed by the statute; for example, a rule providing an exemption not made by the statute itself as in Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944). Addison is discussed in the text accompanying note 19 supra.
33. Id.
34. H. Hart & A. Sacks, supra note 30, at 1315.
35. K. Davis, Administrative Law of the Seventies §§ 6.01.7-.10 (1976). In § 6.01.8 of his treatise, Professor Davis cites and discusses cases requiring notice-and-comment for rulemaking exempt from FAPA. There is, however, serious question whether these cases will stand in the face of the Supreme Court's recent decision in Vermont Yankee Nuclear Power v. Natural Resources Defense Council, 435 U.S. 519 (1978). In Vermont Yankee, the Court affirmed "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" and rejected the argument that FAPA, 5 U.S.C. § 553 (1976), merely establishes minimum procedural requirements, permitting the courts to impose more stringent requirements when they think fairness so dictates. 435 U.S. at 544-45.
The Minnesota Supreme Court also seems to have accepted this idea. In *McKee v. Likens*, the court was called upon to decide whether a policy bulletin issued by the Commissioner of Public Welfare in 1973 (before MAPA's definition of "rule" was expanded by the 1975 amendments) allowing the coverage under the state's medical assistance program of elective, nontherapeutic abortions, was a "regulation" within the meaning of MAPA. The court held that it was a regulation because it "involved a question of social and political policy so important to the public as a whole." For this reason, whether it was termed legislative, interpretative, or procedural, the policy bulletin could not become effective unless preceded by MAPA rulemaking.

After considering the arguments for and against subjecting interpretative rules and general statements of policy to the rulemaking requirements of an administrative procedure act, Professor Bonfield concluded that an exemption was probably justified. He recommended that if such an exemption is provided, the agencies should be urged to utilize the rulemaking procedures voluntarily whenever they think it would be feasible and useful. Bonfield, however, did not succeed in persuading the Iowa Legislature to adopt this position.

The Minnesota Legislature should reconsider the coverage of interpretative rules and general statements of policy in light of experience with them. It should also consider the practical difficulty of enforcing MAPA's requirements as applied to interpretative rules. It is difficult to know what the consequences would be of an agency's failure to comply with MAPA before it issued an interpretative rule or general statement of policy. A legislative or substantive rule issued without such compliance would not have "the force and effect of law." But what would that mean for an interpretative rule or general statement of policy? The agency could still act accordingly. Even if a court disregarded the interpretative rule or policy statement in a judicial proceeding involving the agency action, it would know that the action itself reflected the agency's policy and interpretation of the statute it was implementing. This agency view, whether or not embodied in an interpretative rule or policy statement, would be entitled to weight upon judicial review, though it would not be binding upon the court any more than the interpretative rule or policy statement itself.

36. 261 N.W.2d 566 (Minn. 1977).
37. *Id.* at 577-78.
2. Exclusions

MAPA excludes from the general definition of “rule” five categories of statements that might otherwise be included. These exclusions are considered in the Appendix to this Article.

C. Temporary Rules

Although not excluded from the definition of “rule,” temporary rules may be promulgated by an agency without following the rulemaking procedures otherwise prescribed.40 A temporary rule may be adopted if the agency “is directed or authorized by statute, federal law or court order to adopt, amend, suspend or repeal a rule in a manner that does not allow for compliance with” the prescribed procedures.41 The meaning of this provision is not entirely clear. It could be construed to mean that a temporary rule may be promulgated only if a statute, federal law, or court order specifies a timetable for rulemaking that cannot be met by satisfying MAPA requirements. This would be an unduly restrictive reading of the provision that would deprive the agencies of needed flexibility. A reasonable construction of the statutory provision in question would also authorize an agency to adopt a temporary rule if the accomplishment of the objectives of the rule imposes time constraints that cannot be met if MAPA’s requirements had to be satisfied. There is little danger that the authority to issue temporary rules will be abused. A temporary rule is initially effective for only ninety days and it may be continued in effect for another ninety days.42

Under the temporary rulemaking procedures, the agency must publish the proposed temporary rule in the State Register.43 For at least twenty days thereafter, the agency must afford all interested persons an opportunity to submit written data and views on the proposal. The agency must transmit the rule as published, or as modified in light of the data and views submitted, to the Attorney General for review as to form and legality. The Attorney General must approve or disapprove it within five working days. The temporary rule takes effect upon its approval by the Attorney General or his failure to act within the five days. Notice of the Attorney General’s decision must be published in the State Register. The adopted temporary rule must be published in the same manner as any permanent rule.

Both the Revised Model Act and IAPA contain much broader exemptions in this context. The Revised Model Act provides:

41. Id.
42. Id.
43. Id.
If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days [renewable once for a period not exceeding — days]. . . .

The IAPA exemption, based on that contained in FAPA, is even broader:

When an agency for good cause finds that notice and public participation would be impracticable or contrary to the public interest, [the prescribed rulemaking procedures] shall be inapplicable. The agency shall incorporate in each rule issued in reliance upon this provision either the finding and a brief statement of the reasons therefor, or a statement that the rule is within a very narrowly tailored category of rules whose issuance has previously been exempted [from the prescribed rulemaking procedures] by a special rule relying on this provision and including such a finding and statement of reasons for the entire category. In any action contesting a rule adopted pursuant to this subsection, the burden of proof shall be on the agency to show that the [prescribed procedures] were impracticable, unnecessary, or contrary to the public interest and that, if a category of rules was involved, the category was very narrowly tailored.45

Professor Bonfield justifies this broad exemption on the ground that it "attempts to reconcile the [IAPA] requirements for public participation in rulemaking . . . with the practical realities of life, more specifically, the agencies' need to conduct their business effectively and efficiently."46 Thus, the IAPA exemption is intended to cover, among others, any instance in which "the cost of adhering to usual procedures may be so great for certain rules proportional to any conceivable benefits that it is unwise for the agency to use those procedures."47 At the same time, Professor Bonfield is convinced that, in light of the federal experience, adequate safeguards surround the use of the exemption to discourage agencies from abusing it.48 The addition of the Iowa exemption to MAPA would be wise.

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44. Revised Model State Administrative Procedure Act § 3(b) (1961).
46. Bonfield, supra note 8, at 860.
47. Id. at 861.
48. See id. at 861-873. Unlike FAPA, IAPA places on the agencies the burden of proving in a court that the challenged use of the exemption was justified. Iowa Code § 17A.4(2) (1977).
D. STATUS OF RULES OF EXEMPT AGENCIES

A state officer, board, commission, bureau, division, department, or tribunal, other than a court, that is excluded from the definition of "agency" is not required to follow any rulemaking procedures other than those prescribed by MAPA's section 15.0413(3) or some other applicable statute. Section 15.0413(3) states that the rules of such an agency "shall have the force and effect of law if they are filed in the office of the secretary of state in the same manner as rules adopted pursuant to section 15.0412 are so filed and if they are submitted to the commissioner of administration in a manner he shall prescribe and published in the state register." Rules of the Regents of the University of Minnesota are excepted by this section even from these requirements.

There is no requirement, so far as MAPA is concerned, that rules of exempt agencies must be approved by the Attorney General. There is such an express requirement for temporary rules, so it is not reasonable to imply such a requirement for the rules of exempt agencies. Nor, apparently, do MAPA's judicial review provisions, sections 15.0416 and 15.0417, apply to exempt agency rules, since these sections relate to the determination of the validity of "any rule." The definition of "rule" in section 15.0411(3) includes "every agency statement" except statements of exempt agencies.

MAPA does not seem to cover at all the agency general statements that are exempted from the definition of "rule" by section 15.0411(3). Section 15.0413(3), relating to the rules of exempt agencies, does not cover them. Nor are they covered by the judicial review provisions of sections 15.0416 and 15.0417, for the reasons mentioned in connection with general statements of exempt agencies.

Generally it would seem that there is greater reason to require Attorney General approval of rules that may be adopted without satisfying the rulemaking procedures prescribed by MAPA than of rules that must satisfy these procedures. In the case of two specific exclusions from MAPA, however, the requirement of Attorney General approval would be inappropriate: (1) rules of the legislature itself, the courts themselves, or the Governor exercising certain emergency powers, and (2) rules "concerning only the internal management of the agency or other agencies, and which do not directly affect

50. Id. § 15.0413(3).
51. Id.
52. Id.
53. Minn. Stat. § 15.0411(2) (Supp. 1977) (items (a) and (b)); see text accompanying Appendix notes 3-8, infra.
the rights of or procedure available to the public.”

Statutes other than MAPA should be examined to determine whether the rules exempt from MAPA must be approved by the Attorney General, and whether and how they are to be subjected to judicial review. In the absence of an applicable statutory provision, a suit for an injunction or declaratory judgment, or one of the prerogative writs, may be used to seek a determination of the validity of these rules.

III. AUTHORITY TO PROMULGATE RULES

Prior to 1975, MAPA was itself a source of rulemaking authority. Section 15.0412(1) provided, inter alia, that for “the purpose of carrying out the duties and powers imposed upon and granted to it, an agency may promulgate reasonable substantive rules and regulations and may amend, suspend or repeal the same, but such action shall not exceed the powers vested in the agency by statute.” It also authorized each agency, in “addition to other rulemaking powers or requirements provided by law,” to “adopt rules governing the formal or informal procedures prescribed or authorized” by MAPA for making rules or deciding contested cases. These rules were to include “rules of practice before the agency and . . . forms and instructions.” Each agency was required, “so far as deemed practicable,” to “supplement its rules with descriptive statements of its procedures, which shall be kept current.” At the same time, MAPA’s definition section provided that, to be covered by it, an “agency” must be “authorized by law to make rules.” To give all these provisions some coherence, it must be assumed that this definitional condition was satisfied by the provision quoted above, which made MAPA itself an independent source of authority for each agency to promulgate substantive, interpretative, procedural, and practice rules—unless, of course, some other statute expressly denied the agency any rulemaking authority. In any event, no agency was authorized to take any action by authority of MAPA that was inconsistent with the statute it was implementing.

54. Minn. Stat. § 15.0411(3)(a) (1976); see text accompanying Appendix notes 28-34, infra.
57. Id.
58. Id.
59. Id. § 15.0412(2) (Supp. 1977).
60. Id.
61. Id. § 15.0412(1).
The 1975 amendments to MAPA changed all this. They altered section 15.0412(1) to provide that each agency "shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified in [MAPA] and only pursuant to authority delegated by law and in full compliance with its duties and obligations." In 1977, section 15.0412(1) was further amended to add that "[e]xcept as provided in [section 15.0412(3)]," MAPA "shall not be authority for an agency to adopt, amend, suspend or repeal rules.

Before 1977, too—and apart from MAPA—the head of any department or other state agency, except as otherwise expressly provided by law, was empowered to "prescribe rules and regulations, not inconsistent with law, for the conduct of his department or agency and other matters within the scope of the functions thereof." This provision, which was inconsistent with the intent of the 1975 amendments, seems to have been overlooked when the latter were enacted. In 1977, however, the provision was deleted. The existing comparable provision now empowers a Commissioner, except as otherwise expressly provided by law, to "prescribe procedures for the internal management of his department or agency to the extent that the procedures do not directly affect the rights of or procedure available to the public." Such internal procedures are explicitly excluded from the MAPA definition of "rule."

The only vestige of independent rulemaking authority remaining in MAPA after the 1975 and 1977 amendments, therefore, lies in section 15.0412(3), which requires that "[e]ach agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public." Section 15.0412(2) requires each agency to "prepare a description of its organization, stating the process whereby the public may obtain information or make submissions or requests," and provides that "the commissioner of administration shall annually publish these descriptions in the state register." Such a description is not specifically excluded from the

69. Minn. Stat. § 15.0411(3)(a) (1976); see text accompanying Appendix notes 28-34, infra.
70. Id. § 15.0412(3).
72. Id. The State Register is published by the Commissioner of Administration.
broad MAPA definition of "rule."73 If preparing an organizational
description under section 15.0412(2) amounts to rulemaking, then it
is rulemaking that MAPA does not authorize. This is so because the
only exception to the broad statement in 15.0412(1) which declares
that MAPA does not itself authorize rulemaking is 15.0412(3), not
15.0412(2). Some other statute, therefore, would have to be looked to
for agency authority to issue a description of its organization.

The express grant of authority in section 15.0412(3) was neces-
sary only on the assumption that, without it, an agency, whether or
not expressly empowered by a statute other than MAPA to make
substantive rules, would have no authority to make procedural or
practice rules unless that authority was expressly granted by some
other statute. In other words, it was assumed that such authority, as
well as the authority to issue statements governing the organization
of the agency, was not inherent in the power to administer the stat-
ute.

Given this assumption, problems were created by the 1975
amendments which broadened the MAPA definition of "rule,"74 the
issuance of which was no longer independently authorized by MAPA.
When this was done, there seems to have been no accompanying
review of the Minnesota Statutes to determine whether they ex-
pressly granted power to each agency to issue rules that are not sub-
stantive, that is, statements of general applicability and future effect
governing the agency's organization, its procedures, practice before

pursuant to Minnesota Statutes, section 15.051 (Supp. 1977). That provision requires
the State Register to contain: (1) all notices for hearings and the full text of the action
being proposed; (2) all rules and amendments, suspensions, or repeals of rules, pur-
suant to the provisions of MAPA; (3) executive orders issued by the Governor; and (4)
any other official notices which a state agency requests the Commissioner to publish
in the State Register, including notices of the date on which a new agency becomes
operational, the assumption of a new function by an existing state agency and the
appointment of Commissioners. The Commissioner is authorized to prescribe the form
and manner in which agencies must submit any material for public action in the State
Register and to withhold publication of any material not submitted according to the
prescribed form or procedures. The rules of the Commissioner governing the State
Register are set forth by the Department of Administration as part of the Minnesota
State Agency Rules, reproduced as part of the Minnesota Code of Agency Rules loose-
leaf series, assembling all agency regulations. This service is commonly referred to as
MCAR. See 9 MCAR § 3.

The Commissioner is directed to publish the State Register whenever he deems
necessary, but no material properly submitted to him for publication may remain
unpublished for more than ten working days. The Commissioner is expected to offer
the State Register for public sale at a price determined by him. He may also require
each agency to pay its proportionate cost of the State Register "unless other funds
are provided and are sufficient to cover" its costs. Each agency must pay for any
copies of the State Register it wishes to have.

74. See text accompanying notes 13-17 supra.
it, its interpretation of the statute entrusted to its administration, its enforcement policies, or any other of its policies.

It may be maintained that the 1975 and 1977 amendments to MAPA were intended only to bar agencies from relying upon MAPA as a source of authority to promulgate substantive rules and to require them to follow the prescribed rulemaking procedures when issuing any of the other statements falling within the expanded definition of "rule." In other words, the amendments were not intended to prohibit agencies from promulgating non-substantive rules unless this, too, was expressly authorized by some other statute. Such a reading of the 1975 and 1977 amendments would not advance the public interest served by the issuance of such statements and by public participation in their making.

Accordingly, it could be argued that every agency should be held to have inherent power under its constitutive statute to issue such statements, whether or not it has the requisite authority to promulgate substantive rules. This argument is untenable, however, since MAPA does not generally distinguish between substantive and non-substantive rules, except to the extent indicated in section 15.0412(3). There is also no evidence that such a general distinction was intended to be drawn by the drafters of the 1975 and 1977 amendments, or the Minnesota Legislature that enacted them. Quite the contrary may be inferred from the reasons given for the expansion of the definition of "rule."75

In my judgment, it was a mistake to remove from MAPA the general grant to all agencies of authority to make substantive rules not inconsistent with their constitutive statutes. This authority is necessary for effective administration and may be used in harmony with an adjudicatory power in ways that can benefit all those subject to the statutes. If the legislature, upon reconsideration, should refuse to make such a general grant, it should at least amend MAPA to authorize all agencies to adopt non-substantive rules.

IV. PRESCRIBED RULEMAKING PROCEDURES AND JUDICIAL REVIEW UNDER MAPA

A. AUTHORITY TO PROMULGATE RULES IMPLEMENTING MAPA'S PROCEDURAL REQUIREMENTS FOR RULEMAKING

As discussed above,76 section 15.0412(3) of MAPA authorizes each agency to "adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly

75. See text accompanying note 15 supra.
76. See text accompanying notes 64-70 supra.
affect the rights of or procedures available to the public.” Pursuant to this provision, each agency may promulgate rules implementing the rulemaking requirements of MAPA.

In addition to the promulgating agency itself, there are two other rulemakers that implement MAPA’s procedural requirements: the Chief Hearing Examiner and the Attorney General. The Chief Hearing Examiner, head of an independent State Office of Hearing Examiners, is empowered to “promulgate rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearings.” His rules are to include (1) “provisions relating to recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing”; and (2) “a procedure whereby the proposed final rule of an agency shall be reviewed by the chief hearing examiner to determine whether or not a new hearing is required because of substantial changes or failure of the agency to meet the requirements of section 15.0412, subdivision 4.” The rules promulgated by the Chief Hearing Examiner “shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict.”

Because the Attorney General must approve agency rules covered by MAPA as to form and legality before they can become effective, he, too, has issued rules implementing MAPA’s procedural requirements that he regards as necessary to fulfill his responsibilities. His authority to issue such procedural rules stems from section 15.0412(3) of MAPA, granting all covered agencies such general authority. In addition, MAPA expressly authorizes the Attorney General to issue rules prescribing the form and procedures for the submission, consideration, and disposition of petitions for the adoption of rules.

The Attorney General is an “agency” as defined by MAPA. His rulemaking, therefore, must also comply with MAPA’s prescribed procedures in which, as we shall see, hearing examiners play an important role. The Chief Hearing Examiner, too, is an “agency” as defined by MAPA, and his rules must also comply with the procedural requirements of MAPA and be approved by the Attorney Gen-

78. Id. § 15.052(4).
79. Id.
80. Id.
81. Id. § 15.0412(4).
82. See text accompanying notes 64-70 supra.
84. Id. § 15.0411(2). See text accompanying notes 9-11 supra.
85. Id.
eral as to form and legality before they can become effective. In this situation, cooperation among the agencies, the Chief Hearing Examiner, and the Attorney General is a necessity if conflict is to be avoided. MAPA, however, does not assure such cooperation.86

The Attorney General has not yet promulgated any rules regarding the "procedural conduct" of the public hearings on proposed rules. But his procedural rulemaking authority is not restricted in any way by MAPA. The "procedural conduct" of a public hearing—the principal province of the Chief Hearing Examiner—may raise issues as to "form and legality." The Attorney General might wish to issue rules in this area to indicate what criteria he will use in determining whether to approve or disapprove the rule finally adopted by the agency.

In fact, the existing rules of the Attorney General and the Chief Hearing Examiner cover some of the same subjects,87 but do not always impose the same requirements upon the agencies. It may be maintained that, in the event of conflict, the rules of the Chief Hearing Examiner should govern because they became effective only after approval by the Attorney General as to form and legality. The Attorney General should not approve such rules if they are in conflict with his own. Even so, problems of the application of the rules to particular situations would remain and the answers to these problems given by the Chief Hearing Examiner and the Attorney General may differ.

The fact remains that unless MAPA specifies the contrary in particular instances, the Attorney General is the final arbiter of the form and legality of rules that must be submitted to him for approval or disapproval.88 Eventually, of course, the courts may have to decide conflicts between the Chief Hearing Examiner and the Attorney General in the process of determining the validity of the rule.89

It is unfortunate that the potential for conflict is not eliminated by clear provisions in MAPA itself or in the rules of the Attorney General. It would be even better if MAPA left the issuance of procedural rules implementing its requirements to the agencies alone. In the eyes of the public, the legislature, and the Governor, the agencies are ultimately responsible for the substantive rules they promulgate. The agencies should have commensurate authority to prescribe the procedures governing their issuance. The agencies are also in the best position to know the kinds of procedures that would be most suited to handling the different matters subject to their rulemaking.

86. See, e.g., text accompanying notes 234-59 infra.
87. See, e.g., text accompanying notes 227-33 infra.
88. MINN. STAT. § 15.0412(4) (Supp. 1977).
89. See text accompanying note 251 infra.
B. INITIATION OF A RULEMAKING PROCEEDING

A rulemaking proceeding may begin in either of two ways under MAPA: the agency may initiate it either on its own motion or following a petition of any interested person requesting the adoption, suspension, amendment, or repeal of a rule. Such a petition must be "specific as to what action is requested and the need for the action." Section 15.0415 provides that within sixty days after it receives such a petition, the agency must make "a specific and detailed reply in writing as to its planned disposition of the request." If the agency states its intention to hold a public hearing on the subject of the request, it must comply with the procedures prescribed by MAPA for such a hearing and the steps that follow it.

MAPA's provisions regarding petitions for a rule are essentially the same as those in the Revised Model Act and IAPA. Under IAPA, an agency's failure, within sixty days, either "to deny the petition in writing on the merits, stating its reasons for the denial" or to "initiate rulemaking proceedings" is subject to judicial review. This is because IAPA subjects "final agency action" to judicial review and defines "agency action" to include "the performance of any agency duty or the failure to do so." The same conclusion would not be reached under MAPA or the Revised Model Act. MAPA, following the Revised Model Act, provides only that the validity of "any rule" or "final decision in a contested case" may be determined on judicial review. An agency's failure to conform to the requirements of section 15.0415 constitutes neither a "rule" nor a "final decision in a contested case." Nevertheless, the traditional writ of mandamus

90. MINN. STAT. § 15.0415 (1976).
91. Id.
92. Id.
93. Id. This provision should not be read as limiting the agency to only two responses to a petition for the adoption of a rule: either to deny the petition or state its intention to hold a public hearing on the subject of the request. For example, it would be a proper reply to a petition if the agency stated its intention to publish notice that it would seek to obtain information or opinions preparatory to proposing the adoption, amendment, suspension, or repeal of the rule, pursuant to the provisions of Minnesota Statutes, section 15.0412(6) (Supp. 1977). See text accompanying notes 115-20 infra.
94. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 6 (1961); IOWA CODE § 17A.7 (1973). The Model Act gives the agency thirty days to take action; IAPA, like MAPA, gives it sixty days.
95. IOWA CODE § 17A.7 (1977).
96. Id. § 17A.19.
97. Id. § 17A.2(9); see Bonfield, supra note 8, at 894-95.
99. MINN. STAT. § 15.0416 (1976).
100. Id. § 15.024(1).
may be available in Minnesota to compel the agency to make the reply called for by section 15.0415.\textsuperscript{101}

Professor Bonfield points out that IAPA makes judicial review available even if the agency denies the petition and gives written reasons for the denial, but one or more of its reasons “are improper or inadequate as a matter of law.”\textsuperscript{102} In such a case, the reviewing court may order the agency to reconsider its action.\textsuperscript{103} In this situation, it is likely that a reviewing court in Minnesota would also issue such an order in response to a petition for a writ of mandamus.

C. PRE-PROPOSAL CONSULTATION AND DOCUMENTATION

The 1975 amendments added the following provision to MAPA:

When an agency seeks to obtain information or opinions in preparing to propose the adoption, amendment, suspension, or repeal of a rule from sources outside of the agency, the agency shall publish notice of its action in the State Register\textsuperscript{104} and shall afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally. Such notice and any written material received by the agency shall become a part of the hearing record to be submitted to the attorney general under subdivision 4.\textsuperscript{105}

Neither the Revised Model Act nor IAPA contains such a provision. Its commendable purpose is to enlarge the scope of public participation in agency rulemaking in still another way. It was apparently feared that the process of agency consultation with affected interests prior to the public hearing required by MAPA\textsuperscript{106} might settle the agency’s views and minimize the significance of the hearing.\textsuperscript{107} The

\textsuperscript{101} Minnesota Statutes, section 15.0424 (1976), regarding the judicial review of contested cases, provides that nothing therein “shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo provided by law now or hereafter enacted.” There is no similar provision in section 15.0416 regarding the judicial review of rules. But there is no reason to read MAPA as foreclosing resort to the prerogative writs in situations in which they traditionally apply. See note 55 supra and accompanying text.

