

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Rules of
the State Department of Natural
Resources Relating to Aquatic Plant
Management, Minnesota Rules Chapter
6280

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Richard C. Luis conducted a series of hearings concerning rules proposed by the Minnesota Department of Natural Resources (DNR or Department) regarding aquatic plant management. On November 3, 2008, hearings were held at 2:00 p.m. and 6:30 p.m. at the University of Minnesota Southern Research Station and Outreach Center, 35838 120th Street, Waseca, Minnesota. On November 5, 2008, hearings were held at 2:00 p.m. and 6:30 p.m. at Camp Ripley Education Center, 15000 Highway 115, Little Falls, Minnesota. On November 6, 2008, hearings were held at 2:00 p.m. and 6:30 p.m. at Bigwood Event Center, 921 Western Avenue, Fergus Falls, Minnesota. On November 7, 2008, hearings were held at 2:00 p.m. and 6:30 p.m. at the Days Inn Maplewood Hotel and Conference Center, 3030 Southlawn Drive, Maplewood, 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 at the hearings on November 3, 2008, were Steve Hirsch, Acting Director; Steve Enger, Statewide Coordinator for Aquatic Plant Management Program; Ray Valley, Senior Research Biologist, Division of

¹ Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2008 edition, and all references to Minnesota Rules are to the 2007 edition.)

Fisheries and Wildlife; and Jacquelyn Bacigalupi, Fishery and Habitat Specialist, Division of Fisheries and Wildlife. On November 5, 2008, the DNR's panel members were Steve Hirsch; Steve Enger; Paul Radomski, Research Biologist; and Wayne Mueller, Aquatic Plant Management Specialist. On November 6, 2008, the DNR's panel members were Steve Hirsch; Steve Enger; Paul Radomski, and Leslie George, Aquatic Plant Management Specialist. On November 7, 2008, the DNR's panel members were Steve Hirsch; Steve Enger; Assistant Attorney General David Iverson; Ray Valley; and Tim Ohmann, Fishery and Habitat Specialist. Approximately 10 people attended the hearings in Waseca; 25 in Little Falls; 30 in Fergus Falls; and more than 100 in Maplewood.

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 (December 1, 2008), 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 (December 8, 2008), 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 December 8, 2008.

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 DNR takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the DNR 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.

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. The Department proposes amendments to rules governing aquatic plants and nuisances. Aquatic plants growing in public waters are owned by the state, and their control has been regulated by the DNR since the 1940s.² The Aquatic Plant Management (APM) statutes and rules allow control of aquatic vegetation, primarily to facilitate riparian landowner access to open water. The statutes and rules specify limits on the amount and type of vegetation control allowed and conditions under which permits may be issued for vegetation control.

2. In recent years, invasive aquatic plants have posed new management challenges. Minnesota's lakes have recently been impacted by increased shoreline development. The number of permits issued to control aquatic plants has risen continually since the early 1990s. In 1992, the DNR issued about 1,100 APM permits; in 2004, the Department issued 3,600 permits; in 2007, the DNR issued 4,600 permits.³

3. Minnesota's lakes have also been impacted by invasive species, particularly Eurasian watermilfoil and curlyleaf pondweed. These species can out-compete native aquatic plants and form mats on the water surface that hinder recreational use. Curlyleaf pondweed dies or senesces in early summer, after which increases in phosphorous and algae blooms may occur.⁴

4. Large-scale control of invasive aquatic plants is a developing science and the results vary considerably between lakes. Lake-wide chemical control does not eradicate invasive aquatic plants, but has temporarily reduced the abundance of Eurasian watermilfoil and increased native plants in some moderately fertile lakes.⁵ Chemical control has led to algae blooms and decreased water clarity with no increase in native aquatic plants in fertile lakes that had sparse populations of native aquatic plants prior to the chemical treatment. Even in cases where lake-wide chemical control has been successful, repeated treatments have been necessary, usually within one to three years, to keep Eurasian watermilfoil at a low level.⁶

5. The loss of aquatic plants can affect the entire lake ecosystem. The cumulative loss of aquatic plants coupled with nutrient loading can lead to drastic ecological changes in lakes characterized by turbid water, little to no rooted aquatic plant growth, and disturbance-tolerant fish species.⁷ Lakes in this state of ecological distress are common in agricultural regions of southwest Minnesota and are becoming increasingly common in the Twin Cities metropolitan area. Surveys have documented

² Minn. Stat. § 84.091, subd. 1.

³ Statement of Need and Reasonableness (SONAR), p. 10.

⁴ SONAR, p. 10.

⁵ SONAR, p. 10.

⁶ SONAR, p. 11.

⁷ SONAR, p. 9.

functional extirpations of certain fish species in several metro-area lakes that have likely suffered aquatic plant habitat degradation.⁸ Near-shore aquatic plants, which are the most frequent targets of control efforts by shoreline property owners, are particularly important as habitat for young or small fish.⁹

6. Many species of birds and mammals are also dependent on aquatic plants for food and nesting sites.¹⁰

7. Accordingly, APM issues have become increasingly complex, and balancing the desires of shoreline property owners with the need to protect aquatic habitat has become more challenging.

8. In 2002, the Legislature mandated that the DNR develop a proposal to review its APM Program. The DNR developed this proposal and subsequently conducted an extensive review of the program over the past two years. The review resulted in a number of recommendations, which prompted the DNR to propose changes to the APM rules.

9. The proposed rules address a number of APM issues, including: which APM activities require a permit; prohibited methods of aquatic plant control; criteria and conditions for APM permits; aquatic plant control restrictions; APM permit application requirements; APM permit revocation; variances for APM permits; commercial harvest of aquatic plants; and lake vegetation management plans (LVMP).

II. Compliance with Procedural Rulemaking Requirements

10. On December 19, 2005, the DNR published in the State Register a Request for Comments on possible amendments to rules governing aquatic plants and nuisances. The notice indicated that the DNR had not yet prepared a draft of the proposed rule and requested comments on proposed criteria.¹¹

11. On August 28, 2008, 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 dated September 3, 2008, the Administrative Law Judge approved the additional notice plan.¹²

12. 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

⁸ SONAR, p. 9.

⁹ SONAR, p. 9.

¹⁰ SONAR, p. 9.

¹¹ 30 SR 651 (Dec. 19, 2005); DNR Ex. 1.

¹² Ex. 7.

April 21, 2008. Executive Budget Officer Marsha Battles-Jenks concluded that the proposed rules would have “minimal fiscal impact on local units of government.”¹³

13. On September 23, 2008, 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.¹⁴ 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.

14. At the hearing in Waseca, Minnesota, on November 3, 2008, 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 December 19, 2005;¹⁵
- B. the proposed rules dated August 6, 2008, including the Revisor’s approval;¹⁶
- C. the Department’s Statement of Need and Reasonableness (SONAR);¹⁷
- D. a letter dated September 3, 2008, noting that the Administrative Law Judge had approved the DNR’s Notice of Hearing and Additional Notice Plan;¹⁸
- E. the Notice of Hearing as mailed on September 23, 2008;¹⁹
- F. the certification that the DNR mailed a copy of the SONAR to the Legislative Reference Library on September 15, 2008;²⁰
- G. the Notice of Hearing as published in the *State Register* on September 22, 2008;²¹
- H. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on September 23, 2008, and Certificate of Accuracy of the Mailing List as of September 15, 2008;²²

¹³ Dept. Comment, Dec. 1, 2008, Attachments 7-9.

¹⁴ Ex. 8.

¹⁵ Ex. 1.

¹⁶ Ex. 2.

¹⁷ Ex. 3.

¹⁸ Ex. 7.

¹⁹ Ex. 8.

²⁰ Ex. 4.

²¹ Ex. 6.

²² Ex. 8.

- I. the Certificate of Mailing the Notice of Hearing to the Parties identified in the Additional Notice Plan on September 23, 2008;²³
- J. the Certificate of Mailing the Notice of Hearing and the SONAR to various Legislators on September 15, 2008, accompanied by a copy of the transmittal letter;²⁴
- K. the DNR's news release, dated September 30, 2008, announcing the proposed rules, and information on the rules from the DNR's web page;²⁵ and
- L. a copy of the opening statement of Steve Hirsch.²⁶

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

III. Statutory Authority

16. In its SONAR, the Department asserts that its statutory authority to adopt these rules is contained in Minn. Stat. § 103G.615, subd. 3.

17. Section 103G.615, subd. 3, provides:

Subd. 3. Permit standards. The commissioner shall, by rule, prescribe standards to issue and deny permits under this section. The standards must ensure that aquatic plant control is consistent with shoreland conservation ordinances, lake management plans and programs, and wild and scenic river plans.

18. The ALJ concludes that the DNR has general statutory authority to adopt the proposed rules.²⁷

IV. Additional Notice Requirements

19. Minn. Stat. §§ 14.131 and 14.23 require 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 Administrative Law Judge by letter dated September 3, 2008. During the rulemaking

²³ Ex. 9.

²⁴ Ex. 10.

²⁵ Ex. 11.

²⁶ Ex. 12.

²⁷ A further discussion of the DNR's statutory authority as it relates to licensed commercial pesticide applicators is contained elsewhere in this Report.

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.²⁸

20. 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 December 19, 2005;²⁹
- B. letters requesting comments were mailed to approximately 3,900 individuals who received an aquatic plant management permit in 2005; individuals with commercial aquatic pest control licenses and commercial aquatic plant harvest permits; conservation districts; aquatic and plant-related professional societies; watershed districts; and conservation and environmental organizations;³⁰
- C. the DNR announced this rulemaking process in September 2008 in a statewide news release that it distributed to all general news media in the state;³¹ and
- D. the proposed rules, the SONAR, and other information relating to the proposed rules have been available on the DNR's website.³²

21. During the 60-day period after the Request for Comments was published, from December 19, 2005, through February 17, 2006, the DNR received comments from 94 groups and individuals.³³ These comments were filed with the ALJ on November 20, 2008, and are admitted to the record as Exhibit 25A. Also included in Exhibit 25A are comments filed with the Department, rather than with the Administrative Law Judge, between the date of publication of the Notice of Hearing (September 22, 2008), and the convening of the first hearing on November 3, 2008.

22. The Department has disseminated the proposed rules to affected parties. The Administrative Law Judge finds that the DNR has satisfied the notice requirements.

V. Impact on Farming Operations

23. 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

²⁸ Ex. 8; Ex. 9.

²⁹ SONAR, p. 1.

³⁰ SONAR, p. 1.

³¹ Ex. 11.

³² Ex. 11

³³ SONAR, p. 1.

operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

24. The proposed rules do not affect farming operations, and the ALJ concludes that the Department was not required to notify the Commissioner of Agriculture.

VI. Compliance with Other Statutory Requirements

A. Cost and Alternative Assessments

25. 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.

26. With respect to the first factor, the DNR indicated in its SONAR that the proposed rules will primarily affect people who own shoreline properties that are affected by the growth of aquatic plants, individuals and companies that control aquatic

plants for hire or harvest aquatic plants for sale in retail or wholesale markets, and recreational users of public waters including boaters, anglers, and hunters.³⁴

27. With regard to the second factor, the DNR acknowledged that the proposed rules part 6280.0350, subp. 4, item C, require the DNR to develop lake vegetation management plans for lakes affected by changes in that subpart. There will be a cost to develop these plans, but it will be accomplished by existing staff and will not increase the Department's operating costs.³⁵

28. Apart from developing the lake vegetation management plans, the proposed rules will not result in additional costs to the DNR or other agencies. Current costs to the DNR result primarily from administration of the APM permitting program and enforcement of APM regulations. Costs are largely dependent on the number of permits requested and issued, and the amount of enforcement effort. The proposed rules would affect the amount of aquatic plant control allowed under APM permits, but would not require an increase in permitting or enforcement activity.³⁶

29. Regarding the third factor of whether there are less costly methods for achieving the purpose of the rule, the DNR noted that the proposed rules would reduce the amount of submersed aquatic plants that could be controlled for some shoreline property owners, but that it is not feasible to provide adequate protection for aquatic plants without suitable permitting and enforcement programs. The rules are needed to ensure that lakeshore development does not degrade the economic, recreational and ecological values of Minnesota's lakes. Although the proposed rules are more restrictive, they do not require permits for activities that are currently allowed without permits.³⁷

30. The proposed rules also specify criteria for APM, commercial harvest, and commercial mechanical permit revocation. People who control aquatic plants without a permit or violate the conditions of their permit may cause significant fish and wildlife habitat destruction. It is necessary for the DNR to have the authority to revoke permits to prevent undue damage to the state's aquatic resources.³⁸

31. Regarding the fourth factor, a description of alternative methods considered, the DNR noted that the primary purpose of the proposed rule is to allow riparian landowners to control aquatic plants when necessary to get access to open water for traditional recreational uses, while protecting the habitat and water quality values that aquatic plants provide. The proposed rules are also intended to help determine when aquatic plant control limits should be exceeded to help control invasive aquatic plants, protect or improve aquatic resources, provide riparian access or enhance recreational use on public waters. The DNR has programs to educate people

³⁴ SONAR, p. 4.

³⁵ SONAR, p. 4.

³⁶ SONAR, p. 4.

³⁷ SONAR, p. 4.

³⁸ SONAR, pp. 4-5.

about the value of having natural riparian and aquatic vegetation along shorelines and provide technical assistance and grants for people who want to restore their shorelines. While these programs are growing in popularity and have had some successes, they have not been sufficient to stop the trend of declining habitat due to increased lakeshore development. The demand for APM permits has increased from 1,100 in 1992 to 4,600 permits in 2007.³⁹

32. With regard to the fifth regulatory factor, the probable costs of complying with the proposed rule, the DNR noted that the proposed rule change in part 6280.0350, subp. 2a, would decrease the amount of shoreline allowed for submersed aquatic vegetation control for some property owners and would require most property owners to leave at least half of the shoreline untreated. This provision will not increase costs for property owners, but it could reduce profits of businesses that control aquatic plants for hire, because it will reduce the amount of control allowed on some lakes and prevent uninterrupted control along multiple property owners' shorelines.⁴⁰

33. With respect to the sixth factor, the probable costs of not adopting the proposed rule, the DNR noted that the major consequences of not adopting the proposed rules are: decision-making criteria used for APM permits would continue to be ambiguous to the public and the DNR field staff, resulting in a lack of consistency in how APM rules are applied across the state; control of near-shore submersed aquatic vegetation will increase on developed lakes, to the detriment of aquatic habitat and water quality; submersed aquatic plant control in excess of the littoral area limits on the "grandfather lakes" could result in further declines in aquatic habitat and water quality and elimination of some fish species; rules would continue to provide inadequate guidance on revocation of permits for people who violate APM laws; and rules would continue to provide inadequate guidance on when to allow variances to address invasive aquatic plants and other issues.⁴¹

34. Finally, with respect to the seventh factor, the DNR indicated that the proposed rules do not conflict with federal regulations.⁴²

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

B. Performance-Based Regulation

36. 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

³⁹ SONAR, p. 5.

⁴⁰ SONAR, p. 6.

⁴¹ SONAR, pp. 7-8.

⁴² SONAR, p. 8.

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.”

37. The DNR maintained that the rule as proposed is performance-based, stating that invasive aquatic plants are spreading in Minnesota’s lakes and the DNR is increasingly relying on the APM rules to be adaptable for lakes that have problems with invasive aquatic plants. The proposed rule changes will provide specific criteria for determining when a variance should be issued to control invasive species (part 6280.1000, subp. 1). It is necessary to provide criteria for a variance to allow standard limits to be exceeded for control of invasive aquatic plants because physical and chemical characteristics of lakes vary considerably across the state and control methods may work on some lakes, but cause problems on others. To enhance native plants and biodiversity, management strategies need to include efforts to reduce nutrients entering lakes and increase water clarity. The proposed language for variances provides flexibility in helping the DNR and regulated parties determine if higher levels of control will help address problems with invasive aquatic plants.⁴³

38. The DNR also maintains that the proposed rules provide criteria for making decisions regarding how much control to allow in an APM permit. These changes will allow the DNR to meet its regulatory objectives by providing more consistency in APM decisions across the state.⁴⁴

39. The DNR notes that the proposed rules also provide more guidance for the development of lake vegetation management plans (LVMP) to facilitate partnerships between the DNR and lake groups in managing lakes. Current rules allow APM permits to be issued in accordance with LVMPs approved by the DNR, and lake groups have used the LVMP process to obtain variances for APM permits. Some groups have indicated that more clarity is needed to determine what is required in an LVMP, and the proposed rules will provide such clarity. It is necessary for the DNR to allow an LVMP to guide APM permit decisions, because it encourages lake groups to establish lake management goals, address underlying problems like water quality and land use in the watershed, and develop monitoring plans to determine if proposed actions are successful.⁴⁵

40. 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.

⁴³ SONAR, p. 6.

⁴⁴ SONAR, p. 6.

⁴⁵ SONAR, p. 7.

C. Consultation with the Commissioner of Finance

41. 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.”

42. As required, the Department consulted with the Commissioner of Finance. On April 21, 2008, Executive Budget Officer Marsha Battles-Jenks stated by letter that the proposed rules would have minimal fiscal impact on local units of government.⁴⁶

43. The ALJ finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for consulting with the Commissioner of Finance.

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

44. 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.”⁴⁷ 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.⁴⁸

45. The DNR indicated in its SONAR that the proposed rules would not directly increase costs by more than \$25,000 for small businesses, but that they could reduce profits for businesses that control aquatic plants because of the proposed change to reduce the amount of submersed aquatic vegetation that a shoreline property owner can control. Current rule language allows control of submersed aquatic vegetation on up to 100 feet of shoreline for a property owner (part 6280.0350, subp. 4, item A). The proposed change will allow control of submersed aquatic plants on up to 100 feet or half the person’s shoreline, whichever is less (part 6280.0350, subp. 1a). Businesses that control aquatic plants are more likely to be able to control longer, uninterrupted stretches of shoreline under the existing rules than under the proposed rules. The DNR does not have information that would allow it to estimate the potential lost profits for businesses that control aquatic plants.⁴⁹

46. Daniel Kelsey, a resident on Lake Owasso, commented that the DNR failed to meet its statutory requirements under Minn. Stat. §§ 14.127 and 14.131 because it failed to consider the cost of lost property value to individuals, counties and cities affected by the rule change. He asserts that the rule changes will cost Ramsey County and the Cities of Roseville and Shoreview more than \$25,000 in lost revenue.⁵⁰

⁴⁶ Dept. Comment, Dec. 1, 2008, Attachments 7-9.

