

**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
Permit Fees,
Minnesota Rules, Chapter 6280

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Bruce H. Johnson conducted a series of hearings concerning rules proposed by the Minnesota Department of Natural Resources (DNR or Department) regarding aquatic plant permit fees. On February 23, 2010, hearings were held at 2:00 p.m. and 7:00 p.m. at the Big Woods Event Center, 925 Western Avenue, Fergus Falls, Minnesota. On February 24, 2010, hearings were held at 2:00 p.m. and 7:00 p.m. at the Camp Ripley Education Center, 15000 Highway 115, Little Falls, Minnesota. On February 25, 2010, hearings were held at 2:00 p.m. and 7:00 p.m. at Kelly Inn Hotel, 2705 Annapolis Lane North, Plymouth, 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 hearings when a sufficient number of persons request one. The hearings are 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 each of the hearings were Steve Enger, Statewide Coordinator for the Aquatic Plant Management Program, and David Wright, DNR Monitoring and Control Unit Supervisor. Approximately four people attended the hearings in Fergus Falls; four in Little Falls; and approximately 22 attended in Plymouth.

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 2009 edition.)

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 (March 17, 2010), 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 (March 24, 2010), 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 March 24, 2010.

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 DNR administers the aquatic plant management (APM) program, which allows riparian owners to gain access to open water while protecting the aquatic habitat and water quality provided by aquatic plants. Minnesota Statutes, section 103G.615, gives the DNR authority to adopt rules regarding the APM program. The statute authorizes the DNR to establish a fee schedule for permits to control or harvest aquatic vegetation and to prescribe standards to issue and deny permits.²

2. In 2008, the Minnesota Legislature directed the DNR to establish rules for APM permit fees that recover the full cost of administering and enforcing the permit

² Exhibit (Ex.) 13 at 1.

program.³ To facilitate this directive, the Legislature removed the existing permit fees from statute. In response, the DNR tracked its APM permit program fees from 2006 through 2008 and found that the annual cost over this period was approximately \$1 million. The Department also tracked permit revenues over this period, which averaged \$300,000 per year.⁴ Prior to 2005, aquatic plant permit fees were deposited in the state's game and fish fund, and other revenues from that fund subsidized the cost of operating the DNR's aquatic plant management program.⁵ In 2005, the Legislature amended Minn. Stat. § 103G.615 by requiring permit fees to be deposited in the state's water recreation account and directing that revenues from that account be appropriated to fund the cost of the APM program.⁶ In 2008, the Legislature again amended Minn. Stat. § 103G.615, mandating the adoption of rules requiring aquatic plant permittees to bear the full cost of the program.⁷ Accordingly, the Department now needs to generate an additional \$700,000 in annual revenue to meet the Legislature's most recent directive.

3. In response to this legislative directive, the DNR formed an advisory committee with representatives from three lake associations, two statewide organizations interested in lake management, four businesses that sell aquatic plant control services, and an APM specialist from the DNR's Fisheries Division.⁸ The advisory committee provided input on three different APM permit fee options. The first option closely resembled the current fee structure, but increased the permit fee to \$110 and capped the fees at \$2,200. The advisory committee felt that a fee of \$110 was too high and that the cap was unfair when compared to the fee that individual permit holders would pay. The second option was a tiered system of permit fee caps based on the number of applicants on a single permit. According to the advisory committee, this system was too complex and would result in many errors. Furthermore, the committee opined that this system would encourage lake associations to add people to the applications simply to reach the next pricing break point. The third option incorporated an inspection fee within the permit fee. The DNR suggested the base permit fee could be \$65, with a \$150 inspection fee tacked on if the inspection was necessary (i.e. new permits or significant changes to existing permits). The advisory committee also thought this price point was too high.⁹

4. The advisory committee concluded that the key components of a successful permit fee structure are that: (1) everyone who receives a permit should pay some amount; (2) the permit fee structure should be simple; (3) there should be no fees for lake-wide invasive species management; (4) landowners should not pay more than

³ Laws of Minnesota 2008, chapter 363, article 5, section 22, codified at Minn. Stat. § 103G.615, subd. 2.

⁴ Ex. 13 at 1.

⁵ Minn. Stat. § 103G.615, subd. 2 (a) (2004).

⁶ Laws of Minnesota 2005, 1st Special Session, chapter 1, article 2, section 123, codified at Minn. Stat. § 103G.615, subd. 2.

⁷ Laws of Minnesota 2008, chapter 363, article 5, section 22, codified at Minn. Stat. § 103G.615, subd. 2 (2008).

⁸ Ex. 13 at 1-2.

⁹ Ex. 13 at 2.

