

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF WATER & SOIL RESOURCES

In the Matter of the Proposed
THE
Rules to Implement the Wetland
LAW JUDGE
Conservation Act of 1991

REPORT OF

ADMINISTRATIVE

Public hearings on these proposed rules were held at 1:00 p.m.
and
7:00 p.m. in the following locations:

December 7, 1992	Alexandria
December 9, 1992	Thief River Falls
December 10, 1992	Grand Rapids
December 14, 1992	Marshall
December 15, 1992	Mankato
December 17, 1992	St. Paul

Attendance at each of the hearing sessions was substantial, with more than 200 persons at each location. The written transcript of the hearings occupies more than a thousand pages. More than 200 written comments were submitted during the post-hearing comment period.

The Board of Water & Soil Resources had one or more of its members in attendance at each of the hearings. The Board was represented by Special Assistant Attorney General A. W. Clapp III. The Board panel included Greg Larson and John Jaschke, as well as personnel from the Board's regional offices.

The Board of Water & Soil Resources must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

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 Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board 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 Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board 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 Board files the rule 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 the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 27, 1992, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) A Statement of Additional Notice.
- (f) The Certificate of the Board's authorizing resolution.
- (g) A schedule of ten information meetings to be held around the State immediately prior to the hearings.
- (h) Minutes of the Board's September 30 - October 1 meeting ordering the rules for publication.

2. On October 29, 1992, the Board filed its Statement of Need and Reasonableness, along with a group of exhibits to support it, and a list of the names of Board personnel who would represent the Agency at the hearing.

3. On November 2, 1992, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register 976.

4. On November 7, 1992, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. In addition, a copy of the notice and proposed rule was mailed to all 91 soil and water conservation districts, 41 watershed districts, 42 watershed management organizations, 141 other local government units, approximately 300 interested citizens who had requested a copy of the proposed rules, and a variety of other government and quasi-government entities.

5. Appendix A to the SONAR is a six-page set of examples using the wetland type index system proposed in the rules. Two of the six examples contained an error as originally filed. On November 20, 1992, the Board filed a corrected version of Appendix A to the SONAR. The November 20 filing corrected the error in those two examples. (Ex. 3 and Ex. 4.) No person

complained about this during the hearing process, and it is found that the erroneous filing did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The error is, therefore, a harmless error.

6. On December 7, 1992, at the start of the first public hearing, the Board formally entered the procedural documents into the record. In addition to those already noted above as having been previously filed with the Administrative Law Judge, the Board entered the following documents:

- (a) A copy of the State Register containing the Notice of Hearing and proposed rules.
- (b) The Board's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Board's list (and others, as noted above).
- (d) A copy of the Notice of Intent to Solicit Outside Opinion which was published at 16 State Register 2038 on March 9, 1992. Later in the hearing process, on December 17, 1992, the Board introduced the three letters which had been received in response to its solicitation (Exhibit 15a), as well as a variety of news releases, advertising material, newsletters, and newspaper articles about the rules and the hearings. Ex. 33.

7. Minn. Rule pt. 1400.0600 requires that certain of the jurisdictional documents noted in the immediately preceding Finding be filed with the Administrative Law Judge at least 25 days prior to the hearing. This was not done. However, only one person asked the Administrative Law Judge for an opportunity to view any of the documents within the 25 days prior to the hearing, and that person did not raise the issue of the Board's failure to timely file them during the public hearing process. No person raised the issue in any manner. It is found that all of the necessary documents are in the record, and that no person was prejudiced by the Board's failure to file some of them prior to the start of the hearing. No person was deprived of an opportunity to participate meaningfully in the rulemaking process. The

Board's failure was, therefore, a harmless error within the meaning of Minn. Stat. § 14.15, subd. 5 (1992).

8. The period for submission of written comments and statements remained open through December 31, 1992, the period having been extended by Order of the Administrative Law Judge to 14 calendar days following the last hearing session. The record closed for all purposes on January 8, 1993, the fifth working day following the close of the comment period.

Statutory Authority

9. Minn. Stat. § 103B.101, subd. 7 (1992) authorizes the Board to "adopt rules necessary to execute its duties".

10. Minn. Stat. § 103B.3355 (1992) directs the Board, in consultation with the Commissioner of Natural Resources, to "adopt rules establishing criteria to determine the public value of wetlands".

11. Minn. Stat. § 103G.2242, subd. 1 (1992) directs the Board, in consultation with the Commissioner, to "adopt rules governing the approval of wetland value replacement plans". The subdivision goes on to identify a number of issues and procedures which the rules may address,

12. No one seriously questioned the Board's overall authority to adopt these rules. There were specific questions raised about whether or not particular rules were authorized or conflicted with various statutory provisions. Those questions will be dealt with in the context of the particular rule at issue. The Administrative Law Judge concludes, as a general matter, that the Board does have statutory authority to adopt the proposed rules.

Introduction and scope of this report

13. The Legislature has authorized and directed the Board to adopt rules. Before those rules can take effect, however, the Legislature has required that they be subjected to a public hearing process and review by an independent third party, the Administrative Law Judge. The scope of the Administrative Law Judge's review, however, is not unlimited. The Administrative Law Judge's duties have also been specified by the Legislature. They include the preparation of a Report which is to include a review of the degree to which the Board has:

- (i) documented its statutory authority to take the proposed action,
- (ii) fulfilled all relevant, substantive and procedural requirements of law or rule, and
- (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.

14. Many of the rules proposed by the Board are controlled by the detail of the statute. Most of the persons who spoke at the hearings and most of the persons who submitted written comments made suggestions that require changes

in the statute, as well as the rule. Many of the rules are based on specific language or specific procedures required by the statute. It is impossible for the Board to adopt those suggestions until the statute has been amended. The Board can only adopt rules which are consistent with the current statute. The numerous criticisms of the Board's proposed rules that are really criticisms of the statute cannot be recommended by the Administrative Law Judge nor adopted by the Board, until the statute is changed. The Legislature has required that the proposed rules, and the public comments on the proposed rules, be submitted to the Agriculture and Environment Committees by March 1, 1993. The Legislature has prohibited the Board from finally adopting the rules until at least sixty (60) days after these materials have been submitted. Therefore, the Legislature will have an opportunity to review the public comments and determine whether it is appropriate to change the statute. This Report will not deal with those suggestions which require statutory changes. The majority of them are based upon substantial philosophical differences with the current statute, and only the Legislature

can resolve those. Instead, this Report will focus upon those areas where public comment suggested that the rule was:

- (1) beyond the Board's statutory authority, or in conflict with the current statute;
- (2) not supported by the Statement of Need and Reasonableness; or
- (3) was unnecessary or unreasonable.

15. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. This Report will not specifically address those provisions in the discussion below. It is found that the need for and reasonableness of those proposed rules which are not discussed below has been demonstrated, and that the Board does have statutory authority to adopt them. The discussion which follows will only address remaining substantive issues of need, reasonableness or statutory authority.

16. In order for the Board to meet its burden of demonstrating reasonableness, the Board must demonstrate that the rule is rationally related to the end sought to be achieved. *Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation*, 347 N.W.2d 88, 91 (Minn. App. 1984). This demonstration may be either by adjudicative facts or legislative facts. *Manufactured Housing Institute v. Pettersen*, 237 N.W.2d 238, 244 (Minn. 1984). The Board must show that a reasoned determination has been made, as opposed to an arbitrary one. *Id.* at 246. It is not the job of the Administrative Law Judge to declare a rule to be unreasonable simply because a more reasonable alternative was proposed, or a better job of drafting might have been done. An agency is entitled to choose among possible alternative standards so long as its choice is one that a rational person could have made, and the choice does not conflict with the statute. *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943). This Report will not attempt to select the "best rule" from among the various options proposed by the Board and the commentators. Instead, it will only determine whether the Board's rule is a reasonable one. See, Memorandum at the end of this Report.

17. After the hearings had concluded, and the initial comment period had ended, the Board's staff reviewed the record and proposed numerous changes (modifications) to the rules in response to the public comments. This Report will focus on the "modified version" of the rule, and will not dwell on the rule as initially proposed. In each case where the Board has proposed a change from the rule as originally proposed, the Administrative Law Judge must determine whether or not the new rule constitutes a "substantial change" such that interested persons were denied an opportunity to comment. The Administrative Law Judge finds that the changes proposed by the Board do not constitute "substantial changes".