\textsuperscript{102} Bonfield, supra note 8, at 895.

\textsuperscript{103} Id.

\textsuperscript{104} See note 72 supra.

\textsuperscript{105} MINN. STAT. § 15.0412(6) (Supp. 1977). In addition, Act of March 22, 1978, ch. 510, § 4, 1978 Minn. Laws 127, provides that “all proposed rules of any state agency which will have their primary effect on Spanish-speaking people shall be submitted to the Council [on Affairs of Spanish-speaking People, created by ch. 510] for review and recommendation at least 15 days prior to . . . initial publication in the State Register.” If a proposed rule will be submitted to the Council, the agency must comply simultaneously with the requirements of section 15.0412(6).

\textsuperscript{106} MINN. STAT. § 15.0412(4) (Supp. 1977).

\textsuperscript{107} J. Nobles & T. Triplett, A Staff Report to the House and Senate Governmental Operations Committees on the Minnesota Administrative Procedure Act and
solution sought was not to prohibit such consultations, which were useful because they could go far to "resolve potential debilitating conflicts," but to try to bring the general public into the process of prehearing consultation.

It is questionable, however, whether the means chosen are best suited to achieve these ends. In the first place, it is not clear under what circumstances an agency must publish notice that it is seeking "to obtain information or opinions in preparing to propose the adoption, amendment, suspension, or repeal of a rule from sources outside of the agency." Yet courts reviewing rules are directed to declare invalid any rule that was adopted "without compliance with statutory rulemaking procedures." A rule may thus be declared invalid if an agency obtains such information or opinions without having published notice of its intent to seek them.

Administrative agencies have been created and delegated authority to promulgate rules because, in part, they can be expected to deal with particular subject matters on a day-to-day basis that puts them in constant communication with the individuals and groups affected or potentially affected by the agencies' rules or proposals. This ability to engage in ex parte, pre-hearing conversations, conferences and investigations is essential if the agencies are to perform their tasks fairly and effectively. To do their jobs satisfactorily and comply with the pre-proposal notice provision of section 15.0412(6), the agencies would need to publish standing notices in the State Register stating that they are constantly seeking information or opinions that might lead them to propose the adoption, amendment, suspension, or repeal of rules. Such notices, of course, would be of little value.

After publishing the required notice, the agency must "afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally." Interested persons must decide whether to take this opportunity seriously and duplicate the presentations they will have the chance to make at the public hearing on any rule actually proposed. It appears that MAPA now requires that a FAPA-like notice-and-comment procedure precede an on-the-record rulemaking proceeding. As a result, the cost to interested persons wishing to participate in the two stages of rulemaking will increase. The increased cost, in turn, may inhibit participation.


108. Id.
110. Id. § 15.0412(6).
111. For a description of FAPA's notice-and-comment rulemaking procedure, see Auerbach, supra note 6, at 21-23.
MAPA now also provides that the published notice "and any written material received by the agency shall become a part of the hearing record to be submitted to the attorney general" for his review of the rule as to form and legality. 112 This provision was suggested by the Attorney General. 113

The rules of the Chief Hearing Examiner require the agency to file copies of such written materials with him or his designee at least 25 days prior to the opening of the public hearing. 114 This is intended to afford interested persons the opportunity to examine the materials prior to the hearing. Moreover, the rules require the agency at the public hearing to introduce the materials for the record. 115 This is proper because all interested persons should have an opportunity to comment on materials that the Attorney General may take into consideration in the course of his review. At the same time, participants in the public hearing may feel compelled to comment on these materials even though they may not be significant or even relevant.

The requirement that these written materials become part of the hearing record is of dubious value for another reason. A good deal of the benefit of pre-hearing consultations comes precisely from making them ex parte and off-the-record. Persons and groups interested in a contemplated rule may be willing to indicate to the agency, informally and off-the-record, what they are prepared to live with, but may not be willing to do so in writing for the record.

A possible consequence may be that no written material of significance will be received by the agency in the course of the notice and informal comment stage. The oral expression of views "on the subject of concern" need not be reduced to writing by the agency officials or staff who hear them, nor made a part of the hearing record. This is an unwise distinction because, obviously, agency representatives may be influenced as much by oral as by written communications of interested persons. It would be better to treat oral and written comments alike by not requiring written materials submitted in the course of the notice-and-comment stage to be made part of the hearing record.

It would be even better to repeal section 15.0412(6) of MAPA. The aim of assuring meaningful public participation during all phases of agency rulemaking could be accomplished more effectively by requiring each agency to create standing advisory committees that would represent the broad interests affected by a particular agency's work. The agencies should then be required to consult with their advisory committees before instituting rulemaking proceedings, but

113. See J. Nobles & T. Triplett, supra note 107, at 22.
114. 9 MCAR § 2.105(G).
115. Id. § 2.106(F).
they should not be precluded from consulting with other persons and groups as well. This means of consultation would do more to enlarge meaningful public participation in agency rulemaking than the pre-proposal notice provision of section 15.0412(6).

D. Notice of Proposed Rulemaking

No rule may be adopted by any agency unless it "first holds a public hearing thereon, affording all affected interests an opportunity to participate . . . ." The agency must give "notice of its intention to hold such a hearing at least thirty days prior to the date set for the hearing . . . . " The notice must be published in the State Register and sent by mail to representatives of associations or other interested groups or persons who have registered their names with the Secretary of State for that purpose. The notice in the State Register must include the full text of the rule proposed for adoption, and the agency must make available at least one free copy of the proposed rule to any person requesting it. If the rule will require the expenditure of public moneys by local public bodies in the state and if the agency estimates that the total cost to all local bodies to implement the rule will exceed $100,000 in either of the two years immediately following adoption of the rule, then the notice must be accompanied by a written statement giving the agency's reasonable estimate of the total cost for the two years.

Both the Chief Hearing Examiner and the Attorney General have issued rules imposing upon the agencies detailed requirements implementing these statutory notice provisions. Although these two sets

118. Id.
119. Id.
120. If the Chief Hearing Examiner approves, the agency may incorporate by reference provisions of federal law or rules, or other materials from sources that he determines are conveniently available for viewing, copying, and acquisition by interested persons. Id. The Chief Hearing Examiner may not, however, approve incorporation by reference of materials that are less than 3000 words in length or would require less than five pages of publication in the State Register. Id.
121. Id.
122. Id. § 15.0412(7).
123. Compare 9 MCAR § 2.101-.112 (Office of Hearing Examiners' rulemaking procedures) with Minn. Reg. Atty. Gen. 301-306, 401-421, 1 MCAR § 1.301-.306, .401-.21 (Attorney General's rulemaking procedures). The rules of the Attorney General were promulgated prior to the enactment of MAPA's 1975 amendments. See note 60 supra. The Attorney General instituted a public proceeding in 1976 to amend these rules, but no amendments have yet been made.
of requirements overlap for the most part, there are some not insignificant variations between them. Since MAPA specifically directs the hearing examiner to conduct only hearings for which proper notice has been given, it would seem that the Chief Hearing Officer may impose his will in case of conflicting rules. He may refuse to assign a hearing examiner to conduct a hearing for which notice was not given in accordance with his rules. This would be an unseemly way of resolving differences, which the general public might not appreciate. It could also induce an agency to petition a court for a writ of mandamus directed against the Chief Hearing Examiner in order to decide the issue of authority. The agency might avoid possible conflict by complying with the notice requirements in the rules of both the Chief Hearing Examiner and the Attorney General. This is possible and would not be unduly burdensome.

MAPA's notice provisions are similar to those contained in the Revised Model Act, except that the latter requires only twenty, not

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Attorney General Regulation 302(d) requires that the Notice of Hearing contain the following information and statements:

1. When and where the hearing is to be held.
2. That all interested parties will have an opportunity to be heard.
3. A statement or description of the subjects and issues involved. If the proposed rules themselves are not included with the notice then the notice must clearly show the nature and extent of the proposed rules.
4. The manner in which interested parties may present their views.


As indicated above, MAPA now requires the notice to include the full text of the rule proposed for adoption. MINN. STAT. § 15.0412(4) (Supp. 1977); see text accompanying note 120 supra.

The rules of the Chief Hearing Examiner cover the same ground as those of the Attorney General, but differ significantly in some respects. Chief Hearing Examiner's Rule 102(B) requires the Notice of Hearing to contain the following, inter alia:

1. A proposed time, date and place for the hearing to be held.
2. A statement that all interested or affected persons will have an opportunity to participate.
3. A statement or a description of the subjects and issues involved. If the proposed rules themselves are not included with the Notice of Hearing, then the Notice must clearly indicate the nature and extent of the proposed rules and a statement shall be included announcing the availability and the means of obtaining upon request at least one free copy of the proposed rules.
4. A citation to the agency's statutory authority to promulgate the proposed rules.
5. A statement describing the manner in which interested persons may present their views.
6. A statement advising interested persons that lobbyists must register with the State Ethical Practices Board, which statement shall contain the statutory definition of a lobbyist and indicate that questions should be directed to the Board, giving the address and telephone number thereof . . . .

9 MCAR § 2.102(b).

124. MINN. STAT. § 15.052(3) (1976).
125. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1961).
thirty days' notice and does not require the notice to include the full text of the proposed rule. IAPA requires 35 days' notice to be given only by publication in the biweekly Iowa Administrative Code. It, too, does not require the notice to include the full text of the proposed rule.

Professor Bonfield comments that an agency under IAPA may be expected to publish the full text of a proposed rule if it has such a text, because such publication would eliminate any possible question about the adequacy of the notice. IAPA did not impose the requirement found in MAPA, apparently, because an agency may not have fixed the precise terms of the rule prior to the public proceedings or the proposed rule may be so long as to make publication too cumbersome or too expensive. In this respect, MAPA's requirements seem to be too rigid. Yet they are indispensable in light of the role of the Office of Hearing Examiners in rulemaking, which will be considered next. In all other respects, MAPA's notice requirements seem to be satisfactory.

E. ROLE OF THE HEARING EXAMINERS

MAPA gives the independent Office of Hearing Examiners, created by the 1975 amendments, a significant role in the process of agency rulemaking. There is nothing like it in the Revised Model Act or IAPA. FAPA, however, gives administrative law judges important functions in certain formal, or on-the-record, rulemaking proceedings.

All agency hearings that are required to be held under MAPA must be conducted by a hearing examiner assigned by the Chief Hearing Examiner. The Chief Hearing Examiner, "who shall be learned in the law," is appointed for a six-year term by the Governor with the advice and consent of the Senate, and may be removed only for cause. The Chief Hearing Examiner appoints the hearing examiners needed to discharge the responsibilities of the office. They must be "learned in the law" to be assigned to contested case hearings but, otherwise, they "shall have demonstrated knowledge of administrative procedures and shall be free of any political or economic association that would impair their ability to function officially in a fair and objective manner." Because ninety percent of

127. Bonfield, supra note 8, at 851.
128. Id.
129. See Auerbach, supra note 6, at 18-21.
131. Id. § 15.052(1).
132. Id.
133. Id. §§ 15.052(1), (3).
the work of the hearing examiners is devoted to contested case hearings and only ten percent to public hearings on proposed rules, all the hearing examiners are lawyers.\textsuperscript{134} 

In assigning hearing examiners to particular proceedings, the Chief Hearing Examiner must “attempt to utilize personnel having expertise in the subject to be dealt with in the hearing.”\textsuperscript{135} The following duties are imposed upon the hearing examiner conducting the hearing:

(1) advise an agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests; (2) conduct only hearings for which proper notice has been given; (3) see to it that all hearings are conducted in a fair and impartial manner; and (4) make a report on each proposed agency action in which the hearing examiner functioned in an official capacity, stating his findings of fact and his conclusions and recommendations, taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant substantive and procedural requirements of law or rule, and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.\textsuperscript{136}

\section*{F. Nature of the Public Hearing}

The public hearing is the principal means by which all interests that may be affected by the proposed rule must be afforded an opportunity to participate in its making. MAPA, itself, does not set out in

\textsuperscript{134} There are, currently, twelve hearing examiners employed on a full-time basis in the office. The hearing examiners are placed in the classified service of the state; the Chief Hearing Examiner, in the unclassified service. \textit{Id.} § 15.052(1). There are three classes of hearing examiners. One hearing examiner is in class 1, with a salary range of $17,539 to $21,924; eight are in class 2, with a salary range of $21,924 to $29,629; three, with supervisory responsibilities, are in class 3, with a salary range of $25,432 to $31,926. The Chief Hearing Examiner is paid $36,000 a year. The Chief Hearing Examiner is also authorized to contract with qualified individuals to serve as hearing examiners on specific assignments at a rate not to exceed $150 per day, if regularly appointed hearing examiners are not available. \textit{Id.} § 15.052(2). Twelve such individuals are under contract for the current fiscal year. The Chief Hearing Examiner, in consultation with the Commissioner of Administration, may assess agencies for the cost of services rendered to them in the conduct of hearings. \textit{Id.} § 15.052(6). The agencies are directed to budget for such assessments. \textit{Id.}

For the fiscal year, July 1, 1977 through June 30, 1978, state agencies were appropriated approximately $1.3 million to pay for the services of the Office of Hearing Examiners. The office operates on a revolving fund, billing each agency for the services rendered it. For the fiscal year ending June 30, 1978, the agencies were billed a total of $850,305. This information was supplied by Duane R. Harves, Chief Hearing Examiner. I wish to thank Mr. Harves for his cooperation and assistance.

\textsuperscript{135} \textit{Minn. Stat.} § 15.052(3) (1976).

\textsuperscript{136} \textit{Id.}
detail how the affected interests shall take part. It gives only a few guidelines for conducting the hearing. It refers repeatedly to the making of a "hearing record." An audiomagnetic recording device must be used to keep the record, unless the Chief Hearing Examiner determines that the use of a court reporter is more appropriate. If the agency, the Chief Hearing Examiner, or the Attorney General requests, the hearing examiner must cause a transcript of the hearing to be prepared.

At the hearing, the agency must "make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption and fulfilling any relevant substantive or procedural requirements imposed on the agency by law or rule." The hearing examiner is directed to "see to it that all hearings are conducted in a fair and impartial manner. . . ." To this end, MAPA also gives the Chief Hearing Examiner the power to issue subpoenas.

The hearing examiner must allow written material to be submitted and recorded in the "hearing record" for five working days or, on order of the hearing examiner, up to twenty calendar days after the public hearing ends. The hearing record is to be closed upon the expiration of the time fixed for the receipt of such written material.

Within thirty days after the close of the hearing record, the hearing examiner who conducted the hearing must complete the required report. The report must be available to all affected persons upon

140. id.
142. minn. stat. § 15.052(4) (supp. 1977). The Chief Hearing Examiner upon his own initiative or upon written request of an interested party . . . may issue a subpoena for the attendance of a witness or the production of such books, papers, records or other documents as are material to the matter being heard. The subpoena shall be enforceable through the district court in the district in which the subpoena is issued.

id.

While this language seems most suited to a contested case proceeding, it is not so limited and would apply to a rulemaking proceeding as well. The Chief Hearing Examiner has pointed out, however, that no party has yet requested a subpoena for rulemaking. Letter from Duane R. Harves, Chief Hearing Examiner, to Carl A. Auerbach (oct. 26, 1978) [hereinafter cited as Harves Letter].

143. minn. stat. § 15.0412(4).
144. id.
145. id. Upon written request of the agency and the hearing examiner, the Chief Hearing Examiner may order an extension of the time within which the hearing examiner must complete the report. An extension may not be granted if the Chief Hearing Examiner determines that it "would prohibit a rule from being adopted or becoming effective until after a date for adoption or effectiveness as required by statute." id.
request for at least five working days before the agency takes any final action on the rules." The agency's final rule must be submitted to the Chief Hearing Examiner so that he may determine whether a new public hearing is required because the final rule is "substantially different" from the proposed rule or because the agency failed to comply with MAPA's rulemaking procedures. Then, the final agency rule must be submitted "with the complete hearing record" to the Attorney General for review as to form and legality. The agency must give notice to all persons who requested to be informed that the hearing record has been submitted to the Attorney General.

These general guidelines set out in MAPA are implemented in considerable detail by the rules of the Chief Hearing Examiner and the Attorney General. The rules of both require that the agency's notice of the public hearing contain a statement describing the manner in which interested parties may present their views. The rules of the Attorney General also require that the hearing record "shall show that all interested parties were afforded an opportunity to speak and otherwise present evidence to the agency."

The Chief Hearing Examiner's rules go further. They require that the agency's notice of the public hearing contain a separate paragraph reading as follows:

Notice is hereby given that 25 days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Hearing Examiners. This Statement of Need and Reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

At least 25 days prior to the opening of the public hearing, the agency must file with the Chief Hearing Examiner copies of the Statement of Need and Reasonableness, as well as of all materials received during the notice-and-informal comment process. The Chief Hearing Examiner has specified that the Statement of Need and Reasonableness must contain

146. Id.
147. Id. § 15.052(4).
148. Id. § 15.0412(4).
149. Id.
150. See note 123 supra.
151. 9 MCAR § 2.102(C)(5); 1 MCAR § 1.302(d)(4).
153. 9 MCAR § 2.102(C)(9).
154. Id. § 2.105(B),(G).
a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing, and a list of any expert witnesses to be called to testify on behalf of the agency, together with a brief summary of the expert opinion to be elicited. The Statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The Statement shall be prepared with sufficient specificity so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the rule/rules as proposed. . . . 155

The rules of the Attorney General do not contain these requirements. They state only that when an agency rule is submitted to the Attorney General for review as to form and legality, the agency shall also submit, inter alia, (1) a Statement of Need containing a recitation of the reasons supporting a finding of need for the rules; 156 and (2) findings of fact supporting the reasons or need for the rules adopted. 157 If the agency is acting pursuant to a petition for a rule and the petition sets forth reasons for the rule, the agency may substitute the petition for the Statement of Need. 158

It cannot be said that the rules of the Chief Hearing Examiner and those of the Attorney General conflict in these respects, because it is possible for the agencies to comply with both sets of rules. But

155. Id. § 2.104. The rule goes on to provide:
Presentation of evidence or testimony (other than bona fide rebuttal) not summarized in the Statement of Need and Reasonableness may result in the Hearing Examiner, upon proper motion made at the hearing by any interested person, recessing the hearing to a future date in order to allow all interested persons an opportunity to prepare testimony or evidence in opposition to such newly presented evidence or testimony, which recessing shall be for a period not to exceed 25 calendar days, unless the 25th day is a Saturday, Sunday or legal holiday, in which case, the next succeeding working day shall be the maximum date for the resumed hearing.

If the agency so desires, the Statement of Need and Reasonableness may contain the verbatim affirmative presentation by the agency which may then be either read at the hearing or, if all persons appearing at the hearing have had an opportunity to review the Statement, may be introduced as an exhibit into the record as though read. In such instance, agency personnel or other persons thoroughly familiar with the rules and the agency's Statement shall be available at the hearing for questioning by the Hearing Examiner and other interested persons.

156. Minn. Reg. Atty. Gen. 302(g), 1 MCAR § 1.302(g).
158. Minn. Reg. Atty. Gen. 302(g), 1 MCAR § 1.302(g).
obviously the views of these officials differ greatly as to what is proper procedure. There is a great difference between requiring the agency to submit a Statement of Need and Reasonableness in the detail called for by the Chief Hearing Examiner before the public hearing begins, and submitting such a statement after the public hearing ends, which is all that the Attorney General requires. The views as to what the statement should contain also differ. Yet the Attorney General approved the rules of the Chief Hearing Examiner, and MAPA, therefore, makes them binding upon the agencies.

The rules of the Attorney General do not deal with the conduct of the public hearing itself, except to require the transcript of the hearing to show that during its course, the agency recited the reasons why the proposed rules are needed and that the "record" supports the rule as adopted. The conduct of the hearing is a principal subject of the Chief Hearing Examiner's rules. They provide, inter alia:

E. The agency shall make available copies of the proposed rule at the hearing.
F. The agency shall introduce its exhibits relevant to the proposed rule including written material received prior to the hearing.
G. The agency shall make its affirmative presentation of facts showing the need for and the reasonableness of the proposed rule and shall present any other evidence it deems necessary to fulfill all relevant, substantive and procedural, statutory or regulatory requirements.
H. Interested persons shall be given an opportunity to address questions to the agency representatives or witnesses.
I. Interested persons shall be given an opportunity to be heard on the proposed rule and/or to present written evidence. All interested persons submitting oral statements are subject to questioning by representatives of the agency.
J. The Hearing Examiner may question all persons, including the agency representatives.
K. The agency may present any further evidence that it deems appropriate in response to statements made by interested persons. Upon such presentation by the agency, interested persons may respond thereto.
L. Consistent with law, the Hearing Examiner shall be authorized to do all things necessary and proper to the performance of the foregoing and to promote justice, fairness and economy, including but not limited to, the power to:
   1. Preside at the hearing;
   2. Administer oaths or affirmations when he deems it appropriate;
   3. Hear and rule on objections and motions;

159. Minn. Reg. Atty. Gen. 303(b)-(c), 1 MCAR § 1.303(b)-(c).
4. Question witnesses where he deems it necessary to make a complete record;
5. Rule on the admissibility of evidence and strike from the record objectionable evidence.\textsuperscript{160}

The Chief Hearing Examiner’s rules also paraphrase the statutory provision that the hearing examiner must allow written material to be submitted and recorded in the “hearing record” for \textit{five working days} or, on order of the hearing examiner, for a longer period \textit{not to exceed twenty calendar days} after the public hearing ends.\textsuperscript{161} But the Attorney General’s rules require that the hearing record “shall show that a reasonable time period, \textit{at least 20 days}, was allowed subsequent to the hearing for interested parties to submit briefs or other written material relative to the proposed rules” and that the “time to be allowed must have been stated at the hearing.”\textsuperscript{162}

Here the potential for conflict exists, for it is conceivable that a hearing examiner may refuse to order an extension of as much as twenty days. If MAPA is read as limiting the extension period to no more than twenty days and giving the hearing examiner overriding authority to order an extension of less than twenty days, the Attorney General’s rule is ultra vires. But it is doubtful that the legislature intended to circumscribe the Attorney General’s authority to state the conditions he would exact in reviewing the final rule as to form and legality. Perplexing, too, is the significance to be attached to the Attorney General’s approval of the Chief Hearing Examiner’s rules in this respect.