\$50-\$60 to participate in the APM permit program; and (5) the DNR should find efficiencies in the program to reduce costs.¹⁰

5. The Department is proposing that lakeshore residents pay either a \$90 or a \$40 permit fee depending on the type of control requested, up from \$35 and \$20 respectively. The Department is also proposing to eliminate the maximum cap on fees associated with several different types of permits. The \$90 fee would be charged for permit categories that require an initial inspection and DNR follow-up to ensure compliance. Permits in the \$90 category include: aquatic plant control adjacent to lakeshore property; offshore control of aquatic plants; and lake-wide or bay-wide pesticide control of plankton algae or duckweed. Permits in the \$40 category include swimmer's itch control adjacent to lakeshore property and pesticide control of filamentous algae adjacent to lakeshore property. These permits generally do not require an inspection or follow-up monitoring.¹¹ For automated aquatic plant control on a site that does not exceed 2,500 square feet in an area adjacent to lakeshore property, the Department is proposing a three-year permit for \$90.

6. The proposed rules contain two new permit fees: (1) a \$100 permit fee for businesses that engage in the commercial mechanical control of aquatic vegetation or harvest aquatic plants for sale; and (2) a \$300 inspection fee for each body of water listed on a permit application that requires an inspection.¹²

7. The DNR is also proposing to eliminate the fees for permits that authorize selective lake-wide invasive aquatic plant control (i.e. Eurasian water milfoil, curly-leaf pondweed, and flowering rush).

8. In addition, the proposed rules prohibit the control of lotus; specify that an inspection is required after an APM permit has lapsed for three years or more; allow the landowner signature requirement to be waived for control performed under an invasive APM permit when there are numerous property owners; allow an alternate form of landowner notification when the signature requirement is waived; extend the expiration date of permits from September 1 to December 31 of the year the permit is issued; clarify when permit fees can be refunded; specify who is responsible for reporting on the activities covered by an APM permit; specify that a commercial mechanical control permit is valid for one calendar year and expires on December 31 of the year it is issued; and specify that commercial mechanical permits may not be transferred.¹³

II. Compliance with Procedural Rulemaking Requirements

9. On July 28, 2008, the DNR published in the *State Register* a Request for Comments on possible amendments to rules governing aquatic plant permit fees. The

¹⁰ Ex. 13 at 2.

¹¹ Ex. 13 at 3.

¹² Ex. 13 at 3.

¹³ Ex. 13, at 4.

notice indicated that the DNR had not yet prepared a draft of the proposed rules and requested comments on proposed criteria.¹⁴

10. On July 6, 2009, the DNR published a second Request for Comments in the *State Register*. The notice indicated that the Department was considering adopting rules regarding aquatic plant permit fees as well as aquatic plants and nuisances.¹⁵

11. As required by Minn. Stat. § 14.131, the DNR asked the Commissioner of Minnesota Management and Budget to evaluate the fiscal impact and benefit of the proposed rules on local units of government. Minnesota Management and Budget provided comments in a memorandum dated November 20, 2009. Executive Budget Officer Michael Salzwedel concluded that the proposed rules would have “minimal fiscal impact on local units of government.”¹⁶

12. On December 7, 2009, 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 December 14, 2009, the Administrative Law Judge approved the additional notice plan.¹⁷

13. On December 28, 2009, the DNR distributed to more than 700 daily and weekly newspapers and electronic media a statewide news release announcing the hearing schedule and proposed rules. This same day, the DNR also posted information regarding the proposed rules to its APM webpage and sent an email to its advisory committee members. The DNR provided notice of the proposed rules by electronic mail on December 30, 2009, to individuals who provided comments via email.¹⁸

14. On January 13, 2010, 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 and pursuant to the Additional Notice Plan.¹⁹ 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.

15. At the hearing in Fergus Falls, Minnesota, on February 23, 2010, the DNR filed copies of the following documents, as required by Minn. R. 1400.2220:

¹⁴ 33 SR 221 (July 28, 2008); DNR Ex. 1.

¹⁵ 34 SR 29 (July 6, 2009); DNR Ex. 1a.

¹⁶ Ex. 4.

¹⁷ Ex. 5.

¹⁸ Exs. 8 and 10.

¹⁹ Exs. 8 and 9.

- A. the DNR's Request for Comments, as published in the *State Register* on July 28, 2008;²⁰
- B. the DNR's second Request for Comments, as published in the *State Register* on July 6, 2009;²¹
- C. the proposed rules dated December 3, 2009, including the Revisor's approval;²²
- D. the Department's Statement of Need and Reasonableness (SONAR), dated November 18, 2009;²³
- E. memorandum from Minnesota Management and Budget regarding review under Minn. Stat. § 14.131, dated November 20, 2009;²⁴
- F. a letter dated December 14, 2009, noting that the Administrative Law Judge had approved the DNR's Notice of Hearing and Additional Notice Plan, and the DNR's request to OAH dated December 4, 2009;²⁵
- G. the Notice of Hearing as published in the *State Register* on December 28, 2009;²⁶
- H. the Notice of Hearing as mailed, dated December 14, 2009;²⁷
- I. the Certificate of Mailing the Notice of Hearing to the parties identified in the Additional Notice Plan on January 13, 2010;²⁸
- J. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on January 13, 2010, and Certificate of Accuracy of the Mailing List as of December 4, 2009;²⁹
- K. the DNR's news release, dated December 28, 2009, announcing the proposed rules, and information on the rules from the DNR's web page;³⁰
- L. the certification that the DNR mailed a copy of the SONAR to the Legislative Reference Library on January 13, 2010;³¹

²⁰ Ex. 1.

