

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed
Permanent Rules Relating to Drainage
Projects Impacting State-Owned Lands
in Consolidated Conservation Areas,
Minnesota Rules Chapter 6115.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Barbara L. Neilson conducted a series of hearings concerning rules proposed by the Minnesota Department of Natural Resources (the "DNR" or "the Department") regarding drainage projects affecting consolidated conservation lands. On June 26, 2007, a hearing was held at 2:00 p.m. in the Aitkin High School Auditorium, 306 - 2nd Street N.W., Aitkin, Minnesota. On June 27, 2007, hearings were held at 8:30 a.m. in the Beaux Arts Ballroom, Hobson Memorial Union, Bemidji State University, 1500 Birchmont Drive, Bemidji, Minnesota, and at 4:00 p.m. in the Grygla High School Gym, 114 N. Fladland Avenue, Grygla, Minnesota. On June 28, 2007, a hearing was held at 8:30 a.m. in the Warroad Middle School Lunchroom, 510 Cedar Ave., Warroad, Minnesota. Each hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in their being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The members of the DNR's hearing panel were Mike Carroll, Northwest Regional Director; Craig Engwall, Northeast Regional Director; John Williams, Assistant Regional Wildlife Manager; Bob Bezek, Regional Hydrologist - Division of Waters; and Kathy Lewis, Transactions Manager, all of whom are employed by the DNR. Approximately

¹ Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2006 edition, and all references to Minnesota Rules are to the 2005 edition.)

20 members of the public attended the hearing in Aitkin, 95 in Grygla, 20 in Bemidji, and 50 in Warroad.

The Department and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. At the hearing, the initial deadline for filing written comment was set at twenty calendar days (July 18, 2007), to allow interested persons and the DNR an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days (July 25, 2007), to allow interested persons and the Department the opportunity to file a written response to the comments received during the initial period. Numerous comments were received during the rulemaking process. To aid the public in participating in this matter, comments were posted on the Office of Administrative Hearings' website as they were received. The hearing record closed for all purposes on July 25, 2007.

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the

proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background and Nature of the Proposed Rules

1. In these proposed rules, the Department seeks to establish criteria and procedures for determining drainage benefits to state-owned lands located in “consolidated conservation” areas (also known as “con-con” areas).

2. During the early 1900’s, a substantial amount of land in northern Minnesota that was considered unsuitable for agriculture was included in a large construction project that created a system of public ditches to drain the land. The costs of construction of this drainage system were charged back to the property owners who were benefited by the system in the form of ditch assessments. Unfortunately, much of the land remained incapable of supporting farming operations and many farms went into bankruptcy due to unpaid ditch liens. Because the large number of forfeitures threatened the financial collapse of the affected counties, the State took action in 1929 to take title to this land as part of a tax-forfeiture bailout.² The majority of the lands that the State purchased that were suitable for agricultural use were later exchanged or sold back to the private sector.³

3. The Legislature created con-con areas in 1929 in Beltrami, Lake of the Woods, and Koochiching counties.⁴ In 1931, similar treatment was afforded to land in Aitkin, Mahnomen, and Roseau Counties.⁵ In 1933, land in Marshall County was included in this system.⁶

² *Marshall County v. State of Minnesota and Department of Natural Resources*, 636 N.W.2d 570, 572-73 (Minn. App. 2001). See also the March 1, 1999, mediation statement accompanying the Department’s July 18, 2007, comment.

³ DNR’s July 18, 2007, comment at 2.

⁴ Minn. Laws 1933, Chapter 258, now codified as Minn. Stat. §§ 84A.01 through 84A.11.

⁵ Minn. Laws 1931, Chapter 407, now codified as Minn. Stat. §§ 84A.20 through 84A.30.

⁶ Minn. Laws 1933, Chapter 402, now codified as Minn. Stat. § 84A.31 through 84A.42.

4. The DNR now manages almost 2 million acres of this tax-forfeited “con-con” land.⁷ These lands have been classified for various purposes, such as forestry, wildlife, and flood control.⁸

5. The statutes that govern con-con lands are set forth in Chapter 84A of the Minnesota Statutes. These statutes contain the following provision relating to drainage of con-con lands:

Subd. 9. **Drainage.** The commissioner may make necessary investigations and surveys for and may undertake projects for the drainage of state-owned lands within a game preserve, conservation area, or other area subject to this section so far as the commissioner determines that the lands will benefit from the project for the purposes for which the area was established. The commissioner may pay the cost of drainage projects out of funds appropriated and available for them. If the commissioner finds after investigation that a project for the construction, repair, or improvement of a public ditch or ditch system undertaken by a county or other public agency as otherwise provided by law will benefit the lands for those purposes, the commissioner may cooperate in the project by joining in the petition for the project or consenting to or approving it on any conditions the commissioner determines. The commissioner shall authorize the imposition of assessments for the projects on the lands in any amounts the commissioner determines, or may make lump sum contributions to the county or other public funds established for the payment of the cost of the project. The assessments or contributions must not exceed the value of benefits to the state-owned lands as determined by the commissioner and specified by written certificates or other statement filed in the proceedings. Assessments or contributions are payable only out of funds appropriated and available for them in amounts the commissioner determines. The commissioner of natural resources shall establish by rule before January 1, 1986, the criteria for determining benefits to state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other

⁷ DNR Ex. 3 (Statement of Need and Reasonableness or “SONAR”) at 2; DNR Exhibit (“Ex.”) 12 (Opening Statement of Michael Carroll, Region 1 Director for DNR) at 1; see *also* DNR Ex. 13 for maps of con-con areas and state-owned land administered by the DNR within those areas. The DNR provided the following breakdown regarding acres of state-owned land in the seven affected counties:

| | |
|--------------------|---------|
| Aitkin County | 409,300 |
| Beltrami County | 515,430 |
| Koochiching County | 227,349 |
| Lake of the Woods | 466,661 |
| Mahnomen County | 6,198 |
| Marshall County | 102,328 |
| Roseau County | 205,851 |

⁸ *Marshall County*, 636 N.W.2d at 573.

purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources.⁹

The rulemaking requirement contained in the last sentence of this subdivision was added in 1984, but the other provisions granting the Commissioner discretion in paying assessments were in effect prior to that time.¹⁰

6. The affected counties, in their capacities as drainage authorities, have constructed and maintained drainage systems for several decades. To fund the drainage systems, the counties have levied assessments against the lands that they believe benefit from the systems, including state-owned con-con lands.¹¹

7. During the 1980s, the State disputed certain assessments made against the con-con lands and asserted that the assessments did not correspond to the actual benefits to those lands.¹² The State and the affected counties engaged in efforts to resolve the matter for several years.

8. In July 1992, the State sent a letter to the counties in which it indicated that the State would pay the assessments that had been issued over the prior ten years but would not pay any future assessments until a joint review of the benefits was completed. In 1993, the State discontinued paying assessments on Marshall, Beltrami, and Roseau county con-con lands where a redetermination had not occurred. The State continued to pay assessments on lands other than con-con lands and on con-con lands where a redetermination of benefits had taken place.¹³

9. Mediated negotiations were held in 1999 in an attempt to develop a process to redetermine benefits to state-owned lands in accordance with Minn. Stat. § 84A.55, subd. 9. Although a tentative agreement was reached, two ditch authorities later withdrew.¹⁴

10. The dispute between the DNR and county drainage authorities culminated in the commencement of a lawsuit by Marshall, Beltrami, and Roseau counties and landowners to force the DNR to pay drainage assessments made for ditch improvements in those counties. The District Court granted summary judgment in favor of the counties and landowners, and the DNR appealed. In a decision issued at the end of 2001, the Court of Appeals reversed, holding that, under Minn. Stat. § 84A.55, subd. 9, the Commissioner of DNR had “almost total discretion in deciding how much should be paid for assessments on con-con lands.”¹⁵ The Court determined that Minnesota

⁹ Minn. Stat. § 84A.55, subd. 9.

¹⁰ *Marshall County*, 636 N.W.2d at 576-77.

¹¹ *Id.* at 573.

¹² *Id.*

¹³ *Id.* at 573; see also March 1, 1999, mediation statement attached to the DNR’s July 18, 2007, comments at 3; Testimony of Scott Peters at Grygla Public Hearing.

¹⁴ DNR Ex. 12 at 1.

¹⁵ *Marshall County*, 636 N.W.2d at 575.

Statutes Chapter 103E, which generally sets forth procedures under which drainage authorities build and maintain public drainage systems, “does not grant authority to the counties to be the final arbiters of the appropriate ditch assessment” but “only prescribes how counties are to make such assessments.”¹⁶ In addition, even if there were a conflict between Chapters 84A and 103E, the Court found that Chapter 84A would prevail because it focuses upon con-con lands and thus it is the more specific statute, citing the general rule of statutory construction that specific statutes prevail over general statutes.¹⁷ According to the Court:

The principle emerging from reading all of these statutes together is that chapter 103E permits counties to make assessments to lands (including con-con lands); section 84A.55, subdivision 9, grants the commissioner the discretion to pay such assessments to the extent to which they are beneficial; and section 84A.55, subdivision 12, forbids the commissioner from eliminating or physically altering existing ditches or drainage systems that they do not own—even if the commissioner determines that they are detrimental to the con-con lands.¹⁸

11. The Court of Appeals also held that the DNR’s failure to promulgate rules relating to the determination of benefits for state lands by January 1, 1986 (the time frame set forth in the statute), did not preclude the DNR from taking action based upon the statute after that time, since there was no evidence that the Legislature intended to bar subsequent agency action. Finally, the Court ruled that the fact that private landowners have a property right in the drainage systems did not compel the DNR to pay the assessments as determined by the counties or require that the DNR subsidize the cost of the system for the benefit of private landowners when the DNR has determined that it receives no benefit from the drainage.¹⁹

12. Because efforts to resolve issues relating to assessments of state-owned lands in con-con areas have proven unsuccessful, the DNR has elected to proceed with rulemaking. The proposed rules seek to establish criteria and procedures for determining drainage benefits to state-owned lands in con-con areas administered under Minnesota Statutes Chapter 84A.

13. Under the rules as finally proposed, the DNR will complete an analysis of each 40-by-40-acre parcel it holds to determine the positive and negative impacts from drainage. The DNR will prepare a table based upon an analysis that will be conducted by hydrologists, foresters, wildlife managers, and plant ecologists. When completed, the watershed districts and drainage authorities will be provided “a documented up-front assessment of what the DNR will pay for repairs.” For projects that go beyond ordinary repairs, the DNR will review each project and conduct a site-specific investigation and,

¹⁶ *Id.* at 576.

¹⁷ *Id.*; see also Minn. Stat. § 645.26, subd. 1.

¹⁸ *Marshall County*, 636 N.W.2d at 576.

¹⁹ *Id.* at 577-78.

for improvement projects, the DNR will respond as part of the project development process.”²⁰

II. Compliance with Procedural Rulemaking Requirements

14. On November 25, 2002, the DNR published in the State Register a Request for Comments on the DNR’s intention to draft a rule that establishes criteria for determining benefits on consolidated conservation lands under Minn. Stat. § 84A.55, subd. 9. The notice indicated that DNR had not yet prepared a draft of the possible rule and requested comments on proposed criteria.²¹

15. On April 17, 2007, the DNR filed copies of the proposed Notice of Hearing, proposed rules, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the DNR also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of April 23, 2007, the Administrative Law Judge approved the additional notice plan.

16. As required by Minn. Stat. § 14.131, the DNR asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government. The Department of Finance provided comments in a memorandum dated December 29, 2005.²²

17. On May 2, 2007, the DNR mailed the Notice of Hearing to all persons and associations who had registered their names with the DNR for the purpose of receiving such notice.²³ The Notice contained the elements required by Minn. R. 1400.2080, subp. 2. The Notice identified the dates and locations of the hearings in this matter. The Notice also announced that the hearing would continue until all interested persons had been heard, or additional hearing dates added, if needed.

18. At the hearing in Aitkin, Minnesota, on June 26, 2007, the DNR filed copies of the following documents as required by Minn. R. 1400.2220:

- A. the DNR’s Request for Comments as published in the *State Register* on November 5, 2002;²⁴
- B. the proposed rules dated March 30, 2007, including the Revisor’s approval;²⁵

²⁰ DNR’s July 18, 2007, Comment at 2.

²¹ 27 State Reg. 747 (November 25, 2002); DNR Ex.1.

²² SONAR at 8 and Attachment C.

²³ DNR Ex. 8.

²⁴ DNR Ex. 1.

²⁵ DNR Ex. 2.

- C. the Agency's Statement of Need and Reasonableness (SONAR);²⁶
- D. a letter dated April 23, 2007, noting that the Administrative Law Judge had approved the DNR's Notice of Hearing and Additional Notice Plan;²⁷
- E. the Notice of Hearing as mailed on April 24, 2007;²⁸
- F. the certification that the DNR mailed a copy of the SONAR to the Legislative Reference Library on May 2, 2007;²⁹
- G. the Notice of Hearing as published in the *State Register* on May 7, 2007;³⁰
- H. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List and to the Parties Identified in the Additional Notice Plan on May 2, 2007, and Certificate of Accuracy of the Mailing List as of that date;³¹
- I. the Certificate of Sending the Notice of Hearing and the SONAR to various Legislators on May 2, 2007, accompanied by a copy of the transmittal letter;³²
- J. the DNR's news release, dated May 16, 2007, announcing the proposed rules, and a paper copy of information on the rules from the DNR's web page, as provided in the notice plan;³³ and
- K. a letter to the Commissioner of Agriculture dated December 29, 2005, accompanied by a copy of the proposed rules, based upon the DNR's determination that application of the proposed rules may affect some farming operations located on public ditch systems, in accordance with Minn. Stat. § 14.111.³⁴

19. The Administrative Law Judge finds that the DNR has met all of the procedural requirements under applicable statutes and rules.

²⁶ DNR Ex. 3.

²⁷ DNR Ex. 7.

²⁸ DNR Ex. 5.

²⁹ DNR Ex. 4.

³⁰ DNR Ex. 6 (see 31 State Reg. 1541).

³¹ DNR Ex. 8.

³² DNR Ex. 9.

³³ DNR Ex. 10.

³⁴ DNR Ex. 11.

III. Statutory Authority

20. In its SONAR, the Department asserts that its statutory authority to adopt these rules is contained in Minn. Stat. § 84A.55, subs. 9 and 11.³⁵ Minn. Stat. § 84A.55, subd. 9, provides authority for the DNR to participate in or authorize the imposition of assessments for drainage projects for state-owned lands within “a game preserve, conservation area, or other area subject to this section so far as the commissioner determines that the lands will benefit from the project for the purposes for which the area was established.” Subdivision 9 specifies that the “assessments or contributions must not exceed the value of benefits to the state-owned lands as determined by the commissioner and payable in amounts the commissioner determines.” It further states that the DNR “shall establish by rule before January 1, 1986, the criteria for determining benefits to state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources.” Minn. Stat. § 84A.55, subd. 11, contains a general authorization for the Commissioner of the DNR to “promulgate rules necessary for the execution of this section. . . .”³⁶

21. The Aitkin County Board of Commissioners (acting in its capacity as Ditch Authority), the Marshall County Board of Commissioners, the Marshall County Auditor, and others maintained that the DNR lacks the statutory authority to adopt the proposed rule since the statute set a January 1, 1986, timeline for the completion of rulemaking. They also point out that, under Minn. Stat. § 14.125, which was enacted by the Legislature in 1995, an agency must publish notice of a hearing for rule adoption within 18 months of the effective date of a law authorizing or requiring rules to be adopted; otherwise, authority for rulemaking expires. Under the commentators’ interpretation, the DNR lacks the statutory authority to adopt these rules.³⁷

22. Minn. Stat. § 14.125 was enacted in 1995.³⁸ The effective date provision contained in the relevant legislation stated that Section 14.125 only “applies to laws authorizing or requiring rulemaking that are finally enacted after January 1, 1996.”³⁹ Therefore, Minn. Stat. § 14.125 was not intended to have retroactive effect. Because the statute authorizing the DNR Commissioner to adopt rules establishing criteria for determining drainage benefits to state-owned lands was enacted in 1984, long before the date on which Minn. Stat. § 14.125 became effective, Minn. Stat. § 14.125 does not apply here.