The rules of the Attorney General require that a transcript be prepared of all hearings and that a copy of the transcript and all exhibits accompany any rule submitted to the Attorney General for review.\textsuperscript{163} The Attorney General and the Chief Hearing Examiner have both specified what shall constitute the “record.”\textsuperscript{164} While not identical, these requirements are not in conflict. Taken together, they specify that the record include: (1) the rule that the agency requests the Attorney General to approve; (2) the petition for a rule, if any; (3) the written materials, if any, submitted during the notice-and-informal comment process; (4) the proposed rule; (5) the Notice of Hearing; (6) the Order of Hearing;\textsuperscript{165} (7) the affidavit of receipt of the

\textsuperscript{160} 9 MCAR § 2.106.
\textsuperscript{161} Id. § 2.106(B).
\textsuperscript{162} Minn. Reg. Atty. Gen. 303(e), 1 MCAR § 1.303(e) (emphasis added).
\textsuperscript{163} Minn. Reg. Atty. Gen. 303(a), 1 MCAR § 1.303(a).
\textsuperscript{165} The Order of Hearing must be issued by the agency and filed with the Chief Hearing Examiner prior to the public hearing. 9 MCAR § 2.103. In slightly differing language, the Attorney General and Chief Hearing Examiner rules require that the Order of Hearing contain (a) the proposed time, date and place for the hearing to be held; (b) a statement that the Notice of Hearing will be published in the State Register
Secretary of State’s list, showing that the list was obtained from the Secretary of State within a reasonable period of time before the Notice of Hearing was mailed; (8) the affidavit of mailing the notice to all persons on the Secretary of State’s list; (9) the Statement of Need and Reasonableness; (10) all written comments or other evidence received prior to, during or subsequent to the hearing, but prior to the close of the record; (11) the transcript of the hearing; and (12) the agency’s findings of fact; and (13) the order adopting the rule which shall recite (a) the time and place of the hearing; (b) that proper notice was served; (c) that all parties were given the opportunity to be heard; and (d) that the rule adopted is based on the record, applicable statutes, and an existing need. Neither the Attorney General nor the Chief Hearing Examiner has made the report of the hearing examiner a part of the “record.”

Putting together the provisions of MAPA and the implementing rules of the Attorney General and Chief Hearing Examiner, it seems clear that the public hearing mandated is an “on-the-record” proceeding, in the sense that the agency is expected to adopt a rule only if it can be supported by the oral and written evidence introduced at the public hearing. Requests for the opportunity to make oral presentations are to be honored. Although there is no explicit requirement that the public hearing be a “trial-type” or “evidentiary” hearing, in the sense that all the oral and written evidence must be presented by witnesses subject to cross-examination by all other participants in the hearing, it may easily become one. All the participants will be apprised of all the data on which the agency is relying to support the rule. They will have the opportunity to submit their own data in support of or in refutation of the agency’s position and to “question” the agency’s representatives and witnesses. In turn, they will be subjected to questioning by the agency’s representatives and by the hearing examiner, who may also question the agency’s representatives and witnesses. But they may not be able to question the representatives of other affected interests.

and be given to all persons who have registered with the Secretary of State for that purpose; and (c) the signature of the agency official authorized to order a hearing. Minn. Reg. Atty. Gen. 302(c), 1 MCAR § 1.302(c); 9 MCAR § 2.102(B).

166. The Chief Hearing Examiner's Rule 107, 9 MCAR § 2.107, ignores the fact that Attorney General Regulation 303(a), 1 MCAR § 1.303(a), requires a transcript to be prepared of every public hearing on a proposed rule. It provides that if a transcript of the proceedings has been prepared, it shall be part of the record and copies shall be available to persons requesting them at a charge fixed by the Chief Hearing Examiner. Otherwise, Rule 107 makes a tape recording of the hearing part of the record, unless the Chief Hearing Examiner determines that the use of a reporter is more appropriate.

MAPA requires a transcript only if the agency, the Chief Hearing Examiner, or the Attorney General requests it. By his rule, however, the Attorney General has requested one in every case.
The Chief Hearing Examiner’s rules, however, empower the hearing examiner conducting the hearing “to do all things necessary and proper . . . to promote justice, fairness and economy . . . .” 167 This is a broad grant of power which is stated to include the authority to administer oaths and affirmations, to hear and rule on objections and motions, to rule on the admissibility of evidence, and to strike objectionable evidence from the record. Pursuant to this authority, the hearing examiner may decide, in a particular situation, to conduct a “trial-type” hearing, to permit questioning to become cross-examination, and even to allow the representatives of affected interests favoring and opposing the rule to question and cross-examine each other. 168

Neither the Revised Model Act nor IAPA provides for the kind of “hearing” that takes place under MAPA. The Revised Model Act prescribes a hearing at which all interested persons will be afforded a “reasonable opportunity to submit data, views, or arguments, orally or in writing.” 169 Opportunity for “oral hearing” must be granted only if a “substantive rule” is proposed by the agency and such opportunity is requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members. 170 No mention is made of a “hearing record.” The agency need make no affirmative presentation of facts or present any Statement of Need and Reasonableness. It is required to “consider fully all written and oral submissions respecting the proposed rule”; if it adopts the rule and is so requested by an interested person, it must “issue a concise statement of the principal reasons for and against its adoption,” incorporating therein its reasons for overruling the considerations urged against its adoption. 171

IAPA is based upon the Revised Model Act in these respects but differs from it in two important ways. First, it mandates oral proceedings when procedural, as well as substantive, rules are under consid-

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167. 9 MCAR § 2.106(L).
168. For an example of public hearings on a set of proposed rules that had many features of a “trial-type” proceeding, see In re Pollution Control Agency’s Proposed Adoption of Rules Governing the Identification, Labelling, Classification, Storage, Collection, Transportation and Disposal of Hazardous Wastes and of Amendments to Minnesota Regulations SW 1, 2, 3, 4, 6 and 7, No. PCA-78-003-WS (Minn. Office Hearing Examiners, May 25, 1978) (Report of Hearing Examiner) [hereinafter cited as In re Hazardous Wastes].

The hearing examiner, as a routine part of the opening of a rulemaking hearing, states that “speakers may agree to be questioned by other members of the public.” The Chief Hearing Examiner reports that to the best of his knowledge, no participant has ever refused to answer questions from another participant. Harves Letter, supra note 142.

169. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1961).
170. Id.
171. Id.
eration.\textsuperscript{172} Professor Bonfield justifies this departure from the Revised Model Act on the ground that "some procedural rules are so important that any wholesale exclusion of them from the opportunity to make oral presentations thereon . . . is unjustified."\textsuperscript{173}

Second, whereas the Revised Model Act describes the oral proceedings that may be required as an "oral hearing," IAPA describes them as "oral presentations."\textsuperscript{174} Professor Bonfield explains that the distinction is important. The term "oral presentation," rather than "oral hearing," was used in order to assure that IAPA would not be read as contemplating a "trial-type" or "evidentiary" hearing, with "rights to confrontation, cross examination, and the making of a formal record on the exclusive basis of which the validity of the rule will later stand or fall in any judicial proceeding."\textsuperscript{175} Instead, IAPA envisages "informal rulemaking of the notice and comment variety where the comment is usually made in writing and sometimes orally," that is, when interested persons think their views can be communicated more effectively orally than in writing.\textsuperscript{176}

Professor Bonfield's fear of the Revised Model Act's provision may be exaggerated since the Supreme Court has held that the requirement that a rule be made only after a "hearing" does not by itself command a "trial-type" or "evidentiary" on-the-record proceeding.\textsuperscript{177} One would have good cause to fear that MAPA provisions and implementing rules of the Attorney General and Chief Hearing Examiner may be read as requiring an on-the-record, trial-type hearing.

G. REPORT OF THE HEARING EXAMINER

Within thirty days after the close of the hearing record (or longer, if the Chief Hearing Examiner so orders), the hearing examiner who conducted the public hearing must write a report.\textsuperscript{178} The report must state the hearing examiner's findings of fact and . . . conclusions and recommendations, taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relev-

\begin{itemize}
\item 173. Bonfield, supra note 8, at 853.
\item 175. Bonfield, supra note 8, at 853.
\item 176. Id. Formal rulemaking "on a record" is required in Iowa only if a statute other than IAPA specifically commands it. Id.
\item 177. IAPA authorizes the agency to issue rules governing the conduct of the oral presentations. \textit{Iowa Code} § 17A.4(1)(b) (1977). If it wishes, the agency may, by rule, provide for cross-examination and a verbatim transcript. Bonfield, supra note 8, at 854.
\end{itemize}
vant substantive and procedural requirements of law or rule, and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.\textsuperscript{179}

By reading the reports of hearing examiners and discussing with them their role in the rulemaking process, it becomes evident that they are adopting the attitude and approaches of a judge reviewing agency rules.\textsuperscript{180} The provisions of MAPA and the rules of the Chief Hearing Examiner encourage this posture. As already discussed, the notice of the public hearing must include “the full text of the rule proposed for adoption.”\textsuperscript{181} Twenty-five days prior to the hearing, the agency must make available to the public a detailed Statement of Need and Reasonableness summarizing all the evidence and argument that it will rely upon to justify the proposed rule.\textsuperscript{182} At the hearing, the agency must “make an affirmative presentation of facts establishing the need for and reasonableness of” the proposed rule.\textsuperscript{183} In short, the agency is expected to have a settled position on the proposed rule even before the public hearing starts, to assume the burden of justifying the proposed rule at the hearing and to rebut the evidence and argument presented by participants who oppose the rule. The hearing is thus seen as not only “on-the-record,” but as an adversary proceeding over which the independent hearing examiner will preside and express impartial judgment—as would a judge called upon to determine the validity of the rule in a review proceeding.

This is a far cry from the principal purpose sought to be achieved by public participation in the rulemaking process. On the federal level and in other states, public participation is viewed not as a means of trying a case, but of enlightening the agency and protecting affected interests, as well as the agency, against action or inaction which has been shown to be uninformed or unwise.\textsuperscript{184} If this purpose is to be accomplished, the agency’s representatives should come to the public hearing with minds open to the information and views that will be communicated to them by the public. This is difficult for the agency representatives to do under MAPA, which expects them to justify the agency action in the eyes of the hearing examiner who comes between them and the participants in the hearing.

\textsuperscript{179} MINN. STAT. § 15.052(3) (1976).
\textsuperscript{180} In the preparation of this Article, a study was made of hearing examiner reports, and interviews were carried on with four hearing examiners. The author was assisted in this study and interviewing by Mary L. Josephson, J.D. 1978, University of Minnesota.
\textsuperscript{181} MINN. STAT. § 15.0412(4) (Supp. 1977).
\textsuperscript{182} 9 MCAR § 2.102(C)(9).
\textsuperscript{183} MINN. STAT. § 15.0412(4) (Supp. 1977); 9 MCAR § 2.106(G).
\textsuperscript{184} See Auerbach, supra note 6, at 17. See also Bonfield, supra note 8, at 845-48.
Under these circumstances, it is not surprising that the hearing examiners think of themselves as administrative law judges and serve to judicialize the rulemaking process. It is difficult to see how they can take any other position. They are given no other role under MAPA; they are not agency employees; they are not ultimately responsible for the rules promulgated; and the principal statutory standard that they are asked to follow in arriving at their conclusions and recommendations is the "reasonableness" of the agency's proposals. They are not asked to put themselves in the place of the agency heads and recommend which of a number of ways of solving a particular problem is the preferred alternative.

Yet, as in the case of judicial review, "reasonableness" is an elastic concept, and it cannot be said that hearing examiners never reach conclusions nor make recommendations which reflect their own independent judgments. In some cases, hearing examiners have expressed independent judgments even without invoking the standard of "reasonableness." They often also undertake to interpret applicable statutory provisions independently.

185. MINN. STAT. § 15.052(3) (1976).

186. See, e.g., In re the Proposed Adoption of Rules by the Insurance Division [of the Minnesota Department of Commerce] Relating to Unfair Discrimination Practices Based Upon Sex or Marital Status, No. Ins.-77-003-SM (Minn. Office Hearing Examiners, Dec. 16, 1976) (Hearing Examiner's Report). Hearing Examiner Steve M. Mihalchick concluded that the proposed rule to eliminate sex discrimination in extending insurance coverage was "authorized, necessary and reasonable, and, thus, proper for adoption." Id. at 19. Nevertheless, he recommended that the rule not be adopted because it did not also deal with sex discrimination in premium rates. The Hearing Examiner regarded the latter as inseparable from the availability of coverage because rates could be fixed so high as to make coverage "effectively unavailable." Id.

Commissioner of Insurance Berton W. Heaton rejected this recommendation because "there are specific rating laws which prohibit differentiation of rates among like risks" and it "would appear highly unlikely that discriminatory prohibitive rates such as the Hearing Examiner suggests could be exacted without detection and subsequent action by the Insurance Division under the existing insurance statutes." In re Proposed Adoption of Rules by the Insurance Division Relating to Unfair Discrimination Practices Based Upon Sex or Marital Status, No. Ins.-77-003-SM (Minn. Office Hearing Examiners, Feb. 18, 1977) (Findings of Fact of Commissioner of Insurance).

The rule in question never became effective because the Attorney General concluded that the Insurance Division had no statutory authority to promulgate it.

187. See, e.g., In re Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Large Oil Storage Facilities and Large Coal Storage Facilities for Energy Users, Nos. EA-801-891 & EA-76-002-WS (Minn. Office Hearing Examiners, Jan. 18, 1977) (Report of the Hearing Examiner) [hereinafter cited as In re Energy Users]. Hearing Examiner William Seltzer concluded that the Energy Agency had misconstrued the definition of "Large Energy Facilities" in section 116H.02(5) (1976) of the Minnesota Statutes and, consequently, the agency lacked statutory authority to promulgate rules requiring a certificate of need for large coal storage facilities for energy users because such facilities did not fall within the statutory definition as
MAPA seeks to specialize the hearing examiners by directing the Chief Hearing Examiner, in assigning them, to "attempt to utilize personnel having expertise in the subject to be dealt with in the hearing." But given the small number of hearing examiners and the diversity of the relatively large number of rulemaking proceedings, it is difficult for the Chief Hearing Examiner to succeed in this attempt. An examination of the reports of the hearing examiners indicates that each hearing examiner is assigned to rulemaking hearings dealing with a great variety of subjects. For example, one hearing examiner, in less than a year, was assigned to conduct hearings on proposed rules of the Board of Dentistry, the Department of Corrections (relating to the implementation and operation of the Community Corrections Act), the Department of Public Safety (relating to the flame resistance standards for tents and sleeping bags), the Attorney General (relating to peace officer training and the reimbursement program of the Minnesota Peace Officer Training Board), the Board of Registration of Architecture, Engineering, Land Surveying and Landscape Architecture, the Department of Administration's Building Code Division (relating to the installation of mobile home support and tie-down systems), and the Minnesota Board of Teaching (relating to procedures for the issuance of life licenses, the issuance and renewal of all license fees, and the registration and licensing of nurses and coaches of interscholastic sports in the elementary and secondary schools).

It appears that some progress has been made by the Chief Hearing Examiner in specializing hearing examiners in the areas of environmental, transport, and utility regulation. The same three hearing examiners conduct hearings for the Pollution Control Agency, the Environmental Quality Board, the Energy Agency, and the Department of Natural Resources. The same four hearing examiners handle utility and transport matters. Nevertheless, it cannot be said that any hearing examiner is as expert on the subject matter of any proposed rule as the agency heads and staff members who worked on it.

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189. Harves Letter, supra note 142.
190. It may be that this and other generalizations hazarded about the work of the hearing examiners would have to be altered or qualified after a closer study of all the reports of the hearing examiners. It would be interesting to know to what extent the recommendations of the hearing examiners are being accepted by the agencies; what types of recommendations are being accepted or rejected more or less readily; to what extent agencies withdraw or modify rules on the basis of the hearing record, even when the hearing examiner did not recommend such action; to what extent objections
This discussion is not intended to suggest that the hearing examiners serve no useful purpose. In many cases, the hearing examiners provide useful checks. The drafting changes they suggest are often accepted by the agency, and the mistakes they point out are often corrected. As a result, the final rules are improved.

H. Final Action by the Agency

MAPA requires that the hearing examiner's report shall be available to all affected persons upon request for at least five working days before the agency takes final action on the rule. Since the purpose of this five-day period is not explained by the rules of either the Attorney General or the Chief Hearing Examiner, it is not entirely clear how this period is meant to be employed. Although the affected interests are able to secure the hearing examiner's report, they are given no formal opportunity to comment on it or to make any further formal appearances before the agency. It is possible, of course, to view the five-day interval as an invitation to informal, ex parte comments on the report. Given the structure of MAPA, it would be improper for any person or association to submit new evidence during this period of time. But even comments which do not attempt to offer

voiced by the hearing examiner but not accepted by the agency constitute cause for disapproval of the agency rules by the Attorney General; to what extent the Attorney General approves the rules despite such objections; and to what extent the Attorney General disapproves rules for reasons not suggested by the hearing examiner.


193. The rules of the Chief Hearing Examiner state only that the report must be made available at a reasonable charge to any interested person upon request. 9 MCAR § 2.109.

194. By contrast, in dealing with contested cases, MAPA provides: In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the hearing examiner as required by section 15.052, has been made available to parties to the proceedings for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.


195. Id. § 15.0412(4) (Supp. 1977).
new evidence would seem to be inappropriate unless all participants in the proceeding are offered an opportunity to comment on the comments. Thus, one of the objectives apparently sought to be achieved by the five-day provision may be inconsistent with the requirements of an on-the-record proceeding.

The statutory provision in question may also serve to make it appear that the agency will pay attention to the hearing examiner’s report. In fact, agencies do pay attention to the reports, though the reports are not binding on them, in taking final action.

MAPA does not contain the explicit provision found in both the Revised Model Act and IAPA that in coming to its final decision the agency “shall consider fully all written and oral submissions respecting the proposed rule.” Professor Bonfield explains that this provision does not require the agency heads to preside at the oral presentations or to read all the written submissions; it does require that the agency heads “be fully and adequately informed as to the content of all written and oral submissions.” For this purpose, “their subordinates may read the written submissions and preside at oral presentations and then summarize the materials for the agency heads who may decide based upon an understanding derived from those summaries.”

Under MAPA, agency representatives always attend and participate in the public hearing. Invariably, too, the agency heads read the hearing examiner’s report and in this way, at least, are acquainted with the “hearing record.” They also have the benefit of staff summaries and analyses. A recent decision by the Minnesota Supreme Court, however, may indicate that this is not sufficient, and that individual agency heads may be required to read the verbatim transcript of the “hearing record,” as well as all the exhibits, before taking final action.

People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council (MEQC), involved a controversy over whether the MEQC, an agency under MAPA, should grant a permit to Northern States Power Company and Minnesota Power and Light Company for the construction of a high voltage transmission line. Because the controversy before the MEQC constituted a “contested case” under MAPA, a hearing was held before a hearing examiner pursuant to section

197. Bonfield, supra note 8, at 854-55.
198. Id. at 855.
199. People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978).
200. Id.
15.0418 of MAPA. A record was made, exhibits introduced, and a report produced.

After the MEQC made its final decision to grant the permit, PEER sought judicial review. In doing so, PEER sent requests for admission and then interrogatories to MEQC members, asking whether they had read the Environmental Impact Statement, the other exhibits introduced at the hearing, and the hearing examiner's transcript of the testimony at the hearing. MEQC members refused to answer the interrogatories.

On review, the district court affirmed the grant of the construction permit by the MEQC and found it unnecessary to determine whether the MEQC members had properly refused to answer the interrogatories, because it held that the MEQC decision was supported by substantial evidence. The Minnesota Supreme Court reversed the judgment of the district court and remanded the case for further consideration by the MEQC. In an opinion for the court en banc, Chief Justice Sheran held, inter alia, that the district court erred in failing to require MEQC members to respond to PEER's interrogatories. The Chief Justice began this portion of the opinion by stating that PEER's allegation on appeal—that all the MEQC members were not familiar with the record made at the public hearings on the route selection—had to be considered by the supreme court because it had concluded that the agency's findings of fact were not sufficiently specific to permit judicial review on the merits.

Because the controversy over the selection of a route for the power line was viewed as a "contested case," MAPA required the decision to be that of "the officials of the agency who are to render the final decision." It became "extremely important," therefore, for PEER "to discover whether the officials themselves actually made the decision as [MAPA] requires or whether they simply rubber-stamped the findings of fact, conclusions, and recommendations submitted to the MEQC by the hearing examiner." Citing the United

202. 266 N.W.2d at 863-64.
203. Id. at 864.
204. Id. at 872-73.
205. Id. at 872.
206. "Any suggestion that route-selection hearings might not be contested cases within the meaning of [MAPA] was laid to rest by the legislature in its 1977 revisions of the PPSA [Power Plant Siting Act] . . ., which appears to be merely a codification of existing MEQC practices." Id. at 873 (citation omitted). Act of June 2, 1977, ch. 439, § 11, 1977 Minn. Laws 1195 (codified at Minn. Stat. § 116C.58 (Supp. 1977)), provides, inter alia, that "[a]ll hearings held for designating a site or route or for exempting a route shall be conducted by a hearing examiner from the Office of Hearing Examiners pursuant to the contested case procedures" of MAPA. Id.
207. Minn. Stat. § 15.0421 (1976); see 266 N.W.2d at 873.
208. 266 N.W.2d at 873.
States Supreme Court opinion in *United States v. Morgan (Morgan IV)*, 209 the Chief Justice acknowledged that "it is generally not proper to permit discovery of the mental processes by which an administrative decision is made," 210 but decided to follow the Minnesota court's previous holding in *Mampel v. Eastern Heights State Bank*. 211 In *Mampel*, the supreme court allowed persons seeking judicial review of agency decisionmaking to "make inquiry through discovery to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process." 212

The Chief Justice concluded that the statutorily defined procedures required the agency in *PEER* to "come to an independent decision" and reflected a clear legislative intent that "agency members read the material presented to [the agency] prior to reaching their decision." 213 The court reasoned that in order "[t]o ensure that agency actions comport with this legislative intent, parties must be permitted to elicit from agency members sufficient information to establish that the problem had been addressed and that agency functions have been performed properly." 214 The Chief Justice emphasized:

[T]he discovery we sanction is limited to information concerning the *procedural steps* that may be *required by law* and does not extend to inquiries into the mental processes of an administrator which, being part of the judgmental processes, are not discoverable under *United States v. Morgan*. . . . It should be clear that this rule would similarly protect from discovery the process of judicial decisionmaking which is judgmental rather than procedural in nature. 215

It must be pointed out, with all due respect, that the distinction made by the Chief Justice between the "procedural" and "judgmental" aspects of the decisionmaking process cannot be found in *Morgan IV*. 216 In that case, a ratemaking decision by the Secretary of Agriculture had been called into question. It was uncontested that only the Secretary of Agriculture had authority to make this decision and that, in doing so, the Secretary had been acting in a quasi-judicial capacity and had the duty to come to an independent decision. Justice Frankfurter, writing for a unanimous Court, dealt with the same issues raised in *PEER*:

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209. 313 U.S. 409 (1941).
210. 266 N.W.2d at 873.
211. 254 N.W.2d 375 (Minn. 1977). *Mampel* also involved a contested case.
212. Id. at 378.
213. 266 N.W.2d at 873.
214. Id.
215. Id. (emphasis in original).
216. 313 U.S. 409 (1941).
Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding" . . . Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." . . . Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected. . . . It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.\textsuperscript{217}

Nothing in Justice Frankfurter's opinion indicates that the Court was proscribing only the attempt to discover the judgmental process by which the Secretary reached his decision, but not the attempt to discover "the manner and extent of his study of the record"—a "procedural" process. The integrity of the administrative process is as threatened by court-ordered discovery to elicit the latter information as it is to elicit the former information. So would the integrity of the judicial process be threatened if trial and appellate judges were subjected to discovery procedures designed to determine the "manner and extent" of their personal study of the records and briefs in the cases before them—a possibility held out in the \textit{PEER} case.

The \textit{PEER} opinion proceeds on an erroneous assumption—namely, that the agency officials responsible for making the decision in a case cannot "come to an independent decision" unless they themselves read and study all the material in the record of the hearings conducted by the hearing examiner. But the heads of the agency may be fully and adequately informed as to the content of a hearing record by the hearing examiner's report and by summaries and analyses prepared by their staffs. Decisions made on the basis of such information may nonetheless be characterized as independent.

