

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Amendments
to Permanent Rules Relating to Game
and Fish; Aquatic Management Areas

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on April 29, 1997, in St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1995 Supp.), to hear public comment, to determine whether the Minnesota Department of Natural Resources (DNR or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rule amendments, whether the proposed rule amendments are needed and reasonable, and whether or not any modifications to the amendments proposed by the Department after initial publication are substantially different.

The Department's hearing panel consisted of Steve Masten, Assistant Attorney General; Ed Boggess, Wildlife Program Manager; Steve Hirsch, Fisheries Program Manager; Blair Joselyn, Wildlife Populations and Research Manager; Dave Schad, Forest Wildlife Program Coordinator; Mike DonCarlos, Furbearer/Wildlife Damage Program Coordinator; Richard Baker, Heritage Zoologist; and Roy Johannes, Commercial Fisheries Program Coordinator. Fifteen persons signed the hearing register. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for 16 calendar days following the hearing, to the close of business on May 15, 1997. The Department's post-hearing response was filed by the close of business on May 19, and mailed out to those who signed the hearing register. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on May 27, 1997, the rulemaking record closed for all purposes. The Administrative Law Judge received numerous comments during the initial comment period. The Department also filed initial comments in response to issues raised at the hearing, including one proposed change. During the five-day response period, the Administrative Law Judge received four public comments.

This Report must be available for review to all interested persons upon request for at least five working days before the Department takes any further action on the proposed amendments. The Department may then adopt a final rule, or modify or withdraw its proposed amendments.

When the Department files the amendments with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On February 18, 1997, the Department filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules, with a certification of approval as to form by the Revisor of Statutes.

(b) a proposed Dual Notice of Intent to Adopt Rules, which included a Notice and Order for Hearing.

(c) a copy of the Statement of Need and Reasonableness.

2. On March 10, 1997, a Dual Notice of Intent to Adopt Rules and a copy of the proposed rules were published at 21 S. R. 1284.

3. On March 4, 1997, the Department mailed the Dual Notice of Intent to Adopt Rules to all persons and associations who had registered their names with it for the purpose of receiving such notice.

4. On the day of the hearing, the Department placed the following documents in the record:

(a) the Request for Comments as published on Aug. 5, 1996, at 21 S. R. 177,

(b) the certificate of mailing the Request for Comments, as signed and dated July 31, 1996; and the certificate of mailing list, as signed and dated July 30, 1996,

(c) Office of Administrative Hearing's approval of proposed notice plan for Request for Comments, as signed and dated July 24, 1996; and the Department's request for prior approval of notice plan, as signed and dated July 22, 1996,

(d) the proposed rule, including the Revisor of Statutes approval, dated February 11, 1997,

(e) the Statement of Need and Reasonableness, dated February 11, 1997, and signed February 12, 1997 by Gail Lewellan,

(f) a copy of the transmittal letter and a certificate showing that the agency sent a copy of the Statement of Need and Reasonableness to the Legislative Coordinating Commission, as signed and dated March 4, 1997,

(g) the Dual Notice of Intent to Adopt Rules, signed and dated February 20, 1997, as mailed,

(h) the Dual Notice of Intent to Adopt Rules, as published at 21 S. R. 1284,

(i) Office of Administrative Hearings' approval of notice plan for dual notice, as signed and dated January 28, 1997; and the Department's request for prior approval of notice plan, as signed and dated January 23, 1997,

(j) the certificate of mailing the dual notice, as signed and dated March 4, 1997; and certificate of mailing list, as signed and dated March 3, 1997,

(k) the certificates of additional notice given, as signed and dated March 4 and 5, 1997,

(l) written comments on the proposed rule and written requests for a hearing,

(m) the certificate of mailing the notice of hearing, dated April 24, 1997, and notice of hearing to those who requested a hearing, signed April 23, 1997, and

(n) the Department's opening statement.

All of the above documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comments and statements remained open until May 15, 1997 for comments from the public, and to May 19, 1997 for comments from the Department, the period having been extended by Order of the Administrative Law Judge and announced at the hearing. The record closed for all purposes on May 27, 1997, the fifth working day following the close of the comment period.