³⁵ SONAR at 3.

³⁶ Minn. Stat. § 84A.55, subd. 11.

³⁷ Testimony of Brian Napstad at Aitkin Public Hearing; Public Ex. 1 (June 26, 2007, letter from Brian Napstad, Chairman, Aitkin County Board of Commissioners); July 16, 2007, Letter from Aitkin County Commissioners, Ex. B; July 3, 2007, Letter from Marshall County Board of Commissioners; Testimony of Scott Peters at Grygla Public Hearing.

³⁸ Laws of Minn. 1995, Chapter 233, Article 2, Section 12.

³⁹ Laws of Minn. 1995, Chapter 233, Article 2, Section 58. *Accord: In the Matter of Proposed Permanent Rules Requiring Lake Shore Leases*, 12-2000-10228-1 (1996).

23. Moreover, there is a well-established rule of statutory construction that statutory provisions defining the time and mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system, and dispatch in public business, are generally deemed to be directory (as opposed to mandatory) in nature.⁴⁰ While public agencies should make every effort to comply with directory time periods, their failure to do so does not deprive them of the authority to engage in subsequent action where the statute does not specify any consequences for their failure to act.⁴¹

24. Minn. Stat. § 84A.55, subd. 9, is directory in nature and does not specify any penalty for the failure of DNR to adopt rules by 1986. A violation of a directory statute does not invalidate the subsequent action taken.⁴² There has been no showing that the legislative history reflected any intent to bar promulgation of rules after 1986. The counties also could have initiated a mandamus action to compel the Commissioner to engage in rulemaking. Accordingly, the Administrative Law Judge concludes that the DNR's rulemaking authority under subdivision 9 has not expired, and that it has statutory authority to adopt the proposed rules under subdivisions 9 and 11.⁴³

IV. Additional Notice Requirements

25. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. As discussed above, the Department submitted an additional notice plan to the Office of Administrative Hearings, which was reviewed and approved by the

⁴⁰ *Heller v. Wolner*, 269 N.W.2d 31, 33 (Minn. 1978), *citing*, *Wenger v. Wenger*, 200 Minn. 436, 438, 274 N.W. 517, 518 (1937) (Failure to hold hearing within 30-day statutory time period did not deprive court of jurisdiction where the statute does not provide any consequences to the parties for the court's failure to act.)

⁴¹ *Id.* See also *Henry v. Minnesota Public Utilities Commission*, 392 N.W.2d 209 (Minn. 1986) (failure of MPUC to issue a decision in a rate proceeding within 10-month suspension period did not deprive MPUC jurisdiction to issue decision); *First National Bank of Shakopee v. Department of Commerce*, 245 N.W.2d 861 (Minn. 1976) (statute requiring Department of Commerce to issue its decision within 90 days of hearing on bank application, is directory only and violation of 90-day requirement did not invalidate Commissioner's subsequent order); *Szcech v. Commissioner of Public Safety*, 343 N.W.2d 305 (Minn. App. 1984) (defining "shall" as mandatory in Minn. Stat. § 645.44(16) is only a rule of construction and is not binding on the courts).

⁴² *City of Chanhassen v. Carver County*, 369 N.W.2d 297, 300 (Minn. App. 1985), *citing* *Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (Minn. 1974). *Accord* *Marshall County v. State of Minnesota*, 646 N.W.2d 570, 577 (Minn. App. 2001), *relying upon* *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1400 (9th Cir. 1995) (failure of an agency to take action within a time period set forth in a statute does not bar subsequent agency action unless there is a specific indication that such a bar was intended).

⁴³ See, e.g., *In the Matter of Proposed Amendments to Rules Governing the Minnesota Environmental Review Program*, 12-2901-15496-1 (2005) (EQB failed to adopt rules by Jan. 1, 2005, despite statement in authorizing legislation that it "shall" adopt rules relating to environmental review for recreational trails by that date. ALJ emphasized that the statute was directory and provided no penalty for failure to meet the Jan. 1, 2005, deadline, and found that the EQB's statutory authority to adopt the proposed rules had not expired).

Administrative Law Judge by letter dated April 23, 2007. During the rulemaking proceeding, the DNR certified that it provided notice to those on the rulemaking mailing list maintained by the DNR and in accordance with its additional notice plan.⁴⁴

26. As described below, the DNR made significant efforts to inform and involve interested and affected parties in this rulemaking:

- A. the DNR published a Request for Comments in the State Register on November 25, 2002, and posted it on the DNR website along with maps showing the boundaries of the con-con areas and the state-owned lands within those areas;⁴⁵
- B. letters requesting comments were mailed to over 200 organizations as well as federal and state agencies; county, city, and township officials; individuals; and members of the State Legislature whose districts include the con-con areas;⁴⁶
- C. the DNR announced this rulemaking process in November 2002 in a statewide news release that it distributed to all general news media in the state, some border state media, outdoor recreation publications, freelance writers, affected county auditors, and agricultural agencies;⁴⁷
- D. the proposed rules, the SONAR, and other information relating to the proposed rules have been available on the DNR's website,⁴⁸ and
- E. a copy of the proposed rule and the Notice of Hearing was mailed to each of the persons who responded to the Request for Comments. This group included officials from each of the affected counties, members of public interest groups, and local government officials.⁴⁹

27. During the 60-day period after the Request for Comments was published, the DNR received comments from all seven con-con county boards, various conservation organizations, affected township boards, and individuals.⁵⁰

28. The DNR has widely disseminated its proposed approach to assessing con-con lands for drainage and engaged in mediation with the affected entities for years.

⁴⁴ DNR Exs. 7 and 8.

⁴⁵ SONAR at 2.

⁴⁶ SONAR at 2.

⁴⁷ SONAR at 2.

⁴⁸ DNR Ex. 10.

⁴⁹ DNR Ex. 7.

⁵⁰ SONAR at 2-3.

The public hearings were held in the affected areas and the robust attendance at those hearing supports the conclusion that adequate notice was provided by the DNR. Therefore, the Administrative Law Judge finds that the DNR has satisfied the notice requirements.

V. Impact on Farming Operations

29. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

30. In the SONAR, the DNR acknowledged that the proposed rules “will affect those farming operations that own land on any public ditch system where that ditch system has benefited lands within a con-con area” and that “other landowners’ contribution to a drainage project may increase” if the Commissioner finds that benefits to state-owned lands are lower than the benefits as originally determined by the drainage authority. The SONAR indicated that other farming operations will not be affected by the proposed rules, and drainage authorities will continue to have authority under Minn. Stat. Chapter 103E to conduct drainage projects they find to be necessary and cost-effective.⁵¹ The Aitkin County Board maintained that the latter statement in the SONAR was inaccurate based upon its argument that the proposed rule will require additional reporting and documentation even for minor repairs, and thereby delay those repairs.⁵²

31. Because application of the proposed rules may affect some farming operations located on public ditch systems, the DNR sent a letter to the Commissioner of Agriculture dated December 29, 2005, accompanied by a copy of the proposed rules. In the letter, the Department indicated that the proposed rule will affect farming operations that own land on any public ditch system where that ditch system has benefited lands within a con-con area. The letter acknowledged that, if the Commissioner determines that benefits to state-owned lands are lower than the benefits originally determined by the drainage authority, other landowners’ contribution to a drainage project may increase. The DNR indicated that all other farming operations will not be affected by the proposed rules.⁵³

32. All of the public hearings were held in or near the affected agricultural areas of the State.

33. The Administrative Law Judge concludes that DNR has provided notice in accordance with Minn. Stat. § 14.111.

⁵¹ SONAR at 7.

⁵² July 16, 2007, Letter from Aitkin County Board, Ex. E at 5.

⁵³ DNR Ex. 11.

VI. Compliance with Other Statutory Requirements

A. Cost and Alternative Assessments

34. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

35. With respect to the first factor, the DNR indicated in its SONAR that the proposed rules will primarily affect drainage authorities acting under Minnesota Statutes Chapter 103E, which include county boards, joint county drainage authorities, and watershed districts. The proposed rules will also affect parties who own land on any public ditch system where that ditch system has benefited lands in a con-con area. If the Commissioner determines that benefits to state-owned lands are less than the benefits that were originally determined by the drainage authority, the drainage authority will have reduced revenues. The DNR noted that it “continues to pay ‘payments in lieu of taxes’ (PILT), as well as contributing to the economic viability of each county by returning at least 50% of the revenues from agriculture leases, forestry timber sales and gravel sales, with Marshall County receiving 100% of these revenues.”⁵⁴ The SONAR

⁵⁴ DNR’s July 18, 2007, Comment at 5.

notes that, if the benefits of a proposed project outweigh the cost of the project, this could lead to increased assessments to other landowners. If the costs are higher than the benefits, the project cannot proceed and the landowners would not be assessed. Minnesota taxpayers will also be affected by the proposed rules since payments for ditch assessments to state-owned lands are made from funds that the Legislature appropriates for that purpose.⁵⁵

36. With regard to the second factor, the DNR acknowledged that the proposed rules will result in modest additional costs to the agency due to increased staff commitments and operating costs. The DNR will be required to conduct investigations with respect to the benefits arising from drainage projects using the criteria set forth in the proposed rules, determine whether the project will benefit state-owned lands, decide whether to participate in a project, and determine how much to contribute. The DNR will also be required to report findings to the drainage authority.⁵⁶

37. Regarding the third and fourth factors, the DNR noted that, while it perhaps would be less costly for the DNR to accept the drainage benefits as determined by the drainage authority under Minn. Stat. Chapter 103E without investigation, that approach would not comply with the requirements of Minn. Stat. § 84A.55, subd. 9. Since the latter statutory provision sets the requirements for the DNR to follow for drainage assessments in con-con lands, no other alternatives were investigated by the DNR.⁵⁷

38. With regard to the fifth regulatory factor, the DNR estimated that the costs related to the notification and documentation requirements imposed by the proposed rules, which will extend to drainage repair projects, will be slightly more burdensome for drainage authorities than under existing law. The DNR thus anticipates that drainage authorities in con-con areas will incur additional nominal costs, but was unable to estimate those costs. The DNR also acknowledges that landowners in con-con areas may be affected by application of the proposed rules to the extent that their contributions to the drainage project may increase.⁵⁸

39. With respect to the sixth factor, the DNR noted that Minn. Stat. § 84A.55, subd. 9, requires that the Commissioner promulgate rules relating to criteria to be used to determine benefits of drainage projects to state-owned lands in con-con areas. The Department indicated that it would possibly incur significant costs if it failed to adopt rules in this area, since it could be subject to a mandamus action seeking a court order compelling it to proceed with rulemaking.⁵⁹

40. Finally, with respect to the seventh factor, the DNR indicated that the proposed rules encompass areas that are not addressed by federal law. Therefore, it is

⁵⁵ SONAR at 4-5.

⁵⁶ SONAR at 5.

⁵⁷ SONAR at 5-6.

⁵⁸ SONAR at 6-7.

⁵⁹ SONAR at 7.

not necessary to assess differences between the proposed rules and existing federal regulations.⁶⁰

41. The Administrative Law Judge concludes that the DNR has fulfilled its obligation under Minn. Stat. § 14.131 to discuss cost and alternative assessments in the SONAR.

B. Performance-Based Regulation

42. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

43. The DNR maintained that the rule as proposed is performance-based, stating:

Con-Con preserves were created to vest the state with title to lands for the purpose of preserving, protecting, propagating and breeding wildlife, for the development of forests and the prevention of forest fires, and for the preservation and development of rare and distinct plant species native in the area. The legislature, in enacting Minn. Stat. § 84A.55, subd. 9, created an exception to the general laws pertaining to drainage benefits by vesting the commissioner with authority to determine benefits to state-owned lands in con-con areas. The legislature also directed the commissioner to promulgate rules to establish criteria to determine benefits for those lands. The proposed rules set forth criteria that will enable the commissioner to determine if, and to what extent, a drainage project will provide benefits that are consistent with the purposes for which the con-con areas were established.

The criteria set forth in the proposed rule provide the commissioner with the flexibility to consider a number of impacts, both positive and negative, from a proposed drainage project affecting state-owned con-con lands. The rules enable the commissioner to balance these impacts and make a determination as to benefits that is demonstrably neither arbitrary nor capricious. Additionally, the rules provide the commissioner with the flexibility to set conditions to modify a proposed project if it [is] necessary to ensure that the project will benefit state-owned con-con lands.⁶¹

⁶⁰ *Id* at 7.

⁶¹ SONAR at 8.

44. The Administrative Law Judge finds that the DNR has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

C. Consultation with the Commissioner of Finance

45. Under Minn. Stat. § 14.131, the agency is also required to “consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

46. By memorandum dated December 29, 2005, the DNR provided the Commissioner of Finance with copies of the proposed rules and SONAR and asked for evaluation of the proposed rules’ fiscal impact on local units of government. In its memorandum, the DNR indicated that it had determined that the proposed rules will cause increased staff commitments and operating costs for DNR. The Department also stated that the proposed rules may affect local units of government (counties, joint county drainage authorities, and watershed districts) acting in their capacities as drainage authorities in con-con areas to the extent that the DNR Commissioner determines that benefits to state-owned lands are less than the benefits as originally determined by the drainage authority. The DNR also acknowledged that drainage authorities will incur minimal costs associated with the requirement to notify the Commissioner of drainage projects that would have an assessment within a con-con area.⁶²

47. In its January 27, 2006, memorandum in response to the DNR, the Department of Finance concluded that the proposed rule “expands the definition of ‘drainage project’ to include repairs” and that, as a result, counties, joint county drainage authorities and watershed districts with authority over con-con areas “will incur nominal cost increases to comply with the proposed rule with respect to proposed repairs.” The Commissioner of Finance agreed with the DNR’s view that the drainage authority could “either spread the costs of the proposed project to other landowners or abandon the project entirely” in the event that the Commissioner of DNR reduced the State’s assessed payment because the benefits of a proposed drainage project were less than those determined by local drainage authorities. The Commissioner of Finance noted that it was also possible that counties could see increased payments from the State if wildlife habitat was benefited. The Commissioner of Finance determined that the DNR had adequately analyzed the potential costs and benefits to local units of government of complying with the proposed rule, and concurred with the DNR’s assessment that such compliance was “likely to be of insignificant fiscal impact.”⁶³

48. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed

⁶² SONAR at 8 and Attachment C.

⁶³ SONAR, Attachment C.

rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

49. Effective July 1, 2005, under Minn. Stat. § 14.127, the DNR must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁶⁴ The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶⁵

50. The DNR indicated in its SONAR that neither of these types of entities will incur any costs associated with complying with the proposed rule because they are not drainage authorities who are subject to the proposed rules.⁶⁶

51. The Administrative Law Judge finds that the DNR has made the determination required by Minn. Stat. § 14.127 and approves that determination.

VII. Rulemaking Legal Standards

52. Under Minnesota law,⁶⁷ one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.⁶⁸ The DNR prepared a Statement of Need and Reasonableness (SONAR)⁶⁹ in support of its proposed rules. At the hearing, the DNR relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by DNR staff at the public hearing, and by the DNR written post-hearing comments and reply.

53. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.⁷⁰ Arbitrary or unreasonable agency action is action without

⁶⁴ Minn. Stat. § 14.127, subd. 1.

⁶⁵ Minn. Stat. § 14.127, subd. 2.

⁶⁶ SONAR at 9.

⁶⁷ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

⁶⁸ *Mammenga v. DNR of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

⁶⁹ DNR Ex. 3.

⁷⁰ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

consideration and in disregard of the facts and circumstances of the case.⁷¹ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁷² The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."⁷³

54. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.⁷⁴

55. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with the rule adoption procedure, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.⁷⁵

56. Because the DNR suggested changes to proposed rules parts 6115.1520, subpart 3; 6115.1530, subparts 1 and 1a; and 6115.1540 after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

⁷¹ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁷² *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

⁷³ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

⁷⁴ *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁷⁵ Minn. R. 1400.2100.

VIII. Analysis of the Proposed Rules

57. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

58. The Administrative Law Judge finds that the DNR has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

IX. Broad Issues Relating to the Proposed Rules

59. Numerous commentators representing the affected counties and interested watershed districts opposed the proposed rules, as did members of the public living in the affected areas. The Consolidated Conservation Joint County Natural Resources Board (“the Joint County Board”) submitted post-hearing comments in opposition to the proposed rules on behalf of Lake of the Woods, Beltrami, Roseau, Marshall, Clearwater, Mahnomen, Koochiching, and Aitkin Counties.⁷⁶ Separate written and oral comments challenging the proposed rules were provided by the Marshall County Board of Commissioners,⁷⁷ the Aitkin County Board of Commissioners,⁷⁸ the Koochiching County Board of Commissioners,⁷⁹ the Warroad Watershed District,⁸⁰ the Red River Watershed Management Board,⁸¹ the Lake of the Woods County Board of Commissioners,⁸² the Roseau County Board of Commissioners,⁸³ the Roseau River Watershed District,⁸⁴ Grand Plain Township in Marshall County,⁸⁵ the Mahnomen County Board of

⁷⁶ July 18, 2007, Submission from Gerald Von Korff on behalf of the Consolidated Conservation Joint County Natural Resources Board.

⁷⁷ July 3, 2007, Letter from Marshall County Board of Commissioners.

⁷⁸ Testimony of Brian Napstad at Aitkin Public Hearing; Public Ex. 1; July 16, 2007, Letter from Aitkin County Board of Commissioners, Ex. A at 2; Testimony of Gary Kiesow at Grygla Public Hearing.

⁷⁹ July 12, 2007, Letter from Charles C. Lepper, Koochiching County Chairperson.

⁸⁰ Public Ex. 10.

⁸¹ Testimony of Ron Harnack at Aitkin Public Hearing; Public Ex. 2. The Red River Watershed Management Board is a joint powers of watershed districts in the Red River of the North.

⁸² July 11, 2007, Letter from Todd Beckel, Board Chair.

⁸³ July 6, 2007, Letter from Anne Granitz; July 17 and 25, 2007, Letters from Russell Walker; July 18 and 25, 2007, Letters from Orris Rasmussen; Testimony of Russell Walker and Orris Rasmussen at Warroad Public Hearing.

⁸⁴ Testimony of Todd Miller at Warroad Public Hearing.

⁸⁵ June 25, 2007, Letter from Harry Farris, Supervisor, Grand Plain Township, and attachment.

Commissioners,⁸⁶ and the Beltrami County Board of Commissioners.⁸⁷ Apart from the DNR, no individuals or organizations testified in support of the proposed rules or filed written comments in favor of their adoption during the current rulemaking process. The SONAR indicated that some comments were filed in early 2003 (in response to the Department's Request for Comments) by the Minnesota Center for Environmental Advocacy, Minnesota Audubon, Mississippi Headwaters Audubon, American Lands Alliance, Fish & Wildlife Legislative Alliance, and Minnesotans for Responsible Recreation.⁸⁸

60. Many of those filing comments on the proposed rules and offering testimony at the public hearings stressed the importance of drainage to agriculture, forestry, and flood control in the northwestern part of the state.⁸⁹ The Joint County Board noted that, without Minnesota's drainage infrastructure, "the farming of hundreds of thousands of acres would be significantly impaired."⁹⁰

A. Concerns about Lack of Stakeholder Involvement in Formulation of Proposed Rules

61. The Red River Watershed Management Board, the Roseau County Board of Commissioners, the Roseau River Watershed District, the Lake of the Woods County Board of Commissioners, the Joint County Board, and others emphasized that the proposed rules were developed solely by the DNR, without outside participation by interested parties. They urged the Department to withdraw the proposed rules in favor of mediated or negotiated resolution of these issues. In the alternative, they argued that the Administrative Law Judge should disapprove the proposed rules and require the DNR to engage in a more participatory and collaborative process involving stakeholders and supported by internal and external scientific expertise.⁹¹

62. In many instances, proposed rules are drafted by members of a task force composed of agency and non-agency personnel representing varying interests. However, the Minnesota Administrative Procedure Act does not require that approach to be followed. Accordingly, the proposed rules are not defective because they were

⁸⁶ Testimony of Jerry Dahl at Grygla Public Hearing.

⁸⁷ Testimony of Tim Faver at Bemidji Public Hearing.

⁸⁸ See Summary in SONAR, Ex. A.

⁸⁹ See, e.g., Testimony of Mike Hanson, Koochiching County Commissioner, at Grygla Public Hearing; Testimony of Todd Beckel, Lake of the Woods County Commissioner, at Warroad Public Hearing; Testimony of Gordon Foss at Grygla Public Hearing; July 18, 2007, July 11, 2007, Letter from Bruce Hasbargen; July 11, 2007, Letter from Sharon Bring; July 12, 2007, Letter from Carol Kofstad; Submission of Consolidated Conservation Joint County Natural Resources Board at 7-12.

⁹⁰ July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 7.

⁹¹ July 17, 2007, Letter from John Finney, President, Red River Watershed Management Board; Testimony of Ron Harnack on behalf of Red River Watershed Management Board at Aitkin Public Hearing; July 18, 2007, Letter from Orris Rasmussen; July 25, 2007, Letter from Russell Walker; July 11, 2007, Letter from Todd Beckel; Testimony of Myron Jesme, Scott Peters, and Todd Miller at Grygla Public Hearing; July 18, 2007, Submission from Consolidated Conservation Joint County Natural Resources Board at 21-22.

developed solely by DNR personnel and disapproval of the rules is not warranted on that basis.

B. Concerns about the Amount of Discretion given to the Commissioner under the Proposed Rules and Differences between Proposed Rules and General Drainage Process under Chapter 103E

63. Among the primary arguments made in opposition to the proposed rules was the assertion that they give excessive discretion to the Commissioner and are contrary to Minnesota Statutes Chapter 103E. Chapter 103E generally pertains to the powers of drainage authorities and the procedures to be followed with respect to drainage projects. In the opinion of many of those commenting on the proposed rules, the Department is obligated to pay its share of drainage project costs as determined in the independent assessment process under Minn. Stat. Chap. 103E. They urged adoption of an approach similar to that used under Chapter 103E, under which a neutral panel, rather than solely the Commissioner of the DNR, would determine benefits to state-owned land. They further emphasized that drainage systems should be viewed as a whole, taking into consideration benefits incurred by all, rather than permitting the State to unilaterally decide what it should pay based on determinations of benefit to state-owned land alone.⁹²

64. Many comments made during the rulemaking process by County officials and other members of the public focused on perceptions that it is not fair or desirable to allow the Commissioner of the DNR the entire authority to decide what amount the State will pay in connection with state-owned land in con-con areas and fears that the State will fail to pay “its fair share” of assessments. The Red Lake Watershed District,⁹³ the Board of Thief Lake Township;⁹⁴ Sharon Bring, Marshall County Board Chair;⁹⁵ Keith Landin and Rick Battles of the Warroad Watershed District,⁹⁶ Ron Ringquist, Secretary of the Minnesota Viewers Association;⁹⁷ Bruce Hasbargen, P.E., Public Works Director for Lake of the Woods County;⁹⁸ the Lake of the Woods County Board of Commissioners;⁹⁹ Carol Kofstad, retired employee of the Roseau County Auditor’s Office;¹⁰⁰ Roseau County Commissioners Orris Rasmussen and Russell Walker;¹⁰¹ Mahnomen County Commissioner Jerry Dahl;¹⁰² Aitkin County Commissioner Dale

⁹² See, e.g., Public Ex. 6; July 11, 2007, Letter from Todd Beckel.; July 3, 2007, Letter from Marshall County Commissioners.

⁹³ Public Ex. 6; Testimony of Myron Jesme at Grygla Public Hearing.

⁹⁴ Public Ex. 7.

⁹⁵ July 11, 2007, Letter from Sharon Bring.

⁹⁶ Public Ex. 10.

⁹⁷ July 2, 2007, Letter from the Minnesota Viewers Association.

⁹⁸ July 3, 2007, Letter from Bruce Hasbargen.

⁹⁹ July 11, 2007, Letter from Todd Beckel; Testimony of Commissioners Ken Moorman and Todd Beckel at Warroad Public Hearing.

¹⁰⁰ July 12, 2007, Letter from Carol Kofstad; Warroad Public Hearing Testimony.

¹⁰¹ Public Ex. 12; July 18, 2007, Letter from Orris Rasmussen.

¹⁰² Testimony of Jerry Dahl at Warroad Public Hearing.

Lueck,¹⁰³ and many others¹⁰⁴ maintained that the Commissioner of the DNR should not have the ability to determine the amount of benefit derived by state-owned land from a particular drainage project and to decide whether the DNR will participate and in what amount, and argued that the rules are defective due to their failure to require an unbiased party to make this determination. Several of those commenting on the proposed rules also objected to DNR staff making the assessments, asserting that they lacked expertise in drainage issues. They contended that the uncertainty about State participation will render approval of projects by drainage authorities difficult, since the drainage authority will not know in advance that the costs will be paid. Many members of the public noted that failure to pay their assessed drainage project costs would result in tax forfeiture of their property.¹⁰⁵

65. The Joint County Board objected to the proposed provisions granting the DNR the ability to determine its own benefits, without the benefit of an independent recommendation. It maintained that Chapter 103E does not require the Drainage Authority to base assessments on who receives a hydrological benefit from the particular repair work being conducted or allow the Drainage Authority to exempt some property owners from assessment on the grounds that they do not benefit. It contended that, if adopted, the DNR proposal “will create a trainwreck in Northwestern Minnesota.” The Joint County Board also objected to the DNR’s indication that it intended to use staff ecologists and wildlife managers to determine the amount that the State should pay to maintain drainage systems, and took issue with the implication that the State’s interest is limited to wildlife ecology and other conservation concerns. The Joint County Board challenged the DNR’s failure to incorporate “traditional” methods of apportioning the costs of hydrological systems into the proposed rules, such as the use of public engineers and appraisers.¹⁰⁶

66. In its post-hearing comments, the DNR maintained that the Minnesota Court of Appeals already addressed the interplay between Chapters 84A and 103E in the *Marshall County* case and concluded that Chapter 84A must prevail over Chapter 103E.¹⁰⁷ In response to these concerns, the DNR emphasized that the power given to the DNR stems not from the proposed rule but from the Legislature’s grant of authority under Minn. Stat. § 84A.55, subd. 9. That statute reflects the judgment of the

¹⁰³ Testimony of Dale Lueck at Aitkin Public Hearing.

¹⁰⁴ See, e.g., Public Exs. 11, 14, 17, 18, and 20; Testimony of Daryl Rodahl, Jerry Krohn, Jim Jenson, Trent Stanley, Todd Stanley, Charles Pazdernick, Colleen Hoffman, Gerald Krahn, Brian Ketring, Scott Peters, Lon Aune; Letters from Emma Christian, Gary Boekelheide, Bruce Streich, William Krzoska, John Heneman, Tony Moe, Larry Nesteby, Jerome Burkel, Bruce & Connie Nelson, Darrold Rodahl, Owen Hagen, Sharon Bring, Arthur Krahn, Marilyn Kofstad, Dennis Kofstad, James Jenson, Carter Hontret, Mark Karl, Alan Summitt, Gerald Krahn, and Ardeene Hagen.

¹⁰⁵ See, e.g., July 11, 2007, Letter from Bruce Hasbargen; June 28, 2007, Letter from Jerome Burkel; July 11, 2007, Letter from Sharon Bring; June 20, 2007, Letter from Steven Jorland; July 12, 2007, Letter from Carol Kofstad.

¹⁰⁶ July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 6, 19-20; July 25, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 2-5, 14.

¹⁰⁷ DNR’s July 18, 2007, Comment at 4.

Legislature that the Commissioner (rather than the independent viewers used under Chapter 103E) should determine drainage benefits. The Department contends that “[t]he proposed rules will enable the commissioner, with the assistance of [DNR] staff, to determine benefits to state-owned con-con lands in a manner that is demonstrably neither arbitrary nor capricious.” The DNR contends that it is seeking fairness in the proposed rules on behalf of all taxpayers and stakeholders statewide. It asserts that, “[c]onsidering the historical actions of the state legislature in the 1920s and 1930s to pay off the county ditch bonds, it is reasonable to eliminate the subsidy paid to maintain present ditch systems that do not enhance the ‘state owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development or use of soil, water, forests, wild animals or related natural resources’ (MS 84A.55, subd. 9). Under the current 103E process, costs are assessed to public funds for benefits not realized on public lands.”¹⁰⁸

67. The Court of Appeals determined in the *Marshall County* case that, in the event of conflict between Chapters 103E and 84A, Chapter 84A would prevail because it specifically relates to con-con lands. Reading the statutes together, the Court concluded that “chapter 103E permits counties to make assessments to lands (including con-con lands); section 84A.55, subdivision 9, grants the commissioner the discretion to pay such assessments to the extent to which they are beneficial; and section 84A.55, subdivision 12, forbids the commissioner from eliminating or physically altering existing ditches or drainage systems that they do not own—even if the commissioner determines that they are detrimental to the con-con lands.”¹⁰⁹

68. In response to concerns about the expertise of DNR staff in evaluating benefits to state-owned land, the DNR stated:

According to Minn Stat 84A.55, subd 9, the commissioner can only participate in drainage projects affecting state-owned lands established under Minn Stat 84A.01 if drainage of the state-owned lands will benefit from the project for the purposes for which the area was established. The consolidated conservation areas were created for “the purpose of preserving, protecting, propagating, and breeding wildlife of all suitable kinds, including all species of game and fish and fur-bearing animals and birds of rare and useful species, and for the development of forests and prevention of forest fires, and the preservation and development of rare and distinctive plant species native in the area”. DNR professional staff are well qualified to evaluate the positive and negative impacts of drainage to state-owned lands that were established for the natural resource purposes outlined above, whereas ditch viewers are trained to evaluate the positive and negative impacts of drainage primarily for economic purposes.¹¹⁰

¹⁰⁸ DNR’s July 18, 2007, Comment at 2.

¹⁰⁹ *Marshall County*, 636 N.W.2d at 576.

¹¹⁰ DNR’s July 18, 2007, Comment at 5-6.

69. As noted above, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the “best” approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made. Because the Legislature in Chapter 84A.55, subd. 9, provided authority to the Commissioner to “authorize the imposition of assessments for the projects on the lands in any amounts the commissioner determines” and stated that State assessments or contributions “must not exceed the value of benefits to the state-owned lands as determined by the commissioner and specified by written certificates or other statements filed in the proceedings,” the Judge finds that the DNR’s decision to place the authority to make these determinations on the Commissioner or the Commissioner’s designated representative has a reasonable basis in statute.

