

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Permanent Rules Relating to Fish and Aquatic Wildlife, Minnesota Rules, Chapters 6254, 6256, 6258, 6260, 6262, 6264, and 6266.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

A hearing concerning the above rules was held by Administrative Law Judge Richard C. Luis at 9:00 a.m., on June 20, 2007, at the Minnesota Department of Natural Resources in St. Paul, with a simultaneous video conference connection to the Department of Natural Resources in Brainerd.

That hearing and this Report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act¹ before an agency can adopt rules. The Legislature has designed that process to ensure that state agencies here, the Minnesota Department of Natural Resources (Department or Agency) have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the Agency may have made after the proposed rules were initially published do not result in their being substantially different from what the Agency originally proposed. The rulemaking process also includes a hearing to allow the Agency and the Administrative Law Judge reviewing the proposed rules to hear public comment about them.

Kathy A. Lewis, J.D., Transactions Manager of the Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, MN, represented the Agency at the hearing. The following persons also appeared at the rule hearing on behalf of the Department of Natural Resources: Linda Erickson-Eastwood, Fisheries Program Manager; Roy Johannes, Fisheries Consultant for Aquaculture and Commercial Fishing; Rick Bruesewitz, Fisheries Area Manager for Aitkin County; Rich Baker, Ecological Services' Non-Game Research Coordinator; and Al Stevens, Fisheries Consultant in Lake and Stream Surveys. Except for Mr. Bruesewitz, who appeared in Brainerd, all of the listed officials attended the hearing in St. Paul.

¹ Minn. Stat. §§ 14.131 through 14.20.

Approximately 35 persons attended the hearing (including the video conference attendees). The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another twenty calendar days—through July 10, 2007—to allow interested persons and the Department to submit written comments. Following the initial comment period, Minnesota law² required that the hearing record remain open for another five business days to allow interested parties and the Department to respond to any written comments. Numerous members of the public submitted comments before, during, and after the rulemaking hearing. The Department submitted post-hearing comments. The rulemaking record closed for all purposes on July 17, 2007.

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 the final rule or modify or withdraw its proposed rule. If the Department makes any changes in the rule, it must submit the rule 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 a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rule with the Secretary of State. At that time, the Department must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

After adopting the final version of the rules, the Department of Natural Resources must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.

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

² Minn. Stat. § 14.15, subd. 1.

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. The primary purpose of the Minnesota Department of Natural Resources' game and fish rules is to preserve, protect, and propagate desirable species of wild animals and native plant communities while ensuring recreational and commercial opportunities for those who enjoy wildlife-related activities and continued use of these resources.³ Its purpose is directed under Minnesota Statutes, section 97A.045, subd. 1. The rules governing fish and aquatic wildlife serve to help the Department fulfill statutory mandates.⁴ The proposed rules and rule amendments in this rulemaking proceeding cover a variety of areas pertaining to plants, fish, and other aquatic wildlife including minnows, turtles, commercial fishing operations, fishing regulations and requirements, designated waters, and Boundary Waters fishing regulations. The rules also remove certain waters from the list of waters closed to taking fish, and repeal various commercial fishing rules, redundant language, border water redundancies, and expedited emergency rules.

2. Among other things, the provisions amend rule part 6262.0575, subp. 5 to allow angling for minnows in closed waters. They also amend rule part 6254.0300, subp. 3, and 6262.0575, subp. 6, to close the Cedar River watershed (in Dodge, Freeborn, and Mower counties) to commercial and recreational minnow harvest except by special permit, in order to protect slender madtoms. An amendment to rule part 6256.0500, subp. 9, item C, adds a size limit for the western painted turtle.⁵ In addition, the amendments make technical corrections dealing with the mussel closure on the Minnesota-Wisconsin border waters.⁶

3. The amendments make several changes to commercial fishing operations. A proposed change to part 6260.0300, subp. 2, repeals the issuance of a Class A permit to use an artificial light to take turtles at night.⁷ The provisions eliminate the Lake of the Woods helper license references to reflect statutory changes.⁸ Other changes propose to repeal rules relating to licensing setlines on inland Mississippi River waters to reflect statutory changes, add core lakes to commercial fishing operation area number 12, and remove areas 26, 27, 28, and 29, which are located in northeast Minnesota, from the list of areas designated for inland commercial operation to better reflect current harvest conditions.⁹

³ Statement of Need and Reasonableness ("SONAR") at 2

⁴ Ex.15 at 1.

