

APPENDICES

Appendix A: Legislative Review of Agency Rules

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Appendix A
Task Force Recommendations on Legislative Review
of State Agency Rules and Related Laws and Programs

Task Force Recommendations on Legislative Review of State Agency Rules and Related Laws and Programs

- (1) We recommend that the “process to be used by agencies, the governor, and the legislature to identify and prioritize rules and related laws and programs that will be subject to legislative review” be as follows:
- This process applies to the rules subject to review under Minnesota Statutes, section 14.3691, which states in pertinent part: “An entity whose rules are scheduled for review under this section must report to the governor and the appropriate committees of the legislature The speaker of the house of representatives and the senate committee on rules and administration shall designate the appropriate committees to receive these reports. The report must: (1) list any rules that the entity recommends for repeal; (2) list and briefly describe the rationale for rules that the entity believes should remain in effect; and (3) suggest any changes in rules that would improve the agency's ability to meet the regulatory objectives prescribed by the legislature, while reducing any unnecessary burdens on regulated parties.”
 - Agencies required to report on their rules should report separately on each chapter of their rules. For most rule chapters that should remain in effect, the report would be a paragraph or two on the continuing viability of the rules chapter. Where appropriate, this would list parts that need updating and when this is anticipated. The report might be more in depth for one or two chapters, but this would happen only if the program or issues related to the rule chapters has taken a recent controversial or problematic turn.
 - The agency report should comply with Minnesota Statutes, section 3.197, which states: “A report to the legislature must contain, at the beginning of the report, the cost of preparing the report, including any costs incurred by another agency or another level of government.”
 - Legislative committees would identify and prioritize rules for review after considering:
 - the agency reports;
 - input from the public; and
 - legislators’ experience and opinions.
 - Legislative committees would then select for review only one main topic area per committee, except in rare circumstances, where more than one topic area merits legislative attention and scrutiny. In many cases, a topic area would fit within one agency’s set of rules. In other cases, a topic area could cut across several agencies when necessary to address the regulatory issues of an industry that is affected by many agencies’ rules.
- (2) We recommend that the “process by which the legislature will review rules and related laws and programs identified under clause (1)” be as follows:

- A legislative committee could decide to do the review as a committee of the whole or could form a subcommittee to do some or all of the review. Senate and House committees could do the reviews separately or could agree to do the review jointly.
 - The legislative committee or subcommittee would review the rules, along with the underlying state statutes, related federal statutes and rules, and the agency programs that implement the statutes and rules.
 - The legislative committee or subcommittee would hold hearings to conduct the review and would do so early in the legislative session. The committee or subcommittee would take testimony from the agency or agencies, regulated parties, and any other interested persons.
 - The legislative committee or subcommittee would consider recommendations on whether continued regulation is needed, and if so, what can be done to improve the effectiveness of the rules and reduce the burden of the rules while still accomplishing the purposes of the rules.
- (3) Our estimate of the “agency and legislative time and resources required for review of rules and related laws and programs under the processes recommended under clauses (1) and (2)” is:
- We estimate that the agency time to prepare the report under item (1) to range from about 10 hours for agencies with very few rules to 100 hours or more for agencies with many rules.
 - We estimate the legislator and legislative staff time to identify and prioritize rules for review to range from 10 to 20 hours.
 - We estimate that review of a topic area would entail from one to three legislative hearings, with the corresponding legislator, legislative staff, and agency staff time.
- (4) Our estimate of the “effect of possible repeal of agency rules on the state budget and any loss of benefits to citizens of the state resulting from such a repeal” is:
- * Note: the requirement of item (4) was relevant to an early version of ML2000, chapter 469, but is not relevant to chapter 469, as passed. The Conference Committee just did not delete item (4) at the end of the Session.

Appendix B
Office of the Governor, Rules Review Procedures



Office of the Governor

RULES REVIEW PROCEDURES

REQUEST FOR COMMENTS

The agency should send an executive summary (i.e. see DHS form) along with any draft language to the Governor's Office before doing a Request of Comments. While this information is useful, the Governor's Office cannot perform a substantive review until it receives the SONAR. The purpose of the memo is to alert the Governor's Office of possible rulemaking in a specific area and to identify any potential controversies. The agency does not need to wait for a response from the Governor's Office before publishing the Request for Comments. The rules coordinator will contact the agency with a rule tracking number. All future correspondence should include this tracking number.

NOTICE OF INTENT TO ADOPT

The agency should send an executive summary, the proposed rules and the Statement of Need and Reasonableness (SONAR) to the Governor's Office for review and approval before publishing the Notice of Intent to Adopt Rules (this includes three options: Notice of Hearing; Notice of Intent to Adopt Rules Without a Hearing; or Dual Notice). The agency may send an almost-final draft of the proposed rules and the SONAR so that the Governor's Office may review the documents concurrently with the agency's final steps to prepare the proposed rules for publication. **The Governor's Office will review and respond within three weeks.** If the rules are not reviewed within three weeks, the Governor's Office will contact the agency about the status of the review and explain why more time is needed to complete the review. The agency may not proceed with publication until receiving approval from the Governor's Office.

COMMUNICATION

The Governor's Office recognizes that agencies cannot predict all controversies at the outset of a rules project. As a result, the agency should use its judgment to send issues to the Governor's Office for review throughout the process. Additional review is necessary if a rule suddenly becomes controversial, if the rules change in direction, or if the agency makes any substantial changes to the proposed rules. Minor or technical changes need not be submitted for review. If the agency believes that an issue or proposed change may be in conflict with the Governor's beliefs and principles, it

should notify the Governor's Office immediately. Our goal is to give agencies input on important issues at the front-end of the process and to avoid a gubernatorial veto at the end of the process.

When seeking additional review, the agency should send the Governor's Office a copy of the draft rule, the appropriate portions of the SONAR, and a summary memo explaining the issues. **The Governor's Office will review and respond within three weeks unless the agency specifies in its memo that an immediate turnaround is necessary.** If the issues are not reviewed within three weeks, the Governor's Office will contact the agency about the status of the review. The agency may not proceed until receiving approval from the Governor's Office.

TRACKING

When draft rules are received by the Governor's Office, they will be logged in by the rules coordinator and routed for approval to the appropriate Policy Manager, the Director of Policy Management, General Counsel and the Chief of Staff. If any of these reviewers identify concerns, the Governor's Office will contact the agency with recommended changes. Once these changes are made, an agency must re-submit the revised rules to the Governor's Office for approval. A cover memo explaining the changes should accompany the revised draft rules.

GOVERNOR'S DECISION

After the reviewers in the Governor's Office approve the draft rules, the Policy Manager will determine if a briefing with the Governor is necessary. Most rule changes will not rise to the level of gubernatorial review. Controversial rules or rules that affect *Big Plan* initiatives will be discussed with the Governor. The Governor may suggest changes or he may not allow the draft rules to move forward.

NOTIFICATION

The rules coordinator will notify the agency contact once the Governor's Office review is complete. If the Governor's Office approves the draft rules, the agency may proceed with its process. If the rules are not approved, the agency may not move forward.

FILES MAINTAINED

The rules coordinator will maintain a file with copies of all draft and final rules.

COMPLETING THE PROCESS

Agencies should contact the Governor's Office prior to sending the final copy of the rule to the Office of Administrative Hearings (OAH) or filing it with the Secretary of State. This notice will serve to verify that the rule did not change from the approved draft and that no controversial issues have surfaced since the Notice of Intent to

Adopt was published. Once the Governor's Office receives a final copy of the filed rule from the Secretary of State, the rules coordinator will notify agencies in writing that the rules are either approved or, in rare instances, that the Governor intends to veto the rules. If approved, agencies may proceed with the Notice of Adoption. If they are not approved, the letter will explain the Governor's rationale for vetoing the rules.

RULE REPEALS

Agencies do not need to submit rule repeals to the Governor's Office for approval. However, an agency should send an informational memo identifying the obsolete, unnecessary or duplicative rule(s) to be repealed, describing the rationale for repeal, and indicating any potential controversies. This memo will serve to notify the Governor's Office that the agency is seeking to repeal a rule. No approval is necessary at any stage in the rule process.

Revised on 12/01/00

Appendix C
Rules Reform Task Force
Meeting Minutes

For working documents and submissions to the task force, see:
<http://www.commissions.leg.state.mn.us/rtf/rtf.htm>

Appendix C
Rules Reform Task Force
Meeting Minutes, October 20, 2000

For working documents and submissions to the task force, see:
<http://www.commissions.leg.state.mn.us/rtf/rtf.htm>

Rules Review Task Force (RRTF) October 20, 2000, Meeting Minutes

Members Present:

Katie DeBoer, Citizen Member
Senator Don Betzold
John Knapp, Esq., Winthrop & Weinstine, P.A.
Representative Gene Pelowski
Laura Offerdahl, Governor's Office
Representative Marty Seifert
Dave Orren, Minnesota Department of Health (MDH)
Senator Dan Stevens

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert
Diane Gnotta, MDH

Introductions. Representative Marty Seifert, facilitator for the meeting, called the meeting to order at 1:47 p.m. There were about 40 to 50 people in attendance. Task force members introduced themselves.

Overview of the Current Administrative Rulemaking Process. Dave Orren, Rules Coordinator for the Minnesota Department of Health, presented an overview of the current rulemaking process. See Mr. Orren's handout, "State Agency Rulemaking in Minnesota." Some highlights from the overview include:

- X State agency rules are law: rules have the force and effect of law.
- X Historically, before there were formal, written rules, agencies still implemented the law. Agencies made decisions on how to apply or interpret the law. These decisions and interpretations had the force and effect of law. The Legislature created rules and the rulemaking process in response to the public's desire to know in advance how agencies would implement the law.
- X After passing laws that set major policy directions and goals, the Legislature will sometimes delegate the details to an agency because: (1) the agency has scientific expertise; (2) the agency has specialized knowledge or experience with a regulated industry; or, (3) the agency has the necessary resources to work with interested parties and adequately address all issues.
- X Before an agency can adopt rules, the rules are reviewed by an Administrative Law Judge. About 20% of rules are adopted after a hearing. About 80% of rules are adopted without a hearing.
- X There is broad public involvement in most rulemakings. It is more in the nature of representative involvement rather than participation by all affected individuals

- X The Legislature has been very active in overseeing the rulemaking process during the past few years. The legislation leading to this task force followed directly from the Legislature's active interest in state agency rules.

Discussion following Rulemaking Overview. Representative Seifert asked whether committee members had questions, clarifications, or concerns regarding Mr. Orren's presentation.

- X Senator Dan Stevens commented that Socrates was correct a few thousand years ago when he stated that we do not really need laws because good people do not require them and bad people ignore them anyway. Senator Stevens also commented that from the birth of our nation on, for 150 years, we had the standard of common sense and common law. Senator Stevens expressed the opinion that the perception that everything must be in law or rule in order for people to get along is a dismal failure, because no one has ever crafted the perfect law. Senator Stevens also opined that no rulemaker will ever craft the perfect rule, because it is impossible to address 100% of any issue. Senator Stevens stated that the task force should keep these points in mind as they move forward with its tasks.
- X Senator Stevens also commented that there are some things that can work, and some things that the agencies are doing that would allow us to take some steps back to common sense and common law. Senator Stevens suggested that we need to look at alternatives to rulemaking and cited Minnesota Laws 2000, chapter 469, section 5, clause (6), in which administrative penalty orders, descriptive guidelines, best management practices, technical assistance, etc. are listed as means to ensure compliance with state policies and goals. Senator Stevens expressed hope that the task force would spend considerable time on these alternatives to rulemaking. Senator Stevens viewed these alternative mechanisms to rulemaking as facilitating a return to common sense by allowing people in the front lines to make judgments as any reasonable person would do. Senator Stevens stated that these people have no authority to change rules or laws, and that such authority lies with the Legislature.
- X Representative Gene Pelowski stated that legislators receive, on a weekly or monthly basis, reports from constituents about the laws and rules. Representative Pelowski stated that constituents do not understand that legislators only meet for 120 days over a two year period, that legislators do not have constant contact with the agencies, and that many legislators do not know all the rules and laws because they do not sit on all of the committees. Representative Pelowski stated that constituents have the misperception that legislators should have total command of the situation. Representative Pelowski stated that when the Legislature is not in session, the agencies are in charge of implementing the laws enacted by the Legislature.

Representative Pelowski Elected Task Force Chair. Representative Seifert asked members to elect a task force chair. Representative Pelowski volunteered to be the chair. Representative Seifert nominated Representative Pelowski. The task force unanimously elected Representative Pelowski as task force chair.

Task Force Charge. Representative Pelowski directed the members to the task force charge under Minnesota Laws 2000, chapter 469, section 5, which states:

“The task force must study and make recommendations to the governor and the legislature by January 15, 2001, on issues relating to review of agency rules. The recommendations must include, but are not limited to:

(1) a process to be used by agencies, the governor, and the legislature to identify and prioritize rules and related laws and programs that will be subject to legislative review;

(2) a process by which the legislature will review rules and related laws and programs identified under clause (1);

(3) the estimated agency and legislative time and resources required for review of rules and related laws and programs under the processes recommended under clauses (1) and (2);

(4) the effect of possible repeal of agency rules on the state budget and any loss of benefits to citizens of the state resulting from such a repeal;

(5) the desirability of changes in the rulemaking requirements of the Administrative Procedure Act, given increased legislative scrutiny of rules; and

(6) an analysis of ways to ensure or encourage compliance with state policies and goals using methods other than rulemaking, such as administrative penalty orders, descriptive guidelines, best management practices, compliance incentives, technical assistance, training, and procedural templates.

In making its recommendations, the task force must consult with interested parties, and must consider relevant state and federal laws and commitments.”

Discussion of Task Force Charge. Representative Pelowski facilitated a discussion of the task force charge. The discussion took a number of turns, including the task force’s role in identifying obsolete rules, the schedule of task force meetings, meeting topics, public testimony, and publicizing the work of the task force.

Obsolete Rules Discussion. Representative Pelowski asked task force members to provide input into formulating the time line and scope of work of the task force. Representative Seifert responded that the task force members received a draft of a task force workplan. One of the items in the workplan was “draft obsolete rules repeal bill for task force consideration and approval,” which lead to an extensive discussion on obsolete rules and whether it is the task force’s responsibility to deal with obsolete rules.

X Representative Pelowski stated that at the last meeting before the conference committee report, many agencies approached the conference committee with rules that the agencies wanted repealed. Representative Pelowski then asked parties in attendance at the task force meeting to present obsolete rules to the task force as an ongoing process, so that the task force could maintain a list of which rules need to be repealed and why. Mr. Orren responded that the rules presented to the conference committee were likely rules that the agencies had identified in their annual obsolete rules reports. Mr. Orren indicated that agencies would be willing to come forward to have their obsolete rules repealed by legislation, and by doing so, avoid having to go through the rulemaking process to repeal the rules.

X Senator Betzold stated that it was not within the task force’s scope of authority to maintain a list of obsolete rules to be repealed.