70. The Administrative Law Judge concludes that the enactment of Minn. Stat. § 84A.55, subd. 9, reflects the intent of the Legislature to afford the Commissioner of the DNR authority to establish criteria for determining the benefits of drainage projects to state-owned lands located in con-con areas and to make the determination regarding whether a drainage project will benefit state-owned lands for the purposes for which the area was established. The statute also reflects the intent of the Legislature to vest in the Commissioner of the DNR the power to authorize the imposition of assessments or contributions as long as they do not exceed the value of benefits to the state-owned lands. The statute does not place any obligation on the DNR to use outside parties in arriving at the benefit determination required under these rules, nor does it require the use of individuals with particular types of training or the use of any particular methods. The DNR has shown a reasonable basis for the approach reflected in the proposed rules and for its decision to vest decision-making authority in the Commissioner with the assistance of DNR staff rather than third party viewers.

C. Appeal Process

71. The Red River Watershed Management Board, the Marshall County Board, the Marshall County Auditor, the Town Board of Morrison Township in Aitkin County, the Aitkin County Board, the Joint County Board, and many others objected to the failure of the proposed rules to include an administrative or judicial appeal process under which the determination of the Commissioner could be appealed. Many of them urged adoption of a process similar to that followed under Chapter 103E.¹¹¹ The Joint County Board indicated that, under the proposed rules, the DNR could “unilaterally ignore the existing benefits roll, thereby shifting significantly the cost of a repair project away from itself and onto other property owners, and deprive those property owners [of] an opportunity to be heard, or to appeal from a decision which adversely impacts them.”¹¹²

¹¹¹ Testimony of Brian Napstad, Dale Lueck, and Ron Harnack at Aitkin Public Hearing; Testimony of Scott Peters at Grygla Public Hearing; Public Exs. 1 and 2; July 3, 2006, Letter from Marshall County Commissioners; July 18, 2007, Letter from William Pratt, Chairman, Morrison Town Board; July 16, 2007, Letter from Aitkin County Board; July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 3.

¹¹² July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 3.

72. In response, the DNR maintained that a drainage authority or other party who is aggrieved by a determination of benefits by the Commissioner under Minn. Stat. § 84A.55, subd. 9, and the proposed rules would, in fact, have the right to challenge the Commissioner's determination in District Court. The Department pointed out that this right of appeal is similar to that set forth in Minn. Stat. § 103E.091, subd. 1, under which appeals from drainage authority orders are filed directly in District Court.¹¹³

73. Chapter 84A of the Minnesota Statutes is silent concerning the judicial and/or administrative review to be accorded the Commissioner's determinations under Minn. Stat. § 84A.55, subd. 9, and the proposed rules. If the DNR is not correct in its assertion that an appeal could be taken to District Court, it is possible that the Minnesota Administrative Procedure Act would apply to the Commissioner's determinations. In that event, an aggrieved party could request that a contested case hearing be held before an Administrative Law Judge, and thereafter pursue further rights of appeal to the judicial courts that are available under the Administrative Procedure Act.¹¹⁴

74. The failure of the proposed rules to expressly address the availability of an appeal from the Commissioner's determination does not constitute a defect in the rules. However, because the lack of an explicit right to appeal was one of the primary concerns raised in public comment during the rulemaking proceeding and because the DNR agreed in its post-hearing comments that persons aggrieved by the Commissioner's determination of benefits could file an appeal of that determination, the Administrative Law Judge recommends that the DNR consider including a provision in the rules acknowledging its intent that there be a right of appeal from the Commissioner's determination. Such a modification to the proposed rules would be responsive to public comments, would serve to clarify the rules, and would not constitute a substantial change from the rules as originally published.

D. Unpaid Past Assessments

75. The Marshall County Board,¹¹⁵ the Marshall County Auditor,¹¹⁶ the Roseau County Auditor,¹¹⁷ the Roseau County Board of Commissioners,¹¹⁸ the Marshall County

¹¹³ DNR's July 18, 2007, Comment at 7.

¹¹⁴ A right to a hearing may arise from a statute or rule or from constitutional due process. G. Beck, M.B. Gossman, and L. Nehl-Trueeman, *Minnesota Administrative Procedure* (2d ed. 1998) at 45-53, and 250-258. When there is no statute or rule authorizing a hearing, a due process argument may be raised if the official agency action adversely affects the person's liberty or property interests. *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658 (Minn. 1984). See also Minn. Stat. §§ 14.02, subd. 3 (defining "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing"); 14.57(a) (specifying that "[a]n agency shall initiate a contested case proceeding when one is required by law...."); and 14.63 (stating that a person aggrieved by a final decision in a contested case is entitled to judicial review of the decision and may file a petition for certiorari with the Minnesota Court of Appeals).

¹¹⁵ July 3, 2007, Letter from Marshall County Board.

¹¹⁶ Testimony of Scott Peters at Grygla Public Hearing.

¹¹⁷ July 6, 2007, Letter from Anne Granitz, Roseau County Auditor.

Auditor,¹¹⁹ the Joint County Board,¹²⁰ and many other local officials and members of the public¹²¹ objected to the failure of the DNR to pay assessments made by drainage authorities in the past. Some of them noted that the DNR has not paid assessments since 1993.¹²² The total unpaid assessments in the seven counties are estimated to exceed \$3 million.¹²³

76. Roseau County Auditor Anne Granitz and Roseau County Commissioners Russell Walker and Orris Rasmussen indicated that the total delinquent assessments for state-owned con-con lands located within the con-con area in Roseau County for the years 1996-2006 exceeds \$316,000. An additional \$148,000 in unpaid assessments during the same period relates to lands in the con-con area that are classified as Trust Fund, Volsted, and Acquired Lands. Ms. Granitz indicated that, when the DNR fails to pay its share of the ditch maintenance assessments, the burden shifts to the private landowner. Commissioner Rasmussen pointed out that the failure of DNR to pay their portion of the levy has had both an immediate and cumulative negative impact on the fund balance in ditch accounts and has affected the county's ability to have funds available for maintenance work it is obligated to perform to keep the ditch system operational.¹²⁴

77. The Aitkin County Board provided information relating to 2000 assessments on ditch systems in Aitkin County showing that the total balances due from the DNR with respect to Trust Fund land, Con-Con land, Wildlife Management Area land, Acquired land, and Volsted land amount to over \$16,900. The Board indicated that the deficits created in those ditch accounts has made it necessary for Aitkin County to temporarily borrow funds from other ditch system accounts to pay for routine repair work. The Board noted that it is likely to have to issue "correcting assessments" to remove the deficits caused by the DNR's failure to pay, and incur legal fees in connection with lawsuits filed by other parties on the ditch system. The Board asserted that, contrary to the DNR's statements in the SONAR, private landowners will incur significant additional costs if the proposed rules are adopted. The Board argues that it is unfair for private citizens and units of local government to have to pay for all of the

¹¹⁸ July 18, 2007, Letter from Orris Rasmussen; July 17, 2007, Letter from Russell Walker.

¹¹⁹ Testimony of Scott Peters at Grygla Public Hearing.

¹²⁰ July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 16, 23 and attached Comments of Delray Larson.

¹²¹ See, e.g., Letters from Steven Jorland, Arthur Krahn, Roger Kofstad, and Carol Kofstad; Testimony of Arnold Stanley, Trevor Irlbeck, Edward Moe, Tony Moe, Don Lunke, Nathan Bukowski, Gary Kiesow (Marshall County Commissioner), Jeff Pelowski (Mayor of Roseau), Brian Ketring (Roseau County Highway Engineer), Scott Peters (Marshall County Auditor), and Orris Rasmussen (Roseau County Commissioner).

¹²² July 6, 2007, Letter from Anne Granitz; June 28, 2007, Letter from Arlene Wald; July 3, 2007, Letter from Marshall County Board of Commissioners.

¹²³ July 3, 2007, Letter From Marshall County Board.

¹²⁴ July 6, 2007, Letter from Anne Granitz; July 18, 2007, Letter from Orris Rasmussen; July 17 and 25, 2007, Letters from Russell Walker.

maintenance and repair costs of a ditch system that continues to provide drainage benefits to state-owned land.¹²⁵

78. The complex issues arising from past drainage assessments are obviously of great importance to the State, the Drainage Authorities, and affected private landowners, and have created a highly charged situation between all parties. However, the proposed rules merely seek to establish criteria for determining benefits to state-owned lands in con-con areas. The status of assessments imposed in the past is outside of the scope of this rulemaking proceeding. The Administrative Law Judge concludes that the failure of the proposed rules to address this issue does not give rise to a defect in the proposed rules.

E. Economic Impact of Proposed Rules

79. A number of those commenting on the proposed rules, including the Joint County Board and the Aitkin County Board of Commissioners, expressed concern that the Commissioner's determination of benefits will cause serious economic hardship for the affected counties and for private citizens. The Aitkin County Board challenged the statements in the SONAR and the finding by the Department of Finance that the proposed rules would have insignificant fiscal impact and asserted that adoption of the proposed rules would inject a level of confusion as to management jurisdiction and regulatory authority, add unwarranted administrative burden, and lead to costly and unacceptable delays.¹²⁶

80. The Joint County Board indicated that it "regards the proposed rule as a direct threat to the economic future of Northwest Minnesota because it fails to protect the ability of Counties and Watershed Districts to maintain vital public infrastructure." The Board noted that farmers throughout the region have constructed their own private networks of open laterals and other private ditches which depend upon an outlet to the public drainage system. If the public systems cannot be maintained by the counties and watershed districts, the Board indicated that it would have a catastrophic impact on these private systems. The Joint County Board expressed concern that the DNR would attempt to apply the proposed rules in a retroactive fashion to vacate existing benefits determinations, and that it would use the proposed rule to interfere with the maintenance of existing projects. The Board argued that that approach would be contrary to the intent of Chapter 84A.55, subd. 9, and urged that the rules be applied only to future determinations of benefit. It also asserted that the DNR had not provided any information about the anticipated magnitude of the shift of costs from the State to private property owners or the effect it would have on the economy of Northwestern Minnesota. The Joint Board maintained that the affected counties believe that the

¹²⁵ Testimony of Brian Napstad at Aitkin Public Hearing; July 16, 2007, Letter from Aitkin County Board, Ex. D.

¹²⁶ Testimony of Brian Napstad and Dale Lueck at Aitkin Public Hearing; Public Ex. 1; July 16, 2007, Letter from Aitkin County Board, Exs. D and E; July 18, 2007, Submission of the Consolidated Conservation Joint County Natural Resources Board at 1.

proposed rules will significantly interfere with their ability to maintain vital infrastructure.¹²⁷

81. In its post-hearing comments, the DNR acknowledged that “it is likely that the commissioner’s determination of benefits will result in reduced financial participation by the state,” but asserted that “the overall financial burden of a ditch project is borne by private parties on the system, not a political entity.” The DNR indicated that it would continue to make payments in lieu of taxes and return at least 50% of the revenues from agriculture leases, forestry timber sales, and gravel sales to the counties.¹²⁸

82. As the Department acknowledged throughout the rulemaking process, it is likely that the implementation of Minn. Stat. § 84A.55, subd. 9, under the proposed rules will reduce the level of financial participation by the State in drainage projects in northwestern Minnesota. Vesting of discretion in the Commissioner to determine benefits to state-owned lands and decide upon what assessment is to be paid by the State is, however, in keeping with the expression of legislative intent in the statute. The extent of the reduction in State financial participation is uncertain at this point and will depend upon the parcel-by-parcel application of the criteria set forth in the proposed rules. The Court of Appeals ruled in the *Marshall County* decision that even though a decrease in the state-paid portion of ditch maintenance costs will increase the financial burden on the counties and private landowners, “[t]he state is not compelled to subsidize the cost of constitutionally-guaranteed drainage ditches where it has determined that its lands are not benefited by the ditches.”¹²⁹

83. The Minnesota Viewers Association suggested that the proposed rules state that, once benefits have been redetermined, the Commissioner will include in the Department’s annual budget request an item seeking adequate funding to make payment to the drainage authorities of the pro rata amount due on drainage system repair or maintenance, subject to allocation.¹³⁰ While the DNR may consider making such a modification to the proposed rules, the Administrative Law Judge concludes that the proposed rules are not defective by virtue of their failure to include the suggested language.

X. Rule-by-Rule Analysis

Proposed Rule Part 6115.1500 - Purpose

84. Proposed rule 6115.1500 states that the purpose of the proposed rules is to “establish criteria and procedures for determining drainage benefits to state-owned lands in consolidated conservation (con-con) areas administered under Minnesota

¹²⁷ July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 1-3, 8-10, 22.

¹²⁸ DNR’s July 18, 2007, Comment at 5. The DNR noted in its submission that Marshall County receives 100% of these revenues.

¹²⁹ *Marshall County*, 636 N.W.2d at 578.

¹³⁰ July 2, 2007, Letter from Ron Ringquist of Minnesota Viewers Association.

Statutes, chapter 84A.” The rule part proceeds to list the seven counties in Minnesota in which con-con areas are found.

85. Michael Williams, Marshall County Attorney; Tim Faver, Beltrami County Attorney; Dan Sauve, Clearwater County Engineer; Orris Rasmussen and Russell Walker, Roseau County Commissioners; Scott Peters, Marshall County Auditor; and the Boards of Marshall and Aitkin Counties objected to the broad reference to “state-owned lands” in the proposed rule. They asserted that the rule improperly implies that it applies to all types and classifications of state-owned lands in con-con areas rather than only game preserves, areas, and projects established under Minn. Stat. §§ 84A.01, 84A.04, 84A.07, 84A.11, 84A.20 and 84A.31. Mr. Williams and Mr. Faver proposed inclusion of a definition of “state-owned lands” in the definitional section of the proposed rules that would make it clear that it was limited to land acquired by the State under Minn. Stat. § 84A.01, 84A.20 and 84A.31.¹³¹ The Aitkin County Board contended that the “vagueness associated with the term ‘state owned lands could eventually lead to the commissioner gaining new unauthorized regulatory authority over state owned parcels that are not con-con land.”¹³² Roseau County Commissioner Russell Walker and Roseau County Auditor Anne Granitz noted that only 68 percent of the parcels in con-con areas with delinquent drainage assessments are classified as Con-Con Lands. They indicated that the remaining 32% of the parcels identified as being in arrears are classified as Trust Fund lands, Volsted Lands, and Acquired Lands.¹³³

86. The DNR responded that, in describing the “state-owned” land governed by the proposed rules, it incorporated exactly the same language that was used in Minn. Stat. § 84A.55, subd. 9. The DNR maintained that the issues raised in the written comments and at the public hearings involve questions of statutory interpretation and are therefore outside the scope of this proceeding.¹³⁴

87. As the Court of Appeals found in the *Marshall County* case, the Minnesota Legislature has mandated different treatment for state-owned lands located in con-con areas and the more typical drainage assessment process set forth in Chapter 103E is not controlling in that situation. The Administrative Law Judge thus concludes that part 6115.1500 of the proposed rules appropriately references Minn. Stat. Chapter 84A as the controlling law. Moreover, because the statute under which these rules are adopted refers to “state-owned land,”¹³⁵ it is reasonable for that phrase to be incorporated in the

¹³¹ Public Exs. 1, 3, 4, and 12; July 3, 2007, Letter from Marshall County Board; Testimony of Brian Napstad at Aitkin Public Hearing; Testimony of Dan Sauve at Bemidji Public Hearing; Testimony of Michael Williams and Scott Peters at Grygla Public Hearing; Testimony of Orris Rasmussen and Russell Walker at Warroad Public Hearing.

¹³² July 16, 2007, Letter from Aitkin County Commissioners, Exhibit C.

¹³³ Public Ex. 12; Testimony of Russell Walker at Warroad Public Hearing; July 6, 2007, Letter from Anne Granitz.