18. Substantial change problems were lessened by the form of the Hearing Notice which was issued by the Board. In addition to the normal description of the rules, the Board laid out five specific issues where public comment was particularly invited. In four of the five cases, the descriptions of the issues offered alternatives for public comment. An example of this technique is the following:

Whether, when a wetland is drained or filled without replacement under an agricultural exemption, the notice of agricultural use should be required to be recorded with the deed only when the land is in a city, or in all cases .

After listing the five issues, the Board inserted the following statement in the Notice:

Since the purpose of the hearing is to improve the rule as proposed, interested persons must understand that the final rule may differ from the rule as it is now proposed.

In addition to highlighting those five issues in the Notice, the Board staff also highlighted them in their introductory remarks at the start of each hearing session. The Board also laid out the five issues in press releases which it issued prior to the start of the hearings.

Definition of Agricultural Land

19. Agricultural land is given favored treatment in the statute and the rules. There are two principal places where this occurs. First of all, there are exemptions which apply only to wetlands on agricultural land. Secondly, the replacement ratio for wetlands on agricultural land is only half as large as the replacement ratio that applies to non-agricultural lands. Because of the favored treatment given to agricultural land, the question of how that term is defined became a hotly contested one.

20. The statute itself gives no definition of the term.

21. The definition proposed by the Board is a split definition.

For purposes of determining whether or not the exemptions are available, the Board has proposed a relatively narrow definition. However, for purposes of determining the applicable replacement ratio, the Board has proposed a broader definition. The Board supported this use of two definitions by pointing to the overall goal of the law, which is to achieve "no net loss" in the quantity, quality, and biological diversity of existing wetlands. By providing only narrow exemptions from the replacement requirements, the quantity of wetlands lost will be minimized. Nonetheless, the adverse impact

on farmers who must replace drained wetlands (because they do not fit into one of the exemptions) will be minimized if they must only replace at a 1:1 ratio, rather than a 2:1 ratio. Therefore, the Board reasoned, applying a broad definition, and maximizing the opportunity for 1:1 replacement, will still result in "no net loss".

22. Public comments on the Board's proposed rule were numerous and diverse. There were those who thought the Board's proposed split definition allowed too many wetlands to be drained without replacement, and should be tightened up as much as possible. On the other hand, some commentators believed the Board's proposed definitions were far too restrictive, and did not allow farmers enough latitude to earn a living. Some even urged that the term "agricultural land" be defined to include not only crop land, pasture and

gravel pits, but also hunting, trapping, and recreational land. Tr .
26.

There were a number of allegations about what the Legislature intended.

23. Minn. Stat. § 645.16 provides that when the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the loss;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretation of the statute.

The rulemaking record does not contain the kind of legislative history that would enable a finding of legislative intent to be made with any certainty.

Two of the authors of the House bill, Representatives Willard Munger and Marcus Marsh, both testified to a narrow definition of "agricultural land".

Munger at Tr. 809, and Marsh in a letter dated December 28. However, Representative Bertram, who was also heavily involved in the bill, testified

to the variety of farming practices that exist in different parts of the state

and the difficulty in trying to come up with a definition that treated them

all fairly. He pointed out that he did not know what the intent of the entire

Legislature was, and thought it "humorous" to hear firm and unequivocal statements of legislative intent from persons with opposite ideas of what the

intent was. Representative Bertram stated that he could tell what his intent

was, but that other legislators might well have had different intents of what

the language in the bill meant. Tr. 70-75. Indeed, the Board, in its post-hearing submission on the issue, pointed out that they had received exactly opposite opinions from legislators.

24. The record demonstrates that the Board (and its two drafting committees, the Wetland Heritage Advisory Committee and the Rule Working Group) deliberated long and hard over this issue. They were presented with a number of options to choose from, and the ultimate decision in favor of a "compromise" split definition was a reasoned one. For example, the record contains a memo dated May 11, 1992 from Special Assistant Attorney General Clapp setting forth a variety of options from other statutes, and a June 3 memo from Greg Larson showing how the various options would work. The Board chose to use a split definition with these materials available. The Administrative Law Judge concludes that the Board's split definition has been justified as a reasonable response to the problem.

25. During the hearings, one person noted that the Board's definition of agricultural land did not include farm yards or lands which would be used for building farm barns or sheds. Paul Brutlag, at Tr. 312-13. He said that land used for farm buildings ought to be treated the same as land used for crop production. The Board agreed with this comment to the extent that it was willing to add the language "and associated buildings" to that part of the definition of "agricultural land" which applied to the reduced replacement ratios, so that a wetland drained or filled for a silo would still have to be replaced, but only at a 1:1 ratio, rather than a 2:1 ratio. The change is reasonable, and is not a substantial one.

Related Definitions

26. Both parts of the split definition of "agricultural land" include two terms that drew criticism and comment. Those terms are "introduced pasture" and "introduced hayland". Both are defined in the proposed rules as being in "agricultural crop production" if they meet any one of a number of tests. One of the tests is that they have been interseeded with introduced species at least once during the 20-year period before January 1, 1991. The definition of introduced hayland goes even further -- it will be considered agricultural land if it has been interseeded with introduced or native species at least once during the 20-year period before January 1, 1991.

27. A concern about the definitions of "introduced pasture" and "introduced hayland" is that they are impossible to enforce, because it is impossible to determine whether or not a piece of ground was interseeded within the last 20 years. One commentator asserted that USDA offices do not keep records of interseeding, and interseeding may or may not show up on aerial photographs. Tr. 698. Another stated that the ASCS only keeps records for ten years. Clearwater SWCD, letter of December 18. The Department of

Natural Resources, whose conservation officers are the primary persons who will be enforcing the Act, stated that the proposed definitions would be "very difficult to verify, creating significant enforcement problems." Letter of 17 December, 1992; Tr. 839. Clearwater SWCD stated that it would be almost impossible for people to prove that they had interseeded (Id.) A similar concern over enforceability came from the Isaac Walton League, which asserted that enforcement would be extremely difficult. Letter of December 17. The Department recommended that the once in 20-year limitation in planting and twice in 10-year limitation on harvesting be changed to twice in ten years for planting and twice in five years for harvesting. These are the time periods used in the RIM definitions (Minn. Rule pt. 8400.3030). The Department urged that in the interests of consistency and simplicity, as well as enforceability, that the RIM definitions be substituted for the Board's proposed definitions.

28. The Board justified its proposals by pointing out that the rule drafters began with the RIM definitions, but then the Heritage Advisory Committee modified them to make them less restrictive as a compromise between those trying to minimize loss of wetlands and those seeking broad application of the exemptions to all farmers. SONAR, p. 4-5. While the Administrative Law Judge is hesitant to upset policy compromises that took many hours to achieve, it is a matter of great concern when those who will be doing most of the enforcement state that the proposed definition will create significant enforcement problems because it would be very difficult to verify. The

Department, presumably, has had experience in enforcing the RIM program and working with its definitions. It is, therefore, in a good position to evaluate the practicality of verification.

29. Difficulties in verification are a two-edged sword: not only is an enforcement officer unable to determine if a violation has occurred, but also a landowner may be unable to prove entitlement to an exemption. Absent some scheme of filing with the ASCS, SWCD or other type of body, it will be very difficult for a landowner to convince a skeptical LGU or enforcement officer that land was, in fact, cropped or interseeded 18 or 19 years ago.

30. The Board has failed to demonstrate the reasonableness of its proposed definitions of introduced hayland and introduced pasture insofar as they are based on unenforceable measures. In order to cure this defect, the Board must adopt definitions that have some reasonable likelihood of objective verification and consistent enforcement. The Department's experience with the RIM program would support the timelines in the RIM definitions as being verifiable and enforceable. There may be other timelines which have also been demonstrated in the record to be verifiable and enforceable, but the Administrative Law Judge is not aware of any. Therefore, he recommends that the Board adopt the timelines in the RIM definitions. Another alternative would be for the Board to fashion some sort of verification provision whereby longer timelines, such as 20 years, could be used if the landowner could prove, by aerial photographs, ASCS records, or some other reliable means, that the activities had, in fact, occurred.

Other Definitions

31. The statute and these rules both provide that an impacted wetland must be replaced by a wetland within the same watershed or county, with a few major exceptions. One of the exceptions is described in the statutes as follows:

Wetlands impacted by public transportation projects may be replaced statewide, provided they are approved by the

commissioner under an established wetland banking system, or under the rules for wetland banking as provided for under section 103G.2242.