⁵ SONAR at 2; Ex.6.

⁶ SONAR at 2; Ex.6 (part 6258.0500, subp.3; part 6266.0500, subp.1).

⁷ SONAR at 2; Ex.6.

⁸ SONAR at 2; Ex. 6 (part 6260.1700, subp.8).

⁹ SONAR at 2.

4. The amendments also include changes to certain fishing regulations and requirements. The proposed change to part 6262.0200, subp. 1, establishes winter trout fishing for trout lakes in Aitkin County and Blue Lake in Hubbard County. The changes also close fishing for muskellunge (muskie) during the winter season and standardize size limits. Also, the amendments establish permanent and seasonal closures of fishing on various water bodies¹⁰ and night bowfishing opportunities.¹¹ Other provisions propose to close or open whitefish/tullibee netting,¹² establish or clarify fish use, possession, and transportation requirements, and generally change or add to existing regulations to reflect recently enacted statutory changes, including bag limits, seasons, and size limits for sturgeon, northern pike, and walleye.¹³

5. Several provisions speak to designated water regulations. An amendment to rule part 6264.0125 designates fish spawning areas and fish preserves. The changes add connected waters or tributaries to reduce angler confusion and provide for better management, in such water bodies as Little Osakis, Lake of the Woods, and Rainy River. The amendments reflect recently enacted statutory changes to such topics as sturgeon, Mille Lacs Lake, and southeastern trout streams. The proposed rule changes include amendments to Boundary Waters fishing regulations, in particular. Such changes include fish culling, Minnesota-Wisconsin border water sturgeon regulations, North Dakota border water limits, changes in seasons on walleye and northern pike, and Canada border fishing restrictions for walleye and sturgeon.¹⁴

II. Rulemaking Legal Standards

6. Under Minn. Stat. § 14.14, subd, 2, and Minn. R. 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or the agency may simply rely on interpretation of a statute, or stated policy preferences.¹⁵ The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by the Agency Panel at the public hearing.

7. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is

¹⁰ SONAR at 2; Ex.6 (part 6262.0500)

¹¹ SONAR at 2; Ex.6 (part 6262.0600)

¹² SONAR at 3 (part 6262.0800)

¹³ Id. (parts 6262.1000, 6262.3200, 6262.3250).

¹⁴ SONAR at 3.

¹⁵ *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W. 2d 238, 244 (Minn. 1984).

arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.¹⁶ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.¹⁷ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.¹⁸ The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹⁹ An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one a rational person could have made.²⁰

8. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with rule adoption procedures, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.²¹

9. Because the Department suggested changes to part 6206.0600, subp. 2, item D(1), of the proposed rules after original publication of the rule language in the State Register,²² it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed.²³ The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have

¹⁶ *In re Hanson*, 275 N.W. 2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W. 2d 281, 284 (1950).

¹⁷ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹⁸ *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 44 (Minn. Ct. App. 1985).

¹⁹ *Manufactured Housing Institute*, 347 N.W.2d at 244.

²⁰ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

²¹ Minn. R. 1400.2100.

²² Ex.14.

²³ See Minn. Stat. §§ 14.15, subd.3, and 14.05, subd. 2.

understood that the rulemaking proceeding . . . could affect their interests,” whether “the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”²⁴

III. Compliance with Procedural Rulemaking Requirements

10. On March 14, 2005, the Department published a Request for Comments pertaining to the proposed rules in 29 State Register 1066.²⁵

11. The Department mailed the Request for Comments to a number of angling groups, other environmental and social organizations, businesses, individuals, and representatives from bordering states; published a statewide news release that described major parts of the proposed rule changes with instructions on how to provide comments; and posted on its website the major parts of the proposed rule changes, with a feature allowing comments to be sent directly from the website.²⁶

12. In addition to the Request for Comments period, the Department also contacted minnow dealers that would be affected by the proposed closures of waters in southeastern Minnesota for their comments. The Department also held meetings with bowfishing organizations to discuss night bowfishing opportunities and regulations.