⁴⁷ Minn. Stat. § 14.127, subd. 1.

⁴⁸ Minn. Stat. § 14.127, subd. 2.

⁴⁹ SONAR, p. 7.

⁵⁰ Comment, Dec. 1, 2008.

47. The Administrative Law Judge finds that the DNR has made the determinations required by Minn. Stat. §§ 14.127 and 14.131 and approves those determinations. The DNR consulted with the Commissioner of Finance, and the Executive Budget Officer concluded that the rules would have a minimal impact on local units of government. Though Mr. Kelsey disagrees with the ultimate determination, it cannot be said that the Department did not meet its statutory requirements. See also Findings 12 and 42.

VII. Rulemaking Legal Standards

48. Under Minnesota law,⁵¹ 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.⁵² The DNR prepared a Statement of Need and Reasonableness (SONAR)⁵³ 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.

49. 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.⁵⁴ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁵⁵ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁵⁶ 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."⁵⁷

50. 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

⁵¹ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

⁵² *Mammenga v. DNR of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁵³ DNR Ex. 3.

⁵⁴ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

⁵⁵ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁵⁶ *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).

⁵⁷ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

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.⁵⁸

51. 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.⁵⁹

52. Because the DNR suggested changes to the proposed rules 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.”

VIII. Analysis of the Proposed Rules

53. 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.

54. 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

⁵⁸ *Federal Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁵⁹ Minn. R. 1400.2100.

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

Need to Further Restrict Aquatic Plant Treatment – MHL⁶⁰

55. Minnesotans for Healthy Lakes (MHL), through its Board Chair William Iacoe, argues that the DNR has not conclusively demonstrated the need for new rules to further restrict aquatic plant treatment. MHL points out that the DNR has acknowledged that invasive aquatic plants are spreading to more lakes each year and that they crowd native plants and create recreational nuisances.⁶¹ In the SONAR the DNR summarizes that 17 out of 18 public comments called for greater efforts to control invasive aquatic plants or eliminate barriers for invasive species control.⁶² MHL argues that the DNR has been too conservative in its approach to controlling invasive species and points out that the number of Minnesota lakes infested by Eurasian watermilfoil has increased from one lake in 1987 to 212 infested lakes in 2008.⁶³ MHL states that the proposed rules do nothing to improve control of invasive exotic species and that the imposed limitations contradict the stated objective of controlling invasive species more effectively.⁶⁴

56. Dr. Douglas Pullman, Ph.D, a lake management consultant with Aquest Corporation in Flint, Michigan, voiced similar concerns. He stated that invasive species represent the greatest threat to the stability and integrity of aquatic ecosystems and that it is irresponsible to fail to suppress invasive species. He stated that the application of aquatic herbicides represents the most ecologically sound means to manage the proliferation of invasive species and that the application of an aquatic herbicide is inherently selective. He commented that the proposed rules are not framed with a realistic consideration of the risks and benefits associated with common nuisance species controls and the risk of creating impediments to proper management. He concluded that the proposed rules represent a greater threat to the water resources of the state without providing adequate documentation that the risk of consistent and proper application of modern lake management methods exceed the benefits associated with their use.⁶⁵

57. MHL further argues that the DNR has failed to acknowledge or understand that available herbicidal technology allows invasive species to be treated selectively while causing minimal damage to native aquatic plants. It claims that recent studies indicate that whole-lake treatment of Eurasian watermilfoil

⁶⁰ The Department's proposal to phase out the "grandfathered" status for specific metropolitan area lakes will be discussed below, in detail.

⁶¹ Ex. 16, p. 3, citing SONAR, p. 5.

⁶² Ex. 16, p. 3, citing SONAR, p. 3.

⁶³ Ex. 16, p. 5.

⁶⁴ Ex. 16, pp. 3, 5.

⁶⁵ Ex. 35D.

may reduce invasive species but still allow native plants to thrive when the herbicides are used according to manufacturer's instructions. Conversely, overly conservative whole lake treatments have usually failed to meet their objectives.⁶⁶ MHL suggested that more objective research is required before these rules can be adopted. MHL contends that despite 20 years of studying, the DNR has formulated no definitive course of action to stem the spread of Eurasian watermilfoil. MHL proposes that external, unbiased experts are needed to assess this situation.⁶⁷

58. The Department responds that the proposed rules will help guide management of invasive aquatic plants by providing more direction on when to allow variances for invasive aquatic plant control (part 6280.1000, subp. 1, item B). The Department also points out that the proposed rules allow more control of invasive aquatic plants by a shoreline property owner than current rules if the control is selective for the invasive plants (part 6280.0350, subp. 1a, item C).⁶⁸ The DNR clarified that it proposed the exception to allow selective control of invasive plants not because it believes individual landowners can staunch the spread of invasive species, but because invasive aquatic plants do not require the same level of protection as native aquatic plants.⁶⁹

59. The Department further responds that the Attachments to MHL's response include letters or statements from Dr. Pullman, who works for a private lake management corporation and three chemical companies. The DNR acknowledges that private companies involved with aquatic herbicides represent part of the cross-section of constituencies with whom the DNR needs to partner on invasive species, but suggests that it cannot and should not act on their advice alone.⁷⁰

60. The DNR further responds that it followed about 40 of the approximately 55 recommendations made by the Center for Aquatic Plants at the University of Florida, after the DNR contacted the Center to evaluate its APM program in 1991. The DNR used them as a basis for making program changes to its aquatic plant and invasive species management programs.⁷¹

61. In response to the letters from the aquatic herbicide companies, the DNR agrees with the statements therein that there are no "technical," "environmental fate," or "toxicological" reasons for the proposed rules. The rationale for the proposed rules is to protect the habitat and water quality values afforded by aquatic plants, not to address concerns about environmental fate or possible toxicity of the herbicides to non-target organisms.

⁶⁶ Ex. 16, p. 6, Attachment I (Minnetonka Conservation District Debriefing on the Three Bay Treatment Program).

⁶⁷ Ex. 16, p. 6, Attachments D, E, F, G, H.

⁶⁸ Dept. Comment, Dec. 1, 2008, p. 13-14.

⁶⁹ Hirsch Test., Waseca, p. 157.

⁷⁰ Dept. Comment, Dec. 1, 2008, p. 16.

⁷¹ See Ex. 16, Attachment E; Dept. Comment Dec. 1, 2008, p. 21-22, Attachment 14; see also Ex. 37.

62. The companies were also concerned that herbicides may not be effective in smaller treatment areas due to dilution. The DNR acknowledges that some permitted treatment areas may be too small for effective control with aquatic herbicides and notes that mechanical control of aquatic vegetation may be used where the efficacy of herbicides may be reduced by dilution. However, the DNR notes that greater control, up to control of entire shorelines, is possible if the control is selective for invasive aquatic plants. Its staff experts will factor any selective properties of herbicides into APM permit decisions. The letters emphasize that their products can be selective for invasive aquatic plants; and the letters from SePro and UPI point out that the DNR has addressed the ability of herbicides to be selective. The DNR also points out that it has considered the scientific literature which indicates that application of herbicides to lakes to control non-native invasive species can damage non-target native plants.⁷² On page 22 of its December 1 Comment, the DNR specifies the documentation of decreases in native submersed plant species after whole-lake treatment with fluridone and of damage to native pondweeds by endothall treatment for curly-leaf pondweed.

63. The DNR comments that MHL is not recognizing its efforts to control and manage invasive species, including invasive aquatic plants. Its annual invasive species budget for DNR's Division of Ecological Resources increased from \$2.3 million in 2007 to \$4.9 million in year 2009. The budget increase is being used to fund additional field positions to provide technical assistance to local groups and assist with the development of LVMPs, increase enforcement of invasive species laws, and increase grants to local groups to control aquatic invasive species. The Department responds that MHL and Dr. Pullman overstate the role that aquatic plant management rules play in the control of invasive species and underestimates the DNR's efforts to manage aquatic invasive species.⁷³ The DNR further comments that there is no evidence that lake frontage rules which allow individual landowners aquatic plant control have any significant or measurable bearing on the extent to which invasive aquatic plants spread within a lake or from lake to lake, so there is no objective, scientific evidence which would substantiate MHL's claim that the proposed rules will facilitate the spread of invasive aquatic plants.⁷⁴

64. In the SONAR, the DNR explained that the primary purpose in allowing shoreline property owners to control aquatic plants is to provide access to open water. According to the DNR, in virtually all cases, this can be done without exceeding control thresholds in the existing rule and proposed rule changes. Therefore it is unnecessary to push the safe limits of aquatic plant control and risk degradation of the state lakes when issuing APM permits.⁷⁵

65. MHL argues that the DNR has used obsolete and irrelevant data to support its case that more restrictive rules are needed. MHL points out that the SONAR fails to cite peer-reviewed research outside DNR internal surveys

⁷² Ex. 16, Attachment F, G, H; Dept. Response, Dec. 1, 2008, p. 21.

⁷³ Dept. Comment, Dec. 1, 2008, pp. 13-14.

⁷⁴ Hirsch Test., Waseca, pp. 155-156.

⁷⁵ SONAR, p. 10.

that prove that chemical and manual removal of near-shore aquatic plants have caused extirpations of some fish in metro-area lakes. MHL argues that the research the DNR cited to show the importance of aquatic plants to bird and mammal nesting and feeding is largely from the 1970s and that the DNR even cited a study from 1941.⁷⁶

66. Even though the DNR's scientific evidence documenting the ill-effects of chemical treatment of aquatic plants is relatively thin, the ALJ finds the DNR has demonstrated the reasonableness of restricting chemical herbicide treatment further than allowed under current rules. The DNR's invasive species program is separate and distinct from its APM program and there is no evidence to suggest that control of invasive species will be hindered by the proposed rules. The DNR has made a policy decision to restrict further the limitations on chemical/herbicide treatments of aquatic plants. Its position is found to be reasonable.

Repeal of the Grandfather Clause – Part 6280.0350, subp. 4, items B and C

67. A great deal of controversy was generated by proposed rule part 6280.0350, subp. 4, items B and C, in which the Department seeks to repeal the grandfather clause. Many comments and copies of postcards were received from lakeshore property owners living on lakes currently allowed to treat more than the 15% littoral zone limit under the grandfather provision.⁷⁷ Proposed subpart 4 provides:

~~Subp. 4. **Pesticide control of aquatic macrophytes restrictions.** Except as otherwise specified in this part, items A and B apply to pesticide control of aquatic macrophytes.~~

~~A. On all public waters and watercourses, the lesser of Pesticide control of aquatic plants in public waters may not exceed 15 percent of the littoral area or a maximum of 100 feet of shoreline per site belonging to an individual riparian property owner may be treated for control of submerged vegetation, except that on waters that are 20 acres or less, pesticide control may be permitted on up to five acres or one-half the surface area of the pond, whichever is less. These limitations do not apply in the circumstances described in subitems (1) to (3) item B.~~

~~(1) For resorts, apartments, condominium complexes, public swimming beaches, and marinas, the commissioner must make an individual determination, taking into consideration the total impact on the protected water.~~

~~B. (2) Larger percentages of the littoral area shall be treated at the discretion of the commissioner when authorized by permits issued prior to 1976. The waters affected by this provision are: Sunfish~~

⁷⁶ Ex. 16, p. 4, citing SONAR, p. 9.

⁷⁷ See Ex. 13 (postcards from residents on Lake Owasso opposing the repeal of the grandfather clause); Ex. 14 (letters from residents on Lake Owasso opposing the repeal of the grandfather clause); Ex. 15 (letters from homeowners on Carson's Bay on Lake Minnetonka opposing the repeal of the grandfather clause); Ex. 42 (letters from residents on Cedar Island Lake opposing the repeal of the grandfather clause).

Lake in Dakota County; Cedar Island and Lost Lakes and Carson's and St. Louis Bays of Lake Minnetonka in Hennepin County; and Johanna, Owasso, Gervais, and McCarron Lakes in Ramsey County.

~~(3) On stormwater retention ponds, treatment may occur on up to five acres or one-half the surface area of the pond, whichever is less.~~

~~B. Applications from riparian property owners' associations for large area or baywide treatment must include a written statement of the plan and a map showing areas proposed to be treated. The commissioner may reduce the amount of littoral area which the applicant proposes to control. Any application for treatment must include the names, addresses, location on lake, and signatures of all property owners whose shorelines will be treated. Signatures must be obtained every three years or when there is a change of property ownership.~~

C. Item B expires five years after the effective date of this item. Before the expiration of item B, the commissioner shall develop a lake vegetation management plan as provided under part 6280.1000, subpart 2, for each of the waters listed in item B. The commissioner shall provide opportunities for the public to participate in the planning process, including a notice or news release in a local newspaper, at least one public meeting, and a 30-day comment period.⁷⁸

68. Under the current rules, only 15% of a lake's littoral area (15 feet deep or less) can be treated. Under the grandfather clause, seven lakes in the Twin Cities metropolitan area and two bays on Lake Minnetonka have been allowed to treat more than 15% of the littoral area. When the littoral area limits were established in 1976, these bodies of water had received permits to treat more than 15% of the littoral area. The bodies of water affected by the grandfather clause are not listed in the current rule. Since 2002, the percent of the littoral area that has been treated on these bodies of water has ranged from 11.5% to 65.8%.⁷⁹

69. The proposed language in item C would terminate the grandfather clause in five years to allow affected lake groups to work with the DNR to develop a lake vegetation management plan (LVMP) to guide future aquatic plant control. The proposed language specifies the lakes which are affected by the grandfather clause.

70. MHL commented that the DNR had not demonstrated the need to limit control of invasive species to 15% of the littoral area. MHL argues the rule provision limiting control to 15% of the littoral area of a lake was implemented in 1976 to apply to native species. It argues that now the DNR seeks to apply the same arbitrary,

⁷⁸ The italicized portion of the text is language that the DNR has added to the proposed rules as a result of comments received at the public hearings.

⁷⁹ SONAR, p. 28.

conservative limit to invasive species, which did not exist in 1976, and that so limiting the treatment of invasive species contradicts the stated objective of controlling invasive species more effectively.⁸⁰

71. Dr. Pullman stated that invasive species destroy the biodiversity of aquatic plant communities and depress ecosystem stability in most of the vegetated littoral zone of lakes and that rarely is this zone limited to 15% of the total lake area. He concludes that a restriction of treatment to an arbitrarily selected maximum of 15% of the littoral area is a “death sentence for the biodiversity of vegetation of areas that cannot be treated properly.”⁸¹

72. Although the DNR is not proposing to change the 15% littoral area limit and the limit is therefore outside the purview of this rulemaking, the comment and response are pertinent to the grandfather clause issue because the grandfathered lakes are allowed under current rules to treat more than 15% of the littoral area. The DNR responded that the 15% littoral area limit is conservative, but not arbitrary. The DNR pointed out that the 15% limit was challenged and supported in a previous rulemaking. In 1996, the DNR proposed to amend the APM rules to institute the 15% littoral area limit. Administrative Law Judge Allan W. Klein found the DNR had supported the 15% limitation even though scientific research at the time had not documented that 15% was the best limit for all lakes.⁸²

73. The DNR stated in its SONAR that its position that conservative limits are warranted has been consistent since 1996. It stated:

While the science documenting the habitat and water quality value of aquatic plants is strong, the relationship between aquatic plants and the abundance of fish and other wildlife is complex and studies point to the difficulty in defining a precise threshold in aquatic plant abundance at which habitat quality declines. As a result, it is necessary and reasonable to take a “precautionary management approach” in settling limits for aquatic plant control (Rosenberg 2002; Valley et al. 2004). This approach acknowledges that aquatic plants are important habitat and that control limits need to be conservative to avoid negative impacts to the state’s public waters.

...

The primary purpose in allowing shoreline property owners to control aquatic plants is to provide access to open water. In virtually all cases, this can be done without exceeding the control thresholds in the existing rule and proposed rule changes. Therefore it is unnecessary to push the

⁸⁰ Ex. 16, p. 5; see also Ex. 37 (Comment from Carson’s Bay Homeowner Association).

⁸¹ Ex. 35D; Test., Maplewood, pp. 41-48.

⁸² SONAR, p. 10, citing SONAR Ex. 1 (ALJ Report, *In the Matter of Proposed Amendments to Permanent Rules Governing Aquatic Plant Management and Aquatic Nuisance Control*, OAH Docket No. 6-2000-10699-1, Dec. 9, 1996, pp. 14-16).

safe limits of aquatic plant control and risk degradation of the state lakes when issuing APM permits.⁸³

74. The DNR stated that its overall approach is to use the standard aquatic plant control limits for most lakes and the variance process when the limits need to be exceeded to control invasive aquatic plants.⁸⁴

75. The DNR stated in its SONAR that it is necessary to terminate the grandfather clause to protect aquatic plants and their habitat value, and to provide consistent aquatic plant removal regulation throughout the state. The DNR stated that the original reasons for the grandfather clause have been lost over time and that there is no biological justification to treat the grandfathered lakes differently than all the other waters in the state. It stated that the continuation of elevated levels of pesticide control in these lakes jeopardizes aquatic habitat. According to “DNR surveys,” one fish species, banded killifish, has been functionally extirpated from Lake Johanna. This species is sensitive to changes in aquatic habitat, including aquatic plants, and has disappeared from several other metropolitan lakes in Minnesota and Wisconsin. The DNR stated that “there is no documentation that the disappearance of banded killifish in Johanna was caused by elevated levels of aquatic plant control,” but that “it is likely that habitat degradation caused their disappearance and that high levels of pesticide control contributed to this degradation.”⁸⁵

76. The DNR emphasized the increase in permits in recent years and the likelihood that the trend would continue. The DNR stands by its position that the increase in shoreline development is well documented and justifies more conservative treatment regulation and the repeal of the grandfather clause.⁸⁶

77. It is the DNR’s position that it is reasonable to provide an opportunity for the DNR to develop a LVMP with affected lake groups to guide future aquatic plant control on the grandfather lakes. The DNR will provide outreach and education for grandfather lake residents and chart the best course for management of aquatic plants on these lakes.⁸⁷

78. The DNR notes that there is a variance process in place that will allow elevated levels of aquatic plant control if justified.⁸⁸

79. The proposed language would also modify the exception to littoral area treatment limits for storm water retention ponds. The current language states that aquatic plant control may occur on up to five acres or half the surface area of a storm water retention pond, whichever is less. This language has been confusing,

⁸³ SONAR, p. 10.