¹³⁴ DNR July 18, 2007, Comment at 5.

¹³⁵ The grant of rulemaking authority contained in Minn. Stat. § 84A.55, subd. 9, states that the Commissioner shall establish by rule “the criteria for determining benefits to state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes

proposed rules. The extent to which the statute or these rules properly apply to any particular parcel is not at issue in this rulemaking proceeding but will have to await determination in another forum. Accordingly, the Administrative Law Judge finds that the DNR has shown that part 6115.1500 of the proposed rules is needed and reasonable to describe the overall scope of the rules.

Proposed Rule Part 6115.1510 - Definitions

88. Proposed rule 6115.1510 defines terms that are used in the proposed rules to assure clarity in the application of the rules. Only the terms that received comments or otherwise require discussion are discussed below. The DNR has demonstrated that the remaining definitions are needed and reasonable.

Subpart 2 - Commissioner

89. Subpart 2 defines "Commissioner" as "the commissioner of natural resources or the commissioner's designated representative." The Marshall County Board commented that the statute vests authority only in the Commissioner and expressed concern that delegation would result in decisions being made by subordinates without further scrutiny.¹³⁶

90. Minn. Stat. § 84A.55, subd. 1, indicates that game preserves, areas, and projects established under 84A.01, 84A.20, or 84A.31 are under the management, operation, and control of the "commissioner of natural resources" and states that "[t]he commissioner has the powers and duties provided in this section." Subdivision 9 refers generally to "the commissioner" as having the power to conduct necessary investigations for drainage projects, make determinations of whether the state-owned lands will benefit from particular projects, pay the cost of drainage projects, cooperate in such projects, authorize the imposition of assessments or make lump sum contributions in any amounts the commissioner determines, and establish criteria through rulemaking for determining benefits. Minn. Stat. Chapter 84A does not contain any further definition of the term "commissioner."

91. The definition of "Commissioner" in the proposed rules to include the Commissioner's designee is consistent with other statutory provisions allowing commissioners of state agencies the discretion to delegate certain powers or duties to subordinates. Minn. Stat. § 15.06, subd. 6(a), states that, except as otherwise expressly provided by law, a commissioner shall have the power "to delegate to any subordinate employee the exercise of specified statutory powers or duties as the commissioner may deem advisable, subject to the commissioner's control; provided, that every delegation shall be made by written order, filed with the secretary of state; and further provided that only a deputy commissioner may have all the powers or duties of the commissioner." Chapter 84A does not expressly preclude the Commissioner of the DNR from delegating authority to an appropriate subordinate. Under the

relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources."

¹³⁶ Public Ex. 5, Kolb Memorandum.

circumstances, it is permissible for the proposed rules to define the term “Commissioner” to include the Commissioner’s designated representative. This subpart of the proposed rules has been shown to be needed and reasonable as proposed.

Subpart 4 - Drainage

92. Subpart 4 of part 6115.1510 of the proposed rules defines "drainage" as “any method for removing or diverting waters from wetlands. The methods include, but are not limited to, excavating an open ditch, installing subsurface drainage tile, filling, diking, or pumping.” The Aitkin County Board objected to the definition as deceptive, inaccurate and reflecting an improper premise that any drainage project results in the destruction of a wetland. The Board proposed using qualifying language to further define what type of drainage (wetland, floodwater, surface water, etc.) was intended.¹³⁷ The Joint County Board also asserted that this definition “wrongly states that the only function of this drainage infrastructure is to drain wetlands. In fact, Minnesota’s drainage infrastructure is needed to provide drainage to uplands, and without the infrastructure, the farming of hundreds of thousands of acres would be significantly impaired.” The Board argued that, by focusing only on the drainage of wetlands, the proposed rule ignored the primary agricultural role of these systems and their critical function in flood control. The Joint County Board emphasized the importance of drainage to agriculture, pointing out that ditches increase the growing season by carrying off surface waters that accumulate on flat or low areas during spring floods, lower the water table by giving subsurface moisture a place to breathe, prevent the onset of root-rot in crops that are destroyed by excess moisture, create a well-aerated environment for roots and soil organisms, prevent the formation of ponds in adjoining fields, and allow earlier warming of soil and earlier traffic on fields in the spring. In addition to these agricultural purposes of drainage, the Joint County Board noted that drainage infrastructure serves the purposes of storm water management and flood control.¹³⁸

93. The SONAR indicates that the DNR simply intended to provide a general definition of the term “drainage.”¹³⁹ Application of the proposed rules does not hinge on the precise type of drainage that is occurring, and it is evident from the language of the proposed rule that the Department is not attempting to set forth an all-inclusive definition of the term. While the Department may, if it wishes, further clarify the definition in the manner urged by the Aitkin County Board and the Joint County Board, the Administrative Law Judge finds that the definition as proposed is sufficiently clear in the context of these rules.

¹³⁷ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C at 1.

¹³⁸ July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 7-10.

¹³⁹ SONAR at 10.

Subpart 6 – Drainage Project

94. Under the proposed rules, the term “drainage project” is defined to mean “a new drainage system, an improvement of a drainage system, an improvement of an outlet, a lateral, a repair, or a redetermination of benefits” where “the drainage authority will make assessments to state-owned lands” or “the commissioner will be asked or must consider whether to participate in the project through assessments or a lump sum, by joining the petition, by consent, or by approval.”

95. In their comments on the proposed rules, Russell Walker and Orris Rasmussen (Roseau County Commissioners), Lon Aune (Marshall County Engineer), the Aitkin County Board of Commissioners, and the Joint County Board suggested that the reference to “repair” be removed from the definition and that the proposed rules be applied only to improvements and new construction. Mr. Walker asserted that, if the proposed rules are applied to all repairs, projects would be further paralyzed and repair costs would escalate.¹⁴⁰ The Aitkin County Board maintained that the proposed definition will cause confusion because it conflicts with the definition contained in Minn. Stat. § 103E.005, subd. 11. The latter statute merely defines “drainage project” to mean “a new drainage system, an improvement of a drainage system, an improvement of an outlet, or a lateral.” The Aitkin County Board proposed using the definition in 103E in place of the language proposed by the DNR.¹⁴¹ The Joint County Board also argued that the Commissioner’s authority under the proposed rules should be limited to new projects and not encompass the repair of existing infrastructure because only projects involving the establishment of new infrastructure are considered to be “drainage projects” under Chapter 103E. The Joint County Board contended that application of the “heightened scrutiny” required for approval of new infrastructure to repairs “would be unlawful and totally inconsistent with a century of drainage law decisions as well as the plain meaning of the statutory language.” Accordingly, the Board urged that the reference to “repair” be removed from the definition of “drainage project” contained in the proposed rules.¹⁴²

96. The DNR explained in the SONAR that the definition of “drainage project” in the proposed rules includes “repair” in order to mirror the language in the governing statute. Although the DNR acknowledged that the definition of “drainage project” contained in Chapter 103E does not include “repair,”¹⁴³ the DNR emphasized that Minn. Stat. § 84A.55, subd. 9, more broadly applies to “[drainage] project[s] for the construction, *repair*, or improvement of a public ditch or ditch system.”¹⁴⁴ During the public hearing in Grygla, the DNR explained that its goal after adoption of these rules is

¹⁴⁰ Public Ex. 12; July 25, 2007, Letter from Russell Walker; .Testimony of Russell Walker, Orris Rasmussen, and Lon Aune at Grygla Public Hearing.

¹⁴¹ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C; Public Ex. 12.

¹⁴² July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 12-19.

¹⁴³ Minn. Stat. § 103E.005, subd. 11, defines “drainage project” to mean “a new drainage system, an improvement of a drainage system, an improvement of an outlet, or a lateral.”

¹⁴⁴ Emphasis added.

to apply the criteria to each parcel of state-owned land in advance, rather than waiting for a specific project to be proposed, so that it can provide drainage authorities with that information up front and thereby avoid delays in performance of repair projects.

97. The Administrative Law Judge concludes that the definition of “drainage project” in the proposed rules appropriately encompasses a repair and that such a reference is consistent with Minn. Stat. § 84A.55, subd. 9. Chapter 84A is separate and distinct from Chapter 103E and, in light of differences in the language of each, there is no reason that the definitions of “drainage project” must be identical. The proposed rule has been shown to be needed and reasonable. While the definition of “drainage project” is not defective as proposed, the DNR may wish to consider modifying the language to refer to “a new drainage system, an improvement of a drainage system, an improvement of an outlet, a lateral, a repair, or a redetermination of benefits involving state-owned lands in consolidated conservation areas administered under Minnesota Statutes, chapter 84A, where: . . .” in order to clarify that this rule applies only to state-owned lands located in the con-con areas mentioned in Chapter 84A and avoid any implication that state-owned lands located elsewhere in the State are covered.¹⁴⁵

98. The Aitkin County Board also asserted that a redetermination of benefits should not be included in the definition of “drainage project.” The Board contended that the DNR was not granted rulemaking authority to address redetermination of benefits, and a redetermination does not represent physical work to the ditch system but rather is an administrative process.¹⁴⁶ The Administrative Law Judge finds that the inclusion of redeterminations of benefits in the proposed definition is appropriate and consistent with Minn. Stat. § 84A.55, particularly since redeterminations are frequently made in conjunction with consideration of whether or not to undertake a particular drainage project.

Subpart 12 - Repair

99. Subpart 12 of part 6115.1510 defines "repair" as follows:

“Repair” means to restore all or a part of a drainage system as nearly as practicable to the same condition as originally constructed and subsequently improved, including resloping ditches and leveling waste banks if necessary to prevent further deterioration, realignment to original construction if necessary to restore the effectiveness of the drainage system, and routine operations that may be required to remove obstructions and maintain the efficiency of the drainage system.

100. The Aitkin County Board maintained that the definition set forth in the proposed rules conflicts with the definition of “repair” contained in Minn. Stat.

¹⁴⁵ As discussed above, part 6115.1500 uses this same language in describing the purpose of the proposed rules.

¹⁴⁶ July 16, 2007, Letter from Aitkin County Commissioners, Ex. E.

§ 103E.701, subd. 1. The Board proposed referencing that statute in place of the language proposed by the DNR.¹⁴⁷

101. The SONAR indicates that certain of the definitions in the proposed rules, including the definition of “repair” in subpart 12, stem from statutory definitions contained in chapters 84A, 103E and 103G.¹⁴⁸ The term “repair” is not defined in Chapter 84A or Chapter 103G. However, Minn. Stat. § 103E.701, subd. 1, defines “repair” as follows:

The term "repair," as used in this section, means to restore all or a part of a drainage system as nearly as practicable to the same condition as originally constructed and subsequently improved, including resloping of ditches and leveling of waste banks if necessary to prevent further deterioration, realignment to original construction if necessary to restore the effectiveness of the drainage system, and routine operations that may be required to remove obstructions and maintain the efficiency of the drainage system. *"Repair" also includes: (1) incidental straightening of a tile system resulting from the tile-laying technology used to replace tiles; and (2) replacement of tiles with the next larger size that is readily available, if the original size is not readily available.*¹⁴⁹

102. The definition of “repair” contained in the proposed rules mirrors the first sentence of the definition set forth in Minn. Stat. § 103E.701, subd. 1, but does not include the second sentence of the statutory definition (italicized above). It is possible that the second sentence relating to replacement of tiles is not applicable to state-owned lands in con-con areas, but the DNR did not explain in the SONAR or in its post-hearing submissions why it omitted the second sentence from the definition in the proposed rules. In light of this unexplained omission, the Administrative Law Judge concludes that the DNR has not shown that the definition of “repair” contained in the proposed rules is needed and reasonable. To remedy this defect in the proposed rules, it is suggested that the DNR modify subpart 12 to incorporate the entire definition of “repair” that is set forth in Minn. Stat. § 103E.701, subd. 1. If the language of the definition is modified, it will not result in a substantial change in the rules, but will render them consistent with the definition contained in Chapter 103E, in accordance with the intent of the DNR as expressed in the SONAR.

Proposed Rule Part 6115.1520 – Drainage Projects

103. This portion of the proposed rules describes the procedure to be followed by drainage authorities in notifying the DNR of a proposed project affecting a con-con area; the investigation to be conducted by the Commissioner to determine the project’s positive and/or negative impacts on state-owned lands; and criteria to be considered in making that determination. Each subpart will be discussed separately below.

¹⁴⁷ July 16, 2007 Letter from Aitkin County Commissioners, Ex. C.

¹⁴⁸ SONAR at 10.

¹⁴⁹ Emphasis added.

Subpart 1 - Notification and Documentation

104. Subpart 1 of proposed rule part 6115.1520 establishes procedures for drainage authorities to follow if they wish the Commissioner to consider participating in a drainage project that would have assessments within a consolidated conservation area. The proposed rule requires that the drainage authority notify the Commissioner of the proposed project in writing as soon as practicable, provide a description of the purpose and type of project, submit maps showing the location of the project, and give the Commissioner copies of written documents filed or used in connection with the project as they are available. In the SONAR, the Department indicated that it included this requirement to ensure that a well-documented proposal describing the type, location, and extent of the project is submitted to the Commissioner, since it is in the interest of both the DNR and the drainage authority that the investigation proceeds in a timely manner. The Department noted that this requirement does not significantly differ from what is already required under Chapter 103E for drainage projects outside con-con areas.¹⁵⁰

105. The Aitkin County Board asserted that Chapter 84A.55, subp. 9, does not give the Commissioner authority to adopt rules relating to general ditch system documentation or administrative procedure. The Board argues that the DNR is attempting to “override” more recently-enacted procedures under Chapter 103E that govern proposed and existing ditch systems and projects. It further contends that the DNR lacks authority to create a new process for determining benefits or interfere with the responsibility of the relevant ditch authority to appoint and compensate ditch viewers and render a final order under Chapter 103E.¹⁵¹

106. In response, the DNR again relied upon the language of Minn. Stat. § 84A.55 and the ruling in the *Marshall County* case as supporting the approach taken in the proposed rules.¹⁵² The Department emphasizes that the relevant language in Minn. Stat. § 84A.55, subd. 9, states that the Commissioner may, after investigation, decide to cooperate in “a project for the construction, repair, or improvement of a public ditch or ditch system undertaken by a county or other public agency” if the commissioner finds that the project will benefit the state-owned lands.¹⁵³ In addition, the DNR points out that the Court of Appeals found in the *Marshall County* case that Chapters 103E and 84A do not conflict because 103E merely prescribes how counties are to make ditch assessments and does not give the counties the authority to be the final arbiters of what assessment is appropriate. Moreover, the Court determined that, even if a conflict existed between the two chapters, Chapter 84A would prevail because it is more specific. The Administrative Law Judge concludes that the DNR is authorized to adopt reasonable and necessary procedures to implement Minn. Stat. Chapter 84A. Subpart 1 establishes reasonable requirements for notification and documentation, and has been shown to be needed and reasonable as proposed.

¹⁵⁰ SONAR at 11.

¹⁵¹ July 16, 2007, Letter from Aitkin County Commissioners, Exhibit C.

¹⁵² DNR's July 25, 2007, Comment at 1.

¹⁵³ Emphasis added.