\textsuperscript{217} Id. at 421-22 (emphasis added).
The court in *PEER* also disregarded the change in the applicable provisions of MAPA between the times of the *Mampel* and *PEER* decisions. When *Mampel* was decided, section 15.0421 of MAPA made acceptable situations in which a majority of the agency members had not heard or read the evidence, provided that an intermediate decision was rendered to which the parties had an opportunity to except, and about which they had an opportunity to argue before a majority of the agency heads.\(^{217.1}\) The agency in *Mampel* had not rendered an intermediate decision, because it claimed it had considered "all of the evidence, files, records and proceedings therein."\(^{217.2}\)

Prior to 1975, too, MAPA did not require a hearing examiner's report in every contested case. An intermediate decision procedure was required only when a majority of the agency members had not heard or read the evidence. The 1975 amendments modified section 15.0421 to read:

> In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the hearing examiner as required by section 15.052, has been made available to parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.\(^{217.3}\)

*PEER* was decided under the amended section 15.0421. By requiring a hearing examiner's report in every contested case, and by eliminating the pre-1975 language referring to the situation in which a majority of the agency members "have not heard or read the evidence," the legislature, it is reasonable to conclude, assumed that the hearing examiner's report would acquaint the agency members with the evidence in every contested case. Therefore, the report would be an acceptable alternative to a requirement that the majority of the agency members hear or read the evidence. Certainly, the 1975 amendments cannot be read as mandating in every contested case that there be a hearing examiner's report and that, in addition, all the agency members hear or read the evidence.

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\(^{217.1}\) At the time of *Mampel*, section 15.0421 read as follows:

> Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including the statement of reasons therefor, has been served on the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.


\(^{217.2}\) 254 N.W.2d at 378.

\(^{217.3}\) *Minn. Stat.* § 15.0421 (1976).
The Minnesota Supreme Court has not yet indicated whether it will apply PEER to the making of rules under MAPA as well as to the decision of "contested cases." In PEER, it will be recalled, the court relied upon the fact that MAPA requires the decision in a contested case to be that "of the officials of the agency who are to render the final decision." When dealing with rules, MAPA requires the "agency"—not the agency heads—to take final action on the rule. This linguistic distinction is, however, of little consequence since MAPA also speaks of the decision "rendered by an agency [not the "officials of the agency"]] in a contested case." This fact was not mentioned in PEER. Clearly MAPA's use of "agency" rather than "agency officials" should not be taken to indicate a different legislative intent on the issue raised by PEER. The agency heads should be expected to come to an independent conclusion about a rule just as they are expected to come to an independent decision about a contested case.

Furthermore, rulemaking and contested case adjudication cannot always be distinguished on the ground that contested cases never produce records as extensive as those in rulemaking. The burden imposed upon agency heads by PEER in the decision of contested cases will often be as great as the burden that will be imposed by applying PEER to rulemaking. In fact, the contested case in PEER involved matters as complicated, and a record as voluminous, as in most rulemaking proceedings.

As indicated above, the court in PEER held that the question of the propriety of requiring MEQC members to respond to PEER's interrogatories could not be avoided on the ground that the agency's findings of fact were supported by substantial evidence, because the court concluded that they were not sufficiently specific to permit judicial review. MAPA does not require findings of fact to accompany the adoption of rules. The Attorney General, however, requires an agency submitting rules to him for approval as to form and legality, to include with its submission findings of fact supporting the reasons or need for the rules adopted and an order adopting the rules reciting, inter alia, that they "are based on the record, applicable statutes and an existing need." It is doubtful, therefore, that rulemaking may be distinguished from contested case adjudication, for the purpose of applying PEER, on the ground that MAPA does not require findings of fact to accompany the adoption of rules as it does the adjudication of contested cases.

218. Minn. Stat. § 15.0421 (1976); see 266 N.W.2d at 873.
221. 226 N.W.2d at 873.
In any case, the presence of findings of fact adequate to permit judicial review of the validity of a rule (or decision in a contested case) and sufficient data to support the findings, does not dispose of the issue in PEER, because none of the reasons advanced by the court as to why agency heads should personally read the record are affected by the presence of such findings and data.\textsuperscript{223}

I do not wish to maintain that agency heads should never be present at the public hearings on their proposed rules or that they should never personally read the transcript of the hearings and the written submissions in their original form. They should, to the extent it is possible and practical for them to do so. But it is unrealistic to assume that this can be done in every instance of agency rulemaking—or even in every contested case—any more than it can be done by every judge in every judicial proceeding.\textsuperscript{224}

Neither the Revised Model Act nor IAPA imposes any obligation upon the agency to make any presentation of facts justifying the rule in the course of public proceedings. They do provide, however, that upon the request of any interested person, the agency must issue a concise statement of the principal reasons for and against the rule it adopted, incorporating therein the reasons for overruling considerations urged against the rule.\textsuperscript{225} MAPA contains no such provision. The rules of the Attorney General, as indicated above, require the agency to accompany its adoption of a rule with a statement of need, findings of fact, and an order adopting the rule reciting, among other things, that the rule adopted is "based on the record, applicable statutes and an existing need."\textsuperscript{226} These rules do not quite accomplish the objectives of the provisions of the Revised Model Act and IAPA referred to above, namely, to require the agency to state all "the principal reasons for and against the rule" and all of the reasons why the agency rejected the arguments against it.\textsuperscript{227}

\textsuperscript{223} See 266 N.W.2d at 873.

\textsuperscript{224} I respectfully disagree with Professor Bonfield's view that, "in most cases," agency heads should preside at the oral presentations in rulemaking proceedings and personally read all written submissions in their original form, and with his suggestion that when there is extrinsic evidence that they have not done so, they should be subjected to cross-examination under oath to test their understanding of the contents of the submissions. Bonfield, supra note 8, at 856. By "extrinsic evidence," Bonfield means "all evidence other than the legally compelled testimony of the agency heads themselves, and includ[ing] all of their voluntary admissions, testimony of other persons, and all circumstantial evidence." Id. It is sufficient, in my view, that agency heads take responsibility for the rules they issue and are held to public account for them.

\textsuperscript{225} REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3(a) (1961); IOWA CODE § 17A.4(1)(b) (1977).

\textsuperscript{226} Minn. Reg. Atty. Gen. 302(i)(1), 1 MCAR § 1.302(i)(1).

\textsuperscript{227} Bonfield, supra note 8, at 857.
I. VARIANCE BETWEEN PROPOSED RULE AND FINAL RULE

MAPA requires the Chief Hearing Examiner to include, as part of his rules governing the conduct of the public hearing, provisions "relating to recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing." These provisions are also to include "a procedure whereby the proposed final rule of an agency shall be reviewed by the chief hearing examiner to determine whether or not a new hearing is required because of substantial changes or failure of the agency to meet [MAPA's other requirements]." Even before these provisions were enacted by the 1975 amendments to MAPA, the rules of the Attorney General provided, as they still do, that "[i]f a change is made which goes either to another subject matter or results in a rule fundamentally different from that contained in the notice of hearing, a further hearing must be held, at least on the rules insofar as they relate to another subject matter or are fundamentally different from the Notice of Hearing."

Two questions arise when these provisions are juxtaposed. First, can a final rule be "substantially" but not "fundamentally" different from the proposed rule? Second, if there is a conflict between the Chief Hearing Examiner and the Attorney General in determining whether the final rule is different from the proposed rule, how is that conflict to be resolved?

In his Rule 111, the Chief Hearing Examiner has articulated the procedures and criteria used to guide his determination of these questions. The agency is to submit the rules in both their proposed and final forms to the Chief Hearing Examiner prior to any review by the Attorney General. Within ten calendar days, the Chief Hearing Examiner will complete his review, and submit his report to the agency on the variance question and on whether the agency has complied with the other requirements of MAPA. If he finds that the final rules are "substantially different" from the proposed rules, or that the agency failed to meet MAPA's other requirements, the agency must either withdraw the final rules or reconvene the rule hearing. Rule 111 goes on to provide:

In determining whether the proposed final rule is substantially different, the Chief Hearing Examiner shall consider the degree to which it:

A. Affects classes of persons not represented at the previous hearing; or

229. Id.
231. 9 MCAR § 2.111.
B. Goes to a new subject matter of significant substantive effect; or
C. Makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; or
D. Results in a rule fundamentally different from that contained in the Notice of Hearing.233

On the basis of these rules, it would appear that the Chief Hearing Examiner believes that the 1975 amendments, which he is implementing, impose more severe strictures against a variance between the proposed rule and the final rule than those imposed by the Attorney General. Thus, the final rule may be “substantially different” from the proposed rule under Rule 111(A), (B), or (C) without being “fundamentally different” under alternative criterion (D). Otherwise, there would be no reason to specify them as alternative considerations.234

Furthermore, a final rule that is “substantially different” under Rule 111(A) because it “affects classes of persons not represented at the previous hearing” may not be “fundamentally different” from the proposed rule. The Chief Hearing Examiner has applied this criterion broadly to find variances between proposed and final rules. For example, in reviewing the Pollution Control Agency’s (PCA) final rules governing hazardous waste, the Chief Hearing Examiner found substantial changes because certain rules were more stringent, and others less stringent, than their counterparts in the originally proposed rules.235 The Chief Hearing Examiner assumes that everyone should be able to rely on the text of the proposed rules accompanying the notice of the public hearing published in the State Register. Any subsequent changes in that text, about which it is reasonable to expect that affected classes of persons would wish to be heard, are “substantial” and must be preceded by a new notice and public hearing. In reviewing the PCA’s final hazardous wastes rules, the Chief Hearing Examiner emphasized that the persons who could be expected to object to the change from the less to the more stringent rules “would have had no reason to attend the hearings for the original rules as published did not contain them”;236 those who could be expected to object to the change from the more to the less stringent

233. 9 MCAR § 2.111 (emphasis added).
234. Hearing Examiner’s Rule 111(D) would seem to be an unnecessary appendage, since any final rule that is “fundamentally different” from the rule proposed in the Notice of Hearing would certainly make a “major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing,” under Rule 111(C). 9 MCAR § 2.111(C).
235. In re Hazardous Wastes, supra note 168, at 5-6 (findings 9 and 11).
236. Id. at 5.
rules "would have [had] no notice."\textsuperscript{237}

The PCA objected to these conclusions, calling attention to the notice of hearing it had published together with the text of the proposed rules. The caption of this notice stated that the hearing would involve "the identification, labeling, classification, storage, collection, transportation and disposal of hazardous wastes."\textsuperscript{238} The notice "indicated that the proposed rules would establish criteria for determining whether a waste is hazardous, require producers of most wastes to evaluate their wastes, and require handling and disposal of all hazardous wastes in accordance with the proposed rules."\textsuperscript{239}

In effect, the PCA argued, whether the final rules are substantially different from the proposed rules should be determined not only by comparing the respective texts but also by determining whether the original notice of hearing was adequate to inform industry, government, environmental groups, and the public of the general scope of the proposed rulemaking proceeding.\textsuperscript{240} The PCA maintained that affected classes of persons did not have a "justifiable right to rely on the immutable nature of the rules as originally proposed."\textsuperscript{241} It was sufficient that they "had notice that their interests would be affected in this proceeding."\textsuperscript{242}

The Chief Hearing Examiner regards his determination of whether an agency's final rule is "substantially" or "fundamentally" different from its proposed rule as binding on the Attorney General as well as the agency. It should be noted in this connection that the applicable MAPA provision also requires the Chief Hearing Examiner "to determine whether or not a new hearing is required because of . . . failure of the agency to meet the requirements of section

\textsuperscript{237} Id. at 6. The PCA replied that "obviously whether a change is less stringent or more stringent than the original proposal is not what determines whether a change is substantial." Memorandum of Minnesota Pollution Control Agency, \textit{In re Hazardous Wastes}, \textit{supra} note 168 (Minn. Office Hearing Examiner, Sept. 7, 1978) at 19 (PCA Memorandum in Support of Adoption of Rules) [hereinafter cited as PCA Memorandum]. While the PCA agreed with the general criteria of substantiality set forth in 9 MCAR § 2.111, it disagreed with the Chief Hearing Examiner's application of these criteria to its hazardous waste rules.

\textsuperscript{238} The notice was published in the State Register on September 16, 1977. See 2 State Register 421 (1977).

\textsuperscript{239} PCA Memorandum, \textit{supra} note 237, at 22-23. The Pollution Control Agency indicated that it had not only published the September 16, 1977 notice, \textit{id.} at 23, but that on July 13, 1976, it had given notice in 2 State Register 23 (1976), that public meetings would be held to discuss hazardous waste management rules. PCA Memorandum, \textit{supra} note 237, at 22. Such meetings were held before the proposed rules were drafted. \textit{Id.}

\textsuperscript{240} \textit{Id.} at 23.

\textsuperscript{241} \textit{Id.} at 27.

\textsuperscript{242} \textit{Id.} at 30.
15.0412, subdivision 4," that is, the basic rulemaking procedures prescribed by MAPA. If the Chief Hearing Examiner has the authority conclusively to determine whether the final rule is substantially different from the proposed rule, he also has the authority conclusively to determine whether the agency met all "the requirements of section 15.0412, subdivision 4." Indeed, the rules of the Chief Hearing Examiner assert this authority, at least to the extent of keeping a rule from the Attorney General in the event the Chief Hearing Examiner finds that the agency failed to meet MAPA's requirements. The Chief Hearing Examiner sought to exercise this authority when he ordered the PCA either to reconvene the rulemaking hearing or withdraw its hazardous wastes rules, because he also determined that the agency failed to make an affirmative presentation of facts establishing the need for and reasonableness of some of the rules.

To read MAPA as conferring authority upon the Chief Hearing Examiner to bind the agency and the Attorney General by such determinations would have strange consequences. The hearing examiner who conducted the public hearing must take notice in his report of the degree to which the agency demonstrated the need for and reasonableness of its proposed rules with an affirmative presentation of facts. Yet the conclusions of the hearing examiner in this respect are only advisory and not binding on the agency. It would be inconsistent with the statutory scheme as a whole if the Chief Hearing Examiner, reviewing the agency's action following its consideration of the hearing examiner's report, could make binding determinations. As the PCA maintained, this would give him "a veto authority which usurps the agency's decisionmaking power," as well as the Attorney General's prerogatives. Furthermore, if the Chief Hearing Examiner's negative determinations are binding on the agency and the Attorney General, so are his affirmative determinations that the agency satisfied the requirements of section 15.0412(4) and that the final rules are not substantially different from the proposed rules. MAPA does not distinguish between "negative" and "affirmative" determinations of the Chief Hearing Examiner. Yet a reading of MAPA that would produce the results argued for by the Chief Hearing Examiner, in his memorandum regarding the PCA's hazardous waste rules, would

244. 9 MCAR §§ 2.110-.111.
246. PCA Memorandum, supra note 237, at 4-5, 8. The PCA also objected on the ground that the Chief Hearing Examiner's determinations were inconsistent with the findings of the hearing examiner who conducted the hearing. Id. at 5, 9, 11, 24-28. In any case, the PCA maintained, the Chief Hearing Examiner was claiming authority to convert a hearing examiner's recommendation into a determination binding on the agency and the Attorney General. Id. at 24-28.
supersede the Attorney General's responsibility and authority to review final agency rules as to form and legality—a consequence the legislature could hardly have intended, since MAPA still requires such review.

What significance should be attached to the fact that the Attorney General approved the Chief Hearing Examiner's rules? Certainly, it would be rash to view this approval as reflecting an intent by the Attorney General to yield his authority and shift his responsibility in these matters to the Chief Hearing Examiner. It is questionable whether MAPA would permit this.

What remains, then, is the potential for conflict. The Chief Hearing Examiner may determine that the final rule is not substantially different from the proposed rule, but on reviewing the rule as to form and legality, the Attorney General may decide otherwise and thus compel a new hearing. If the Chief Hearing Examiner determines that the final rule is substantially different from the proposed rule, he may direct the agency to withdraw the rule or to reconvene a new hearing. But the agency may disagree with the Chief Hearing Examiner and submit the final rule to the Attorney General for review, and the Attorney General may approve it.

This is precisely what happened in the case of the PCA's hazardous waste rules. The PCA disagreed with the Chief Hearing Examiner's determinations and, over his objections, submitted the final rules to the Attorney General for approval. The Attorney General agreed with the PCA that the Chief Hearing Examiner's determinations are advisory only and, with certain exceptions, approved the final rules as to form and legality.

The reasons for not approving certain of the rules were not those advanced by the Chief Hearing Examiner. The Attorney General indicated that the PCA might

248. J. Michael Miles, the Special Assistant Attorney General in charge of the operation within the Attorney General's Office to review agency rules, is reported as admitting that "perhaps we made an error" in approving the Chief Hearing Examiner's rules in question, which he now views as "ultra vires." MN. Gov't Rep., Oct. 12, 1978, at 4.

249. PCA Memorandum, supra note 237, at 1.


251. The Attorney General refused to approve certain rules that appeared "to contain incorporations by reference which must be [but had not been] approved by the Chief Hearing Examiner" under section 15.0412(4) of the Minnesota Statutes. The Attorney General refused to approve another rule because it used the word "may" instead of the word "shall," and another because its language was vague. Attorney General Memorandum, supra note 250, at 1. In the latter case, the Attorney General suggested clarifying language. Id. The Attorney General refused to approve a particular rule because he had concluded that the agency had failed to make any affirmative
resubmit these latter rules for his approval after considering the matters raised in his memorandum and taking appropriate action. The PCA took appropriate action and resubmitted the rules with the required modifications, and the Attorney General approved them. They were filed with the Secretary of State and published in the State Register.2 The possibility exists, of course, that the courts may be asked to decide whether the adopted rules are valid in view of the Chief Hearing Examiner's determinations and thus settle the question of the respective powers of the Chief Hearing Examiner and the Attorney General. In the meantime, the validity of the hazardous wastes rules, now more than two years in the making, may still be in doubt.

This unresolved conflict between the Chief Hearing Examiner and the Attorney General is obviously a detriment to efficient rule-making. But even if the legislature or the Minnesota Supreme Court should decide who has final authority to determine variances, the question of variance is bound to provoke disagreement and encourage litigation, which may result in delaying the effectiveness of the rules. MAPA's provision requiring new hearings if the final rule is substantially different from the proposed rule is itself most unwise. No such requirement is to be found in FAPA, the Revised Model Act, or IAPA. Arguments that new proceedings should be instituted when the final rule is substantially different from the proposed rule have been made under FAPA and rejected by the Circuit Courts of Appeal. In South Terminal Corporation v. Environmental Protection Agency,253 the First Circuit emphasized that a rulemaking proceeding under FAPA "is intended to educate an agency to approaches different from its own; in shaping the final rule it may and should draw on the comments tendered. . . . Parties have no right to insist that a rule remain frozen in its vestigal form."254 In International Harvester Company v. Ruckelshaus,255 Judge Leventhal of the District of Columbia Circuit reiterated that the "requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submis-

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presentation of facts "on the record" establishing the need for, and reasonableness of, the rule. Id. The Chief Hearing Examiner objected to that rule on the ground that it was a substantial change from the proposed rule. In re Hazardous Waste, supra note 168, at 4. The objections of the Chief Hearing Examiner and the Attorney General were to rules that were acceptable to representatives of both industry and environmental groups. Letter from Sandra S. Gardebring, Executive Director, Minnesota Pollution Control Agency, to Carl A. Auerbach (Dec. 20, 1978).

252. 3 State Register 0000 (1979).
253. 504 F.2d 646 (1st Cir. 1974).
254. Id. at 659.
255. 478 F.2d 615 (D.C. Cir. 1973).
Judge Leventhal added that "[a] contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." In that event, as an earlier panel of the District of Columbia Circuit aptly stated, "the proceedings might never be terminated." Indeed, there are instances under MAPA in which hearing examiners have recommended that warranted changes in a proposed rule not be made for fear they would be regarded as substantial and trigger a new hearing. Such an outcome of a public hearing completely subverts its purpose.

Of course, the notice of proposed rulemaking should adequately inform the public of the subjects and issues involved in the rulemaking hearing, so that there can be meaningful public participation. But this requirement can be satisfied even in a case in which the agency makes substantial changes in the proposed rules as a result of what it learns at the public hearing. In other words, it cannot be assumed under MAPA that the notice was inadequate in every case in which one or more of the factors are present by which the Chief Hearing Examiner is guided in determining whether the final rule is "substantially different" from the proposed rule.

A special difficulty arises under MAPA because of the fact that the hearing record must justify the final rule. If substantial changes are made in the proposed rule, it is possible that they may not be supported by the hearing record. Therefore, if judicial review is sought of a final rule that is different from the proposed rule, the parties seeking review should be afforded an opportunity to introduce data challenging the final rule that they could not reasonably have been expected to introduce against the proposed rule. The adoption of the protest procedure recommended in this Article would make it possible for such data to be introduced before the agency prior to judicial review.

J. REVIEW BY THE ATTORNEY GENERAL AS TO FORM AND LEGALITY

A final agency rule must be "submitted with the complete hearing record to the attorney general, who shall review the rule as to form

256. Id. at 632.
257. Id. at 632 n.51.
The agency must give "notice to all persons who requested to be informed that the hearing record has been submitted to the attorney general." MAPA does not require that such persons, or other interested persons, be afforded an opportunity to make any presentation to the Attorney General. But the rules of the Attorney General provide:

If a person or association advises the Attorney General that he wishes to question the legality of the rules, he shall be permitted to do so by submitting a further brief or making an oral argument, whichever the Attorney General deems appropriate in the particular case. This must be done within 10 days after receipt of the rules by the Attorney General.

Although persons or associations will occasionally submit written briefs to the Attorney General pursuant to this rule, the Attorney General has never deemed oral argument appropriate in any case, but has permitted individuals to discuss rules being reviewed with his staff.

Within twenty days after the hearing record has been submitted to him, the Attorney General must either approve or disapprove the rule. If he approves, he must file the rule promptly in the Office of the Secretary of State. If he disapproves, he must "state in writing his reasons therefor, and the rule shall not be filed in the office of the secretary, nor published." Although MAPA is silent on the question, the rules of the Attorney General provide that if he fails to approve or disapprove a rule within the twenty-day period, "the agency may file the rule in the Office of the Secretary of State and publish the same."

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261. Id.
262. Minn. Reg. Atty. Gen. 305(c), 1 MCAR § 1.305(c).
263. Interviews with Lee E. Sheehy, Special Assistant Attorney General, in Minneapolis, Minnesota (Oct., 1978).
265. Id. MAPA does not state who must arrange for the publication of an approved rule in the State Register. It may be inferred, however, from section 15.047(1) of the Minnesota Statutes, which directs the Commissioner of Administration to "require each agency which has adopted and published rules in the state register to pay its proportionate cost of publishing those rules" in the Manual of State Agency Rules, that it is the agency itself that must do so. Minn. Stat. 15.047(1) (1976). This accords with current practice.


266. In contrast, MAPA expressly provides that temporary rules, which must be approved by the Attorney General within five working days after they are submitted to him, will be deemed approved if the Attorney General fails to act within those five days. Minn. Stat. § 15.0412(5) (Supp. 1977).
267. Minn. Reg. Atty. Gen. 305(a)(4) provides that if the Attorney General
MAPA does not set forth the criteria to guide the Attorney General's review as to "form and legality." The Attorney General, however, has specified that he will be guided by the following considerations:

1. Regarding form, the rule may be disapproved if the rules, record and supporting documents do not demonstrate compliance with these regulations and regulations of the Minnesota State Publications Board.

2. Regarding legality, the rule shall be disapproved if it:
   (a) Exceeds the statutory authority conferred or the required conditions have not been met.
   (b) Conflicts with the governing statute or other relevant law.
   (c) Has no reasonable relationship to statutory purposes.
   (d) Is unconstitutional, arbitrary or unreasonable.