²¹ Ex. 1a.

²² Ex. 2.

²³ Ex. 3.

²⁴ Ex. 4.

²⁵ Ex. 5.

²⁶ Ex. 6.

²⁷ Ex. 7.

²⁸ Ex. 8.

²⁹ Ex. 9.

³⁰ Ex. 10.

- M. the Certificate of Mailing the Notice of Hearing and the SONAR to various Legislators on January 13, 2010, accompanied by a copy of the transmittal letter;³²
- N. a copy of the opening statement of Steve Enger, Aquatic Plan Management Program Coordinator;³³ and
- O. all written comments and submissions on the proposed rules received by the Department during the comment period.³⁴

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

III. Statutory Authority

17. In its SONAR, the Department asserts that its specific statutory authority to adopt the fee provisions of these rules was granted by the Legislature in 2008 and is contained in Laws of Minnesota 2008, chapter 363, article 5, section 22, codified at Minn. Stat. § 103G.615, subd. 2.³⁵ Subdivision 2 provides:

(a) The commissioner shall establish a fee schedule for permits to control or harvest aquatic plants other than wild rice. The fees must be set by rule, and section 16A.1283 does not apply, but the rule must not take effect until 45 legislative days after it has been reported to the legislature. The fees shall be based upon the cost of receiving, processing, analyzing, and issuing the permit, and additional costs incurred after the application to inspect and monitor the activities authorized by the permit, and enforce aquatic plant management rules and permit requirements.

The remainder of the section allows the DNR to charge a fee for control of rooted aquatic vegetation along a shoreline, but prohibits the DNR from charging a fee for the control of purple loosestrife or lakewide Eurasian water milfoil. A fee may not be charged to a state or federal government agency applying for a permit to control aquatic plants, and the money received for the permits must be credited to the water recreation account.³⁶

18. The DNR contends that it has general statutory authority to adopt the non-fee provisions of these rules contained in Minn. Stat. § 103G.615, subd. 3, regarding permit standards. Section 103G.615, subd. 3, provides:

³¹ Ex. 11.

³² Ex. 12.

³³ Ex. 13.

³⁴ Ex. 14.

³⁵ The correct section number is 22, not 18, as stated in the SONAR.

³⁶ Minn. Stat. § 103G.615, subd. 2 (b), (c), and (d).

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.

19. The ALJ concludes that the DNR has specific and general statutory authority to adopt the proposed rules.

IV. Additional Notice Requirements

20. 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 December 14, 2009. During the rulemaking proceeding, the DNR certified that it provided notice to those on the rulemaking mailing list maintained by the DNR and in accordance with its additional notice plan.³⁷

21. 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 July 28, 2008, and another one on July 6, 2009, after expanding the scope of the proposed rules;³⁸
- B. letters requesting comments were mailed to approximately 3,900 individuals who received an aquatic plant management permit in 2005-2008; 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;³⁹
- C. the DNR sent notice of the rule hearings to the 228 individuals and groups who responded to the Requests for Comments;⁴⁰
- D. the DNR announced this rulemaking process in December 2009 in a statewide news release that it distributed to all general news media in the state;⁴¹ and

³⁷ Exs. 8 and 10.

³⁸ SONAR at 2.

³⁹ SONAR at 2.

⁴⁰ SONAR at 2 and 13.

⁴¹ Ex. 8.

- E. the proposed rules, the SONAR, and other information relating to the proposed rules have been available on the DNR's website.⁴²

22. During the periods after the Requests for Comments were published, the DNR received comments from 228 groups and individuals. Most of these comments were critical of the proposed fee increases.⁴³

23. 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

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

25. 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

26. 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;

⁴² Ex. 8.

⁴³ SONAR at 2.

- (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.

27. 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 or other aquatic nuisance organisms, government units and private organizations that coordinate APM efforts, 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.⁴⁴

28. With regard to the second factor, the DNR stated that the costs are largely dependent on the number of permits requested and issued, as well as the intensity of enforcement efforts. The proposed rules do not require an increase in permitting or enforcement activity.⁴⁵

29. The proposed rules will increase state revenues, as directed by the Legislature. Specifically, the proposed rules are designed to increase revenue by \$700,000 per year to account for the difference between current permit revenue and program implementation costs. The DNR is aware that the increased permit costs in the proposed rules may result in a decrease in the number of permits issued.⁴⁶

30. 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 need to maintain the existing permitting and enforcement programs to provide adequate protection for aquatic plants. Less costly or less intrusive methods would not be sufficient to achieve the desired site-specific habitat management approach. Although the proposed rules increase permit fees to comply with the Legislature's directive, the proposed rules are not more intrusive because they do not require permits for activities that are currently allowed without permits.⁴⁷

⁴⁴ SONAR at 7.