- X John Knapp pointed out that agencies presently compile a list of obsolete rules and asked Paul Marinac, Deputy Revisor for Drafting, to testify before the task force regarding this matter.
- X Mr. Marinac testified that there is an obsolete rules report provision in chapter 14 that requires each agency to report, by December 1st of each year, on its obsolete rules and a time table for repeal, as well as a requirement to report to the Legislature what the agency did with previously identified obsolete rules. Mr. Marinac stated that agency compliance with the report provision has, in the recent past, been 80-90%. Mr. Marinac credited Mr. Orren and the Interagency Rules Committee for educating agencies about this report requirement. Mr. Marinac offered to share his report with the task force. Mr. Marinac also commented that agencies have some other options to handle obsolete rules: 1) the Revisor's Office has narrow editorial authority to remove obsolete rules; 2) the agencies could prepare a bill to repeal the obsolete rules; or 3) the agencies could utilize the rulemaking process, including the good cause exemption. Mr. Marinac stated that the law is very clear in holding agencies responsible for identifying obsolete rules and identifying a course of action to deal with them.
- X Representative Pelowski asked Mr. Marinac why, if this report provision is in place, that a number of agencies came forward to the conference committee last session with list of such rules. Mr. Marinac replied that he did not know the reason for that, but thought perhaps that the agencies might have presented obsolete rules intended for this coming session.
- X Representative Pelowski asked Mr. Marinac to clarify whether MNSCU falls under the aegis of a state agency in regard to reporting obsolete rules. Mr. Marinac stated that some educational institutions are exempted from the report requirement, but that he was not sure whether MNSCU was specifically exempted. Representative Pelowski asked Mr. Marinac to include this information in his report to the task force, as well as information on DCFL's exemption status. Mr. Marinac stated that DCFL routinely reports, but other education agencies do not. Mr. Marinac stated that in the area of education, large grants of authority for such agencies were repealed and were replaced by specific grants of authority as the result of the 1995 APA Reform Act.
- X Senator Stevens concurred with Senator Betzold's statement that it was not within the task force's scope of activities regarding agency compliance with obsolete rule reporting. He stated he was uncomfortable with this task force identifying obsolete rules. Senator Stevens stated that the task force should leave the process of identifying such rules to agencies, and that the Legislature should only review the rules presented by agencies. Senator Stevens stated that the task force should rethink its charge in terms of what the session bill specified the charge of the task force to be. Senator Stevens suggested focusing on agencies that do not comply with obsolete rule reporting and perhaps withdraw rulemaking authority from those agencies.
- X John Knapp asked how wide spread a practice it is for the Legislature to repeal long sections of administrative rules that might, perhaps, have some unintended consequences. Mr. Marinac stated that he will provide the task force with information concerning bills containing rule repealers as well as bills containing rule repealers identified in an obsolete rule report.
- X Representative Seifert commented that repealing rules was not listed in the six specific tasks listed under section 5 of Minnesota Laws 2000, chapter 469, but might be a task for

this task group after it is able to fully address the six specific tasks under section 5. Representative Seifert offered to chief author the repealer bill and have the agencies contact his office, so that the task force does not have to address this matter.

- X Mr. Orren stated that agencies must go through the rulemaking process to repeal obsolete rules, if the rules are not repealed by legislation. When rules are repealed by legislation, each respective legislative committee reviews the rules in order to avoid unintended consequences.

Task Force Meeting Schedule. The task force scheduled three meetings. The consensus of the task force was that the meetings would last about two hours each. Meeting locations will be arranged. The meeting dates and times are:

- X Friday, November 10, 2000, at 10:30 a.m.
- X Friday, December 1, 2000, at 9:30 a.m.
- X Thursday, December 14, 2000, at 9:30 a.m.

Further Discussion of Task Force Charge. Discussion returned to the task force charge.

- X Senator Betzold stated that items 1 and 2 of the task force charge require the task force to recommend a process to identify rules, not necessarily under consideration for repeal, but rules that the agencies have adopted that should be presented to the Legislature for its review. Senator Betzold mentioned, as an illustration, the bed rail rules that might have had a better outcome had the legislative committees worked more closely with the agencies.
- X Representative Seifert stated that some items of the required task force recommendations might be addressed by Mr. Orren's letter to the conference committee for chapter 469. The letter had been discussed with the conference committee in regard to the process the agencies would follow to facilitate legislative review of rules. Mr. Orren stated he had drafted the letter after meeting with Representative Seifert and Senator Hottinger, co-chairs of the conference committee, about their understanding of what type of justification agencies would need for reporting to the Legislature about their rules. Mr. Orren indicated that the understanding was that agencies would provide a paragraph or two on each chapter of rules, and that agencies would not be required to provide another Statement of Need and Reasonableness for each chapter of rules. Mr. Orren stated that the one or two paragraphs would identify which rules are controversial, out-of-date, in need of attention and which ones are up-to-date and don't need attention. The paragraphs would give a short justification for the agency's conclusions. This level of detail would not overburden the agencies and yet would focus attention on rules requiring legislative attention. Representative Seifert asked Mr. Orren to provide the task force with a copy of the letter at the next task force meeting.
- X Representative Seifert expressed an interest in knowing what other states are doing in regard to regulatory reform. John Knapp indicated that his firm has information regarding how other states handle regulatory reform and would be happy to present it to members. Representative Pelowski asked that Mr. Knapp's presentation of this information be placed on the next meeting agenda. Representative Pelowski also asked that information from George McCormick (Counsel for Senate Gov Ops) concerning how

other state legislatures provide oversight to agency rulemaking be placed on the next meeting agenda.

- X Representative Pelowski indicated that public testimony regarding best business practices, and other non-rule methods of achieving compliance with state policies, would be welcome but asked that the public contact the task force in advance of its meeting, with the subject matter of the testimony.
- X Senator Stevens pointed out that rules are usually technical in nature, and that it is not the role of the Legislature to review every rule. Senator Stevens indicated that controversial rules, however, do require legislative oversight. Senator Stevens stated that information as to what other states are doing would be helpful, but stressed that the task force should not just copycat what other states are doing.
- X Representative Pelowski indicated that the task force is more interested in a macro approach, not a micro approach.
- X Mr. Orren suggested that the task force should recommend that the policy committees should plan on each reviewing only one set of rules during the first year in order to provide the committees with a better idea of what resources it would entail to adequately complete the review. Mr. Orren suggested that the review of one set of rules would include the rules and underlying legislation and also any relevant federal laws and rules. As an example, Mr. Orren mentioned the bed rail issue that had been reviewed by Senator Stevens' subcommittee after the 1999 Session.
- X Senator Betzold suggested that the task force divide the six items out across the remaining meetings and place specific items on specific meeting agendas, so that the task force may report back on each one.
- X Representative Pelowski asked members to make a motion regarding Senator Betzold's proposal to place specific items on the remaining meeting agendas. The members agreed to address report requirements as follows:
 - X November 10, 2000 - items 1 to 4.
 - X December 1, 2000 - items 5 and 6.
 - X December 14, 2000 - any of the items or other issues before the task force.

Stakeholder Input. Representative Pelowski asked members to discuss stakeholder input.

- X John Knapp asked if stakeholder testimony should be related to the scheduled topic items. Representative Pelowski indicated that public testimony should be related to topic agenda items associated with a specific meeting, and that stakeholders should let the task force know if they wish to testify. The members agreed to reserve time during each task force meeting for stakeholder and other public testimony.
- X Senator Stevens suggested that in regard to stakeholder input, written submissions should be encouraged and would be more efficient. Testimony should only be on the high points of the written material.

Publicizing Task Force Meetings and Work.

- X Mr. Orren asked if information presented to the task force could be placed on the web. The members agreed that this would be good, if it can be done. Adrienne Buske will check out if this can be done through the legislative web site.

- X John Knapp suggested that the task force utilize the State Register to solicit written comments. All members agreed to the use of the State Register, and that Mr. Orren would work with Laura Offerdahl to put a notice in the State Register.
- X Representative Seifert stated that meeting notices should be distributed as broadly as possible, and stated that the notices will be published in the House Information Web Site.
- X Representative Seifert asked whether agency representatives will be notified of task force meetings so that they may assist the task force with stakeholder questions. Mr. Orren indicated that there are approximately 100 persons on the Interagency Rules Committee listserv and that he would notify these persons. Laura Offerdahl indicated that the Governor's Office will notify the agencies regarding the scheduled task force meetings.

No Further Discussion. Representative Pelowski invited public comment on task force discussion thus far. No public comments were made. Representative Pelowski asked the task force if there was any other discussion. There was none.

Meeting Adjourned. Representative Pelowski moved to adjourn the meeting. Mr. Orren seconded. The motion for adjournment passed unanimously. The meeting was adjourned at 3:10 p.m.

Attachments:

- X Meeting agenda.
- X Workplan.
- X State Agency Rulemaking in Minnesota.

Thank you to Diane Gnotta for her assistance in taking notes and preparing the minutes.

Appendix C
Rules Reform Task Force
Meeting Minutes, November 10, 2000

For working documents and submissions to the task force, see:
<http://www.commissions.leg.state.mn.us/rtf/rtf.htm>

**Rules Reform Task Force (RRTF)
November 10, 2000, Meeting Minutes**

Members Present:

Katie DeBoer, Citizen Member	Senator Don Betzold
John Knapp, Esq., Winthrop & Weinstine, P.A.	Representative Gene Pelowski
Laura Offerdahl, Governor's Office	Representative Marty Seifert
Dave Orren, Minnesota Department of Health (MDH)	Senator Dan Stevens

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert	Norma Coleman PCA
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Call to Order. Representative Pelowski, RRTF Chair, called the meeting to order promptly at 10:30 a.m. Representative Pelowski noted that all RRTF members were present. No roll call was taken.

Approval of 10/20/00 Minutes. Motion to approve minutes as written made by Senator Betzold, seconded by Mr. Knapp. Motion passed unanimously.

Presentation of Legislative Oversight in Other States. George McCormick from Senate Counsel & Research distributed a handout and made a presentation on legislative oversight in other states. The handout was available on the RRTF web site for a week before this meeting. See Mr. McCormick's handout for details of his presentation. Highlights of the presentation include:

- ◆ Before its abolition in 1996, the Legislative Commission to Review Administrative Rules (LCRAR) played the main role in Minnesota's system of legislative oversight of rulemaking. Since 1996, most of the LCRAR's powers have been exercised by the Legislative Coordinating Commission (LCC). These powers are summarized in the handout.
- ◆ 27 states use legislative committees to review proposed rules and 17 states use legislative committees to review existing rules. There are a variety of means that legislatures use to accomplish this.
 - ◆ One specific example is Colorado, where the state Administrative Procedure Act (APA) provides that any agency rule adopted during the previous year expires, unless it is extended by law. Each year, a ten-member joint Committee reviews all adopted rules from the past year and uses three criteria to determine that a rule should expire: (1) the rule is in conflict with a state or federal law or constitutional provision; (2) the agency lacked statutory authority to adopt the rule; or (3) the agency exceeded its statutory authority in adopting the rule.
- ◆ An agency is only authorized to adopt rules when the Legislature passes a law to let the agency do so. The Legislature clearly has the authority to pass a law to suspend or repeal state agency rules.

- ◆ Under federal case law, the separation of powers doctrine does not allow Congress to veto or repeal agency rules or decisions made under authority delegated by law, unless Congress passes another law to do so. In other words, Congress may only veto or suspend a federal agency rule by passing a law.
- ◆ The MN LCRAR had the authority to suspend rules, but this authority was repealed in 1997. In large part, this was because the Minnesota Constitution has separation of powers provisions that are similar to the U.S. Constitution. This varies from state to state depending on the language of their constitutions. Wisconsin, whose Legislature has authority to suspend rules, has an implied doctrine of separation of powers. Minnesota has explicit separation of powers.

Discussion following Legislative Oversight Presentation.

- ◆ Representative Seifert asked, if Minnesota goes back to LCRAR's authority to suspend rules, would it draw legal challenge? Mr. McCormick didn't feel comfortable giving an opinion on this and how the courts would rule. He provided example in Iowa where a challenge was addressed.
- ◆ Legislative review by a standing committee doesn't present a constitutional problem.
- ◆ Senator Stevens asked about the Colorado constitution; is it similar to ours? He asked for more detail on how long they've had this process and if it's working. Mr. McCormick answered - keep in mind that in Colorado, 1) grant of rule authority says this is the way it works, and 2) the grant of rulemaking is still legislatively done. We did that on occasion in Minnesota quite a few years ago. A bill would give an agency direction to adopt energy codes, but because agency folks and industry representatives were nervous, they would compromise. The agency would adopt rules but need to go through prescribed steps with a timetable to meet each of the steps. This process was beyond the usual requirements to the APA. No problems with that process then.
- ◆ Senator Stevens referred to the Colorado system. He would have some uneasiness with rule language that is vague or unconstitutional. Would a joint and standing committee that has oversight be able to modify a rule before them? Example: part of rule was not what Legislature intended and the committee didn't want to throw out entire rule. How broad is the oversight? Mr. McCormick answered that he didn't know what the Colorado procedure is but could get additional information for him. Senator Stevens would like to pursue additional information on the Colorado process.
- ◆ Mr. Knapp asked: How often does Colorado committee exercise this power and does it apply to existing rules? Mr. McCormick - Review Commission acts every year in Colorado. The Commission acts on rules that were adopted in that given year. They don't go back to another year. Mr. Knapp - How frequent do they use their authority to veto rules? Mr. McCormick - Don't know but can research the information and get back to committee.
- ◆ Mr. Orren commented that in Minnesota, the three criteria used by Colorado are addressed during the Administrative Law Judge's (ALJ's) review of Minnesota rules before the rules become effective. Mr. Orren recommended that each legislative policy committee review rules adopted in the previous year that relate to the committee's jurisdiction. Mr. Orren also suggested the RRTF move on to discussion of regulatory reform.
- ◆ Ms. DeBoer was interested in knowing Colorado procedures for passing rules. Ms. DeBoer also asked if an agency could adopt rules after an ALJ rules against the rules. Mr. Orren replied that the rules would be stopped if the ALJ determined the agency didn't have statutory

authority, exceeded its statutory authority, or the rules were unconstitutional. However, if the ALJ finds that the rules were not needed or reasonable, the agency can go ahead and adopt the rules, but must first wait up to 60 days to receive and consider advice and comments from the Legislature.

Presentation of 50 State Survey of Regulatory Reforms. John Knapp and Julie Fishel of the Winthrop & Weinstine law firm distributed a handout and made a presentation on state initiatives in rulemaking reform (1995-2000). The handout is available on the RRTF web site. See the handout for details of the presentation. Highlights of the presentation and discussion include:

- ◆ Ms. Fishel discussed several key trends in the review and oversight of rules and the removal of regulatory burdens.
 - ◆ Economic impact analysis.
 - ◆ Waivers or variances for small businesses.
 - ◆ Streamlining regulations and procedures, especially regarding permits.
 - ◆ State permit reform initiative (New York).
 - ◆ A movement in public participation at the beginning and the end of rulemaking.
 - ◆ Increased noticing at the beginning of a rulemaking.
 - ◆ Rulemaking documents now required to be on the web (Iowa).
 - ◆ Ten states in the nation have directives by their Governors to reform rules and rulemaking. In 1999, the Iowa Governor began an initiative for quality and efficiency that includes a review of all agency rules, agency web sites, uniform waiver procedures and training for agency rule writers.
- ◆ Mr. Knapp added that in 1999, Minnesota gave the Governor authority to veto rules. Representative Seifert asked when this expires. Ms. Offerdahl said it expires sometime after the 2001 Session. (MS14.05,s6, expires 6/30/01.) Ms. Offerdahl said the veto was enacted with a sunset because the Legislature did not want to enact this new authority permanently without knowing how it would work.
- ◆ Mr. Knapp also noted that Michigan has 15 staff in Governor's Office to review proposed rules and newly adopted rules. Ms. Offerdahl stated that the six members of the Policy Management staff in the Minnesota Governor's Office review proposed and newly adopted rules along with their policy review responsibilities related to proposed legislation. Representative Pelowski asked if State Planning could help do rule review for the Governor's Office. Ms. Offerdahl said this would be a possibility. Ms. DeBoer asked if State Planning had its own rulemaking authority and, if so, would that present a conflict. Representative Seifert recalled that Planning did have rule authority, but there was no conclusion whether this would present a conflict.
- ◆ Representative Pelowski asked if Minnesota agencies use web sites to distribute rulemaking information and documents. Mr. Orren replied that many Minnesota agencies distribute rulemaking info via the web and that it is steadily getting better as technology improves and small agencies develop the capacity to have web pages. Mr. Orren cited the Minnesota Pollution Control Agency web site as an example of an excellent rules web page. Norma Coleman, PCA rules coordinator, described the PCA rules web page and how it is used.