From January 1, 1976, the effective date of MAPA's 1975 amendments requiring the use of hearing examiners in rulemaking proceedings, until August 28, 1978, the agencies submitted to the Attorney General for review as to form and legality 176 sets of rules adopted pursuant to MAPA section 15.0412(4). Of these, 108 (61%) were approved on initial submission; 68 (39%) were disapproved on initial submission and returned to the submitting agency. Of the 68, 56 (82%) were approved on subsequent submissions; 12 (18%) were either not resubmitted or not approved on resubmission. Thus, of the 176 submitted, 164 (93%) were ultimately approved; 12 (7%) were either not resubmitted or not approved on resubmission.

During the same period of time, 65 sets of rules were submitted
for the Attorney General's review in the making of which hearing examiners did not participate because the rulemaking proceedings were instituted prior to January 1, 1976. Of these, 43 (66%) were approved on initial submission; 22 (34%) were disapproved on initial submission and returned to the submitting agency. Of the 22 that were disapproved, 19 (86%) were approved on subsequent submissions; 3 (14%) were either not resubmitted or not approved on resubmission. Thus, of the 65 submitted, 62 (95%) were ultimately approved; 3 (5%) were either not resubmitted or not approved on resubmission.

During the same period of time, the agencies submitted for the Attorney General's review 24 sets of temporary rules adopted pursuant to MAPA section 15.0412(5), which does not require the participation of hearing examiners. Of these, 9 (38%) were approved on initial submission; 15 (62%) were disapproved on initial submission and returned to the submitting agency. Fourteen (93%) of these 15 were approved on subsequent submissions; 1 (7%) was not resubmitted. Thus, of the 24, 23 (96%) were ultimately approved; 1 (4%) was not resubmitted.

It is not clear what, if any, conclusions should be drawn from these figures. They show that during the period in question, the Attorney General approved a slightly greater percentage of permanent rules in the making of which hearing examiners did not participate, than of rules in the making of which hearing examiners did participate. This is true of approval both on initial submission (66% and 61%, respectively) and ultimately (95% and 93%, respectively). More insight may be gained into the role the Attorney General plays in MAPA by looking at the reasons for disapproval that have appeared in Attorney General memoranda sent to agencies. An examination of the Attorney General's memoranda disapproving rules initially submitted to him during the period January 1, 1976 to August 28, 1978 reveals the following categories of reasons for disapproval:

270. These figures would be more meaningful if one compared the reasons for disapproval in each of the sets of rules mentioned in the text. We were unable to do so. It was also not ascertained to what extent the Attorney General initially approved or disapproved provisions of rules submitted to him by agencies in accordance with or against the recommendations of hearing examiners. However, it is somewhat surprising that the Attorney General has approved only a relatively small percentage (38%) of the temporary rules initially submitted to him, in the making of which the hearing examiners did not participate. Yet, temporary rules have the highest percentage (96%) of ultimate approval.

271. These disapproving memoranda are not very revealing. They are short and terse, stating but not explaining the reasons for disapproval. The reason for this is that these memoranda are written only after substantial discussion between members of the Attorney General's staff charged with the review function and members of his staff assigned to the promulgating agencies. Since the agency has been fully informed of the
1. **Technical defects in the submission.** For example, rules were disapproved because the agency failed to submit one or more of the documents called for by the rules of the Attorney General.

2. **Defective drafting.** This category is the most numerous of all. The defects pointed out by the Attorney General include misspellings; grammatical errors; typographical errors; poor word usage; unnecessary verbiage; ambiguity; vagueness; duplication in the rule of language contained in the Minnesota Statutes without the necessary determination by the hearing examiner that duplication "is crucial to the ability of a person affected by a rule to comprehend its meaning and effect," and the incorporation by reference in the notice of the proposed rule of other materials without the required approval of the Chief Hearing Examiner. The Attorney General has frequent occasion to object to the use of "should" when the discretionary "may" or mandatory "shall" is intended; to the use of "shall" when the statute intends the agency to exercise discretion; to "may" when the statute imposes a mandate to act upon the agency; and to the failure to accompany the proper use of "may" with standards to guide the exercise of the agency's discretion.

3. **Defective notice.** The Attorney General has disapproved a final rule because the agency did not give notice thirty days prior to the date set for the hearing of its intention to hold a public hearing on the proposed rule, as required by MAPA.

4. **Substantive reasons.** Although his substantive review approximates and sometimes is broader than that of a reviewing court, the Attorney General does not seek to substitute his judgment for that of the agency with respect to the wisdom of the rule itself. He may communicate his views on the advisability of a rule to the agency informally.

The Attorney General has disapproved rules for the following substantive reasons: (a) the agency did not document its statutory authority to issue them; (b) the rule failed to comply, or conflicted, with applicable statutory provisions; (c) the rules submitted were internally inconsistent; (d) the findings of fact (including those related to need) did not support the rule; (e) the public hearing record did not support the findings of fact; (f) the findings of fact did not refer specifically to the data in the hearing record; (g) at the public

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Attorney General's reasons during the course of these discussions, the memoranda themselves do not purport to be fully informative. Lee E. Sheehy, Special Assistant to the Attorney General, informs the author that the Attorney General has recently begun to elaborate his reasons for disapproval so that any interested reader will be able to understand them fully. Letter from Lee E. Sheehy, Special Assistant to the Attorney General, to Carl A. Auerbach (Aug. 14, 1978) (on file at the Minnesota Law Review).


273. **Id.** § 15.0412(4).
hearing, the agency failed to make an affirmative presentation of
facts establishing the need for and reasonableness of the rule; (h) the
agency failed to explain why it rejected the recommendations of the
hearing examiner; (i) the rule was overly broad; or (j) any other
reason the Attorney General deems sufficient.

The Revised Model Act does not contain a provision for review
of agency rules by the State Attorney General. IAPA gives the Attor-
ney General such a responsibility but no authority to prevent a rule
from becoming effective. It provides that if "the attorney general
finds objection to all or some portion of a proposed rule because that
rule is deemed to be unreasonable, arbitrary, capricious or otherwise
beyond the authority delegated to the agency," the Attorney General
may, in writing, notify the agency of the objection prior to the effec-
tive date of such a rule. The Attorney General "shall also file a
certified copy of such an objection in the office of the secretary of
state... and a notice to the effect that an objection has been filed
shall be published in the next supplement to the 'Iowa Administra-
tive Code.' In that event, the "burden of proof shall... be on
the agency in any proceeding for judicial review or for enforcement
of the rule heard subsequent to the filing to establish that the rule or
portion of the rule timely objected to according to the above proce-
dure is not unreasonable, arbitrary, capricious or otherwise beyond
the authority delegated to it." If the agency fails to meet this bur-
den of proof, "the court shall declare the rule or portion of the rule
objected to invalid and judgment shall be rendered against the
agency for court costs," including "a reasonable attorney fee... payable by the state comptroller from the support appropriations of
the agency which issued the rule in question."

Professor Bonfield justifies such review by the Attorney General
on the ground that persons dealing with agencies should not have to
undergo the great expense of seeking judicial review in order to pro-
tect themselves against "improper exercises of agency rulemaking
authority." In addition, Bonfield points out, "the agencies them-
selves may benefit from such external review because it gives them
an additional means by which they may discover and cure deficien-
cies in a rule before it becomes effective or before it is invalidated by
the courts."

These are weighty arguments for review by the Attorney General,

274. IOWA CODE § 17A.4(a) (1977).
275. Id. The Iowa Administrative Code is the equivalent of the Minnesota State
Register and Minnesota Code of Agency Rules (MCAR). See also note 72 supra.
277. Id. § 17A.4(b).
278. Bonfield, supra note 8, at 896.
279. Id. at 896-97.
but there are countervailing considerations. Agencies were created to become experts in their respective fields. The Attorney General is not an expert in any other agency's area. Agencies have more time to analyze the problems rules are meant to solve. Consideration by the Attorney General is also "usually in private and ex parte; it is therefore likely to be very one sided," as well as "brief and superficial." Professor Bonfield adds:

Perfunctory approval is likely, for example, when an assistant attorney general reviews a rule drawn up by a co-worker. And there remains a serious danger of rejection by an Attorney General on policy rather than legal grounds, no matter how clear the law is on the more limited role of the Attorney General in reviewing agency rules. . . . It should also be noted that although the legal opinion of the Attorney General may not necessarily be better than that of the legal advisor to the agency, a formal affirmative opinion of the Attorney General as to a rule's propriety may, nevertheless, make it harder for the ordinary citizen to overturn the rule in a judicial proceeding."

IAPA seeks, therefore, to obtain the benefits of review by the Attorney General, but minimizes its dangers by not empowering the Attorney General to prohibit an agency rule from becoming effective.

Some of the objections to Attorney General review mentioned by Professor Bonfield may also be raised to such review under MAPA. It is fair to say that the Minnesota Attorney General seeks to avoid disapproving a rule for policy rather than legal reasons, but this is more difficult to avoid under MAPA than under IAPA. Professor Bonfield reads IAPA criteria guiding Attorney General review as authorizing objection only on two grounds: (1) the rule "so lacks a rational basis as to be a violation of the due process clause of the state or federal constitution"; and (2) "a rational agency could [not] believe that an otherwise fair rule was within the scope of the express or implied statutory power granted the agency." These are narrow grounds indeed.

By contrast, under MAPA, the Attorney General reviews the rule not only on these grounds but also to determine whether the agency’s findings of fact demonstrate need for the rule and whether the hearing record supports the findings of fact. These determinations edge the Attorney General closer to making policy determinations.

280. See id. at 897-98.
281. Id. at 898. The Minnesota Attorney General occasionally permits written briefs or statements to be submitted to him before he decides to approve or disapprove an agency rule. See text accompanying note 262 supra.
282. Bonfield, supra note 8, at 898.
283. Id. at 909.
Provision for external review of agency rules—other than in a judicial proceeding—reflects legislative distrust of the administrative agencies. It cannot be said that this distrust is entirely unwarranted. But it is doubtful whether external review by a state Attorney General will dissipate this mistrust. Such review dilutes agency authority and responsibility and contributes to making agency employment less attractive to the most qualified persons.

If there is to be review of agency rules by the Attorney General, the MAPA system of review is preferable to that of IAPA. Professor Bonfield recognizes that "[p]ractically speaking, the filing of a proper timely objection to a rule [by the Attorney General] places the issuing agency in a bind."\(^{285}\) If it does not modify the rule to satisfy the Attorney General's objections, it invites judicial review in which it will have to bear the burden of demonstrating the rule's validity and run the risk of a judgment against it for court costs and a reasonable attorney fee. Until such review, uncertainty will hang over the rule and compliance with its requirements is not very likely. The judicial review proceeding itself will be complicated by the fact that the court will be reviewing not only the validity of the rule but also the validity of the Attorney General's objections to it in order to determine whether the agency must carry the burden of proving the rule valid or the parties seeking review must carry the burden of proving it invalid.\(^{286}\) In such a proceeding, the Attorney General would not be able to represent the agency that is challenging his objections to its rule; the agency would have to employ and pay for counsel independent of the Attorney General's office.\(^{287}\)

Under these circumstances, agencies will probably hesitate to proceed with a rule to which the Attorney General objected. If so, it is better to empower the Attorney General to prevent an agency rule from becoming effective. In that way he must take full responsibility for the consequences of his action and would exercise his review function in a more deliberative fashion.

The Minnesota system of Attorney General review cannot be evaluated without taking into consideration the fact that members of the Attorney General's staff also act as legal advisers to the agencies. Almost always, the review process takes the form of an oral and written dialogue between these staff members and the staff members entrusted with the review function.\(^{288}\) A 1976 survey, based on a ques-

\(^{285}\) Bonfield, supra note 8, at 914.

\(^{286}\) Id. at 916.

\(^{287}\) Id. at 924.

\(^{288}\) Of all the Attorney General's memoranda disapproving agency rules which were examined, see note 269 supra, only one was not addressed to a member of his staff assigned to a particular agency. The one exception was a memorandum addressed to a practitioner employed as attorney for a state board.
tionnaire submitted to 87 state agencies, revealed that in only 5 (12%) of the 42 agencies that responded was initial drafting of rules exclusively the responsibility of the Attorney General's staff person assigned to the agency. In 13 (31%), the Attorney General's staff person collaborated with other agency staff in the initial drafting. In 24 (58%), the initial drafting was done by agency members and agency staff (including attorneys) other than the Attorney General's staff person assigned to the agency. In 20 (48%), the latter reviewed the rules after initial drafting by others.

Most of the objections to the agency rules made in the Attorney General's disapproving memoranda could and should have been obviated by careful drafting. Since the Attorney General is the final arbiter of the form and legality of the rules, it would make sense for the agencies to give his staff persons assigned to them a central role in the drafting of the rules. Certainly, too, the Attorney General's staff persons assigned to the agencies should be in a position to advise effectively against the submission to the Attorney General for review of rules that are either unconstitutional or ultra vires. In turn, the Attorney General should supervise the work of these staff persons more closely so that the rules initially submitted to him will be approved. In time, such working relationships may make formal Attorney General review unnecessary. Until they are established, however, the statutory requirement of Attorney General approval of agency rules may accomplish not only the desirable objectives mentioned above, but also impel the agencies to solicit and take seriously the legal assistance and advice of the Attorney General staff assigned to them.

K. Time Consumed by Rulemaking Procedures—Effective Date of Rules

IAPA requires that within 180 days following publication of the notice of proposed rulemaking or the last date of the oral presentations on the proposed rule, whichever is later, the agency must adopt a rule or terminate the proceeding.


proceed with the rule, the agency must start all over again. Neither the Revised Model Act, FAPA, nor MAPA contains such a provision. Professor Bonfield explains that it is intended to preclude the situation in which

an agency operating under those laws [the Revised Model Act and FAPA] issued a notice of rulemaking that was met by a public furor. The agency then waited a year or two until the furor died down and people forgot about its controversial proposal. Then, to everyone's surprise, the agency suddenly issued a rule based on the long forgotten notice.291

It seems unlikely that such a situation would occur frequently under MAPA because of the existence of Attorney General review. There are, however, a number of instances in which the Minnesota Attorney General has disapproved an agency rule which, to date, has not been resubmitted to him for approval.292 The public has no way of knowing whether the agency has decided to withdraw the rule or whether it will resubmit the rule to the Attorney General at a future date. No "statute of limitations" bars the latter possibility.

The IAPA provision gives agencies an incentive not to prolong the rulemaking process for any reason. But the excessive time consumed by the rulemaking process under MAPA, in most cases, cannot be attributed primarily to agency delaying tactics, but to the statutory rulemaking structure itself. It has been estimated that it takes a minimum of 234 days to promulgate a set of simple rules that require no more than a day of public hearing and are approved by the Attorney General on initial submission.293 This estimate assumes, too,

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292. See text accompanying notes 269-70 supra.
293. T. Triplett, Rule-Making by Minnesota State Agencies: Practice and Procedure 6, 11 n.43 (1976). This estimate was made prior to the 1977 amendments to MAPA which, among other things, sought to reduce the time consumed by the rulemaking process by (1) requiring the hearing record to remain open for five, instead of twenty days, but authorizing the hearing examiner to keep the record open for up to twenty days; (2) making a rule effective five working days, instead of twenty calendar days, after its publication in the State Register; and (3) requiring the hearing examiner to complete his report within thirty days, instead of "as promptly as possible," after the close of the hearing record, unless the Chief Hearing Examiner, upon written request of the agency and the hearing examiner, orders an extension. Act of June 2, 1977, ch. 443, 1977 Minn. Laws 1217 (amending Minn. Stat. § 15.0412(4) (Supp. 1977)).

The Legislative Commission to Review Administrative Rules has estimated that during the period of August 1, 1977 to August 1, 1978, "the average time between the date that an agency forwards the proposed rules and notice to the hearing examiner and the State Register and the date that the adopted rules take effect is approximately 198 days, or six and one-half months."

that the Chief Hearing Examiner has determined that the final agency rule is not "substantially different" from the proposed rule. Until MAPA's rulemaking procedures are modified, incorporation of an IAPA-type "statute of limitations" may impose an impossible deadline upon agencies. By requiring agencies that did not meet the deadline to start all over again, such a limitation could actually serve to increase the time it takes to promulgate a rule.

The discrepancy in MAPA as to when an adopted rule becomes effective—five or twenty days after publication in the State Register—has already been pointed out. When the legislature acts to eliminate this discrepancy, it should also make some provision to allow rules to become effective sooner than the generally specified time. Both the Revised Model Act and IAPA contain such exemptions from the delayed effectiveness requirement. The Revised Model Act, which makes the adopted rule effective twenty days after filing with the Secretary of State, provides:

[S]ubject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the [Secretary of State], or at a stated date less than 20 days thereafter, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of the reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

IAPA has a similar provision but, unlike the Revised Model Act, also exempts from the delayed effectiveness requirement any rule which "confers a benefit or removes a restriction on the public or some segment thereof."

In making this estimate, however, the Commission staff did not include cases in which the rules were proposed but not adopted during that one-year period. Of the 55 sets of proposed rules selected for the Commission's study, 18 were not adopted within this period. Nor did the Commission staff include the time taken to obtain information or opinions in preparing to propose a rule, pursuant to section 15.0412(6) of the Minnesota Statutes.

The Commission's estimate, therefore, is not comparable with Mr. Triplett's. It should also be noted that the Chief Hearing Examiner's office maintains that it takes no more than 180 days to promulgate a set of simple rules. Harves Letter, supra note 142.

294. See note 3 supra and accompanying text.

295. Temporary rules become effective upon approval of the Attorney General or his failure to approve or disapprove within five working days after the rules are submitted to him, MNN. STAT. § 15.0412(5) (Supp. 1977). Exigencies may require that temporary rules become effective even sooner and this should also be permitted by MAPA.


297. IOWA CODE § 17A.5(2)(b)(2) (1977). Another IAPA provision not found in the Revised Model Act requires that in "any subsequent action contesting the effective
As Professor Bonfield explains, the objectives of the general delayed effectiveness requirement are to give the parties subject to the rule, and the general public, fair notice of its existence and "a reasonable opportunity to make final objections to it or to prepare their affairs for its impact."\footnote{288} In "the case of a rule conferring a benefit or removing a restriction, however, the parties who are the direct beneficiaries are not likely to object to the rule and, indeed, will want the rule to be effective as soon as possible."\footnote{289} Since those who are not the direct beneficiaries of the rule, the general public, "will normally already have had a chance to make whatever input they desired in opposition to the rule during" the rulemaking process, "a required deferred effectiveness period will normally not be of any special benefit to them."\footnote{300}

One may question why representatives of affected interests, other than the direct beneficiaries of such a rule, should not have a "reasonable opportunity to make final objections to it." But on the whole, the exemption in question makes sense.

**L. Judicial Review of Agency Rules**

The validity of any rule may be determined by an appropriate district court upon a petition for a declaratory judgment if "it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner."\footnote{329} Any party to the review proceedings, including the agency, may appeal an adverse decision of the district court to the Minnesota Supreme Court.\footnote{322} The reviewing court is directed to declare the rule invalid "if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures."\footnote{303} The latter standard directs the court's inquiry to whether the applicable requirements of all the other provisions of MAPA have been satisfied, including the requirement that the agency shall have made an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule.

Except for some differences that will be pointed out, MAPA's date of a rule [exempt from general delayed effectiveness requirement], the burden of proof shall be on the agency to justify its finding."\footnote{Id. § 17A.5(2)(b)(3).}

For examples of the type of rules that may become effective immediately under the IAPA "imminent peril to the public health, safety, or welfare" standard, see Bonfield, supra note 8, at 885.

\footnote{288. Bonfield, supra note 8, at 885.}
\footnote{289. Id.}
\footnote{300. Id.}
\footnote{301. Minn. Stat. § 15.0416 (1976).}
\footnote{302. Id. § 15.0417 (Supp. 1977).}
\footnote{303. Id.}
judicial review provisions parallel those of the Revised Model Act.\textsuperscript{304} The Revised Model Act authorizes direct review by declaratory judgment of the “applicability” as well as “validity” of the rule. It is difficult to know whether the omission of “applicability” in MAPA is intended to imply that questions of the applicability or coverage of a rule may be determined only in the course of a proceeding brought by the agency to enforce the rule. It seems reasonable to say that a party threatened with the application of a rule which it claims does not cover it, should be able to bring a declaratory judgment or injunction suit to decide the issue. But there are significant latent problems in the Revised Model Act’s provision which involve the allocation of decisional responsibilities between courts and agencies.\textsuperscript{305} The Minnesota Supreme Court should proceed with caution if asked to allow such declaratory judgment or injunction suits. In any case, the protest procedure recommended in this Article could be used to raise issues of rule applicability in a manner that would avoid the difficulties of the Revised Model Act provision.

The Revised Model Act states that a rule, to be valid, must be adopted in “substantial” compliance with its procedural requirements.\textsuperscript{306} MAPA does not make this qualification. Nevertheless, it would undoubtedly be read into MAPA by a reviewing court applying the harmless error doctrine. Professor Bonfield explains that this provision, which appears in IAPA as well, requires the reviewing court to examine the extent to which the agency deviated from the statutory requirements, whether the deviation was inadvertent or a part of a purposeful scheme to avoid compliance, and the extent to which that noncompliance disabled those who might have wanted to from participating in the rulemaking or structuring their affairs to take account of its existence.\textsuperscript{307}

A reviewing court should consider similar factors in determining compliance with statutory rulemaking procedures under MAPA.

The Revised Model Act and IAPA also require that a proceeding to contest any rule on the ground of substantial noncompliance with procedural requirements must be commenced within two years from the effective date of the rule.\textsuperscript{308} MAPA contains no such requirement. The draftsmen of the Revised Model Act justified this provision on

\textsuperscript{305} See Gifford, Declaratory Judgments under the Model State Administrative Procedure Acts, 13 Houston L. Rev. 825 (1976).
\textsuperscript{306} Revised Model State Administrative Procedure Act § 3(c) (1961). See also Iowa Code § 17A.4(3) (1977).
\textsuperscript{307} Bonfield, supra note 8, at 874.
\textsuperscript{308} Revised Model State Administrative Procedure Act § 3(c) (1961); Iowa Code § 17A.4(3) (1977).
the ground that without it, "a rule which had been in effect for many years might be upset on some technical ground, and the setting aside of a rule under such circumstances might cause substantial mischief." This justification seems sound and a similar provision should be added to MAPA, taking care that no limit is placed inadvertently on the time when the validity of a rule may be challenged on the ground that it is unconstitutional, ultra vires, or in violation of some statute other than MAPA.

The Revised Model Act does not set forth any standards to guide the courts in determining the substantive validity of agency rules. IAPA authorizes the court reviewing an agency rule or decision in a contested case to declare the agency action invalid

if substantial rights of the petitioner have been prejudiced because the agency action is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the agency; (c) In violation of an agency rule; (d) Made upon unlawful procedures; (e) Affected by other error of law; . . . (g) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

These specific standards are to be preferred over the more general ones contained in MAPA because they foreclose disputes about the meaning of the latter. For example, it is not specified in MAPA that the court may declare a rule invalid because the agency violated its own rules or the rules of the Chief Hearing Examiner which are binding upon it. Read literally, only a rule adopted without compliance with "statutory" rulemaking procedures may be invalidated. It may be argued that the "statutory" procedures include the procedures prescribed by rules promulgated under the authority of the statute. But there is no reason MAPA should not say so and forestall litigation on the question.