One of the issues that arose during the public hearing process was the proposed definition of "public transportation projects". The rules define a "public transportation project" as a project "conducted by a public agency involving transportation facilities open to the public". Representative Munger testified that it was the intent of the Legislature to limit this benefit to projects administered by the Minnesota Department of Transportation. He explained that MNDOT had created a wetland mitigation bank at the time of the 1991 enactment with the anticipation of being able to use it for statewide projects. Representative Munger pointed out that the Board's proposed rule covers any kind of public transportation, including airports, trains, public transit and similar projects, and is not limited to the state Department of Transportation. Tr. 809. A similar comment was made by the Wetlands Conservation Coalition (Letter of December 31), which urged that the definition be rewritten to apply solely to projects conducted by the state Department of Transportation.

32. In response, MNDOT (Letter of December 24) and the Association of Minnesota Counties (Letter of January 8) both point out that had the Legislature intended to limit transportation projects to MnDOT projects, they clearly could have. The AMC comment notes that a number of counties were in the process of implementing a banking program similar to that of MNDOT, and there is no reason why their transportation projects should not be treated similarly to MnDOT's.

33. The Board, in its Statement of Need and Reasonableness and in its post-hearing submission, justified its definition as consistent with the statute. They point out that the statute contains no special preference for MNDOT, and that it would be improper for the Board to impose one. The Administrative Law Judge accepts the Board's position. If the Legislature intended a narrower interpretation, it will have an opportunity to insert it following the March submission.

34. The statute contains a list of 24 specific exemptions, which are applicable so long as three conditions are followed. The conditions relate to appropriate erosion control, not blocking fish passages in a watercourse, and compliance with other applicable governmental requirements, including best management practices. While most of the exemptions drew no substantial comment (other than comments directed at the statute, which will not be dealt with here), there were some general provisions relating to exemptions and some specific exemptions that did draw comments worthy of discussion below.

35. Exemptions 1, 2, 4, 7, 8, and 23 (known as the "agricultural exemptions") all contain similar language, which reads as follows:

Present and future owners can make no use of the wetland area after it is altered, other than as agricultural land for ten years, unless it is first replaced If the local government unit approves an exemption, the landowner must execute and the local government must record a notice of this restriction If the Wetlant II In a City. [Emphasis added].

Discussion focused on whether recording should be required statewide, or just in cities. The theory behind requiring the recording of an exemption is that a buyer purchasing land which had been drained using an agricultural exemption might not know that the land could not be converted to non-agricultural use for ten years, unless the restriction was recorded. During the rule drafting process, persons argued that recording was a burdensome requirement to place upon all landowners, and that it was most likely that conversion to non-ag uses would occur in cities, rather than in unincorporated areas, and so the recording requirement ought to be limited to cities. This was the position adopted by the Board, but the Board did recognize it was controversial and identified it as one of the five issues for particular attention during the public hearing process.

36. Public opinion was strongly in favor of imposing the reporting requirement in all locations, not just in cities. The general rationale was

that conversion to non-ag uses was likely to occur before incorporation or annexation to a city, and not afterwards, and that the minimal cost and burden of recording (estimated at an average of \$17.00 around the State by the Builders Association of Minnesota in a December 31 letter) was relatively minor in comparison to the damages that could occur to an innocent buyer who was unaware of the restriction.

37. In response to the public comments, the Board's post-hearing submission recommended that the five agricultural exemptions all be modified to require recording in all locations, not just in cities. The Board volunteered to make notice forms available locally, so that all a landowner would have to do would be to fill in a property description and then take it to the county recorder. The Administrative Law Judge concludes that the Board has justified the need for and reasonableness of its modified proposal.

38. The Board may wish to consider the comments of the Minnesota State Bar Association's real property section, which proposed that the rule contain minimum criteria for a proper notice. The minimum criteria would be the following:

1. the name or names of the land owners;
2. the name and address of the LGU granting the exemption;
3. a complete legal description (a tax description, street address or tax identification number is not adequate) of the real property affected by the restriction; and
4. the date on which the 10-year restriction expires.

The real property section recommended that all landowners named should sign the notice, and that the notice be acknowledged so as to meet the requirements of the recording act. Letter dated December 31. The Board's proposed rule cannot be said to be inadequate or unreasonable without the real property section's recommendations, but the Board should consider them to avoid any problems with the forms it has offered to provide to landowners.

39. In addition to the change to require recording, the Board also

proposed that each of the five agricultural exemptions receive a new sentence which would provide that for ten years, the wetland could not be restored for replacement credit. This is really more of an editorial change than a substantive one, as the same prohibition is contained in another part of the rule, part 8420.0540, subpart 2. That provision states:

Wetlands drained or filled under an exemption may not be restored for replacement credit for ten years after draining or filling.

The wisdom of that restriction was another of the five Issues identified for particular comment.

40. During the rule drafting process, some persons argued that if a wetland is drained under an exemption (so that it is not replaced elsewhere) ,

it should never be allowed to be restored for "credit" so that some other wetland can be drained in its place. Other persons felt that an absolute prohibition was too severe, and that some length of time (ten years was ultimately selected) would be long enough to discourage abuses of the exemption provisions. One of the most widely debated topics was whether or not created wetlands were as good as restored wetlands in terms of providing biological diversity and wetland values. Those people who favored a ten-year limitation, as opposed to an absolute prohibition, pointed out that restoring an old wetland is often better than creating a new one, and that one of the act's goals was to restore previously drained wetlands.

41. The Board, in its Statement of Need and Reasonableness and in its post-hearing comments, took the position that a ten-year limitation was adequate to prevent abuse, yet still allow the use of previously drained wetlands for replacement. The Administrative Law Judge concludes that the Board has demonstrated the need for and reasonableness of its two proposals regarding these agricultural exemptions -- that it is desirable to repeat the ten-year limitation in each exemption so that it is clearly understood, and that it is appropriate to record the fact that an exemption has been taken in all locations, not just in cities.

42. Exemption 3 relates to drainage systems. The statutory exemption allows the following: "Activities necessary to repair and maintain existing public or private drainage systems as long as wetlands that have been in existence for more than 20 years are not drained." The Board's rule goes on to specify how spoil material from the repair and maintenance activity must be dealt with and what documentation is required.

43. The bulk of the opposition to the Board's rule was really directed at the statute, for it is the statute that contains the 20-year wetland provision. The gist of the comments was that if a landowner had paid for the

right to drain land, the landowner ought to be able to exercise that right at any time, and if that requires repairing or maintaining an unused ditch, then the landowner ought to be able to do so without any time limitation. See, for example, Tr. 55-56, 237, 248-49, 324. The pros and cons of this question will not be discussed here, as the 20-year rule merely tracks the statute, and any changes must come from the Legislature.

44. A Marshall County commissioner pointed out that the exemption does allow the filling of a wetland resulting from the side casting of spoil materials when the wetland is located within the right-of-way acreage of the ditch. Some of the ditches in Marshall County do not have any right-of-way beyond the width of the ditch itself, and thus would not be able to use the exemption for the efficient placement of spoil materials. Tr. 293. The Board acknowledged that its intent had been to allow for side casting, and proposed the addition of language which would allow side casting either within the right of way or within a one-rod width on either side of the top of the ditch, whichever is greater, so long as the spoil deposition area is permanently seeded into grass to avoid erosion problems. The Administrative Law Judge finds that this is a reasonable accommodation for those ditches without rights-of-way, and that it is not a substantial change.

45. Exemption 6 deals with activities authorized under general permits issued by the United States Army Corps of Engineers. It tracks, verbatim, a statutory exemption. The record suggests that since the time that the act was

passed in the spring of 1991, there have been changes to the Corps' program and negotiations between the Corps and the Minnesota Pollution Control Agency over appropriate regional conditions have caused the language in the act and the rule to be out of date. There did not appear to be any substantive disagreement with the concept of the exemption; rather, the problem occurs as a result of changes in the Corps program. The Board may want to consider seeking legislative amendment of the statute so that it can adopt the current version of the Corps exemption.

46. Exemptions 7 and 8 are expected to be two of the most frequently used exemptions, and the ones that triggered much of the debate over the definition of "agricultural land". Exemption 7 exempts activities in a Type I wetland on agricultural land (except for bottomland hardwood type I wetlands), while Exemption 8 exempts activities in a Type 2 wetland on agricultural land that is two acres in size or less. In the case of both exemptions, Representative Marsh (Letter of December 28) recommended that the rule be changed so that the local government unit would be required to seek the advice of the technical panel as to whether the wetland were a type I or 2 wetland or not, rather than the Board's permissive language which merely allowed the LGU to seek the advice of the technical panel. Marsh felt that it was a clear violation of legislative intent not to require the use of the technical panel for these two exemptions. A similar issue arises in later language regarding the role of the technical panel in connection with replacement plans.