Discuss and Approve the Rules Review Process Identified in 1-4 of the Task Force Charge.

Mr. Orren distributed a copy of his 5/1/00 memo to the Conference Committee Co-Chairs regarding reporting requirements for agencies under SF3234 (Laws 2000, ch469). Mr. Orren directed task force members' attention to section 4 of chapter 469, which requires cabinet-level

agencies to report on the status of all their rules. The reports are scheduled over the next four years and must include: "(1) list any rules that the entity recommends for repeal; (2) list and briefly describe the rationale for rules that the entity believes should remain in effect; and (3) suggest any changes in rules that would improve the agency's ability to meet the regulatory objectives prescribed by the legislature, while reducing any unnecessary burdens on regulated parties."

- ◆ The 5/1/00 memo documented the authors' intent that "briefly describe" for most rule chapters would be only a paragraph or two on the continuing viability of the rule chapter. The report would be more in-depth only for those few rule chapters that had taken a recent controversial or problematic turn. The committee co-chairs agreed this was their intent.
- ◆ Mr. Orren recommended that the task force include the 5/1/00 memo's points in the task force report. Mr. Orren also suggested that the task force recommend that each legislative committee select only one rule chapter or issue area to review each Session. There is not enough time for a committee to discuss all rules, there are too many agencies grouped together, and it is better to focus on problem rules. Mr. Orren used as an example Senator Stevens' subcommittee which did an in-depth look at the issues around nursing home bed rails. Senator Stevens' subcommittee held three hearings around the state during the interim to learn more about this issue.
- ◆ Senator Stevens told about some history of the bed rail issue. He also recommended we consider alternatives to hard and fast rules. We should not be timid in looking at alternatives.
- ◆ Representative Pelowski recommended that we post all rule information on the web. This would increase accessibility to material.
- ◆ Senator Stevens noted that not all folks have computers. We should also have information available in a more public facility such as a town hall, etc. and on the web.
- ◆ Mr. Knapp expressed the concern that repealing rules through legislation is not the best way to approach rule repeal, especially where the repeal is added by a conference committee. Adopting rules is much more complicated, so repealing shouldn't be too easy. Maybe have an expedited rule repeal process in place to expedite but also provide some public notification and discussion.
- ◆ Mr. Orren suggested that rule repeal should still be allowed by statutes, but not first put in the bill in conference committees.
- ◆ Representative Pelowski said the Legislature should be cautious when repealing rules by statute. He used as an example the rule on teacher licensure that was repealed by statute.

Determine Format of Agency Reports. This was discussed under the previous agenda item. Mr. Orren asked if he should come with some language at next committee for discussion? Representative Pelowski suggested to do this as quickly as possible and have it posted on web.

Review Stakeholder Input - Written Submissions. Ms. Offerdahl reported that we have received nothing to date. Representative Pelowski asked the audience - no one came forward with any submissions. Senator Stevens encouraged stakeholders to come forward soon, given the schedule. He asked what direction folks would like to see in regulatory reform for the future. Representative Pelowski asked stakeholders at the meeting to notify their constituents of needed input. Ms. Offerdahl noted that notice about the RRTF was published in the State Register on November 6, 2000.

Public Testimony by Kathryn Ludwig. Kathryn Ludwig of Flaherty & Hood, P.A., testified on behalf of the Coalition of Greater Minnesota Cities (CGMC). Her remarks were based on the CGMC's long-standing experience with the Minnesota Pollution Control Agency and its rules, especially water quality standards in Minnesota Rules, chapter 7050.

- ◆ Ms. Ludwig was asked about the PCA's web site and whether individual cities used this to get information about PCA rules and whether CGMC encouraged cities to use it for information. Ms. Ludwig said that cities are aware of the PCA web site, but their clients trust them to interact with the agency directly. CGMC makes folks aware information exists, but at the same time cities know that coalition is their representative and will respond formally to the agency. Representative Pelowski said he hopes CGMC's message is to encourage direct input by cities and not just wait for the coalition to respond. Ms. Ludwig responded that that is the way things have been proceeding currently.
- ◆ Ms. Ludwig reviewed the first bullet point of her handout. She believes it is appropriate for some new rules to undergo a cost benefit analysis and be reviewed by the Legislature for cost effectiveness. She acknowledged the cost involved to prepare a cost benefit analysis, but feels it is important to consider the costs involved in some rules.
- ◆ Representative Seifert asked, does Minnesota require a cost impact for all rules?
- ◆ Mr. Orren noted that Minnesota Statutes, section 14.131, requires a regulatory analysis for all new rules. Ms. Offerdahl also noted the requirements of Minnesota Statutes, section 3.987 for all new rules. Ms. Offerdahl also noted the requirements of Minnesota Statutes, section 3.987.
- ◆ Mr. Knapp said that the 1995 overhaul of the APA added some key requirements in the regulatory analysis that agencies must address in the SONAR. Mr. Knapp summarized the six regulatory analysis requirements: (1) a description of persons affected by the rules; (2) the probable costs to the state and effects on state revenues to implement or enforce the rules; (3) whether there are less costly or less intrusive methods for achieving the purpose of the rules; (4) any alternative methods for achieving the purpose of the proposed rules that were seriously considered; (5) the probable costs of complying with the proposed rule; and (6) an assessment of any differences between the proposed rule and existing federal regulations. Mr. Knapp added there were two problems with the regulatory analysis – it doesn't apply to existing rules, and it doesn't apply to permits and other regulatory actions that have the effect of rules.
- ◆ Senator Stevens said we need to also consider comparative risk assessment because monetary analysis not always easy or comparable, especially when valuing lives. An example - mandatory seat belt law to save lives because of the large number of deaths due to accidents (approximately 700 per year in Minnesota) compared to the likelihood of being struck by lightning (approximately 4 per year in Minnesota – one in a million).
- ◆ Ms. Ludwig reviewed the second bullet point of her handout. She proposed that the SONAR contain the total costs to implement the rule. There should be a trigger amount where a higher level of legislative oversight would be required. For example, Legislature would have to review if cumulative costs projected to exceed \$1,000,000 or if individual costs projected to exceed \$100,000.
- ◆ Ms. Ludwig's third bullet point recommended legislative review and approval for any rules with stricter requirements than federal requirements.
- ◆ Representative Seifert asked what Ms. Ludwig recommended – should these rules be passed as statutes or should the rules be suspended? Ms. Ludwig said the rules should be delayed until legislative review.

- ◆ Ms. Ludwig's fourth bullet point noted non-rulemaking efforts instead of going through the formal rulemaking process. Example: PCA phosphorous limits strategy. Approved by the PCA board and currently being used by PCA. Another example is the Mercury Reduction Plan.
- ◆ Ms. DeBoer asked what enforcement authority do agencies have with regard to strategies, etc? Mr. McCormick quoted Minnesota Statutes, chapter 14, that says if an agency policy has general impact, it is a rule. Such a policy can be struck down by a judge if it hasn't gone through the rulemaking process. Mr. Knapp noted that even though these deal with permits, they are regulatory policy.
- ◆ Mr. Orren recommended the RRTF consider the expedited rulemaking process. Because the regular rulemaking process is so complex and burdensome, agencies sometimes look for ways other than the rulemaking process to implement policy. Policies that are not controversial should be allowed to go through an expedited process or agencies should be allowed to use alternatives to rulemaking such as best practices, etc.
- ◆ Senator Stevens said it is the Legislature's authority to set policy and the agency's authority to implement policy. There have been instances of agencies setting policies beyond legislative authority.
- ◆ Ms. DeBoer asked, are you saying agencies should only implement policy? Do agencies have rulemaking authority outside of legislative authority?
- ◆ Senator Betzold said agencies have jurisdictional authority. Does every rule have to be tied to some statute? Mr. McCormick said every rule has to be tied to statutory authority. There are some very broad grants of rulemaking authority. For example, Commerce has statutory authority to do rules related to its statutory duties. Policy committees reviewed this several years ago and must have thought the broad authority was justified.
- ◆ Senator Stevens said the task force should address that issue. When you get into areas where agencies say we need to have a limit on a specific item (example PCA policy) and no legislative mandate exists, that is considered rulemaking and perhaps the agency has gone beyond its authority.
- ◆ Ms. Ludwig made a closing comment. She has worked on PCA rulemaking and very much appreciates Norma Coleman's work.

Assignments for Next Meeting. Next RRTF meeting Friday, December 1, 2000, at 9:30 a.m. in Room 300 South of the State Office Building.

- ◆ Mr. Orren will prepare his recommendations and post them to the RRTF web site before the meeting.
- ◆ Mr. McCormick will be in Ireland doing a cost / benefit study on Guinness Stout, but will post material on web before departing.
- ◆ The RRTF will discuss alternatives to rules. Senator Stevens said we already have some very good programs that can serve as examples of alternatives to rules. We have administrative penalty orders by PCA, best management practices at Agriculture, descriptive guidelines with DHS child care, and revenue notices by the Department of Revenue. Staff can bring forward these examples. Possibly discuss other alternatives from other states.
- ◆ Representative Pelowski encouraged stakeholders to bring forward suggestions also.

January meeting date. RRTF recommendations are due January 15, 2001. RRTF members looked at their calendars and tentatively set a meeting for Tuesday, January 9, 2001, from 4:00 to 6:00 p.m.

Meeting Adjourned. The meeting adjourned at 12:30 p.m.

Handouts:

- 1) Meeting agenda.
- 2) Draft minutes from the 10/20/00 Rules Task Force meeting.
- 3) "Legislative Oversight of Agency Rules" 11/3/00 memo by George McCormick, Senate Counsel.
- 4) "State Initiatives in Rulemaking Reform (1995-2000)" by John Knapp and Julie Ann Fishel.
- 5) "Table of State Rulemaking Reforms (1995-2000)" by Winthrop & Weinstine.
- 6) Kathryn Ludwig's written testimony on behalf of the Coalition of Greater Minnesota Cities.
- 7) "Rules Reform Task Force Notice of Meetings" as published in the 11/6/00 State Register.
- 8) 5/1/00 Memo regarding the Reporting Requirements of SF3234 (Ch469) to Senator Hottinger and Representative M. Seifert, Conference Committee Co-Chairs, from Dave Orren.
- 9) Revised Workplan for the Rules Reform Task Force.
- 10) Materials prepared by Deputy Revisor of Statutes Paul Marinac in response to information requests by the Rules Task Force at its 10/20/00 meeting:
 - ◆ Memo dated 11/6/00 by Paul Marinac summarizing the Task Force's requests and the information provided by the Revisor's Office. The information included: obsolete rules report compliance; rules repeal legislation; and status of rulemaking authority of MnSCU.
 - ◆ An excerpt from the Revisor's *Review of 2000 legislation affecting Rulemaking by Agencies* listing legislative repeals of agency rules during the 2000 Session.
 - ◆ An example of a bill that repealed administrative rules - Minnesota Laws 2000, chapter 313, section 10, which repealed obsolete emergency medical services rules of the Board of Emergency Medical Services.
 - ◆ Memo dated 11/7/00 by Senior Assistant Revisor Karen Lenertz outlining the statutory authority of MnSCU to adopt rules and policies.

Thank you to Norma Coleman for her assistance in taking notes and preparing the minutes.

Dave Orren note regarding Audio Tape of Meeting. Due to technical problems, no audio tape of the meeting was made. A GREAT deal of discussion took place. These notes capture a lot of the comments and, hopefully, captured the flavor of the discussion. Every effort was made to accurately capture the comments: my apologies if any comments were misquoted or mischaracterized or missed.

Appendix C
Rules Reform Task Force
Meeting Minutes, December 1, 2000

For working documents and submissions to the task force, see:
<http://www.commissions.leg.state.mn.us/rtf/rtf.htm>

**Rules Reform Task Force (RRTF)
December 1, 2000, Meeting Minutes**

Members Present:

Katie DeBoer, Citizen Member
John Knapp, Esq., Winthrop & Weinstine, P.A.
Laura Offerdahl, Governor's Office
Dave Orren, Minnesota Department of Health (MDH)

Senator Don Betzold
Representative Marty Seifert
Senator Dan Stevens

Member Absent:

Representative Gene Pelowski

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert Wendy Willson Legge, MDH

Call to Order. Representative Seifert, RRTF Vice Chair, called the meeting to order at 10:38 a.m. Representative Seifert noted that Representative Pelowski would not be able to attend. All others were present within a few minutes of the start of the meeting.

Approval of 11/10/00 Minutes. Representative Seifert made a motion to approve minutes as written. Seconded by Mr. Knapp. Motion passed unanimously.

Presentation on Legislative Oversight of Agency Rules (Legislative Rule Review in Colorado). George McCormick from Senate Counsel & Research distributed a handout prepared by Tammy Shefelbine, Senate Counsel & Research Law Clerk. Mr. McCormick stated that the memo was a summary of answers to questions raised at the last RRTF meeting. Mr. McCormick also said:

- In Colorado, there is no agency like the Office of Administrative Hearings to determine the reasonableness of and statutory authority for rules. All issues are resolved with the agency. The first outside review of an agency's rules is the legislative review.
- Colorado does not allow rules to lapse very often.

Discussion following Legislative Oversight Presentation.

- Ms. DeBoer asked whether Colorado's procedure would be redundant with the administrative law judge procedure we have in Minnesota. Mr. McCormick said that that depended on the role of the legislative oversight group. If the legislative oversight group were to repeat the Office of Administrative Hearings determination of whether need and reasonableness had or had not been established, and whether there was statutory authority, then the legislative oversight group would be redundant. On the other hand, legislative review could include other factors, such as whether there were better ways of achieving the rule's purpose. If the Legislature wanted to be more involved in the rulemaking process, the legislative oversight group could not hurt.