⁸⁴ Dept. Comment, Dec. 1, 2008, p. 15, citing SONAR, pp. 6, 10-11.

⁸⁵ SONAR, p. 29; see *also* Dept. Comment, Dec. 1, 2008, p. 14.

⁸⁶ Dept. Comment, Dec. 1, 2008, p. 14, citing Ex. 22A.

⁸⁷ SONAR, p. 29.

⁸⁸ SONAR, p. 29.

because there is no definition of storm water retention ponds and most are not public waters and, therefore, are not regulated by this Chapter. In practice, this provision has most often been applied to small ponds in urban environments. These waters often receive lots of nutrient-rich run-off, which exacerbates problems with nuisance growths of aquatic plants. The proposed change is to eliminate the use of the term storm water retention ponds, and replace it with a provision that allows pesticide control on up to five acres or half the surface area of waters that are 20 acres or less.⁸⁹

80. The current language in item B has several requirements for permit applications from riparian property owners' associations for large area or bay-wide aquatic plant control and is similar to existing language in 6280.0350, subp. 3, item C. The proposed change eliminates the language from item B (and 6280.0350, subp. 3, item C) and replaces it with language in part 6280.0450, subp. 1a, which deals with group permit applications. The proposed change is necessary and reasonable, because this language is a better fit in part 6280.0450, which deals with APM permit requirements.⁹⁰

81. The Administrative Law Judge questioned the statement in the DNR's SONAR to the effect that the original reasons for the grandfather clause have been "lost over time," because in the ALJ Report issued in 1996 (regarding the rules currently in effect) the ALJ stated that the reasons for the grandfather clause were that the 15 percent littoral area limit for aquatic plant control had been added for lakes in the Twin Cities Metropolitan area in 1976, at a time when several lakes in the Metro Area had extensive areas of shallow water and a long history of aquatic plant control exceeding 15 percent of their littoral areas. In its Comments the DNR acknowledges that the main reason for the grandfather clause appears to be avoiding conflict with landowners on the grandfathered lakes. When the grandfathered lakes were enumerated in 1976, permits for aquatic plant control had been issued on them that exceeded the area limits put into the rules at that time. The Commissioner's Order designating the grandfathered lakes noted that "larger percentages of the littoral area shall be allowed when they have been authorized in the past by aquatic nuisance control permits."⁹¹

82. The DNR clarified its statement in the SONAR regarding the origins of the grandfather clause in its comment dated December 1, 2008. The grandfather clause was not first implemented during a rulemaking proceeding. Rather, the clause was first implemented in a Commissioner's Order. Before 1976 there were no lake-wide limits on the control of aquatic vegetation with herbicides. The 1976 revision of Commissioner's Order 1938 established the following littoral area limits for pesticide control of aquatic plants based on lake classification: 1) general development lakes – 10% of littoral area; 2) recreational lakes – 5% of the littoral area; and 3) natural

⁸⁹ SONAR, p. 29.

⁹⁰ SONAR, p. 29.

⁹¹ Dept. Comment, Dec. 1, 2008, p. 9.

environment lakes – no area may be treated. It stated that the grandfather clause most likely originated to avoid conflict with landowners on the grandfathered lakes.⁹²

83. As noted above, when the limits were established in 1976, there were several lakes in the metropolitan area where permits had been issued that exceeded these limits. Commissioner’s Order 1938 provided that “larger percentages of the littoral area shall be allowed when they have been authorized in the past by aquatic nuisance control permits.” This provision became known as the “grandfather clause.” The transcript of the 1976 hearing in which Commissioner’s Order 1938 was discussed reveals no specific reason or justification for the grandfather clause, other than to continue to allow past practice.⁹³ The clause has existed since the 1976 Commissioner’s Order. It was modified slightly in 1997 to clarify that it applied to lakes for which permits had been issued before 1976.⁹⁴

84. It is the DNR’s position that the presence of extensive shallow areas in the grandfathered lakes is not a valid reason for the grandfather clause, because there are numerous other lakes in the metropolitan area and throughout the state with the same conditions.⁹⁵ It is the DNR’s position that aquatic plant control should not be allowed to alter the ecological character of a shallow lake. Shallow bays and wetlands used to be considered marginal or unsuitable for shoreline development, but as development continues to increase and prime lakeshore becomes less available, shorelines adjacent to shallow bays and lakes are becoming increasingly attractive for development. These areas are extremely important for fish and wildlife habitat, and wetland loss and habitat degradation is considered a major environmental issue affecting waterfowl and other wildlife. The DNR argues that it is necessary to view aquatic plant control differently in these areas than on deeper lakes because aquatic plant control should not be permitted to change the ecological character of a wetland or shallow lake. The DNR argues that it would be unreasonable for the DNR to permit shoreline owners to alter the natural character of a shallow lake or wetland to engage in unimpeded surface water recreation.⁹⁶

85. The DNR further states that current rule language gives the Commissioner discretion to lower the amount of treatment on the grandfathered lakes, therefore the proposed rules do not constitute a drastic change.⁹⁷

86. The DNR’s primary goal is to put the grandfather lakes through a more systematic and scientific variance process, which will be aided by the proposed modifications to the variance language in rule part 6280.1000.⁹⁸ The DNR

⁹² Dept. Comment, Dec. 1, 2008, p. 9; Hirsch Test., Maplewood, pp. 67-68.

⁹³ Dept. Comment, Dec. 1, 2008, Attachment 5.

⁹⁴ Dept. Comment, Dec. 1, 2008, p. 9.

⁹⁵ Dept. Comment, Dec. 1, 2008, p. 9.

⁹⁶ SONAR, p. 19.

⁹⁷ Dept. Comment, Dec. 1, 2008, p. 10; Hirsch Test., Maplewood, p. 62.

⁹⁸ Dept. Comment, Dec. 1, 2008, p. 10; Hirsch Test., Maplewood, pp. 61-62.

justified the state-wide thresholds by stating that the rules allow for exceptions and variances.⁹⁹

87. The DNR compromised on this issue by proposing to sunset the clause after five years rather than terminate the grandfather clause when the rules take effect, and by requiring itself to prepare a LVMP for each of the grandfathered lakes before the clause expires.¹⁰⁰

88. The DNR has also proposed to allow the treatment of the entire shoreline property provided that the method of control is selective for invasive aquatic plants. See 6280.0350, subp. 1a, item C.

No Need to Repeal Grandfather Clause

89. Many of the commentators stated that the Department failed to demonstrate the need to repeal the grandfather clause. Most, if not all, of the commentators on this issue stated that the DNR had not supported its position that weed control in excess of the littoral area limits on the grandfather lakes could result in further declines in aquatic habitat and water quality and the elimination of some fish species. The commentators stated that damage to treated lakes has not been documented.¹⁰¹

90. The Lake Johanna Improvement Society (LJIS), which has 98 members, commented that the DNR has offered “no granular details in the SONAR that can be validated or refuted” regarding the need for more stringent restrictions.¹⁰² The Carsons Bay Homeowners Association stated that there is no scientific evidence supporting the 15 percent treatment limit.¹⁰³

91. The Lake Johanna Improvement Society commented that the DNR relied on outdated evidence from a time when Eurasian milfoil, zebra mussels and carp had not yet invaded Minnesota lakes.¹⁰⁴ Before then, it was possible to improve lake habitat by treating fewer weeds per acreage.

92. A number of people commented that there is not much scientific literature or commentary on the effect of chemical treatment on water quality.

⁹⁹ Hirsch Test., Maplewood, pp. 83-84.

¹⁰⁰ Dept. Comment, Dec. 1, 2008, p. 10.

¹⁰¹ See, e.g., Ex. 13 (Judith A. Wood Postcard and Comment), Ex. 14 (Andrew Walz Comment, Oct. 26, 2008; David A. Lutz Comment, Oct. 23, 2008; Steve Youngquist Comment, Oct. 13, 2008); Ex. 15 (Bob and Mary A. Hullsiek Comment, Oct. 22, 2008; Kevin and Casey Kelly Comment, Oct. 22, 2008); Ex. 34; Ex. 37; Ex. 38; Ex. 39; Ex. 40; Test. of M. Pennings, Maplewood, p. 89; Test. of E. Kucera, Maplewood, p. 114; Test. of M. Feist, Maplewood, pp. 116-117; Test. of R. Thompson, Maplewood, p. 138; Test. of N. Quitevis, Maplewood, p. 146; Test. of Joe Bester, Maplewood, pp. 168-171.

¹⁰² Test. of R. Thompson, Maplewood, p. 139.

¹⁰³ Ex. 37; Pokonosky Test., Maplewood, pp. 77-80.

¹⁰⁴ Test. of R. Thompson, Maplewood, p. 135.

Rather the literature emphasizes the importance of controlling run-off to improve water quality.¹⁰⁵

93. LJIS commented that the Department failed to discuss the alternatives reviewed and that it offered no evidence that it had considered the recently developed selective control herbicides and means of application. It stated that the DNR, which cited decreased fish populations on unnamed lakes as justification for the more restrictive controls, should name these lakes and explain how increased aquatic plant control diminished the populations.¹⁰⁶

94. MHL also took exception with DNR's information regarding the disappearance of banded killifish in Lake Johanna. It characterized the information as arising from a "mere oral survey" and concluded that the DNR failed to prove that chemical or manual removal of invasive and native plants from shore areas has caused loss of fish population, especially given other possible causes such as runoff or insecticides. MHL criticizes the DNR for using anecdotal evidence in lieu of scientific evidence.¹⁰⁷

95. Dave Kenney, a resident on Lake Owasso, stated that because "there is little evidence that the grandfather clause has caused environmental harm, we need to guard against the possibility that elimination of the rule might ruin a lake's recreational character."¹⁰⁸

96. Warren Wildes, who lives on Lake Johanna, which is nine miles from St. Paul and Minneapolis, stated that it was necessary that the metropolitan lakes be liberally treated because of the surrounding development.¹⁰⁹ He stated that Lake Johanna is part of the Rice Creek watershed, which includes run-off from Rosedale and areas along Highway 36. Lake Johanna was originally fed by natural springs through a creek from a small lake (Little Lake Johanna). The development of Rosedale and other areas caused excessive weed and algae in the lake. Extensive draining and paving of the wetland holding areas from Rosedale dramatically increased run-off drainage flows, carrying sediment and nutrient content from fertilizers, yard wastes, leaves and grass clippings, and street debris. Little Lake Johanna became a dumping ground for all the eroded soil and debris. The lake became filled with sediment which plugged the natural spring flows that had been partially fed by the wetlands, which the development destroyed. Wildes stated that the residents of the lake have been able to offset the environmental damage caused by the development by spraying for weeds and algae, but that the repeal of the grandfather clause will disallow at least half of the spray treatment. Algae and weeds have grown worse and have required

¹⁰⁵ See, e.g., Ex. 14 (Jane Ullmann Comment, Nov. 3, 2008); Test. of J. Bester, Maplewood, pp. 169-171.

¹⁰⁶ Ex. 38, p. 4.

¹⁰⁷ Ex. 16, p. 4.

¹⁰⁸ Ex. 14 (Comment, Oct. 20, 2008).

¹⁰⁹ Test. of R. Thompson; Ex. 39.

more treatment each year. He indicated that 2008 has been the worst year for algae and weeds since Wildes moved to the lake in 1977.¹¹⁰

97. Jon Schroder and William C. Schumacher, residents on Cedar Island Lake, noted that Cedar Island Lake measures 88 acres, has 85 homeowners, and is very shallow, with a maximum depth of eight to ten feet. As such, the entire lake falls within the DNR definition of littoral area. Before the aquatic plants are treated in the spring, they grow so thick that boats, motorized and non-motorized, cannot navigate the water and the lake becomes impassable. Timothy C. Theisen commented that Cedar Island Lake would be better served by local, individualized control, rather than state-wide regulations. He commented that standardized rules may be suitable for the more pristine waters up north, but that the lakes in the metro area require a more particularized assessment.¹¹¹

Increased Development

98. The Carson's Bay Homeowners Association also noted that shoreline development on Carson's and St. Louis Bays of Lake Minnetonka have not increased dramatically for more than fifty years so the Department's position that the treatment limitations need to be more restrictive to counter increased shoreline development does not apply to these grandfathered bays. MHL also claimed that the Department did not substantiate the argument that lakeshore development is a justification for the proposed rules.¹¹²

99. Douglas D. Wild, President of the Arden Hills Island Beach Club, also commented that one of the DNR's justifications for more stringent regulation of aquatic plants is increased lakeshore development, but that this justification does not apply to urban lakes such as Lake Johanna because they have been fully developed for years. He objected to the Department's "one-size-fits-all" approach.¹¹³

Increase in Permits

100. The LJIS challenged the DNR's position that the rules needed to be more conservative because of the increase in permits in recent years. LJIS suggested that the increased number of permit requests correlates to the spread of undesirable aquatic plants and that the DNR's approach incorrectly attributes the increase in permit numbers to be for esthetic or recreational purposes and not for control of invasive species.¹¹⁴ Janet B. Krause, a resident on Lake Johanna, suggested

¹¹⁰ Ex. 39.

¹¹¹ Ex. 42A (Jon Schroeder Comment, Nov. 5, 2008); Ex. 42C (William C. Schumacher Comment, Nov. 3, 2008); Ex. 42B (Scott Skimek Comment, undated); Ex. 42E (Timothy C. Theisen Comment, Nov. 5, 2008); *see also* 42F (Patrick Olek Comment, Nov. 4, 2008).

¹¹² Ex. 16.

¹¹³ Douglas D. Wild Comment, Nov. 2, 2008.

¹¹⁴ Ex. 38; Test of R. Thompson, Maplewood, p. 138.

that the increasing number of permits issued could be a result of greater compliance with permit requirements, not actual increases in weed treatment.¹¹⁵

101. MHL also took issue with using the increase in number of APM permits as a reason to revise the APM rules. It stated that the DNR was falsely reporting the increase in permits and characterized the increases as not that significant. According to MHL, before 1997, automated aquatic plant control devices (AAPCDs) did not require a permit. AAPCDs account for 1,825 or 55% of the total increase in permits (3,300) between the years 1996 and 2007. In 2000, there were 10,000 properties permitted for aquatic plant management. There were 11,512 properties permitted in 2007. According to MHL, AAPCDs account for about 800 of the 1,512 new properties permitted since 2000. Therefore, only 700 of the newly permitted properties since 2000 were for use of aquatic herbicides, which constitutes only a 1% per year increase in permits for herbicidal treatment. MHL concludes that this slight increase should not be relied upon as justification to implement the proposed rules.¹¹⁶

102. The Department responded that generally, the number of all types of permits issued has been increasing each year and that every permit allows for the destruction of aquatic plants.¹¹⁷

103. The Carson's Bay Homeowners Association stated that because there is no scientific or justifiable reason to limit the treatment to 15% of the littoral area of any lake or bay, the proposed repeal of the grandfather clause is arbitrary, capricious and without merit.¹¹⁸

Lake Association Success

104. LJIS pointed out that the treatment of Lake Johanna has been successful because the treatment has allowed access to all lake users, while preserving its fish and wildlife species, and that the proposed rules could cause Lake Johanna's habitat to fail.¹¹⁹

105. Nito Quitevis, a life-long resident of Lake Owasso, also commented that the efforts of the Lake Owasso Association have greatly improved the lake and water quality over the last fifty years. He stated that the invasive plant control programs conducted through organized efforts have proven to be effective and beneficial to the lakes and the current programs should be expanded and offered to other lakes based on their effectiveness.¹²⁰ Emil Kucera similarly commented on the success of the Lake Josephine Homeowners Association, especially the association's

¹¹⁵ Ex. 34.

¹¹⁶ Ex. 16, p. 5, citing April 2008, Staff Report 43 from the DNR Division of Ecological Resources.

¹¹⁷ Hirsch Test., Waseca, pp. 160-163; Ex. 22; Ex. 22A.

¹¹⁸ Pokonosky Test., Maplewood, pp. 75-76; Ex. 37.

¹¹⁹ Ex. 38.

¹²⁰ Ex. 40; Testimony, Maplewood, p. 147; see also Ex 14 (Steve Youngquist Comment, Oct. 13, 2008, commenting on success of Lake Owasso Association's lake vegetation management plan).

outreach and education efforts. Jon Schroeder and Patrick Olek commented on the success of the Cedar Island Lake Association and pointed out that the association and homeowners of Cedar Island Lake spend approximately \$8,000 to \$16,000 a year to control curly leaf pondweed. Mr. Schroeder commented that the lake fostered a strong community bond and that he fears the proposed rules will destroy the common thread of the neighborhood and unravel the community that has formed around the lake.¹²¹

106. Janet B. Krause, a resident on Lake Johanna, and Roberta Thompson of LJIS, commented that the grandfathered lakes are all heavily used by the public for swimming, fishing and boating and that the treatment used on the lakes has not eradicated the weeds, but merely reduced them.¹²² LJIS also pointed out that its members understand the importance of aquatic plants to the lake ecology and that the residents of the lake have worked to install rain gardens and wetland holding areas. The neighborhood on the northeast side of the lake donated land for wetland retention to reduce and filter the water moving into the lake, at a cost of approximately \$4,000 per homeowner.¹²³

107. Some commentators stated that despite the existing treatments currently used on the grandfathered lakes, the lakes are thriving with wildlife and fish species. The LJIS submitted comments that Lake Johanna is consistently cited as one of the metropolitan area's best fishing lakes because it has sunfish, crappies, smallmouth bass, northern pike, walleye and tiger muskie.¹²⁴ The LJIS noted an abundance of waterfowl and shore birds, including mallards, wood ducks, teal, kingfishers, egrets, blue herons, green herons, bald eagles, cormorants, osprey and loons.¹²⁵ Lake Johanna is also inhabited by several species of turtles, frogs and dragonflies, some of which are listed as Threatened or of Special Concern by the DNR.¹²⁶ The commentators on this issue stated that the abundance of fish and wildlife contradicts the DNR's position that aquatic plant treatment threatens the water habitat. Margy Pennings, on behalf of the Minnesota Aquatic Management Society (MAMS), stated that the quality of the grandfather lakes has greatly improved because of the application of chemical treatment over the years, and based on that success, suggested that the restrictions on the lakes throughout the state be loosened to allow stewardship by lake associations.¹²⁷ Roberta Thompson, of LJIS, stated that Lake Johanna had been treated for many years and the current lake quality and balance of fish, waterfowl, shore birds and mammals are testament to the successful aquatic plant control program. She stated that maintaining the grandfather clause would motivate the

¹²¹ Ex. 42A (Jon Schroder Comment, Nov. 5, 2008); Ex. 42F (Patrick Olek Comment, Nov. 4, 2008); see also Ex. 42B (Scott Klimek Comment, undated).