The judicial review sections of MAPA are silent on one very important question: whether review must be based exclusively on the "hearing record" made in the course of the rulemaking proceedings. By contrast, in the case of the judicial review of agency decisions in

309. F. Cooper, State Administrative Law 207 (1965). See also Bonfield, supra note 8, at 875.
310. Iowa Code § 17A.19(8) (1977). Section 17A.19(8)(f) adds the following ground in the review of contested cases: "In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole."
311. A violation of a rule of the Attorney General, of course, may lead him to disapprove a proposed rule before it can ever be challenged in a court. See also Minnesota State Bankers Ass'n v. Commissioner, No. 397933 (Dist. Ct. Ramsey County, Minn., Apr. 1, 1975) at 4 (Findings of Fact, Conclusions of Law and Order for Judgment); Id. (Mar. 3, 1975) at 14, 15 (Memorandum Opinion), discussed in text accompanying notes 322-32 infra.
contested cases, MAPA expressly provides that review is to proceed exclusively on the basis of the record of the agency proceeding under review except in certain limited circumstances. The fact that these express statutory provisions are not to be found in connection with the review of rules, however, should not preclude a court from holding that MAPA's detailed rulemaking requirements in their entirety (particularly since the 1975 amendments) imply that judicial review of the validity of a rule shall proceed exclusively on the basis of the "hearing record" made in the course of the rulemaking proceeding.

Neither the Revised Model Act nor IAPA specifies the components of the "record" on which judicial review of agency rules is to be based. The administrative rulemaking record is not the exclusive basis of review under either of these statutes. IAPA removes any possible doubt about this by providing that the court reviewing the validity of a rule "may hear and consider such evidence as it deems appropriate." Of course, a reviewing court in Iowa would pay careful attention to the agency's statement that accompanies the adoption of the rule, setting forth the reasons for and against the rule and why the agency was not persuaded by the considerations urged against the rule. Furthermore, the agency is not permitted to advance in the reviewing court reasons in defense of the legality of the rule that are not contained in the statement of reasons. Nevertheless, a party seeking review of a rule to which the Attorney General has not objected has the burden of coming forward in the reviewing court with data challenging its validity, and bears the ultimate burden of demonstrating invalidity. The agency has an opportunity to respond to the data thus adduced and introduce any other data supporting the reasons contained in the statement accompanying the adoption of the rule. In

312. Section 15.0424(6) (1976) of the Minnesota Statutes provides that the review conducted by the court "shall be confined to the record." Section 15.0424(4) requires the agency to transmit to the reviewing court "the entire record of the proceeding under review," or a shortened record to which all the parties have stipulated. Sections 15.0424(5) and (6) state the circumstances under which the reviewing court may permit additional evidence to be taken before the agency or in the court. Section 15.0425(e) authorizes the reviewing court to reverse or modify the agency decision or remand the case to the agency for further proceedings if the decision is "unsupported by substantial evidence in view of the entire record as submitted."

Like MAPA, the Revised Model Act and IAPA require review of decisions in contested cases to proceed exclusively on the basis of the record of the agency proceeding under review. Revised Model State Administrative Procedure Act § 15(d), (e), (f), (g)(5) (1961); Iowa Code §§ 17A.12(6), (8), 17A.19(6), (7), (8)(f) (1977).

314. Bonfield, supra note 8, at 857.
315. If a rule to which the Attorney General has objected is under review, the agency has the burden of coming forward in the reviewing court with data supporting its validity—and ultimately the burden of demonstrating validity. Iowa Code §
short, the issue of the rule’s validity is to be “tried” in the reviewing court.

The Minnesota Supreme Court has not yet been called upon to decide whether the “hearing record” produced under MAPA procedures should be the exclusive basis for judicial review of a rule’s validity. State district courts have had differing views on the “exclusivity” of the administrative record prior to MAPA’s 1975 amendments. In Can Manufacturers, Inc. v: Minnesota Pollution Control Agency,316 for example, a group of manufacturers and trade associations in the packaging industry brought suit for declaratory judgment against the Minnesota Pollution Control Agency (PCA) to determine the constitutionality of section 116F.06 of the Minnesota Statutes317 and the validity of rules promulgated by the PCA pursuant thereto.

In an effort to reduce the volume of solid waste produced in Minnesota, the statute in question authorizes the PCA to review new or revised packages or containers sold at retail in the state after May 25, 1973, except when a revision involves only color, size, shape or printing. If the PCA determines that any new or revised package or container would create a solid waste disposal problem or conflict with state environmental policies, it may, by order and following notice and hearing, prohibit the sale of the package or container in Minnesota. The prohibition will continue until revoked by the PCA or, unless extended by legislative enactment, until the last day of the next following legislative session. The statute directs the PCA to adopt “guidelines identifying the types of new or revised containers and packaging that are subject to its review after notice and hearing as provided in section 15.0412, subdivision 4” of MAPA.318 The PCA rules in question implement the packaging review program, identifying those packages subject to review and setting out the procedures to be followed by the PCA and the criteria by which alternative forms of packaging are to be judged.

The parties challenging the PCA’s rules alleged, among other things, that the rules were not supported by substantial evidence in the record of the rulemaking hearings.319 District Court Judge Harold

17A.4(4)(a) (1977). The statement of reasons accompanying the adoption of the rule may be sufficient to support the burden of coming forward. The parties challenging the validity of the rule will have an opportunity to respond to the data introduced by the agency and offer other data supporting their position.


318. Id. § 116F.06(3). Since the rules in question were issued prior to January 1, 1976, they were not promulgated under the 1975 amendments to MAPA.

319. Under MAPA, the “substantial evidence” test applies only to the judicial review of agency decisions in contested cases, not rules. Compare MINN. STAT. § 15.0425(e) (1976) with MINN. STAT. § 15.0417 (Supp. 1977).
W. Schultz did not deal with this question. His memorandum begins by stating that the matter "came on for trial before" him on May 17 through May 24, 1976. Witnesses testified and written data were introduced in court. The "record" made during the public hearings on the rules seems not to have been regarded as exclusive by any party to the judicial proceeding, including the PCA and the State of Minnesota. On the basis of the evidence introduced during the week of trial, Judge Schultz concluded that the rules were "supported by substantial evidence on the record as a whole,"321 and upheld the constitutionality of the statute and the validity of the rules.

An examination of another district court opinion, Minnesota State Bankers Association v. Commissioner of Insurance,322 suggests a different answer to the question of the "record" on review. In that case, a group of bankers sued to enjoin the Commissioner of Insurance from enforcing Rule 116323 promulgated by him. Rule 116, like the PCA rules in Can Manufacturers, had been issued prior to MAPA's 1975 amendments. The rule made it an unfair trade practice for insurers who issue credit life insurance or credit accident and health insurance to (1) deposit their money or securities in a bank without interest or at a lower rate of interest than that currently paid other depositors on similar deposits, (2) deposit in a bank money or securities which would otherwise be required by the creditor of the bank as a compensating balance or offsetting deposit for a loan, or (3) engage in any other practice involving the use of their financial resources for the benefit of the bank as an inducement to it to purchase credit insurance from them.324

District Court Judge John W. Graff concluded, inter alia, that Rule 116 had not been validly adopted primarily because the agency had not complied with the rules of the Attorney General that "the record [of the public hearing] must support the rules as adopted";325 that the Statement of Need "shall contain a recitation of the reasons which support a finding of need for the rules";326 and that the

321. Id. at 12.
325. Minn. Reg. Atty. Gen. 303(c), 1 MCAR § 1.303(c).
“Findings of Fact must contain that which the agency finds to be fact which supports the reasons or need for the rules adopted.”327 “After a complete review of the record, the Statement of Need, [and] the Finding[s] of Fact,” explained Judge Graff, “it appears there was a deficiency of evidence to support the adoption of the rule.”328 He noted:

Other than the opening statement by the Commissioner about the proposed rule . . . the record is meager, sparse and inadequate to support the proposed rule. The Findings of Fact must be based upon the record. Here the Findings of Fact consists of a brief conclusionary statement. The Statement of Need is a restatement of the findings plus a statement that this practice is considered to be an unfair method of competition.329

Judge Graff went so far as to say that procedural due process was denied the banks challenging the validity of the rules because they were given no opportunity “to confront the defendant's officers” (their request to question the officials of the agency who presided at the hearing was denied) and because the Commissioner did not show that “meaningful consideration was given to the submission of information by the opponents of the rule.”330 Also, Judge Graff found, there “is nothing in the record that indicates what evidence was relied upon by the [defendants] in making the Findings of Fact and the Statement of Need.”331

The 1975 amendments to MAPA did not alter the standards for judicial review of a rule. Even before then, a rule was to be declared invalid only if the reviewing court found that “it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.”332 Judge Graff’s reliance upon agency violations of the Attorney General’s rules as grounds for invalidating a rule would seem to be misplaced with respect to a rule that has been approved by the Attorney General. Judge Graff did not point to any statutory rule-making procedure that had been violated.

At the time the Can Manufacturers and Bankers Association cases were decided, MAPA itself did not speak of a “hearing record.” It required agencies to hold public hearings on proposed rules and provided that every rule, “before being adopted,” must be “based upon a showing of need for” it.333 Judge Graff construed even these

327. Id.
329. Id.
330. Id.
331. Id.
333. Id. § 15.0412(4).
requirements as mandating on-the-record, trial-type rulemaking pro-
cedings. "A rule adopted, based upon an inadequate record," he
concluded, "is not in compliance with required rulemaking pro-
duores." Judge Graff thus appears to have assumed that the rule-
making record was the exclusive basis on which the reviewing court
would determine the validity of the rule. This assumption, however,
was never made an issue because neither party requested the oppor-
tunity to introduce evidence in the district court. The case was sub-
mitted on the briefs and oral arguments.

Given the existing MAPA requirements for rulemaking, neither
a holding by the Minnesota Supreme Court that the administrative
"hearing record" is the exclusive basis for judicial review of the valid-
ity of a rule nor a holding that the rule's validity may be "tried" in
the reviewing court would be satisfactory. To allow the record for
review to be made or even supplemented in the reviewing court is to
force the agency and the affected parties to repeat, or supplement and
amplify, what was done at the public hearing. Such a "trial" runs the
risk of enlarging the scope of review and tempting the reviewing court
to usurp the agency's decision-making authority. Furthermore, if new
data are introduced in the reviewing court, the agency may be reluc-
tant to reconsider its action and possibly modify it in light of the new
data, for it is in an adversary position seeking to defend the validity
of its rule. To encourage reexamination, the reviewing court may
exercise its discretion to remand the matter to the agency to receive
and consider the additional data.

On the other hand, requiring judicial review to proceed exclu-
sively on the basis of the "hearing record" would also have unfor-
tunate consequences. Once it is understood that all persons and
groups that may be affected by a proposed rule will be limited to the
"hearing record" in any judicial proceeding challenging the validity
of the rule, the parties participating in the public hearing would
multiply—and so would the issues. Only by participation would they
be able to affect the contents of the record and preserve the issues
they may wish to present to a reviewing court.

The agency's "affirmative presentation" at the public hearing
"of facts establishing the need for and reasonableness" of the pro-

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335. If a court, reviewing an agency decision in a contested case, decides that
additional evidence should be received because it is "material" and "there were good
reasons for failure to present it in the proceeding before the agency," the court must
remand the case to the agency to take the evidence and reconsider its decision in light
of it. MINN. STAT. § 15.0424(6) (1976). On the assumption that a rulemaking "hearing
record" is not exclusive, the parties seeking to introduce data in the reviewing court
would have to show that they are "material" but not that there were good reasons for
failure to present the data in the course of the rulemaking proceeding.
posed rule would have to include a presentation of all the significant data, inferences, and conclusions upon which it relies to support the rule. Representatives of the affected interests participating in the public hearing would have to be given an opportunity to challenge the agency presentation and produce rebuttal or countervailing data. The agency would be obliged to respond to all significant challenges supported by data. Every participant would have to be given the opportunity to respond to the data, inferences, and conclusions presented by every other participant.

Because a reviewing court would refuse to hear any objection to a rule not made during the public hearing, participants opposing the proposed rule would voice all possible objections and introduce data to support them. Since it could not know which of these objections might eventually become the basis of a challenge to the rule's validity, the agency would have no choice but to respond—for the "hearing record"—to each objection with its own data and arguments.

All these factors would operate to produce large and diffuse records that the agencies and reviewing courts would find cumbersome to manage. Finally, the agency would be required to conduct such an on-the-record rulemaking proceeding before issuing any rule, regardless of its importance and even though it is probable that only a small percentage of any agency's rules will be subjected to judicial review.

It is quite clear that such on-the-record rulemaking proceedings would lack the flexibility, efficiency, and informality that should characterize the exercise of the most important means available to an agency to implement statutory policy. Yet, such proceedings seem to be contemplated by MAPA's prescribed rulemaking procedures as elaborated by the rules of the Attorney General and the Chief Hearing Examiner. Since that is the case, the "hearing record" should become the exclusive basis for judicial determination of the validity of the adopted rule.

V. CONCLUSIONS AND RECOMMENDATIONS CONCERNING MAPA'S PRESCRIBED RULEMAKING PROCEDURES

It may be that MAPA's prescribed rulemaking procedures, despite the criticisms levelled at them in this Article, produce "better" substantive rules than would eventuate without them. It is not apparent, however, how one would test such a hypothesis. The views of the

336. Non-controversial rules are not excepted. The Chief Hearing Examiner has expressed the opinion, which is probably correct, that "merely reaching an agreement with the public does not relieve the agency from the burden of making an affirmative presentation of facts at the hearing." In re Hazardous Wastes, supra note 168, at 8.
agencies themselves may be of some interest on this issue, though hardly dispositive.

In response to the expressions of concern by some agency heads, former Governor Perpich requested his Legislative Counsel and the Executive Director of the Pollution Control Agency to initiate a study of the impact of MAPA's procedures on the operations of state agencies. Mr. Triplett and Ms. Gardebring solicited the views of the agencies. Twenty-nine agencies responded to various parts of their questionnaire.

Fourteen agencies replied that the high cost of complying with MAPA's requirements was not balanced by increased protection to the public. For five agencies, these procedures imposed additional cost burdens that were not unreasonable in light of the increased protection they afforded the public. Two agencies were unsure whether the additional cost burdens provided further protection to the public.

Twelve agencies replied that the rulemaking procedures were unreasonably time-consuming, without substantial benefit to the public. Three agencies concluded that these procedures imposed difficult time burdens, but resulted in better protection for the public. One agency was of the view that these procedures did not impose substantial time burdens on it.

Ten agencies expressed concern over the conflict between the Attorney General and the Chief Hearing Examiner. Nine agencies were generally satisfied with the performance of the Office of Hearing Examiners. Three agencies questioned whether the Office of Hearing Examiners made a positive contribution to their activities.

In this section of the Article, I do not attempt to bring together the various suggestions offered for modification of MAPA. Instead, I present some conclusions and recommendations concerning the basic features of MAPA's prescribed rulemaking procedures.

It is "the consensus of judges, legislators, administrators and practitioners," as Professor Davis has written, that "trial procedures . . . are not good for making rules of general applicability." MAPA does not expressly mandate trial procedures, characterized by oral testimony and the confrontation and cross-examination of witnesses. But its requirement of a "public hearing" to be conducted by a hearing examiner independent of the agency, its references to the "hearing record," the "transcript" of the hearing which may be requested by the agency, the Chief Hearing Examiner, or the Attorney General, and the "findings of fact" of the hearing examiner, as well

as the implementing rules of the Chief Hearing Examiner, seem to contemplate trial-type proceedings. MAPA should be amended to make it clear that trial-type proceedings are not intended and that oral testimony and cross-examination will be allowed only if it is shown that a particular issue of fact in controversy can best be illuminated in that manner.\footnote{339. The Administrative Conference of the United States has recommended that trial-type procedures are appropriate in rulemaking only "on issues of specific fact" and "never . . . for resolving questions of policy or of broad or general fact." Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 1 C.F.R. § 305.72-5(3) (1977). For a critique of this formulation, see Auerbach, supra note 6, at 51-55.}

The role of the Office of Hearing Examiners in rulemaking should be reconsidered. The potential conflicts between the Chief Hearing Examiner and the Attorney General should be resolved. So long as the Attorney General has the statutory authority and responsibility to review the final agency rule as to form and legality, and to prevent it from becoming effective, he should have the final say with respect to the matters on which the Chief Hearing Examiner may also express himself.

But more needs to be done. The functions that MAPA now gives to the hearing examiners tend to overwhelm the legislative aspects of rulemaking by imposing judicial norms upon it. Agencies must now come to the public hearings prepared to defend their proposed rules before unbiased "judges" who will render their non-binding judgments on the "hearing record." The hearings themselves are conducted under rules promulgated by the Chief Hearing Examiner and binding on the agencies. These rules give the hearing examiners great discretion in the conduct of the public hearings. Under these circumstances, it is difficult for the agency representatives to approach the hearing with inquiring minds and readiness to engage in the informal exchange of data and views with affected interests that might lead them to modify, or possibly withdraw, the rules.

Based on the hearing record, the hearing examiners write their reports, stating their findings of fact, conclusions, and recommendations. In the performance of this function, too, they act like judges. They do not consult with the agency heads or agency staff about the issues of fact, law, or policy raised in the hearings. They do not attempt to give the agencies the benefit of their insights and judgments in any informal manner. The agencies must await the reports in order to ascertain the views of the hearing examiners.

Although these reports are not binding, the agencies dare not ignore them, for then they run the risk of provoking disapproval by the Attorney General or the institution of a judicial review proceeding. At the same time, the affected interests participating in the
public hearings, though able to see the hearing examiners' reports, are not able to comment on them before the agencies finally act on the rules.

If hearing examiners are to play an important part in the rulemaking process, they should forsake the judicial model. They should discuss issues of fact, law, and policy with the members and staff of the agencies. This might encourage desirable modifications in the proposed rules which could then be incorporated in the hearing examiners' reports. In any case, these reports should seek to embody the agencies' views and tentative conclusions on the issues. The participants in the public hearings should then be given the opportunity to comment on the hearing examiners' reports before final agency action is taken. If the "independence" of the hearing examiners is sought to be preserved, the reports could continue to contain their own conclusions and recommendations, even when they disagree with the agencies' views and tentative conclusions.

To discharge their duties adequately, the hearing examiners would need a staff of experts to advise them. Since state agencies have a difficult time attracting such experts, it is not likely that the Office of Hearing Examiners would succeed in doing so, even if the legislature were to countenance such a duplication of personnel. In any case, the hearing examiner should not be given the kind of role in the rulemaking process envisaged by MAPA, even with the modifications I have suggested. If the public hearing is to include oral presentations, they should be made, to the extent practicable, before one or more agency members or the head of the agency division most directly concerned. Such a practice would increase the significance of the oral presentations but it may not always be feasible. The agency, therefore, should be given the option of assigning one or more staff members, or a hearing examiner, to the task of presiding over the public hearing. A hearing examiner so assigned should have no other function.

Instead of a hearing examiner's report, it may be advisable to require the agency, before it takes final action, to issue a statement indicating the final action it proposes to take and its reactions to the data and arguments presented by the affected interests during the course of the rulemaking proceeding. The affected interests should then have a final opportunity to submit written comments on this statement to the agency. It is possible that such a requirement may concentrate hitherto dispersed opposition to the final action the agency proposes to take and, therefore, may not always serve the public interest. Yet, experimentation with the requirement may be worthwhile.

Even if all these recommendations were to be adopted by the Minnesota Legislature, the basic difficulty with the existing, as well as modified, rulemaking process would remain. It would still be an
"on-the-record" proceeding: one intended to produce an administrative "hearing record"—or "rulemaking record"—upon which, exclusively, the agency must base its final action and the courts must determine the validity of the rule. While I share the consensus that trial procedures, generally, are not good for making rules, I am also persuaded that "on-the-record" procedures, generally, are not good for making rules or for creating the exclusive records on the basis of which the validity of the rules will subsequently be determined.1

To avoid on-the-record rulemaking, I would urge adoption of the basic rulemaking provisions of IAPA which prescribe a notice-and-comment procedure essentially similar to that originally contemplated under FAPA.2 I do not think it desirable, however, to "try" the validity of the rule in the reviewing court, as provided in IAPA. It is better, for the reasons outlined above, to have the record for review made before the agency and not the reviewing court. Accordingly, it is proposed that any person seeking judicial review of an agency rule should first be required to file a protest against the rule with the agency. This protest could attack the validity of the rule either as a whole or as applied to the party protesting. The agency would then conduct an on-the-record proceeding with such trial-type procedures as the protesting party shows are necessary to develop fully the issues of fact raised by the protest. Protests raising the same issues of fact, law, or policy would be consolidated in a single proceeding for joint disposition. The agency staff members most involved with the rule being protested should preside over the protest proceeding. Here again, the agency should have the option of using a hearing examiner for this purpose. The agency's disposition of the protest would be subject to direct review exclusively on the basis of the record made in the protest proceeding.3

Professor Davis has objected to the proposed protest procedure for federal rulemaking on the following grounds:

[T]he heart of the idea is, in its most unfavorable aspect, that an agency need not follow good procedure unless a challenge forces it to; if a rule based on inadequate procedure is substantively faulty, it may nevertheless be effective for ten or twenty or fifty years unless someone challenges it, but the facts available at the time of challenge may be altogether different from the facts the agency used in formulating the rule.

340. For a contrary view, see K. Davis, supra note 338, at 447-634.
341. See Auerbach, supra note 6, at 16.
342. See id. at 61-68. The recommended protest procedure is modeled after the statutory system created for the promulgation and judicial review of price and rent regulations during World War II. The features of this system that were determined by the exigencies of economic stabilization during wartime are not incorporated in the recommended protest procedure.
When an agency of the government is making law that affects private interests, the law made by Congress and by the courts should impose on the agency an obligation to use procedure that is designed to protect against unsound rulemaking, whether or not any affected person goes to court to challenge the rule. The best protection against administrative injustice is not judicial review; the best protection is proper administrative action in the first place. To exempt an agency from good rulemaking procedure unless the agency's action is challenged in court may have little or no effect on the best administrators, but it may have the wrong effect on administrators who are less than the best.\textsuperscript{343}

The procedure that Professor Davis criticizes and regards as less than "good," and even as an "inadequate procedure" that will not "protect against unsound rulemaking," is the same notice-and-comment rulemaking procedure that he described in 1970 as "one of the greatest inventions of modern government."\textsuperscript{344} Davis agrees that this procedure "was about the same in 1970 as it was in 1946,"\textsuperscript{345} when it was embodied in FAPA, but he thinks it has been "vastly improved"\textsuperscript{346} during the 1970s by the concept of an administrative rulemaking record upon which, exclusively, the agency must base its rule and support the rule's validity in a reviewing court.\textsuperscript{347}

It is only with this latter judgment of Professor Davis that I respectfully disagree. I join his praise of notice-and-comment rulemaking as it existed for almost 25 years. It was the dominant rulemaking procedure used by federal agencies. Judging by the relative paucity of cases in which they were subjected to judicial review, let alone declared invalid by appellate courts, rules promulgated under these procedures were not, on the whole, "substantively faulty."

It is possible that adoption of the proposed protest procedure may encourage agencies to make a notice-and-comment rulemaking procedure, such as that embodied in IAPA, a perfunctory one. This could happen under notice-and-comment procedure even if unaccompanied by the recommended protest procedure. But it need not hap-
pen. Worry about "administrators who are less than the best" should not lead us to make it very difficult for the "best administrators" to accomplish their purposes. There is warrant for general skepticism about what "good" rulemaking procedures, however defined, can do for mediocre administrators.

I agree with Professor Davis that the "determination of what is necessary [rulemaking procedure] should depend upon the issues in the proceeding, not on judicial review or lack of it." To illuminate particular issues of fact even under IAPA-type rulemaking, the agency may find it necessary to allow evidence to be presented by oral testimony and the witnesses to be cross-examined. But the agency should have the authority to determine what is procedurally useful in particular situations. The point is that all agencies should not be compelled to devise procedures so as to produce administrative rulemaking records which will also become the exclusive bases for determining the validity of rules by reviewing courts.