- Mr. Orren commented that the legislative oversight group would be redundant. Although there is value in having a legislative committee look at rules, agencies would not want to perform all the rulemaking tasks if the legislature could just pass on the rule. Instead, the agencies would proceed through legislation. This would result in a loss of public participation, and would subject these laws to the tumult of the legislative session. This would not be good for the kind of detail needed in rules.
- Ms. DeBoer asked if there is a way to increase legislative participation without being redundant. Mr. McCormick said that he doesn't know. He agrees with Mr. Orren's observations, and noted another drawback to having a legislative oversight group do the same thing as the Office of Administrative Hearings: members of the public may decide that they will find friendlier ears in the Legislature than the agency, and decide not to deal with the agency but rather wait and go to the Legislative committee.
- Representative Seifert commented that, at the next meeting, we will make concrete recommendations for changes.
- Mr. Orren posed a question for both of the Legislators present: should each rule that has been adopted be referred to a policy committee, not for approval or disapproval, but for the committee to review the policy? Senator Betzold commented that that would depend on the committee. The Environment/Natural Resources committee is interested in DNR promulgated rules and would look at them. However, the DHS and Health rules would inundate their policy committee; the committee wouldn't care about the rules, until there is an issue like the nursing home bedrails issue.
- Representative Seifert asked Mr. Orren if all members of the policy committee get copies of the rules when they come out? Mr. Orren said that the agency is required to notify chairs of the committee and legislative authors of rulemaking authority when we give our 30 days notice. Our rulemaking manual recommends that we also give notice to the ranking minority member on the committee. Mr. Orren thinks that usually not all committee members are notified.
- Mr. Knapp commented that, whether or not we recommend the Colorado system, legislative involvement in rules will be ongoing. Mr. Knapp was concerned that, although we have a good procedure in place for the Revisor's bill, we don't have anything in place for reviewing the repeal of rules by the Legislature. Mr. Knapp asked McCormick if he has thought about what process we should consider that would ensure the appropriate level of review before repeal of rules. Mr. McCormick said that there should be something; the procedure with the Revisor's bill is good model.
- Mr. McCormick expressed concerned that, late in session, there may be many bills on the agenda and lists of rules to be repealed. The Legislature then has to rely on the person preparing bill to say that the bill does not repeal any rules that you would want to keep. There have been cases of the inadvertent, mistaken repeal of rules. Several years ago, a Board of Education rule establishing a procedure for certification of school nurses was repealed, even though the law requiring certification was not repealed. Mr. McCormick suggested that a joint rule of the Senate and House could ensure that policy committees would consider legislative repeal of rules and that rule repeals would not be added first in a conference committee.
- Mr. Knapp asked Mr. McCormick to bring to the next meeting proposed statutory language to ensure that those mistakes do not happen in future. Mr. McCormick

agreed. Mr. Knapp suggested that he consult with Mr. (Mark) Shepard and Mr. (Paul) Marinac.

- Senator Betzold suggested that, if the agency says a rule is not controversial and the Legislature believes the agency, then Senate and House counsel would not need to go through every line of the rule. Senator Betzold asked where is the point in the system we're trying to hone into to ensure that problems don't happen? Senator Betzold said that he would go to the source. Mr. Knapp agreed that it was fair to go to the source, perhaps in the nature of the agency bill. He commented that a better process is needed.
- Mr. Orren suggested that the expedited process be available to agencies for noncontroversial rules. That way, regulated parties would have chance to see the proposed rule, but if 25 letters were not received, the agency would not prepare a statement of need and reasonableness. Mr. Orren said that he will distribute this proposal to the committee before the next meeting.

Presentation of Recommendations for Legislative Review of Rules. Mr. Orren distributed two handouts (memoranda dated November 29 and 30, 2000) and made a presentation regarding recommendations for legislative review of rules.

Legislative Review of State Agency Rules and Related Laws and Programs: Mr. Orren summarized the first handout (dated November 29, 2000). The highlights are described below.

1. Under Minnesota Statutes section 14.3691, the agency would prepare a report listing any rules the agency recommends for repeal, describing the rationale for rules to keep, and suggesting any changes in rules. This report would generally consist of one or two paragraphs per chapter of rules. Representative Seifert asked how many chapters there are of MDH rules. Mr. Orren said that he guessed about 50, give or take 20. After the agency prepares this report, legislative committees would ID and prioritize rules and select for review only one set of rules per agency. This would be an in-depth review, such as the review of the nursing home bedrail rule. Mr. Orren noted that Care Providers of Minnesota has expressed a concern about selecting only one set of rules, because some industries, like nursing homes, are subject to rules from several agencies, both state and federal. Mr. Orren agreed that the legislative committee could select one area (such as nursing homes), instead of one chapter, and focus on what is important in that subject area.
2. The legislative committee would look at the big picture. The committee would hold hearings and consider recommendations. During the bedrail issue, Senator Stevens contacted federal agencies about federal rules affecting nursing home bedrails. Senator Don Samuelson and Representative Fran Bradley even went to Washington to talk to federal officials about bedrails. Senator Stevens expanded this issue to include the survey process used in nursing homes and also the issue of who could assist in feeding nursing home patients. Senator Stevens commented that you don't want the issue to be so specific as bedrails, because it makes sense to broaden the issue across agencies. There are lots of issues that cross agencies. Representative Seifert commented that it looks like there would be flexibility for the issue to cross agency jurisdiction, and Mr. Orren agreed.

3. The time spent for an agency to prepare the report would range from about 10 hours to 100 hours or more, and the legislator and legislative staff time to identify and prioritize rules would range from 10 to 20 hours.
4. The requirement that the agency estimate the effect of possible rule repeal on the state budget and any loss of benefits to the citizens was included in the law when the Legislature was considering repealing all rules. An agency cannot make this estimate if the agency is not recommending repeal.

Discussion Following Presentation on Legislative Review of State Agency Rules and Related Laws and Programs:

- Representative Seifert said that the recommendations look very good. The chair of the legislative committee could take the review of a set of rules or an issue area and re-fer it to a subcommittee. The subcommittee could dig into it, and full committee meetings would not be needed until the chair said so. Senator Stevens commented that this is exactly the model used by the Senate Health and Family Security Committee. The Committee chair appointed a subcommittee which brought in staff from agencies, and brought the advisory committee together with all of the stakeholders. The benefit of this system is that all of the people are sitting at the same table. With facilitation, they can come together on many issues ; they can find common ground and can disagree without being disagreeable. Representative Seifert asked how many were on the subcommittee, and Senator Stevens replied five or six.
- Representative Seifert asked if the committee wants to recommend that this be put in the final report for recommendation, or hold it over until next meeting? Senator Stevens agreed that the memo is very well written, and stated that it should be strongly considered and dealt with at the next meeting.
- Senator Stevens said that he would encourage the task force to recommend a process for dealing with federal rules. Although we can't make a direct impact, we need a process for identifying federal rules that are causing problems in Minnesota. We would submit to our federal delegation and the federal agency our identification of the federal rule, why the rule is causing a problem, and our recommended changes. Representative Seifert said that that sounds like good recommendation, and that the committee would hold the recommendation until the next meeting. We'll also consider the governor's authority to veto rules and whether to make a recommendation about that. We'll hold the November 29th memo over until the next meeting; anyone who wants changes should get those ready for the next meeting.
- Representative Seifert said to put in the memo that the task force says that, because the sunsets on rules were removed in the conference committee for ML2000, chapter 469, clause (4) requiring agencies to estimate the effect of possible rule repeal is not relevant.

Rulemaking Notice to the Legislature: Mr. Orren summarized his second handout (dated November 30, 2000). He stated that Minnesota Statutes, section 14.116, is a good statute by and large, but there are problems with notifying the legislative authors because some statutes are old and have been amended many times. Performing the research to find the authors or supporting authors who are still legislators requires ten or more hours of agency work. When Representative Munger was still in the Legislature, the research had

to go back to 1955. Each piece of big legislation requires a big effort by the agency. Mr. Orren's proposed statutory change, which is in the memo, would require notice to be sent to the chairs of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule, and would require the agency to make reasonable efforts to notify sitting legislators who were chief authors of the law or companion bill if the legislation became effective during the previous two years. Mr. Orren would also add that notice be sent to the ranking minority members of the relevant legislative policy and budget committees. The proposed notice would still give very good notice to the Legislature and reduce some of the burden on agencies.

Discussion Following Presentation on Rulemaking Notice to the Legislature:

- Senator Betzold commented that he had previously proposed a bill that would do this. Representative Seifert said that he was one of the people who opposed the bill because only the committee chairs would have received notice of changes in the rules. Representative Seifert said that the notice proposed by Mr. Orren looks good, especially since the House now allows 25 or 30 co-authors on a bill. Mr. Orren's recommendation makes a good faith effort to give notice.
- Senator Stevens said that Mr. Orren's proposed language is a reasonable compromise that eliminates lots of unnecessary time by agency staff. With the addition of giving notice to ranking minority members, Senator Stevens thinks that the proposal is a good idea for a task force recommendation.
- Senator Betzold said to put this in the mix of things to discuss for the final report.
- Mr. Orren said that he would take both the November 29th and 30th memos, revise them to include what has been discussed today, and include the revised memos in the materials for the next meeting.

Current Alternatives to Rulemaking Used by Various State Agencies.

Testimony by the Minnesota Pollution Control Agency (MPCA): Ann Foss from the MPCA gave testimony regarding administrative penalty orders (APOs) and distributed two handouts: an MPCA fact sheet regarding the use of APOs and a copy of the MPCA's APO statute, including the most recent amendments. The highlights are discussed below:

- In 1987 the MPCA was given APO authority in the area of waste violations. This authority was broadened in 1991.
- The statute required the agency to develop a plan for the implementation of the APO authority. The agency published the plan for comment. The plan was then approved by the agency's board. The plan included an introduction, overview of authority, discussion of the process to use in issuing an APO, the administrative appeals process, and the role of the Attorney General. The plan did not include any matrix of potential violations with proposed penalties, and did not include all criteria to be used to determine if the violation was serious enough to require a nonforgivable penalty.
- The decision process is not based on the decision of one individual. The agency started using a forum process to make decisions about penalties and other enforcement. The forum consists of the investigator, senior enforcement staff, the enforcement supervisor, and a member of the Attorney General's Office. The investigator recommends enforcement action and the group much reach consensus.

Discussion Following Testimony by MPCA:

- Representative Seifert asked what means a party has of contesting an APO if the party receives an APO and disagrees with the agency's conclusion. Ms. Foss said that the person can request an administrative hearing in front of an administrative law judge (ALJ) or can request that the agency go to district court. Typically the agency goes to the ALJ. Also, the agency has the person come in and discuss the matter. Many times they waive the appeal after this discussion. Senator Stevens said that Ms. Foss did a good job of presenting. The advantage of APOs is that you do have an expedited administrative process available. The key to the APO process is that compliance is the real goal, and you're not charging anyone with criminal activities. Senator Stevens doesn't often laud the MPCA, but this is one area where they've done an excellent job. He thinks that APOs are well-suited for certain things, and should be looked at as an alternative for use in other agencies.
- Representative Seifert asked what if the party goes to court, hires an attorney, and the judge decides the MPCA went too far because there was no violation of law. Who would pay for the court fees? Ms. Foss stated that she was not sure. She only recalls one instance where the agency was asked to reimburse for attorney fees, so this is not automatic. When Representative Seifert asked if a judge could order this, Ms. Foss said that was what happened in the one case she recalls.
- Ms. Deboer asked if APOs are enforcement mechanisms for existing rules? Ms. Foss said yes, and that she's also confused about why this is an alternative to rulemaking. She thinks it is because the process for implementing APOs is an alternative. Mr. Orren said that this is a part of "ways to make regulation work better," not an alternative to rulemaking. This is a way to provide flexibility in enforcement.
- Mr. Knapp said that he agrees APOs are appropriate and other agencies should use them, but his criticism is that it's a black box process. The method for calculating the penalty is not known, and once the penalty comes out, it's take it or leave it. Mr. Knapp asked if any document exists that describes how the agency calculates the penalty. Ms. Foss said that the regulated party is not invited to forum, but that during the informal process the agency spells out how it calculated the penalty. The MPCA uses a penalty matrix and walks through the method with the parties, if they have questions.
- Senator Stevens said that another advantage of the APO is that it can be forgivable, nonforgivable, or a combination. If it is a first offense, the penalty is usually forgivable; if the party takes corrective action in 30 days, the penalty will be forgiven. It's not a perfect system, but it's an enhancement to enforcement (not an alternative to rulemaking). Ms. Foss said that Senator Stevens had made a good point. The MPCA typically reserves a nonforgivable penalty for serious or repeat violations.

Testimony from the Department of Revenue (DOR):

Linda Geier, an attorney for DOR, gave a presentation on revenue notices as an alternative to rulemaking, and distributed two handouts: an informational sheet on revenue notices and a highlighted copy of the revenue notice statute (MS270.0604). Highlights of the presentation are listed below:

- DOR started publishing revenue notices in 1991, as a result of the taxpayer bill of rights. The Society of CPAs and the Minnesota Bar Association had gone to the Legislature and wanted something similar to IRS revenue rulings. At the direction of the Legislature, the DOR studied the issue.
- The Legislature wanted the DOR to use broad-based pronouncements, and they wanted the DOR to be bound by these statements. People were getting different answers to questions depending on whom they called. They wanted quick answers, and they wanted to be able to rely on the statement made.
- The DOR then came up with the revenue notice. A revenue notice is a statement of policy that provides an interpretation of existing law. The legal effect of the revenue notice is that it is binding on the DOR but not on the taxpayer. The DOR has generally found that the revenue notices are followed. They have no precedential value, and do not have the force and effect of law. A person can go to the tax court and contest a revenue notice.

Discussion Following Testimony from the DOR:

- Representative Seifert asked if a judge found that the revenue notice was not the judge's interpretation, would another revenue notice be sent out? Ms. Geier said that the revenue notice would immediately become null. The DOR usually revokes it, and publishes notice in the State Register.
- Representative Seifert commented that other agencies could use this method. This could remove inconsistencies in enforcement, and result in consistency across the state. It would be very helpful. Why was it just the DOR? Ms. Geier said that the DOR has an exception from the Administrative Procedure Act for revenue notices. When the DOR requested an exception, that was a pretty serious request, and the Legislature looked at it very carefully before granting that exception. Practitioners came forward and said that they needed information more quickly; rules would take too much time.
- Ms. Geier said that the DOR averages 25 to 30 revenue notices per year. The DOR is happy with this process. Senator Stevens asked what the public response is. Ms. Geier said that the feedback has been very positive. They have had revenue notices for a number of years. There are people on a mailing list who receive a revenue notice as soon as it is published. The revenue notices are also on the DOR web site.
- Mr. Orren stated that revenue notices were not allowed in the past because the Legislature was very careful about extending flexibility to agencies. Mr. Orren said he thinks the Government Operations committees should hold hearings on this method to determine whether it would be reasonable to extend this authority to other agencies and what restrictions should apply. Mr. Orren asked if there was any federal law on this subject. Mr. Knapp said that he didn't know.
- Representative Seifert suggested that the task force consider including revenue notices as part of the groups' recommendations.
- Senator Stevens said that the group should consider something like an interpretive policy notice that would be specific to certain rules. It could be used with more controversial, substantial rule changes, along with some sort of notification of those rule changes. If we do something in this area, we should include notification of ranking minority members (see subdivision 4 on issuance and notice to legislators).

- Ms Geier said that the handout of the statute is section 279.0604. The highlighted portion was added in 1995. The DOR's experience is that staff of the committees look at it and might have comments; it's been very helpful, and has allowed the DOR to fix the bugs in the revenue notice before it is published.

Testimony from the Department of Agriculture : Carol Milligan, the Department of Agriculture rules coordinator, and Jerry Spetzman, also from the Department of Agriculture, testified about Best Management Practices (BMPs). Ms. Milligan said that BMPs provide technical assistance in the area of chemical use, which can be very confusing. The agency develops information to give to farmers on what the agency thinks is the best use of chemicals. Mr. Spetzman said that BMPs are by definition voluntary. If the agency wants one to be mandatory, the agency needs to make it into a rule.

