6-2000-10699-1

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Amendments to Permanent Rules Governing Aquatic Plant Management and Aquatic Nuisance Control

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on October 1, 1996 in Camp Ripley, Minnesota; October 2, 1996 in Fergus Falls, and October 3, 1996 in St. Paul. Both afternoon and evening sessions were held in each location.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1994), 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 modifications to the amendments proposed by the Department after initial publication are impermissible, substantial changes.

The Department's hearing panel consisted of David Iverson and Steve Masten, Assistant Attorneys General; Steve Enger, the Department's Aquatic Plant Management Program Coordinator; Howard Krosch, Technical Advisor in Ecological Services; and David Wright, Monitoring and Control Unit Supervisor in Ecological Services. A number of aquatic plant management specialists from regional offices also appeared at various locations. Thirty-four persons signed the hearing register at Camp Ripley, 26 signed in Fergus Falls, and 28 signed in St. Paul. However, in each location, there were additional people who attended but did not sign the register.

The record remained open for the submission of written comments for 12 calendar days following the hearing, to the close of business on October 15, 1996. 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 October 22, the rulemaking record closed for all purposes. The Administrative Law Judge received numerous comments, including some petitions, during the initial comment period. The Department also filed initial comments, including some proposed changes in response to issues raised at the hearings. During the five-day response period, the Administrative Law Judge received one public comment and one filing from the Department.

The Administrative Law Judge requested, and received, an extension of time to prepare this Report pursuant to Minn. Stat. § 14.15, subd. 2 (1994).

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.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse Findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

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 August 7, 1996, 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 Order for Hearing.

(c) a proposed Notice of Hearing, including the proposed amendments to the rules which had been added since their publication on December 26, 1995 (see Finding 4(i), below).

(d) a statement of the number of persons expected to attend the hearings.

(e) a copy of the Statement of Need and Reasonableness and an addendum thereto.

2. On August 26, 1996, a Notice of Hearing and a copy of the proposed rules were published at 21 State Register 268.

3. On August 28, 1996, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with it for the purpose of receiving such notice. In addition, on the same date the Department mailed a copy of the Notice of Hearing and proposed amendments to all persons and associations who had submitted a written request for a public hearing during the January 1996 comment period.

4. On August 30, 1996, the Department filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed.

(b) the Agency's certification that its mailing list was accurate and complete.

(c) the Affidavit of Mailing the Notice to all persons on the Department's list and the parties who requested a public hearing.

(d) the names of Department personnel who will represent the Department at the hearing, together with the names of the other witnesses solicited by the Department to appear on its behalf.

(e) a copy of the Notice as published in the August 26, 1996 issue of the State Register.

(f) all materials received following Notices of Intent to Solicit Outside Opinion published in the October 17, 1994 and July 3, 1995 issues of the State Register and copies of those Notices.

(g) a copy of the proposed changes to the proposed amendments since publication on December 26, 1995, with a certification of approval as to form by the Revisor of Statutes.

(h) a copy of the letters showing that the Department sent a copy of the SONAR and addendum to the LCRAR and LCC, respectively.

(i) a copy of the Notice of Intent to Adopt Rules without a Public Hearing, as published in the December 26, 1995 issue of the State Register; a copy of the Affidavit of Mailing the Notice of Intent to Adopt Rules without a Public Hearing to persons on the Department's rulemaking list, with a certification of that list; a copy of the Affidavit of Discretionary Mailing of the Notice of Intent to Adopt Rules without a Public Hearing; copies of the comments received pursuant to that Notice; and copies of the written requests for a public hearing that were received in response to that Notice.

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 October 15, 1996, the period having been extended by Order of the Administrative Law Judge and announced at each hearing session. The record closed for all purposes on October 22, following the close of the responsive comment period.

Statutory Authority and Nature of the Proposed Rule Amendments

6. Minn. Stat. § 103G.615 (1996) provides, in subdivisions 1 and 2, for a permit system to regulate the gathering, harvesting, and destruction of aquatic plants. The statute goes on to provide as follows:

> Subdivision 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 shoreline conservation ordinances, lake management plans and programs, and wild and scenic river plans.

Subdivision 1 of that statute provides, in relevant part, that the Commissioner may issue permits to:

> (3) destroy harmful or undesirable aquatic vegetation or organisms in public waters under prescribed conditions to protect the waters, desirable species of fish, vegetation, other forms of aquatic life, and the public.

The Administrative Law Judge finds that the Department does have statutory authority to adopt the proposed rules, with the exception noted at Finding 37, below.