⁴⁵ SONAR at 7-8.

⁴⁶ SONAR at 8.

⁴⁷ SONAR at 9.

31. Regarding the fourth factor, a description of alternative methods considered, the DNR contemplated both education and incentive-based approaches. While the DNR has made efforts in the past to educate shoreland owners about the need to limit shoreland disturbances and maintain shoreland, the DNR is aware that influencing attitude and behavior is difficult, particularly when owners of shoreline property will incur treatment costs. Although the DNR suggests that incentives could be an effective way to encourage shoreland owners to leave aquatic plant communities and habitats intact, it believes that there are insufficient financial incentives to offer them broadly. Ultimately, the possibility of financial incentives is constrained by the Legislature's instructions.⁴⁸

32. With regard to the fifth regulatory factor, the probable costs of complying with the proposed rule, the Department acknowledges that the proposed rules will increase permit costs for individual shoreland property owners, governmental units that own shoreland property and wish to control aquatic vegetation, and commercial businesses that mechanically control aquatic vegetation or harvest aquatic plants for sale.⁴⁹

33. With respect to the sixth factor, the probable costs of not adopting the proposed rule, the DNR noted that the major consequence of not adopting the proposed rules is that permit fees would not be sufficient to recover the cost of administering and enforcing the APM program and the Department would not be in compliance with the 2008 legislative direction. Inadequate funding of the APM program will ultimately result in diminished protection and regulation of aquatic vegetation.⁵⁰

34. Finally, with respect to the seventh factor, the DNR indicated that the proposed rules do not conflict with federal regulations.⁵¹

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 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."

⁴⁸ SONAR at 10. See also, Findings 3 and 4.

⁴⁹ SONAR at 11.

⁵⁰ SONAR at 11.

⁵¹ SONAR at 11-12.

37. The DNR maintains that the rules as proposed are performance-based for several reasons. First, the proposed fee structure simplifies permit fees by placing them into four categories: (1) near-shore plant and nuisance control; (2) off-shore control of submersed aquatic plants; (3) lake-wide or bay-wide control of plankton algae and free-floating aquatic plants; and (4) APM activities for which no fee is charged. The DNR believes that this simplified structure will reduce confusion among applicants and thereby decrease DNR administrative costs.⁵²

38. Second, the DNR asserts that not requiring re-inspection until an APM permit has lapsed for three or more years will reduce the number of required inspections. The DNR also believes that the increased permit fees will provide an incentive for some property owners to think more carefully about the amount of control of their shoreline that they wish to exercise.⁵³

39. Finally, the proposed rules relax reporting requirements for permits that are valid for three years, permits that are valid for as long as a person owns their property, and permits that authorize a commercial service to perform the aquatic plant control.⁵⁴

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.

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, now known as Minnesota Management and Budget. On November 20, 2009, Executive Budget Officer Michael Salzwedel stated by letter that the proposed rules would have minimal fiscal impact on local units of government.⁵⁵

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

⁵² SONAR at 12.

⁵³ SONAR at 12.

⁵⁴ SONAR at 12.

⁵⁵ Ex. 4.

one statutory or home rule charter city that has less than ten full-time employees.”⁵⁶ 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.⁵⁷

45. The DNR indicated in its SONAR that the proposed rules would not directly increase costs by more than \$25,000 for small businesses in the first year after the rules take effect. The proposed rules implement an annual \$100 fee for a commercial mechanical control permit (6280.0450, subp. 4.C). This proposed fee, like all of the proposed fees in this rulemaking, is the DNR’s method of complying with the Legislature’s directive to recover the cost of administering the APM program. The proposed rules also require an annual \$100 fee for a commercial harvester permit (6280.0550, subp. 6). The final proposed rule affecting small businesses is the proposed fee of \$300 per public water listed on an application that requires an inspection (6280.0550, subp. 6).⁵⁸ The DNR asserts that the proposed rules do not directly increase costs by more than \$25,000 for small businesses but concedes that the proposed rules could reduce profits for businesses that control aquatic plants for hire. The increased permit fees could result in fewer APM permits, but the DNR has no way to estimate the potential lost profits for small businesses.⁵⁹

46. Kevin Kretsch of Lake Restoration, Inc., argues that the DNR has not adequately addressed the impact to small businesses as required by Minn. Stat. § 14.127. According to Mr. Kretsch, the proposed increase in permit fees would directly cost Lake Restoration more than \$100,000 in additional permit fees paid to the DNR for the treatment of lakeshore properties. Currently, Lake Restoration pays approximately \$66,000 in permit fees to the DNR. Mr. Kretsch alleges that this amount would increase to more than \$170,000 if the proposed rules are adopted. He also insists that Lake Restoration will lose more than \$25,000 of revenue due to customers being unwilling or unable to pay the increased permit costs. Mr. Kretsch questioned the necessity of on-site inspection. Instead, he suggested that the DNR could reduce the cost of the permitting process by allowing permit applicants to send photos of the site to be treated.⁶⁰

47. In response, the DNR states that it has met its burden under Minn. Stat. § 14.127 because there are no provisions in the proposed rules that small businesses are required to implement. As to Mr. Kretsch’s argument regarding the increase in fees from \$66,000 to \$170,000, the DNR points out that these are fees paid to Lake Restoration by its customers and passed on to the DNR. These are not costs incurred directly by the company. The rules do not require commercial aquatic pesticide

⁵⁶ Minn. Stat. § 14.127, subd. 1.