Discussion Following Testimony from the Department of Agriculture:

- Mr. Orren said that the Department of Agriculture gets a huge percent of compliance (over 90%) with BMPs. The use of BMPs is not something that would work if the agency is dealing with vulnerable populations and needs to protect everyone, but BMPs are wonderful where 95 percent compliance is good enough.
- Senator Stevens said that he wants an executive summary of how to do BMPs. The agency probably gets good compliance because it involves people up front. Representative Seifert asked Ms. Milligan for a brief summary before the next meeting.
- Senator Stevens said that he has small booklet with two documents, the Declaration of Independence and the United States Constitution. For 150 years we operated on common sense and common law. As we add more and more language to our statutes and more rules, we limit the ability of regulators to make decisions. When it's a hard and fast rule, regulators have no authority to ignore rules. Senator Stevens used the example of the Department of Human Services which uses descriptive guidelines on the regulation of day care. These guidelines explain the rules in plain language. We need to get people out of the mode that you have to have a hard and fast rule in a book to achieve compliance. Representative Seifert agreed.

Determine Assignments for Next Meeting; Schedule Next Meeting

- Representative Seifert stated that, at the next meeting, the task force will hear any last public input and the committee will assemble recommendations. A copy must be printed and voted on by December 15th.
- Ms. Offerdahl said that it would be helpful if we could get the recommendations posted on the website ASAP. Ms. Buske said that she could put them on the website. Mr. Orren could send or fax his memos to Ms. Buske.
- Representative Seifert said that the agenda for the next meeting would repeat items one through three on the current agenda, and then go right to the recommendations for the task force report. There will be no approval of the final report until the January meeting. However, Representative Seifert asked if members would be comfortable approving pieces, item by item? The members concurred.

- Representative Seifert asked about holding the next meeting on December 14th. Senator Stevens said that there is a 95% chance that he won't be at that meeting, but he is comfortable with the task force going ahead. The date was acceptable to the other members. Representative Seifert said that we will plan to hold meeting at 9:30 a.m. on December 14th, in room 400N of the State Office Building. At least five members are needed for a quorum. If at least five members cannot attend, we'll reschedule. Members should get their suggestions to Ms. Buske by one or two days before the meeting.

Review Stakeholder Input

Presentation by George A. Beck, Administrative Law Judge

Judge Beck distributed two handouts and gave a presentation regarding rulemaking notice. The two handouts were a letter from Judge Beck to Representative Pelowski dated November 15, 2000, and a copy of a bill introduced in 1999 with proposed statutory amendments to chapter 14. Highlights of Judge Beck's presentation are listed below:

- The Office of Administrative Hearings (OAH) is responsible for the legal review of rules and for conducting controversial rulemaking hearings.
- OAH has four suggestions regarding notice: (1) requiring agencies to publish rules and all supporting materials on the web; (2) requiring an agency to explain in the Statement of Need and Reasonableness if an advisory committee was not appointed; (3) authorizing the Governor's office to maintain a state rulemaking docket, which the OAH would like to see published in community newspapers; and (4) requiring agencies to include on their web site and in their notices of intent to adopt rules information about how to be put on the agency rulemaking list.
- OAH's comments are aimed at making more affected people aware that a rulemaking proceeding is pending.

Discussion Following Presentation by Judge Beck

- Senator Betzold said that Senator Metzen was reluctant to proceed with the bill until he got the green light that people were on board with it. Judge Beck said that the only feedback they had received was from Mr. Orren, and his comments could be incorporated in the bill. Mr. Orren agreed.
- Mr. Knapp commented that the committee has heard some discussion of agencies adopting policies by non-rulemaking processes. Mr. Knapp asked Judge Beck if he is aware of any process that involves administrative law judges (ALJs) where an agency adopts a policy that has the effect of a rule, but does so through non-rulemaking processes. Is there a role for ALJs to determine if the agency has authority, without rulemaking? Judge Beck said that there could be a role for ALJs in a contested case hearing. There is a process in California where someone can challenge a policy and obtain an ALJ ruling before the policy becomes a rule. Senator Stevens said that we should look at and research options other than a full contested case hearing, by either party requesting an opinion from an ALJ with some sort of expedited hearing. Mr. Knapp said that, for the next meeting, he will look at California law and see if it is something we can adopt in Minnesota.

- Senator Stevens commented that every county in Minnesota must have a legal newspaper for publication of legal notices of the county. Besides requiring a listing in the State Register, agencies could be required to publish a brief readers digest description in county legal newspapers (87 county papers). Judge Beck said that this was the ideal solution, but that, even if this publication was not mandated, a lot of publications would pick up the information if it was easily available.
- Representative Seifert asked Judge Beck if there were any rules he thinks should not have gone forward. Judge Beck said that the OAH review is a legal review; the OAH does not get into the policymaking area. If there is a strong policy objection to a rule, that's a place for the legislature to step in. There should be a process for the policy review of a rule.
- Representative Seifert said that we don't have that in place. The Governor's veto helps. What mechanism is there to stop a bad rule? Ms. Deboer asked if Representative Seifert was looking for something more immediate than the Legislature's authority to repeal any rule or change the law. Representative Seifert said that the problem is that you're empowering the minority to stop things. For example, with the Profile of Learning, a certain senator refused to say there was a problem with the rule, and as a minority of one blocked anything that happened. How can we get a group to say there's a problem with a rule? How can we stop it? Mr. Orren says that he doesn't have an answer. There is a Governor's veto. If there was lots of legislative concern with a Department of Health rule, we would almost always withdraw it. Also, if the Legislature knows that it's an area like the Profile of Learning, the Legislature could say to the agency, "you draft the rule and you bring it back to the Legislature for final approval." Representative Seifert said that we might put that in the task force report; he was going to suggest it for the feedlot rule.
- Senator Stevens said that in Colorado a rule would sunset after a year unless the legislature took action to extend it. Rules would become law for one year, and would be extended by legislative authority. It is a gray area whether this is constitutional or not. Judge Beck said that it can be structured in a constitutional manner; it depends on what authority is at the end of the legislative review process. His experience is that agencies are very cooperative. The Legislature doesn't need a strong veto authority. Representative Seifert said that he will visit with Mr. Sheperd and Mr. McCormick and put something together. We need a rarely used but very needed mechanism to stop the rules that cause problems.
- Senator Stevens asked Judge Beck for his opinion of the Governor's veto authority. Judge Beck said that he has a personal opinion, but not an agency opinion. Judge Beck said the problem is that it's creating a delay in the rulemaking process. It's a problem having that review prior to rule adoption. We're trying to expedite rulemaking, but the Governor's review is adding delay. The Governor's control over the agency head is sufficient and should be relied on. Having the Governor's review for every rule is overkill. Senator Stevens said that Judge Beck's personal opinion is then to let the Governor's veto authority sunset.

Presentation by Patti Cullen, Vice President, Care Providers of Minnesota

Ms. Cullen distributed a memo and made a presentation. Highlights of the presentation are listed below:

- The last page of the memo she distributed concerns things that are not rules but are implemented anyway. Her industry is subject to a variety of mechanisms that institute changes without rules, such as bulletins. Most of these changes are outside interpretive changes. She cautions us to add something on the entities being impacted, especially changes that cost providers money. For example, MDH very appropriately uses bulletins. Usually it's Care Providers asking for a bulletin, such as on the use of haldol and how they're going to be surveyed. On the other hand, the agency that pays Care Providers will add a change and suggest that it is part of their per diem, so the agency won't pay for it. There is no mechanism for Care Providers to address this problem.

Discussion Following Presentation by Ms. Cullen

- Representative Seifert asked Ms. Cullen, for the next meeting, to give concrete examples of interpretations that cost money or caused problems where Care Providers was not jeopardizing life or health.
- Senator Stevens said that Care Provider's only alternative now (to address a problem with an interpretation) is to go through a contested case hearing. Senator Stevens asked Ms. Cullen if she would agree that we should have a different option rather than going right to a contested case hearing. Ms. Cullen said she had had success in the past in going to the LCRAR and having them stop it. She agrees that going to a contested case process would not be done, and an alternative would be very much appreciated. The ALJ has been good about identifying issues, but then the agency says, we'll do it anyway. Our process now is to write to the commissioner and copy legislators who we hope will also write to the commissioner. If there will be a financial impact, maybe a process should be added so that there would be a separate notice, maybe to the chairs of the appropriate funding committees.
- Mr. Knapp said that agencies must justify state rules that exceed federal rule. He is concerned about the wholesale repeal of rules, but wondered what Ms. Cullen thought about requiring the agency to identify rules that exceed federal requirements. Ms. Cullen thought that was a great idea. She would add to that rules and their interpretations.

Public Testimony

Testimony by Wallace Rogers, Senior Associate, Jefferson Center

Mr. Rogers distributed a handout and gave testimony. Highlights of his testimony are listed below:

- Mr. Rogers has in the past been a mayor and county administrator, and therefore on the front line regarding rules to enforce at the local government level. He suggests a process that involves ordinary rank and file citizens who are affected, and involves them at the front end of the rulemaking process. He suggests using a Feedback Panel. This takes 8 to 12 people who look like a snapshot of the group of citizens who might be affected by the rule. This group has an opportunity to affect the rule.
- Mr. Rogers believes a procedure like giving testimony to our task force is more comfortable than sitting as a mayor and reacting to a rule. Because nothing in writing

has come down from the task force, Mr. Rogers feels that his comments will be taken into account.

- A Feedback Panel might also address some of the other problems, such as a bad rule. Maybe if there was a Feedback Panel, a bad rule wouldn't get to the point where it's even written. If people are not involved until the back end, they must react in a more negative way to try and stop the process. The idea is to get people to talk about it at beginning and get their input before something is written.
- The memo Mr. Rogers distributed is what they've forwarded to the Governor's office. It addresses the public perception that something is missing in the process. A Feedback Panel does not prolong the process. The panel will meet for 1 or 2 days. The first half of the meeting would be to bring them up to speed on what's behind proposed rule from the points of view of the special interest groups and the agency. During the second half of the meeting, they would deliberate and come up with some suggestions and reaction. It is a very nonpartisan process.

Discussion Following Mr. Rogers' Testimony

- Senator Stevens said that some of the agencies have done similar things, but he doesn't know what they are doing in the area of rulemaking.
- Mr. Orren said that this idea fits within concept that agencies are trying to give early notice. With respect to whether the agencies first prepares a draft or not, we need to approach this by training for the agencies. Sometimes it wouldn't work to not have a draft because, if the agency is amending a rule, they already have an idea of how to amend it. Not giving people that draft would be dishonest. But if we don't have any agency proposal of how to solve the problem, we could use this Feedback Panel.
- Senator Stevens said that where the legislature mandates that the agency shall draft rules to implement a statute, it would be very beneficial to obtain input before drafting rules. Representative Seifert said that he can also see the benefits. This is a concept that we should have been using for a long time.

Testimony by Chuck Williams, Vice President for Internal and External Affairs, EVTAC Mining

Mr. Williams is also a former Commissioner of the PCA. Highlights of his testimony are listed below:

- The rulemaking system has become fairly complicated. Mr. Williams is concerned as he watches agencies struggle with issues. For example, the agency is finally moving to the rulemaking process with respect to the mercury policy draft.
- There isn't enough funding for this rulemaking process to be carried out. The Legislature has to think about how to give incentives to agencies.
- Agencies tell Mr. Williams that he has to decide if he wants his permits issued or if he wants rulemaking. The agency has a big backlog in issuing permits.
- The task force needs to talk about increasing the number of signatures that can trigger a hearing. Twenty-five signatures is a pretty low bar to step over. The task force should consider raising the bar; the world is so complicated and it's so costly to hold a hearing.

Discussion Following Mr. Williams' Testimony

- Senator Stevens said that, in our task force report, we need to make clear that policy statements or interpretations are not binding on the regulated industry until there is a formal rulemaking process. Also, some agencies are not doing a good job of prioritizing their mission. The head of the PCA and PCA staff were at global warming conference in the Netherlands We have to have priorities; we have to issue permits and protect the environment in Minnesota before we go around and try to cure all the ills of the world. Sometimes these policy statements are ways that the bureaucracy holds its finger down on the regulated parties without having the blessing of the legislators.

Adjournment

The meeting adjourned at approximately 12:05 p.m.

Handouts:

- 1) Meeting agenda
- 2) Draft minutes from the 11/10/2000 RRTF meeting.
- 3) "Legislative Oversight of Agency Rules - Follow-Up Questions to 11/03/00 Meeting," memo dated 11/28/00 by Tammy Shefelbine, Senate Counsel & Research Law Clerk.
- 4) "Suggestions for Task Force Recommendations on Legislative Review of State Agency Rules and Related Laws and Programs," memo dated 11/29/00 by Dave Orren, RRTF Member and Rules Coordinator for MDH.
- 5) "Suggestion for Task Force Recommendations on Rulemaking Notice to the Legislature," memo dated 11/30/00 by Dave Orren.
- 6) "Administrative Penalty Orders: Compliance is the Goal," Fact Sheet dated June 1996 by MPCA.
- 7) Minnesota Statutes, Section 116.072 (2000) (entitled "Administrative penalties").
- 8) "Information Sheet - Revenue Notices," dated 12/1/00.
- 9) Minnesota Statutes, sections 270.0603 through 270.0604 (1998) (section 270.0604 is entitled "Revenue Notices").
- 10) Letter dated 11/15/00 from George A. Beck, Administrative Law Judge, to Rep. Gene Pelowski, Jr., Chair, RRTF.
- 11) S.F. No. 994, as introduced: 81st Legislative Session (1999-2000).
- 12) "Comments on rules review process," memo dated 11/28/00 by Patti Cullen, Vice President, Care Providers of Minnesota.
- 13) "Subject: Concept Paper – Proposal to Expand Citizen Participation Opportunities in the State of Minnesota's Administrative Rule Making Process," by the Jefferson Center.

Appendix C
Rules Reform Task Force
Meeting Minutes, December 14, 2000

For working documents and submissions to the task force, see:
<http://www.commissions.leg.state.mn.us/rtf/rtf.htm>

**Rules Reform Task Force (RRTF)
December 14, 2000, Meeting Minutes**

Members Present:

Katie DeBoer, Citizen Member
John Knapp, Esq., Winthrop & Weinstine, P.A.
Laura Offerdahl, Governor's Office
Dave Orren, Minnesota Department of Health (MDH)

Senator Don Betzold
Representative Gene Pelowski
Representative Marty Seifert

Member Absent:

Senator Dan Stevens

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert Wendy Willson Legge, MDH

Call to Order. Representative Pelowski called the meeting to order at 9:38 a.m. Representative Pelowski noted that Senator Stevens would not be able to attend. Ms. Buske said that she had spoken to him; he is out of the country and trusts the judgment of the task force members.

Approval of 12/1/00 Minutes. Mr. Orren made a motion to approve minutes as written. Seconded by Ms. Offerdahl. Motion passed unanimously. (Thank you to Wendy Legge for her assistance in taking notes and preparing the minutes for the 12/1/00 and 12/14/00 meetings.)