13. On April 10, 2007, the Department requested the scheduling of a hearing regarding the proposed rules and filed the following documents with the Chief Administrative Law Judge:

- a. a copy of the proposed rules certified by the Revisor of Statutes;
- b. a copy of the Dual Notice of Hearing proposed to be issued; and
- c. a draft of the SONAR.²⁷

14. On April 19, 2007, the Administrative Law Judge approved the Department’s Dual Notice of Hearing and Additional Notice Plan.²⁸

²⁴ Minn. Stat. § 14.05, subd. 2.

²⁵ Ex. 1.

²⁶ SONAR at 3.

²⁷ Ex. 7.

²⁸ Ex. 7.

15. On May 2, 2007, the Department mailed a copy of the SONAR to the Legislative Reference Library as required by law.²⁹

16. On May 2, 2007, the Department mailed the Dual Notice of Hearing and a summary of the proposed rules to all persons and associations on the Department's rulemaking mailing list, which includes angling groups, other environmental and social organizations, businesses, individuals, state legislators who have an interest in these topics, and staff from bordering states that are responsible for rulemaking.³⁰

17. On May 2, 2007, the Department mailed the Dual Notice of Hearing and the SONAR to certain legislators, pursuant to Minnesota Statutes, section 14.116.³¹

18. On May 7, 2007, a copy of the proposed rules and the Notice of Hearing were published at 31 State Register 1574.³² Those documents, the SONAR, and a rule summary were also posted on the Department's website on or around May 15, 2007. The Department also issued a statewide news release, dated May 8, 2007, concerning the proposed rules.³³

19. Approximately one hundred persons requested that a hearing be held on the proposed rules.³⁴

20. On June 8, 2007, the Department mailed a Notice of Hearing to all persons who requested a hearing and who provided their mailing address, and e-mailed a Notice of Hearing to all persons who requested a hearing through e-mail but did not provide their mailing address.³⁵

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

- a. the Request for Comments as published in the State Register (Exhibit 1);
- b. the proposed rules, including the Revisor's approval; the SONAR; the Certificate of Mailing to the Legislative Reference Library; the Dual Notice of Intent to Adopt Rules; the Dual Notice of Hearing as published in the State Register; the Office of Administrative Hearings' approval of Notice Plan for Dual Notice; and the Department's request

²⁹ Ex. 4; Minn. Stat. § 14.131 and Minn. R. 1400.2220, subp. 1(E).

³⁰ Exs. 7-9.

³¹ Ex. 9.

³² Ex. 6.

³³ Ex. 10.

³⁴ Ex. 12.

³⁵ Ex. 12.

for the prior approval Notice plan (Exhibits 2, 3, 4, 5, 6 and 7);

- c. the Certificate of Mailing the Dual Notice to the parties on the Department's rulemaking list and the additional parties identified in the Notice Plan, and the Certificate of the Department Mailing List (Exhibit 8);
- d. the Certificate of Sending the Dual Notice and the SONAR to Legislators (Exhibit 9);
- e. a copy of the statewide news release and a copy of the information on the proposed rules, from the Department's website, as provided in the additional notice plan (Exhibit 10);
- f. written comments and request for hearing; certificate of mailing the notice to those persons who requested a hearing and the Notice of Hearing (Exhibit 11);
- g. a letter to the Commissioner of Agriculture; a list of further rule changes proposed by the Department; and the Department's opening statement (Exhibits 12, 13, and 14).

22. The Administrative Law Judge finds that the Department met all of the procedural requirements established by statute and rule.