7. The Department has been regulating aquatic plant control since 1945, and orders and regulations have been revised approximately 14 times since then. The rules were revised most recently in 1985. The amendments proposed in this proceeding are essentially "updates" to address new methods of aquatic plant control and to increase protection of floating leaf vegetation, such as water lilies. The two topics which drew the greatest comments were rules relating to "automated untended aquatic plant control devices", particularly the Crary WeedRoller, and, secondly, the area limitations on the use of aquatic herbicides and pesticides.

Small Business Considerations in Rulemaking

8. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must document in the SONAR how they have considered methods for reducing adverse impacts on those businesses. In this case, the Department concluded that the amendments would have minimal impact on small businesses engaged in the commercial harvesting of aquatic plants or the commercial

application of aquatic pesticides for reasons set forth in the SONAR at pages 5-7. The Department has met the requirements of Minn. Stat. § 14.115, subd. 2.

Overview of Judge's Analysis

9. Minn. Stat. § 14.50 (1994) 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 (1994) 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. After 25 or more persons requested a public hearing, the Department made some changes in the proposed rules, and published an Addendum to the SONAR. At the hearing, the Department supplemented the SONAR, both in prepared statements (such as those by Jack Skrypek and John Barko) and also by an extensive dialogue with members of the public throughout the various hearing sessions. The Department also made 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 9, 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.

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.

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 (1994) and Minn. Rule pt. 1400.1100 (1994). 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

6280.0250: Standards for Aquatic Plant Management Permit Issuance.

Actions not requiring a permit.

10. Subpart 1 (C) is the basic "swimming beach" provision. No permit is required for the cutting or pulling of submerged vegetation in order to maintain a site for swimming or boat docking under a number of conditions. First, the cleared area is limited to not more than 50 feet of the owner's shoreline or one-half the length of the owner's total shoreline, whichever is less. In addition, the cleared area cannot exceed 2500 square feet. A boat channel extending to open water may be maintained so long as it does not exceed 15 feet in width. Cutting or pulling may only be done with equipment that does not significantly alter the course, current, or cross-section of the lake bottom, and drag lines, bulldozers, hydraulic jets, automatic untended aquatic plant control devices, or other power-operated earth-moving equipment may not be used.

The cutting or pulling must take place in the same location each year and the vegetation that has been cut or pulled must be removed from the water.

11. Several persons objected to the shoreline length limitation, arguing that it was fundamentally unfair to allow a person with a 100-foot shoreline to have a 50-foot beach, while somebody with a 50-foot shoreline, for example, would be limited to a 25-foot beach. At the hearing, the Department explained how it arrived at the 50-foot/50 percent limitation as well as the 2500-square foot limitation. Balancing the public's need to access and use the lake for recreational purposes against maintaining some semblance of natural conditions was the basis for the limitation. Tr. II, pp. 265-66. The dimensions have been in the Department's plant management regulatory scheme for a number of years, and they are not proposed for change in this proceeding. They are, therefore, not technically "fair game" for comment, but are addressed here because a number of persons raised them during the hearing process.

12. A change from the existing rule is proposed with regard to water lilies, water shield, and other floating leaf vegetation. In the past, owners have not needed a permit to remove either floating leaf vegetation or submerged vegetation within the area defined by the rule. The amendments proposed in this proceeding would limit the no-permit provision to removal of submerged vegetation, and only allow the removal of floating leaf vegetation in the 15-foot-wide boating channel to open water. It is found that the Department has justified this change because of the characteristics of water lilies' presence in lakes and their benefit to fish and other aquatic life.

Actions Requiring a Permit: The Crary WeedRoller.

13. The proposed amendments establish a new category of weed removal devices and regulate their use. This category is "automated untended aquatic plant control device". To date, there is only one commercially manufactured device which meets the definition -- the Crary WeedRoller. There are, however, some homemade devices which also meet the definition. For ease of reference, all will be referred to as Crary WeedRollers.

14. The Crary WeedRoller was invented in the early 1990s. It is manufactured by the Crary Company of West Fargo, North Dakota. The company manufactures agricultural equipment and outdoor power equipment, which together account for some 90% of the sales revenue. The WeedRoller is a relatively new product which accounts for about five percent of sales revenue. Tr. II, pp. 273-74. The WeedRoller is essentially an L-shaped tubular device, part of which extends above the water surface and is attached to a dock, tripod, or other fixed object. That is one side of the "L". It extends down to the lake bottom, where it joins the other side of the "L" in a 90-degree angle. That other side of the "L" is the roller. It consists of five or ten-foot sections of what appear to be large-diameter aluminum cylinders, in the range of 12 inches in diameter. These cylinders are joined together by semi-flexible couplers so that the total length of the roller itself can be 5 feet, 10 feet, 15 feet, 20 feet, 25 feet, 30 feet, etc. A small 75-watt electric motor, mounted above the water surface, turns the roller in a large arc around the dock or tripod. The angle of the arc can be easily