Presentation on Methods of Repealing Obsolete Rules. George McCormick from Senate Counsel and Research, Paul Marinac, Deputy Revisor of Statutes, and Mark Shepard, House Research, distributed a memorandum. Mr. Shepard gave a presentation. Mr. Shepard said that, at the last RRTF meeting, there was some concern about legislators who brought obsolete rules for repeal at a point late in legislative session. The RRFT had asked him, Mr. McCormick and Mr. Marinac to come up with ideas on how to approach this situation. Their memorandum presents the following ideas:

- Joint legislative rules could permit the Revisor to attach to a bill the text of the rules proposed for repeal.
- The Legislature could develop a practice of having one bill to repeal obsolete rules. This bill would be introduced early in the session. The current statute gives the Revisor authority to prepare bills. It could be amended to allow the Revisor to prepare a memo to explain why rules are obsolete. If there is an obsolete rules bill, it might be useful to have a sign-off procedure.
- Each policy committee, as a general practice, would hold hearings in January on obsolete rules to allow for more public input.
- Require a legislative note when rules are to be repealed. Under current law, the chair of standing committee to which a bill delegating rulemaking authority has been referred can require a rulemaking note. A similar law could be enacted for bills proposing repeal of rules.

- Amend existing joint legislative rules to require that all bills repealing rules be referred to Government Operations. Certain rulemaking actions currently must be referred to Government Operations.
- If an agency lists a rule as obsolete in the agency's annual report of obsolete rules, the agency could automatically use the expedited rulemaking process to repeal the rule, unless enough people objected to this method. This option would not involve the legislative process.
- The memo expresses some concern about prohibiting the repeal of obsolete rules late in the session. It is possible that rules might become obsolete as a result of a statute being repealed late in session.

Discussion Following Presentation on Methods of Repealing Obsolete Rules.

- Mr. Knapp asked if it is not possible now for the Revisor to attach to a bill the text of the rules proposed for repeal. Mr. Marinac said that it is not. Programming is needed to accomplish it. This would absolutely be part of the Revisor's current redesign package. Until then, the Revisor's office would do it on each bill. Joint rule 2.01 needs to be amended to give the Revisor this authority.
- Mr. McCormick commented on a sign-off procedure if the Legislature had one bill to repeal obsolete rules. He was thinking of something like the Revisor's procedure; the chairs of the policy committees and Government Operations could sign off that this was a repealer of noncontroversial obsolete rules. Mr. Orren asked why the chair of Government Operations. Mr. McCormick replied that there was no particular reason. Mr. Orren said that the chair of the policy committee should certainly sign off, and Government Operations chairs should be consulted to see if they want to sign off.

Public Testimony

Testimony by Marcus Marsh, Minnesota Association of Farm Mutual Insurance Companies.

Highlights of Mr. Marsh's testimony include:

- Mr. Marsh works for the Minnesota Association of Farm Mutual Insurance Companies, which is a statewide insurance association. It consists of 98 small companies and 6 statewide members. The members are property and casualty carriers.
- When Mr. Marsh was a legislator, he heard a fair amount of complaints on rulemaking. Constituents called him, concerned about the rulemaking process in the insurance, DNR and PCA areas. A year ago Mr. Marsh was appointed to the PCA board. He is still happy to be available for constituent concerns that might come up.
- The Association has had good relationships with the Department of Commerce, which governs the Association. Mr. Marsh has not seen the amount of problems from years past, partly because he tries to keep open a good line of communication with the Department. The Association has continuing education meetings in the spring and fall when rules are discussed. The Association is trying harder to educate its members about what's happening in statutes and rules.
- However, adversarial situations have developed from time to time.
- The legislative committee from the Association suggests that there be a statutory change so that no rule could become effective until the next legislative session would end. There would be an exception for emergency situations. That way, if there are rules that seem onerous, at least the industry could make its concerns known to legislators.

Discussion Following Mr. Marsh's Testimony

- Senator Betzold asked Mr. Marsh why he couldn't go to the respective policy committees now if he sees a rule that he has some concern about. Why should the Legislature hold up all those rules? Isn't there a better way to approach this? Mr. Marsh said that there is now an improved relationship between the Association and the Department, but there used to be concerns about onerous requirements. Historically, there have been more activist people in various agencies. There just needs to be legislative oversight or review. Senator Betzold said he agrees that Legislature should be more involved in oversight, but delaying all rules seems like overkill.
- Mr. Marsh said there could be modifications to the proposal. If there is no concern over rules, they could go into effect, but if there are rules that become controversial or someone objects to, there would need to be a legislative session to allow those rules to go into effect. Senator Betzold asked, if one person objects is that enough to trigger delaying a rule? Should it be a group of people? Senator Betzold said that Mr. Marsh needs more specificity as to what he would like the task force to look at. Mr. Marsh said that he certainly will do this. The quick answer would be that if an industry entity affected by that rule objects, that would trigger a delay, but if one or two people in the general public objected, that would not trigger a delay. He'll take this back to the Association's legislative committee and see if he can get more detail.
- Mr. Knapp said that the task force has heard a concern that agencies are doing by bulletin or another mechanism things that they should be doing by rule. Mr. Knapp asked Mr. Marsh if he sees any cause for concern in that area. Mr. Marsh said that the Association recently had a problem with a far-reaching bulletin issued by Commerce. The bulletin concerned the need for other liability coverage where there was an exemption from workers compensation. The bulletin was far-reaching to the point that the Association's members couldn't provide coverage, or the coverage was so expensive that farmers couldn't afford it. Mr. Marsh called the commissioner, scheduled a meeting, and was able to work it out. The bulletin was re-issued. If they hadn't been able to work it out, there would have been serious consequences.
- Mr. Orren asked Mr. Marsh if he finds there is value to the public participation in rulemaking? Mr. Marsh said certainly. Mr. Orren then asked if there are any times where the Association and the agency agree that changes need to be made fairly quickly. Mr. Marsh said that they haven't had a lot of problems recently. In the case of the bulletin, it was a far-reaching issue but it was resolved. The comments and concerns of the Association's legislative committee are more a result of historic problems. Mr. Orren said that the value in public participation is great, and that public participation has increased greatly since 1995, when the Administrative Procedure Act (APA) began requiring greater notice. If the APA required waiting for the Legislature, the agency would just write up what it wanted, give it to the Legislature as a bill, and not obtain public participation. Mr. Orren agrees that there are problems with bulletins. He has a proposal today that would allow interpretive notices like those issued by the Department of Revenue, but that would have safeguards (publication in the State Register and notice to committee chairs). Mr. Orren said that he doesn't know if there should be veto power by the committee chairs. At least his proposal would allow the agency to work quickly where the agency and the industry agree. We aren't going to get anything that's perfect. Even if there is legislative approval, you'll still get that one bad rule.

- Ms. Offerdahl offered one other alternative. If the Legislature knew that a set of rules might be controversial, they could specify in statute that they want the agency to bring the rules back to the Legislature before they are adopted.
- Mr. Marsh said that the biggest concern of the Association's legislative committee is rules going into effect without additional oversight. If there is additional review, this gives an additional safeguard.

Testimony by Kathleen Davis, Supervising Attorney at the Legal Aid Society of Minneapolis

Ms. Davis gave testimony and then distributed a copy of her testimony. Highlights of her testimony include:

- Legal Aid attorneys represent low-income people who have serious problems with public assistance programs. They rely on government programs to meet their basic assistance needs. They contact Legal Aid because they have been denied or been terminated from a public assistance program.
- Public assistance is very important to the lives of these low-income families. Two rulemaking issues affecting public assistance recipients: (1) the need to make the Minnesota Administrative Procedure Act (MAPA) processes as open as possible; and (2) the need for agencies to promulgate rules through MAPA rather than using manuals.
- Citizens benefit from an open process. Notices published in the State Register do not reach low-income persons. Agencies should give notices in newspapers. Notices and SONARs should be on the agency's website. For public benefit recipients, notices should be posted in public assistance lobbies and in the lobby of the agency. The notice should always include an address and phone number. Since many Legal Aid clients don't speak English, the notice should be translated. At a minimum, a block should be included in the notice, in eight different languages, which would inform people where they can get more information about the notice from someone who speaks their language.
- An agency, such as the Department of Human Services (DHS), does much of its policy implementation through manuals, bulletins, and unwritten policies. The public has little or no ability to comment. This can cause significant harm to low-income persons. DHS will on occasion implement an unwritten policy. For example, an unwritten policy for the Minnesota Family Investment Program (MFIP) prevented some students from participating in a University of Minnesota program. These requirements were not communicated to the public. A judge found that DHS has created a rule without following MAPA procedures. While MAPA requirements are lengthy, they are intended to prevent arbitrary agency actions. Legal Aid advocates that more policies be promulgated by regulation, and less by manual.

Discussion Following Ms. Davis' Testimony

- Mr. Orren said that he understands the problems of unpromulgated rules, but he is trying to get a balance. He asked Ms. Davis if there are times when there's a need for quick corrections in the agency's process, when the 18 months to 2 years it can take to promulgate a rule is too long. Ms. Davis said yes. She said that the option of interpretive notices would help. It would give low-income people some ability to comment. Mr. Orren said that interpretive notices would allow fairly quick corrections. So would notice and comment rulemaking for noncontroversial rules. Mr. Orren asked Ms. Davis if the major things that she wants are notice and the opportunity to be heard. Ms. Davis said yes; then people have the ability to challenge or comment on proposed policies.

- Mr. Orren asked Ms. Davis if she knows the cost of translating into the 8 languages. Ms. Davis said that that was involved in the Yang lawsuit recently settled with DHS. There are two critical documents that DHS will be translating. In January of last year, the cost of translating a 4-page form was \$5000. If a language block is placed on a document with a message in several languages that will say where to obtain more information in each language, that's a beginning.
- Mr. Knapp said that he has seen the DHS manual and it is huge. He doesn't know how realistic it is to have all that information in rule. Mr. Knapp asked Ms. Davis what if the manual conflicts with state or federal law? What are the remedies to address that? Has Ms. Davis experienced this? Ms. Davis agreed that there is a lot of paper and regulation. Legal Aid discovers a problem when a client comes in and Legal Aid researches it. One way to attempt to work things out is to contact the agency; if this doesn't work, then under the DHS appeals system, Legal Aid can make legal arguments to the referee. Sometimes the referees say the manual prevails. Referees are hired by DHS. They have the ability to go beyond saying the policy is what's in the manual. Another option is to challenge the policy as it affects the individual.
- Mr. Knapp said that he has a proposal that a regulated party could ask an administrative law judge for a determination of whether an agency is exceeding its authority or acting beyond the statute. Mr. Knapp asked Ms. Davis whether that would be workable. Ms. Davis said that it has some real possibilities. The Office of Administrative Hearings is quite good, and Legal Aid attorneys feel comfortable making arguments before it.

Testimony by Ron Elwood, Legal Service Advocacy Project

Highlights of Mr. Elwood's testimony include:

- The Legal Service Advocacy Project provides legal assistance by representing low-income Minnesotans statewide.
- Problems can arise for consumers when there are no rules. Mr. Elwood spent 15 years as a utility regulator in New York. An example of a problem would be for a utility customer who gets behind on bills. There are currently no rules providing for installment or deferred payments in this situation. Since there are no rules, consumer assistance organizations really can't intercede to work it out. It is important to have rules to enable agencies to provide consumer protection.

Discussion Following Mr. Elwood's Testimony

- Mr. Orren said that, in a situation like the utility customer who gets behind on bills, something needs to be in place quickly. Mr. Orren asked Mr. Elwood how that would work in our rulemaking process. Mr. Elwood said that the immediacy of this circumstance would call for some faster action, but this is an ongoing problem that could recur. Another option would be to institute a process where a temporary rule could be enacted under certain emergency conditions, and then could be reviewed for long-term necessity.

Suggestions by Task Force Members

Recommendations by Mr. Orren

Mr. Orren distributed 4 memos with suggestions for RRTF recommendations, and presented each recommendation orally. There was discussion of each memo.

First Memo (labeled DEO #1) Related to Notice to Legislature Under MS14.116.

- This memo recommends improving the notice to the Legislature in Minnesota Statutes, section 14.116. The proposed revision adds notice to ranking minority members, and limits notice to legislative authors to those bills passed during the last 2 years. Notifying authors of the law is the biggest problem because it requires research. Last year, while Representative Munger was still a legislator, the research had to be done back to 1955. Mr. Orren made a motion to adopt the first memo, but Representative Pelowski said that everyone could make recommendations and draft them for the next meeting.
- Senator Betzold said that, often with Omnibus bills, many items are rolled into big bills. He wants to make sure that the agency is getting the authors of the bill. Senator Betzold asked if the author specified in the statute is the person who carries the omnibus bills, who really doesn't care. Mr. Orren said that the notice would go to the author of the omnibus bill. He doesn't know how to get notice to the author of a piece that went into the omnibus bill. Senator Betzold said that usually could be traced, if you're only going back two years. That person is usually someone who cares a lot about the bill, and may be following bills. Mr. Orren asked Senator Betzold if he would leave it up to agency discretion, such as by giving notice to any Legislator the agency knows to be involved in the bill. Senator Betzold said yes, think about something along those lines. Representative Pelowski said that this language could be in draft form at the next meeting.

Second Memo (labeled DEO #2) Related to Legislative Review of Rules Under MS14.3691

- This memo makes recommendations on legislative review of state agency rules. Minnesota Statutes, section 14.3691, requires cabinet-level agencies over the next 4 years to offer up their rules for review. Each agency would do a report, and each rule chapter would require a paragraph or two unless the program or issues had taken a recent controversial or problematic turn. The bottom of the first page of the memo says that the agency should estimate the cost under section 3.197 of producing this report to the Legislature. The second page of the memo states how Legislators would use that report. Legislative committees would select one main topic area per committee. The committee would have discretion to choose more. (We changed this from one chapter because topic areas can go across agencies.) Legislative committees would hold hearings - this would possibly be delegated to a subcommittee. (Representative Seifert suggested this at the last meeting.) Mr. Orren's estimate for the time required for this review is 10 to 100 hours of agency time and 10 to 20 hours, plus hearing time, of legislative time
- Representative Seifert said that this looks wonderful, but asked Mr. Orren to delete "in the rush" in last sentence on the second page.
- Representative Seifert asked Representative Pelowski if the task force report is going to be drafted for the next meeting. Representative Seifert said that, to have a draft for the next meeting, we'll have to work out the details of who assembles the draft report. Are we going to start assembling these items by motion, or just order that they be put into the draft that

we'll officially approve at that meeting? Representative Pelowski said that, unless there's an objection, everything a task force member brings up would be put in the report. Ms. DeBoer asked if one of the things we're doing is to draft legislation as well as a report. Representative Pelowski said that his preference was that, where we can have the legislative language, let's include it.

Third Memo (labeled DEO #3) Related to Interpretive Notices

- This memo recommends that the House and Senate Government Operations Committees study the idea of interpretive notices. The draft language is taken from the revenue notice language of DOR. This is limited in that they can only interpret existing law. Notice would be published in the State Register, and notice would be given to policy committees (chairs and ranking minority members). Mr. Orren said that he doesn't know if it would be a good idea to allow this for just certain agencies, or to include a sunset provision, to ensure that the law is reviewed within a year or two.
- Senator Betzold said that, before we recommend adopting this, we need to think it through clearly. DOR is dealing with complicated tax language. It's important that someone be able to say, "Here's what is needed." Senator Betzold said that he can imagine an agency using this as an end-run to get around rulemaking. This works well for DOR, but it may or may not be what we want other agencies to do. Mr. Orren agrees; we can recommend that House and Senate committees study these. Mr. Orren said that a pilot project with a sunset is as far as he would want to go, if that

Fourth Memo (labeled DEO #4) Related to Notice and Comment Rulemaking Process

- In this memo, Mr. Orren recommends a notice and comment rulemaking process for noncontroversial rules. The protection here would be that a certain number of requests could kick it into the full rulemaking process. The Minnesota process for adopting rules is the most complicated in the country. SONARs are lots of work. If there are controversial issues, that's appropriate; but there are times when the issues are noncontroversial and everyone agrees, but the agency won't do rulemaking because it's too much time, expense, and work. A notice and comment rulemaking process is a compromise that would allow the agency to go forward, but those outside the agency would be doing a check and balance. If the proposed rule goes 30 days without the specified number of requests, no SONAR would be required. The recommendation includes the ability to get back to the regular rulemaking process; if enough people request that the regular rulemaking process be followed, the agency would have to go back to the SONAR process.
- Representative Seifert likes the ideas on the first page of the memo. Regarding notice provisions, Representative Seifert wondered if the chair and ranking committee members would be notified. Representative Pelowski asked if there was a way to get notice to affected persons. Mr. Orren said yes.
- Representative Seifert asked if this is making every rule an expedited rule. Mr. Orren said that, on first reading, yes, this makes it the default. But the expedited process would not be the most common because with lots of rules there are controversies.
- Representative Seifert said that there are problems with bad rules getting through the rulemaking process. He is concerned about the definition of noncontroversial. The proposal puts the onus on the public to pay attention. He realizes that this process would be wonderful for noncontroversial rules.