Professor Davis seems to assume that under the proposed protest procedure, a protest against a rule will not be allowed unless and until the protesting party seeks judicial review. This would not be the case. While no one, under the proposal, may seek judicial review without having first filed a protest against the rule, anyone affected by the rule may file a protest against it without subsequently seeking judicial review. Whenever a protest is filed, the agency would consider de novo all the issues raised by the protesting party. As a result, the rule might be amended, or even withdrawn; the rule might be held not to be applicable to the protesting party; the protesting party might be granted an exception or adjustment; or the protest might be denied in its entirety. The party protesting would decide whether to seek judicial review only in light of the disposition of the protest.

Thus, in Professor Davis' terms, "good procedure" will be employed even in the absence of judicial review. Professor Davis also argues, in opposition to the protest procedure, that "if a rule based on inadequate procedure is substantively faulty, it may nevertheless be effective for ten, twenty, or fifty years unless someone challenges it, but the facts available at the time of challenge may be altogether different from the facts the agency used in formulating the rule." I agree that rules based on "inadequate" procedure are more likely to be "substantively faulty" than rules based on "adequate" procedure and that the availability of judicial review should not excuse "inadequate" procedure. But I do not agree that the IAPA-type procedure is inadequate. Nor do I agree that it will be rendered "inadequate" by the requirement that a protest proceeding must

348. Id. § 6:32, at 601.
349. Id. at 600.
precede judicial review of the validity of the rule instead of having the issue of validity "tried" in the reviewing court.

Whether the rulemaking procedure is adequate or inadequate according to Professor Davis, the possibility always exists that the facts at the time of judicial review may be different from what they were during the rulemaking proceeding. If this is so, it would make no sense for the reviewing court to determine the validity of the rule on the basis of the old administrative rulemaking record. Even when the rulemaking record must be the exclusive basis for judicial review, this contingency is allowed for by permitting the party seeking review to request the court's permission to introduce additional evidence that could not reasonably have been offered during the rulemaking proceeding. A court granting such permission will normally remand the matter to the agency to receive the additional evidence and reconsider its action in light of it. This is precisely the function that the protest procedure will perform for the parties, the agency, and the reviewing court.

Furthermore, it is not necessarily true that the protest proceedings will always be conducted while the rule being protested is in effect. The agency itself may decide to stay the effective date of the rule pending the disposition of the protest. Or a reviewing court may issue such a stay. Even so, the protest procedure is advisable because it would relieve the agency of the necessity of conducting on-the-record rulemaking proceedings in connection with most promulgated rules against which, experience teaches, there will be no objections. It would also facilitate judicial review of a rule by focusing the issues for review more sharply on a concrete factual situation than is possible when the pre-issuance rulemaking record is the exclusive basis for review.350

VI. LEGISLATIVE AND GUBERNATORIAL REVIEW OF ADMINISTRATIVE RULES

A. LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

In 1974, the Minnesota Legislature created a Legislative Joint Committee to review administrative rules as defined by MAPA.351 The Joint Committee, which became the Legislative Commission to Review Administrative Rules in 1975,352 is composed of five senators appointed by the Senate Committee on Committees and five repre-

350. See Auerbach, supra note 6, at 61-62.
351. Act of March 30, 1974, ch. 355, § 69, 1974 Minn. Laws 629 (codified at MINN. STAT. § 3.955 (1976)). It is difficult to know why rules exempt from MAPA were not subjected to review by the joint committee.
sentatives appointed by the Speaker of the House of Representatives.\textsuperscript{353}

The Commission is authorized to "hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention [and] on the basis of the testimony received at . . . public hearings, [to] suspend any rule complained of by the affirmative vote of at least six members."\textsuperscript{354} Before suspending a rule, however, the Commission must "request the Speaker of the House and the President of the Senate to refer the question of suspension of the given rule or rules to the appropriate committee or committees of the respective houses for the committees' recommendation."\textsuperscript{355} The suspension may not take effect until the recommendation, which is advisory only, is received by the Commission or sixty days have elapsed after referral of the question of suspension to the committees and no recommendation has been received.\textsuperscript{356}

If it suspends a rule, the Commission must as soon as possible place before the legislature, at the next year's session, a bill to repeal the suspended rule. If the bill is defeated, or fails of enactment in that year's session, the rule shall stand and the Commission may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a law specifically authorizes the adoption of that rule.\textsuperscript{357}

The Commission is required to make a biennial report to the legislature and Governor of its activities and to include therein its recommendations.\textsuperscript{358} A majority of the Commission may request any department issuing rules to hold a public hearing on the recommendations contained in its biennial report.\textsuperscript{359} The hearing must then be conducted in accordance with the provisions of MAPA.\textsuperscript{350}

The Revised Model Act does not provide for such legislative

\begin{itemize}
\item \textsuperscript{353} Minn. Stat. § 3.965(1) (1976).
\item \textsuperscript{354} Id. § 3.965(2).
\item \textsuperscript{355} Id. § 3.965(4).
\item \textsuperscript{356} Id.
\item \textsuperscript{357} Id. § 3.965(2).
\item \textsuperscript{358} Id.
\item \textsuperscript{359} Id. § 3.965(3). The language in subdivision 3 is ambiguous for it authorizes public hearings "in respect to recommendations made pursuant to subdivision 2." Such recommendations include the recommendations under subdivision 4 (incorporated by reference in subdivision 2) made by the appropriate legislative committees on the question of the suspension of a given rule or rules. But it would seem that such recommendations were not intended to be included by subdivision 3. It also seems anomalous that subdivision 3 should apply only to departments—and not other agencies—issuing rules.
\item \textsuperscript{350} The significance of this provision is also not clear since it was not reconsidered by the legislature in light of the 1975 amendments to MAPA. Act of June 4, 1975, ch. 380, 1975 Minn. Laws 1285.
\end{itemize}
committee review of administrative rules. IAPA creates a Bipartisan Administrative Rules Review Committee composed of three senators appointed by the President of the Senate and three representatives appointed by the Speaker of the House. The Committee is given authority, parallel to that of the Iowa Attorney General, to object to any rule prior to its effective date. An objection filed by the Committee has the same effect as one filed by the Attorney General. It imposes upon the agency the burden of demonstrating the rule's validity when that is questioned in any subsequent judicial proceeding. The criticism directed at the IAPA scheme of Attorney General review is also applicable to this aspect of review by the legislative committee.

As originally enacted, IAPA also authorized the Administrative Rules Review Committee to refer any rule in effect, for any reason it chose, to the Speaker of the House and the President of the Senate, who were then required to refer the rule to the appropriate standing committees of the legislature. The referral could be accompanied with a recommendation that the "rule be overcome by statute" or that any other action be taken. But the rule was to remain in effect until "overcome by statute."

IAPA was recently amended to give the Administrative Rules Review Committee the additional authority, upon a two-thirds vote of its members, to delay the effective date of any rule, other than a rule exempt from the delayed effectiveness requirement, "until the expiration of forty-five calendar days, excluding legal holidays, during which the [Iowa] general assembly is in regular session." If at the expiration of that period, the General Assembly has not disapproved of the rule by a joint resolution approved by the Governor, the rule becomes effective. If the rule is disapproved, it may not become effective and the agency must withdraw the rule. These provisions are similar to those governing the powers of the Minnesota Legislative Commission to Review Administrative Rules. Both sets of provisions authorize a milder form of "legislative veto" than exists in a number of other states.

362. Id. § 17A.8(8); see text accompanying notes 274-77 supra.
363. See text accompanying notes 285-87 supra.
365. Id. § 17A.8(8). "Other reasons for referral might be that the rule is of such importance that it should be embodied in a statute; or that the rule illustrates a problem with the agency's enabling statute which should be modified in a specified way." Bonfield, supra note 8, at 904.
367. Id.
368. Id.
369. See Bonfield, supra note 8, at 904 n.681.
Nevertheless, even these provisions raise questions of constitutionality under the state constitutions of Iowa and Minnesota. Professor Bonfield has expressed the opinion that the Iowa Constitution precludes the legislature from undercutting "the rulemaking power delegated by statute to the agency without going through the exact same process by which the original delegation was made." While he was addressing the proposal that the legislature be allowed to repeal a rule by joint or concurrent resolution without approval by the Governor, the case for constitutionality is not made stronger by the fact that the legislative committees in Iowa and Minnesota may only suspend the effectiveness of a rule for a limited period of time. By so doing, the committees alone will have rendered ineffective, for the specified period of time, a rule which would otherwise have the force of law.

The constitutionality of various forms of legislative veto of administrative and executive actions on the federal and state levels is currently a matter of great debate. I shall not enter the debate here, except to hazard the judgment that the legislative veto is not unconstitutional either under the United States or the Minnesota Constitution.

Whether the Minnesota Legislature is wise to resort to the legislative veto or suspension of agency rules is another matter. The argument in favor of such legislative oversight is that it is the most effective means by which the legislature can be informed of the policies being translated into law by the agencies and can hold the agencies accountable. As a result, the public is expected to be better protected against agency action that is unreasonable or exceeds its statutory authority.

These are important considerations, but so are the countervailing ones. Legislatures have delegated rulemaking authority to executive and administrative agencies because they are unable to perform this function themselves. As the problems of our society become more complex and technical, the need for such delegation becomes greater. By reserving the power to veto or suspend agency rules, the legislature embroils itself in the complexity and detail it sought to avoid by the original delegation of rulemaking authority. Furthermore, neither the legislature as a whole nor a legislative joint committee can devote the time necessary to become familiar with, or expert in, all of the areas covered by agency rules. To the extent that the legislative review committee must rely on staff for guidance, it defeats the purpose for its existence, namely, to bring to bear the judgment of legislators on the desirability of particular agency rules.

370. Id. at 904.
371. See id. at 918-19.
No standards are laid down in the Minnesota or Iowa legislation to guide the legislative committee in exercising its suspension power. To prescribe such standards would be inadvisable because the purpose of the legislative review of agency rules is to empower the legislature to substitute its judgment on policy for that of the agency—however that judgment is made. There can be no valid objection to the exercise of "political" judgment by the legislative review committee because rulemaking is political, in the sense that the policies it embodies reflect an authoritative choice of values.

A major problem with legislative committee veto or suspension of rules is that it lends itself to undemocratic political decisions. Only six legislators in Minnesota need to be persuaded and a rule will be suspended. Groups that unsuccessfully opposed the policies embodied in the basic legislation may, therefore, be encouraged to try to turn their defeat into victory by exerting pressure on the legislative review committee to suspend agency rules implementing the legislation. This concern is obviated somewhat by the fact that in both Minnesota and Iowa, the rule goes back into effect unless a statute is passed repealing or modifying it. But in Minnesota, the suspension may be effective for as long as a full year. In the interim, the public may be deprived of the benefits of the rule, and the uncertainty about its future may make it impossible for both the agency and affected interests to plan their affairs.

The Legislative Commission to Review Administrative Rules in Minnesota has been in existence for more than four years. Its experience should be evaluated before deciding whether the Minnesota scheme of legislative review is desirable. The Commission was not very active during the first three years of its existence. It met once in 1974, three times in 1975, and once in 1976. During these three years, it received a total of four complaints against agency rules. It held hearings in three of these cases. No rule was formally suspended.372

372. Letter from Marshall R. Whitlock, Executive Secretary, Legislative Commission to Review Administrative Rules, to Carl A. Auerbach (Sept. 26, 1978)(statistical enclosure) [hereinafter cited as Whitlock Letter]. The author is indebted to Mr. Whitlock for his help in gathering this information.

In one case, after a hearing, the Commission decided that the complaint was not sufficiently meritorious to warrant further attention. This case involved a complaint by an electric cable company that a rule of the Cable Communications Board requiring cable companies to have equipment for live broadcasts was unreasonable.

A second complaint, involving a claim by the Minnesota-Dakotas Retail Hardware Association that rules on unfair trade practices issued by the Commerce Department's Consumer Services Division were unreasonable, was withdrawn and the agency was sued instead. In Minnesota-Dakotas Retail Hardware Ass'n v. Minnesota, File No. 406422 (Dist. Ct. Hennepin County, Minn., Jan. 27, 1977), District Judge Otis H. Godfrey, Jr. granted the plaintiffs' motion for summary judgment, holding that the Consumer Services Division had no statutory authority to issue the rules in question.
In 1977, the Commission, which was without staff until that time, employed a full-time Executive Secretary. Two attorneys employed by the Revisor of Statutes have also been assigned as legal advisors to the Commission. In addition, the Commission calls upon the services of other legislative staff for needed investigation and research. It now acts only after receiving a report from its staff.

Since January 1, 1977, the Commission has received 29 complaints against agency rules. It met eleven times in 1977 and five times in 1978 as of this writing. In the last year, seventy percent of the complaints received by the Commission came from legislators, fifteen percent from Commission and legislative staff, ten percent from individual citizens, and five percent from representatives of interest groups. Complaints from legislators receive first claim on the Commission's attention.

In the third complaint, the Commission, after hearing, reported to the legislature on the problem raised. This case involved a question that the Southeast Minnesota Regional Arts Commission put to the Commission as to whether the creation of the State Arts Board was intended to centralize grant-making authority in the Board and deprive regional arts groups of funds with which they could make grants to artists and arts organizations.

In the fourth, the result of the Commission's intervention was the same as if it had suspended the rule in question. In that case, private hospitals complained about being covered by a Department of Public Welfare rule requiring the licensing of facilities for the care of the mentally ill. After hearing, the Commission received assurances from the Department that it would not enforce the rule against the private hospitals until the legislature had a chance to resolve the issue. At its next session, the legislature excluded private hospitals that meet certain conditions from the licensing requirement. Act of April 13, 1976, ch. 243, § 5, 1976 Minn. Laws 907 (codified at MINN. STAT. § 245.791 (Supp. 1977)).

Six involved the Department of Education; five, the Department of Public Welfare; three, the Department of Natural Resources; three, the Department of Health; two, the Pollution Control Agency; and one each, the Arts Board, the Energy Agency, the Department of Human Rights, the Public Service Commission, the Cable Communications Board, the Department of Corrections, the Department of Agriculture, the Department of Transportation, the Commerce Department's Insurance Division, and the State Auditor. Whitlock Letter, supra note 372 (statistical enclosure).

Mr. Whitlock points out that the same complaint may have been received from more than one person, in which case it is counted as a single complaint. In all, complaints from 38 persons were received since January 1, 1977.

The complaint against the State Auditor was that he had not promulgated any rules on allowable administrative expenses in connection with the administration of the fire and police pension fund, which is under the State Auditor's supervision. It was explained to the complainants that the State Auditor did not have rulemaking authority. The Commission took the initiative in calling this matter to the attention of the appropriate legislative committees and a law was passed specifying the criteria by which such administrative expenses were to be allowed. Act of March 28, 1978, ch. 690, 1978 Minn. Laws 540.

It is not possible to say how many of the complaints submitted by legislators and legislative staff were, in turn, initiated by individual citizens and representatives of interest groups.
The grounds for complaint have been categorized as follows: 35% of the complaints charged that the rules in question violated legislative intent; 25% that they were unreasonable; 14% that rules as defined by MAPA were issued as guidelines without following MAPA’s rulemaking procedures; and 11% that rules were not promulgated. The remaining 15% were based on miscellaneous grounds.

No rule involved in these 29 complaints has been formally suspended, but Commission intervention has resulted in rule changes. In one case, for example, the Commission threatened to suspend five Arts Board rules specifying criteria for accepting or rejecting applications for grants unless the Arts Board redrafted these rules, within a specified time, to meet the Commission’s objections. The Arts Board redrafted the rules to embody all the changes suggested by the Commission. These rules are now in the final stages of adoption.

The Commission found that more than half of the complaints it received were without foundation. As of this writing, about one-third were still under investigation.

It is probably too early to come to any definitive conclusions about the experience of the Commission. No pattern seems to be emerging with respect to the agencies complained against or the nature of the complaints. The total number of complaints do not seem to indicate general dissatisfaction with agency rulemaking. The Commission’s intervention has undoubtedly resulted in the improvement of some rules and the passage of desirable pieces of legislation. Whether its intervention has always had a good effect cannot be determined without a closer examination of particular cases. It is interesting to learn, however, that the Commission is prepared to review proposed rules, as well as rules in effect, even though the statute limits its authority to the suspension of adopted rules.

At least one concern expressed about the wisdom of legislative committee review seems to be confirmed by the Commission’s limited experience to date. The threat of suspension of an agency’s rules, when made by legislators who will vote on legislation and appropriations affecting the agency, seems to be enough to induce the agency to satisfy the Commission’s objections. This frustrates the statutory intent that the Commission have the power only to suspend agency

375. Whitlock Letter, supra note 372 (statistical enclosure).

376. Mr. Whitlock estimates that as of October 17, 1977, approximately 6,240 agency rules were set forth in the Minnesota Code of Agency Rules. This count may not be entirely accurate because, as Mr. Whitlock points out, “while . . . the Department of Public Welfare includes large numbers of things within each rule, the Department of Agriculture has a rule for virtually every product on the market.” M. Whitlock, Report of Executive Secretary on behalf of the Legislative Commission to Review Administrative Rules on Numbers of Administrative Rules by Department or Agency (Oct. 18, 1977) (unpublished report of Commission to Review Administrative Rules).

377. MINN. STAT. § 3.965 (1976).
rules and that only the legislature, with the approval of the Governor, have the authority to repeal or modify them.

Possibly, the Commission's power is no greater than that of other standing committees that have been known to express displeasure with particular agency rules from time to time and with effect. But agencies have also been known to withstand such legislative committee pressure in the expectation that they would be supported by the legislature as a whole. A standing joint committee with the power to suspend rules is a formidable adversary. It concentrates power to an undesirable degree. In time, too, there will be a tendency for a measure of this power to be exercised by the Commission's staff.378

B. REVIEW OF ADMINISTRATIVE RULES BY THE GOVERNOR

The 1978 amendments to IAPA also gave the Governor of Iowa authority to object to agency rules before they become effective, with the same consequences as an objection by the Attorney General or the Administrative Rules Review Committee.379 They also empowered the Governor to rescind an adopted rule by executive order within thirty-five days of the publication of the rule.380 To assist the Governor in this task, the Governor was required to establish, as part of the Governor's Office, an Office of the Administrative Rules Coordinator and to appoint its staff.381 The Coordinator was also empowered to prescribe the style and form of agency rules.382

No such authority is granted the Governor by the Revised Model Act or MAPA. I would express the same doubts about the desirability of giving the Governor the power to object to rules as I did to giving such power to the Attorney General or a legislative review committee. But the idea of giving the Governor the authority to rescind an adopted rule by executive order within a specified time is worthy of serious consideration. If there is to be external review of agency rules—in addition to judicial review—it is more fitting to entrust it

378. The Commission is also required by statute to "promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them." Id. § 3.865(2). In discharge of this responsibility, Commission staff has worked with staff of the State Register and the Minnesota Code of Agency Rules to change the format of these documents so as to make them more understandable. In addition, Commission staff carried out the study mentioned above, see note 293 supra, to ascertain the length of time it takes for agencies to promulgate rules. However commendable these efforts may be, they would seem to be tasks more properly within the domain of the Executive Branch.


380. Id. § 15 (adding a new subsection to Iowa Code § 17A.4).

381. Id. § 2 (adding a new section to Iowa Code, ch. 7).

382. Id.
to the head of the Executive Branch than to the Attorney General or a legislative review committee.

Such authority may give the Governor an important means of advancing state policies and objectives and coordinating the work of the various state agencies. Whether this authority is needed in Minnesota may, in turn, depend upon whether the Governor's power to appoint and remove department heads, who serve at his pleasure, is sufficient to give him effective control over departmental policies, and whether the "independent" agencies, the members of which do not serve at the Governor's pleasure, are important enough to warrant this kind of gubernatorial supervision.

If such authority is granted the Governor, it should be expanded to include the power to modify an agency rule, as well as to direct an agency to propose a particular rule for public consideration under MAPA. Furthermore, if the Governor is to exercise such authority by executive order within a specified time—a condition necessary to eliminate uncertainty about the status of agency rules—the promulgation of the executive order should itself be exempt from MAPA. But the Governor should be required to provide for the expression of public views on the action he proposes to take in some other way—by a notice-and-comment procedure, for example, unaccompanied by a public hearing.

It should be recognized that the Governor would be unable to exercise such authority personally. He would have to rely on staff for the purpose, as IAPA explicitly recognizes. But the action taken in his name would be embodied in an executive order for which he would be held personally responsible by the people of the state. This would be different, therefore, from the authority exercised in the name of the anonymous Legislative Commission to Review Administrative Rules, which is not accountable to the general public.
APPENDIX

EXCLUSIONS FROM MAPA'S DEFINITION OF "AGENCY" AND "RULE"

I. EXCLUDED AGENCIES

IAPA excludes from the definition of "agency" only "the General Assembly, the courts, the Governor, or a political subdivision of the State or its officers and units."¹ The Revised Model Act excludes only the legislature and the courts.² MAPA follows neither IAPA nor the Revised Model Act in this respect. MAPA excludes:

1. Agencies directly in the legislative or judicial branches.³ This is a broader exclusion than one for the "legislature" or the "courts," for it also exempts bodies subordinate to, yet distinct from, the legislature itself or the courts themselves.⁴ To the extent that separation of powers doctrines permit, there is no reason to exclude such bodies when they perform functions otherwise covered by MAPA.

2. Emergency powers that the Governor may exercise under the Minnesota Civil Defense Act of 1951.⁵ The Governor's exercise of these powers in the event of an actual enemy attack upon the United States, or the occurrence within Minnesota of a major disaster from enemy sabotage or other hostile action, is excluded from MAPA's requirements. The Governor's personal actions are not otherwise excluded from MAPA if they amount to rulemaking or the adjudication of contested cases. In this respect MAPA differs from IAPA.

Although Professor Bonfield thinks that a state legislature may impose an administrative procedure act upon a Governor "for most of the functions he performs without breaching the separation of powers concept,"⁶ he questions the wisdom of doing so. The need to impose administrative procedures upon the Governor is far less than the need to impose them upon other executive agencies. The Governor has "greater visibility and more direct and clear political accountability" and "in at least many cases," the Governor's actions, like those of the legislature, are expected "to be based solely or primarily on ad hoc political considerations rather than on the kind of

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² Revised Model State Administrative Procedure Act § 1(1) (1961).
⁶ Bonfield, supra note 4, at 764.
dispassionate principled bases toward which the requirements of an administrative procedure act are directed. But Bonfield points out that only personal actions of "the Governor" are exempt from IAPA, not the acts of any subordinate and distinct administrative unit within the "office of the Governor."

3. The Corrections Board and Pardon Board. The Commissioner of Corrections has justified the exemption of the Corrections Board on two grounds, which he thinks also apply to the Pardon Board. First, the rules of the Corrections Board, which deal only with the granting and revocation of parole and the supervision of parolees, "affect a very limited 'public,' and to a large extent affect only the internal management of the [Board] as an agency." Second, the granting and revocation of parole and the decision to discharge from parole, or to order confinement in an institution, are all acts involving the exercise of discretion. They are substantive decisions based upon factors not subject to objective measurement by hard and fast rules.

The two grounds advanced by the Commissioner do not justify the exemption. If particular parole and probation decisions call for the exercise of discretion that cannot be controlled by "hard and fast rules," they should not be the subject of rulemaking. But if the Corrections Board or Pardon Board decides to promulgate rules, it should be required to comply with the rulemaking procedures prescribed by MAPA.

The Commissioner of Corrections may also be underestimating the public interest in rules governing probation and parole, which determine the circumstances under which persons convicted of crime will be returned to the society at large. Even if only "a very limited 'public'" is interested, that public, as well as the convicted persons themselves, should have an opportunity to participate in the rulemaking process. Finally, to the extent that the rules of any agency concern "only the internal management of the agency ... and ...