adjusted. The rollers that are on the bottom of the lake contain fins which operate like paddles of a paddle-wheel boat. As the electric motor drives the roller sections in an arc, the fins dig into the lake bottom (whether it be sand or muck) and as the roller continues, the fins bring up a small amount of muck, sand and weeds off the bottom. The sand and gravel falls back down to the lake bottom, while the silt and weeds float. The WeedRoller goes at a very slow rate. The theory behind it is to gradually break down the weeds and suspend the sediment so that over a relatively long period of time, say several days of continuous operation, the weeds and sediment would have been dispersed, leaving behind the sand and gravel to create a clean and hard bottom. It does not attempt to work quickly in the sense that a rake, bed spring, or other device might allow a landowner to clear away all weeds in a few hours' time. Instead, it works gradually, and takes at least several days to achieve its goal. Users reported operating it for a week in the spring and then some lesser amount of time once or twice during the summer. It is not used on a continuous basis throughout the entire summer, but, on the other hand, it cannot just be used for a few hours once a year.

The WeedRoller does its job well. The record is replete with stories of frustration and, in some cases, failure to control weeds using rakes, scythes, electric cutters, mechanical weed cutters (some of which can get very large), bed springs, and various other kinds of drags. See, for example, Public Ex. 9. Frustration and failure resulted from the fact that none of these devices permanently remove the weed problem, even for a single season. Depending upon the type of device and the type of weed, the landowner would have to repeatedly work on weed control. The Crary WeedRoller, on the other hand, requires far fewer applications. Once it has done the initial clearing, it may only have to be used once or twice again during the season. In addition, it is electrically powered and much easier to use than a rake or other drag thrown from shore or hauled behind a tractor.

15. The ability to uproot weeds and to suspend muck is a benefit to the landowner with the WeedRoller, but may be a detriment to a neighbor. The Department has received a few complaints regarding a neighbor's WeedRoller causing floating vegetation debris and turbidity. (See, for example, Letter dated September 3, 1996 and Complaint Report dated August 13 and 20, 1996. See also, aerial photograph labeled Photo Number 2 submitted October 15, showing sediment drifting along shoreline.) The Region 1 aquatic plant specialist received three complaints in 1996 and two in 1995 regarding turbidity and one regarding hum. Tr. I, p. 189. However, given the fact that there are roughly 1,000 Crary WeedRollers already being used in Minnesota, some of which are being used on a shared and rental basis so that they are in more than one location during a season, the number of complaints has been very small.

16. Initially, Crary WeedRollers were sold with 10-foot-long roller sections, and the typical length was a 30-foot-roller. When this roller was operated in at least a 180-degree arc parallel to the shoreline, that caused a length of 60-plus feet to be rolled. This exceeded the 50 feet allowed by the current rule (without a permit), resulting in a number of citations and fines. When it became evident to the Crary company that the 50-foot limitation was being enforced in Minnesota, the company

began selling a five-foot section, along with ten-foot sections, so that it would be possible to stay within the 50-foot limit by using a 25-foot roller.

17. An inspection during the summer of 1994 of WeedRollers on nine lakes in the Brainerd region indicated 39 in operation. Of those 39, 33 were in non-compliance with the current rule. Fourteen were operating beyond the 50-foot limit, ten were operating in an area exceeding 2500 square feet (some having been moved to more than one location on a site), eight were operating within beds of emergent (as opposed to submerged) vegetation, and one was operating in an area of bog. See, Memo dated October 8, 1996 to David Wright, Ecological Services, from Terry Ebinger, Region 3.

18. At least one realtor has purchased a WeedRoller and taken it to multiple sites in order to make the sites more attractive prior to offering them for sale. A few firms rent WeedRollers to landowners by the week. These practices would be made more difficult by a permit program which requires an inspection of each location prior to the use of the device.