IV. Statutory Authority

23. As statutory authority for the proposed rule changes, the Department cites Minnesota Statutes, sections 84.027, subd. 13; 84D.12; 97A.045, subd. 2-4; 97A.101, subd. 1; 97A.475, subd. 30-37; 97A.501, subd. 1-2; 97A.551, subd. 6; 97B.106; 97C.025; 97C.001, subd. 3; 97C.005, subd. 3; 97C.025; 97C.045; 97C.085; 97C.087; 97C.345, subd. 2(b); 97C.375; 97C.401, subd. 1-2; 97C.405; 97C.411; 97C.505, subd. 1-3; 97C.605, subd. 3,4,6; 97C.701, subd. 1; 97C.705, subd. 2; 97C.801, subd. 1; 97C.805; 97C.811, subd. 3; 97C.815, subd. 1; 97C.825, subd. 9; and 97C.841.³⁶

24. The Administrative Law Judge finds that the Department has general statutory authority to adopt the proposed rules. Issues relating to the Department's statutory authority to adopt specific provisions of the proposed rules shall be discussed below.

³⁶ SONAR at 5; Ex. 6.

V. Impact on Farming Operations

25. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

26. The proposed rule dealing with the size of western painted turtles could have affected turtle farming operations.³⁷ The Department sent a letter, the proposed rules, and the SONAR, to the Commissioner of Agriculture on December 18, 2006, as required by statute.³⁸ The correspondence explained that the rule change was designed to conform the rule to prior legislation. The Administrative Law Judge finds that the proposed rules, if adopted, will not affect farming operations.

VI. Additional Notice Requirements

27. Minn. Stat. § 14.131 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made. On April 19, 2007, the Office of Administrative Hearings reviewed and approved the Department's additional notice plan.

28. The Department made significant efforts to inform and involve interested and affected parties in this rulemaking. It sent the dual notice of intent to adopt rules with or without a public hearing to all of the previously mentioned groups (angling groups, other environmental and social organizations, businesses, individuals, and staff from bordering states that are responsible for rulemaking); published a statewide news release describing the proposed rule changes, with instructions on how to provide comments; posted information on the proposed rules on the DNR website; provided notice to state legislators who have an interest in these topics, as required by Minnesota Statutes, section 14.116; and notified the Department of Agriculture, as required.³⁹

29. The Administrative Law Judge finds that the Department fulfilled its additional notice requirement.

VII. Other Statutory Requirements for the SONAR

A. Cost and Alternative Assessments

³⁷ SONAR at 9.

³⁸ Ex. 13.

³⁹ SONAR at 5.

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

- a. 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;
- b. 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;
- c. a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- d. 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;
- e. the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- f. the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- g. 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.

31. With respect to the first requirement, in its SONAR, the Department separated into two groups those who will benefit from the rule changes and those who will be affected or minimally affected by the changes. The classes of persons who will benefit from the changes are: minnow anglers; commercial operations mentioned in rule chapters 6266; the commercial operators in area 12; trout anglers; enforcement agencies and anglers affected by rule parts 6262.0200, 6264.0300, and 6264.0400; people who do bowfishing; and anglers and associated businesses in general. The classes of persons who will be affected or minimally affected by the proposed changes are: minnow dealers, anglers who harvest minnows, businesses associated with the bait industry in

southeastern Minnesota, dealers and anglers who harvest in the Cedar River drainage, turtle harvesters and associated businesses, commercial operators in the area described in rule part 6260.2400, commercial mussel operators, and people who gill net whitefish and cisco for sport.⁴⁰

32. With respect to the second requirement, the Department asserted that the proposed fish rules will result in no costs to itself or to other agencies.⁴¹ In addition, the Department anticipated that there will be no significant positive or negative direct impacts on state revenues as a result of these rules. The rules dealing with the harvest of sturgeon will minimally affect DNR revenues, but no other proposed fish rule will have any effect on state revenues.⁴²

33. The third requirement imposed by Minn. Stat. § 14.131 asks the Agency to determine whether there are less costly or less intrusive methods to achieve the purposes of the proposed rules. In the SONAR, the Department mentioned its analysis of less intrusive alternatives; it did not discuss cost. The Department conceded that some of the proposed rules would result in stricter and therefore more intrusive limits and seasons on fish and turtles. However, it maintained that the best option for reducing harvest and maintaining fish and other aquatic animal populations is, by definition, more intrusive than alternatives. It did consider, and occasionally has implemented, less intrusive regulations.⁴³