¹²² Ex. 34; Test. of R. Thompson, Maplewood, p. 134.

¹²³ Ex. 38; Test. of R. Thompson, Maplewood, p. 138.

¹²⁴ Ex. 38; see also Ex. 34, Ex. 39 (noting large amount of fishing on Lake Johanna).

¹²⁵ Ex. 38; Ex. 39.

¹²⁶ Ex. 38; see also T. of R. Thompson, Maplewood, p. 138.

¹²⁷ See Test. of M. Pennings, Maplewood, pp. 89-90, 268.

formation of more lake associations and provide the DNR with organized forums to present its views and affect control at the local level.¹²⁸

Consequences

Ineffective Treatment

108. The Carson's Bay Homeowner Association cited letters from two chemical companies, SePro Corporation and Sygenta Corporation, in which the companies stated that the reduction of the treatment area makes it difficult to obtain effective control of target plants because of water dilution and other effects. According to the companies, many products are not effective in small treatment areas because the untreated water increases dilution. Rapid dilution of aquatic herbicides reduces the contact time with the target plant and decreases efficacy. The proposed rules would therefore result in greater risk of herbicide nonperformance.¹²⁹

Increased Weeds

109. Bob and Jane Spartz, residents of Lake Owasso, opposed the repeal of the grandfather clause. They stated that the elimination of the clause would result in a 70% reduction in aquatic plant treatment on the lake. They have lived on the lake for 33 years and have experienced a dramatic increase in exotic weed growth. In one recent year, they could not navigate their end of the lake until the Lake Association sponsored application of chemical weed treatment.¹³⁰

110. Many commentators commented that the DNR has failed to address the consequences of reduced treatment. David A. Lutz, a resident on Lake Owasso stated that he fears the rule change will drastically alter the recreational component of the lake and affect the public's ability to enjoy the lake.¹³¹ Many commentators stated that they feared the lakes would become overgrown with aquatic plants and that the overgrowth will damage the water quality and habitat.¹³² Douglas D. Wild, on behalf of the Arden Hills Island Beach Club, commented that the amount of

¹²⁸ Test. of R. Thompson, Maplewood, pp. 137, 141.

¹²⁹ Ex. 37; Pokonosky Test., Maplewood, pp. 77-80.

¹³⁰ Ex. 14 (Comment, Oct. 22, 2008).

¹³¹ See e.g., Ex. 14 (David A. Lutz Comment, Oct. 23, 2008).

¹³² See e.g., Ex. 14 (Mark Christopherson Comment, Oct. 30, 2008; Chuck and JoAnn Copeland Comment, Nov. 3, 2008; Megan Malvey Comment, Nov. 4, 2008; Melvin M. Rohling Comment, Nov. 4, 2008); Ex. 15 (Jim and Trudy Burkholder Comment, Sept. 24, 2008; Geraldine Hedlund Comment, Sept. 24, 2008; Tom Kenyon Comment, Sept. 27, 2008; Boyd Schreiber Comment, Oct. 1, 2008; Connie Blanchard Comment, Oct. 3, 2008; Tom Burton Comment, Oct. 22, 2008; Bob and Mary A. Hullsiek Comment, Oct. 22, 2008; Kevin and Casey Kelly Comment, Oct. 22, 2008; Marjory Williams Comment, Oct. 22, 2008); Ex. 42B (Scott Klimek Comment, undated); Ex. 42F (Patrick Okek Comment, Nov. 4, 2008); Bill Schultz and Sara Mohn Comment, Nov. 3, 2008; Carolyn Mohn Comment, Nov. 7, 2008.

spraying that would be allowed under the proposed rules would not effectively control aggressive plant species such as curly leaf pondweed and vallisneria.¹³³

111. Some commented that it is reasonable to expect that these metropolitan lakes would need more treatment, as permitted, but not required, by the grandfather clause.¹³⁴ Ms. Krause stated that without the treatment, users of the lakes would experience swimmers' rashes, weeds would prevent the navigation of motorboats, and weeds would attach to motorboats, which would then transfer parasites from one lake to another.¹³⁵ Mr. Quitevis commented that the effect of repealing the grandfather clause will be accelerated, unchecked growth of exotic species, which will result in the displacement and destruction of the native species which the DNR claims they are trying to protect.¹³⁶ A few people commented that the increase in vegetation could cause more drowning because swimmers may become entangled in the plants.¹³⁷

112. Homeowners on Lost Lake in Plymouth, Minnesota, opposed the repeal of the grandfather clause. They commented that Lost Lake is shallow, with a depth of six to nine feet, and that it is fed by little spring water. The lake was treated last spring, but because of the low rainfall and other weather factors, the treatment was insufficient and the curly leaf pondweed was rampant and made paddling difficult. They fear the lake will become a swamp if they are not able to treat it as needed. As a result, property values will decrease along with tax revenue for the city and county.¹³⁸

113. Paul Skrede, Mayor of Deephaven, spoke in opposition to the repeal of the grandfather clause as it relates to St. Louis Bay and Carson's Bay on Lake Minnetonka. The two bays have swimming beaches and municipal marinas, and those two bays are the only portion of Lake Minnetonka covered under the grandfather clause. The City of Deephaven is concerned that the repeal of the grandfather clause would prevent it from treating the shoreline of the Bays because of the relationship to the 15 percent limitation on the littoral areas. The Bays account for less than 10 percent of the lake's surface.¹³⁹

114. The Carson's Bay Homeowners Association, a group of 51 of the 90 homeowners on Carson's Bay, opposed the repeal of the grandfather clause for various reasons. Before the 1930s, the littoral areas of Carson's Bay were a peat bog. Sometime in the 1930s the areas were dredged and made part of Carson's Bay. Now, 17.5% of the littoral area of the Bay is treated. The Association argues that because of the unique nature and shallow depth of the bay, more than 15% treatment is

¹³³ Douglas D. Wild Comment Nov. 2, 2008.

¹³⁴ See e.g., Test. of E. Kucera, Maplewood, p. 115.

¹³⁵ Ex. 34.

¹³⁶ Ex. 40.

¹³⁷ Test. of P. Skrede, Maplewood, pp. 66-67; Test. of John Enstrom, Little Falls, pp. 180-181; Ex. 42F (Patrick Olek Comment Nov. 4, 2008).

¹³⁸ Ex. 43 (signed by six homeowners).

¹³⁹ Test. of P. Skrede, Maplewood, pp. 57-68.

required to maintain the quality of the bay for all users, including fishermen, boaters, swimmers, homeowners, boaters seeking shelter when Lake Minnetonka is rough, and other recreational users.¹⁴⁰

115. Jon Schroeder commented that the requirement to develop a special lake management plan each year to be considered for a variance would cost more than the Cedar Island Lake Association could afford.¹⁴¹

116. The DNR responded generally that even though some of the grandfathered lakes are shallow, the purpose of the aquatic plant management program should not be to change the natural character of a lake. The lakes that have a higher proportion of shallow basins are naturally going to have a higher proportion of aquatic plant growth across the area of the lake. The DNR believes it would be poor policy to allow a higher level of aquatic plant control on shallow lakes and wetlands because of the high number of aquatic plants that exist in the natural state of these bodies of water.¹⁴²

Suggestions by the Public

117. LJIS suggested that the DNR propose a more lake-specific and targeted approach to invasive species. LJIS suggested that lakes could be categorized by the major factors that contribute to the spread of invasive species. Citing Minn. Stat. § 103G.615, LJIS stated that instead of seeking to restrict overall weed control through a reduction of littoral acreage restrictions, the DNR should focus on eradicating invasive and nuisance species.¹⁴³

118. LJIS suggested that the DNR include provisions to: 1) stratify a sample of lakes over a “manageable size” by the major factors that contribute to invasive species issues; 2) study the efforts and techniques used successfully on grandfathered lakes, with consideration given to all contributions to maintenance of quality attributes, not just littoral area treated; and 3) consider the viability of identifying simplified yet acceptable “best practices” for all lakes.

119. Andrew Whitman suggested that the DNR withdraw the proposed rule and enter a mediation process by which the DNR can work with the interested parties and experts to develop a LVMP for each of the grandfathered lakes. Mr. Whitman noted that the DNR currently has authority to develop LVMPs, so he suggested the LVMPs be developed before the new rules sunseting the grandfather clause are adopted. Kevin Driscoll suggested the proposed rules should be modified to

¹⁴⁰ Ex. 37.

¹⁴¹ Ex. 42A (Jon Schroeder Comment, Nov. 5, 2008).

¹⁴² Hirsch Test., Waseca, pp. 143-144.

¹⁴³ Ex. 38.

include a provision that the grandfather clause will not sunset until an LVMP is approved by a majority of the affected property owners.¹⁴⁴

120. In the SONAR, the DNR stated that it had “considered more liberal control limits for invasive aquatic plants” when developing the proposed rule changes, but ultimately determined that this approach was problematic because of the “variety of lake types, complexity of relationships between native and invasive aquatic plants and risks to water quality and habitat posed by liberal control measures.”¹⁴⁵

121. In its Comments, the Department responded to specific recommendations made in comments presented by the LJIS. Regarding the recommendation to study the efforts and techniques on the grandfathered lakes, the DNR acknowledges that such a study would provide good information, but would be precluded by funding limits and priorities. Regarding the recommendation to review and report on the feasibility of the latest selective and invasive species control, the Department notes that it is involved currently in efforts to evaluate the use of pesticides for selective control in benefiting native plants. Regarding the recommendation to advocate and foster the formation of landowner groups organized to balance the desire for treatment with a need to preserve habitat, the DNR notes that it is doing that already. Regarding best practices, the DNR notes that its APM packet mailed to property owners includes information on best practices. In general, the Department notes that many of the recommendations from the LJIS seem to be fostering a closer working relationship between the DNR and the grandfathered lake groups. The Department agrees that would be beneficial, and notes that it has included a requirement in the proposed rules for an LVMP, which would accomplish this purpose, it contends, before sunseting the grandfather clause currently in effect on any particular lake.

Property Values

122. A substantial number of lakeshore property owners commented that their property values would decrease as a result of the treatment limitations in the proposed rules. For example, Daniel Kelsey, a resident on Lake Owasso, questioned the Department’s statement on page six of the SONAR that the proposed rules will not increase costs for property owners. He suggested the SONAR was deficient because it did not address the costs to property owners if property values decrease as a result of the proposed rules. He stated that if his home was removed from the lakeshore he believed he could sell it for only 40 percent of its current value. He suggested that for the DNR to meet its burden to show the rules are reasonable, it should present expert testimony from a real estate appraiser that the rules will not affect property values.¹⁴⁶

¹⁴⁴ Whitman Test, Maplewood, pp. 298-300; Driscoll Test., Maplewood, p. 301.

¹⁴⁵ SONAR, p. 3.

¹⁴⁶ Kelsey Test., Maplewood, p. 294-298; see also Exs. 42C, 42D, 42F and 43.

123. With his written comment, Kelsey attached two letters from realtors who commented on the value of homes on Lake Owasso. Julie Overbye Ledy, a realtor for 17 years, commented that she owned three homes on Lake Owasso and she fears that if the weed management is not maintained as it has been the last five years, the property values on the lake will dramatically decrease. Ginger Overbye, a realtor for more than 30 years who also owns a house on Lake Owasso, commented that she has sold many homes on the lake, but people usually indicate they do not want to buy a home where they cannot use the shoreline because of the thick weeds.¹⁴⁷

124. The Department responded that there is insufficient evidence to demonstrate that property values will decrease because of the proposed treatment limitations.¹⁴⁸ The only study the DNR is aware of that potentially addresses this issue was conducted by the Mississippi River Headwaters Board and Bemidji State University in 2003, which indicated that protection of aquatic plants results in better water quality, which was positively correlated with property values. The DNR also argues that its SONAR documents that aquatic plants benefit water quality. Therefore the proposed rules, which increase protection for aquatic plants, could positively impact property values.¹⁴⁹

125. In its December 1 Comments, the Department offered a generalized response to criticism that the SONAR did not discuss adequately the potential for the proposed rules to cause declines in lakeshore property values. The DNR believes that the proposed rules are unlikely to have a measurable effect on lakeshore property values. The DNR already has discretion to reduce the amount of aquatic plant control on an individual's shoreline below the 100-foot maximum allowed under the current rule, and many people testified at the hearings that the DNR is already placing such limitations. Lakeshore property values are influenced by a variety of factors, including trends in the housing market and supply and demand for lakeshore properties, as evidenced by development pressure and high-priced lakeshore on shallow lakes and bays formerly considered too marginal to develop. The DNR believes the proposed rules are unlikely to produce enough of a change in aquatic plant control to affect property values.¹⁵⁰

126. The ALJ agrees that any potential decrease in property value is too speculative to consider at this point. Regarding the grandfathered lakes, one would have to assume that the overall treatment would drastically decrease, despite the availability of variances, and that shorelines would become unusable as a result. To calculate any lost tax revenue to local units of government, the value of the properties would have to be reassessed after the changes in treatment occurred. Given the complexity of the housing market, especially in turbulent financial times, it would be nearly impossible to attribute lower property values to the proposed rule changes. Though the ALJ believes the Department's argument that property values could

¹⁴⁷ Kelsey Comment, Dec. 1, 2008.

¹⁴⁸ Hirsch Test., Waseca, p. 145.

¹⁴⁹ Dept. Comment, Dec. 1, 2008, p. 10.

¹⁵⁰ Dept. Comment, Dec. 1, 2008, p. 10.

increase as a result of the proposed changes may be overly optimistic, the potential for decreased property values is found not to constitute a defect, because the DNR's position is supported by a rational basis (that real estate values are affected by a large variety of factors).

127. The DNR also reiterates its general policy regarding the effect of aquatic plant control on property values, that even if current social values caused property values to be correlated positively with the destruction of aquatic plants, the Department would be remiss in its public trust responsibilities if it sacrificed the increased protection of aquatic plants, which it believes the evidence shows clearly are beneficial to the health of Minnesota's lakes, for the benefit of private property values.

LVMPs Will Not Effectively Control Invasive Species

128. MHL argues that the variance process is not an effective means by which to control invasive species and that "it has not worked on several lakes." MHL suggests that language that enables control of invasive aquatic plants should be in the rule itself and not available only through a time consuming and cumbersome variance process, especially considering the short field seasons.¹⁵¹

129. MHL argues that LVMPs are time consuming and expensive to develop – usually two or more years. Normally outside consultants are required to develop them, at the expense of property owners. The aquatic plant surveys require significant expenditures by lake associations, for example, a survey required for the development of an LVMP typically costs more than \$10,000 for lakes of approximately 800 acres. MHL states that LVMPs must be approved by the DNR, and historically the approval is contingent on a lake association's adoption of the Department's conservative treatment standards, regardless of the consultant's original findings and recommendations. MHL argues that requiring an LVMP imposes an undue burden on property owners.¹⁵²

130. Dr. Pullman commented that LVMPs serve as an administrative impediment to the quick and effective management and suppression of invasive species. He commented that lakes are dynamic systems and their conditions are in constant flux. Continually changing cultural disturbance dynamics lead to the development, evolution and emergence of difficult to manage native and exotic plant genotypes and hybrids, some of which can be extremely invasive. He voiced concern that the proposed rules would require development of an LVMP before DNR could authorize the treatment of a newly discovered invasive aquatic plant.¹⁵³ He voiced concern that the proposed rules do not allow for quick decisive action for the management of some invasive species. He suggested that regulations must be adaptive to adjust to dynamic conditions in aquatic vegetation communities, and that the

¹⁵¹ Ex. 16, p. 8.

¹⁵² Ex. 16, p. 8 (see discussion in Dept. Comment, Dec. 1, 2008, p. 17 regarding distinction between "survey" and "inspection").

¹⁵³ Test., Maplewood, pp. 47-48.

LVMPs be used to focus on the outcomes of management efforts rather than to ban the use of certain management strategies.¹⁵⁴

131. In the SONAR the DNR explained why the variance and LVMP approach to determining whether elevated levels of aquatic plant control are warranted is reasonable.¹⁵⁵ It is the DNR's position that liberalizing APM rules to allow individual, discretionary treatment would result in an ineffective, piecemeal approach to invasive species control.¹⁵⁶

132. In response to Dr. Pullman's testimony, the Department stated that an LVMP would not be necessary to treat a newly discovered invasive aquatic plant. The DNR described how it immediately treated Brazilian waterweed in Powderhorn Lake in Minneapolis when it first discovered it within the last two years. The DNR suggested that Dr. Pullman is unfamiliar with the DNR's regulatory structure regarding invasive species (Minn. Stat. Ch. 84D and Minn. R. Ch. 6216).¹⁵⁷

133. With respect to variances, the DNR pointed out that the proposed rules require an LVMP before granting a variance only if the proposed control needs to be evaluated to determine if the goals of the variance are met. The DNR emphasizes that the LVMP will be utilized when attempting to manage established populations of invasive aquatic plants so that more information can be gained on how to provide effective long-term management for these species. This is not the tool the DNR would use for infestations of newly discovered species that require a rapid response.¹⁵⁸

134. The DNR acknowledged that the LVMP process and related surveys can take time and cost money. The DNR noted that property owners sometimes choose to pay the expense of the surveys because adequate state funding is not available, though the proposed rules do not require that property owners cover these costs. The DNR addressed these funding issues by providing an abbreviated LVMP format, adding field staff to provide more technical assistance for LVMPs and by providing more grant dollars for LVMPs, surveys, and invasive aquatic plant control.¹⁵⁹

135. The DNR responded further that LVMP approval is not contingent on a lake association's adoption of the Department's treatment standards, and points out that it has approved a number of LVMPs which included variances to help manage invasive species.¹⁶⁰

Inspection and Enforcement Costs Are Likely to Increase

¹⁵⁴ Ex. 35D.