47. There is a statutory provision which discusses the role of the panel in connection with replacement plans, but the Administrative Law Judge does not read that provision as extending to exemptions. There is no corresponding statutory directive regarding the technical panel's use for exemptions. Therefore, the Administrative Law Judge does not believe the Board's proposed language for these exemptions conflicts with the statute.

48. Substantial criticism was directed at the exemption for road and

bridge maintenance. The statute, at section 103G.2241, subd. 1(a)(16) exempts:

Activities associated with routine maintenance of existing public highways, roads, streets, and bridges, provided the activities do not result in additional intrusion into the wetland and do not result in the draining or filling, wholly or partially, of a wetland.

The rule explains that this exemption does not prevent repairing washouts or adding material to the driving surface so long as the road's occupancy of the wetland does not increase.

49. Many comments were received to the effect that this exemption is too limited, and that it ought to allow for upgrades to improve the safety of roads without having to go through the entire process of the rules. A number of persons pointed out that forest roads were treated better than public roads, even though forest roads often went through more "pristine" areas and were for private profit, rather than the public good. The Board's basic reaction to the testimony was to point out that there was another exemption available for the maintenance of existing roads -- the use of Corps Nationwide Permit 14, which the Legislature did allow to be used for maintenance of existing roads, but not for new roads. Pursuant to Exemption 6 of these

rules, work which is done in conformity with Corps Permit 14 (except for new roads) would be exempt. Tr. 120.

50. The Administrative Law Judge finds that the complaints regarding road maintenance must be directed to the Legislature, not to the Board. The Board has in no way restricted the availability of the exemption as it is written in the statute, and if it is going to be changed, it must be changed by statute.

51. An interesting alternative is proposed by Wright County. The county pointed out that its highway department has worked with the local soil and water conservation district to restore wetlands along highways and create additional wetlands. The County proposes that if a wetland is the result of highway construction, then some reasonable intrusion ought to be allowed for highway maintenance. The County points out that if maintenance is going to require mitigation in the future, then the County may not make such an effort to create new wetlands in the future. Tr. 857.

52. A question has arisen as to whether or not a person draining or filling a wetland under an exemption must obtain an exemption certificate from the LGU, or whether the exemption certificate process is merely voluntary. The statute is silent on the question. The Board's proposed rule makes it voluntary on the part of the landowner, but specifies that if a landowner does request a certificate of exemption, and is entitled to one, then the local government unit must issue one. The rule specifies, however, that an exemption applies whether or not the LGU chooses to issue certificates of exemption or not.

53. Representative Munger urged that certification be mandatory. He pointed out that a formal certificate would make it easier for owners, contractors and enforcement officers to deal with the legitimacy of an action. Tr. 813. Others, however, urged that there was no reason to have a certificate in each case, and it was appropriate to leave it up to the

landowner as to whether or not one was obtained. The utility industry, for example, felt comfortable without obtaining one in each case, feeling it would be a waste of time for both them and the LGUs. Letter of January 8. The Association of Minnesota Counties thought the current language was just right, because it did allow the landowner the option. Letter of January 8. The Builders Association of Minnesota urged that the rule be clear in setting forth whether or not a certificate was required. Letter of December 31.

54. The Administrative Law Judge concludes that the Board has justified its rule as reasonable. As will be discussed below, there were numerous complaints from LGUs regarding the cost of this program, and requiring a certificate in each case would only add to the cost for both LGUs and landowners. Giving the landowner an option to obtain one or not is a reasonable approach.

Minimis Prgvision

55. The Act does not contain any de minimts provision. The Board felt, however, that it must specify some amount of impact that is so small as to not warrant attention. The Board picked 100 square feet as that amount, reasoning that it was small enough not to conflict with the Legislature's decision to

put no minimum size in the Act, and yet not so small as to be totally meaningless. The Board coupled that with restrictions to avoid cumulative impacts that would exceed that amount. The proposed rule reads as follows:

A landowner unsure if proposed work will result in a loss of wetland may apply to the local government unit for a determination. The local government unit shall issue a no-loss certificate if . . . the draining or filling will be minimal and not warrant replacement. This item is applicable if the total wetland loss will be less than 100 square feet per year per landowner, and the cumulative impact on a wetland over time without replacement after January 1, 1992, of draining and filling by all persons does not exceed five percent of the wetland's area.

56. This provision drew a host of negative comments, and only a few supportive ones. Most commentators said 100 square feet was too small. Recommendations were made for one-tenth of an acre, one-half an acre, one acre, two acres, three acres, all the way up to five acres. The basic concept expressed was that the administrative time and money, both for the landowner and the LGU, to deal with very small wetlands was simply out of proportion to their value, and there should be some realistic de minimis provision. One commentator pointed out (advocating four or five hundred square feet "as a bare minimum") that the law should generally follow ordinary peoples' perception of what is minor and what is not minor, and 100 square feet was simply too small. Tr. 22. Cass County, which has been operating under the interim rules, has 71 open files, and 80% of them deal with areas less than 2,000 square feet. The County noted that jurisdictional size is a statutory issue, but if there is no change in the statute, then there must be some streamlining of the process for very small parcels. Tr. 413. Representative Munger pointed out that the Legislature did not include any minimum impact provision, and urged that any attempt to enlarge the size from the 100 square feet should be discouraged. Tr. 810.

57. In its post-hearing submission, the Board pointed out that the difficulty with setting any particular limit is the fact that the Legislature elected not to: The Legislature rejected the Corps' Nationwide Permit No. 26,

which exempts isolated wetlands less than one acre in size, and the Legislature did not extend its one-half acre exemption for utility lines even so far as to include public roads. In light of this history, both the Wetland Heritage Advisory Committee and the Rule Working Group accepted 100 square feet as the maximum that could be allowed without encroaching on the legislative judgment. The Board pointed out that the Act was passed in order to protect wetlands that were not protected by other agencies, and thus proposals to increase the de minimis amount to the same amount as the Corps of Engineers or other existing permit programs would be pointless. As will be discussed more fully below, the Board did propose a change in an attempt to streamline some of the procedural requirements applicable to small wetlands, but left the 100-square de minimis amount intact.

58. The Administrative Law Judge agrees with those who claim that it is for the Legislature, not the Board, to determine the scope of the law. The general rule is that the Legislature may confer discretion on an agency regarding the execution or administration of the law, but it may not give an

agency the authority to determine what the law shall be or supply a substantive provision of the law which the agency believes the Legislature should have included in the first place. Wallace v. Commissioner, 184 N.W.2d 588, 594 (Minn. 1971). An agency cannot limit its jurisdiction through rulemaking. The Legislature, not the agency, determines the scope of the agency's jurisdiction. Leisure Hills of Grand Rapids, Inc. v. Levine, 366 N.W.2d 302, 304 (Minn. App. 1985). On the other hand, it is absurd to believe that the Legislature intended that every square centimeter of wetland be protected. State v. Kulvar, 266 Minn. 408, 123 N.W.2d 699 (1963). It is permissible for an agency to draw a "line of absurdity", but any more substantial limitation on its jurisdiction must be drawn by the Legislature, not the agency. The Administrative Law Judge believes that 100 square feet is a reasonable choice for a de minimis provision based on a "line or absurdity" rationale. It is up to the Legislature to decide if some more substantial number ought to be used.

59. Minnesota Power, on behalf of the utility industry, pointed out that the language regarding issuance of a no-loss certificate was not as clear as the language regarding an exemption certificate, and that it ought to be clear that a certificate was not required in each case, as that would be a waste of LGU time. The Administrative Law Judge agrees that the language is not as clear, but that the outcome of the two is the same. To avoid confusion, however, he suggests that the Board consider taking language from the first paragraph of part 8420.0210, the exemption provision, and use it in the no-loss provision, so that there is no question but that a certificate is not required. The existing no-loss determination is not unreasonable or illegal without the change, but clarification would assist readers.

Replacement Plan Procedure

60. A person desiring to drain or fill who does not qualify for one of the exemptions or no-loss provisions is required to replace the lost wetland

values. The statute requires that the process for this replacement is to be the preparation of a replacement plan, followed by approvals from the LGUs involved. The details of that process drew substantial criticism as being too complicated, too onerous, and too time consuming, particularly for small impacts. After noting its belief that it could not increase the de minimis impact without a legislative change, the Board did propose to modify the procedures so as to minimize the work required for small impacts. Some of those changes are discussed below.