34. The fourth provision of Minn. Stat. § 14.131 requires the Department to describe any alternative methods that were considered and the reasons they were rejected. In the SONAR, the Department identified two major alternatives to size limits and possession limits, as applied to fish and turtles in the proposed rules: (1) quotas where a certain level of harvest is allowed, after which all harvest activity is curtailed for the remainder of the season; and (2) limited entry where only a certain number of anglers or commercial operators are allowed to engage in harvest activities. The Department rejected such quotas and limitations because they are considered to be unnecessarily intrusive and would require more monitoring and surveying from the DNR.⁴⁴

35. The fifth factor requiring consideration under Minn. Stat. § 14.131 is the probable cost of complying with the proposed rules. The Department stated that the types of restrictions being proposed for harvest of fish and turtles do not result in increased costs for the public.⁴⁵

⁴⁰ SONAR at 6-7.

⁴¹ SONAR at 7.

⁴² SONAR at 7.

⁴³ SONAR at 7-8.

⁴⁴ SONAR at 8.

⁴⁵ SONAR at 8.

36. The sixth factor set forth in Minn. Stat. § 14.131 requires an assessment of the probable costs or consequences of not adopting the proposed rule. The Department did not address this factor specifically in its SONAR.⁴⁶ It is found that the absence of a specific statement in the SONAR of the probable costs or consequences of not adopting the Department's proposals does not constitute a defect. The record is replete with reasons supporting adoption of changes in fishing season, size limits, and methods of allowing angling. The reasons for adoption – chiefly protection of the game fish population, opening of new angling opportunities where practicable and preservation of the environment, imply strongly that if the proposals are not adopted, the population of trophy muskies could decline, fishers (in particular, people who fish for trout and those who partake in bowfishing) would be denied some additional sporting and recreational opportunities (which contribute to the economy) and the state's environmental quality could be affected negatively. The fact the Department did not say this specifically at one specific part of its SONAR does not make the SONAR defective.

37. The seventh factor which Minn. Stat. § 14.131 requires the Department to address is consideration of differences between the proposed rule and existing federal regulations. The Department stated in the SONAR that the proposed rules for closing minnow harvest where slender madtoms have been documented (6254.0300 and 6262.0575, subp. 5) would bring state-allowed activities into compliance with Federal Endangered Species regulations. It asserted that the rest of the proposed rules cover areas that are not addressed by federal law, so a consideration thereof is not applicable. The proposed rules dealing with tagging involve an application fee of \$5.00 that was approved by the legislature. The other proposed rules do not involve any new regulatory, permit, or license fees, or any other charges to the public. Minn. Stat. § 16A.1285 does not apply because the rules do not set or adjust fees or charges.⁴⁷

38. The Administrative Law Judge finds that the Department has fulfilled its obligation under Minn. Stat. § 14.131 to discuss cost and alternative assessments in the SONAR.

B. Performance-Based Regulation

39. Minn. Stat. § 14.131 imposes an additional requirement that the Department explain how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002” in developing the proposed rules. Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

⁴⁶ SONAR at 8.

⁴⁷ SONAR at 8-9.

40. The Department explained in the SONAR that, to the extent possible, it attempts to maintain simplicity and understandability of regulations, balanced against the demand for more specialized regulations to protect resources and provide additional opportunities for use of these resources. The agency also attempts to balance the economic and social impacts against the biological requirements necessary to meet goals that conserve and protect the aquatic resources. In developing the proposed rules, the agency sought to make the rules less restrictive and more business-friendly, where resource conservation, safety, and equitable use were not compromised. In the case of more restrictive provisions, the agency sought to make sure that regulatory consistency and resource protection were addressed.⁴⁸

41. The Administrative Law Judge finds that the Department has satisfied the requirements of Minn. Stat. § 14.131 for assessing the impact of the proposed rules.