7. Id. at 764-65.
8. Id. at 766.
13. To the extent there are no hard and fast rules by which a court would exercise its discretion to conditionally release a person on probation, the equally judgmental function of deciding when one may be conditionally released from confinement or discharged from field supervision is not and cannot be made the subject of hard and fast rules.

Id.
do not directly affect the rights of or procedure available to the public," they are excluded from MAPA's definition of "rule."  

4. The unemployment insurance program in the Department of Economic Security. This exemption has been justified because of the perceived adequacy of other procedures governing the administration of the state's unemployment insurance program. This justification is not very persuasive. To the extent that the other procedures do not include the requirements imposed by MAPA, the reasons for subjecting programs covered by MAPA to these requirements also apply to the unemployment insurance program. If the latter program is subject to more stringent requirements than those imposed by MAPA, they would need to be satisfied even if the unemployment insurance program was subject to MAPA.

5. The Director of Mediation Services. It is difficult to justify this exemption when it is noted that the Public Employment Relations Board (PERB) is not exempt from MAPA. The Director of Mediation Services is authorized to "adopt reasonable and proper rules and regulations relative to and regulating the forms of petitions, notices, orders and the conduct of hearings and elections" under the Public Employment Labor Relations Act, subject to PERB's final approval. Must these rules, which otherwise fall within MAPA's definition of "rule," be made only in accordance with MAPA prescribed procedures? PERB has taken the position that the exemption of the Director governs, even though the Director's rules do not become effective until approved by it. It would seem, however, that the process of approving rules is itself a rulemaking process.

6. The Workers Compensation Division in the Department of Labor and Industry and the Workers Compensation Court of Appeals. These exemptions have been justified on the ground that

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14. MINN. STAT. § 15.0411(3)(a) (1976); see text accompanying notes 28-34 infra.


17. The other procedures referred to are codified at Minnesota Statutes, sections 268.05-36 (1976 & Supp. 1977).

18. MINN. STAT. § 15.0411(2)(e) (Supp. 1977). The Director of Mediation Services is authorized to "adopt reasonable and proper rules and regulations relative to and regulating the conduct of hearings" in connection with matters under the Director's jurisdiction. MINN. STAT. § 179.05 (1976).

19. The powers and duties of PERB are set out in Minnesota Statutes, section 179.72 (1978).

20. Id. § 179.71(5)(g).

21. MINN. STAT. § 15.0411(2)(f), (g) (Supp. 1977).
the procedures governing these agencies have been working well for more than half a century and there is no discernible need for change.\textsuperscript{22} The above comments on the exclusion of the unemployment insurance program in the Department of Economic Security are also applicable here.

7. The Department of Military Affairs.\textsuperscript{23} The Department was excluded because of "the complexity and continuous relationship [it has] with federal military agencies having substantial authority to establish rules and regulations governing [the Department's] activities."\textsuperscript{24} The question here is whether the relationship with federal military agencies justifies an exemption of the Department in all its activities. An interesting provision of IAPA takes care of such a situation without resorting to a blanket exemption.\textsuperscript{25} As Professor Bonfield explains it, if the Iowa Attorney General determines that a provision of the IAPA (1) would cause a denial of federal funds or services that otherwise would be available to an Iowa agency or (2) would in any way be inconsistent with the requirements of federal law, the provision will be suspended to the extent necessary to avoid that consequence.\textsuperscript{26}

II. EXEMPT RULES

MAPA excludes from the general definition of "rule" five categories of statements that might otherwise be included.\textsuperscript{27} The Revised Model Act excludes three categories, and IAPA excludes eleven. MAPA excludes:

1. "[T]rules concerning only the internal management of the agency or other agencies, and which do not directly affect the rights of or procedure available to the public."\textsuperscript{28} This exclusion is similar to that contained in the Revised Model Act and IAPA.\textsuperscript{29} It is justified

\begin{footnotesize}
\begin{enumerate}
\item[23.]\Minn. Stat. § 15.0411(2)(i) (Supp. 1977).
\item[25.]\Iowa Code § 17A.2(1) (1977).
\item[26.]\Bonfield, supra note 4, at 771. Minnesota Statutes, section 15.0412(5) (Supp. 1977), is directed, in part, at a similar problem. See text accompanying Article notes 40-41 supra.
\item[27.]\Minn. Stat. § 15.0411(3) (Supp. 1977).
\item[28.]\Id. § 15.0411(3)(a).
\item[29.]\See Revised Model State Administrative Procedure Act § 1(7)(A) (1961) (excluding "[s]tatements concerning only the internal management of an agency and not affecting private rights or procedures available to the public"); Iowa Code § 17A.2 (7)(a) (1977).
\end{enumerate}
\end{footnotesize}
“because of the undue burden on the agencies and small public benefit to be gained from utilization of [the prescribed] procedures” for rulemaking in this area.\textsuperscript{30}

Professor Bonfield thinks there are some important differences between the Revised Model Act and IAPA in defining the scope of this exclusion. Unlike the Revised Model Act, IAPA excludes this category of statements only if they do not “substantially affect the legal rights of, or procedures available to, the public or any segment thereof.”\textsuperscript{31} Bonfield maintains that unless the word “substantially” is added, “the exclusion would be meaningless because almost all internal agency procedures eventually affect the public in some way.”\textsuperscript{32} This is probably what the drafters of MAPA had in mind in adding to the Revised Model Act definition the word “directly.”

The word “legal” was added by IAPA to clarify the type of “rights” contemplated, that is, “rights which are normally enforceable against the agency or other parties through legal processes.”\textsuperscript{33} Though MAPA does not contain this clarification, undoubtedly it uses “rights” in the same sense.

IAPA also makes certain that it covers agency statements concerning internal management that substantially affect the legal rights of only a segment of the public. This variation from the Revised Model Act again reflects the careful draftsmanship of IAPA. But it is reasonable to read “public” in MAPA as referring to any portion of the public, as well as the public as a whole.

To illustrate the application of IAPA’s exclusion, Professor Bonfield states that agency “statements specifying employee vacation policies, work schedules, work standards, promotion policies, grievance procedures, and staff benefits are within the exclusion,” but not “statements of general applicability defining agency law or policy in relation to job applicants.”\textsuperscript{34}

2. “Rules of the Commissioner of Corrections relating to the internal management of institutions under his control and those rules governing the inmates thereof prescribed pursuant to section 609.105.”\textsuperscript{35} Section 169.105\textsuperscript{36} of the Minnesota Statutes requires the Commissioner of Corrections to determine the places of confinement of convicted persons and “prescribe reasonable conditions, rules, and regulations for their employment, conduct, instruction, and discipline within or without” these places. In substance, this exclusion

\textsuperscript{30} Bonfield, supra note 4, at 834.
\textsuperscript{31} IOWA CODE § 17A.2(7)(a) (1977).
\textsuperscript{32} Bonfield, supra note 4, at 834.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} MINN. STAT. § 15.0411(3)(b) (1976).
\textsuperscript{36} Id. § 609.105.
was contained in MAPA prior to 1975. The 1975 amendments deleted it despite a plea from the Commissioner that it was both "wise and expedient" to continue the exclusion because the rules in question did not affect the "general public." The exemption was restored in 1976.

The Revised Model Act contains no such exclusion. But IAPA excludes statements "concerning only inmates of a penal institution" and, in addition, statements concerning only "students enrolled in an educational institution, or patients admitted to a hospital," but only when such a statement is issued by the institution itself.

In one respect, IAPA's exclusion is narrower than MAPA's. Emphasizing the word "only," which is not contained in MAPA's exclusion, Professor Bonfield explains that if the agency statement is addressed to others in addition to prison inmates, students, or hospital patients, it is not exempted. Thus, for example, statements prescribing visiting hours at a prison would not be exempt under IAPA. Professor Bonfield must be assuming that such statements are not excluded by the internal management provision discussed above, because they substantially affect the legal rights of, or procedures available to, a segment of the public, in the sense that the right of visitation is enforceable against the prison administration through legal processes. In any case, the "conditions, rules and regulations"

37. Minn. Stat. § 15.0411(3)(b) (1974). The pre-1975 exemption was for "rules and regulations relating to the management, discipline, or release of any person committed to any state penal institution." Id. The pre-1975 MAPA definition of "agency" also exempted the Minnesota Corrections Authority. Id. § 15.0411(2)(c) (1974).


41. Bonfield, supra note 4, at 843.

42. Id. Similarly, "[s]tatements about admission policies at the state universities or state hospitals are not exempt since they are directed at non-students and nonpatients." Id. at 844.

43. See, e.g., Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977). In Jones, first amendment and equal protection challenges were made against rules of the North Carolina Department of Correction that prohibited prisoners from soliciting other inmates to join the North Carolina Prisoners' Labor Union and barred Union meetings in the prisons, as well as bulk mailings concerning the Union from outside sources. The Supreme Court upheld the rules, holding that the prisoners' first amendment right of association "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude" that the claimed association possesses "the likelihood of disruption to prison order or stability," or otherwise interferes "with the legitimate penological objectives of the prison environment." 433 U.S. at 132. A flat ban on visitation from family, friends, and other outside individuals would not meet these tests.
that the Commissioner may prescribe under section 609.105 of the Minnesota Statutes are exempt from MAPA’s rulemaking procedures even if they affect, directly and substantially, persons other than prison inmates.

In other respects, IAPA’s exclusion is broader than MAPA’s. Rules concerning students enrolled in educational institutions or patients admitted to hospitals would seem to be covered by MAPA, because they may not concern “only the internal management” of the institution and they do “directly affect the rights of or procedure available to the public”—namely, at least, that segment of the public consisting of students, patients, and all those concerned about their welfare.45

Professor Bonfield justifies the broader IAPA exemption on practical grounds: “The sheer burden of subjecting all of the thousands of statements concerning the details of these agencies’ daily relationships with inmates, students, and patients to public rulemaking procedures would be intolerable.”46 Furthermore, the public at large is not directly affected; its interest is “general, peripheral, and remote, if at all.”47 Bonfield argues that,

if anyone should have a fair opportunity to participate in the making of policy concerning those persons, it should be the inmates, students, and patients themselves, through appropriate internal agency procedures devised especially for this purpose, rather than through the rulemaking procedures of the IAPA which are geared for input by the public at large.48

These are weighty arguments, but they do not justify the exception. The Supreme Court of the United States has recognized that prison inmates, students, and hospital patients have certain constitutional rights.49 In addition, they may have statutory or common law rights. To the extent that the institutions decide to affect these rights by promulgating rules, there is great public interest in the rules, and the public should be afforded an opportunity to participate in their making. There is little likelihood, moreover, that even inmates, students, and patients will be ensured such an opportunity unless the

44. MINN. STAT. § 15.0411(3)(a) (1976).
45. Rules affecting students at the University of Minnesota would not be subject to MAPA because the University is not a state “agency” within its definition. See State ex rel. Sholes v. University of Minn., 236 Minn. 452, 455-57, 54 N.W.2d 122, 125-26 (1952).
46. Bonfield, supra note 4, at 844.
47. Id.
48. Id.
making of these rules is subject to a state administrative procedure act. Public understanding and acceptance of these rules, which may be important to the accomplishment of the institution's mission, will be enforced by the possibility of public participation in their making. Furthermore, inmates, students, and patients may be more likely to respect and, if required, to abide by rules affecting their lives if they have participated in their making.50 For these reasons, the special exemption of rules of the Commissioner of Corrections should be repealed. His rules should be exempt only if they fall within the larger exempt category of internal management rules.51

3. "[Rules of the [Department of Natural Resources] division of game and fish published in accordance with section 97.53."

Section 97.53 merely requires the Commissioner of Natural Resources to publish promulgated orders, rules, and regulations in qualified legal newspapers, and provides that no order, rule, or regulation shall be effective until seven days after the required publication.52 It contains no general requirement that the public be afforded an opportunity to participate in the making of the rules.

Other statutory provisions, however, require certain fish and wildlife rules to be preceded by notice and hearing. Only after notice and public hearing may the Commissioner (1) "designate and manage public waters for their primary wildlife use and benefit";54 (2) designate as experimental waters all or part of any lake or stream to which the public has free access;55 (3) declare lands as a state game refuge upon the petition of fifty or more residents of the county or counties in which the lands are situated;56 and (4) designate muskie lakes and make special rules for the management of fishing therein.57 In addition, rules designating any species of wild animal as either endangered or threatened may be adopted only after following MAPA procedures.58

The Commissioner of Natural Resources justified this exclusion on a number of grounds.59 First, one-half or more of the Division's

51. Minn. Stat. § 15.0411(3)(a) (1976). This assumes that rules concerning the internal management of the Department of Corrections (the "agency") include rules of the Commissioner of Corrections relating to the internal management of institutions under his control. This would appear to be a reasonable assumption, but if it is at all questionable, MAPA should be amended to ensure this result.
52. Id. § 97.53.
53. Id. § 97.53.
54. Id. § 97.48(11).
55. Id. § 97.48(26).
56. Id. § 99.25(4).
57. Id. § 101.475(1).
58. Id. § 97.488(2).
59. Memorandum from Robert L. Herbst, Commissioner of Natural Resources,
rules issued each year must be promulgated under severe time constraints that make compliance with MAPA impossible. These rules fix seasons and limits that must be modified every year to reflect the latest field analyses of stock size, distribution, health, reproduction success, etc. They must often be changed quickly as the wild animal population changes. A large number of these rules—for example, those affecting migratory birds—must be made during a very few weeks in midsummer; if MAPA had to be followed, the fall hunting season would be over before the rules could be promulgated. Second, compliance with MAPA would also preclude a reasonable working relationship with adjoining states and provinces of Canada in the regulation of sport and commercial fishing in boundary waters.

Finally, the Commissioner explained that his department does not operate in isolation but that "there is a wealth of public input." The Department receives many letters of advice from concerned citizens and holds public meetings even when not required to do so. At the same time, the Commissioner emphasized that the public is not in a position to contribute much data of use to the Department. Fish and wildlife supervisors have university degrees in fish- and wildlife-related fields. Public hearings might make these experts too sensitive to public pressures and induce them to make decisions more expedient than professional, "just in order to reduce the clamor of vocal but possibly unrepresentative or irrational segments of the public."

None of these justifications is very persuasive. The argument about the importance of expertise and the inability of the public to contribute much data of use to the Department could surely be made in connection with other state agencies. It misses the point that members of the public should be afforded an opportunity to participate to the extent of their ability in the making of rules that will affect them. Increasingly, different segments of the public are becoming more and more knowledgeable about particular matters subject to an agency's jurisdiction. The art of administration consists, essentially, of accommodating knowledge and politics, even "the clamor of vocal but possibly unrepresentative or irrational segments of the public."

This is not to question the validity of the argument that the time constraints under which the Department of Natural Resources must operate often do not allow for compliance with MAPA rulemaking procedures. But then the Department may resort to the adoption of temporary rules authorized by MAPA. If temporary rules would not


60. Id.
61. Id.
62. MINN. STAT. § 15.0412(5) (Supp. 1977); see text accompanying Article notes 38-41 supra.
fully satisfy the needs of the Department in this respect, MAPA should be amended so that they do.

Neither the Revised Model Act nor IAPA contains an exclusion for rules concerning fish or wildlife.

4. "[R]ules relating to weight limitations on the use of highways when the substance of such rules is indicated to the public by means of signs." The Commissioner of Transportation is empowered to impose prohibitions or restrictions relating to the weight of vehicles operated upon any highway under his jurisdiction whenever the highway, "by reason of deterioration, rain, snow, or other climatic conditions, will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced." The restrictions imposed by the Commissioner "shall be effective when signs giving notice thereof are erected upon the highway or portion of any highway affected" by them.

Presumably, the justifications for the exclusion are the need for speedy action to prevent serious damage to or destruction of a particular highway and the temporary nature of the administrative action taken. But if the need for speedy action to prevent serious damage is the reason for this exemption, why is the exclusion limited to weight restrictions, and not extended to rules prohibiting the use of particular highways? Moreover, since these rules are temporary in nature, it would seen that temporary rulemaking could take care of the situation.

The Revised Model Act does not contain an exclusion similar to MAPA's. But IAPA excludes statements "relating to the use of a particular publicly owned or operated facility or property, the substance of which is indicated to the public by means of signs or signals." This is a broader exclusion than MAPA's because it refers to all publicly owned or operated facilities and property and not just to the use of highways.

Professor Bonfield justifies the broader exclusion on the ground that it would be impractical "to apply rulemaking procedures to the tens of thousands of specific commands relating to the use of specific state facilities that are communicated to the public by signs posted at those facilities." This justification is most persuasive, except with regard to weight limitations and prohibitions on the use of the high-

64. Id. § 169.87(1).
65. Id.
66. See text accompanying Article notes 38-41 supra.
68. Bonfield, supra note 4, at 842. Examples of such signs would include such mundane commands as "camping prohibited here," "throw litter there," or "no smoking in this room." Id.
ways that are not of an emergency nature. The latter restrictions, among other things, may affect the economic well-being of the trucking industry, which should be given an opportunity to comment on the proposed restrictions. MAPA would seem to exclude what should be covered and to cover what should be excluded.

5. **Opinions of the Attorney General.** IAPA, though not the Revised Model Act, also contains such an exclusion. Professor Bonfield justifies the exemption on a number of grounds. First, it is important to encourage the Attorney General to issue such opinions, and requiring adherence to rulemaking procedures would be discouraging. Second, "it should be possible for [opinions of the Attorney General] to be issued expeditiously and inexpensively." Finally, the value of rulemaking procedures is questionable since the Attorney General "is supposed to exercise his independent legal judgment when he issues an opinion."

As Bonfield recognizes, these arguments are equally applicable to interpretative rules issued by other agencies. The Attorney General, of course, may exercise his independent legal judgment, as he should when he issues an opinion, even after hearing the information and views that members of the public may wish to offer him. Consistency may be achieved by subjecting the opinions of the Attorney General to MAPA's rulemaking requirements or excluding from these requirements the interpretative rules and policy statements of all other agencies. So long as the latter alternative is not adopted, the opinions of the Attorney General should not be exempted. The need for a speedy opinion by the Attorney General could be met by the issuance of temporary rules.

The Revised Model Act and IAPA also contain certain express exclusions from the definition of "rule" that are not set forth in MAPA.

1. Both the Revised Model Act and IAPA, unlike MAPA, exclude from the definition of "rule" declaratory rulings as to the applicability of any statutory provision or of any rule or order of an agency. IAPA also excludes "an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts."

It seems clear that the declaratory rulings referred to by the

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71. Bonfield, supra note 4, at 839.
72. Id.
73. Id.
74. Revised Model State Administrative Procedure Act §§ 1(7)-(8) (1961); Iowa Code §§ 17A.2(7)(b), 17A.9 (1977). IAPA adds "other written statement of law or policy" or "decision" to "rule or order" of any agency.
Revised Model Act and IAPA exclusions would be of particular, not general, applicability. Both acts recognize this by specifically stating that declaratory rulings "disposing of petitions [for such rulings] have the same status as agency decisions or orders in contested cases." Nevertheless, the specific exclusions have been justified on the ground that they will forestall argument that declaratory rulings "do tend to establish law and policy for the agency by precedent and so are in fact of general applicability and within the rulemaking procedures."

A similar argument may be made with respect to decisions in contested cases. IAPA is consistent and also specifically excludes a "determination, decision, or order in a contested case," as well as a "decision by an agency not to exercise a discretionary power." Professor Bonfield explains that the latter exclusion is intended to cover only "certain inactions of particular applicability which are neither products of a contested case, nor a declaratory ruling."

These exclusions from the definition of "rule" in IAPA attest to its meticulous draftsmanship, but their absence from MAPA should not produce the consequences feared by Professor Bonfield. The rulings excluded are exempt from MAPA's basic definition of "rule," which includes only agency statements of "general applicability."

2. The Revised Model Act excludes "intra-agency memoranda" from its definition of "rule." IAPA excludes any "inter-governmental, interagency, or intra-agency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof." IAPA's exclusion is thus more limited than that in the Revised Model Act, which seemingly excludes all intra-agency memoranda, regardless of their impact on the public. It encompasses "policy making that is truly only internal administrative housekeeping."

So far as MAPA is concerned, the exclusion of "rules concerning only the internal management of the agency or other agencies" may reasonably be read to exclude intergovernmental, interagency, or intra-agency memoranda, directives, and manuals. It will be recalled

77. Bonfield, supra note 4, at 836.
79. Id., § 17A.2(7)(j).
80. Bonfield, supra note 4, at 838 (emphasis in original).
84. Bonfield, supra note 4, at 895.
that this MAPA exclusion applies only if the rules "do not directly affect the rights of or procedure available to the public."

3. IAPA also excludes

portions of staff manuals, instructions or other statements issued by an agency which set forth criteria or guidelines to be used by its staff in auditing, in making inspections, in settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution, or settlement of cases, when the disclosure of such statements would:

(1) Enable law violators to avoid detection; or (2) facilitate disregard of requirements imposed by law; or (3) give a clearly improper advantage to persons who are in an adverse position to the state. 84

These exclusions are explained on the ground that the types of agency activity excluded, which relate to the agency's law enforcement responsibilities or arm's length commercial business dealings with the public, "must be kept secret in order to serve the public interest." 85 This justification is persuasive and the incorporation of these exclusions in MAPA deserves careful consideration.

4. IAPA exempts a "specification of the prices to be charged for goods or services sold by an agency as distinguished from a license fee, application fee, or other fees." 86 This exclusion was made for two principal reasons. Public participation in cases of this sort "is arguably of little value due to the obvious point of view of those who would be most likely to participate," that is, "the purchasers of that which the agency has to offer." 87 Also, a "very real burden" would be "imposed on agencies if they were required to follow rulemaking procedures every time they changed the price of carrots and peas in the cafeteria line." 88

IAPA distinguishes between the specification of prices for goods or services sold, which is exempt, and the fixing of "fees," which is covered. In the latter case, the agency "is acting less like an ordinary entrepreneur in the market place and more like a sovereign in the performance of functions which are viewed as unabashedly governmental in nature." 89 Professor Bonfield acknowledges the difficulty of distinguishing between "prices" and "fees," but suggests that a line can be drawn so as to make the public rulemaking procedures applicable only to "those charges levied in aid of regulatory or similar purposes which are uniquely governmental functions." 90

87. Bonfield, supra note 4, at 839. See also id. at 787-791.
89. Bonfield, supra note 4, at 839-40.
90. Id.
91. Id. at 840.
92. Id. at 841.
Even if this distinction is easy to make in practice, covering the fixing of fees for drivers' licenses, automobile licenses, fishing licenses, liquor store licenses, permits to enter state parks, and so forth, may impose greater public costs than public benefits.

5. Finally, IAPA excludes statements "concerning only the physical servicing, maintenance or care of publicly owned or operated facilities or property." This exclusion was made out of an abundance of caution because some such statements might "arguably . . . substantially affect the legal rights of some segment of the public." It is to be hoped that this argument will not often be made successfully under MAPA. For, as Professor Bonfield points out, without such an exclusion,

agencies might be forced to follow rulemaking procedures for staff instructions as to how much rock salt to put on each segment of a state highway, for statements setting the times to shovel the walk in front of a particular state building, or for policies governing the frequency with which floors are to be washed in a state office building.

Reflection upon the IAPA exclusions not contained in MAPA makes it evident that the implications of the expansion the definition of "rule" in MAPA in 1975 may not have been fully comprehended by the draftsmen or the legislature. IAPA's exclusions seem wise, and should be incorporated in MAPA.

94. Bonfield, supra note 4, at 842.
95. Id.