The initial draft of the rule imposed the same notice requirements for applications on all replacement plans, regardless of size. A number of commentators recommended that this be changed, to more appropriately tailor the notice requirements to the size of the impact. The Dakota Soil and Water Conservation District and the Builders Association of Minnesota, along with a number of others, all recommended that there be some streamlining of the notice for smaller projects. The Board has now proposed that the procedures be different depending on the size of the project. The Board divided projects into three classes: 0.1 acres or less; 0.1 acres to 0.5 acres; and 0.5 acres or more. With regard to notice, for example, the largest impacts (one-half acre or more) would have to give notice to all of the entities listed in the statute, including publishing in the EQB Monitor and a local newspaper. However, for impacts between .1 and .5 acres, the requirement for publication

in the EQB Monitor would be dropped. For the smallest class of impacts, only those agencies who requested notice would have to receive it, and there would be no notice to the Board itself or publication in a local newspaper or the EQB Monitor. Instead, the governing Board of the LGU and the technical evaluation panel and the watershed district or watershed management organization would be the only required notifications.

61. The statute, in section 103G.2242, subd. 6, requires that certain notification and publication occur whenever a replacement plan is filed with an LGU. The statute makes no exceptions for small impacts or medium sized ones. It treats all of them the same. In the face of clear statutory language requiring that something occur, the Board cannot adopt a rule which imposes the requirements on some applicants but not all. Presumably the Board would advocate the same "line of absurdity" rationale that was adopted earlier, but it does not apply in this kind of a situation. If the Legislature wants the Board to receive a copy of every replacement plan, no rule can vary that requirement. If the Legislature wants notice published in the EQB Monitor or wants neighbors notified by publication in a newspaper of general circulation, it can require that. None of those requirements are so absurd as to place them beyond the "line of absurdity". The Board's proposed modifications to the notice provisions of part 8420.0230 (page 25, line 6 through 19, along with lines 23 and 27) conflict with the statute, and cannot be adopted. In order to cure this defect, the Board must either return to its original proposal, as published in the State Register, or propose language which does not conflict with the statute.

Technical Evaluation Panel Makeup

62. The statute, in section 103G.2242, subd. 2, specifies the following:

Questions concerning the public value, location, size, or type of a wetland shall be submitted to and determined by a technical evaluation panel after an on-site

inspection. The technical evaluation panel shall be composed of a technical professional employee of the board, a technical professional employee of the local soil and water conservation district or districts, and an engineer for the local government unit. The panel shall use the "Federal Manual For Identifying and Delineating Jurisdictional Wetlands" (January 1989). The panel

shall

provide the wetland determination to the local government unit that must approve a replacement plan under this section, and may recommend approval or denial of the plan. The authority must consider and include the decision of the technical evaluation panel in their approval or denial of a plan.

While a great deal of controversy focused upon the role of the technical panel, an initial matter which must be discussed is the makeup of the panel.

The Board has proposed the following rule:

For each local government unit, there is a technical panel of three persons: A technical professional

employee of the board, a technical professional employee of the soil and water conservation district of the county in which the activity is occurring, and an engineer or their designee for the local government unit. One member selected by the LGU shall act as the contact person and coordinator for the panel. Two members of the panel must be knowledgeable and trained in applying methodologies of the [federal manual], and evaluation of public values. The technical panel may invite additional wetland experts to help the panel in its work.

63. Several counties complained that the rule constituted "micro management", and that they ought to be allowed to have a variety of people on their panels. Lake County, for example, has placed other persons on interim panels, and intends to continue to do so for "grass roots" input. Tr. 438. St. Louis County has a wetland coordinator, a DNR hydrologist, a county land department specialist, etc., that they would like to be able to place on their panels. Tr. 470. Both want the flexibility to name their own panels.

64. The Board responded to these suggestions by pointing out that the statute mandates the membership of the committee, and that adding other voting members of the panel raises the possibility of the panel being "stacked" one way or the other. The Board noted that adding additional members as technical advisors or ex-officio members is a good way to involve local citizens, resource managers, scientific experts, etc., but that limiting voting rights to the three members prescribed in the statute is appropriate.

65. The Administrative Law Judge finds that the Board has justified its proposal as reasonable. The statute binds the Board, and the Board's rule is reasonable. The Board did make other minor changes in response to public input, but none of them are substantial.

Technical Evaluation Panel Role

66. One of the five issues identified by the Board for particular attention was the question of the Technical Evaluation Panel's role.

The basic question is whether or not the panel must be used whenever a replacement plan is submitted to a local unit of government, or whether the

technical panel need only be used when a local unit of government has questions. The Board's Rule Working Group was unable to reach consensus on this issue, but the Wetland Heritage Advisory Committee elected to have the panel review all plans and make recommendations on those plans to the LGU. That was the position set forth in the second paragraph of part 8420.0240. When it made that decision, however, the Advisory Committee did not notice that it also needed to adjust language in another section in order to keep the two consistent. That other section is part 8420.0510, subp. 3, which proposes using the panel only when questions arise. Therefore, the rules as published in the State Register contained an inconsistency, but the Board's notice of a hearing alerted people to this issue so that a great deal of comment was received.

67. The weight of the comments supported the optional use of the panel, primarily because of perceived difficulties of cost and time if the panel were

to be used in each case. Todd County, for example, indicated that between April 1 and December 7 of 1992, it received 70 applications for replacement plan approvals. It pointed out that in the summertime, spring and fall, county engineers are really busy, and that the Board conservationist who must also be on the panel, has to cover more than one county. Tr. 46. The City of Breezy Point, in Crow Wing County, suggested it might take three or four months to convene the panel, given the workload of the various people involved. Tr. 374. Even the American Society of Civil Engineers, whose members might be hired to staff technical panels in particularly busy areas, believes that it would be impractical to have a panel in every case. Tr. 433. The Gun Club Lake Watershed Management Organization (in Dakota County) indicated that its experience is that the majority of wetland replacement issues can be addressed in a technically sound manner without going through the time and expense of convening the panel. The Ramsey-Washington Watershed Board said a large majority of impacts are clear, and no questions arise. Both urged that LGUs be given the discretion of when the panel should be used.

On the other hand, there were persons who urged that the panel should be used in every case, and never be bypassed. The Minnesota Wildlife Society indicated that the purpose of the panel was to ensure that technical decisions are based on scientific analysis, and the technical panel was clearly designed to provide just that. Tr. 40. The Wetland Conservation Coalition, a coalition of environmental and sports groups, urged that using the panel in each case would result in fair and uniform decisions across the State. It argued that this was a compromise between those who wanted a centralized program and those who wanted a decentralized one, and that using the panel in all cases would at least provide some objective input into a decision that might otherwise be driven by the temptation for development and tax revenue. Tr. 88 and letter dated December 31. Representative Munger indicated that the

panel should be used in every case so that the LGU decisions are based on the most information possible. Tr. 809.

68. After considering all of the comments, the Board chose to modify the rule to clarify that the panel need only participate on an as-needed basis, but that it had to be used upon request of the LGU, the landowner, or any member of the panel itself. The Board felt this arrangement provided checks and balances, but placed responsibility with the LGU for making decisions on routine projects without requiring another level of review.

69. The Administrative Law Judge finds that the statute is not clear with regard to whether the LGU was to be used in all situations, or only when there were questions. He further finds that the Board's modification is a reasonable one, and may be adopted. It is not a substantial change in light of the notice which was given.

Appeals

70. The statute contains a definite procedure for appealing an LGU's approval or denial of a replacement plan. But the statute does not deal with appeals from other LGU decisions, such as exemptions and no-loss determinations. Initially, the Board had proposed that all appeals of decisions based on the rules go to the Board, but that appeals of exemption or no-loss determinations must first be appealed to a local government's board of adjustment or appeals or to the governing body of the LGU.

71. During the comment process, criticisms came from those who pointed out that any citizen would have the right to appeal and block a project, probably for a whole construction season, and there was no provision for separating frivolous appeals from serious ones. Letter of Urban Wetland Management Coalition dated December 31. Others pointed out that some LGUs did not have boards of adjustment and appeals and that a variety of structures must be accommodated. Association of Minnesota Counties, December 30.

72. In its post-hearing submission, the Board made proposals for changes to respond to these comments. First of all, the Board noted that the statutory appeal provisions apply only to replacement plans, not all appeals, and so the Board tried to adopt the statutory requirements only for replacement plans. For exemptions and no-loss determinations, the Board established a procedure whereby only the landowner had an absolute right to appeal an exemption or no-loss determination, and before doing so, the landowner must exhaust all local administrative appeal options. Others who might want to appeal an exemption or no-loss determination were limited to those required to receive notice of replacement plan decisions, and those persons did not have an absolute right to appeal. They were granted the right to petition the Board to hear an appeal, but the Board was empowered to grant or deny the petition.