Subpart 2 - Investigation

107. Subpart 2 of this portion of the proposed rules requires that, after receiving notification and documentation, the Commissioner “must complete an investigation to determine whether the proposed drainage project benefits state-owned lands for the purposes they were established.” The rule requires that the Commissioner determine which, if any, state-owned lands are positively impacted and negatively impacted by the proposed drainage project, using the criteria set forth in subparts 3 and 4 of the rule. In the SONAR, the DNR stated that “[i]t is necessary and reasonable to have the commissioner specifically determine positive and negative impacts to show that his decision is neither arbitrary nor capricious.”¹⁵⁴

108. The Aitkin County Board objected to this portion of the proposed rules on similar grounds as it asserted with respect to subpart 1, and urged that the DNR adhere to Chapter 103E rather than adopt separate rules under Chapter 84A.¹⁵⁵

109. The Beltrami and Marshall County Attorneys proposed adding additional language to subpart 2 requiring that the Commissioner’s investigation be completed within 60 days after the Commissioner receives all notification and documentation as required under subpart 1, and that the written results of the investigation be supplied to the drainage authority. They also suggested the addition of a new item C under subpart 2 stating that the Commissioner must determine the net benefits, if any, to the state-owned lands upon which the state will pay assessments for the project and develop a table specifying for each 40-acre parcel the benefits derived from each positive impact and the damages derived from each negative impact. The Red River Watershed Management Board and the Beltrami and Marshall County Attorneys also urged that the Commission be required to provide more specific criteria and explain the methodologies that would be used to determine the benefits and damages.¹⁵⁶

110. Although the Department did not add the 60-day timeline or the suggested new item C to subpart 2, it did (as discussed more fully below) modify part 6115.1540 of the proposed rules (relating to the Commissioner’s determination of benefit and participation) to incorporate a 60-day timeline, and add a new subpart 1a to part 6115.1530 of the proposed rules requiring that the suggested table be developed for each 40-acre parcel for drainage projects considered repairs.¹⁵⁷

111. Subpart 2 establishes the reasonable requirement that the Commissioner conduct an investigation to assess the positive and negative impacts of proposed drainage projects on state-owned lands in con-con areas. The DNR is authorized under Chapter 84A to conduct such investigations and determine benefits to state-owned lands, and the adoption of rules describing the overall scope of the investigation is

¹⁵⁴ SONAR at 11.

¹⁵⁵ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C.

¹⁵⁶ Public Exs. 2, 3 and 4; Testimony of Ron Harnack at Aitkin Public Hearing; Testimony of Tim Faver at Bemidji Public Hearing; Testimony of Michael Williams at Grygla Public Hearing.

¹⁵⁷ DNR’s July 18, 2007, Comment at 3-4.

inherently authorized by the grant of rulemaking authority contained in that statute. Subpart 2 of the proposed rule has been shown to be needed and reasonable as proposed. For purposes of clarity, the DNR may wish to consider modifying the first sentence of the rule to refer to “the purposes for which they were established.” If the Department makes such a modification, it would not result in a substantial change from the rule as originally proposed.

Subpart 3 - Positive Impacts

112. Subpart 3 sets forth criteria the DNR will use to determine when proposed drainage projects positively impact or benefit state-owned lands in con-con areas. The proposed rules specify that positive impacts to state-owned lands occur when a proposed drainage project allows continued or enhanced use of drainage to achieve management purposes as provided in the governing statute. The rule as originally proposed listed four criteria that the Commissioner “may use . . . as evidence that the department uses drainage to achieve a management purpose.”

113. The Department explained this portion of the proposed rules in its SONAR as follows:

This subpart lays out the criteria the department will use to determine when proposed drainage projects positively impact (benefit) state-owned lands. Simple standards are used: 1) Does the department or lessee of state-owned lands use drainage to achieve a specific management purpose for any of the state-owned lands? Items A through D list criteria the department will use to determine whether it or a lessee uses drainage to achieve a management purpose; and 2) on those lands where drainage is used, will the proposed project allow the department to continue to use drainage or enhance its ability to use drainage to achieve a management purpose?¹⁵⁸

114. As explained in the SONAR, the four criteria set forth in items A through D of the rule as originally proposed encompassed (1) situations where the DNR is actively and intentionally using a ditch system to drain state-owned land for agricultural purposes, such as instances in which the DNR maintains lateral ditches or drainage tiles, or uses pumps to assist in dewatering the land; (2) situations where the DNR leases state-owned lands and the lessee outlets water from these lands into a public ditch; (3) situations where the DNR petitions a drainage authority to undertake a drainage project for a repair, improvement, or new ditch construction; and (4) situations where the DNR lowers water levels in impoundments operated exclusively for wildlife management purposes and outlets water into a ditch system.¹⁵⁹

¹⁵⁸ SONAR at 11.

¹⁵⁹ *Id.* at 11-12.

115. In response to comments received during the rulemaking process, the DNR added two further criteria (items E and F) to the proposed rules relating to timber production and wildlife habitat.¹⁶⁰ As finally proposed, subpart 3 would read as follows:

Subp. 3. **Positive impacts.** Positive impacts to state-owned lands occur when a proposed drainage project allows the department or department's lessee to continue to use or enhances its ability to use drainage to achieve management purposes as provided in Minnesota Statutes, section 84A.55. The commissioner may use any one of the following criteria as evidence that the department uses drainage to achieve a management purpose:

- A. the department utilizes a drainage system to outlet water into a public ditch from agricultural cropland it manages;
- B. the department leases the land for commercial purposes such as agriculture, agro-forestry, aquaculture, wild rice paddies, peat mining, or mineral extraction, and the lessee utilizes a drainage system to outlet water into a public ditch from the leased lands;
- C. the department petitions for a drainage project;
- D. the department outlets water from state-owned lands into a public ditch from an impoundment that is designed and used exclusively for wildlife management purposes;
- E. the department determines that timber production is improved by the project; or
- F. the department determines that wildlife habitat is improved by the project.

116. The Aitkin County Board objected to the adoption of the proposed criteria on the grounds that the DNR lacks authority to adopt rules that “disregard the general process or chang[ing] the lines of authority and responsibility with respect to the determination of benefits.” The Board maintained that Chapter 103E controls the determination of benefits and proposed that Minn. Stat. §§ 103E.015, .025, and .315, be followed instead.¹⁶¹ The DNR responded that the proposed rules “are entirely consistent with the authority granted the commissioner in Minn. Stat. 84A.55 and as interpreted by the Minnesota Court of Appeals” in the *Marshall County* case.¹⁶² As discussed fully above, the Administrative Law Judge concludes that the DNR has authority under Chapter 84A to adopt these rules and Chapter 103E is not controlling with respect to state-owned lands in con-con areas.

¹⁶⁰ DNR's July 18, 2007, Comment at 3.

¹⁶¹ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C at 8.

¹⁶² DNR's July 25, 2007, Comment at 1.

117. Many persons commenting on the proposed rules suggested that modifications be made in the criteria set forth in the proposed rules. For example, the Marshall County and Beltrami County Attorneys suggested that seven additional positive impact criteria be added to the proposed rules relating to whether timber production, upland game habitat, or waterfowl game habitat is maintained or improved by the project; the project benefits in any way other state-owned or federal projects outside of the benefited area of the project; the project results in increased management options for state-owned lands; drainage of state-owned lands positively impacts other lands located in the benefited areas or other affected lands; or access to the state-owned lands by the general public is maintained or improved by the project.¹⁶³ They contended that the Legislature has recognized in Minn. Stat. § 103E.005, subd. 27, that benefit to roadways is a public purpose and public value of drainage.¹⁶⁴

118. The Red River Watershed Management Board and the Marshall County Board of Commissioners, Engineer and Auditor objected to the criteria set forth in the proposed rules on the ground that they are too broad and provide too little guidance to the DNR in exercising its discretion. The Red River Watershed Management Board urged that more specific criteria be developed (particularly in addressing impact to wetlands), the reference to “used exclusively for wildlife management purposes” be deleted, and the term “degradation” be defined. The Watershed Management Board also asserted that the phrase “restricts management options” was too vague.¹⁶⁵ The Red Lake Watershed District commented that the impact of drainage on wetlands is confusing and subjective, and indicated that a significant portion of con-con lands are type 1 and type 2 wetlands that require drainage to maintain their function and value to the environment.¹⁶⁶

119. The Aitkin County Board contended that items A and B would create “a major inequity between how private property and state land would be assessed and share in the cost of building of a new ditch, a project or allocation of the costs of routine maintenance and repairs to an existing ditch system.” The Board asserted that the non-renewal of a lease agreement on state land could cause the Commissioner to find that a benefit does not exist one year, even though a benefit might exist in the future. In addition, the Board contended that, unless con-con land currently restricts surface water from leaving its boundaries by the use of dikes and berms, the land uses drainage

¹⁶³ Public Exs. 3, 4; Testimony of Tim Faver at Bemidji Public Hearing and Michael Williams at Grygla Public Hearing.

¹⁶⁴ Public Ex. 5 (Kolb Memorandum). Minn. Stat. § 103E.005, subd. 27, defines “public welfare or public benefit” to include “an act or thing that tends to improve or benefit the general public, either as a whole or as to any particular community or part, including works contemplated by this chapter, that drain or protect roads from overflow, protect property from overflow, or reclaim and render property suitable for cultivation that is normally wet and needing drainage or subject to overflow.”

¹⁶⁵ Public Ex. 2; July 3, 2007, Letter from Marshall County Commissioners; Testimony of Ron Harnack at Aitkin Public Hearing; Testimony of Lon Aune and Scott Peters at Grygla Public Hearing.

¹⁶⁶ Public Ex. 6; Testimony of Myron Jesme at Grygla Public Hearing.

benefit to achieve its purpose, and the rule should reflect that drainage should be deemed to have a positive impact on all such state-owned land.¹⁶⁷

120. The Red River Watershed Management Board suggested that, rather than limiting criteria to the land that is actually leased, it would be more appropriate to consider the state's management purposes or objectives. It contended that the need to track leases and changing lease prices would add confusion and inconsistency to the DNR's determinations. The Watershed also questioned the wording of item D since it is not aware of any impoundments that are designed and used exclusively for wildlife management purposes, and suggested that the language of item D either be clarified or eliminated.¹⁶⁸ Darrold Rodahl similarly suggested that, because many impoundments are now multipurpose, item D be revised to read, "The department outlets water from state-owned lands into a public ditch from an impoundment that is designed and used for wildlife management and/or flood control purposes."¹⁶⁹

121. The Joint County Board contended that the proposed rules merely seek to establish criteria "which evade any responsibility for water management in the Northwest." It suggested that the following four criteria be substituted for those proposed by the DNR: (1) the volume of water contributed by the land owned by the State which the existing systems must manage; (2) the additional costs to the system required by having to manage the additional water which comes from State lands; (3) the contribution of State lands to flood control problems; and (4) the statutory factors applicable to other properties as described in section 103E.025.¹⁷⁰

122. As noted above, the DNR did modify the proposed rules to include criteria relating to improvement of timber production and wildlife habitat, as suggested by several of the commentators. It declined to make the other modifications suggested during the rulemaking process. In its post-hearing comments, the Department indicated that it would be inappropriate to add a criterion relating to whether access to the state-owned lands by the general public is maintained or improved by the project on the grounds that it would be inconsistent if the state was required to pay for ditch grade access it already has while others were simply required to pay for drainage benefits.¹⁷¹ The Department declined to add criteria relating to whether the project benefits in any way other state owned or federal projects outside of the benefited area of the project, whether the project would increase management options for state-owned lands, and whether drainage of state-owned lands would positively impact other lands located in the benefited areas or other affected lands on the grounds that the Commissioner would be allowed to consider these criteria under item C.¹⁷²

¹⁶⁷ *Id.* at 11 and Ex. E at 6.

¹⁶⁸ Public Ex. 2; Testimony of Ron Harnack at Aitkin Public Hearing.

¹⁶⁹ Testimony at Grygla Public Hearing.

¹⁷⁰ July 18, 2007, Submission of Joint County Natural Resources Board at 20-21.

¹⁷¹ DNR's July 18, 2007, Comment at 7.

¹⁷² DNR's July 18, 2007, Comment at 8-9.

123. In its post-hearing comments, the DNR indicated that ditches do not always have a positive impact on timber production and the effects vary based on the depth and width of the ditch and the species of tree involved. The Department noted that, in areas where an open landscape (treeless or low tree density) is the desired management condition, ditches can cause significant negative impacts. The Department also stated that drainage can create significant negative changes to wetland areas and indicated that, “where changes have created forested wetlands, wet meadows/brushlands, or even upland and woodland habitat, the drainage project may be considered a positive impact **only where these habitat types are desired to be maintained or improved as a management objective.**”¹⁷³ The Department stated that, in its view, drainage projects often have a negative impact on waterfowl habitat but can have positive impacts in certain cases. For example, if an impoundment is operated solely for use as a wildlife impoundment, the inflow and outflow of water through drainage systems to the impoundment can have a positive impact.¹⁷⁴

124. The rulemaking authority of the DNR specifically includes establishing “the criteria for determining benefits to state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources.”¹⁷⁵ The Administrative Law Judge concludes that this authority encompasses the adoption of rules pertaining to the criteria that will serve as evidence of the benefit of drainage to parcels of state-owned lands. The Department has shown that it is needed and reasonable to employ the parcel-by-parcel approach to determine benefit that is contemplated by the proposed rules as opposed to a presumption that benefit occurs in particular situations. It also has supported the need and reasonableness of the criteria in the rules as finally proposed by virtue of its statements in the SONAR and comments during and after the public hearings. The criteria are sufficiently specific to provide notice of what matters will be considered by the Commissioner in assessing whether drainage has a positive impact on state-owned lands. The DNR did not specifically respond in its post-hearing submissions to each one of the suggested language modifications made by those commenting on the proposed rules. Although the proposed rules are not rendered defective by virtue of their failure to incorporate all of the suggested language modifications, the DNR is encouraged to continue to consider whether any of these revisions should be made in the proposed rules.

125. The rule as proposed states, “The commissioner may use *any one of the following* criteria as evidence that the department uses drainage to achieve a management purpose” However, neither the SONAR nor the DNR’s comments during and after the hearing provided support for applying only one of the listed criteria to find that drainage is used to achieve a management purposes. And it is entirely possible that more than one of the criteria may be applicable to a particular parcel. Because the Department has not supported the language limiting application to only

¹⁷³ DNR’s July 18, 2007, Comment at 7-8 (emphasis in original).

¹⁷⁴ *Id.* at 8.

¹⁷⁵ Minn. Stat. § 84A.55, subd. 9.

one criterion with an affirmative showing of need and reasonableness, that portion of the proposed rules is defective. To correct this defect, the Department should modify this sentence of the proposed rules to state, “The following criteria are evidence that the department uses drainage to achieve a management purpose” This modification will not render the proposed rule substantially different from the rule as originally proposed.

126. Newly-proposed items E and F were added by the Department in its post-hearing submission, in response to public comment. As proposed, they indicate that there will be evidence that drainage achieves a management purpose if “the department determines that timber production is improved by the project” or if “the department determines that wildlife habitat is improved by the project.” Unlike the other criteria identified in the proposed rules, which are written in an objective fashion, these two criteria merely incorporate a subjective and vague determination by the department concerning whether or not timber production or wildlife habitat is improved by the drainage project. This constitutes a defect in the proposed rules. A rule must establish a reasonably clear policy or standard to control and guide administrative officers so that the rule is carried out by virtue of its own terms and not according to the whim and caprice of the officer.¹⁷⁶ To correct the defect, the Department should delete the phrase “the department determines that” from these two items. The remaining standards, “timber production is improved by the project” and “wildlife habitat is improved by the project,” are sufficiently objective in nature to remedy the defect.

127. With the proposed modifications, subpart 3 establishes reasonable standards for assessing the beneficial impacts of a proposed drainage project. The Department is authorized to conduct such assessments under Minn. Stat. § 84A.55, subd. 9. Subpart 3, as modified in the DNR’s post-hearing submission and as required by the Administrative Law Judge, has been shown to be needed and reasonable. Although the Department is free to consider whether the language of the proposed rules should be further modified, the rule is not rendered unreasonable by virtue of the Department’s failure to incorporate additional criteria suggested by commentators or to revise the language of item D in the manner urged by Mr. Rodahl. The new language proposed by the DNR and suggested by the Administrative Law Judge does not result in a rule that is substantially different from the rule as originally proposed.