C. Consultation with Commissioner of Finance

42. Minn. Stat. § 14.131 also requires that the agency consult with the Commissioner of Finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government. The Department sent its proposed rule and the SONAR to the Commissioner of Finance and received a response back from the Department of Finance on January 19, 2007. The response letter is attached to the SONAR and confirms the Department of Natural Resources' assertion that it does not anticipate that the proposed rules will have any financial impact on local government units.⁴⁹

43. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for consultation with the Commissioner of Finance regarding the fiscal impact and fiscal benefits of the proposed rules.

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

44. Under Minn. Stat. § 14.127, subd. 2, agencies must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁵⁰ Although this determination is not required to be included in the SONAR, the statute states that the agency “must make [this] determination . . . before the close of the hearing record” and the Administrative Law Judge must review the determination and approve or disapprove it.

⁴⁸ SONAR at 9.

⁴⁹ SONAR at 9.

⁵⁰ Minn. Stat. § 14.127, subd. 1.

45. In the SONAR, the Department stated that the proposed rules are not anticipated to increase costs by more than \$25,000 for any small business or small city.⁵¹

46. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.127 for determining whether the cost of complying with the proposed rule in the first year after the rule takes effect will exceed \$25,000 for any small business or small city.

VIII. Analysis of the Proposed Rules

47. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Many sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. For these reasons, it is unnecessary to engage in a detailed discussion of each part and subpart of the proposed rules. The Administrative Law Judge finds specifically that the Department has demonstrated the need for and reasonableness of all proposed rule provisions not specifically discussed in this Report by an affirmative presentation of facts. He finds also that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent adoption of those rules or rule amendments.

IX. Rule-by-Rule Analysis

48. A number of individuals who own or have an interest in property around Taylor Lake in Aitkin County appeared at the hearing and filed subsequent comment in opposition to the Department's proposal to retain Taylor Lake on a list of waters proposed for winter trout fishing (Minn. R. 6262.0200, subp. 1, items B, C and D). They include three of the siblings who own the shoreline surrounding Taylor Lake – David, John and Robert Larson. Their brother, Richard Larson, commented in writing, noting that the family owns the only cabin on the lake. In response to citizen concern expressed about too much pressure on the fishing resource at Taylor Lake, the Department has responded that Taylor Lake is considered to be light to moderate in its fishing effort, surveyed at 113 angler hours per acre in the Agency's creel survey of 1998. The Department acknowledges that fishing effort will increase with the addition of a winter fishery, but points out that it is not likely to increase to the point of having "heavy" fishing pressure (more than 200 hours per acre). The Department notes that its managers in the northeastern region of Minnesota have observed an additional 10 percent fishing effort in winter on other trout waters in the northeast region. A somewhat higher pressure at Taylor Lake is expected as well. That

⁵¹ SONAR at 10.

phenomenon is likely to be mitigated by the lake's lack of accessibility in the winter (forest roads are not typically plowed).

49. The Department believes that the ease of catching trout in the winter would likely taper off after the initial fishing effort occurs. It notes that other waters where new fisheries have been opened up to anglers demonstrate that fishing is often quite good immediately after they are opened up, but that it tapers off after the fish are exposed to angling for some time.

50. In response to the concern that rainbow trout that are stocked in the fall may in fact be too small for many people to keep early in the summer, the Department notes that such fish grow into sizes that anglers prefer to keep as the summer wears on. The Department stocks Taylor Lake with 5,000 rainbow trout and 2,000 brook trout annually. If winter fishing is such that it results in drastically reduced size distribution, the Department is prepared to alter its management of the stocking to accommodate that change in the fishery by stocking different size rainbow trout, more yearling brook trout, or by making use of other species such as splake or brown trout.

51. With respect to the citizens' concern over the spillage of oil or gas from snowmobiles or all terrain vehicles used on the lake during the winter, the Department notes that such problems should not be a concern on Taylor Lake, where the carry-in-access discourages most anglers from bringing in outboard motors, resulting in boating activity being either from canoes or small boats with electric motors. Several other lakes in Aitkin County have been open to motor vehicle traffic, and these lakes have not suffered due to oil or gas spills.

52. In response to the concern about increased soil erosion, the Department notes that soil erosion generally does not occur in the winter when the ground is frozen, even if there is no snow.

53. The Department anticipates very little, if any, increase in the camping and campfire activity in the wintertime, even if Taylor Lake is open for winter fishing. It notes also that the use of minnows for bait will continue to be prohibited in both summer and winter.

54. The Department notes that it may be aesthetically unpleasant to view fishhouses where previously there were none. It notes that a "tradeoff" exists because now winter anglers will have an opportunity to enjoy the beauties of Taylor Lake. If persuaded in the future, the Department retains the option to limit or eliminate fishhouse use.

55. The Administrative Law Judge finds that including Taylor Lake in Aitkin County among those waters now open to winter trout fishing has been shown to be necessary and reasonable by an affirmative presentation of facts. The Department has made a policy decision that has a rational basis. See Finding 7.

56. Regarding the earlier closing date for muskie season (Minn. R. 6262.0200, subp. 1, item I) the Minnesota Muskie Alliance (MMA) presented the early season closure idea to the Department. MMA is an umbrella organization that represents the majority of muskellunge angling groups in Minnesota. The MMA's goal is consistent with that of the Department – to manage muskies by maximizing their growth and trophy potential. Although individuals within the MMA disagreed about the date to close the winter season, the MMA's objective was to protect muskies during the winter when the opportunity for open-water angling is low or non-existent on most waters in the state.

57. The closure proposed by the DNR would eliminate targeted angling of muskellunge through the ice and any remaining opportunity for open-water angling from December 1 until the regular season opener the following June. The change would provide additional protection to this trophy species when they are very vulnerable to anglers. Muskellunge tend to congregate in the deeper pools of the Mississippi River and stay there over the winter. This is known to anglers, who have been able to target such areas in the early part of the winter and have experienced very high catches of muskies. This activity is heavier after December 1 in any given year, and implementing that date as the close of the muskie angling season should prevent the harvest that was experienced previously. The Department notes also that closing the season to fishing by December helps eliminate winter handling of fish on the ice and exposure to freezing temperatures, which can harm gills.

58. Three members of the Brainerd Lakes Chapter of Muskies, Inc., a subgroup within MMA, appeared at the hearing to request that muskie season not be cut off until January 15 or later, because open water conditions prevail in the portion of the Mississippi River where they angle for muskellunge until that time during most years. Greg Kvale, the principal spokesman for the opposition group, clarified that he was representing about 35 members of the Brainerd Lakes Chapter. The group argues it is unreasonable to control the muskie harvest by shortening the season alone, suggesting management of the resource by means such as limiting further the number and size of the fish that can be taken. Mr. Kvale advocates a "take" limit of one fish per person per year, and that anglers be allowed to keep fish only 48 inches long or more. He argues further that no more harm will be done to the muskies in the Mississippi River because all muskies caught there must be released.

59. The Administrative Law Judge finds that the Department's proposal to change the muskie season is necessary and reasonable.

60. The Department proposes to repeal the 30-inch minimum size limit on Shoepack Lake by amending Minn. R. 6262.0200, subp. 1, item I, to create a standard size limit around the lake for muskellunge harvest, except on waters with special or experimental regulations. This change makes the laws less confusing to anglers and provides easier enforcement of the laws. The

Administrative Law Judge finds that the proposed amendment repealing the size limit on Shoepack Lake is necessary and reasonable.

61. Basswood Lake is a Minnesota-Canada Border Water, the Minnesota portion of which is in Lake County. The Department proposes to amend Minn. R. 6266.0700, subp. 2, item C.5.b., by making northern pike regulation for all Minnesota waters of Basswood Lake consistent. The Department points out that the change is needed to protect the quality of northern pike from over-harvest. Examples were provided to establish that people were taking northerns from this lake during the winter, the time of year the northern pike resource is most vulnerable, which activity the proposed change of season is designed to prevent. At the present time, the Minnesota-only bays on Basswood Lake are considered inland waters and are closed to northern pike fishing from the last Sunday in February to the fishing opener in May. The remainder of Basswood Lake within Minnesota's borders is considered Canada-Minnesota Border Waters and is currently open to continuous northern pike fishing with a bag limit of six.

62. The DNR proposes to impose a new open season for northerns on the entirety of the Minnesota waters of Basswood Lake, closing it from the last Sunday in February until the Saturday two weeks prior to the Saturday of Memorial Day weekend, and to limit the number to a bag limit of three. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, that this proposal is necessary and reasonable.

63. Opposition to the changes in season and bag limits for northern pike in Basswood Lake came principally from Sue Rosenwinkel of Ely, who filed a lengthy comment/argument, to which she attached a thread of emails between herself and Department officials dating back to 2002. The major complaint from Ms. Rosenwinkel is of inadequate notice of what the Department proposed for Basswood Lake, but that concern is unfounded in the context of this proceeding. Rosenwinkel cites alleged deficiencies relating to a process begun in 2002, which was a process of designation of the lake as a special management water under Minn. Stat. § 97C.005, not a rulemaking under Chapter 14. The earlier designation process ultimately covered just the Minnesota-only bays of Basswood Lake, whereas the current proposal, where the procedures under Chapter 14 were followed properly (see Finding 22), applies to the rest of the Lake on the Minnesota side of the border.

64. At the hearing, the Department proposed to drop lakes in Anoka County from the areas it was allowing night bowfishing to occur. Minn. R. 6262.0600, subp. 2, item D.1, as published in the State Register, was proposed for deletion. The Department noted that the elimination of Anoka County Lakes from the list of pilot lakes to be opened to night bowfishing does not make the rules as proposed substantially different. The scope of the matter in the notice indicated that a selection of lakes would be piloted for a possible limited night bowfishing opportunity. These lakes do have a good population of

rough fish. However, they are not very accessible for this activity during the period being proposed to be open for night bowfishing due to very high levels of vegetation. Eliminating the lakes noted in Anoka County is within the scope of the matter announced in the dual notice, and is in character with the intent raised in the notice. Interested parties received fair warning that the outcome of the rulemaking proceeding could result in a change in the rules proposed. The subject matter and issue involved in this proposed change are not different than those in the notice. The change does not differ substantially from the intent of the originally-published proposed rules. The change is that a smaller number of lakes will be opened for the pilot project, by which action the DNR is attempting to ensure that the intent of the proposed rule is still being carried out.

65. The Administrative Law Judge finds that the proposal to drop Anoka County lakes from the night bowfishing list is necessary and reasonable, and does not constitute a substantial change in the rule proposals that were published in the State Register.

66. On June 29, 2007, the Department filed Amendments to its SONAR, with attachments. This filing noted that typographical and clerical errors had appeared on the SONAR filed initially, and corrected them. It also contained clarifying explanations of why the listed criteria proposed as factors to consider in closing off fishing or restricting motorboat operations in certain protected waters were chosen – to provide guidelines that will protect spawning beds, fish preserves, and waters used for research and management operations. The ALJ had expressed concern that the guidelines were vague or granted over-broad discretion. He no longer has that concern, based on the Department's comment. It is found specifically that Minn. R. 6262.0500, subp. 4 is necessary and reasonable.

67. The Department's filing also clarified, and made specific, the meaning of the words "84 decibels or the equivalent" in proposed Part 6260.0600, subp. 2.B., which sets the combined noise limit of generators, engines and motorboats utilized in night bowfishing. The ALJ expressed concern at the hearing that the term "equivalent" was too vague to be enforced. The level of 84 decibels at 30 feet is consistent with Minn. Stat. § 86B.321, subd. 2. Equivalency, within the context of the proposed rule, is clarified in the Department's Motorboat Noise Enforcement Manual attached to the June 29 filing. The rule as proposed is found to be necessary and reasonable.

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

CONCLUSIONS

1. The Department of Natural Resources gave proper notice in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. 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) and (ii).

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record.

5. The amendment to the proposed rule offered by the Department after publication of the proposed rules in the State Register is not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

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

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based on an examination of the public comments, provided that the rule finally adopted is based on facts as appearing in this rule hearing record.

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

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules be adopted, consistent with the Findings and Conclusions of this Report.

Dated this 16th day of April, 2011

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

Reported: Transcript prepared by
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(1 volume)