73. There are two problems with the Board's modified plan. First of all, the statute specifies that appeals from replacement plan decisions may be made by any of the following people: "the wetland owner, by any of those to whom notice is required to be mailed under [103G.2242] subdivision 7, or by 100 residents of the county in which the majority of the wetland is located." The Board has attempted to restrict appeals to the following: "the landowner, any of those required to receive notice of the decision as provided for in part 8420.0230, or by 100 residents of the county in which a majority of the wetland is located." The rule reference, however, refers to the list of

people which the Board sought to reduce as described in Finding 61 above. In other words, by attempting to change that list of people, the Board has also changed the list of people who would be entitled to appeal a replacement plan decision. That is contrary to the statute. The statute sets forth the required list, and the Board cannot alter that. Therefore, in order to cure this defect, the Board must modify its proposed language for page 28, lines 14 through 16, to comport with Minn. Stat. § 103G.2242, subd. 9. The Board may use whatever stylistic device it chooses to deal with the cross-references between subdivision 7 and subdivision 9, but it cannot alter the substance of the statute.

74. The other problem raised by the Board's proposal is that the rule allows the Board to grant or deny an appeal petition from an exemption or no-loss determination, but there are no standards in the rule to guide its decision. It is well settled in the law that a rule which grants discretionary authority to an administrative officer must have a "reasonably clear policy or standard of action" so that it is clear that the action is occurring by virtue of its own terms, and not according to the whim or caprice of the administrative officer. *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); *Andersn v, Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964); *Beck, Bakken & Muck, Minnesota Administrative Procedure*, § 24.4 (Butterworths, 1987). In order to cure this defect, the Board must either return to a position whereby all appeals are accepted by the Board, or provide

reasonable standards to guide the Board's discretion. An example of such limiting language might be the following:

The Board shall grant the petition unless it finds that the appeal is meritless, trivial, or brought solely for the purposes of delay. In determining whether to grant the appeal, the Board shall also give consideration to the size of the wetland, other factors in controversy, any pattern of similar acts by the LGU, the landowner or the petitioner, and the consequences of the delay.

The Administrative Law Judge does not mean to suggest that those are the only factors which the Board might want to enumerate, or that all of them are appropriate. Rather, he is attempting to give some guidance to the Board in understanding the kind of restrictions that must be Imposed on the Board's discretion.

Enforcement Procedures

75. Part 8420.0920, subp. 2, includes a provision for delayed effective dates on cease and desist orders. It provides that a cease and desist order with a delayed effective date (three weeks from the date of issuance) can be issued when it is not readily apparent whether an activity is exempt or within the no-loss provisions, and continued drain or fill activity would not cause irreparable harm to the wetland. The rule requires the enforcement authority to advise the landowner that an application should be made immediately to the LGU and that if the LGU determines that the activity is not appropriate, restoration may be required. The rule goes on to provide that in those cases where an application for exemption certificate or no-loss determination is triggered by a cease and desist order, the LGU must make a decision "within three weeks from the date of the application or sooner if the landowner requests."

76. This provision received a number of comments. A Goodhue County official pointed out that giving the landowner the option to request a decision "sooner" places an unnecessary burden on the LGU. She asked whether there was any limitation on "sooner", so that an unreasonable request would

not have to be honored. Tr. 949-50. A Todd County administrator asked what happens if the decision is not issued within three weeks -- is the violator "off the hook"? Tr. 45. The Administrative Law Judge believes that since the rule fails to state the penalty for not meeting the three-week period, it is discretionary, not mandatory, and the party seeking action would be forced to go to court for a writ. The Board may want to consider specifying an outcome, but given the variety of circumstances which can occur, it may be best to leave it for a case-by-case determination. The rule is not defective without specifying an outcome. The first comment, however, does point out a problem which must be dealt with.

77. The provision that requires the LGU or technical panel to make a decision within three weeks from the date of the application "or sooner if the landowner requests" has not been demonstrated to be reasonable. There is no defense of it in the SONAR or hearing record, and common sense suggests it is unreasonable. This defect can be cured by either deleting the last phrase, so that the decision would have to be made within three weeks. Another way to

cure the defect would be to add limiting language to make sure that the request for "sooner" is reasonable under the circumstances. The Administrative Law Judge recommends that the phrase "or sooner if the landowner requests" be deleted, as it would be difficult to draft language that would cover all the possible eventualities.

Replacement Plans: part 8420.0500_to 8420.0630

Sequencing.

78. The Act makes it clear that impacting one wetland and replacing it with another is to be the last resort solution to a problem, The problem must be first addressed by avoiding the impact, minimizing the impact, rectifying the impact, and reducing or eliminating the impact over time. The Act directs that these principles are to be used "in descending order of priority", and that replacing or providing a substitute wetland is to be the last option. The rules on sequencing reflect that legislative priority. They require an applicant who wants to impact one wetland and replace it with another to first demonstrate attempts to avoid, minimize, rectify, etc. The detailed showing required, however, was characterized as "silly", "excessive", "unreasonable", and "impractical". Commentators were particularly concerned when the full sequencing procedures were applied to small impacts, believing that the time and expense required to document the required steps was out of proportion to the impact.

79. The Board responded to these criticisms by proposing to delete the requirement for written documentation in the case of projects impacting wetland areas less than 0.1 acres. The Board proposed that in those cases, the local government unit could provide an on-site sequencing determination without the written documentation. The Board proposed exceptions to that, however, for projects within certain distances of outstanding resource value waters, trout streams, and trout lakes. The Board's proposal for small wetlands would not remove the requirement that the LGU must assure itself that

avoidance, minimization, etc. has occurred. That requirement would still apply. All the Board's modification would do is remove the documentation requirements for those small wetlands less than 0.1 acres.

80. The Administrative Law Judge finds that the Board has justified its proposed change. Although the change was drafted in connection with changes to the notification requirements which were found to conflict with the statute (see Finding 61 above), the change to reduce the documentation does not conflict with any statutory requirement. What the statute requires is that the LGU be guided by the principles of avoidance, minimization, etc. The statute does not specify what documentation is required. The Board's modification on documentation may be adopted.

81. The Board had proposed to insert its language relating to wetland areas less than 0.1 acres on page 44, at line 3. This would seem to "bury" the language in the middle of a paragraph relating to alternatives. It would make more sense if the proposed insertion were a stand-alone paragraph, so that it was clearly seen by persons not familiar with the rules. This is solely an editorial suggestion, however, not a requirement.

Replacement Plan Components

82. The amount and detail of information required in a replacement plan application was attacked as "onerous and expensive" by groups such as the Urban Coalition (Letter of December 31), the Douglas Soil and Water Conservation District (which questioned cost effectiveness at Tr. 28) and the Todd County Administrator, who labeled them "unreasonable". Tr. 46.

83. In response, the Board has reduced the amount of information required for plans utilizing the wetland bank. The Board has also proposed a number of more detailed changes in an attempt to make the application more "user friendly". The Board has committed to the development of standardized forms and procedures to be contained in an administrative manual (post-hearing submission, at p. 19). The Administrative Law Judge finds that the Board has justified the amount of detail required in the replacement plan provision. Since many of the smaller impacts are likely to be mitigated by the wetland bank, simplifying the application paperwork for projects utilizing the bank will alleviate some of the concern expressed.

Replacement Plan Evaluation Criteria

84. Another of the five major issues identified by the Board is a provision which prohibits the use of a previously drained wetland, which was drained pursuant to an exemption from the replacement requirements, as the replacement for a new impact, for a period of ten years from the time that the original wetland was impacted. An example may help explain this somewhat complicated idea. A landowner has two wetlands on his property, one of which is exempt from the Act, the other one is not. This rule would prohibit the landowner from draining the first wetland under the exemption, and then turning around and using it as replacement for draining the second wetland. The Board has proposed that the restriction against using an exempted wetland for replacement extend for ten years from the time that it was originally drained or filled. However, the Board recognized that there were some who

believed that such wetlands should never be allowed for use as replacement wetlands because it would be contrary to the no net loss goal of the Act. The argument in favor of the ten-year limitation is that one of the Act's goals is to restore natural wetlands, and ten years is long enough to deter those "schemers" who would attempt to abuse the law by taking advantage of the exemption. See, for example, Tr. 320. Indeed, some argued that ten years was too long, and that it ought to be reduced to five years. Tr. 418. Both the MPCA (letter of December 30) and the Urban Wetlands Management Coalition (letter of December 31) supported the ten-year compromise, arguing that it will prevent "deals", but will also allow the use of natural wetlands for restoration.