Subpart 4 - Negative Impacts

128. Subpart 4 of the proposed rules sets forth impacts that have negative impacts to con-con lands. The proposed standard for negative impacts is when the “drainage project adversely affects the management of the land for its intended purposes.” In applying that general standard, the proposed rules list specific criteria that may be used by the Commissioner as evidence of negative impact. As proposed, subpart 4 states in its entirety as follows:

¹⁷⁶ See, e.g., *Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

Subp. 4. **Negative Impacts.** Negative impacts to state-owned lands occur when a drainage project adversely affects the management of the land for its intended purposes. The commissioner may use any one of the following criteria as evidence that a drainage project negatively impacts state-owned lands. The drainage project:

- A. degrades public waters, public waters wetlands, or wetlands on state-owned lands;
- B. causes direct physical disturbance to rare species or significant natural communities through project activities such as, but not limited to, ditching and depositing soils;
- C. causes an alteration of the hydrology that disturbs rare species, natural communities, or peatland features;
- D. causes an alteration of the hydrology that degrades designated peatland, scientific and natural areas;
- E. restricts management options for state-owned lands; or
- F. results in the reduction or elimination of access to state-owned lands.

129. In its SONAR, the DNR asserted that it is reasonable to evaluate not only the benefits of a drainage project but to determine if a project will have overall negative impacts. The Department indicated that it was likely that there would be circumstances under which “a proposed project would benefit an isolated parcel of state-owned land but cause significant damage to the majority of state-owned lands for the purposes they are managed.” The DNR contended that it also needs to evaluate negative impacts in order to determine whether to cooperate in a project as proposed, cooperate in a project with conditions, or cooperate at all. The Department asserted that “[i]t is necessary for the DNR to assess cumulative negative impacts and determine where they occur, and the local drainage authorities need to know the impacts that will be analyzed for this determination.”¹⁷⁷

130. The DNR fully stated its reasons for the selection of each of the proposed criteria in its SONAR. With respect to item A, the DNR indicated that it manages vast acreages of wetlands for a variety of wetland resource values, including providing habitat for wetland-dependent species and providing flood control benefits to property downstream. The DNR stated that a project that constructs new ditches into undisturbed wetlands or cleans out ditches that have not been cleaned in years would degrade those wetlands. With respect to item B, the SONAR indicated that a proposed drainage project may directly damage or destroy rare plants and plant communities. During ditch repair or cleanout, the SONAR noted that spoil banks are created on land adjacent to the ditch that include sediments from the ditch. The DNR indicated that it is

¹⁷⁷ SONAR at 12.

reasonable to conclude that rare peatland plant species growing adjacent to a ditch will be affected by construction and ditch spoil. In addition, any rare plant community in the ditch alignment would be damaged or destroyed where construction of a new ditch is proposed. With respect to item C, the SONAR indicates that damage to wetland communities occurs when a drainage project disrupts the water regime that sustains the wetland. The Department stated that cleaning out a ditch can lower the water table adjacent to the ditch and negatively affect rare species and plant communities growing next to the ditch, and placement of spoil along a ditch can block lateral flow and cause unwanted flooding of rare plants and wetland plant communities. With respect to item D, the SONAR indicated that peatland ecosystems depend on water levels, water chemistry, and unobstructed water movements, and stated that it is critical to maintain an unimpeded hydrologic regime around and within peatland Scientific and Natural Areas (SNAs). The DNR asserted that Minn. Stat. § 84.035, subd. 5(a)(1) protects peatland SNAs from new ditch construction and prevents a cleanout of existing ditches. Finally, with respect to items E and F, the DNR indicated in the SONAR that the state operates some impoundments on state-owned lands for dual purposes (for example, partly to benefit waterfowl and other wildlife and partly for flood control for farmlands and cities located downstream), and stated that high water levels often compromise benefits to wildlife habitat. As a result, the SONAR stated that the flood reduction benefits provided by the impoundments restrict the DNR's ability to manage the impoundments for wildlife benefits. The DNR indicated that "[i]t would be unreasonable to expect the department to pay assessments to drainage authorities for land within and upstream of these impoundments because of the frequent loss of wildlife benefits and because of the significant monetary value the lands already provide to the ditch systems in terms of stored water that other lands on the ditch systems do not provide."¹⁷⁸

131. Marshall County asserted that the criteria listed in the proposed rules to determine negative impacts reflects an attempt by DNR to try to "overturn express provisions of statute by associating possible negative impacts with the maintenance or repair of public drainage systems." The County argued that this approach is in conflict with Minn. Stat. § 103G.225.¹⁷⁹ The Red River Watershed Management Board objected to the proposed negative criteria as too vague and urged the DNR to more fully describe each individual standard. In particular, the Watershed asked for a delineation of the specific criteria or methodologies that will be used to determine if degradation of public waters and wetlands has occurred; inclusion of a list of rare or endangered species; additional definitions of "natural communities," "significant natural communities," and "disturbs" as used in the rules; and clarification of what is mean by "restricts management options" and "reduction or elimination of access to state-owned lands."¹⁸⁰

¹⁷⁸ SONAR at 12-13.

¹⁷⁹ Public Ex. 5 (Kolb Memorandum). Minn. Stat. § 103G.225 states, "If the state owns public waters wetlands on or adjacent to existing public drainage systems, the state shall consider the use of the public waters wetlands as part of the drainage system. If public waters wetlands interfere with or prevent the authorized functioning of the public drainage system, the state shall provide for the necessary work to allow for proper use and maintenance of the drainage system while still preserving the public waters wetlands.

¹⁸⁰ Public Ex. 2.

The Aitkin County Board also objected to the adoption of the proposed negative impact criteria, asserting that the rules are inconsistent with Chapter 103E, fail to give appropriate consideration to the concept of public welfare or public benefit, and are written with a bias toward finding net negative impact. The Board contended that “physical disturbance to rare species or significant natural communities” that occurs within the right-of-way of the ditch cannot be considered to be a negative impact “since the sole purpose of this corridor is for public drainage infrastructure [under Chapter 103E].” The Board noted that it is reasonable to include physical disturbance beyond the corridor of the ditch right-of-way as a potential negative impact that might give rise to a finding that damage will occur, and provide compensation for that damage.”¹⁸¹

132. In its post-hearing submission, the DNR responded to some of these comments by giving examples of physical disturbances that may directly damage or destroy rare plants and plant communities, such as spoil from ditch repair or clean-out being cast on top of the plants and construction equipment driving over such plants and damaging or destroying them.¹⁸² The Department did not respond to some of the questions raised, such as what was meant by “rare or endangered species” and “significant natural communities.”

133. Subpart 4 of the rule as proposed states, “The commissioner may use *any one of the following* criteria as evidence that a drainage project negatively impacts state-owned lands” This language is defective for the same reasons discussed above with respect to Subpart 3. Neither the SONAR nor the DNR’s comments during and after the hearing provided support for applying only one of the listed criteria to find that a drainage project negatively affects state-owned lands, and it is conceivable that more than one of the listed criteria may be applicable to a particular parcel. Because the Department has not supported the language limiting the Commissioner to applying only one criterion with an affirmative showing of need and reasonableness, that portion of the proposed rules is defective. To correct this defect, the Department should modify this sentence of the proposed rules to state, “The following criteria are evidence that a drainage project negatively impacts state-owned lands” This modification will not render the proposed rule substantially different from the rule as originally proposed.

134. The Administrative Law Judge concludes that, as modified, subpart 4 establishes reasonable criteria for assessing negative impacts arising from a proposed drainage project. The DNR provided adequate support for each of the criteria it identified in the SONAR and in its comments during and after the hearing. The criteria are sufficiently specific to provide notice to affected parties of what the DNR will consider as evidence of negative impact. The approach and criteria reflected in the proposed rules are within the scope of Chapter 84A and are not prohibited by the provisions of Chapters 103E or 103G. While the proposed rules are not rendered defective by their failure to more fully describe what was meant by the terms “rare or endangered species” and “significant natural communities,” the DNR is encouraged to consider incorporating in the rules a reference to an appropriate definition or list to

¹⁸¹ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C.

¹⁸² DNR’s July 18, 2007, Comment at 6.

assist members of the public in understanding the rules. Such a modification to the proposed rules would serve to clarify the terms used in the rules and would not constitute a substantial change.

Proposed Rule Part 6115.1530 – Determining Benefit and Participation

135. Proposed rule 6115.1530 establishes the process for the Commissioner to follow in determining whether a drainage project benefits state-owned land and whether to participate in the project. Subpart 1 establishes the general method for making the determination. In response to comments, the DNR added a new subpart 1a pertaining to the Commissioner’s determination for drainage projects considered repairs. Subpart 2 provides an exception for “routine” repairs. Each subpart will be discussed separately.

Subpart 1 – Commissioner’s Determination

136. Subpart 1 requires that, following the investigation conducted under part 6115.1520, the Commissioner determine whether the drainage project benefits state-owned lands and whether to participate in the project. The proposed rule specifies that, in making the determination, the Commissioner shall evaluate state-owned lands on a parcel-by-parcel basis, with each parcel consisting of no more than 40 acres. Subpart 1 of the proposed rule goes on to state:

A drainage project benefits a parcel of state-owned land only when the investigation shows that the positive impacts outweigh the negative impacts to that parcel of state-owned land. If the commissioner determines the project benefits state-owned lands, the commissioner may participate in the project. Having determined to participate, the commissioner shall authorize the imposition of assessments for the project on the lands in any amounts the commissioner determines or may make lump sum contributions to the county or other public funds established for the payment of the cost of the project. The commissioner may also set conditions to modify the project before approving or joining a petition.

137. In support of this portion of the proposed rules, the DNR indicated in the SONAR that it is necessary and reasonable to require the Commissioner to use the criteria in the rules to determine whether the positive impacts of the proposed project outweigh the negative impacts in order to arrive at a determination of benefits and a decision regarding State participation. The DNR stated that use of the 40-acre parcel standard is reasonable because “that is the historic and current standard used throughout Minnesota’s drainage laws.” The DNR also asserted that it is reasonable and necessary that the Commissioner have the discretion to impose conditions on the project that would mitigate or offset some or all of the negative impacts because, “[w]ithout this discretion, the commissioner would face an all-or-nothing determination

every time a drainage project is proposed that would affect state-owned lands within con-con areas.”¹⁸³ With respect to the standards set forth in the rule, the DNR stated:

The criteria set forth in the proposed rule provide the commissioner with the flexibility to consider a number of impacts, both positive and negative, from a proposed drainage project affecting state-owned con-con lands. The rules enable the commissioner to balance these impacts *and make a determination as to benefits that is demonstrably neither arbitrary nor capricious*. Additionally, the rules provide the commissioner with the flexibility to set conditions to modify a proposed project if it [is] necessary to ensure that the project will benefit state-owned con-con lands.¹⁸⁴

138. The Marshall County Board, the Marshall County Auditor, the Aitkin County Board, the Red River Watershed Management Board, and the Joint County Board objected to the failure of the proposed rules to specify any timelines for action by the Commissioner. They contended that delays in the issuance of the Commissioner’s determinations will lead to delays in repair work and, ultimately, damage to property affected by particular drainage ditches. The Red River Watershed Management Board emphasized that timeliness in repairing a drainage system can make the difference between crop failure and crop success and can significantly reduce flood damages to roads, homes, machinery, buildings, and animals. The Joint County Board noted that the failure of the proposed rules to set any time limits was of considerable concern in light of the DNR’s “long history of delay in matters of this kind.”¹⁸⁵ In response to concerns regarding delays in repairs that could arise from the time needed for participation determinations, the DNR committed to a 60-day response time for routine ditch repairs over \$20,000 (see discussion of part 6115.1540 starting at Finding 158 below). The DNR proposed that the language of the first sentence of subpart 1 be modified to explicitly exclude drainage projects classified as repairs from this subpart, and added a new subpart 1a relating to the Commissioner’s determination for repairs. The new subpart 1a is discussed more fully below.

139. The Marshall County Board, the Red River Watershed Management Board, the Minnesota Viewers Association, and many members of the public maintained that the rule should contain more specific criteria and explain the methodologies by which the DNR will determine the value of the benefits and detriments associated with a particular drainage project. These commentators maintained that the absence of such information in the rules results in the potential for arbitrary determinations.¹⁸⁶

¹⁸³ SONAR at 13 (citing Minn. Stat. §§ 103E.005, subd. 19; 103E.202, 103E.212, 103E.285, subd. 6, and 103E.321).

¹⁸⁴ SONAR at 8 (emphasis added).

¹⁸⁵ Public Exs. 2, 5; July 3, 2007, Letter from Marshall County Commissioners; July 16, 2007, Letter from Aitkin County Commissioners, Ex. C; July 17, 2007, Letter from Scott Peters and attached meeting minutes; Testimony of Ron Harnack at Aitkin Public Hearing; July 18, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 5.

¹⁸⁶ See, e.g., July 3, 2007, Letter from Marshall County Board; July 2, 2007, Letter from Ron Ringquist; Public Ex. 2.

140. The Marshall County Attorney, the Marshall County Board of Commissioners, the Marshall County Auditor, and the Beltrami County Attorney also objected to the use of “may” in the proposed rule language stating that, “If the commissioner determines the project benefits state-owned lands, the commissioner may participate in the project. They recommended that the wording be changed to “shall” in order to ensure accountability and avoid any possibility that the DNR would refuse to participate in paying for drainage projects or repairs even though the project was found to benefit state-owned lands.¹⁸⁷

141. In response to the concerns about the lack of language requiring participation when the Commissioner finds an overall net benefit to state-owned lands, the DNR stated in its post-hearing submissions:

To determine whether the commissioner will participate in improvement projects or new drainage projects, the commissioner will review each project and conduct a site specific investigation to determine if there is a net positive impact to that state-owned lands parcel resulting from the proposed project. If there is a net positive impact to that state-owned parcel, the commissioner *will participate* in the project.¹⁸⁸

142. The Administrative Law Judge finds that the language contained in subpart 1 as proposed would potentially allow the Commissioner to choose *not* to participate in a project even after a determination was made that the drainage project would have a net positive impact on state-owned lands. The DNR has not offered any rationale to support such an outcome. Rather, the statements that the DNR has made with respect to this rule provision suggest that the Department *will* participate in a project if there is a net positive impact to that state-owned parcel. Accordingly, the Administrative Law Judge finds that the language of the rule is not only lacking support in the rulemaking record but contrary to the expressed intent of the DNR. This constitutes a defect in the proposed rule. To cure this defect and to render the language of the rule consistent with the DNR’s stated intent, modifications should be made in the language of the rule to eliminate the unfettered discretion and ensure that participation by the state shall be deemed to be appropriate when the drainage project results in a net benefit to state-owned lands. To remedy this defect, the DNR should modify the fourth sentence of subpart 1 of the proposed rules to state, “Where the commissioner determines that the project results in a net benefit to state-owned lands, the commissioner shall participate in the project.”

143. The Aitkin County Board, the Marshall County Board, the Marshall County Engineer, and the Red River Watershed Management Board also challenged the propriety of the last sentence of proposed subpart 1, which states that “[t]he commissioner may also set conditions to modify the project before approving or joining

¹⁸⁷ Public Exs. 3 and 4; July 3, 2007, Letter from Marshall County Board of Commissioners; Testimony of Tim Faver at Bemidji Public Hearing; Testimony of Michael Williams and Scott Peters at Grygla Public Hearing. See *also* Testimony of Dan Sauve at Bemidji Public Hearing.