Statutory Authority and Nature of the Proposed Rule Amendments

6. The Department lists 30 different statutes under Minn. Stat. chapters 97A, 97B and 97C as authority to adopt the various portions of the proposed rules. (SONAR, p. 5). The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

7. The proposed rules and amendments to existing rules cover a variety of areas pertaining to game and fish including: state game refuges and wildlife management areas; controlled hunting zones; deer and bear licenses, permits and tags; deer registration; deer and bear quota area boundaries; moose and elk license applications; rabbit limits; raccoon and red fox seasons; trapping regulations; goose season regulations; possession of bears by wildlife rehabilitators; commercial mussel, minnow and fish harvest operations; seasons and limits for fish and snapping turtles; and provisions for aquatic management areas.

Most of the proposed wildlife rule changes are to incorporate changes into permanent rule that were previously in effect through the temporary expedited rulemaking process. The expedited process was used for seasons, open areas, and limits. Other rule changes for fisheries and wildlife are new rule language requested by the public and changes or clarifications believed to be necessary by the department.

The rule provisions which drew the greatest comments were amendments relating to the continuous seasons for taking raccoon and red fox, repeal of the rules prohibiting use of multiple-catch traps, use of dogs while setting or tending traps, and changes to various goose season rules.

Overview of Judge's Analysis

8. Minn. Stat. § 14.50 requires the Administrative Law Judge to take notice of the degree to which the agency has demonstrated the need for and reasonableness of its proposed rules with an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2 requires the agency to make an affirmative presentation of facts establishing the need for and reasonableness of its proposed rules. That statute also allows the agency to rely upon facts presented by others on the record during the rule proceeding to support the proposal. In this case, the Department prepared a Statement of Need and Reasonableness ("SONAR") to support the adoption of each of the proposed amendments. At the hearing, the Department supplemented the SONAR, both in prepared statements (such as those by Ed Boggess and Steve Hirsch) and also by an extensive dialogue with members of the public throughout the hearing session. The Department also submitted written post-hearing comments.

The question of whether a rule is needed focuses upon whether a problem exists that calls for regulation. In an early case after this requirement of establishing need and

reasonableness was first enacted, the Chief Administrative Law Judge adopted the rationale that in establishing the need for a rule "the agency must make a presentation of facts that demonstrates the existence of a problem requiring some administrative attention". See, Report of the Hearing Examiner, In the Matter of the Proposed Adoption of Rules Relating to the Control of Emissions of Hydrocarbons, OAH File No. PCA-79-008-MG, as cited in Beck, Bakken & Muck, Minnesota Administrative Procedure (Butterworth, St. Paul, 1987) at § 23.4.

The question of whether a rule is reasonable focuses on whether the Department has articulated a rational basis for its solution to the perceived problem. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 448 (Minn. App. 1985); Blocher Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Minnesota Supreme Court has further defined the burden by requiring that an agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards so long as the choice that it makes is a rational one. If commentators suggest approaches other than a rational one selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach. A rule cannot be said to be unreasonable simply because a more reasonable alternative exists, or a better job of drafting might have been done. The Agency is free, however, to adopt a "better" proposal if it chooses to do so, subject to the limitations set forth in Conclusion 7, below.

In addition to need and reasonableness, the Administrative Law Judge must assess whether the Legislature has granted statutory authority to the Agency, whether rule adoption procedure was complied with, whether the rule grants undue discretion to Agency personnel, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is impermissibly vague.

9. This Report is generally limited to the discussion of the portions of the proposed amendments that received significant critical comment or otherwise need to be examined. Accordingly, this Report will not discuss each amendment, nor will it respond to each comment which was submitted. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, because many of the proposed amendments were not opposed, and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rule is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of provisions of the rule that are not discussed in this Report, that such provisions are within the Department's statutory authority noted above, and that there are no other problems that prevent their adoption.

10. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.05, subd. 2 and Minn. Rule pt. 1400.2240, subp. 7. Any language proposed by the Department which differs from the rule as published in the State Register and is not discussed in this Report is found not to be substantially different from the language published in the State Register.

Section-by-Section Analysis

6234.1200 Taking Raccoon and 6234.1300 Taking Red Fox and Gray Fox

11. In both of these rule provisions, the Department is proposing a change in the length of the season during which raccoons and red fox can be taken. For raccoon, the existing rule provides that they can be taken from 9:00 a.m. on the Saturday nearest October 15 to December 31. For red fox, the existing rule provides that they can be taken from 9:00 a.m. on the Saturday nearest September 16 to March 15. However, in 1994 the legislature nullified these seasons by mandating a continuous season for a two-year trial period. Therefore, the Department now proposes to amend the rules to allow for a continuous season for raccoon and red fox.