85. The Administrative Law Judge believes that the Agency has demonstrated the need for and reasonableness of its proposed rule which would allow wetlands drained under an exemption to be used as replacement wetlands after ten years had passed. While it does allow for a loss, the 2:1 ratio on many replacements should make up for that loss, so there will not be a net loss. Moreover, the arguments favoring restoration of natural wetlands, as opposed to created ones, support this provision. It is unlikely that many people will bother to drain an exempt wetland now so it will be available for

restoration ten years from now. The benefits outweigh the risks, and the Board has justified its position.

86. Both the statute and the rule require that replacement of wetland values must be completed prior to or concurrent with the actual draining or filling of a wetland, unless an irrevocable bank letter of credit or other security acceptable to the local government unit is submitted to guarantee successful completion of replacement. However, one of the goals of replacement is the replacement of impacted plant life, and a later rule, part 8420.0550, subp. 2 E. states that when feasible, organic soil used for backfill of a restored wetland should be taken from the impacted wetland. One commentator thought these two provisions were irreconcilable, particularly when it may take weeks or even months for a drained wetland to dry out enough to allow earthmoving equipment to be used. Letter of Dennis Miller, December 29. The Administrative Law Judge does not believe the two are fatally irreconcilable, because of the flexibility inherent in terms like "concurrent with" and "when feasible". However, the Board may want to consider asking the Legislature to allow a reasonable period of time, say one or two months, to allow for the transfer of organic soil from the old wetland to the new. While a bank letter of credit could be used to facilitate this, it seems an unnecessary penalty to place on the landowner who is attempting to comply with the soil transfer rule.

87. An error occurred in the preparation of the final draft of part 8420.0540 so that two sentences were omitted from the version as published in the State Register and mailed out to interested persons. This error was announced at the start of each hearing session except for the first two sessions in Alexandria. The first announcement of the error occurred at the start of the afternoon session in Thief River Falls (Tr. 206) and was made at all subsequent sessions. In addition, an errata sheet describing the omission was distributed at each of the hearing sessions except for Alexandria. Ex. 19. The question arises as to whether the Board's proposed insertion of the omitted language into the rule without its being published and distributed in advance is mere harmless error, or whether it constitutes a substantial change.

88. The language at issue is to be added to part 8420.0540, subp. 6, which is on page 55, at line 12. That section deals with the required size of replacement wetlands, and contains a statement that for wetlands on non-agricultural land, the minimum replacement ratio is 2:1, but for wetlands on agricultural land, the minimum replacement ratio is 1:1. The omitted language reads as follows:

Present and future owners may make no use of the wetland after it is altered, other than as agricultural land for a period of ten years unless future replacement to achieve a 2:1 ratio occurs. The landowner must execute and the LGU must record a notice of this restriction.

As explained during the hearing sessions, and in the Board's post-hearing submission, this provision is parallel with other 10-year provisions which are designed to avoid abuses of the Act. For example, as discussed above, a wetland which has been drained or filled under an exemption cannot be used as a restoration credit for ten years after it has been drained or filled. Secondly, a wetland that has been drained or filled under an agricultural

exemption (so that no replacement is required) must stay in agricultural use for ten years. If it is converted to another use, then it must be replaced at that point, as if the land had been converted before the draining had occurred. The omitted language quoted above provides that if a wetland on agricultural land is drained but not under an exemption, but is replaced at a 1:1 ratio rather than at a 2:1 ratio, and then the land is converted to nonagricultural use during ten years, the rule requires that the replacement must be increased to a 2:1 ratio, as if the conversion had occurred prior to the draining. The Department argues that because the omitted language is logically consistent with the other two rules, persons should not be surprised to see it, even though it was omitted from the rule as published.

89. The provision was adopted by the Wetland Heritage Advisory Committee and accepted by the Board prior to the hearing. It was apparently suggested by DNR to the Wetland Rule Working Committee, but the affected section of the rule did not receive final review by the committee, and thus the suggestion was left to the Heritage Advisory Committee and the Board for their consideration.

90. The Board points out that all persons who attended the hearings, except for those on the first day, had the opportunity to comment on the proposed language, and none expressed any concern with the fact that it had not been published.

91. No persons submitting written comments criticized the proposed language as a substantial change, although it was criticized on other grounds.

92. Minn. Stat. § 14.05, subd. 2 provides as follows:

An agency may modify a proposed rule in accordance with the procedures of the Administrative Procedure Act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the Notice of Intent to Adopt Rules.

93. Minn. Rule pt. 1400.1100, subp. 2 provides as follows:

In determining whether a proposed final rule or a rule as adopted is substantially different, the Administrative

Law Judge or the Chief Administrative Law Judge shall consider the extent to which it affects classes of persons who could not have reasonably been expected to comment on the proposed rules at the rulemaking hearing or goes to a new subject matter of significant substantive effect, or makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing, or results in a rule fundamentally different in effect from that contained in the Notice of Hearing.

94. The test quoted above has four elements. The omitted language does not affect classes of persons who could not have been expected to comment on the rules at the hearing. The classes of persons affected, landowners who would take advantage of the 1:1 ratio for impacts on agricultural land, were well represented at the hearings. The added language does not go to a new

subject matter of significant substantive effect. The concepts of special treatment for agricultural land, and assuring that special status is not abused, were discussed at length. What was not discussed, however, was the concept of having to go out to acquire additional mitigation within a ten-year period if the land were converted. That is so close to the idea of having to mitigate if an agricultural exemption is used, that it certainly cannot be labeled "new subject matter". Nor does the additional language make a major substantive change that was not raised by the original Notice of Hearing. The impact of the new language is simply not "major" in the sense of these rules, and the two other parallel provisions would be likely to evoke the same response as this one.

95. The most troublesome of the four tests is the last one -- whether the new one results in a rule fundamentally different in effect from that contained in the Notice of Hearing. The Administrative Law Judge does not believe that adding the proposed language creates fundamentally different effects. A great deal of testimony was directed to the idea of recording exemptions, for example, so that buyers would know limitations on what they were purchasing. Much comment was devoted to the question of whether or not a wetland drained under an exemption could be used as a replacement after ten years. The concept of requiring additional mitigation if a conversion occurs within ten years after draining a nonexempt wetland is similar in effect to the others that the omission does not result in a rule that is "fundamentally different in effect".

96. The conclusion is buttressed by the fact that no commentator raised the substantial change issue, even though the omission was announced and explained at the start of each hearing session except for the first two, and the fact that it was highlighted by a separate handout available at each hearing session except the same two. In addition, the language must have been the subject of a specific discussion at the Heritage Commission review of the Rule Working Committee's report in order for it to have been included in the

rule as adopted by the Heritage Commission. The Heritage Commission is made up of persons with a broad range of views. Some members of the Commission did testify during the hearings, but none of them raised this as a concern. All this buttresses the judgment that this is not a substantial change.

97. MNDOT (which was aware of the potential for a substantial change issue, but did not raise it) is opposed to the rule because, they allege, it conflicts with the statute. MNDOT points out that Minn. Stat. § 103G.222 (f) and (g) provide as follows:

(f) for a wetland located on nonagricultural land, replacement must be in the ratio of two acres of replaced wetland for each acre of drained or filled wetland.

(g) for a wetland located on agricultural land, replacement must be in the ratio of one acre of replaced wetland for each acre of drained or filled wetland.

MNDOT argues that the statute does not reference activity as the prerequisite for a 1:1 replacement ratio, rather, it references the location of the wetland. MNDOT argues that the omitted language exceeds statutory authority by limiting the 1:1 replacement ratio to only agricultural activities impacting wetlands on agricultural land. They argue that the only rationale

for limiting the 1:1 ratio to agricultural activities is that of retribution on the nonagricultural community, by arbitrarily increasing the amount, and therefore cost, of their required wetland replacement. The nature of the loss itself, not the type of activity causing the loss, they believe, should be the deciding factor.

98. The Administrative Law Judge cannot accept MnDOT's argument. It is true that the determinative factor in all of the exemptions and other special benefits is whether or not the wetland is located on agricultural land. It is true that it is not the purpose for which the activity is undertaken that determines whether or not the exemption occurs. But it is the change in the status of the land which triggers the increased ratio. It is converting the land from agricultural land to some other kind of land that is at issue here, and thus the proposed language is not in conflict with the statute.