- Senator Betzold said that the proposal allows 30 days for comment. Maybe there should be a delay for rules to become effective. Mr. Orren asked if he wanted a longer notice period, such as 60 days. Senator Betzold said perhaps. Thirty days might not be enough.
- Mr. Knapp said that this is potentially a very significant initiative. If we have two rulemaking processes, this could be very confusing for regulators and regulated parties. He is also concerned that it would be too easy to adopt rules. 80% or 90% of adopted rules are noncontroversial. If we did adopt this recommendation, it would have the potential of being very widely used.
- Mr. Orren asked if the committee would be opposed to allowing this process as automatic if the agency has identified a rule as obsolete. Representative Pelowski said that's a horse of a different color. That could be a possible suggestion for inclusion, but there are concerns to be addressed.

Recommendations by Ms. Offerdahl

Ms. Offerdahl distributed a handout ("Rein in Rulemaking and Excessive Regulation") with 10 recommendations by the Governor, and presented the recommendations orally. Highlights of the presentation include:

- The first problem is the lengthy and bureaucratic nature of the process. The Governor would deal with this by implementing an expedited rules process. This helps address the problems of the agency circumventing Minnesota's APA by issuing bulletins (for noncontroversial rules).
- The Governor's preference is to extend the Governor's veto authority. This provides a check on the agencies. The Governor has proposed a 3-week deadline for reviewing rules after an agency has drafted rules and before the agency can propose the rules. Additionally, the Legislature could extend the veto period (which is currently 14 days) to allow the Governor's Office an adequate amount of time to review the rules.
- The Governor supports Mr. Orren's second proposal to focus legislative review on one rule chapter or main topic area.
- With respect to dedicated oversight, the Governor would assign someone in the Governor's Office or Minnesota Planning as responsible for oversight. The Governor wants to be careful to avoid adding another level of bureaucracy.
- The second problem is how to clean up obsolete and outdated rules. Ms. Offerdahl said that good ideas were presented by Mr. McCormick and Mr. Shepard. The Governor suggests that a review of rule repeals would occur early in the session.
- The third problem is public access to information about rules. One solution is to increase web access to agency notices and SONARs, and the agency's public rulemaking docket. This docket should also be synchronized with a centralized state docket maintained by the Governor's Office or Minnesota Planning. Another solution is to obtain more citizen feedback. There would be training opportunities to assist agencies that aren't doing such a good job. The Governor's office or the interagency rules committee could coordinate training and technical assistance.
- Another solution is the one-stop shopping idea. As a pilot project, a highly regulated industry could be targeted for better regulatory coordination. If the pilot project works, we could see if it is something that we want to use more broadly.
- It's important that we study alternatives to rulemaking used elsewhere.

- Implementing a general variance law may be an option. This would give agencies more flexibility to vary rules as long as the statutory purpose is met.

Discussion of the Governor's Recommendations

- Representative Seifert asked if there is a stakeholder mailing list for rulemaking kept by state agencies. Mr. Orren said yes, each agency must maintain a mailing list. Representative Pelowski asked if the mailing list was snail mail or e-mail. Mr. Orren said it was currently snail mail. Representative Pelowski asked whether, on the MDH website, someone can click and be added to the list. Mr. Orren said that this was probably possible on the PCA website but not the MDH website. Representative Pelowski said that he assumes that will be standard on those websites at some point.
- Mr. Knapp said that the Governor's list of recommendations is a great list. Mr. Knapp is particularly interested in a general variance law, and wants to work with Ms. Offerdahl to come up with specific language. Representative Pelowski agrees that this would be a good idea. He asked if this would be part of the Governor's state of the state. Ms. Offerdahl was not sure.

Recommendations by Mr. Knapp

Mr. Knapp presented three recommendations:

1. Regarding a bill repealing rules: The second recommendation in Mr. Marinac's memo is to develop a Revisor's rule repealer bill. Does that make it easier for agencies to repeal by legislation, and is that good? It would be good to get rules cleaned up. On balance, it makes sense to have a bill that the Revisor could prepare early in the session. Also, Mr. Knapp agrees with the first recommendation in Mr. Marinac's memo -- to amend internal legislative rules to permit the Revisor to attach the text of rules proposed for repeal.
2. Regarding an ALJ procedure for challenging unadopted rules: A common theme is that agencies are doing things by bulletin or manual that they should be doing by rule. On the other hand, agencies need some flexibility. We don't want to discourage agencies from having written procedures, so Mr. Knapp has come up with a middle ground that gives a remedy to someone who thinks something should be a rule. Mr. Knapp recommends that the person be able to file a petition with OAH and make a case that the agency is exceeding its authority. Then the ALJ would make a determination of whether the bulletin or manual was within the agency's proper authority.
3. Regarding discrepancies between state rules and federal law: The Legislature needs to more carefully scrutinize administrative rules. An area that causes some concern is where state rules are at variance with federal law. In this situation, the regulated entity has two sets of rules to comply with: state and federal law. The Legislature addressed this in the APA by requiring agencies (beginning in 1995) to identify in the SONAR any discrepancies between the proposed rules and federal law. Mr. Knapp proposes that the Legislature give agencies one year to identify all rules that conflict with federal law and repeal them unless the agency justifies the conflict.

- Mr. Orren said that it would be good to look at the rules where there's a variance with federal law, but it would be a huge amount of work. He's not sure there's sufficient value to warrant this. He thinks there may be a forest-for-the-trees problem. How would the agency narrow it down where there's a problem; is the rule really in conflict with federal law? We'd be looking at everything and lose the important ones because we're looking at everything. Mr. Knapp said that this is a good issue. Maybe there's a trigger mechanism we can build into this so that the agencies only address rules where there is a problem.

Recommendations by Representative Seifert

Representative Seifert distributed a handout on Committee Authority (proposed statutory language): This is a stopgap measure. The question is how could the Legislature slow down the rulemaking process in a constitutional manner. Mr. Shepard found a constitutional way. Representative Seifert expects this would be used rarely. It would allow a standing committee to give an objection to a proposed rule. The Speaker would determine which committee has jurisdiction. The committee could vote any time before publication of the notice of adoption. If the committee objected, the agency couldn't adopt the rule until the Legislature next adjourns an annual legislative session. This is a slow-down mechanism. If a rule would go into effect July 1 and a committee sees a problem, they can convene and get jurisdiction.

- Senator Betzold asked if a committee of either the House or the Senate could invoke this. Representative Seifert said yes.
- Senator Betzold commented on timelines. If a committee meets in December, this would give them until May; but if they meet in January, they could put off the rule until the next legislative session.
- Mr. Shepard commented as the drafter of the language that it refers to the next adjournment of a session, not the adjournment of the next session. This may need to be clarified. That was the intent.
- Mr. Orren asked what in this language would make sure that it would not be a gang of one (as in the Profile of Learning example). Mr. Orren's biggest concern is that there could be one legislator with a lot of authority doing it. Mr. Orren also knows that a single committee chair could cause a lot of problems for an agency.
- Representative Seifert said that this would not be a unilateral decision. It must be a decision by the majority of the committee. In the House, there will be close to parity on committees.
- Mr. Shepard said the language could be clarified to require a vote of the majority of committee members. It doesn't say that now.
- Representative Seifert asked Mr. Shepard to clarify the language with respect to the concerns of Mr. Orren and Senator Betzold.
- Mr. Knapp said that he shares Mr. Orren's concerns. Mr. Knapp asked Representative Seifert if he has considered having both the House and Senate committee act on it. Representative Seifert said we could do that, but we could have a situation where the House committee is unanimous and the Senate chair won't even call the committee together.

Reacting to Recommendations by Task Force Members

Representative Pelowski asked if anyone wanted to comment today. No one wanted to comment today, but a question was raised about when to submit comments. Representative Pelowski said before the next meeting, and as soon as possible.

Compilation of Report

- Representative Pelowski asked if it is the intent of the task force that what we'll look at next week will have the suggestions we've discussed here, comments and concerns, and proposed language
- Mr. Knapp said that some of us may want to revise our suggestions based on comments.
- Representative Pelowski said that those revisions would come in and be part of the packet.
- Senator Betzold said that if there are any problems or concerns, get those to the authors or raise them at the next meeting. Senator Betzold wants to hear any problems now.
- Representative Seifert said that all of these suggestions will be put into print and put in a draft report. He asked if we will be voting on items individually.
- Representative Pelowski said that we could do that, or we could look at the whole report and pull out objectionable things.
- Ms. DeBoer asked who's taking oversight responsibility for compiling the report. Representative Pelowski asked for a volunteer. Ms. Offerdahl said that she will, with the understanding that she will delegate a lot of pieces to other folks. Representative Seifert asked that a draft be put on the website.

Scheduling Next Meeting

After some discussion, the next meeting was scheduled for January 9, 2001, at 4:00.

Adjournment

The meeting adjourned at 11:30 a.m.

Handouts:

- 1) Meeting agenda.
- 2) Draft minutes from the 12/01/00 Rules Task Force meeting.
- 3) 12/12/00 Memo, DEO #1: "Suggestion for RRTF Recommendation on Rulemaking Notice to the Legislature" to the Rule Reform Task Force from Dave Orren.
- 4) 12/12/00 Memo, DEO #2: "Suggestions for Task Force Recommendations on Legislative Review of State Agency Rules and Related Laws and Programs" to the Rule Reform Task Force from Dave Orren.
- 5) 12/12/00 Memo, DEO #3: "Suggestions for Task Force Recommendations on Agency Interpretive Notices as an Alternative to Rulemaking" to the Rule Reform Task Force from Dave Orren.
- 6) 12/12/00 Memo, DEO #4: "Suggestion for Task Force Recommendation to Expedite the Rulemaking Process by Using the Notice and Comment Process for Noncontroversial Rules" to the Rule Reform Task Force from Dave Orren.
- 7) Minnesota Pesticide Management Plan, Managing Pests and Protecting Water Resources. (Written materials submitted by Jerry Spetzman, Minnesota Department of Agriculture.)

- 8) "Methods of Repealing Obsolete Rules" memo by Paul Marinac, Deputy Revisor of Statutes, George McCormick, Senate Counsel and Research, and Mark Shepard, House Research.
- 9) "Testimony of Kathleen Davis, Legal Aid Society of Minneapolis, before the Rules Reform Task Force," December 14, 2000.
- 10) Proposed Minnesota Statutes sections 14.165 and 14.265 on Committee Authority.

Appendix C
Rules Reform Task Force
Meeting Minutes, January 9, 2001

For working documents and submissions to the task force, see:
<http://www.commissions.leg.state.mn.us/rtf/rtf.htm>

**Rules Reform Task Force (RRTF)
January 9, 2001, Meeting Minutes**

Members Present:

Senator Don Betzold
Laura Offerdahl, Governor's Office
Dave Orren, Minnesota Department of Health (MDH)
John Knapp, Esq., Winthrop & Weinstine, P.A.

Representative Gene Pelowski
Representative Marty Seifert
Senator Dan Stevens

Members Absent:

Katie DeBoer, Citizen Member

Note: Sen. Betzold excused himself at 6 p.m. to attend a school board meeting

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert

Jeanne Eggleston, MDH

Call to Order. Representative Pelowski, RRTF Chair, called the meeting to order at 4:03 p.m.

Approval of 12/14/00 Minutes. Representative Seifert made a motion to approve minutes as written. Seconded by Mr. Orren. Motion passed unanimously.

Public Testimony

Rep. Pelowski asked if there was any public testimony. There was no public testimony at that time, but the task force later heard public testimony on specific proposals within the draft report.

Discussion of draft Task Force Final Report

- Ms. Offerdahl gave a brief overview of the report introduction, explaining that the executive summary and conclusion would be added at a later date once the task force agreed on which recommendations would be included in the report.
- Mr. Orren stated that the structure was good.
- Mr. Knapp suggested that a bill should be appended to the report.
- Rep. Pelowski concurred that the task force needs to decide if a bill should be drafted.
- Sen. Stevens stated that we should "take the next step" and try to put forth a bill.
- Rep. Pelowski agreed that while the report was necessary work, a bill was the desired outcome.
- Sen. Stevens stated that the work, while not exciting, affects many people and state agencies and is very important
- Ms. Offerdahl suggested including a reference to pending legislation in the report. This would allow the task force to complete the report by the deadline.
- Rep. Seifert suggested a "gentlemen's agreement" on the semblance of a bill based on the

contents of the final report.

- Rep. Seifert volunteered to author a bill in the House.
- Sen. Betzold concurred that they should not hold up the report to get a bill drafted.
- Sen. Stevens moved that the task force proceed with completing the report and developing a bill concurrently. Mr. Knapp seconded the motion. Motion prevailed unanimously.

The discussion of the content of the draft Final Report was taken up proposal by proposal and followed the format of the draft Final Report.

Chapter 1: Agency Accountability & Legislative Oversight

Proposal: Prioritize and Focus Legislative Review Process

- Mr. Orren provided the overview. There was no discussion.
- **Motion:** Mr. Orren made a motion to approve the proposal for inclusion in the final report. Rep. Seifert seconded the motion. The motion prevailed unanimously.

Proposal: Amend Notice Requirement to Legislature

- Mr. Orren provided the overview.
- Sen. Betzold stated that the specific wording might need to be worked on after the Report is done. Mr. Orren agreed. Sen. Betzold suggested clarifying the term “companion bill” and asked the Revisor to work on this.
- **Motion:** Mr. Orren made a motion to approve the proposal for inclusion in the final report. Sen. Betzold seconded the motion. The motion prevailed unanimously.

Proposal: Dedicate Executive Branch Position to Oversee Internal Rules Review Process

- Ms. Offerdahl presented an overview.
- Mr. Orren agreed in concept but suggested that the language be worked on to reflect the fact that the current procedure allows agencies to submit draft copies of proposed rules to the Governor’s Office for review.
- Rep. Eric Lipman provided public testimony on this provision. Mr. Lipman, citing his former experience in a constitutional office, questioned the value of the numerous and pyramiding reviews within the Governor’s Office. Rep. Lipman supports the Governor’s veto authority but questioned the number of staff reviewing proposed rules.
- Ms. Offerdahl responded that dedicating a staff person to coordinate the review process could address Rep. Lipman’s concerns.
- **Motion:** Ms. Offerdahl made a motion to approve the proposal for inclusion in the final report. Mr. Knapp seconded the motion. The motion prevailed unanimously.