¹⁵⁵ SONAR, pp. 10-11, 38, 43.

¹⁵⁶ Hirsch Test., Waseca, pp. 147-148.

¹⁵⁷ Dept. Comment, Dec. 1, 2008, p. 23; Hirsch Test., Maplewood, pp. 51-52.

¹⁵⁸ Dept. Comment, Dec. 1, 2008, p. 24.

¹⁵⁹ Dept. Comment, Dec. 1, 2008, p. 17; Hirsch Test., Waseca, pp. 166-167.

¹⁶⁰ Dept. Comment, Dec. 1, 2008, p. 18.

136. MHL commented that it is likely that enforcement costs will increase if these rules are adopted. Tighter standards typically require more inspection and enforcement and these costs will be passed to the taxpayers. MHL also suggested that non-compliance will increase as permitting becomes more restrictive and permitting fees increase.¹⁶¹

137. In the SONAR the Department stated that the proposed rules would affect the amount of aquatic plant control allowed under APM permits, but would not require an increase in permitting or enforcement activity.¹⁶² The DNR does not believe permit inspections will increase as a result of the proposed rules. The cost of the aquatic plant management program is a direct function of the number of permits the program issues and the amount of enforcement activity. The proposed rules do not add any activities to the permitting program that are not already in existence, so the DNR does not believe permit applications or enforcement activities will increase.¹⁶³ The language set forth in rule part 6280.0250, subp. 7, specifies criteria that are currently being used to determine when an inspection should occur; it does not set forth new inspection criteria. The DNR further responded that it had no reason to believe noncompliance would increase under the new rules.¹⁶⁴

138. The only area in which the DNR anticipates increased costs is the additional staff time needed to develop the LVMPs for the grandfathered lakes.¹⁶⁵

The DNR Has Already Implemented the Proposed Rules

139. MHL claims that DNR has already implemented the proposed rules because in recent years it has failed to give valid, science-based reasons for rejecting or restricting permits. MHL conducted a survey of dozens of lakes and hundreds of APM permit holders in 2007 and found that many permits had been restricted or denied. It claims the DNR has already limited the allowable treatment amounts, consistent with the proposed rules, before the rules received approval through the administrative law process.¹⁶⁶ The DNR denies that allegation.

140. The DNR notes that some reduction in aquatic plant control has occurred prior to the initiation of this rulemaking process. Current rules allow permits to be issued with precise restrictions, so the proposed rules are not a drastic change.¹⁶⁷ The DNR notes that a number of factors have contributed to an admitted rise in the number of permits being reduced below the 100-foot maximum.

¹⁶¹ Ex. 16, p. 8.

¹⁶² SONAR, p. 4.

¹⁶³ Hirsch Test., Waseca, pp. 148-149.

¹⁶⁴ Dept. Comment, Dec. 1, 2008, p. 18.

¹⁶⁵ Hirsch Test., Waseca, pp. 149-150.

¹⁶⁶ Ex. 16, p. 9, Attachment B, C; see also D. Pennings Test, Maplewood, p. 270 (stating that DNR has been implementing these rules over the past two years).

¹⁶⁷ Dept. Comment, Dec. 1, 2008, p. 17.

DNR has added APM specialists to address increasing permit workload and reductions have occurred in some instances because permits were reviewed more rigorously than in the past. APM permits in northeast Minnesota have seldom allowed the maximum of 100 feet and in southern Minnesota APM permits have seldom allowed control over more than half the shoreline for the past seven years. The DNR asserts that it has never issued any instructions to staff to begin implementing the proposed rules. The DNR also points out that some of the information included in the MHL survey is misleading because some control areas are characterized as reductions because the area was less than in previous years, but the DNR actually approved what the landowner requested.¹⁶⁸ The DNR believes that the proposed rules will help to address perceived inconsistencies and shortcomings in the APM permit decision-making process by providing specific criteria for issuing these permits.¹⁶⁹

City of Deephaven Shoreland Management Ordinance

141. The City of Deephaven alleges it has authority to adopt aquatic plant management rules as part of its shoreland management ordinance and has, in fact, done so to “memorialize” current practices in permitting for aquatic plant management in Lake Minnetonka’s Carson’s and St. Louis Bays, which are currently covered under the grandfather clause. Paul Skrede, Mayor of the City of Deephaven, testified that the proposed rules should not be adopted because they conflict with the City’s Shoreland Management Ordinance. The City maintains that the state must change its proposed rule to conform to the City Ordinance, pursuant to Minn. Stat. § 103G.615, subd. 3, which requires that aquatic plant control be consistent with shoreland conservation ordinances.¹⁷⁰

142. The Department responded that the City does not have the authority to adopt APM rules or ordinances and therefore its argument is without merit. Deephaven’s ordinance attempts to negate the changes that the Department is proposing for the grandfather clause and, according to the Department, is inconsistent with current rules, because the elevated level of plant control allowed in the grandfathered lakes currently is at the discretion of the DNR Commissioner. Shoreland regulations are implemented by local government units (LGU) through an LGU’s zoning authority. Minn. Stat. § 103G.621 allows for local regulation “in a manner consistent with the rules of the commissioner.” The State directly regulates activities taking place within public waters through APM statutes and rules. The DNR argues that the APM program is not a shoreland zoning program, delegated to the LGU, and therefore the City’s argument that the DNR must comply with its shoreland ordinance is without merit.¹⁷¹ The DNR points out that if the City of Deephaven’s argument is correct, the state may have to attempt to adopt rules that comply with hundreds of different local APM ordinances adopted by hundreds of different local units of government, a situation that would be unworkable and contrary to legislative intent.

¹⁶⁸ Dept. Comment, Dec. 1, 2008, Attachment 13.

¹⁶⁹ Dept. Comment, Dec. 1, 2008, p. 21.

¹⁷⁰ Test. P. Skrede, Maplewood, pp. 57-68; Comment, Nov. 24, 2008.

¹⁷¹ Dept. Comment, Dec. 1, 2008, pp. 26-27.

143. The Administrative Law Judge agrees that Deephaven’s argument is erroneous. The City’s authority does not extend beyond the shoreline and into Lake Minnetonka. The ALJ finds that the Department need not amend the proposed rules to comply with Deephaven’s Ordinance and that the Ordinance is not an impediment to the proposed rules.

Regulation of Commercial Aquatic Herbicide Applicators

144. The Minnesota Aquatic Management Society (MAMS) put forth two arguments regarding the Department’s statutory authority as it relates to the regulation of commercial pesticide applicators. MAMS is an association of Minnesota businesses that provide aquatic plant management (APM) services to lake shore property owners, lake associations, lake and watershed districts, and government agencies throughout the State of Minnesota.¹⁷² APM permits are issued by the DNR to individual property owners who in turn contract with commercial applicators to perform the permitted activities.

A. The DNR lacks authority to indefinitely suspend the APM activities of a licensed commercial applicator or to render a commercial applicator ineligible to apply aquatic herbicides.

145. First, MAMS argues that the proposed amendments to the permitting sections of the APM rules go beyond the DNR’s authority to regulate the licenses of commercial herbicide applicators. Commercial application of herbicides is a heavily regulated activity, and every commercial applicator must obtain a license from the Minnesota Department of Agriculture (MDA), as well as comply with all federal, state, and local laws that apply to commercial applicators and herbicide applications.¹⁷³ According to Minn. Stat. § 103G.615, commercial applicators must also comply with the terms of APM permits.

146. MAMS disputes the proposed rules that allow the DNR to suspend indefinitely APM activities, regardless of whether the suspended party holds an APM permit or a commercial applicator’s license.¹⁷⁴ MAMS states, “[t]hese amendments arguably would permit the Commissioner [of the DNR] to suspend the APM activities of any person – including those of a licensed commercial applicator – if the Commissioner determines that the suspension is in the public interest.”¹⁷⁵ MAMS asserts that the DNR is proposing to codify “incredibly broad” authority allowing the DNR to suspend any person’s APM activities. According to MAMS, if the Department were to issue such an order to a licensed commercial applicator, it would prohibit the commercial applicator from doing the very thing it is authorized to do under its license.

¹⁷² Minnesota Aquatic Management Society’s Response to the DNR’s Statement of Need and Reasonableness (“MAMS Response”), submitted November 26, 2008, at p. 2.

¹⁷³ See Minn. Stat. § 18B.33 and Minn. R. 6280.0700.

¹⁷⁴ MAMS Response at p. 4. See Minn. R. parts 6280.0900, subparts 1 and 1a, and 6280.0100, subpart 2d.

¹⁷⁵ MAMS Response at p. 5.

147. Furthermore, MAMS argues that the DNR does not have the authority to enforce the rules as drafted because the DNR cannot make a commercial applicator licensed by the MDA “ineligible” to apply aquatic herbicides.

148. MAMS believes that the DNR’s ability to make a licensed commercial applicator ineligible to apply aquatic herbicides in addition to revoking an APM permit amounts to a “penalty enhancer.”¹⁷⁶

149. MDA made few comments regarding the proposed rules. Specifically, the MDA found no problems with the DNR’s use of phrases or definitions in which MDA regulations are mentioned, and found acceptable the DNR’s proposal to be able to limit or prohibit MDA licensed commercial pesticide applicators from working in public waters when a history of non-compliance with DNR regulations is shown.¹⁷⁷

B. The proposed rules do not afford sufficient due process to licensed commercial applicators.

150. MAMS also asserts that the proposed rules at part 6280.1100 do not adequately protect the rights of commercial licensees. MAMS first argues that the review and appeal provisions only apply to “permits” and “applicants” and not to licensed commercial applicators contracting with permit holders to perform permitted APM activities. Second, MAMS suggests that the proposed rules impose a “guilty before proven innocent standard” and that commercial applicators must be provided an opportunity to be heard before a suspension or revocation becomes final.¹⁷⁸

151. Based upon these arguments by MAMS, the DNR has proposed to make changes to the proposed rules at parts 6280.0100, subpart 2d, and 6280.0900, subpart 1a. Those changes are discussed in more detail below at Findings 170-172, 238-244, and 287-288.

Other Department Responses to Comments

152. In its Post-Hearing Comments filed on December 1, 2008, as amended for clerical corrections on December 8, and its Response to Comments filed December 8, 2008, the DNR responded to a large number of the public comments filed during the Post-Hearing Comment period between November 8 and December 1, 2008. The Administrative Law Judge has selected some for discussion below, but refers the reader to the texts of the Department’s filings for its response to their concerns. As noted earlier, the Administrative Law Judge has read every comment, and every response, and given them full consideration.

153. Garry Krebs of Lakeville, Minnesota, is concerned about the proposed provision that does not allow pesticide control in natural environment

¹⁷⁶ MAMS Response at p. 6. See Minn. R. parts 6280.0900, subparts 1a, and 6280.0100, subparts 2c and 2d.

¹⁷⁷ Ex. 23.

¹⁷⁸ MAMS Response at pp. 7-8.

lakes. His concern is that a separate shoreline rules process may result in many different zoning classifications in the same lake, which could change the classification of the bay where he lives to one where pesticide use is restricted. The DNR notes that the provision that concerns Mr. Krebs is not proposed for change during this rulemaking process, and that local governments are allowed by rule, after public review and comment, to rezone shorelands into special protection districts. The DNR has established the necessity and reasonableness of restricting pesticide control in natural environment lakes and special protection districts.

154. The Lake Detroiters Association is concerned about the provision that it believes imposes a requirement that all residents of a lake must provide signature authority before an entire lake can be treated. The concern of the Lake Detroiters, and the Detroit Lake Association, involves infestations of curly-leaf pondweed and flowering rush. The DNR points out that its proposals allow landowner approval to be waived if the Commissioner determines that it is necessary to protect aquatic habitat. Since the control in question would be for invasive aquatic plants, the problem at Detroit Lakes seems to fit the criteria in the proposed language for waiving landowner approval during the permit application process.

155. Edward C. Oliver, who owns lakeshore on Carson's Bay at Lake Minnetonka, notes that he would only be able to treat 35 feet of nuisance aquatic plants along his 41 feet of shoreline, which would be impractical and create difficulty for any applicator to perform. Mr. Oliver suggests that the Department should "go back to the drawing board and try again" if it wishes to proceed with the current proposals, given that every witness he observed at Maplewood spoke against the DNR's proposals.

156. Similar concerns regarding the need to begin again with this rule-making process, or convene all the stakeholders for a possible mediation, were expressed also by the Lake Owasso Association through its president, Joe Bester, and by Roger Williams, a resident of Lake Johanna. The Administrative Law Judge noted in Maplewood that the Office of Administrative Hearings stands ready to provide mediation services, if the DNR would request them, in connection with the APM rules, but the DNR declined in its Comments and Response. DNR's staff noted that it learned during the extensive program review process conducted for these rules that a negotiated rulemaking process would have made consensus difficult to achieve because of all the debate and disagreement in the process conducted already.

157. In response to a suggestion that the grandfather clause not be sunsetted on particular lakes until their LVMPs are approved by a majority of affected property owners was rejected by the DNR in its Comments, because the Department believes the proposal is inappropriate and would be subject to a legal challenge because it gives too much authority over a public resource to a special interest group.

158. With regard to the concerns expressed by Midwest Aqua Care, and its president, Tom Gertz, the DNR responds that the potential for economic impacts to commercial businesses that control aquatic plants is covered in the SONAR.

The DNR denies the argument that the Department has lumped together submersed, floating-leaf and emergent vegetation for standard, uniform regulation. The DNR notes that it has provided specific definitions for each of these vegetation types, and generally is not making any substantive changes regarding the regulation of floating-leaf and emergent vegetation.

159. Midwest Aqua Care is concerned that creating “micro control sites” is counter productive to achieving the intended outcome of nuisance relief, an argument which the DNR addresses at numerous places in its SONAR. The Department notes also that its proposed rules will allow both recreational access and protection for aquatic plants.

160. Mr. Gertz argues also that the incremental change in development on rural lakes is not enough to justify rule changes when fully developed lakes have been successfully managed for decades under the conservative 15 percent limit without evidence of harm. He notes also that grandfathered lakes exceed the 15 percent limit and continue to be healthy. Again, the DNR notes that it has responded to this concern in its SONAR and throughout its Comments.

161. Mr. Gertz and at least one other commentator have quoted from Larry Shannon, a past director of the Division of Fish and Wildlife in the DNR, to the effect that he made a statement in 1989 that the “smallest realistic skip distance should be 100 feet. Five or ten foot skips serve no useful purpose. Fifteen percent littoral area limit is believed to provide sufficient protection ... no need to further limit the amount of area to be treated unless there are extraordinary circumstances.” In its comments, the DNR responds that the statements of former Director Shannon are almost 20 years old and do not reflect current thinking at the DNR.

162. In response to Mr. Joe Bester on December 8, the Department notes that Mr. Bester argues that scientific literature indicates that land use practices are more important to water quality than aquatic plant management practices, that the Department’s aquatic plant permit inspection process is flawed, and that the Department’s process in developing rule changes was flawed. The Department responds that while addressing land use practices is key to water quality improvement, and that it does not suggest that its proposed rules are the total solution to water quality issues, maintaining healthy aquatic plant communities is important to water quality and the DNR has provided documentation to support this. As was noted with other commentators, the Department points out that Mr. Bester focuses on the lack of scientific documentation linking aquatic plants to water quality benefits, but does not address the importance of aquatic plants and sufficient wildlife habitat, which has been strongly documented in the scientific literature cited in this record.

163. Regarding Mr. Bester’s allegation of flaws in the DNR’s inspection process, the DNR notes that its inspectors conduct the process on the private shorelines of landowners seeking permits, and the visual observations from shore are usually sufficient because the landowner generally seeks treatment near the shoreline. The Department is also reasonable in requiring documentation of actual

nuisance conditions, and identification of the organisms that are causing the nuisance. It notes that once nuisance conditions are documented, a permit can be issued in subsequent years without an inspection and that the vast majority of APM permits are issued in a timely fashion.

164. The concerns expressed by Mr. Bester, Rogers Williams, and others regarding the process the DNR used to propose these rules are addressed by the Department with a denial that it had its mind made up before relevant facts were gathered and a denial that it deliberately excluded grandfathered lake people from the rule notification to avoid opposition. In connection with not using a negotiation/mediation-type process, the Department notes that it did proceed within extensive APM program review prior to commencing rulemaking in this proceeding, which review is described at pages 11-13 of the Department's December 1 Comments. Its report on that review was also added to the record at the request of the Administrative Law Judge.¹⁷⁹

165. Several entities and individuals, including the Minnesota Chapter of the American Fisheries Society, Minnesota Citizens for Environmental Advocacy (MCEA) (through a filing by Henry VanOffelen), Dann Siems, and John Kamman, all offered comments in support of the rules, as did Paul Liemandt of the Minnesota Department of Agriculture, and the Minneapolis Park Board. The comments of Mr. Kamman and Mr. Siems were accompanied by attachments that demonstrate scientific evidence of studies that document the ecological importance of aquatic vegetation in maintaining water quality, biodiversity and nutrient benefits. Mr. Siems presents point-by-point refutation of the eight major arguments of Minnesotans for Healthy Lakes (MHL). He notes also that the intentional removal or inadvertent destruction of rooted plant communities increase both the probability of invasion and the severity of impacts in waters that are treated by herbicides. He notes that invasive species have increased in Minnesota in the last two decades because prevailing shoreline developmental practices have compromised significant proportions of native rooted plant communities. He posits that MHL and other participants in this process who have expressed opposition to the DNR's proposals constitute a "small but outspoken minority of lakeshore property owners with a strong sense of entitlement who are willing to compromise a commonwealth resource to serve their short-sighted self-interest." Siems strongly urges approval of the APM rules as currently proposed because they are based on the best available science and will serve the long-term interests of all Minnesotans.