19. The Department is proposing to require a permit for the use of a WeedRoller. The permit would be site specific, and would require a site inspection. It would carry a $20.00 fee, but would be good for three years if the WeedRoller were operated in an area of no more than 2500 square feet which did not include any emergent or floating leaf vegetation. Under the existing rule (and the proposed one), no permit is required for cutting or pulling submerged plants either by hand or with power-operated cutters or rakes, so long as the 2500-square-foot area and 50-foot/50 percent limitation described above is met. By requiring a permit and a site inspection, the Department is treating the WeedRoller differently from a tractor-drawn bed spring or similar device. The Department justifies this difference based on its lack of experience with the WeedRoller (the Department claims to be quite conservative and cautious in such matters). It desires to be sure that the WeedRoller is being operated in an appropriate location where it is removing submerged vegetation, rather than emergent or floating leaf vegetation. More importantly, the Department wants to be sure the device is being used to remove plants rather than muck and sediment. The Department is also concerned about the destruction of fish spawning nests by the WeedRoller, and intends to condition permits on a case-by-case basis with a "blackout period" when they could not be used in order to avoid harming spawning areas and nests. The Department's caution comes from a belief that frequent and lengthy use of the WeedRoller will permanently alter the lake bottom and vegetation in a manner different from a hand-drawn rake or a tractor-drawn bed spring. The Department believes that the impacts of existing methods are more localized, and affected areas recover more quickly than areas which have been rolled with the WeedRoller. The Department claims that WeedRollers can remove plants for at least one growing season depending on how often they are used, and they are in the lake, available for operation all season long. They are much easier to use than existing methods, and thus more likely to be used often. In addition, the Department is concerned about educating users so that the negative impacts of the WeedRoller can be minimized. Without a site inspection, the Department does not believe it will be able to properly educate users, especially renters

or persons sharing a unit. The Department sees site inspections as an educational tool. Initially, when the first WeedRollers appeared, the Department observed them being used in areas with firm lake bottoms and few aquatic plants, and thought their impacts were minimal. However, as more units were sold in the State, the Department observed use in different types of substrate which showed more significant impacts, such as the disruption and displacement of bottom sediments. The Department is concerned not only about complaints from neighbors with regard to turbid water, but also about the impact on spawning grounds and spawning nests which might be covered with muck stirred up by a WeedRoller. There is concern that if one neighbor moves sediment onto another's property, the other neighbor will feel compelled to get it off, and the end result will be constant shifting of sediment and increased turbidity throughout the lake. While all of the above impacts could also occur with a bed spring attached to a tractor or some of the other mechanical devices described in the record, the Department believes that the convenience of just flicking a switch and starting the WeedRoller up, and allowing it to run unattended, will result in greater use and greater impacts than with existing methods.

20. The requirement for a permit and the likelihood of an inspection (at least the first time) raised questions during the hearing with regard to what standards would be used in determining whether or not to grant the permit. The Department responded that the standards are set forth at Part 6280.0250, subp. 3, which provides as follows:

> Permits for the destruction of emergent and floating-leaf aquatic macrophytes including wild rice, bulrush, cattail, water lilies, and similar vegetation will not be issued unless the commissioner determines sufficient justification exists. The commissioner will balance the reasonable needs of riparian owners to gain access and use public water against the need to protect emergent and floating-leaf aquatic macrophytes so that the integrity and value of the aquatic macrophyte community is maintained.

The first sentence of this rule was previously found in existing Rule Part 6280.0400, subp. 2 (1995). The second sentence is new. It is an attempt to further explain what the Commissioner will deem to be "sufficient justification" for granting a permit. It focuses on emergent and floating-leaf vegetation, rather than submerged vegetation. The implication is, therefore, that so long as only submerged vegetation is at issue, a permit will be granted. This is consistent with other changes noted above, which focus upon the preservation of emergent and floating-leaf vegetation, not submerged vegetation. While the "balancing" called for is not terribly specific, the Administrative Law Judge understands the Department's expressed concern for allowing site-by-site determinations which avoid the "one size fits all" complaints which have been voiced about other portions of the rule. The question is whether or not the standard is so vague that it provides no guidance for APM specialists, landowners or reviewing courts.

21. The Administrative Law Judge concludes that the language is not impermissibly vague because the goal is to allow for site-by-site determinations, and what is important in one site may well be irrelevant in another. To attempt to catalogue