⁵⁷ Minn. Stat. § 14.127, subd. 2.

⁵⁸ SONAR at 14-15.

⁵⁹ SONAR at 15.

⁶⁰ Ex. 17; Plymouth T. at 53-57 (Kevin Kretsch).

applicators to offer this service to their customers. This is a service that Lake Restoration and other companies have elected to offer to their customers.⁶¹

48. The Administrative Law Judge finds that the DNR has made the determination required by Minn. Stat. § 14.127 and approves that determination. Though Mr. Kretsch disagrees with the ultimate determination, it cannot be said that the Department did not satisfy the statutory requirements.

E. Adoption or Amendment of Local Ordinances under Minn. Stat. § 14.128

49. Effective August 1, 2009, the DNR must:

[D]etermine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. An agency must make this determination before the close of the hearing record The administrative law judge must review and approve or disapprove the agency's determination.⁶²

50. The DNR determined that no local governments would be required to adopt or amend an ordinance to comply with the proposed rules because the rules do not require local governments to accept any responsibility with regard to aquatic plant management.⁶³ The Administrative Law Judge approves that determination.

VII. Rulemaking Legal Standards

51. Under Minnesota law,⁶⁴ 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.⁶⁵ The DNR prepared a Statement of Need and Reasonableness (SONAR)⁶⁶ 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 rebuttal.

⁶¹ DNR Response to Comments, dated March 17, 2010, at 22.

⁶² Minn. Stat. § 14.128, subd. 1. A determination that the proposed rules do in fact require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

⁶³ SONAR at 14.

⁶⁴ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

⁶⁵ *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).

⁶⁶ Ex. 3.

52. 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.⁶⁷ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁶⁸ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁶⁹ 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."⁷⁰

53. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.⁷¹

54. 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.⁷²

VIII. Analysis of the Proposed Rules

55. 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.

56. 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

⁶⁷ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

⁶⁸ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁶⁹ *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).

⁷⁰ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

⁷¹ *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁷² Minn. R. 1400.2100.

not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

IX. Broad Issues Relating to the Proposed Rules

Increase in Permit Cost

57. Almost without exception, the comments received regarding the proposed rules were objections to the increased cost of APM permits. Lakeshore property owners from across the state objected to the doubling and tripling of permit fees and the elimination of the fee cap on certain permits. For example, a cabin owner on Cedar Lake in Rice County commented that the total treatment costs to be paid by all property owners on the lake will increase from the \$750 maximum to more than \$6,000.⁷³

58. The Clear Lake Association in Forest Lake explained that in 2009 the Association members contributed \$26,000 and the City of Forest Lake provided a grant of \$5,000 to chemically treat 60 offshore acres and 77 shoreline properties for Eurasian water milfoil. The Association's program for 2010 has generated over \$16,000 from residents and another city grant of \$5,000. Under the current rules, the Association was able to take advantage of the \$750 permit fee cap. If the proposed rules were adopted, the cost to the Association to treat the 60 offshore acres and the 77 shoreline properties would be approximately \$7,200.⁷⁴

59. Many lakeshore property owners on lakes with public access feel that they are being asked to bear an unfair burden for the maintenance of a public resource that also benefits other members of the public, such as boaters and fishermen.⁷⁵

60. Several lakeshore property owners believed that the DNR is not making enough of an effort to protect the health of Minnesota's lakes. A Detroit Lake cottage owner said he would be more willing to pay the substantial fee increase if he saw the DNR making more of an attempt to protect Big Detroit Lake.⁷⁶

61. In response to these concerns about the increase in fees, the DNR points to other parts of the proposed rules that provide less expensive alternatives. For example, no permit or fee is required to clear limited submersed aquatic plants adjacent to privately owned shoreline using mechanical methods (part 6280.0250, subpart 1). Lakeshore property owners can also obtain a one-time channel permit (part 6280.0450, subpart 3, item B). Applicants receiving an annual permit for

⁷³ Naomi and Lanny Uber comment, dated January 28, 2010.

⁷⁴ Clear Lake Association, Inc. comment, dated January 26, 2010.

⁷⁵ Gordo and Dorothy Agee comment, received February 26, 2010; Little Falls T. at 22, 30-31 (Bill Jordan and Lee Jordan); Plymouth T. at 51 (Don Selby); Plymouth T. at 73 (Michael Norton).