Proposal: Extend the Governor’s Veto Authority

- Ms. Offerdahl provided the overview.

- Rep. Seifert asked Ms. Offerdahl and Mr. Orren what rules had been impacted by the Governor's veto authority. Someone mentioned a withdrawal of a gambling board rule but no one was certain of the facts.
- Motion: Rep. Seifert made a motion to approve the proposal for inclusion in the final report. Sen. Stevens seconded the motion. The motion prevailed unanimously.

Proposal: Encourage Legislative Policy Committee Rule Repeals Review

- Ms. Offerdahl introduced the proposal stating that several of the proposals relating to rule repeals originated with legislative counsel.
- Motion: Mr. Knapp moved to approve the proposal for inclusion in the final report with one additional sentence to the recommendation section:

Recommendation: The task force recommends . . . Agencies should be encouraged to submit proposals for repeal of rules at the time of introduction of agency omnibus or housekeeping bills.

- Rep. Seifert seconded the motion.
- Motion prevailed unanimously.

Proposal: Require Full Text of Rule to Accompany Repeal Legislation

- Ms. Offerdahl introduced the proposal.
- Motion: Mr. Knapp moved to approve the proposal for inclusion in the final report with the following legislative language. The "must" reverts to "may."

JOINT RULE 2.01.

A bill that repeals a statute or rule may include or be accompanied by an appendix containing the full text of the section or subdivision repealed.

- Mr. Orren seconded the motion.
- Motion prevailed unanimously.

Proposal: Re-Refer Rules Bills to Governmental Operations Committees

- Mr. Knapp suggested that the proposal not be included in report.
- Sen. Stevens agreed stating that policy committees are the ones that should be hearing these bills.
- No Motion to include proposal in the report.

Proposal: Use Expedited Rulemaking Process to Repeal Obsolete Rules

- Mr. Orren suggested that the committee hold this discussion until it reviewed the Notice and Comment proposal in Chapter 3 of the draft report.
- Rep. Pelowski concurred.

Proposal: Develop One Bill Repealing Obsolete Rules

- Mr. Knapp suggested that the proposal not be included in the final report.
- Sen. Betzold concurred with Mr. Knapp that one combined bill is not practical or useful because the subject areas of the obsolete rules are diverse.
- No Motion to include proposal in the report.

Proposal: Include Rule Notes on Proposed Rules Repeals

- Mr. Knapp suggested that the proposal not be included in report.
- No public testimony taken at this time. Public testimony was offered later and is included here in the minutes for readability.
- Kathryn Ludwig representing the Coalition of Greater Minnesota Cities gave public testimony expressing support for rule notes as a vehicle for including the costs expected to be born by the regulated parties.
- Mr. Orren stated Ms. Ludwig's concern seemed to be with rules that were being proposed and that information on estimated costs is a part of our current rulemaking process. Agencies must include this information in the required Statement of Need and Reasonableness (SONAR).
- Ms. Ludwig responded that Coalition of Greater Minnesota Cities wants cost effectiveness included.
- Mr. Orren replied that the SONAR identifies costs but not cost effectiveness. He stated that cost effectiveness is difficult to determine and cited the problem that agencies would have in comparing costs with the value of human lives or quality of life. How do you put a dollar value on a life? In any event, it is too late in the RRTF process to begin discussion of such a complex topic as cost / benefit effectiveness.
- No Motion to include proposal in the report.

Proposal: Delay Adoption of Rule

- Rep. Seifert provided the overview.
- Mr. Orren stated that he had several comments from agencies that were concerned about this provision.
- Rep. Seifert amended both section 14.165 and 14.265 by inserting "majority vote from a" after "(a) A".
- Mr. Knapp and Sen. Betzold proposed amending sec.14.165, item (a), and sec.14.265, item (a), by requiring both the House and Senate to take action: changing the "or" to an "and". Rep. Seifert accepted the changes.
- Mr. Orren offered grammatical corrections to sec.14.165, item (a), and sec.14.265, item (a), deleting the "vote to" in line 2, deleting "a" after "vote from" and making committee plural. Rep. Seifert accepted the changes.
- Sen. Betzold suggested that someone should look into the authority of the LCC to decide how this new legislation interacts with the LCC authority.

The amended proposed language:

14.165 COMMITTEE AUTHORITY

(a) A majority vote from standing committees of the house of representatives and senate with jurisdiction over the subject matter of a proposed rule may advise an agency that a proposed rule should not be adopted as proposed. The speaker of the house of representatives and the senate committee on committees must determine if a standing committee has jurisdiction over a rule before a committee may act under this section.

Items (b) and (c) are not changed.

14.265 COMMITTEE AUTHORITY

(a) A majority vote from standing committees of the house of representatives and senate with jurisdiction over the subject matter of a proposed rule may advise an agency that a proposed rule should not be adopted as proposed. The speaker of the house of representatives and the senate committee on committees must determine if a standing committee has jurisdiction over a rule before a committee may act under this section.

Items (b) and (c) are not changed.

- **Motion:** Rep. Seifert made a motion to approve the proposal as amended for inclusion in the final report.
- Sen. Stevens seconded the motion.
- The motion prevailed unanimously.

Chapter 2: Public Access & Input in the Rulemaking Process

Proposal: Improve and Expand Web Access to Rules Information

- Ms. Offerdahl provided the overview.
- Rep. Pelowski expressed strong support for the proposal.
- **Motion:** Ms. Offerdahl made a motion to approve the proposal for inclusion in the final report.
- Rep. Seifert seconded the motion.
- The motion prevailed unanimously.

Proposal: Make Notices and Dockets Available

- Ms. Offerdahl provided the overview stating that Judge George Beck originally proposed this idea.
- Mr. Orren asks for clarification on how this notice would be made available.
- Ms. Offerdahl responded that notice would only need to be given to the newspapers one time and the newspapers would be responsible from that point forward.
- Mr. Orren suggested that county's newspaper of record may not be as useful as other local newspapers.

- Sen. Stevens suggested contacting the Minnesota Newspaper Association and get a recommendation from them.
- Mr. Bert Black, legal analyst with the Secretary of State's Office testified that to publish in Minnesota, legal newspapers must register with the Secretary of State's Office and that might be a useful resource in determining who to notify.
- Motion: Ms. Offerdahl made a motion to approve the proposal for inclusion in the final report.
- Sen. Stevens seconded the motion.
- The motion prevailed unanimously.

Proposal: Obtain Greater Citizen Feedback

- Ms. Offerdahl provided the overview stating that Wally Rogers with the Jefferson Center had offered this suggestion for the task force's consideration.
- Rep. Pelowski questioned Ms. Offerdahl if this provision was necessary suggesting that the Governor's Office could do this now.
- Ms. Offerdahl responded that including this effort in the report documented the intent of the Governor's Office.
- Motion: Ms. Offerdahl made a motion to approve the proposal for inclusion in the final report.
- Rep. Pelowski seconded the motion.
- The motion prevailed unanimously.

Chapter 3: Regulatory Burdens & Industry Compliance

Proposal: Provide Administrative Law Judge Procedure of Challenging Unadopted Rules

- Mr. Knapp provided the overview stating that several constituencies had expressed concern about agencies exceeding their authority by enforcing unadopted rules.
- Mr. Knapp proposed amending the legislative language by adding at the end of sec. 14.381 the sentence "Costs of the Office of Administrative Hearings in considering the petition shall be born in equal parts by the petitioner and the agency."
- Judge George Beck gave public testimony stating that the cost amendment is feasible and reasonable. Judge Beck advised that additional language authorizing the Office of Administrative Hearings (OAH) to bill private parties would be needed.
- Mr. Orren asked what the remedy would be if the OAH would find that an agency's actions constituted an unadopted rule.
- Mr. Knapp pointed out that the proposed language allows for "the order of the administrative law judge may direct the agency to cease enforcement of any unadopted rule."
- Mr. Orren stated that agencies may still retain the ability to enforce the statute on a case-by-case basis without a rule. Mr. Orren suggested that it was not always cut and dry.
- Kathryn Ludwig representing the Coalition of Greater Minnesota Cities gave public testimony and submitted a letter in support of this proposal. She suggested that a

petitioner should bear the costs of initiating the process unless the administrative law judge determines that the agency has exceeded its authority.

- Motion: Mr. Knapp made a motion to approve the proposal for inclusion in the final report.
- Sen. Stevens seconded the motion and proposed an amendment to include the Coalition of Greater Minnesota Cities' (Ms. Ludwig's) cost language. Mr. Knapp accepted the amendment.

14.381 UNADOPTED RULES. *Add as the last sentence of the section: The petitioner shall pay for the costs of the office of administrative hearings unless it is determined that the agency must cease enforcement of an unadopted rule, in which case the agency must pay.*

- Mr. Orren commented that the cost elements need more discussion, stating that an agency may have a supportable position even when the judge rules for the petitioner. Mr. Orren referenced cost shifting under the Equal Access to Justice Act. There is most often a gray area.
- Motion prevails on a vote of 6 to 1 with Mr. Orren voting no.

Proposal: Implement General Variance Law

- Mr. Knapp provided the overview. The language is taken directly from an executive order issued by Governor Vilsack from the State of Iowa.
- Motion: Mr. Knapp made a motion to approve the proposal for inclusion in the final report.
- Rep. Pelowski seconded the motion.
- Mr. Orren requested, based on comments received from state agencies, that the following provisions be included in the legislative language:
 - 1) In granting a variance, the commissioner may attach conditions that the commissioner determines are needed to protect public health, safety, or the environment;
 - 2) a variance shall have only future effect; and
 - 3) alternative measures or conditions attached to a variance have the force and effect of the applicable rule. If the party violates the alternative measures or conditions attached to the variance, the party is subject to the enforcement actions and penalties provided in the applicable law or rule.
- Mr. Knapp accepted the above amendments. Placement of the legislative language was not provided.
- Motion prevailed unanimously.

Proposal: Reduce Instances Where State Varies from Federal Rules

- Motion: Mr. Knapp provided the overview and made a motion to approve the proposal for inclusion in the final report.
- Mr. Orren stated that he approved of the concept but was concerned with the details. The

proposal could be used frivolously. Could it be incorporated in some way into the rules review process?

- Sen. Stevens stated that he was interested in knowing why Minnesota is different than federal law, citing the Wetland Act example.
- Mr. Orren suggested that they needed a way to focus on problem rules.
- Joel Carlson representing the Lyon County Board of Commissioners gave public testimony supporting the proposal, but suggesting that it doesn't go far enough. He suggested a review of differences and conflicts within state rules should be included, giving the MPCA and Wetlands Act as an example.
- Rep. Seifert asked Mr. Carlson if the one-stop-shopping proposal in this report would be useful in resolving Lyon County's conflict with the MPCA regarding wetlands? Would it be a possible solution if Lyons County was identified as a pilot project under the one-stop-shopping provision?
- Mr. Carlson responded that he was not sure.
- Sen. Stevens questioned the memorandum of understanding between MPCA and BWSR as it relates to the Wetland Act.
- Mr Carlson stated that if MPCA signed it, they are not honoring it.
- Mr. Orren recommended the one-stop-shopping method as the preferred method for addressing conflicting and overlapping regulations.
- Mr. Knapp acknowledged Mr. Orren's concerns about implementation of this proposal. Mr. Knapp suggested an alternative. He proposed that the existing petition provision in Chapter 14 be amended such that if a petition is brought forth on conflicting rules then the procedures in chapter 14 would be followed.
- Mr. Orren supported the concept of Minnesota Rules differing from federal requirements only for good reasons, but was uncomfortable with the way the current proposal would work.
- Motion: Mr. Knapp withdrew the first motion. Mr. Knapp moved to include the proposal in the final report with the following changes. Under *Implementation Strategy*, the proposed legislative language is deleted. Implementation Strategy should read as follows:

Implementation Strategy: The task force proposes that the legislature considers an amendment to the Minnesota Administrative Procedures Act which would allow for reconsideration of rules adopted before 1995 that are inconsistent with federal law or other state rules.

- Rep. Pelowski seconded the motion.
- Motion prevailed unanimously.

Proposal: Study Whether Interpretive Notices Should Be Extended to Other State Agencies

- Dave Orren provided the overview and proposed language changes to the *Implementation Strategy* to clarify that this proposal is for *study* by the legislature of extending interpretive notices. The legislative language is provided as an example to legislature to assist their study. The modified language (page 23) reads:

Implementation Strategy: The task force proposes the following legislative language for purposes of studying the possible extension of interpretive notices.

- **Motion:** Mr. Orren made a motion to approve the proposal as amended for inclusion in the final report.
- Rep. Pelwoski seconded the motion.
- The motion prevailed unanimously.

Proposal: Implement Notice and Comment Process for Non-controversial Rules

- Mr. Orren presented the overview.
- Mr. Knapp expressed concern that the provision could implement far-reaching changes. Mr. Knapp commented that a notice and comment process is very different than the approach we currently take when considering public comments.
- Mr. Orren proposed that the Notice and Comment Process proposal be amended to solely apply to the repeal of obsolete rules. Subdivision 1 of the proposed legislative language on page 25 of the draft report is amended to read:

Subdivision 1. Application. An agency may use this section to repeal rules identified in the agency's annual obsolete rules report under section 14.05, subdivision 5, unless a law specifically requires another process or unless 25 requests are received under subdivision 4. Sections 14.19, 14.20, 14.365. amd 14.366 apply to rules repealed under this statute.

Subds. 2 to 6 remain unchanged.

- **Motion:** Mr. Orren made a motion to approve the proposal as amended for inclusion in the final report.
- Mr. Knapp seconded the motion.
- The motion prevailed unanimously.

Proposal: Implement One-Stop-Shopping Pilot Program to Coordinate Multigovernmental Rules

- **Motion:** Ms. Offerdahl provided the overview and moved to approve the proposal for inclusion in the final report with the addition of a clause addressing conflicts in state rules.
- Mr. Orren proposed an amended changing "industry" to "affected party."
- Ms. Offerdahl accepted the amendment.
- Mr. Orren seconded the motion.
- The motion prevailed unanimously.

The modified language (page 27) reads:

Implementation Strategy: The task force supports the efforts of the Governor's

Office to target a highly regulated industry with many operators throughout the state as a pilot project. The Governor's Office will seek input from the legislature, state agencies and the regulated community to identify an industry affected party that will benefit from better regulatory coordination. The Governor's Office will work with various agencies to reduce duplicative reporting requirements, and create an index explaining which agency regulates what, and address conflicts in state rules.

- The motion prevailed unanimously.

Staff assignments

Legislative staff will review the statutory language included in report.

Deadlines

Task force revisions due Wednesday, January 10, 2001

Task force review and approval of cover letter, final report, and January 9, 2001 meeting minutes due Thursday, January 11, 2001 (12:00 noon)

Publication submittal due Thursday, January 11, 2001 (5:00 p.m.)

Delivery to the Legislature and Governor by Friday, January 12, 2001 (5:00 p.m.)

Adjournment

Rep. Pewolski announced that this was the final meeting of task force.

The meeting adjourned at 7:00 p.m.

Handouts:

- 1) Meeting agenda.
- 2) Draft minutes from the 12/14/00 Rules Task Force meeting.
- 3) Draft Task Force Final Report (1/15/01)
- 4) "Proposals from the December 14 Task Force Meeting," memo dated 1/3/2001 from Marcus Marsh, Legislative Affairs Manager, Minnesota Association of Farm Mutual Insurance Companies, Inc.