X. Rule-by-Rule Analysis

Part 6280.0100, subpart 2

166. The DNR proposes to define "Aquatic plant" as follows: "~~Aquatic macrophytes plant' means vascular nonwoody plants, either submerged,~~

¹⁷⁹ Ex. 25; p. 43 of the *Little Falls Transcript*.

floating-leafed, a plant naturally growing in water, saturated soils, or seasonally saturated soils, and includes algae, submersed, floating-leaf, floating, or and emergent plants growing in water, and their root stalks, seeds, and other vegetative propagules.”

167. The DNR wishes to use the term “plant” instead of “macrophyte” to broaden the definition and make it more understandable to the public. The Department proposes to delete the phrase “growing in water” because it creates ambiguity when dry conditions cause water levels to recede below where aquatic plants are growing. The DNR intends for the rules to apply to emergent aquatic plants that are temporarily growing out of the water.¹⁸⁰

168. Minnesotans for Healthy Lakes (MHL) contests the proposed definition because it appears to give the DNR authority over terrestrial plants as well as aquatic plants. MHL questions the purpose or value of this new language.¹⁸¹ The DNR declined to make changes to the proposed definition, referring back to the statements made in the SONAR.¹⁸²

169. The Administrative Law Judge finds that the DNR has shown a rational basis for the proposed definition.

Part 6280.0100, subpart 2d

170. The DNR seeks to add a definition of “Aquatic plant management (APM)-related permit revocation” as follows: “Aquatic plant management (APM)-related permit revocation’ includes the revocation of an APM, commercial mechanical control, or commercial harvest permit and ineligibility to apply aquatic pesticides to public waters under an APM permit.” The DNR asserts that this definition is needed because the term is used in the proposed language in part 6280.0900 regarding authority to amend and revoke permits.¹⁸³

171. The DNR now acknowledges that because there is no DNR permit or license required for commercial pesticide applicators, it is problematic to prevent commercial pesticide applicators from conducting activities that are licensed by another agency, namely the MDA.¹⁸⁴ Accordingly, the DNR has agreed to amend subpart 2d as follows: “Aquatic plant management (APM)-related permit revocation’ includes the revocation of an APM, commercial mechanical control, or commercial harvest permit and ineligibility to apply aquatic pesticides to public waters under an APM permit.”

¹⁸⁰ SONAR, p. 11.

¹⁸¹ Ex. 16, Attachment A, p. 1.

¹⁸² Hirsch Test., Waseca, p. 169.

¹⁸³ SONAR, p. 12.

¹⁸⁴ See Findings 144-150, summarizing the arguments of MAMS.

172. The Administrative Law Judge finds that this change is needed and reasonable and not substantially different than the rules as originally published in the State Register.

Part 6280.0100, subpart 3a

173. The DNR proposes to define “Automated aquatic plant control device” as follows: ~~“Automated untended aquatic plant control device’ means a self-propelled device for that is capable of destroying aquatic macrophytes that may be remotely operated or placed on a timer and is capable of being operated without the assistance of an operator plants.”~~

174. The Department wishes to include all devices that are self-propelled, such as weed rollers. The current definition uses the term “untended,” which creates ambiguity as to whether it includes devices that are automated but require occasional adjustments by a person. The DNR states that the proposed changes are necessary and reasonable to eliminate loopholes that could allow these devices to be used without the regulatory constraints in Chapter 6280.¹⁸⁵

175. MHL asserts that the term “untended” should be left in the definition to prevent any confusion between “totally automated” and “mechanically-assisted” devices. In response, the DNR refers MHL to the arguments in its SONAR and declined to make the requested change.¹⁸⁶

176. The Administrative Law Judge finds that the DNR has shown a rational basis in the record for the proposed change.

Part 6280.0100

177. MHL proposes to add a definition of “Riparian access” as follows: “Riparian access’ means both access to and use of public waters by riparian owners. This use includes recreational and esthetic enjoyment of the water contiguous to their shoreline.”¹⁸⁷

178. According to the Department, MHL seeks to add this definition to facilitate their proposed change to part 6280.0250, subp. 4, where MHL proposes to eliminate the prohibition against issuing an APM permit for esthetic purposes alone on developed shoreline. The DNR is opposed to this proposal because it would promote a value that is inconsistent with conservation of aquatic resources. The DNR also points out that MHL’s desire to remove this prohibition so that property owners can have a clean shoreline appears to be inconsistent with MHL’s desire to

¹⁸⁵ SONAR, p. 12.

¹⁸⁶ Hirsch Test., Waseca, pp. 169-70.

¹⁸⁷ Ex. 16, Attachment A, p. 4.

control invasive aquatic plants to maintain “diversity of lake ecosystems.”¹⁸⁸ For these reasons, the DNR declined to add this new subpart.

179. It is within an agency’s discretion not to add additional proposals. The Administrative Law Judge is concerned here only with the legality, need and reasonableness of the DNR’s proposals. But in this instance, when the Department has commented on why it will not accept a stakeholder’s suggestion, the Administrative Law Judge finds that the DNR has provided an adequate response to MHL’s proposal and that the DNR is justified in not adding a definition of “Riparian access.”

Part 6280.0250, subpart 1

180. Subpart 1 addresses actions not requiring an APM or commercial harvest permit. The DNR asserts that many of the proposed changes to subpart 1 are technical in nature, but also proposes to add two new items regarding skimming duckweed or filamentous algae off the surface of a water body, and mechanical or pesticide control of aquatic plants done as part of public road or utility crossing right-of-way maintenance by government units or utility companies.¹⁸⁹ The proposed language clarifies that a person must own, lease, or be an easement holder of land adjacent to the water to conduct, without a permit, APM activities that involve gaining access to public water.

181. MHL objected to the proposed amendments to item C. Specifically, MHL argued that use of automated untended aquatic plant control devices should be included as an activity that does not require an APM permit, subject to the parameters of item C. MHL requested that power-operated cutters, rakes, or similar equipment that do not significantly alter the course, current, or cross-section of the lake bottom (i.e. weed rollers), all of which are proposed for deletion in item C, be added back into the text of the proposed rules.¹⁹⁰

182. The DNR does not support MHL’s request to have weed rollers included in item C. The DNR stated that weed rollers are difficult to track from an enforcement standpoint and have the highest violation rate of all permit types.¹⁹¹

183. In addition, MHL proposes to add a new action not requiring an APM permit, Item I, to the end of this subpart as follows: “Use of pesticide for control in water bodies of 10 acres or less having no continuously flowing outlets.”¹⁹²

184. The DNR objects to this proposed new item because pesticide application is a highly contentious issue that should require an APM permit. The DNR is concerned that fluctuations in the water levels of these small isolated

¹⁸⁸ Dept. Comment, Dec. 1, 2008, p. 10.

¹⁸⁹ SONAR, pp. 15-16.

¹⁹⁰ Ex. 16, Attachment A, p. 5.

¹⁹¹ Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, p. 171.

¹⁹² Ex. 16, Attachment A, p. 6.

bodies of water could create outlets which could, in turn, create run-off downstream during a rainfall.¹⁹³

185. The DNR has established the need for and reasonableness of its proposed changes and additions to subpart 1. Furthermore, the DNR has shown a rational basis for declining to adopt MHL's proposed language.

Part 6280.0250, subpart 2

186. Subpart 2 addresses actions requiring an APM permit. The DNR argues that its proposed changes to this subpart primarily streamline existing language and do not bring activities under APM permitting that currently do not require a permit.¹⁹⁴ One of those actions, item A, is "mechanical and pesticide control of aquatic plants or nuisances."

187. MHL argues that the use of the word "mechanical" in item A conflicts with the language in subpart 1, item C, which states that mechanical control of submersed plants does not require an APM permit.¹⁹⁵ But subpart 1, item C clearly shows that the APM permit is not required for mechanical control of aquatic plants only when the plant removal is done to maintain a swimming site or boat dock not to extend along more than 50 feet or one-half the length of the owner's total shoreline, and not to exceed 2,500 square feet plus the area needed to extend a channel no wider than 15 feet. Accordingly, the two subparts do not conflict with each other.

188. MHL also expressed concern that the DNR was deleting the three year permit provision from item D of subpart 2. In fact, the effect of this provision is being retained and is proposed to be moved to proposed rule part 6280.0450, subp. 3.¹⁹⁶

189. The Administrative Law Judge finds that the provisions of subpart 2 are needed and reasonable.

Part 6280.0250, subpart 3a

190. Proposed subpart 3a describes the criteria for issuing APM permits.

The commissioner may issue APM permits for public waters to provide riparian access, enhance recreational use, control invasive aquatic plants, manage water levels, and protect or improve habitat. The following criteria

¹⁹³ Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, p. 174.

¹⁹⁴ SONAR, p. 16.

¹⁹⁵ Ex. 16, Attachment A, p. 6.

¹⁹⁶ Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, p. 175.

shall be considered to determine if an APM permit should be approved or denied and how much control or harvest to allow under an APM permit. . . .

191. What follows are eleven criteria that the DNR must consider when making a determination regarding issuing APM permits. The DNR is proposing these new criteria in an attempt to inform the public about how these decisions are made and to help ensure that decisions are fair and consistent across the state.¹⁹⁷

192. At least two commentators voiced objections to some or all of this subpart. Jeffrey Peterson resides on the shores of Big Marine Lake in Scandia, MN. He is in favor generally of the increased protections for native aquatic plants put forth by the DNR in the proposed rules. As to subpart 3a, Mr. Peterson expressed concern over the use of what he calls the legally ambiguous term “recreation” or “recreational use.”¹⁹⁸ He fears that this language could allow the DNR to grant APM permits that harm native aquatic plants in deference to any form of recreation.

193. The first of the eleven criteria in subpart 3a that the DNR must consider is “[t]he extent to which aquatic plants or nuisances are interfering with a permit applicant’s ability to use watercraft, swim, or engage in other traditional recreational uses.” Mr. Peterson proposes inserting the word “extensively” or “substantially” before the word “interfering” as a means of ensuring that more than just a minimal amount of interference by aquatic plants results in the issuance of an APM permit.¹⁹⁹ In addition, the Minnesota Chapter of the American Fisheries Society (MNAFS) recommended that the word “reasonably” be inserted before “use watercraft, swim, . . .”²⁰⁰

194. In response, the DNR notes that use of the phrases “recreational use” or “traditional recreational use” have not been a problem in the past and that Mr. Peterson did not propose alternative language. As to Mr. Peterson’s second point, the DNR believes that its own proposed language will allow APM permits to be limited to those situations where removal is necessary for recreation.²⁰¹

195. MHL objected to the full text of subpart 3a, arguing that the proposed criteria add too much subjectivity to the APM permitting process and should be deleted.²⁰² In response, the DNR reiterated that the proposed criteria add transparency, openness, and consistency to the rules, and the DNR stands in strong support of its proposed subpart 3a.²⁰³

¹⁹⁷ SONAR, p. 18.

¹⁹⁸ Jeffrey L. Peterson Comment, November 25, 2008.

¹⁹⁹ Jeffrey L. Peterson Comment, November 25, 2008.

²⁰⁰ Minnesota Chapter of the American Fisheries Society Comment, November 25, 2008, p. 3.

²⁰¹ Dept. Response, Dec. 8, 2008, p. 8.

²⁰² Ex. 16, Attachment A, p. 8.

²⁰³ Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, pp. 175-77.

196. The 1854 Treaty Authority expressed overall support of item E in subpart 3a. The 1854 Treaty Authority is an inter-tribal natural resource management agency governed directly by the tribal councils of the Bois Forte Band and Grand Portage Band of Chippewa. It protects treaty rights in Lake, Cook, St. Louis, Carlton, Pine and Aitkin counties. Item E states that consideration should be given to wetlands or shallow lakes and bays that naturally support abundant aquatic plants. The Treaty Authority suggests that “the presence of wild rice” be mentioned specifically and added as a listed criterion.²⁰⁴

197. The Department responded that the proposed criterion in item B (habitat, water quality, and erosion control value of the aquatic plants) is sufficient, because wild rice has all of the listed attributes.²⁰⁵ However, the ALJ finds that if the DNR revises the criteria to mention specifically wild rice, as suggested by the Authority, such a rule would be reasonable, and adopting it would not constitute a substantial change.

198. The Administrative Law Judge finds that the proposed language of subpart 3a is needed and reasonable. The use of criteria in administrative rules is an important practice, and the DNR’s specificity enhances the transparency of its processes in this context.

Part 6280.0250, subpart 4

199. Subpart 4 deals with aquatic plant control activities that are prohibited. The proposed changes to the current language include language clarifications and some additions to the categories of prohibited activities. Commercial harvest permits are added to the types of permits that will not be issued for the prohibited activities. The Department argues that it is necessary and reasonable to clarify that commercial harvest is among the prohibited actions so that the rules apply consistently to all permittees and to provide resource protection where aquatic plants should not be destroyed or removed.²⁰⁶

200. MHL argued that the prohibition against APM permits issued solely to maintain or improve the esthetics on developed shoreline should be deleted. MHL asserts that property owners have a right to maintain a clean shoreline.²⁰⁷

201. The DNR responded that this particular provision of the rule is not proposed for change at this time. Nevertheless, the DNR noted that the aquatic plant management program always receives resistance from shoreline property owners who believe that their lakeshore “should look like [their] front lawn” and be kept

²⁰⁴ 1854 Treaty Authority Comment, Nov. 4, 2008.

²⁰⁵ Dept. Comment, Dec. 1, 2008, pp. 25-26.

²⁰⁶ SONAR, p. 20.

²⁰⁷ Ex. 16, Attachment A, p. 9.

clean and tidy. The DNR believes strongly that this mentality is a poor way to manage the State's lakes and declined to make the change requested by MHL.²⁰⁸

202. The Administrative Law Judge finds that the DNR has put forth a rational basis for the proposed changes to subpart 4, and the changes are needed and reasonable.

Part 6280.0250, subpart 6

203. Subpart 6 is a new subpart that specifies five conditions that may be placed on APM permits. Current rule language does not specify all of the conditions that may be put on APM permits, and the DNR believes that it is necessary and reasonable to list these conditions and the reasons they may be used to inform the public and improve statewide consistency in how permits are administered.²⁰⁹

204. The five conditions that the DNR may specify for APM permits to avoid or minimize harm to aquatic resources and conflict between public water users are as follows:

- A. limits on the amount of control allowed, including limits on the percentage of the littoral area, shoreline length, and distance outward from the shoreline to be managed;
- B. restrictions on the method and timing of control;
- C. restrictions on the species of plants targeted by the control;
- D. requirements for supervision of the control by the commissioner; and
- E. requirements for public notice including posting at public water access sites, news releases or public notices in a local newspaper, public meetings, or other notice that would effectively inform users of the affected water.

205. MHL objected to the inclusion of "the percentage of the littoral area" in item A. The group also disagreed with restrictions on the method and timing of control, stating that such determinations should be left to the licensed applicator. MHL further asserted that there should be no supervision requirement when a licensed applicator is hired to complete the project. Finally, MHL requested that language be inserted in item C to state that "exotic invasive species should not be restricted."²¹⁰

206. The DNR referred back to the statements in the SONAR that emphasize the need of the DNR to assess each lake situation separately and place conditions on the APM permit as necessary to address the unique characteristics of

²⁰⁸ Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, pp. 177-78.

²⁰⁹ SONAR, p. 21.

²¹⁰ Ex. 16, Attachment A, pp. 9-10.

each permit application and each lake to which it applies.²¹¹ The DNR also asserts that these types of conditions are increasingly necessary as there is significantly more shoreline development now on shallow lakes and wetlands where sensitive aquatic conditions exist than there was in the past.²¹²

207. The proposed rule language clearly states that the DNR may invoke these conditions only “to avoid or minimize harm to aquatic resources and conflict between public water users.” Each situation will be individually analyzed and some or all of the conditions will be used in a rational way. The Administrative Law Judge finds that subpart 6 is needed and reasonable. And as noted at Findings 275 and 281, the change made to this subpart does not make it substantially different than originally published in the State Register.

Part 6280.0250, subpart 7

208. Subpart 7 is new language regarding field inspections of proposed APM permit sites prior to issuing a permit. The current rule language regarding inspections does not provide good guidance on the specific circumstances that require an inspection, and the DNR proposes to create this new subpart so that APM permit applicants will know when an inspection is required.²¹³ The proposed rule requires field inspections for properties with no previous permit history; properties where there has been a lapse in permit history; requests for changes in treatment areas, plant type controlled, or method of control; requests for off-shore control or control of invasive aquatic plants to enhance growth of native aquatic plants; and for properties where there has been a shoreline restoration order.

209. MHL commented that this proposed subpart contradicts the DNR’s contention that these proposed rules would not result in additional costs to the DNR.²¹⁴ MHL also suggested that the DNR add another subpart entitled “Permit approval processing time,” in which the DNR would be required to approve or reject permit applications and variance requests within 15 business days of receipt. Failure to respond within the allotted time would result in a default approval of the application or variance request.

210. The DNR answered that the proposed language describes the current practices of the DNR regarding inspections, and that again, the purpose of adding this language is to improve the transparency and consistency of the DNR’s inspection process. Concerning MHL’s proposed new subpart, the DNR declined to add

²¹¹ SONAR, pp. 21-22.

²¹² Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, pp. 178-79.

²¹³ SONAR, p. 22. The DNR has proposed to delete the current rule language regarding inspections, supervision, and monitoring at Minn. R. 6280.0350, subp. 1.