⁷⁶ Edward Van Hal comment, dated January 19, 2010.

their automated aquatic plant control devices can reduce their permit fee by reducing the area of control and applying for a three-year permit for \$90 (part 6280.0450, subpart 3, item A). The DNR proposed these reduced-price and no-permit options as incentives for property owners to disturb smaller areas of shoreline and enhance the protection of near-shore habitat. The DNR, however, believes that activities posing a higher risk to near-shore habitat, such as the use of pesticides or larger scale control, require greater oversight in the form of annual permits, monitoring, and inspections.⁷⁷

62. Furthermore, the DNR has also proposed changes to the APM rules that will reduce the administrative costs of the program. These changes include: (1) specifying that inspections are not required until three or more years after a permit has lapsed; (2) clarifying that annual reports may come from either the person who conducted the control activities or the person's agent; (3) simplifying the permit fee structure to reduce errors on the part of applicants; and (4) grouping inspections to make efficient use of time and travel expense.⁷⁸

Possible Consequences of the 2008 Legislation

63. Members of the DNR's advisory committee, as well as members of the public, expressed the belief that permit fees above the \$50-\$60 level will exceed the compliance "tipping point" – that is, will either discourage shoreline owners from performing any aquatic plant control or will encourage some owners to perform surreptitious and unpermitted plant control. There was concern that the result in both cases will be impairment, rather than improvement, of the state's waters.⁷⁹

64. The Lake Minnetonka Association has noted that illegal control activity has increased greatly since the DNR's new shoreline treatment restrictions went into effect last year. The Association projects that the implementation of the proposed rules will only add to the increase in unpermitted treatment activity. The Association acknowledged that the DNR's proposed rules are in response to legislative direction and urged legislative leaders to reconsider this directive in future legislation.⁸⁰

65. The Prior Lake Spring Lake Watershed District Administrator also expressed concern about the possibility of increased unpermitted control activities if the new fees are adopted. He suggested that the DNR require proof of an APM permit prior to the sale of any herbicide. He also supports a tax or user fee on herbicides as a means of recouping APM program costs.⁸¹

66. In response, the DNR acknowledged that the permit fee increase may cause some people to discontinue control of aquatic plants or cause

⁷⁷ Dept. Comment, dated March 17, 2010, at 5.

⁷⁸ *Id.* at 5 and 7.

⁷⁹ Plymouth T. at 84-86 (Kevin Kretsch); Plymouth T. at 95 (Barb Hones); Plymouth T. at 124 (Vern Wagner).

⁸⁰ Lake Minnetonka Association comment, dated January 15, 2010.

⁸¹ Michael Kinney comment, dated February 18, 2010; Plymouth T. at 50 (Don Selby).

others to perform illegal control of aquatic plants. But the DNR believes that the fee increase may also encourage shoreline owners to engage in aquatic plant control that is allowed without a permit or apply for multiple-year permits and treat smaller areas. Ultimately, the DNR states that it is not possible to encourage participation in the APM program by keeping permit fees low and also meet the legislative direction to recover program costs from aquatic permit fee revenues.⁸²

Suggestions by the Public

67. Several of the comments received suggested that the maintenance of state waters should not be the primary responsibility of lakeshore property owners, who already bear an increased property tax burden.⁸³ One affected person worried that the elimination of the fee to obtain an invasive aquatic plant management permit would result in an unfair burden on individual lakeshore property owners who obtain permits to control native aquatic plants.⁸⁴ A number of concerned individuals suggested that the shortfall of APM program money be recouped by an increase in boat registration fees, fish house licenses, or fines.⁸⁵

68. The Clear Lake Association recommended that inspections be eliminated when chemical treatments are performed by licensed and certified contractors.⁸⁶ Similarly, the Little Elk Lake Improvement Association suggested that the DNR transfer some of its oversight responsibility to licensed commercial contractors.⁸⁷ Another individual recommended that the DNR transfer some of its chemical monitoring responsibilities to individual lake associations.⁸⁸

69. Regarding transferring oversight responsibilities, the DNR responded that the purpose of the oversight is not only to assess compliance with permit requirements, but also to evaluate whether current permitting actions are adequately protecting aquatic plant habitat. The DNR does not believe that licensed commercial contractors or lake associations can, or should, meet this dual responsibility.⁸⁹

70. Some of the homeowners on Sunset Lake in Washington County feel that the proposed rules have a deeper impact on small lakes with no public access. Sunset Lake does not receive government assistance, and all of the treatment falls on the property owners. These individual property owners suggested that the

⁸² Dept. Comment, dated March 17, 2010, at 4.

⁸³ Rod and Elaine Collins comment, dated February 6, 2010; Nancy Golio comment, dated March 7, 2010.

⁸⁴ Kevin Kretsch comment, dated March 2, 2010.

⁸⁵ Naomi and Lanny Uber comment, dated January 28, 2010; Elaine Swanson comment, dated March 17, 2010; Plymouth T. at 141-42 (Ryan Wood).