12. In its SONAR, the Department stated the justification for the proposed rule amendments as follows:

The purpose of this change is to continue the year-round [raccoon, red fox] season established by the 1994 legislature for 1994-1996. It is necessary to simplify nuisance animal control activities, and reasonable because it will not affect population status. (SONAR, p. 19)

At the hearing and in its post-hearing comments, the Department provided further justification for the need and reasonableness of the proposed amendments. The Department explained that the continuous seasons are consistent with the seasons in effect the past three years through a combination of legislative action for 1994 and 1995 (Minn. Laws, Ch. 623, Art. 1, Sec. 43.) and expedited emergency rule for 1996 and 1997 (20 S. R. 2505). The expedited rules will expire in December 1997.

The Department explained that in 1994 the legislature expanded the season for taking raccoon and red fox to a continuous season and allowed persons to possess raccoon and red fox in any quantity. The legislation also required the Department to prepare a report for the legislature, by January 15, 1996. The report was to include the effects on the raccoon and red fox populations, effects on populations of protected species on which raccoon and red fox prey and other effects. The report was also to include any recommendations the commissioner had for changes in the provisions of the game and fish laws relating to raccoon and red fox.

After two years, the Department submitted a report on the effects of 1994 legislation. (Exh. Q). The conclusions of the report were that:

The continuous red fox and raccoon seasons were ineffective in accomplishing the goals of reducing predator populations and increasing prey populations. However, given current high populations of red fox and raccoon and the low harvest that occurred during the added "off-season" days, the continuous seasons caused no harm to red fox or raccoon populations. Unless harvest motivators (especially fur prices) increase, it is unlikely that continuous red fox and raccoon seasons will have any biological effects, positive or negative, on populations of these species.

The continuous seasons had some positive results in aspects other than the goals of population management. The seasons simplified the regulations pertaining to nuisance trapping activities, and increased recreational opportunities for some stakeholders.

The continuous season framework may reduce the "competition" previously associated with an opening date, especially for trapping seasons. When seasons open on a specific date, recreational activity may be very high on and immediately after that date. By contrast, when no specific opening date occurs, the onset of recreational harvest is more gradual, and is dictated by factors such as weather and fur primeness.

Based on the above conclusions, the Department recommended in the report that the legislation be allowed to expire, which would reinstate the Department's rulemaking authority for establishing the seasons. The Department then recommended to the legislature that it would establish the continuous seasons in the rule indefinitely.

There was no direct reason given in the report to the legislature as to why the Department made the recommendation to establish the continuous season in rule. However, at the hearing, Ed Boggess, testified that the Department had objected to an original proposal recommended by the legislature to totally unprotect these species. If the species had been left unprotected, then the Department would have no authority to set restrictions on seasons, bag limits and areas where the animals may be taken.

Mr. Boggess further testified that it was only after the Department opposed the legislative provision that the Department agreed to the compromise of setting a continuous season in rule, thereby maintaining the Department's authority to set regulations on those species should a need arise for that in the future.

13. Several persons at the hearing and in their post-hearing comments testified or wrote that they were generally opposed to trapping and bow and arrow as a method of taking animals. There were several pleas to the Department by these commentators to ban the use of various traps and bow and arrow for taking animals,

including raccoon and red fox. There were videos and other statements entered into the record concerning the pain and destruction caused by the use of traps. The commentators urged the Department to consider non-lethal methods to control animal populations where it was necessary.

In addition to a total ban on trapping and bow and arrow, there were several other anti-trapping related issues that were addressed by the commentators. Many of the comments by the public at the hearing and in the post-hearing submissions challenged the use of the word “nuisance” by the Department in their SONAR. Some of the people at the hearing requested data from the Department regarding nuisance complaints the Department has received for raccoons and red fox. Jill Gescheidle testified that she was concerned that the Department’s reference to raccoons and red foxes as “nuisance” animals and the need for the Department to kill them in order to solve the problem was not based on the actual number or severity of the complaints.

14. At the hearing and in the post hearing comments, the Department clarified the use of the word “nuisance” in the SONAR. At the hearing, Mr. Boggess, testified that the primary reason for the rule was not to address nuisance animal complaints and that a careful reading of the SONAR states that the rule would “simplify nuisance animal control activities.” Current statute already allows property owners to take raccoon and fox at any time of the year without a permit. The statute also allows other trappers or hunters that might want to assist a neighbor to do so with a permit. This amendment would provide for that to happen without a permit.