all the factors that should be considered would be a daunting task. While most of the factors were no doubt discussed at some point during the three days of hearing, or somewhere in the numerous documents in the record, the Administrative Law Judge is not aware of either the Department or the opponents putting together a comprehensive list of the factors which ought to be considered. In a somewhat analogous situation, the Minnesota Supreme Court upheld a Pollution Control Agency rule which allowed for approval or denial "based upon a finding that the total positive impacts. . . outweigh the total negative impacts in comparison to the existing [situation] and/or all feasible alternatives . . . ." While in that case the rule indicated ten criteria which should be considered in assessing a permit, there was no indication of what weight should be given to each, and the court acknowledged that the relative weights could change for different types of situations. Nonetheless, the court allowed the rule to stand, acknowledging the need for flexibility in the review process, the likelihood of future changes in knowledge and evaluation tools, and the need to allow for different situations presenting different kinds of problems. Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416, 423 (1979). Another consideration noted by the court was the fact that there was an appeal procedure. Such a procedure also exists in the case of the DNR rule here. Moreover, since the time of the court's decision in Can Manufacturers, the Legislature has added a procedure whereby an individual or small business can recover their expenses and attorney's fees for contesting an agency action if the agency was not "substantially justified" in its position. If an agency were to deny a permit without substantial justification, the applicant could appeal the denial and recover expenses and attorney's fees. See, Minn. Stat. § 15.471 to 15.475 (1995). While that is no substitute for evenhanded application of clearly defined rules, it gives some meaning to the opportunity to appeal a decision.

22. There was mention during the hearing of an “operational order” which was still in draft form, but which would be issued to assist DNR personnel in evaluating permit applications for WeedRollers. Tr. I, pp. 91-94. The Administrative Law Judge cautions the Department that it can only enforce the detail in the rule, and that it cannot enforce any greater level of detail that might appear in this “operational order”. There were complaints in the hearing process that the rule’s standard was too vague. At least one person suggested that the rule ought to be withdrawn, and not proposed until the Department had enough experience with the WeedRoller to be able to propose a rule with more detailed standards. The Administrative Law Judge has accepted the Department’s argument that a rule is needed now, and it is impossible to write a more detailed rule at this time. It would be an act of bad faith for the Department to issue, and attempt to enforce, detailed standards in the form of an “operational order”. When the Department feels it has enough experience to adopt more detailed standards than the currently proposed rule, it must put those standards into the rule.

23. Another problem that must be addressed in connection with the WeedRoller is the overlap between these aquatic plant management rules, which are administered by one division of the Department, and the "anti-excavation" rules of a different division of the Department, the Division of Waters. Those rules govern the "displacement or removal of the sediment or other materials from the beds of protected waters by means of hydraulic suction or mechanical operation". In response to

questions raised during the hearing process, the Division of Waters provided guidance with regard to its interpretation of "excavation" as it might apply to the Crary WeedRoller. See, Memo dated October 15, 1996 to Lee Pfannmuller from John Linc Stein, supplied as part of the Department's post-hearing comment of that date. In that memo, the Department of Waters reviewed its rule (Minn. Rule Part 6115.0200) relating to excavation of protected waters, and it went on to state the following:

> It is clear that a Crary WeedRoller, if its primary purpose is to remove sediment or other materials from the bed of protected waters, is within the realm of "excavation" -- it is a mechanical device used to displace/remove sediment material from the bed of protected waters. There is a distinction between use of the device for one of two primary purposes -- the first to control aquatic plants, the second to perform excavation.
>
> To distinguish incidental movement of sediment associated with the primary purpose of mechanical control of aquatic plants from excavation subject to a DOW permit, the division considers whether the device excavates beyond that necessary to control aquatic plants. A protected waters permit would be required when that limit is surpassed. Determining this limit will require field data concerning the depth of sediment, type of sediment, vegetation types relationship to neighboring properties, prevailing wind and wave conditions, etc.

The memo goes on to alert persons that if a device appears to be involved in "excavation" rather than control of aquatic plants, a separate permit from the Division of Waters will be required, and given the Division's existing rules regarding excavation, it is unlikely that a permit would be issued.

Persons selling these devices, renting them, sharing them, or owning them should understand that they should not be advertised, sold, rented, or used for excavation. Their primary use must be for control of aquatic plants, and their use should be limited to the area necessary to control the plants.

24. Many persons complained about the "hassle" of applying for a permit, going through an on-site inspection, paying a fee, and then having to file a report at the end of the season, then going through the same process again the next year. The Department responded with a number of the arguments noted above concerning the need for an on-site inspection and a permit prior to allowing the use of a device such as the WeedRoller. In their post-hearing comments, however, the Department did propose a change to lessen some of the "hassle". That change was to allow a permit with a three-year duration for these devices "operated in an area up to 2500 square feet, excluding emergent and floating leaf vegetation". That language comes from the first page of the Department's October 15 submission to the Administrative Law Judge, where it was underlined to show it is a change from the one-year permit initially proposed at the hearing. However, back on page 9 of that submission, the Department