⁸⁶ Clear Lake Association, Inc. comment, dated January 26, 2010.

⁸⁷ Dean McDevitt comment, dated January 26, 2010; Plymouth T. at 137 (Jerry Teichman).

⁸⁸ Norman Bradow comment, dated February 24, 2010; Fergus Falls T. at 52-56.

⁸⁹ Dept. Comment, dated March 17, 2010, at 16.

proposed rules contain graduated fee levels based on lake size, depth, and amount of infestation.⁹⁰

71. Another concerned individual understood the need to increase the fees generally, but objected to the fact that the permit fee will be the same for renewal permits as for new applications. He requested that the DNR have a lower fee for a permit renewal where no inspection is required and a higher fee for a new application.⁹¹

72. The DNR and its advisory committee considered the option of charging lower fees for permit renewals. The committee determined that a base fee of \$65 for permit renewals would require an inspection fee of \$150 to meet the identified revenue requirement. Adding the inspection fee to the \$65 permit fee would make the cost of a new or modified permit \$215. The DNR rejected this option in favor of a flat fee of \$90 to simplify the fee structure.⁹²

73. Several lakeshore property owners felt that the DNR should review or cut its own expenses for the APM program before it raises permit fees.⁹³ A property owner on Beebe Lake suggested that the revenue shortfall could be solved through a combination of DNR expense cuts, other state funds, and an increase in permit fees.⁹⁴ A property owner on Lake Owasso recommended that a fee cap be reinstated in the amount of \$2,200.⁹⁵

74. The Department and the advisory committee did consider maintaining a fee cap in the proposed rules. According to the Department, group permits could be capped if there were clear economies of scale. After a thorough analysis of the fee structure, the Department did not find clear efficiencies that would justify the deep discounts that these groups currently enjoy. The Department asserts that the flat rate for aquatic plant control adjacent to private property is necessary because it raises the amount of revenue required to cover the costs of the APM program. Each property owner requires approximately the same amount of DNR permitting services regardless of how many properties are covered by a single permit. If caps were placed on permit fees based on the number of participating properties, the fee for people applying for individual permits would have to be higher.⁹⁶

⁹⁰ Bruce Maki comment, dated January 12, 2010; Tom and Juleann Crever comment, dated January 21, 2010. An individual on Bass Lake expressed a similar concern. Plymouth T. at 24-28.

⁹¹ Tom Schaffer comment, dated December 28, 2009.

⁹² Dept. Comment, dated March 17, 2010, at 9.

⁹³ Lance Ness comment, dated February 24, 2010; Plymouth T. at 132 (Jerry Teichman).

⁹⁴ John Kalenberg comment, dated March 16, 2010.

⁹⁵ Janet Butler Smith comment, dated March 4, 2010.

⁹⁶ Dept. Comment, dated March 17, 2010, at 17.

75. An interested member of the Crow Wing Lake Association suggested that the DNR offer reduced permit fees in exchange for increased shoreline restoration by lakeshore property owners.⁹⁷

76. During the course of this proceeding, members of the public offered a number of thoughtful suggestions and ideas. Incorporation of those suggestions into the proposed rules, however, will not alter the fundamental economic reality. The Legislature established the revenue requirement for the DNR's aquatic plant management program as the program's actual cost, which the agency has determined to be approximately \$1 million. The SONAR indicates that there were approximately 3,900 individual permittees during the period 2005-2008.⁹⁸ In 2009, the DNR issued approximately 4,500 permits.⁹⁹ Even if the DNR were to adopt many of the public's meritorious suggestions, it would not solve the underlying problem of spreading a \$1 million revenue requirement among that relatively small number of permittees.

X. Rule-by-Rule Analysis

Part 6280.0100, subpart 7f

77. The Department is proposing to define "invasive aquatic plant management permit" as "an APM permit that allows the selective control of invasive aquatic plants, authorizes control at a scale to cause a significant lakewide or baywide reduction in the abundance of the invasive aquatic plant, and minimizes harm to nontarget species."

78. The Department has expanded efforts to control invasive aquatic species over the past several years. Two characteristics of most invasive aquatic plant control efforts are size and control method. The Department seeks to incorporate those characteristics into the definition. A definition of the term is important because the proposed rules waive or reduce permit fees and signature requirements for this type of permit.¹⁰⁰

79. At least two lakeshore property owners on Sunset Lake in Washington County expressed concern about the meaning of "lakewide," "baywide," and "reduction in the abundance" and how those terms applied to the unique circumstances in Sunset Lake. They asserted that it would be impossible to manually remove Eurasian water milfoil on a lakewide basis on Sunset Lake and that they do not qualify for a waiver of the fee because they don't meet the definition of "lakewide."¹⁰¹

80. The Department responded that the definition of "invasive aquatic plant management permit" focuses more on the level of control expected from

⁹⁷ Rick Pederson comment, dated March 8, 2010; Little Falls T. at 64-66.

⁹⁸ SONAR at 2.

⁹⁹ Fergus Falls T. at 67.

¹⁰⁰ SONAR at 17.

¹⁰¹ Diane Coderre comment, dated January 11, 2010; Bruce Maki comment, dated January 12, 2010; Tom and Juleann Crever comment, dated January 21, 2010.

the treatment activity than on the area covered by the treatment. For example, some lakes might have a single isolated area of infestation, and treatment of that single area would constitute lakewide reduction of invasive aquatic plants. Other lakes may have widely distributed areas of infestation. Treatment of one particular area of dense growth can still meet the significant reduction standard on a lakewide or baywide scale.¹⁰²

81. The Administrative Law Judge finds that the Department has put forth a definition of “invasive aquatic plant management permit” that is needed and reasonable.

Part 6280.0450, subpart 1c

82. Rule part 6280.0450 currently requires the Commissioner to obtain signatures from all landowners with shorelines adjacent to proposed treatment areas, with some exceptions. The DNR proposes the following new approval and notification requirements in subpart 1c:

A. Before issuing an initial invasive aquatic plant management permit, the commissioner shall require dated signatures of approval from all landowners whose shorelines will be treated, except that the commissioner may waive the dated signature of approval requirement when there are numerous property owners and obtaining signatures creates an undue burden on the premises.

B. If the signature requirement is waived, the commissioner shall require an alternate form of landowner notification, including news releases or public notices in a local newspaper, a public meeting, or a mailing to the most recent permanent address of the affected landowners. The notification must be done annually and must include: the proposed date of treatment, the target species, the method of control or product being used, and instructions on how the landowner may request that control not occur adjacent to the landowner’s property.

83. The DNR believes that it is necessary and reasonable to get landowner approval before aquatic plant control occurs adjacent to a landowner’s property. In most cases the treatment is requested by the landowner to improve lake access. But when invasive species management is the reason for the control, it can be difficult to contact all of the lake shore property owners where the control is needed. The DNR is proposing this new signature waiver option when there are numerous property owners and taking the time to obtain the signatures would create a burden on the premises to be treated. The DNR argues that it is reasonable and necessary to reduce this administrative burden in certain instances.¹⁰³

¹⁰² Dept. Comment, dated March 17, 2010, at 12-13.

¹⁰³ SONAR at 19.

84. Pat Bundy, a lakeshore landowner, objects to the proposed signature waiver language. He argues that he should not be forced to accept treatment in the water bordering his property if he has not requested it. According to Mr. Bundy, the proposed rules put an undue burden on property owners to “opt out” of treatment and “scour the newspapers every week” to see if the DNR will be treating his waterfront.¹⁰⁴ In addition, Mr. Bundy asserts that the DNR would violate the “wrong site” clause in Minn. Stat. § 18B.07, if it were to treat the water on his shoreline without his consent. This statute addresses pesticide use, application, and equipment cleaning and prohibits the direct application of a pesticide onto a property beyond the boundaries of the targeted site without the permission of the landowner.¹⁰⁵

85. In response, the DNR states that it is generally good public policy to conduct invasive aquatic plant management activities in cooperation with lakeshore property owners. Nevertheless, the state has jurisdiction over public waters and needs to be able to authorize control over invasive aquatic plants when it is in the public interest.¹⁰⁶ As for the issue of whether the DNR may violate Minn. Stat. § 18B.07 by treating without consent, the DNR asserts that as long as it applies the herbicides only to the water for the purpose of controlling invasive aquatic plants, that it would not violate Minn. Stat. § 18B.07.

86. The Administrative Law Judge finds that the DNR has shown a rational basis for the proposed rule. The proposed rule appropriately limits when the Commissioner can waive the signature requirement. The Commissioner’s discretion is not unfettered. Further, if the requirement is waived, the rule sets forth what the notice must contain and allows affected landowners to request that the treatment not occur adjacent to their property. Rule part 6280.0450, subpart 1c, is needed and reasonable.

Effective Dates

87. The 2008 legislative directive, codified at Minn. Stat. § 103G.615, subd. 2, makes clear that the fee amendments to the APM permit fee rules are not effective until August 1 following the submission of the adopted rules to the Legislature and the elapse of 45 legislative days. This directive applies to proposed rule parts 6280.0450, subpart 4, and 6280.0550, subpart 6.

88. The remainder of the proposed rules was adopted under the DNR’s general authority to make rules prescribing permit standards, found at Minn. Stat. § 103G.615, subd. 3. All of these proposed amendments will become effective five business days after the Notice of Adoption is published in the *State Register* in accordance with Minn. Stat. § 14.18.

¹⁰⁴ Pat Bundy comment, dated January 28, 2010.

¹⁰⁵ *Id.*

¹⁰⁶ Dept. Comment, dated March 17, 2010, at 12-13.

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. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are adopted as such.
6. 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 be adopted.

Dated: April 22, 2010.

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

Recorded: Transcribed by Kirby A. Kennedy & Associates (3 volumes)