15. Several of the people at the hearing and in the post-hearing comments expressed concern about the lack of conservation officers in the state. The commentators pointed out that the DNR trap-tending rules provide that any trap not capable of drowning the animal must be tended at least once each calendar day and that any trap capable of drowning the captured animal and any body-gripping or conibear-type trap must be tended at least once each third calendar day (Minn. R. 6234.2200). The commentators felt that proper monitoring and adherence to the regulations would simply not be possible or enforceable with a continuous season.

In its post-hearing comments, the DNR stated that the trap-tending regulations are enforceable and the department does enforce them. However, based on records from the Department’s Division of Enforcement, during the most recent five-year period for which data are available (1990-1994), there was an annual average of only 10 summons and 1 warning issued per year for trap-tending violations. On the other hand, the Department pointed out that there is no evidence to suggest that trappers routinely disregard these regulations.

16. Another issue that several persons commented on was the issue of traps catching non-target animals. The commentators introduced data from various reports and studies indicating that a number of non-target animals are needlessly caught in traps intended for other animals.

In its post-hearing comments, the Department continued to maintain that the regulation of leghold traps is not the subject of these rule proceedings, but informed the public that the Department is not ignoring the issue. The Department cited the most recent data from the University of Minnesota Raptor Center which indicated that the total number of raptors received in the last seven years that were injured by leghold traps was less than two percent of the total number of injured raptors received. The Department points out that eagles continue to increase and expand their range in the state to the point that they were removed from the state threatened species list in 1996. There is no evidence that accidental capture of eagles in traps has in the past, or is in any way now, limiting their continued recovery. The Raptor Center data shows that the number of bald eagles caught in leghold traps has actually been declining in recent years, despite the increases in eagle populations. The Department attributes this trend to rule changes adopted in the early 1980s which prohibited the use of exposed bait in traps.

17. The Administrative Law Judge concludes that many of the issues raised by the commentators relate to the fundamental question of whether or not trapping or hunting by bow and arrow should be allowed as morally acceptable methods of taking animals. As the Department has pointed out, trapping is currently authorized by the legislature. (See, e.g., Minn. Stat. §§ 97B.601, 97B.651, 97B.651, 97B.901 to 97B.951.) The rules are consistent with the statutory authority of allowing trapping as a method of taking animals. For raccoon and red fox, the existing rules already allow for the animals to be taken with legal firearms, bow and arrow, and by trapping. These rule changes do not address the issue of what methods are allowed. They do only address the length of the season.

Because the methods of taking animals have been previously justified in a prior rule proceeding, the Department does not need to further demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments. Minn. R. 1400.2070, subp. 1, item D. The Administrative Law Judge agrees with the Department that the proposed rules do not address the method by which animals can be taken and only address the length of season for taking raccoon and red fox. More importantly, the fundamental moral question of whether or not hunting or trapping should continue to be allowed is a decision that can only be made by the legislature. *McKee v. Likins*, 261 N.W. 2d 566 (Minn. 1977).

18. The Administrative Law Judge finds that the Department's proposed rule for a continuous season for taking raccoon and red fox has been justified as needed and reasonable. The Administrative Law Judge agrees with the Department that it is necessary to retain the continuous season so that the Department can maintain its authority to restrict taking if it becomes necessary to do so in the future.

The real threat by the legislature to remove the raccoon and red fox from the protected list and remove the authority of the commissioner to routinely adjust season lengths caused the Department to address this issue. Without this rule, it is likely that the issue of a continuous seasons would go back to the legislature where the

continuous season would be reimposed, or in the alternative, the legislature would remove these animals from the protected species list. If the animals become unprotected, the commentators opposed to this rule will be worse off because the continuous season will be in place with no authority by the Department to take quick action to restrict the season should it become necessary. It is clear from the Department's testimony that the continuous season in the proposed rule was a compromise position with the legislature. It is in the Department's and the commentators' best interest to preserve this compromise.

The Administrative Law Judge also finds that the reasonableness of the rule has been established. As the Department has explained, the continuous seasons have already been in place for three years with little impact on the population of raccoon and red fox. In addition, property owners and occupants are already able to take raccoon year round by any method (Minn. Stat. § 97B.655). The additional secondary benefit of simplifying the process and paperwork also supports the rule.