¹⁸⁸ DNR’s July 18, 2007, Comment at 6.

a petition.” They expressed concerns that this language implies that the Commissioner must approve projects for them to go forward, and asserted that the DNR does not have authority under Chapter 84A to impose conditions on a proposed drainage project or stop the project.¹⁸⁹

144. Minn. Stat. § 84A.55, subd. 9, expressly authorizes the Commissioner to “cooperate in the project by joining in the petition for the project or consenting to or approving it *on any conditions the commissioner determines.*” The statute thus gives the Commissioner authority to decide to approve state participation in the project subject to certain conditions being met. The SONAR indicates that this language was included in the proposed rule in order to give the Commissioner the “flexibility to set conditions to modify a proposed project if it [is] necessary to ensure that the project will benefit state-owned con-con lands.”¹⁹⁰ The DNR further indicated in its SONAR that the imposition of conditions was not intended to act as a veto on a proposed drainage project. Rather, the proposed rule was designed to give the Commissioner “the discretion to impose conditions on the project that would mitigate or offset some or all of the negative impacts.” The DNR noted that, “without this discretion, the commissioner would face an all-or-nothing determination every time a drainage project is proposed that would affect state-owned lands within con-con areas.”¹⁹¹

145. During the Grygla Public Hearing, the DNR Panel acknowledged that Minn. Stat. § 84A.55, subd. 12, prevents the DNR from physically stopping or impairing a drainage project. That statute specifies that “[n]othing shall be done under this section that will interfere with the operation of ditches or drainage systems existing in any game preserve, area, or project . . . or damage or destroy any existing road or highway in it, so far as constructed, improved, or maintained by any governmental subdivision or public agency or person other than the commissioner, unless the right to them is first acquired by the commissioner by purchase or condemnation, upon payment of just compensation to the political subdivision, public agency, or person affected and damaged.”

146. The language of the rule provision relating to the Commissioner’s authority to “set conditions to modify the project before approving or joining a petition” is within the authority granted to the Commissioner by Minn. Stat. § 84A.55, subd. 9. That statute expressly acknowledges that the Commissioner “may cooperate in the project by joining in the petition for the project or consenting to or approving it *on any conditions the commissioner determines.*”¹⁹² While the language in the proposed rules has not been shown to be defective, the Administrative Law Judge recommends that the DNR consider modifying the language of the rule to more closely track the language of the statute and the expression of intent set forth in the SONAR and provide additional

¹⁸⁹ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C at 14; July 3, 2007, Letter from Marshall County Board of Commissioners; Public Exs. 2, 5; Testimony of Lon Aune at Grygla Public Hearing.

¹⁹⁰ SONAR at 8.

¹⁹¹ SONAR at 13.

¹⁹² Emphasis added.

guidance concerning the reasons for the imposition of conditions. This could be done by stating, “Before cooperating in a project by joining in the petition or consenting to or approving it, the Commissioner may identify conditions that must be satisfied or modifications that must be made in the proposed project if such conditions or modifications are necessary to ensure that the project will benefit state-owned lands in con-con areas.” If the DNR chooses to make this modification in the proposed rules, it will not render the rules substantially different from the rules as originally proposed.

147. Subpart 1, with the modifications suggested by the Administrative Law Judge, has been shown to be needed and reasonable. The language suggested by the Judge to cure the defect does not result in a rule that is substantially different from the rule as initially proposed.

Subpart 1a – Commissioner’s Determination for Repairs

148. The Aitkin County Board, Russell Walker (Roseau County District 4 Commissioner), the Joint County Board, Bruce Hasbargen (Public Works Director for Lake of the Woods County), Carol Kofstad, and a number of township officers urged that the proposed determination of benefits not extend to repair projects.¹⁹³ The commentators expressed concern that the benefit determination process would paralyze needed repair work.¹⁹⁴ As discussed above, the Administrative Law Judge finds that the DNR is authorized by Chapter 84A to investigate and determine whether the State will participate in repair projects affecting state-owned lands in con-con areas.

149. In response to the comments made during the rulemaking process with respect to repair projects, the DNR proposed in its post-hearing submission that a new subpart 1a be added to the proposed rules. The new subpart 1a would state as follows:

Subp. 1a. **Commissioner’s determination for repairs.** Following the investigation under part 6115.1520, for drainage projects considered repairs, the commissioner must determine whether the repair project benefits state-owned lands and whether to participate in the project. In making the determination the commissioner, following consultation with drainage authorities, shall develop a table that identifies the benefits for each 40 acre parcel. A repair project benefits a parcel of state-owned land only when the investigation shows that the positive impacts outweigh the negative impacts to that parcel of state-owned land. If the commissioner determines the project benefits state-owned lands, the commissioner may participate in the project. Having determined to participate, the commissioner shall authorize the imposition of assessments for the project on the lands in any amounts the commissioner determines or may make lump sum contributions to the

¹⁹³ Public Ex. 12; Consolidated Conservation Joint County Natural Resources Board Post Hearing Submission at 16-19; July 3, 2007, Letter from Bruce Hasbargen; July 12, 2007, Letter from Carol Kofstad.

¹⁹⁴ Letter from Russell Walker; July 16, 2007, Letter from Aitkin County Commissioners, Exhibit C.

county or other public funds established for the payment of the cost of the project. The commissioner may also set conditions to modify the project before approving or joining a petition.

150. The new language proposed by the DNR addresses some of the concerns identified by commentators, particularly regarding preparation of a table that identifies benefits and the need for consultation with drainage authorities. However, the fourth sentence of subpart 1a suffers from the same defect discussed above with respect to subpart 1, since it would potentially allow the Commissioner to choose *not* to participate in a repair project even after a determination was made that the project would have a net positive impact on state-owned lands. This approach lacks support in the rulemaking record and is contrary to the DNR's statements that it *will* participate in a project if there is a net positive impact to that state-owned parcel. Accordingly, the Administrative Law Judge finds that the language of the rule is not only lacking support in the rulemaking record but contrary to the expressed intent of the DNR. This constitutes a defect in the proposed rule. This defect can be corrected by substituting the following sentence for the third sentence of the proposed rules: "Where the commissioner determines that the project results in a net benefit to state-owned lands, the commissioner shall participate in the project."

151. As noted above with respect to subpart 1, while the language relating to the Commissioner's authority to "set conditions to modify the project before approving or joining a petition" is within the authority granted to the Commissioner by Minn. Stat. § 84A.55. subd. 9, and is not defective, the Administrative Law Judge recommends that the DNR consider modifying the language of the rule to more closely track the language of the statute and the expression of intent set forth in the SONAR and also provide additional guidance concerning the reasons for the imposition of conditions. This could be done by stating, "Before cooperating in a project by joining in the petition or consenting to or approving it, the Commissioner may identify conditions that must be satisfied or modifications that must be made in the proposed project if such conditions or modifications are necessary to ensure that the project will benefit state-owned lands in con-con areas." If the DNR chooses to make this modification in the proposed rules, it will not render the rules substantially different from the rules as originally proposed.

152. Subpart 1a, with the suggested modifications, has been shown to be both needed and reasonable. The new language does not constitute a substantial change from the rules as initially proposed.

Subpart 2 – Routine Repair Exception

153. Subpart 2 of the proposed rules establishes an exception for certain repair projects to the general rule that the Commissioner must investigate every proposed drainage project. The proposed subpart states:

Subp. 2. **Routine repair exception.** If a drainage authority's notification and documentation made under part 6115.1520, subpart 1, shows that the total cost of a proposed drainage repair under Minnesota Statutes, section

103E.705, is less than \$20,000 and the commissioner has previously determined the benefits to the state-owned lands within that drainage system, the commissioner may, without investigation, authorize the imposition of assessments for the proposed repair proportionate to the overall benefits to the state-owned lands as previously determined by the commissioner. If the commissioner authorizes assessments under this subpart, the commissioner need not issue the findings and report required under part 6115.1540.

154. The Aitkin County Board objected to this provision because, in its view, Minn. Stat. § 84A.55, subd. 9, does not grant the DNR rulemaking authority with respect to the ditch authority's responsibility to execute routine repairs and maintenance of an established ditch system and assess costs for such repairs and maintenance. The Board also asserted that a delay in conducting ditch repair and maintenance can result in serious danger to public safety and damage to public and private property due to preventable flooding.¹⁹⁵ As discussed fully above, the Administrative Law Judge finds that the authority of the DNR under Minn. Stat. § 84A.55, subd. 9, does extend to repair projects.

155. Subpart 2 sets clear standards for the process that will apply to repairs that fall within the definition of routine repairs. Although the language of the rule is not defective as proposed, the DNR may wish to consider clarifying it by including an additional statement that any repair project that is not authorized for assessment under subpart 2 will be assessed for participation under subpart 1a. Should the DNR wish to make such a clarification, the Administrative Law Judge suggests the addition of the following language:

Where the commissioner does not authorize an assessment for a repair under this subpart, the commissioner shall follow the procedure set forth in part 6115.1530, subpart 1a.

156. Subpart 2, as proposed, has been shown to be needed and reasonable. Should the DNR choose to adopt the suggested language to further clarify the rule, such a change would not constitute a substantial change from the rules as initially proposed.

Proposed Rule Part 6115.1540 – Findings and Report

157. Proposed rule 6115.1540 requires the DNR to provide findings to the drainage authority following the investigation conducted under part 6115.1520. The rule requires that the DNR must “convey the results of the investigation,” “state whether the commissioner will participate in the project,” “identify which state-owned lands are benefited and which are not,” and “set forth any conditions the commissioner attaches to the project and the amount of the contribution if the commissioner will participate.” With respect to this portion of the proposed rules, the SONAR merely states, “It is

¹⁹⁵ July 16, 2007, Letter from Aitkin County Commissioners, Ex. C at 14-15.

reasonable for the drainage authority to receive a timely report on a proposed project. The report will contain the results of the investigation, the commissioner's determination whether or not to participate, the dollar contribution the department will make, if any, and any conditions attached to the project."¹⁹⁶

158. The Joint County Board argued that Chapter 84A.55, subd. 9, does not amount to a grant of power to the DNR Commissioner or staff to make decisions in an arbitrary, capricious, or unfair manner. "whenever and whatever the Commissioner (or the staff) wants to decide."¹⁹⁷ The Lake of the Woods County Board of Commissioners asserted that this portion of the rule should be modified to assure procedural fairness by requiring that the decision be issued promptly and be based upon the evidence and the record.¹⁹⁸ The Marshall County Board, Marshall County Attorney, Minnesota Viewers Association, Red River Watershed Management Board, Lake of the Woods County Board, and Beltrami County Attorney also objected to the proposed rule because it lacked any timeline for the DNR decision to be issued. The Red River Watershed Management Board recommended that the proposed rules state that the Commissioner's findings will include background information and methodologies used in reaching the conclusions in the findings. The Marshall and Beltrami County Attorneys also urged that the proposed rules include a requirement that the findings issued by the Commissioner expressly indicate whether the state-owned lands are determined to be benefited.¹⁹⁹

159. In response to these concerns, the DNR proposed a modification in the language of this subpart of the proposed rules in its post-hearing submission.²⁰⁰ The proposed rule, as modified, would generally set a 60-day time period for the issuance of the Commissioner's findings and report. The time period would begin running upon completion of the table of parcels (referenced in new subpart 1a of 6115.1530) and receipt of all necessary notification and documentation. As modified, this subpart would state:

Upon completion of the table described in part 6115.1530, subp. 1a for repairs, and following the investigation under part 6115.1520, the commissioner must provide the drainage authority with findings within 60 days after the commissioner has received all notifications and documentation required under 6115.1520, subp. 1. For repairs over \$20,000, and upon completion of the table described in part 6115.1530, subp. 1a, the commissioner must provide the drainage authority with findings within 60 days. The findings must convey the results of the

¹⁹⁶ SONAR at 14.

¹⁹⁷ July 25, 2007, Submission of Consolidated Conservation Joint County Natural Resources Board at 12.

¹⁹⁸ July 11, 2007, Letter from Todd Beckel.

¹⁹⁹ *Id.*; July 3, 2007, Letter from Marshall County Board; July 2, 2007, Letter from Minnesota Viewers Association; Public Exs. 2, 3, 4; Testimony of Ron Harnack at Aitkin Public Hearing; Testimony of Tim Faver at Bemidji Public Hearing; Testimony of Michael Williams at Grygla Public Hearing.

²⁰⁰ DNR's July 18, 2007 Comment at 3-4, 6.

investigation and state whether the commissioner will participate in the project. The findings must identify which state-owned lands are benefited and which are not and set forth any conditions the commissioner attaches to the project and the amount of the contribution if the commissioner will participate.

160. Part 6115.1540 of the proposed rules, as modified by the DNR after the hearing, has been shown to be needed and reasonable. The 60-day timeline proposed by DNR is a reasonable response to the concerns expressed by those who filed comments on the proposed rules. The issuance of findings and determinations by the Commissioner is consistent with the grant of authority contained in Minn. Stat. § 84A.55, subd. 9.

161. The proposed rules do not include any express requirement that the Commissioner's Findings and Report set forth the Commissioner's reasons for making the particular decisions that are included in the report. The DNR indicated in the SONAR that the proposed rules would "enable the commissioner to balance these [positive and negative] impacts and make a determination as to benefits *that is demonstrably neither arbitrary nor capricious*."²⁰¹ As the U.S. Supreme Court has noted, such a showing typically requires that the basis for the agency's action "must be set forth with such clarity as to be understandable" so that the reviewing court is not "compelled to guess at the theory underlying the agency's action."²⁰² Similarly, the Fifth Circuit Court of Appeals has held that an agency's action may be reversed "if it acted arbitrarily or capriciously in adopting its interpretation by failing to give a reasonable explanation for how it reached its decision."²⁰³ The Minnesota Supreme Court has noted that appellate courts are guided in their review of the decisions of administrative agencies "by the principle that the agency's conclusions are not arbitrary and capricious so long as a 'rational connection between the facts found and the choice made' has been articulated."²⁰⁴

162. The proposed rule does require the issuance of "findings" and the "results of the investigation," along with an identification of which state-owned lands were found to be benefited and which were not. Because this language could reasonably be construed to include the reasons why such findings, results, and benefit determinations were made, the language of the proposed rule is not defective. However, in light of the concerns expressed by the affected drainage authorities and property owners, and in keeping with the DNR's statement that it wishes to arrive at a decision that it can demonstrate is not arbitrary or capricious, the DNR may wish to consider modifying the language of this rule part to require inclusion of the reasons for the decisions reached

²⁰¹ SONAR at 8.

²⁰² *SEC v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947).

²⁰³ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999); accord: *Cassell and Kelley Communications, Inc. v. FCC*, 154 F.3d 478 (D.C. Cir. 1998) (a rational explanation is required to support agency decision-making).

²⁰⁴ *In the Matter of the Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264 (Minn. 2001) (citation omitted).

by the Commissioner. This could be accomplished by modifying the second sentence to read, "The findings must convey the results of the investigation, state whether the commissioner will participate in the project, and state the reasons for the commissioner's decisions." If the DNR chooses to make this modification, it would not result in a rule that is substantially different than the rule as originally proposed.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Natural Resources gave proper notice in this matter.
2. The DNR has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The DNR has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).
4. The DNR has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii), except as noted in Findings 102, 125, 126, 133, 142, and 150.
5. The additions and amendments to the proposed rules suggested by the DNR after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.
6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4, as noted in Findings 102, 125, 126, 133, 142, and 150.
7. Due to Conclusions 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.
8. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.
9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the DNR from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

Dated: September 17, 2007.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Recorded: Digitally Recorded, No Transcript Prepared