²¹⁴ Ex. 16, Attachment A, p. 10.

this language based upon logistical problems. The DNR can receive permit applications any time of the year, and if one were received in the middle of winter when the lakes are frozen, there may be no valid way to determine the validity of the permit request.²¹⁵

211. The Administrative Law Judge finds that the proposed language of subpart 7 is needed and reasonable. The use of criteria in administrative rules is an important practice, and the DNR should be commended for its efforts to increase the transparency of its APM permit inspection process.

Part 6280.0350, subpart 1a

212. Proposed subpart 1a is new language regarding submersed aquatic plant control restrictions for riparian property owners and lessees:

The commissioner may issue an APM permit to a person who is an owner, lessee, or easement holder of land adjacent to a public water or to the agent of the owner, lessee, or easement holder to control submersed aquatic plants on up to 100 feet or one-half of the length of the person's shoreline, whichever is less, with the following exceptions:

A. for properties with less than 70 shoreline feet, up to 35 feet of shoreline may be controlled;

B. control may be allowed on more than 100 feet of shoreline owned or leased by resorts, apartments, condominium complexes, townhouse associations, government units, and marinas; and

C. control may be allowed on up to the entire shoreline owned or leased by a person if the proposed method is selective for invasive aquatic plants.

213. The current rule language has two quantified limits for submersed aquatic plant control. First, there is a lake-wide limit on the total amount of control that can occur, which is 50% of the littoral area for mechanical control and 15% of the littoral area for pesticide control. Second, there is a limit for individual properties of a maximum of 100 feet of shoreline for pesticide control of submersed aquatic plants. These lake-wide and individual property limits are intended to work together to prevent excessive control of aquatic plants and negative impacts on habitat and water quality. These parameters are not proposed for change, except for a clarification that the sum of mechanical and pesticide control cannot exceed 50% of the littoral area.²¹⁶

214. The DNR believes that the existing limit for control adjacent to individual properties is not adequate to protect habitat and water quality and is in excess of what is needed to provide shoreline owners recreational access to the

²¹⁵ Dept. Comment, Dec. 1, 2008, p. 19; Hirsch Test., Waseca, pp. 179-81.

²¹⁶ Ex. 26, p. 3. See also, SONAR, pp. 23-26.

water. Existing language is also deficient in that a limit for mechanical control adjacent to individual properties is not specified.²¹⁷

215. The proposed change will allow control of submersed aquatic plants on up to 100 feet or half of a person's shoreline, whichever is less, with an exception to allow more control for resorts, apartments, condominium complexes, townhouse associations, government units, and marinas. In addition, the proposed exceptions allow up to 35 feet of shoreline control for properties with less than 70 feet of shoreline, and allow control on up to the entire shoreline if the control is selective for invasive aquatic plants. These limits and exceptions apply to both pesticide and mechanical control. The effect of these proposed rules would be to reduce the maximum amount of submersed aquatic plant control for people who own less than 200 feet of shoreline.²¹⁸

216. The DNR states that the proposed changes are necessary and reasonable to provide adequate protection for aquatic plants. Under the current rules, aquatic plant removal could occur on long continuous stretches of shoreline, especially on heavily developed lakes where most lot widths are 100 feet or less. The DNR has been under increasing pressure on developed lakes to allow the maximum control of 100 feet and wants to counteract this trend. The proposed rules would allow each shoreline owner to control up to half of the submersed aquatic plants along their shoreline, while requiring that at least half be left untouched. The DNR argues that this is consistent with the overall program goal to allow shoreline owners access to open water, while ensuring that habitat and water quality values are maintained.²¹⁹

217. MHL took issue with the limit on the shoreline footage on a lot-by-lot basis. According to MHL, adding this restriction to the lake-wide restrictions already in place is far too conservative and not supported by scientific evidence.²²⁰ In the same vein, MHL proposed that the DNR delete item A. In response, the DNR referred back to the arguments presented in the SONAR and at the public hearings.²²¹

218. MHL argues that the proposed rules are unreasonable because aquatic plant control herbicides provide safe and selective management of aquatic plants. Selective management will allow for a thinning of aquatic plants within a permitted area, not a denuding of aquatic plants from lake bottoms. MHL argues that the proposed rules will make it difficult or impossible to achieve acceptable plant management results because of the inherent dilution and dispersion characteristics of herbicides, and because of the ability of the aquatic environment to rapidly and completely overgrow small control areas within days or weeks.²²²

²¹⁷ Ex. 26, p. 3.

²¹⁸ Ex. 26, p. 4.

²¹⁹ Ex. 26, p. 4.

²²⁰ Ex. 16, Attachment A, p. 11.

²²¹ Dept. Comment, Dec. 1, 2008, p. 19; Ex. 26.

²²² Ex. 16, pp. 6-7.

219. Robert Woodburn, of Deephaven, Minnesota, commented that 6280.0350, subpart 1a is unreasonable because it will deprive him of the use of his property. He owns 70 feet of shoreline on Carson's Bay. He commented that if he treats only half of the shoreline he will only be able to treat his swimming area or his dock area, but not both. If he treats the swimming area, his boat will tear the milfoil and the treated half will become infested.²²³

220. The Minnesota Chapter of the American Fisheries Society (MNAFS) proposed language for a new subpart to part 6280.0350, entitled "Native aquatic plant control limited," where the DNR could specifically declare its interest in and goal of protecting native plant communities. In addition, MNAFS opposed the inclusion of item C, stating that "extensive eradication of invasive aquatic plant species along the entire frontage of riparian land parcels is best governed under an LVMP (6280.1000, subp. 2) and coupled with strategies to reestablish native aquatic plants."

221. The DNR declined to implement the suggestions of MNAFS, answering that the proposed rules give the Department the discretion to reduce treatment areas below the maximum allowed and provide APM permit decision-making criteria that take the habitat, water quality, and erosion control value of aquatic plants into account. The DNR stated that the proposed rules provide safeguards to avoid the worst-case scenarios posed by MNAFS.²²⁴

222. The Administrative Law Judge finds that the DNR has shown a rational basis for subpart 1a, and it is found to be necessary and reasonable. The DNR is seeking to implement a policy-based decision that is within its discretion. The change to item B proposed by the DNR after the public hearing, as discussed at Finding 282, does not make the proposed rule substantially different than originally proposed.

Part 6280.0350, subpart 4

223. This is the "grandfather clause" portion of the proposed rules, a detailed discussion of which appears at Findings 67-127.

Part 6280.0450, subpart 1

224. The DNR proposes changes to subpart 1, regarding the application process, as follows:

Application for an APM permit for any body of a public waters water may be made by a riparian owner, a lessee, or an easement holder, or by owners of a fee, leasehold, or interest to riparian lands to that body of water; or by the representative of a group of riparian owners a lake association or government agency. The commissioner shall deny a lessee's permit

²²³ Ex. 36 (Comment, Nov. 7, 2008).

²²⁴ Dept. Comment, Dec. 8, 2008, p. 2. See also proposed rule part 6280.0250, subp. 3a, item B.

application if the owner of the leased shoreline is opposed to the proposed permit. . . .

225. MHL objected to the proposed deletion of the language “the representative of a group of riparian owners.”²²⁵ MHL did not explain why this language should remain in the rule, and the DNR believes that the proposed language provides a complete list of the types of entities that might potentially be applicants on an APM permit.²²⁶

226. The Administrative Law Judge finds that the explanation put forth by the DNR in the SONAR provides a rational basis for the proposed changes to subpart 1, and that the DNR’s proposals here are needed and reasonable.

Part 6280.0450, subpart 1a

227. This proposed new subpart, regarding landowner approval, replaces language currently found in the rules in part 6280.0350, subp. 3, item C; subp. 4, item B; and subp. 5. The proposed language requires dated signatures of approval from all landowners with shorelines adjacent to proposed treatment areas, with an exception for lake-wide control of algae, which requires signatures from a majority of landowners consistent with current rule, and an exception that allows the landowner signature requirement to be waived if aquatic plant control is necessary to protect aquatic habitat.²²⁷

228. The DNR believes it is necessary and reasonable to get landowner approval before aquatic plant control occurs adjacent to the landowner’s property. Since most aquatic plant control is done to provide access to open water for shoreline owners, it does not make sense to control these areas if the landowner does not approve. Furthermore, the DNR states that it is necessary and reasonable to require a signature each year so as to avoid mistakes caused by changes in property ownership. Electronic signatures are permitted to expedite the approval process. The proposed subpart is important so that the DNR can obtain shoreline owner approval for aquatic plant control where it is appropriate, but can also authorize aquatic plant removal without shoreline owner approval in situations where broader public interests are at stake.²²⁸

229. This proposed new subpart regarding landowner approval generated some commentary from the public. Some commentators interpreted the proposed language to mean that a person would have to get permission from each next door neighbor before controlling plants in front of his or her property. The DNR

²²⁵ Ex. 16, Attachment A, p. 14.

²²⁶ Dept. Comment, Dec. 1, 2008, p. 19.

²²⁷ SONAR, p. 31.

²²⁸ SONAR, p. 31.

expressed that its intent is that each property owner has to approve treatment in front of his or her own property.²²⁹

230. Other commentators interpreted the new language to mean that a landowner's signature could be waived only regarding lake-wide algae treatment. In fact, the DNR means for that waiver to apply to all types of treatment.²³⁰

231. Based on those comments, the DNR agreed to amend the proposed language as discussed at Findings 284 and 285.

Part 6280.0450, subpart 2

232. Subpart 2 addresses deadlines for permit applications. The changes to this subpart are technical and clerical in nature.²³¹ In both the current and the proposed rules, the DNR will accept applications for permits to control submersed or floating-leaf aquatic plants until August 1, unless the commissioner determines there is justification for late season pesticide control.

233. MHL argued that subpart 2 should be deleted and that there should be no deadline for permit applications because some treatments are successful in the fall.²³² According to the DNR, fall treatments are generally unnecessary and the existing language does allow for late-season control if it is justified.²³³

234. The Administrative Law Judge agrees that the changes proposed to subpart 2 are merely technical in nature and that the concerns of MHL are already addressed within the rule language. The DNR has demonstrated the need for and reasonableness of subpart 2.

Part 6280.0450, subpart 3

235. Proposed subpart 3 addresses the duration of permits and is largely existing language moved from other parts of the current rules. The current rule language provides for APM permit duration of one growing season, expiring on September 1 of the year it was issued unless otherwise noted.²³⁴ Nothing in the proposed subpart changes the effect of this language.

236. MHL argued that APM permits should expire on December 31 instead, again suggesting that some treatments are successfully conducted in the

²²⁹ Dept. Comment, Dec. 1, 2008, p. 2. See also Ex. 31; Colman Test., Fergus Falls, pp. 100-02; George Brezinka Comment, October 27, 2008; Ex. 21 (Rodger Lehr Comment).

²³⁰ Dept. Comment, Dec. 1, 2008, p. 3.

²³¹ See SONAR, p. 31.

²³² Ex. 16, Attachment A, p. 14.

²³³ Dept. Comment, Dec. 1, 2008, p. 20.

²³⁴ SONAR, pp. 31-32.

fall.²³⁵ The DNR responded that December 31 is far later than is necessary for most aquatic plant control, as lakes are generally ice-covered before the end of December.²³⁶ The DNR declined to implement MHL's requested change.

237. The Administrative Law Judge finds that the DNR has demonstrated the need for and reasonableness of subpart 3 and adequately addressed the concerns of MHL.

Part 6280.0900, subparts 1 and 1a

238. Proposed subpart 1 amends the language regarding amendments to and revocation of permits, as follows:

The commissioner may amend or revoke any commercial aquatic plant harvester's permit or an APM permit or suspend aquatic plant management or commercial harvest activities without prior notice whenever it has been determined that it is necessary to protect the interests of the public, to protect human life, or to protect fish, wildlife, and native plants or for violation of the terms and conditions of APM permits, this chapter, or other applicable laws or rules.

239. The DNR proposed this language to correct a deficiency in the current rules, which provide for revocation of a commercial permit without providing detailed guidance as to when such an action should occur and how long the revocation should be in effect. The DNR asserts that these changes are needed and reasonable to provide more consistency and clarity in the permit revocation process, when read in conjunction with the criteria for revocation of permits and activities in subpart 1a of this part.²³⁷

240. Subpart 1a is new language dealing with permit revocation for violation of rules. The proposed language provides for revocation of APM, commercial mechanical control, and commercial harvest permits, and for prohibiting application of pesticides to public waters under an APM permit if a person is convicted of a violation of this chapter or other applicable laws.²³⁸ Item A of subpart 1a states as follows:

A. A person who receives an APM-related conviction may be subject to an APM-related permit revocation. The commissioner shall consider the following criteria in determining whether to invoke an APM-related permit revocation;

(1) the extent and number of violations leading to the conviction;

²³⁵ Ex. 16, Attachment A, p. 14.

²³⁶ Dept. Comment, Dec. 1, 2008, p. 20.

²³⁷ SONAR, p. 36.

²³⁸ SONAR, p. 36.

(2) the extent and number of prior aquatic plant management-related convictions; and

(3) the extent to which the person had received prior warnings regarding unlawful aquatic plant management activities.

241. The DNR argues that it is necessary and reasonable for the Department to be able to revoke permits and prohibit application of pesticides to public waters under an APM permit to provide an incentive to follow the law and prevent damage to aquatic resources.²³⁹

242. Item B of subpart 1a provides that a person who receives two separate APM-related convictions in a three-year period shall be subject to an APM-related permit revocation for one year from the date of the second conviction. Item B goes on to provide that a person who receives an APM-related conviction after having been subject to an APM-related permit revocation shall be subject to an APM-related permit revocation for five years from the date of conviction. Proposed item B also requires a person who has had an APM-related permit revocation to take an aquatic plant management workshop before the person can receive a permit or apply pesticides in public waters.²⁴⁰

243. MHL objected to this proposed subpart on the basis that the DNR should not be the “judge and jury” of alleged APM-related violations. MHL suggested that a court of law or other unbiased entity should hear these types of cases and make penalty determinations.²⁴¹

244. The Minnesota Aquatic Management Society (MAMS) argued against the DNR’s authority to apply these rules to commercial applicators licensed by the Minnesota Department of Agriculture, and the DNR made changes to the proposed rules in light of those arguments. These discussions can be found at Findings 145-150. See Finding 150 for references to changes. It is found that the proposed changes to subparts 1 and 1a of part 6280.0900 are needed and reasonable.

Part 6280.1000, subpart 1

245. In this proceeding, the DNR is proposing that part 6280.1000, (Variance) be renamed “Variance and Lake Vegetation Management Plan”, in order to specify the criteria for granting variances (subpart 1) and the minimum contents required for an approved lake vegetation management plan (LVMP) (subpart 2).

246. Current subpart 1, under which provisions of Minn. R. Chap. 6280 may be waived under special circumstances, when deemed by the Commissioner for the protection and preservation of the natural resources of the state,

²³⁹ SONAR, pp. 36-37.

²⁴⁰ SONAR, pp. 37-38.

²⁴¹ Ex. 16, Attachment A, p. 18.

is proposed for replacement by a listing of which rule parts can be considered for possible variances (one or more of the provisions of parts 6280.0250, subpart 4 and part 6280.0350), except no variances may be issued for proposed part 6280.0250, subpart 4, items B and C. This provision would eliminate variances to be granted for the singular purposes of improving the appearance of undeveloped shoreline or for esthetic purposes alone on developed shorelines.²⁴²

247. Proposed subpart 1A specifies the purposes for which variances can be issued – to control invasive aquatic plants, to protect or improve aquatic resources, to provide riparian access or to enhance recreational use on public waters. Item A provides also that the variance requires a determination by the Commissioner that special or unique conditions, or exceptional circumstances, need to exist before a variance can be granted to control native aquatic plants to provide riparian access or to enhance recreational use.²⁴³

248. The justifications for issuance of a variance to control aquatic plants or to protect or improve aquatic resources are found in the criteria listed in Item B. Under that Item, the criteria to be considered in determining if a variance is justified to control invasive aquatic plants or to protect or to improve aquatic resources are: Whether the variance has the potential to increase or protect native aquatic plants, to improve water quality or provide other ecological benefits; whether the variance has the potential to prevent the spread of invasive aquatic plants; whether the variance would further research or evaluation of invasive aquatic plant control; and whether there is a feasible alternative to control invasive aquatic plants or to improve aquatic resources.²⁴⁴

249. The list of criteria to be considered in determining if a variance is justified to provide riparian access or to enhance recreational opportunities in public waters (Item C) is: The habitat, water quality and erosion control value of the aquatic plants in the proposed permit area and the amount of aquatic habitat reduction that would occur under the proposed control; the abundance of invasive aquatic plants in the proposed permit area; the selectivity of the proposed control for invasive aquatic plants; whether shoreline development is limited sufficiently so that exceeding individual property limits for control would not have the potential to combine with other aquatic plant control to reduce substantially the aquatic habitat or result in other undesirable ecological impacts; whether the presence of extensive massive aquatic plants at the surface substantially interferes with recreation in a proposed permit area (only if the presence of the mass is not a natural condition of a shallow lake, shallow bay or wetland); the compatibility of the proposed variance with the regulatory or management classification of the water and adjacent lands, including natural environment lakes, special protection districts, scientific and natural areas, wildlife managements areas, aquatic management areas, designated wildlife lakes, and wild and scenic rivers; whether the variance, if granted, would alter the central character of the public water;

²⁴² SONAR, pp. 38-42.

²⁴³ SONAR, pp. 38-39.