explained that the proposed change would reduce the permit burden on lakeshore homeowners who operate automated untended devices in a manner that would not have required a permit under the existing rules "(in an area of 2500 square feet or less, in submerged vegetation, extending no more than 50 feet along shore or one-half their frontage, whichever is less)". There is a conflict between what the Department has proposed on page 1 of its submission, and its explanation on page 9. There is no shoreline limitation stated on page 1, but there is one implied on page 9. This conflict was not raised by any person until the Administrative Law Judge was preparing this Report. He contacted the Department to ascertain which it had intended, and was informed that the Department had intended that the 50-foot/50 percent limitation be in the proposed rule, along with the 2500-square-feet limitation. The omission of the limitation from page 1 was human oversight and error. Had this been merely a matter of communications between the Department and the Administrative Law Judge, the error could be described as "harmless" and the Department's error could be overlooked. However, the Department's October 15 submission was provided to a number of persons, including the Crary company. Only one of those persons elected to file a comment in response (which was Crary), but it is unknown whether others might have commented had they seen the correct text on page 1 of the Department's submission. Given the fact that the WeedRoller creates an arc-shaped area of control, and thus is not easily configured to create a neat 50-foot-by-50-foot square, persons may have believed the Department intended to remove the 50-foot/50 percent limitation and only maintain the 2500-square-foot limitation for these devices. The Administrative Law Judge has no way of knowing whether this occurred or not. However, in light of the manner in which the device does operate, and in light of the other limitations contained in the three-year permit provision, the Administrative Law Judge suggests that the Department not reinsert the 50-foot/50 percent limitation in the three-year permit option language. While the Administrative Law Judge will not insist on its omission, because there is insufficient evidence to determine that anyone was, in fact, misled by the omission, he believes it to be a reasonable trade-off for the requirement of a permit and a site inspection. However, if the Department disagrees, it may reinsert the 50-foot/50 percent language without it being a "substantial change".

25. In summary, based upon all of the foregoing considerations, the Administrative Law Judge concludes that the Department has demonstrated the existence of a problem which requires its attention, and further that its proposed solution to the problem has a rational basis. The Department may regulate the use of Crary WeedRollers and other automated untended devices.

Chemical Treatment of Aquatic Vegetation

Area Limitation

26. Existing rule part 6280.0400, subp. 5, contained two different size limitations for pesticide control, depending upon whether the lake was in a rural area, or in a city or town. If the lake was in a rural area, the lesser of ten percent of the littoral area (where the water is 15 feet deep or less) or 100 feet of shoreline per site could be treated. But if the lake were entirely within a city or town, the lesser of 15 percent of the

littoral area or 100 feet of shoreline per site could be treated. In the proposed amendments, the Department is proposing to unify the two under the 15 percent limitation, so that on all public waters and watercourses, the lesser of 15 percent of the littoral area or a maximum of 100 feet of shoreline per site could be treated for controlled submerged vegetation. There are exceptions made for resorts, apartments, public swimming beaches, and storm water retention ponds.

27. In addition, the 15 percent/100 foot limitation does not apply when "larger percentages of the littoral area shall be treated at the discretion of the Commissioner when authorized by permits issued prior to 1976." Proposed Part 6280.0250, subp. 4 (A) (2). This exception replaces an exception in the existing rule which allows for "larger percentages of the littoral area [to] be treated at the discretion of the Commissioner when authorized by previous aquatic nuisance control permits". The only difference between the existing rule and the proposed one is the addition of the 1976 definition of "previous permits". The Department explained that prior to 1976 there were no basin-wide limits on the amount of aquatic vegetation that could be controlled, but that in 1976 the 15 percent limit was added for lakes within the city limits. Because there were several lakes in the metropolitan area which had extensive areas of shallow water and abundant vegetation, and also a long history of aquatic plant control permits issued for more than 15 percent of their area, the 1976 rules "grandfathered" them in so they could continue to control the vegetation without regard to the 15 percent limit. However, in order to focus attention on other means of exceeding the 15 percent limit, the Department now proposes to include the 1976 date as a part of the grandfathered provision. Persons who raised questions about this appeared to be satisfied once it was explained to them, and the Administrative Law Judge finds the Department has justified adding the specific date as needed and reasonable.

28. In addition to adding the 1976 limitation to the grandfather provision, a more important amendment of the rule is the elimination of the 10 percent limit for rural lakes, and increasing permitted control area to 15 percent so that it is consistent with the city lakes. The Department justified this change as needed to eliminate confusion which had occurred in the past because of the two separate limits. No person objected to the increase from 10 to 15 percent. However, some people objected to the whole concept of a 15 percent limit at all, favoring either a larger percentage or no limit for treating certain kinds of plants.

29. Some persons pointed out that the Department's proposed rules (as well as the existing rules) allow mechanical harvesting of an area not to exceed 50 percent of the total littoral area, while even with the increase from 10 to 15 percent, chemical treatments are limited to 15 percent of the total littoral area. The Department responded that mechanical harvesting equipment essentially "mows" vegetation in an area, and only the upper portion of the plant is typically cut. The vegetation in the harvested areas usually recovers quickly. Also, most of the vegetation cut by harvesting equipment is collected and removed from the lake. The Department contrasted this with pesticide control, where the decomposition of dead vegetation causes dissolved oxygen reductions and nutrient releases which, in turn, can cause localized algae blooms. In the Department's experience, the 15 percent limit has allowed lakeshore homeowners

to obtain access and adequate use on a majority of the lakes where pesticides are applied. The Department based it upon a 1975 review showing that in previous years, much less than 15 percent of the littoral zone was treated in most lakes. The Department fears that raising the limit to 50 percent would cause unintended harm to lake ecosystems. It cites possibilities of lowering populations of vegetation-dependent species of fish, and vegetation-dependent life-stages of fish, plus reductions in habitat for invertebrates and reductions in clarity of water. The Department admits that there is no body of scientific research which indicates that 15 percent, 20 percent, or 50 percent, is necessarily the "best" limitation for all lakes. Indeed, the Department admits that some of the research on plant abundance is contradictory, which justifies its conservative approach. The Department states that where additional areas may be required, a variance can be allowed pursuant to proposed part 6280.1000.

30. The Minnesota Herbicide Coalition expressed concern over the growing number of permits being issued because information on how long the pesticides remain in the lake, and the lasting effects on the lake, are unknown. The Department's response is that permits will not be issued unless the Commissioner determines that sufficient justification exists, and it is aware of the Coalition's concerns.

31. The Administrative Law Judge finds that the Department has balanced the competing concerns in a rational fashion, and has justified its proposals as needed and reasonable.

Eurasian Watermilfoil -- Should it be Exempt from Size Limitations?

32. Three commercial herbicide applicators requested that applications of herbicide for control of Eurasian watermilfoil and curly-leaf pond weed be exempted from the limitations on littoral area. They, and a number of their customers, submitted comments regarding the problems caused by these exotic weeds and their frustration with the Department's restrictions on attempts to eradicate it. The Department's response was that in those lakes where Eurasian watermilfoil was already established, the Departments attempts to eradicate it have, for the most part, been unsuccessful. The Department has had greater success when attempting to eradicate populations of very limited extent and abundance, which can usually be treated without treating more than 15 percent of the littoral zone. The Department reiterated its concerns about large scale chemical applications, including reductions in the abundance of native plants, reductions in fish populations, particularly vegetation-dependent fish or fish in vegetation-dependent life-stages, reductions in habitat for invertebrates (which provide feed for both fish and birds), and a reduction in water clarity.

33. While there have been some notable successes in recent years with fluridone based herbicides (Lake Zumbra and Lake George), it is still too early to tell whether or not the success is temporary, or permanent. The Department has sponsored research and has an ongoing program to attempt to discover new ways or better methods of dealing with exotics. The coordinator of the exotic species program has taken the position that these proposed rules allow "adequate amounts of control of exotic plants". See letter dated September 19, 1996 to Don Pennings from J. Rendall.

At least 31 variances from the 15 percent littoral zone limit have been issued to allow greater areas to be treated in an attempt to control Eurasian water millfoil, but the Department has generally given up trying to eliminate the plant where it has already become widespread. Rendall concludes by stating that the current regulations are "flexible and allow adequate control of submersed exotic aquatic plants." The Administrative Law Judge accepts the Department's position on this point. The Administrative Law Judge finds that the Department's justification for its limitations on chemical treatment have a rational basis in fact, and represent a reasonable response to the quandary posed by exotics.

Lake Vegetation Management Plan

34. Proposed part 6280.0350, subp. 2 introduces a new concept into these rules. It is the concept of a "lake vegetation management plan", which would supersede all of the rules and allow permits to be issued so long as they followed the guidelines of the plan. The idea is to allow lakeowners' associations to develop a management plan that takes into account the individual characteristics of the lake, identifying the problems, and "tailoring" solutions that are appropriate for that lake. The idea is voluntary -- there is no requirement that anybody file one of these, and it is intentionally open-ended with regard to content and detail. It is admittedly an experiment. The Department made it clear that both the association and the Department had to agree with the plan, and the staff did not anticipate "just rubber stamping" anything that was submitted. The Administrative Law Judge finds the Department has justified this experiment as both needed and reasonable. However, it is hoped that the next time these rules are amended, greater detail will be included with regard to the content of these plans. Experience will no doubt provide ideas for what works and what does not work.