The Department is charged under Minn. Stat. § 97A.045 to do all things the commissioner determines are necessary to preserve, protect, and propagate desirable species of wild animals. Keeping red fox and raccoon off of the unprotected species list is a policy that is necessary at this time to preserve and protect these species of animals.

6234.2200, subp. 8. Multiple-catch traps.

19. The Department has proposed the repeal of part 6234.2200, subpart 8, which provides as follows:

A trap capable of taking more than one animal at a time may not be used.

20. In its SONAR, the Department stated that there is no longer a need for a regulation to either limit total harvest or to distribute harvest among takers. The Department explains that the only common use of multiple-catch traps are submersion cage traps for muskrats, populations of which are little affected by trapping (Novak et al. 1987). Muskrats caught in these traps die quickly, either by carbon monoxide poisoning or by drowning. This repeal, the Department asserts, would also improve welfare of trapped animals by increasing the use of killing devices (versus those that hold animals alive). The Department also maintains that the proposed repeal of the rule is reasonable because Minnesota is one of only two states that have such a restriction and the Department asserts that there are no unique conditions that would require such a restriction in Minnesota.

21. With regard to the use of multiple-catch traps, many commentators raised similar anti-trapping arguments that were raised in the previous rule part. The commentators were generally opposed to trapping and the expansion of trapping

devices, explaining that the multiple-catch trap, like all traps, is non-selective and a cruel and unreasonable method by which to kill muskrats and other animals.

For example, Mr. Leslie Davis stated in his post-hearing comments that If muskrat population is little affected by trapping then trapping them is not needed and simply saying that multiple-catch traps under water are “the most common use” does not make them reasonable. Mr. Davis argues that multiple-catch traps are cruel, vile and unreasonable. He stated that they cause a painfully slow and miserable death to those animals caught in them and many of them are not the target animal being sought. Just because other states support cruelty does not make it reasonable for Minnesota to do so. Other commentators made arguments similar to those of Mr. Davis.

The Department responded in its post-hearing comments that the only commercially available multiple-catch trap design that the department is aware of in use by North American fur trappers is the muskrat “submarine” trap. The trap is a box or cage trap with a narrow entryway or gravity operated doors. It is placed under the water surface. The trap has no jaws or spring-tensioned mechanisms, and is incapable of catching eagles, or other birds, dogs, or raccoons. The Department asserts that it is one of the most selective traps available.

22. The Administrative Law Judge finds that the repeal of Minn. R. 6234.2200, subpart 8, allowing the use of multiple-catch traps, has been justified as needed and reasonable. If the original purpose for the rule is no longer necessary, then it is reasonable for the Department to repeal it.

6234.2200, subp. 11. Use of dogs while setting or tending traps.

23. The Department is proposing the repeal of part 6234.2200, subp. 11, which provides as follows:

A person may not be accompanied by a dog while engaged in tending or setting traps for protected wild animals, unless the dog is harnessed and attached to a sled or securely tethered to a tree or other stationary object with a leash of no more than 15 feet in length.

24. In its SONAR, the Department states that although there may have been a need for this regulation at one time to regulate the use of dogs for activities such as digging mink out of their dens, there is no longer a need for this rule because digging mink from dens or other animals from dens is now prohibited by Minn. Stat. sec. 97B.095. The Department asserts that the repeal of the subpart is reasonable because it will not affect furbearer populations status and because they are not aware of other states having such a restriction and there are no needs unique to Minnesota that require it here.

In its post-hearing comments, the Department further explained that the Minnesota Trappers Association requested this rule change, and their members are

aware of the low degree of risk to dogs posed by traps. The Department maintains that each fall, thousands of bird hunters in Minnesota have dogs afield in areas where traps are set, and there have been very few problems. If dogs are accompanied and do get caught in a leghold trap, they can be immediately released, usually without injury. Unattended, free-ranging dogs are at a greater risk of significant injury because of the increased length of time that they may remain in the trap before being released. But allowing dogs to run loose is inadvisable for a number of reasons and this rule is specifically addressing the situation of dogs that are accompanied. The Department states that the repeal does not require anyone to bring a dog on a trapline. The Department sees no need to continue the restriction regulating the behavior of trappers who choose to have their dog accompany them in the field when other outdoor users can be accompanied by dogs in the same areas.