²⁴⁴ SONAR, pp. 39-40.

and whether there is a feasible alternative to provide riparian access or enhanced recreational access.²⁴⁵

250. The terms of variances granted under the proposed subpart may also require that aquatic plants, water quality and other parameters be monitored periodically as a condition of APM permits that include such variances. Finally, the proposed subpart gives the Commissioner the power to require practical, feasible mitigation measures to counteract adverse affects on aquatic habitat that result from such variances. Mitigation measures include a reduction in the number or size of docks and other water-oriented structures, removal of shoreline riprap and retaining walls, the restoration of natural riparian vegetation, and the restoration of emergent and floating leaf aquatic plants.²⁴⁶

251. MHL claims that the proposed mitigation measures which the commissioner may require, such as reduction in dock size, shoreline riprap and retaining walls, are unreasonable and beyond the scope of the APM rule.²⁴⁷

252. The DNR acknowledges that some of the mitigation measures such as docks and water structures are above the ordinary high water mark and therefore not covered by APM rules.²⁴⁸ The DNR responds, however, that the proposed mitigation measures offer the potential for flexibility and approval in some cases in which the DNR would otherwise have to deny a variance request because the impacts to the aquatic resource are too severe. The proposed rules do not require that an applicant accept the mitigation requirement; the applicant would always have the choice to withdraw the permit application.²⁴⁹

253. A group of individual property owners on Sandy Lake in Carlton County suggested that a hardship provision be added to the existing variance language. These shoreline property owners are currently experiencing an abundance of water shield (*Brasenia schreberi*), a native aquatic plant.²⁵⁰ In response, the DNR maintains that the proposed variance language is broad enough to cover a request for additional control of native aquatic plants under exceptional circumstances or unique conditions and where there is substantial interference with recreation.²⁵¹

254. Representative Bev Scalze expressed concern about storm water inputs from Interstate 35E into Savage Lake in Little Canada, and suggested that a variance provision that would allow some expanded control of aquatic

²⁴⁵ SONAR, pp. 40-42.

²⁴⁶ SONAR, p. 42.

²⁴⁷ Ex. 16, p. 9.

²⁴⁸ Hirsch Test., Waseca, pp. 167-168.

²⁴⁹ Dept. Comment, Dec. 1, 2008, p. 18.

²⁵⁰ Ex. 17 (Dean E. Johnson Comment); see *a/so*, comments of Shane R. Johnson, Arnold Lofgren, and Donna Lee Stratioti.

²⁵¹ Dept. Comment, Dec. 1, 2008, p. 30.

vegetation is appropriate. The DNR maintained its position that the proposed rules allow sufficient flexibility to address this situation.²⁵²

Part 6280.1000, subpart 2

255. Proposed rule part 6280.1000, subp. 2, specifies parameters under which lake vegetation management plans are to be developed. Item A notes that variance provisions that are authorized under other provisions of Minn. R. Chap. 6280 may be incorporated into LVMPs in order to control invasive species, protect or improve aquatic resources, provide riparian access, and enhance recreational use on public waters.

256. Under item A of subpart 2, the Commissioner shall require APM permit applicants to develop an LVMP before granting a variance if the proposed control would utilize methods or actions that need to be evaluated to determine if the goals of the variance are met (see the Findings below). The item also provides that if a public water has an LVMP already approved by the Commissioner, APM permits shall be issued in accordance with the plan and APM permit applications that are inconsistent with the plan may be denied.

257. Item B of subpart 2 lays out the following information that must be contained in an LVMP before being approved by the Commissioner: A description of the lake and its water quality including location, size and clarity; a description of the aquatic plant community; a description of the public participation process used in developing the plan; a description of the problems addressed in the plan; a statement of the goal for management of aquatic plants; a description of the proposed actions to achieve the plan's goal and a map showing the location of proposed actions; and conditions of APM permits that would be issued as part of the plan, including identification of variances.

258. The Commissioner also shall require a monitoring plan for the LVMP if the plan proposes methods or actions that need to be evaluated to determine whether the plan's goals will be met, as specified at subpart 2, item C.

259. Both the MNAFS and the Minnesota Center for Environmental Advocacy (MCEA) advocated for the inclusion of a purpose statement at the beginning of this subpart.²⁵³ MNAFS included proposed language, arguing that a purpose statement outlining the intent of an LVMP would go a long way in shaping the kinds of plans that are developed and presented to the DNR for review and approval. MNAFS suggests that the criteria listed under this subpart for developing a plan are not sufficient unto themselves to fully guide the development of an LVMP. MNAFS believes strongly that "the working model for an LVMP must be rigorous and the standards clear for any party to develop a robust and acceptable document that clearly demonstrates

²⁵² Dept. Comment, Dec. 1, 2008, p. 30.

²⁵³ MNAFS Comment, November 25, 2008, pp. 6-7; Henry VanOffelen (on behalf of MCEA) Comment, December 1, 2008.

full consideration for resource impacts and the corresponding social and ecological benefits achieved.”²⁵⁴ The DNR responded that it does not believe a LVMP purpose statement is necessary in the proposed rules.²⁵⁵

260. Both MNAFS and MCEA also recommended that subpart 2 include additional criteria for the LVMP regarding basic assessment of the lake watershed and nutrient inputs.²⁵⁶ The DNR agreed that this type of information is useful but knows that it must “strike a balance between the need for good information and having a [rule] format that is user-friendly and practical.”²⁵⁷ Accordingly, the DNR declined to make this addition to the proposed rules.

261. MNAFS suggested the following change to the newly proposed language of item A of subpart 2: “If a public water has an LVMP approved by the commissioner, all APM permits within that public water shall be issued in accordance with the plan and APM permit applications that are inconsistent with the plan may be denied.”²⁵⁸

262. The DNR declined to accept this proposed change, but the Administrative Law Judge notes that MNAFS’ proposed language does add clarity to the DNR’s proposed language. If the DNR chose to make this change prior to adopting the final rules, the Administrative Law Judge finds that it would be necessary and reasonable and would not constitute a substantial change in the rules.

263. It is found that the Department’s Statement of Need and Reasonableness, at pp. 38-43 establishes that proposed Part 6280.1000, regarding variances and lake vegetation management plans, is needed and reasonable. The SONAR lays out a factual basis that supports the proposals adequately.

264. The requirement for the development of an LVMP before granting a variance if the proposed control proposes methods or actions that need to be evaluated to determine if the goals of the variance are met was controversial. In its SONAR, the DNR notes that LVMPs are associated most commonly with lakes where there is a desire to have lake-wide or large-area control of invasive aquatic plants. In those instances, it is necessary and reasonable for the DNR to have the ability to require an LVMP before issuing a variance, in some cases, to ensure that goals are identified and problems correctly diagnosed and that there is an adequate control and evaluation plan. Because the science of lake-wide or large-area control of invasive species with herbicides is still developing, the DNR maintains that it is necessary and reasonable to have good pre-control data on aquatic plant populations and basic water quality parameters, and follow-up monitoring, to determine if the control was a success

²⁵⁴ MNAFS Comment, November 25, 2008, p. 7.

²⁵⁵ Dept. Response, Dec. 8, 2008, pp. 3-4.

²⁵⁶ MNAFS Comment, November 25, 2008, p. 7; Henry VanOffelen (on behalf of MCEA) Comment, December 1, 2008.

²⁵⁷ Dept. Response, Dec. 8, 2008, p. 4.

²⁵⁸ MNAFS Comment, November 25, 2008, p. 7.

and if there are any unanticipated or undesirable impacts. It maintains that an LVMP provides a vehicle for obtaining this type of information. The Administrative Law Judge is persuaded that the explanation for this provision in the SONAR, coupled with the Department's explanation at the rule hearing, identify the proper context for the application of the controversial language. That is, it is applicable only in those instances where there is a desire to obtain permits for lake-wide or large-area control of invasive aquatic plant species, which will be done through an LVMP.

265. Regarding variances, the language proposed by the DNR in this proceeding adds specificity and detail regarding the purposes of a variance and what criteria should be used to determine if a variance is justified to meet those purposes, which is an improvement on the current rule.

266. It is found that the proposed Minn. R. 6280.1000, regarding variances (subpart 1) and lake vegetation management plans (subpart 2), is needed and reasonable. The changes finally proposed by the Department involve elimination of possible overly broad discretion, by removing the words "but not limited to" after "including" or "include" in various listed criteria and similar provisions. Those changes are found to be necessary and reasonable, and do not constitute substantial changes, for reasons specified elsewhere in this Report.

Part 6280.1100

267. The proposed changes in this Part (Review and Appeal of Permit Decision) involve adding commercial mechanical control permits and commercial harvest permits to the types of permits which can be reviewed and appealed after grants, modifications, denials, suspensions or revocations are imposed. The additions, all found at proposed subpart 1 of 6280.1100, are found to be necessary and reasonable. Prior to this proposal, only aquatic plant management permits could be reviewed by the Commissioner, and then only for grants or denials. The proposal also provides for a review of "relevant information", and extends the deadline for issuance of a decision by the Department to 15 working days, rather than the 15-day period found in current language.

268. MHL commented on the proposal regarding review and appeal of permit decisions, to the effect that there should be an unbiased external entity to review appeals. Under the current rule, which is not proposed to be changed in this regard, the Applicant who wishes to appeal the Commissioner's decision after review is allowed to file a written request for a contested case hearing under Minn. Stat., Chap. 14. The concern regarding unbiased external review is met by that provision.

269. MNAFS recommended the following change to subpart 2 of this rule part: "~~If the An~~ applicant wishes to requesting an appeal of the decision of the commissioner after review of subpart 1, ~~the applicant may~~ shall file with the commissioner a written request for a contested case hearing under Minnesota Statutes, chapter 14." While the text of subpart 2 contained no proposed amendments in this rulemaking, the Administrative Law Judge finds that the language proposed by MNAFS is an improvement to the existing language and does not change the meaning or intent

of the subpart. The DNR is free to make this recommended change if it wishes. Such an amendment is reasonable and would not constitute a substantial change. The ALJ notes this language assumes notification to the applicant of the right to appeal. The addition of language specifying such notice at part 6280.1100 is suggested.

Part 6280.1200

270. In the rules as originally proposed in the *State Register*, this rule part (Penalty) was proposed for change, as follows:

~~The description of aquatic macrophytes in public waters without an APM permit issued pursuant to parts 6280.0100 to 6280.1100 or in Violation of this chapter or the terms of such a an APM, commercial mechanical control, or commercial harvest permit is a petty misdemeanor.~~

271. The proposed language specifying the types of permits that are subject to the penalty provision, including the presently-covered APM permits, by adding commercial mechanical control and commercial harvest permits to APM permits as types of permits for which penalties can be imposed when violated, is found to be necessary and reasonable.

272. In its final submission, the Department removed the word “petty” from its original proposal. It was found elsewhere and it is reaffirmed here, that this final proposal is necessary, reasonable and does not constitute a substantial change because it restores consistency with current rule and applicable criminal statutes, under which such permit violations are misdemeanors.

273. In its December 8, 2008 submission, the DNR acknowledges that it has determined its statutes that have established violations of aquatic plant rules do, in fact, impose misdemeanor penalties. The Department so reasons because Minn. Stat. § 84.0894 states that enforcement officers shall enforce violations of Minn. Stat. § 103G.16 (permits to harvest or destroy aquatic plants) in the same manner as a violation of the game and fish laws. The game and fish laws are in Minn. Stat. Chap. 97A, 97B and 97C. Under Minn. Stat. § 97A.301, subd. 1, unless a different penalty is prescribed, a person is guilty of a misdemeanor if the person violates or attempts to violate a rule under the game and fish laws.

274. Based on the statutory/interpretive analysis noted in the preceding Finding, the Administrative Law Judge finds that the Department has established that violations of its permits are to be classified as misdemeanors.

XI. DNR’s Proposed Changes from Initial Publication in the State Register

275. At the suggestion of the Administrative Law Judge and various commentators, the Department has proposed a number of clerical, technical and clarifying changes in the proposed rules as published in the *State Register* on September 22, 2008. These proposed amendments, as specified in the following

Findings, are found by the ALJ to be necessary and reasonable, and do not constitute substantial changes from the proposals published initially in the State Register.

276. At (new) subpart 2d of Minn. R. 6280.0100 (Definitions), a newly-defined “aquatic plant management-related permit revocation” is proposed for amendment. The proposal would eliminate the words “. . . an ineligibility to apply aquatic pesticides to public waters under an APM permit.”, such that the new definition reads:

“Aquatic plant management (APM)-related permit revocation” includes the revocation of an APM, commercial mechanical control, or commercial harvest permit.”

This change responds to the concern of the Minnesota Aquatic Management Society (MAMS), that the original proposal usurped authority granted to the Agriculture Department. See Findings 144-150 and 170-172.

277. At Minn. R. 6280.0100, subp. 5a, the newly-proposed definition of “Emergent aquatic plants,” the words “but not limited to,” following the word “including,” have been removed from the proposal in order to cure any possible defect for granting potential unlimited discretion.

278. For the same reason as mentioned in the preceding Finding, the words “but not limited to” are proposed for deletion from Minn. R. 6280.0100, subp. 7b, the proposed definition of “Floating-leaf aquatic plants.”

279. In the newly-proposed definition of “Submersed aquatic plant,” proposed for Minn. R. 6280.0100, subp. 16, the Department proposes again to eliminate the words “but not limited to,” in order to avoid granting a potential exercise of overly-broad discretion.

280. At subpart 3 (Justification required for issuance of permits) of Minn. R. 6280.0250 (Standards for Aquatic Plant Management Permit Issuance), the Department proposes deletion of the words “including, but not limited to, wild rice, bull rush, cattail, and water lilies, and other vegetation” from the language published in the State Register. The surviving sentence would read “Permits for the control of emergent and floating-leaf aquatic plants . . .”.

281. At newly-proposed subpart 6 (APM permit conditions) in Minn. R. 6280.0250, the DNR again proposes to delete the words “but not limited to” after “including” before following with a list of specified conditions.

282. Minn. R. 6280.0350, subp. 1a, item B, which specifies Submersed aquatic plant control restrictions for riparian property owners and lessees, the word “campgrounds” is added to the list of types of properties where control may be allowed on more than 100 feet of shoreline owned or leased.

The Administrative Law Judge suggests that the DNR, prior to final adoption, insert the word “commercial” before “campgrounds” for further clarification. Such an addition, if finally adopted, would be necessary and reasonable and would not constitute a substantial change.

283. Subpart 4, item C of Minn. R. 6280.0350 (Aquatic plant control) is the “sunset after five years” provision that is proposed by the Department in connection with the water bodies “grandfathered” since 1976. The Department’s clarifying proposal adds the following language to the last section of proposed subpart 4, item C:

. . . “including a notice or news release in a local newspaper, at least one public meeting, and a 30-day comment period.”

This language adds a clarification to a sentence that provides for opportunities for the public to participate in the planning process involving the development of LVMPs on the currently “grandfathered” water bodies.

284. Subpart 1a is new language added to Minn. R. 6280.0450 (APM Permit Requirements). The Department proposes to re-write subpart 1a (Landowner approval), to read as follows:

Before issuing an APM permit, the Commissioner shall require dated signatures of approval from all landowners whose shorelines will be treated, except that for lake-wide control of algae, the commissioner shall require dated signatures of approval from a majority of landowners on the lake. The signatures may be provided in an electronic format.

285. Subpart 1a of Minn. R. 6280.0450, as proposed originally in the State Register, included an exception to provide a waiver if the Commissioner determined that aquatic plant control was necessary to protect aquatic habitat. This extraordinary power is now embodied in a proposed new subpart 1b, which reads:

Landowner approval waiver. The requirements for landowner approval in subpart 1a may be waived if the commissioner determines that aquatic plant control is necessary to protect aquatic habitat.

286. The newly-proposed Minn. R. 6280.0550 (Commercial Harvest of Aquatic Plants), includes a proposed subpart 3 regarding Commercial harvest permit conditions. The words “but not limited to” are eliminated here, in order to prevent a potential abuse of discretion in listing types of situations where permit conditions may be imposed.

287. Two amendments are proposed in the originally-published draft of Minn. R. 6280.0900, subp. 1a, item B. Subpart 1a is a listing of conditions or situations under which permits can be revoked for rule violation(s). The first amendment in subpart 1a, item B is to eliminate the words “or apply pesticides to public waters” from the second sentence of the item, which sentence now would read “The

commissioner shall require a person who has an APM-related permit revocation to participate in an aquatic plant management workshop before the person can receive any APM, commercial mechanical control, or commercial harvest permit.” The elimination of a workshop participation requirement for pesticide applicators is a partial loosening of the requirements published initially.

288. The Department also proposes to add a new sentence, before the final sentence as originally published in subpart 1a, item B. The new sentence reads:

A person who is subject to an APM-related permit revocation may request review pursuant to part 6280.1100, subp. 1, during which time the revocation will be suspended until all administrative appeals are exhausted.

This proposed change also adds flexibility to the restrictions proposed in the original publication in the State Register.

289. Subpart 1, item A of proposed Minn. R. 6280.1000 (Variance and lake vegetation management plan) provides that the Commissioner may issue APM permits with a variance from one or more of the provisions of certain specified parts of the rules relating to aquatic plant management. Subparts 1, items B and C of proposed Rule 6280.1000 list criteria to be considered in determining whether a variance is justified. The final sentence of subpart 1, item A, as proposed by the Department in its final submission, would read:

“The Commissioner shall make a determination that there are exceptional circumstances or special or unique conditions based on the criteria in items B and C before granting a variance to control native aquatic plants to provide riparian access or enhance recreational use.”

This final proposal, which adds the words “based on the criteria in items B and C” at the location shown, adds specificity to the proposed rule.

290. Subpart 1a, item C, subitem (6) in proposed Minn. R. 6280.1000 is one in a list of criteria to consider to determine if a variance is justified to provide riparian access or enhance recreational opportunities on public water. Within the subitem, which contains its own list of regulatory or management classifications of waters and adjacent lands, the words “but not limited to” are proposed for deletion after the word “including.” This proposal adds clarity to the classifications of waters and lands with which variances must be compatible, and removes the potential for possible abuse of discretion.

291. Item E of Minn. R. 6280.1000, subp. 1a, is a listing of mitigation measures that may be required as a condition of an APM permit that includes a variance. The words “but are not limited to” after the word “include” are proposed for deletion, in order to prevent an overly-broad grant of administrative discretion.

292. Minn. R. 6280.1200, as drafted originally, provided that violation of the existing and proposed rules or terms of permits issued under them, was a petty misdemeanor. The Department now has proposed removal of the word “petty”, in order to be consistent with the current rule and applicable statutes, under which those violations are (and will remain) misdemeanors.

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

CONCLUSIONS

1. The Department of Natural Resources (DNR) 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).
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. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are adopted as such.
7. 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 on this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: January 7, 2009.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

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