Permit Application Review Time and Appeals

35. The existing rule provides that the terms, conditions or denial of a permit application may be appealed to the Commissioner by filing a written request for review within 30 days of receipt of written notice. The existing rule goes on to provide that if written notice is not submitted within 30 days, the permit decision becomes final.

36. The proposed rule continues this provision, but adds a new paragraph which provides for a contested case hearing if the applicant disagrees with the commissioner’s decision. The new provision requires that the request for a hearing must be filed within 30 days of the commissioner’s decision, and if the request is not filed with in 30 days, the permit decision becomes final.

37. There is no statute which authorizes the Department to place a 30-day limit on appeals from denials of a permit or permit conditions. While 30 days may well be a reasonable and practical time limit, such a limit must be imposed by the Legislature, and cannot be imposed by the Department. See, Leisure Hills of Grand Rapids v. Levine, 366 N.W.2d 302 (Minn. App. 1985); Keefe v. Cargill, Inc., 393 N.W.2d 425 (Minn. App. 1986) and Res Investment Company v. County of Dakota, 494 N.W.2d

64 (Minn. App. 1992). This is a question of statutory authority, and the Administrative Law Judge concludes that the Department does not have statutory authority to limit its jurisdiction for appeals. If the Department desires to retain the step of Commissioner review before a contested case, it may do so, but it cannot require that a 30-day period be applied to either the Commissioner's review or the contested case. In order to cure the defect, the 30-day limitations must be removed from both procedures in the rule.

38. A number of commentators expressed concern about time delays required for inspections, permit review, and permit issuance. Their concern was that if an inspection had to await the emergence of weeds, and there were a substantial number of inspections required as a result of aggressive marketing of WeedRoller-type devices, the practicalities of waiting for an inspection, permit review, and permit issuance might effectively prohibit them from enjoying the benefits of their property for a substantial amount of the summer. The Department indicated that it tried to get routine permit applications processed in five working days, and even initial applications processed in ten days. Department personnel admitted, however, that a rush of applications in the early summer could jeopardize achieving those dates. Some of the commentators urged that the rule be amended to require permit issuance within a certain number of days. The Administrative Law Judge does not believe that the rule is unreasonable without such a provision. Testimony from various regional specialists and managers indicated that although there are some "long days" in the early summer because of numerous permit requests, they believed that they could handle the additional work required by the inspections and permits required by this rule. The Administrative Law Judge does not believe the rules are unreasonable without a requirement for Departmental action within any given number of days. The Department has a variety of incentives to maintain positive public relations, and those are the incentives that have resulted in the five to ten-day turnaround time achieved to date. While there will be a substantial increase in the number of site inspections required by the WeedRollers, at least in the first year, the Department will just have to find some way to deal with them. The rule is not unreasonable without a time limit for Departmental action.

Other Rule Changes Proposed After the Hearing

39. After the hearing, and after the comment period, the Department did propose four changes to the rule. Three of the four were inconsequential. The only one of any consequence was a change to the permitting requirement for WeedRollers, allowing for three-year permits (rather than just one-year permits) if their operation was limited to an area of 2500 square feet and did not affect emergent or floating leaf vegetation. None of the four changes proposed by the Department constitute "substantial changes" within the meaning of the statutes and rules which prohibit such changes.

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 (1994) 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) (1994), except as noted at Finding 37.

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) (1994).

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. § 14.15, subd. 3 (1994) and Minn. Rule 1400.1000, subp. 1 and 1400.1100 (1995).

6. That the Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3 as noted at Finding 37.

7. That due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 (1994).

8. That any Findings which might be properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. 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 except where specifically otherwise noted above.

Dated this _____ of December, 1996.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded, Transcript Prepared

MEMORANDUM

This rules were initially proposed to be adopted without a public hearing. The Notice of Intent to Adopt without a Public Hearing was published in 1995. After receiving more than 25 requests for a hearing, the Department published a Notice of Hearing in 1996. Substantial changes to the rulemaking procedures were adopted by the 1995 Legislature and took effect on January 1, 1996. These DNR rules, along with a few other sets of rules, raise the question of which statute should govern. In order to avoid confusion, the Office adopted a policy that if a rulemaking proceeding was initiated in 1995, then the whole proceeding would be governed by the "old" statute and rules that were in effect in 1995. This policy was communicated to the Department and other agencies in a similar situation. In order to avoid any confusion on this matter, it is noted again here to assist persons who might otherwise wonder why the more recent statute and rules are not being applied.

AWK