25. All of the remainder of the commentators disagreed with the repeal of the subpart by the Department. They urged that the ban on dogs being allowed to accompany trappers be continued. The commentators were concerned that dogs may contact or attack trapped animals, resulting in injuries to both the dogs and the trapped animals.

In its post-hearing comments, the Department responded that a dog accompanied by a trapper is far less likely to injure trapped animals or to be injured by trapped animals than an unsupervised, free-ranging dog. There is no conservation issue addressed by maintaining a restriction against trappers having a dog with them, particularly when any hunter or hiker can be accompanied by a dog and when prohibitions against using a dog to dig for mink remain in effect.

26. The Administrative Law Judge finds that the repeal of the subpart has been shown to be needed and reasonable.

Chapter 6240. Migratory Birds/Goose Seasons.

27. In Minn. R. pts. 6240.0850, 6240.1100, 6240.1500, 6240.1600, and 6240.1700, the DNR is proposing to either expand the open goose season, expand the zone in which geese can be harvested, or increase the limit of geese that can be harvested in a particular zone. In proposing these amendments, the Department stated in the SONAR that was addressing the locally-breeding or resident goose population, stating that there is a need to harvest more resident geese in portions of the state where such geese are causing damage. The Department also indicated that amendments were also made in the length of the goose season rules to comply with new federal framework.

28. Most of the persons who commented on the rule amendments to chapter 6240 did so generally. The commentators were generally opposed to any hunting, and thus were opposed to any increase in limits, extended hunting seasons or expanded hunting zones.

Mr. Adamec and others requested at the hearing that the proposed changes not be implemented and recommended that the Department consider other effective non-lethal methods to control the non-migratory goose population. Mr. Adamec included in his testimony material that outlined a number of non-lethal techniques. (Exh. O.) Non-lethal solutions outlined in the material included: not feeding geese at municipal parks; use of habitat modification to exclude geese from areas where they are viewed as problems; use of fences or natural barriers around water; and a variety of techniques to harass or scare geese away from certain areas.

In its post-hearing comments, the Department responded that they are aware of non-lethal methods to reduce damage caused by Canada geese and know that they can be effectively applied in certain situations. The Department stated that it actively recommends these methods to agricultural growers and homeowners, where appropriate.

However, the Department also stated that the non-lethal methods are not appropriate, effective or practical in every case. For example, many non-lethal methods are very site-specific and often simply move problem geese from one location to another. Some of the non-lethal methods such as egg oiling, addling, habitat manipulation are currently experimental and not proven to be efficient and cost effective at controlling goose populations. The Department does note that there are some habitat manipulation techniques that can be used effectively to address localized goose problems. However, it is not practical on a regional or statewide basis to manipulate habitat on a scale that will result in any significant reduction in the goose population.

The Department asserts that it is necessary and reasonable to use a combination of methods to deal with the goose population. There are many citizens who would like to hunt geese, and the Department must consider their needs. Hunting is a legitimate method of controlling the overpopulation of geese. The Department has agreed to use non-lethal methods for abatement of specific nuisance or damage problems. The Department argues that such a combined approach is a cost-effective and practical means by which to address the expanding resident Canada goose populations.

29. The Administrative Law Judge finds that the Department's method of increasing limits, expanding or redefining hunting zones and expanding the number of days in a season in the above rule provisions has been shown to be needed and reasonable. The Administrative Law Judge agrees with the Department that there is a need to address the resident geese population on a regional basis. Hunting of the geese is one reasonable way to limit the overall population of the geese in areas where the DNR has seen an increase in the locally breeding resident goose populations. The Department has indicated that it will continue to use the non-lethal methods in situations where it is appropriate. Hunting, combined with the use of non-lethal methods, is a reasonable way for the Department to achieve a balance between the controlling the population of geese, dealing with damage and nuisance problems, and providing recreational hunting opportunities for the public as required by Minn. Stat. § 97A.045, subd. 1.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subd. 1, 1a and 14.14, subd. 2 and 2a, and all other procedural requirements of law or rule.
3. That the Department 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)(ii).
4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50(iii).
5. That the amendments and additions to the proposed rules which were suggested by the Department after publication in the State Register do not result in rules which are 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 and Minn. Rule 1400.2240, subp. 7.
6. That any Findings which might be properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
7. That a Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the proposed rules be adopted.

Dated this _____ of June, 1997.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded