

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

In the Matter of Proposed Permanent  
Rules and Amendments to Existing Rules  
of the Department of Natural Resources  
Governing Game and Fish

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

A public hearing in this matter was held on July 27, 1999, in St. Paul.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.13 to 14.20 (1998), to hear public comment, to determine whether the Department of Natural Resources ("Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed rules are needed and reasonable, and whether or not the modification proposed by the Department after initial publication is an impermissible, substantial change.

Steven B. Masten, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department at the hearing. The Department's hearing panel included Ed Boggess, Wildlife Program Manager for the Department, and Kathy A. Lewis, Attorney.

Approximately six persons attended the hearing, but only two signed the hearing register. The hearing did continue until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules.

The record remained open for the submission of written comments for twenty (20) calendar days following the hearing, to August 16, 1999. During this initial comment period, the ALJ received two written comments from interested persons. The ALJ also received a lengthy submission from the Department, setting forth its responses to issues which had been raised during the hearing and in the public letters. This submission also contained one technical change, to correct an error in the rules as published.

Pursuant to Minn. Stat. § 14.15, subd. 1, five (5) working days were then allowed for the filing of responsive comments. During this responsive comment, the ALJ did not receive any additional comments. The record closed for all purposes on August 23, 1999.

## NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Department of Natural Resources makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

## FINDINGS OF FACT

### Procedural Requirements

1. On May 17, 1999, the Department requested the scheduling of a hearing.
2. On May 17, 1999, the Department requested approval of its dual notice and prior approval of its Notice Plan,<sup>1</sup> and filed the following documents with the Chief Administrative Law Judge:
  - a. A copy of the rule certified by the Revisor of Statutes.<sup>2</sup>
  - b. A draft of Statement of Need and Reasonableness (SONAR).<sup>3</sup>
  - c. The Department's Dual Notice of Intent to Adopt Rules.<sup>4</sup>
3. On May 25, 1999, Administrative Law Judge Allan W. Klein approved the Notice Plan.<sup>5</sup>
4. On June 8, 1999, the Department mailed the Notice of Hearing to all persons and associates who had registered their names with the Department for the purpose of receiving such notice.<sup>6</sup> Copies of the Notice were also mailed on that date to 14 groups or association believed to be interested in the substance of the rules. These were primarily pro-hunting groups, but also included two

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<sup>1</sup> Department Ex. 7.

<sup>2</sup> Department Ex. 2.

<sup>3</sup> Department Ex. 3.

<sup>4</sup> Department Ex. 5.

<sup>5</sup> Department Ex. 7.

<sup>6</sup> Department Ex. 8.

anti-hunting groups.<sup>7</sup> In addition, copies of the Notice and the SONAR were sent to all legislative main authors and supporting authors (who are still legislators) of the pertinent statutes giving the agency authority to make the proposed changes. The Department also sent a copy of the Notice and the SONAR to the chairs of the House and Senate Environment and Natural Resources Committees.<sup>8</sup> The Department also posted a news release and a copy of the proposed rules on the Department's website.<sup>9</sup>

5. On June 14, 1999, the Notice of Hearing and a copy of the proposed rule repeal were published at 23 State Register 2278.<sup>10</sup>

6. On the day of the hearing, the Department placed the following documents into the record:

- a. A copy of the request for comments as published in the State Register on November 9, 1998.<sup>11</sup>
- b. The text of the proposed rule, including the Revisor of Statute's approval.<sup>12</sup>
- c. The Statement of Need and Reasonableness (SONAR).<sup>13</sup>
- d. A copy of the certificate showing that the agency sent a copy of the SONAR to the Legislative Reference Library.<sup>14</sup>
- e. A copy of the Notice of Hearing as mailed and published in the State Register.<sup>15</sup>
- f. A copy of the Department's May 17, 1999 letter to Chief Judge Nickolai requesting approval of its Notice Plan.<sup>16</sup>
- g. A copy of the May 25, 1999 letter from Judge Klein approving the Department's additional Notice Plan.<sup>17</sup>
- h. A copy of the certificate of Notice and SONAR provided to appropriate legislators and other governmental officials, and a copy of the mailing list for those individuals.<sup>18</sup>
- i. A copy of the statewide news release dated June 15, 1999.<sup>19</sup>
- j. A copy of the certificate of Notice provided to all persons on the Department's mailing list and a copy of the mailing list for those individuals.<sup>20</sup>

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<sup>7</sup> Department Ex. 8.

<sup>8</sup> Department Ex. 9.

<sup>9</sup> Department Ex. 10.

<sup>10</sup> Department Ex. 6.

<sup>11</sup> Department Ex. 1.

<sup>12</sup> Department Ex. 2.

<sup>13</sup> Department Ex. 3.

<sup>14</sup> Department Ex. 4.

<sup>15</sup> Department Exs. 5 and 6.

<sup>16</sup> Department Ex. 7.

<sup>17</sup> Department Ex. 7.

<sup>18</sup> Department Ex. 9.

<sup>19</sup> Department Ex. 10.

<sup>20</sup> Department Ex. 8.

- k. A copy of the press release and the text of the proposed rules as posted on the Department's webpage.<sup>21</sup>
- l. A copy of the comments and requests for hearing which the Department received in response to the dual notice.<sup>22</sup>
- m. A copy of the certificate of mailing Notice of the Hearing to those who requested a hearing.<sup>23</sup>
- n. A copy of the opening statement of Ed Boggess and a legal memorandum prepared by Steven Masten, Assistant Attorney General, in response to the comments and requests for hearing.<sup>24</sup>

### Standards of Review

7. In a rulemaking proceeding, an administrative law judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts.<sup>25</sup> An agency need not always support a rule with adjudicative or trial-type facts. It may rely on what are called "legislative facts" which are general facts concerning questions of law, policy, and discretion. The agency may also rely on interpretations of statutes and on stated policy preferences.<sup>26</sup> Here, the Department prepared a SONAR setting out a number of facts, statutory interpretations, and policy preferences to support the proposed rule repeal. It also supplemented information in the SONAR with information presented both at the hearing and in written comments and responses placed in the record after the hearing.

8. Inquiry into whether a rule is reasonable focuses on whether the rulemaking record establishes that it has a rational basis, as opposed to being arbitrary. Minnesota law equates an unreasonable rule with an arbitrary rule.<sup>27</sup> Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.<sup>28</sup> On the other hand, a rule is generally considered reasonable if it is rationally related to the end that the governing statute seeks to achieve.<sup>29</sup>

9. The Minnesota Supreme Court has defined an agency's burden in adopting rules as having to "explain on what evidence it is relying and how the

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<sup>21</sup> Department Ex. 10.

<sup>22</sup> Department Ex. 11.

<sup>23</sup> Department Ex. 12.

<sup>24</sup> Department Ex. 13.

<sup>25</sup> Minn. Stat. § 14.14, subd. 2 (1996); Minn. R. 1400.2100 (1997).

<sup>26</sup> Manufactured Hous. Inst. v. Petterson, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Servs., 442 N.W.2d 786 (Minn. 1989).

<sup>27</sup> In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

<sup>28</sup> Greenhill v. Bailey, 519 F.2d 5, 10 (8<sup>th</sup> Cir. 1975).

<sup>29</sup> Mammenga v. Department of Human Servs., 442 N.W.2d at 789-90; Broen Mem'l Home v. Department of Human Servs., 364 N.W.2d 436,444 (Minn. Ct. App. 1985).

evidence connects rationally with the agency's choice of action to be taken."<sup>30</sup> An agency is entitled to make choices between different approaches as long as its choice is rational. Generally, it is not proper for an administrative law judge to determine which policy alternative might present the "best" approach, since making such a judgment invades the policy-making discretion of the agency. Rather, the question for an administrative law judge is whether the agency's choice is one that a rational person could have made based upon the evidence in the record.<sup>31</sup>

10. In addition to ascertaining whether proposed rules are necessary and reasonable, an administrative law judge must make other decisions – namely, whether the agency complied with the rule adoption procedure; whether the rule grants undue discretion to the agency; whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another; and whether the proposed language is not a rule.<sup>32</sup>

11. When an agency makes changes to proposed rules after it publishes them in the State Register, an administrative law judge must determine if the new language is substantially different from what the agency originally proposed.<sup>33</sup> The legislature has established standards for determining if the new language is substantially different.<sup>34</sup>

### Nature of the Proposed Rule

12. These rules are a collection of more than 20 miscellaneous changes to the Department's wildlife rules. Many of the proposed changes incorporate temporary season rule changes into permanent rules, so that they will not expire. These are primarily changes that were in effect for the 1997 or 1998 hunting seasons as temporary expedited rules. There are 22 different changes, some of which affect more than one animal or location. Most of them drew no comment.

### Statutory Authority

13. The Department cites numerous statutes as authorizing these rules. Although the rules all deal with wildlife, in one way or another, each of them has its own statutory authority, some of which is duplicated for other proposals, but some of which applies only to that particular change. The agency has listed the statutes supporting each rule change.

14. Authority to promulgate rules is also contained in Minn. Stat. § 14.06(a) which requires agencies to promulgate rules to the extent that:

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<sup>30</sup> Manufactured Hous. Instit. v. Petterson, 347 N.W.2d at 244.

<sup>31</sup> Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).

<sup>32</sup> Minn. R. 1400.2100.

<sup>33</sup> Minn. Stat. § 14.15, subd. 3.

<sup>34</sup> Minn. Stat. § 14.05, subd. 2.

Each agency shall adopt rules, in the form prescribed by the Revisor of Statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.

15. The Administrative Law Judge finds that the Department has the general statutory authority to adopt the proposed rules.

#### Impact on Farming Operations

16. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The Department asserts that the proposed rules will not affect farming operations,<sup>35</sup> and the Administrative Law Judge agrees.

#### Analysis of SONAR Contents

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

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

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<sup>35</sup> SONAR, p. 13.

18. The Department addressed each of these items in the SONAR. Given the wide variety of issues addressed by the rules, the Department attempted to highlight the predominant issues for each of the statutory factors. That is a reasonable response under the circumstances.

19. The major complaint voiced at the hearing, and in written comments, was that the Department did not present enough data in the SONAR to support either the need or the reasonableness of its positions. For example, Jill Gescheidle wrote in a post-hearing comment:

The provision of no specific scientific data by the DNR to support their proposed changes (even though it is required by part 1400.2070 of Minnesota Rules), as well as their continual referral to the survey sheets handed out at a few public meetings, does not and should not qualify as the DNR's Statement of Need and Reasonableness for all proposed rules in general. I get the feeling that the reason the DNR provides nothing other than some survey results is because they have no biological/scientific or treaty-related documents to support the changes.<sup>36</sup>

The Administrative Law Judge will review this allegation in the context of the rule-by-rule analysis set forth below.

### Rule By Rule Analysis

20. This Report will not discuss each and every comment which was made about any of the proposed amendments. Instead, it will focus upon those topics which the Administrative Law Judge believes require attention, either because there is a problem with their adoption or, in some cases, because they were quite controversial. Those portions of the rules not commented on or addressed individually are specifically found the Administrative Law Judge to be needed and reasonable. These provisions are supported by an affirmative presentation of facts, are specifically authorized by statute, and do not create problems that prevent their adoption.

21. Proposed Rule 6133.0075 would add a new rule, specifying the restitution value for gray wolves at \$2,000. In the SONAR, the Department explained that prior to 1996, wolves had a restitution value of \$2,000 under the rule applicable to endangered and threatened species. However, in 1996, wolves were removed from the State's threatened species list, but no corresponding rule change was made to re-establish a restitution value for the animal. The Department alleged that gray wolves are of significant value to state citizens, and the Department is empowered to reflect the value of illegally taken wild animals by imposing a restitution cost. In 1998, a broad-based citizens' wolf "roundtable"

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<sup>36</sup> Written comment of Jill A. Gescheidle dated August 12, 1999.

recommended that the restitution value for a gray wolf should be reinstated at \$2,000.

Commentator Jill Gescheidle, who attended the wolf roundtable meetings, alleged that the SONAR was inadequate with respect to this rule. She then went on to provide a more elaborate explanation of the same topics which the Department had raised in their SONAR.

The Administrative Law Judge believes that the Department's explanation in the SONAR, which was clarified in the Department's opening statement<sup>37</sup>, does provide an adequate summary of the evidence and argument that the Department is relying on to justify the proposed rule.

22. Existing Rules 6230.0200 and .0250 contain provisions relating to wildlife management areas. Existing Rule 6230.0400 contains special provisions for state game refuges. All three rules get quite detailed, setting forth what kinds of hunting and trapping may occur on which parcels of land. The proposed rule contains numerous changes, some of which enlarge the scope of hunting and trapping, others of which reduce it. Some are as specific as changing a restriction against taking all "waterfowl" to only restricting the taking of "ducks and mergansers", thereby allowing the taking of geese in the Moscow Game Refuge in Freeborn County.

One objection to these changes was a conceptual objection to the allowing of hunting and trapping in any area known as a "sanctuary" or "refuge". Commentators suggested that those words implied that there would be no taking of animals, and objected to the rules on that ground.<sup>38</sup> The Department's response was that Minn. Stat. § 97A.137 provides that wildlife management areas are open to hunting (including trapping) unless specifically closed by rule or posting, and that section 97A.135 requires that at least two-thirds of the total area acquired for wildlife management areas in a county must be open to public hunting. Section 97A.091 does provide a general prohibition against taking wild animals within a state game refuge, but allows the commissioner to permit hunting under certain conditions. Whatever may be the grammatical ethics of using such terms as "refuge" or "sanctuary" for areas where hunting is allowed, the fact of the matter is that statutes specifically do permit the commissioner to do what he has done.

A second objection raised to the various changes was that the SONAR did not accurately document the need for and reasonableness of each one of them. The Administrative Law Judge finds that requiring such a level of detail for the changes to each of the numerous areas noted in the proposed rules would be unreasonable. This general question of how much data is required is discussed

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<sup>37</sup> Exhibit 13, p. 2.

<sup>38</sup> Letter from Colleen Meyer dated July 24.

more fully in the attached Memorandum. The Administrative Law Judge finds that the Agency has done an adequate job of detailing the justifications for its proposed changes.

23. Proposed Part 6230.1600 contains a lengthy list of lakes, their counties, their lake inventory numbers, and their locations. In post-hearing comments, the Department noted that one of the counties had been incorrectly named. This occurs in the case of Pelican Lake, Lake Inventory No. 860031. The list, as originally published in the State Register and distributed in various mailings, identified that lake as being in Martin County. That is incorrect. It should have identified the lake as being in Wright County. Everything else in the listing is correct. The Department now proposes to correct this error. The Administrative Law Judge concludes that correcting this error would not cause the rule to be substantially different within the meaning of Minn. Stat. § 14.05, subd. 2, and the Department may adopt it.

24. Existing Rule 6232.3300 contains conditions for the taking of nuisance bears by licensed bear hunters. It currently provides that conservation officers are the only persons who can authorize the taking of nuisance bears. The Department proposes to change this rule to allow DNR wildlife managers to also authorize the hunting of nuisance bears. In the SONAR, the Department justified this change in terms of “customer service”, in the sense that oftentimes citizens are not able to contact conservation officers to get authorization, and adding wildlife managers simply makes it easier to find someone who can deal with the problem.

Commentators alleged that there was no justification for this change in the SONAR. They said there was no documentation of the number of complaints, their location, their type and their nature. Earth Protector also suggested that there was no data regarding where the complaints came from, or whether the complaints were, in fact, real nuisance problems or just fictitious ones made up by people who wanted to hunt. Earth Protector asked that the DNR be required to show data concerning their complaints.

The Department responded, in post-hearing comments, that they never asserted that the need for the change was based on an increase in bear damage complaints, but rather was designed to offer additional flexibility and convenience for the public.<sup>39</sup> In response to Earth Protector’s request, the Department did include a summary of bear, deer and goose complaints, broken down by year, and sent it to those who had requested it at the hearing.<sup>40</sup> The Department also included a more detailed compilation of nuisance bear complaints from 1981 to 1998.

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<sup>39</sup> Department Comment Letter of August 13, at p. 6.

<sup>40</sup> Attachment A to Comment Letter.

The Administrative Law Judge finds that the Department has justified its proposed change to allow wildlife managers to authorize the killing of nuisance bears. The underlying concern of the commentators, who are opposed to the killing of any bear, is discussed more fully in the attached Memorandum.

25. Existing Rules 6234.1600, 1700 and 1800 deal with open areas and bag limits for bobcat, fisher and pine marten, respectively. The Department is proposing to create a uniform zone where they may be taken. In the SONAR, the Department explained its proposed unified zone would expand the area where fisher and pine marten hunting and trapping would be allowed. The Department reasoned that this would provide for simplified and standard sized zone regulations, while still protecting bobcat in southern Minnesota where additional population increases and range expansions are possible.

Commentators opposed this change, arguing that there was no documentation of population or range in the SONAR, and thus no data to justify expanding the area. At the hearing, the Department responded that it had survey data which was used as inputs to a fur bearer population computer model, and agreed to provide the details. The Department indicated that Bill Berg, in the Grand Rapids office, was the person familiar with the details of the computer modeling, but that he was not present at the hearing.

In post-hearing comments, the Department did provide data gathered by Mr. Berg and others for not only fisher, marten and bobcat, but also a variety of other fur bearers.<sup>41</sup>

The Administrative Law Judge concludes that the Department does monitor fur bearer populations and at least some of the factors which affect them. The Department's proposed rules have been justified as needed and reasonable. The question of how much data should be provided in the SONAR, as opposed to being provided in response to comments and objections, is discussed in the attached Memorandum.

26. Existing Rule 6236.0900 contains special provisions for taking turkeys. It currently provides that turkeys may not be taken with the aid of any electronic device. The Department is proposing to amend that rule to allow the use of a hearing aid or other device designed to enhance hearing. In the SONAR, the Department justified this because "some hunters, particularly those with hearing loss, have requested a change".<sup>42</sup> The Department also noted that the existing turkey rules are more restrictive than regulations for any other type of hunting, including the federally-regulated hunting of migratory game birds. Those federal regulations only prohibit the use of amplified calls, not the use of devices to enhance hearing. The Department opined that this change would have no negative impact on the wild turkey population.

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<sup>41</sup> Attachment B to August 13 Comment Letter.

<sup>42</sup> SONAR, p. 28.

At the hearing, Durk Gescheidle argued that this change violated the doctrine of “fair chase”, and also flew in the face of common wisdom which dictates that age is the ultimate disability, that if one’s senses are failing, then perhaps it is time to quit hunting. Finally, he noted that there was no documentation to support the contention that the rule change would have no negative impact on population.

In responsive comments, the Department stated that there are no existing “fair chase” laws or regulations that restrict the ability of a person to enhance their hearing or their eyesight, and that hunters who have hearing disabilities should be allowed to enhance their hearing with prescription or non-prescription devices.<sup>43</sup>

The Administrative Law Judge concludes that the Department has demonstrated the need for and reasonableness of its proposed change.

27. Existing Rule 6240.1600 describes the area generally south and west of the Twin Cities as the “four goose zone”. In this rule, the Department proposes to change the area to the “five goose zone”, and change the boundaries of the area as well. In the SONAR, the Department explains that the purpose of the change is to increase hunting pressure on populations of locally bred Canada geese, because higher harvestable surpluses are present and goose populations are causing increasing damage and nuisance problems. The SONAR reasons that there is a greater opportunity for hunters to take more of the harvestable surplus as the populations expand.<sup>44</sup>

At the hearing, a commentator complained that the SONAR failed to document the need for increasing hunting, and failed to document increased populations, increased surpluses, increased damages or increased nuisance complaints.

In its responsive comments, the Department provided data which demonstrated a very large increase in the number of breeding geese between 1975 and 1998.<sup>45</sup> The Department also provided data showing a similar, but less spectacular, rise in the number of complaints regarding geese between the years 1993 and 1998.<sup>46</sup>

The Administrative Law Judge finds that the Department has justified the need for and reasonableness of its proposed change. The question of whether or not the data supplied in the responsive comments should have appeared earlier in the SONAR is discussed in the Memorandum. The Administrative Law Judge concludes the Department may proceed to adopt this rule change.

28. The final rule change to be discussed is a change to existing Rule 6240.2300, which deals with the season and other restrictions on the taking of

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<sup>43</sup> August 13 Comment Letter, p. 8.

<sup>44</sup> SONAR, pp. 29-30.

<sup>45</sup> August 13 Comment Letter, Attachment C.

<sup>46</sup> August 13 Comment Letter, Attachment A.

common crows. In the existing rule, the season runs from July 1 through November 1. The proposed change would shorten this to run from July 15 through October 15, but also add a season from March 1 through March 31. In the SONAR, the Department stated that crow hunters had requested a late-winter season, but federal law limits all states to a 124-day season. State law provides that the season must be the maximum allowed by federal law.<sup>47</sup> In order to accommodate the hunter's request, the summer season was reduced by 30 days and a new, 30-day spring season was instituted.

At the hearing, one of the objectors noted that there was no data to support the change, and the fact that some hunters wanted it was no support for its being reasonable.

In responsive comments, the Department stated that a request from hunters for a season change that can be accommodated while still addressing conservation and maintaining compliance with state and federal laws, was a legitimate justification for making the change.

In this case, state law requires that the crow season be open for the maximum length allowed by federal law. There is a general "tilt" in Minnesota state law in favor of recreational hunting.<sup>48</sup> Making the kind of change which the Department is proposing in this case does not require extensive documentation or justification. It is a policy choice which the Department is free to make. See attached Memorandum for further discussion.

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

### **CONCLUSIONS**

1. That the Department of Natural Resources gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.
3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed

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<sup>47</sup> Minn. Stat. § 97B.731, subds. 1 and 3, respectively.

<sup>48</sup> See attached Memorandum.

rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That any Findings which might 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 rules based upon an examination of the public comments, 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 consistent with the Findings and Conclusions made above.

Dated this 24<sup>th</sup> day of September 1999.

s/ Allan W. Klein

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ALLAN W. KLEIN

Administrative Law Judge

Reported: Tape Recorded  
No Transcript Prepared

### **MEMORANDUM**

This rulemaking proceeding raises the question about how much documentation an agency must provide in the SONAR. The Administrative Law Judge has concluded that each rulemaking presents a different set of circumstances, but that in this case, the documentation, though limited, was adequate.

Minn. Rule pt. 1400.2070, subp. 1, provides, in pertinent part, as follows:

The statement of need and reasonableness must summarize the evidence and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rules, and must state how the evidence rationally relates to the choice of action taken. The statement must explain the circumstances that created the need for the

rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need. The statement must be sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules. A general description of the statute being implemented or restating the proposed rule is not sufficient. The statement must include:

- A. Citations to any economic, scientific, or other manuals or treatises the agency anticipates relying on;
- B. Citations to any statutes or case law the agency anticipates relying on;
- C. A list of witnesses . . . and
- D. A citation to the agency's grant of statutory authority . . . .

*The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.*  
(Emphasis added.)

This standard governs all kinds of rulemakings, whether controversial or non-controversial, whether preceded by a public hearing or without a public hearing. The range of rules covered by that standard is tremendous. At one extreme are, for example, rules of the Pollution Control Agency setting forth how clean water must be before it can be discharged from municipal sewage treatment plants throughout the state. By law, those standards must be based upon chemical, biological, and economic considerations which have required several boxes of backup data for the SONAR. But on the other extreme, for example, there are rules such as these – where a number of relatively minor adjustments are being made to existing rules (mostly) which have been in existence, in one form or other, for many years. A commentator has noted the following:

In each rulemaking proceeding, an agency must make a judgment about what amount of documentation in the statement of need and reasonableness will be sufficient to demonstrate the reasonableness of each subpart of the rule. Among the factors considered by agencies in making this judgment are:

- (1) the extent of the burden a particular requirement places on the regulated industry;

- (2) the amount of controversy surrounding a particular requirement;
- (3) the degree of sophistication and organization of the opposition; and
- (4) whether the rules are new rules or amendments to existing rules.<sup>49</sup>

In this case, the Department was making more than 20 relatively minor changes, mostly to existing rules. They were making these changes against the backdrop of a strong “tilt” which Minnesota law has exhibited for many years in favor of hunting and trapping. The Assistant Attorney General provided a lengthy memorandum<sup>50</sup> outlining this fundamental attitude. The memorandum notes there are over 100 pages in Minnesota statutes relating to hunting, fishing and trapping which give a “clear statement that the legislature intends there to be regulated hunting, fishing and trapping in Minnesota”. The memorandum then goes on to address the constitutional amendment which was adopted on November 3, 1998, supported by 77 percent of the electorate. This amendment states: “Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good.” The Assistant Attorney General described the combination of both the statutes and the constitutional amendment as “a clear mandate to the DNR to manage Minnesota’s wildlife resources in ways that allow for and provide hunting, fishing and trapping opportunities to the citizens of the state, in accordance with sound natural resource management principles.” The Memorandum concluded with the following observation: “If hunting, fishing or trapping are sought to be curtailed or ended for reasons of social policy other than sound natural resource management, the issue is one that can be decided only by the legislature.”

The Administrative Law Judge believes that it is fruitless for opponents of hunting, fishing and trapping to attempt to utilize the rulemaking process to seriously reverse this clear legislative preference. Such a reversal must be made by the legislature itself. But it is legitimate for any person to raise questions about conclusory statements in a statement of need and reasonableness, and ask for more detailed justification for them. That is what was done in this proceeding, and in the opinion of the Administrative Law Judge, the Department provided it. But it is not reasonable to require that the Department provide that level of data for each and every change proposed in “miscellaneous” rules such as these before knowing even whether or not a hearing would be held, or what issues were of concern to objectors.

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<sup>49</sup> Beck, *Minnesota Administrative Procedure*, 2<sup>nd</sup> Edition (Mpls. 1998) at p. 343, citing Orren, *Minnesota Rulemaking Manual*, chapter 4, pp. 3-5 (1997).

<sup>50</sup> Memorandum to Ed Boggess from Steven B. Masten dated February 26, which was attached to Exhibit 13.

There is no “bright line” that defines how much documentation must be in the SONAR and how much can be provided after the hearing. The rule quoted above requires that the SONAR summarize the evidence and the arguments that an agency is relying on. The Department should be aware that the SONAR in this case did meet that standard, but it was close to the line. There may well be cases in the future where the Department will have to put into its SONAR the kind of detail that was not provided until the post-hearing comments in this case. There may be circumstances where the level of documentation needed in the SONAR will be higher than what was needed in this case. The Department should be alert to the risks of an inadequate SONAR, and try to avoid them if it can.

AWK