99. The final issue which must be raised in connection with these two sentences is whether or not the failure of the agency to mention them in its Statement of Need and Reasonableness violates Minn. Rule pt. 1400.0500, which is designed to allow persons to be able to fully prepare any testimony or evidence in favor of or opposition to a rule. The rule provides that if an agency presents evidence or testimony not summarized in the SONAR, and any interested person so requests, the Administrative Law Judge may recess the hearing to allow the public time to prepare their own testimony or evidence in opposition to the agency. No person made such a request, despite the fact that at all the sessions (except Alexandria) the matter was specifically called to their attention by Attorney Clapp, the rationale explained, and comment was solicited. The absence of any such comment (except from MNDOT) suggests that the provision simply was not of interest to the hundreds of organizations and individuals who did comment on the rules. Under the circumstances, no remedial action is required.

Circular 39, the Cowardin System, and the Replacement Ratios

100. Subpart 10 of Rule 8420.0540 was one of the most complicated portions of the rules because it tackles the difficult task of dealing with wetland functions and values. It is a response to the statutory requirement that the rules must:

address the criteria, procedure, timing, and location of acceptable replacement of wetland values; [and] may address . . . the methodology to be used in identifying and evaluating wetland functions

Section 103G.2242, subd. 1(a).

101. These are very difficult assignments, as there is no universally accepted methodology for dealing with values and functions. There are numerous alternatives available from various international and national organizations, as well as from other states.

102. The United States Fish & Wildlife Service has published two separate systems for describing wetlands. The first, published in 1956, is known as Circular No. 39. It described wetland basins by type (type 1, type 2, type 3, etc.) based primarily upon their use by waterfowl and wildlife. Water depth,

salinity, and/or generalized vegetative descriptions (wooded swamps, shrub swamps, etc.) were the primary criteria for typing the wetlands. However, the Fish & Wildlife Service believes that the Circular 39 system is currently outdated and, in fact, is now out of print. Letter of Decemberr 30.

103. The Circular 39 system was replaced by the Fish & Wildlife Service's Coward in system, first published in 1979, which is not based solely on waterfowl or wildlife values. It is more detailed than the Circular 39 system, and is asserted to be based upon ecological concepts and state-of-the-art knowledge of wetlands. It is the basis for the national wetlands inventory maps, and the computerized wetland data base that is being developed from those maps. It provides the basis for the 1989 federal manual which is referenced in section 103G.2242, subd. 2, as the manual which must be used by technical evaluation panels in reviewing replacement plans.

104 Many people who commented on the rule objected to the use of the Cowardin system at all. Many of them, particularly professionals who have worked with the Circular 39 system for some years, objected to the departure from Circular 39. The Board, in response, has proposed to include a conversion chart for the two classification systems. This chart is designed to allow users to determine Circular 39 wetland types based upon the Cowardin inventory maps and on-site field inspections.

105. The Administrative Law Judge concludes that the use of the Cowardin system is an appropriate response to the Legislature's requirement that the Board identify and develop a system based on functions and values. While there are legitimate complaints that the Cowardin system doesn't go as far as it ought to, and that there may be better systems available to meet the legislative goal, the Administrative Law Judge believes that the Board's choice of Cowardin is a reasonable one. The Board has submitted into the record a variety of documents illustrating various systems which are in the literature and in use in various locations. The Board is not unaware of them. However, the Board was concerned about the practicalities of using a system in the field, and chose a relatively simple one over more complex ones. One of the criticisms labeled at the Board was that it attempted to

simplify the Cowardin system too far in order to make it workable in the field. Practicality of application is a legitimate factor for the Board to consider, and so long as a system meets the minimum criteria of the statute, the Administrative Law Judge will not disturb it. See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238 (Minn. 1984).

106. The basic outline of the Board's approach to evaluating replacement wetlands is as follows: A replacement wetland should be as similar to the impacted wetland as possible, not only in terms of size, but also in terms of function and value. There must be flexibility, however, in designing replacement wetlands if they are to be used at all. There are three characteristics which, taken together, represent a reasonable assurance of similar functions and values. These are (1) the type of wetland per the Cowardin system, (2) the location in terms of watershed units, and the (3) inlet/outlet characteristics. If these three factors are the same for both the impacted wetland and the replacement wetland, then it can be said that the two are similar and one is a reasonable replacement for the other. But if any of the three characteristics are different, then the two wetlands are not similar, and it is necessary to consider whether or not some adjustment to the replacement wetland is necessary in order to at least bring

it closer to the impacted one, in terms of replacing the functions and values which have been lost.

107. Much of the complexity of the rule results from these adjustments. They are like the Income Tax Code in that the Code attempts to tax people in similar situations the same amount, but the Code gets very complex in attempting to make the situations similar. For example, one person may have a very high salary, but an uninsured catastrophic medical expense may take much of it away in a particular year. His neighbor may have a low salary, but no catastrophic medical expenses. If we assume that the two have relatively similar abilities to pay, then a fair tax system would be one which provided a deduction for the medical expenses so that the two paid roughly equal taxes. When adjustments are made not only for catastrophic medical expenses but also for home mortgage payments, charitable contributions, investments in capital equipment, child care expenses, legitimate business expenses, etc., the Code does get complex. The same kind of complexity occurs in connection with the various adjustments required by these rules. The more accurate a system is in replicating the functions and values between the impacted wetland and the replacement one, the more complex it is going to be, and the harder it is going to be to administer in the field. The Urban Wetland Management Coalition, for example, recommended an approach (referred to as the "Peterson approach") which would replace the Board's matrix and ratios with a descriptive narrative system. In this system, the impacted wetland would be examined for its functions and its values (separately) that needed to be replaced, then the community would be reviewed to see whether any of those could be adequately addressed by other permitting or approval processes, then each of the remaining unreplaced functions would be evaluated against narrative criteria, which may or may not be quantitative depending on what is known about them. The Administrative Law Judge believes that such a system (if well written and well applied) might yield a more accurate replacement than the Board's system. But he also agrees with those who complained that

the Peterson approach requires highly training personnel and time (and money) for analysis. Letters from DNR of December 31 and January 8. The Administrative Law Judge notes that for projects of unusual complexity or replacement plans that have been denied and are on appeal, the LGU may evaluate the replacement plan using Minnesota wetland evaluation methodology or any other scientific methodology approved by the Board. Therefore, the Peterson approach could be used (if approved) for unusual projects.

108. Another criticism leveled at the Board's index system is that it has the potential to require more than a 1:1 or 2:1 replacement for each impacted acre. The Urban Coalition submitted an example that ended up with more than four acres of replacement for each acre lost. The Board's response is that if it is necessary to go above 1:1 or 2:1 in order to replace the wetland values, then the rules may require it. SONAR, pp. 30-31. The Administrative Law Judge finds that the increased ratios reflect an attempt to compensate for lost values in a rough, but practical manner. As discussed above, the costs of recreating values on a strict acreage basis would require a level of technical expertise and sophistication which neither the State nor the LGUs can afford. The tradeoff for a reduced level of values protection is an increased quantity of acreage. The Board recognizes this tradeoff and the Administrative Law Judge accepts their rationale as a reasoned one, which is not in conflict with the acreage ratios in statute.

Wetland Banking

109. Many persons objected to the "one size fits all" aspects of some of the rules proposed by the Board. They stated that the geography, soil and historic drainage differences between northwestern Minnesota, northeastern Minnesota, southwest, southeast, and metro areas required more flexibility than the rules allowed. The Board's attempt to accommodate these differences included a number of items, but one of the primary ones was the ability to use a wetland bank to mitigate impacts from draining or filling. The Board is authorized by Minn. Stat. § 130G.2242 to adopt rules to establish a wetland banking program, and the Board has done so. The basic idea behind the bank is that it provides an alternative procedure for replacing lost wetland values when project-specific replacement is impossible or impractical.

110. The major issue in connection with wetland banking is whether or not created wetlands ought to be allowed for deposit into the bank, or whether the bank should be limited to accepting only restored wetlands. This issue was one of the five issues highlighted by the Board for particular attention, and a high percentage of all of the comments included statements about this Issue.

111. The statute does not provide any limitation on the use of created wetlands for the bank.

112. Initially, the Board proposed that only restored wetlands would be eligible for deposit into the bank, and created wetlands would not be eligible. The underlying reason for this limitation was the belief that it is extremely difficult to create a truly functioning wetland where no wetland previously occurred, and that it is ecologically better to restore an old wetland than to try to create a new one. The Board reasoned that since the whole idea of a bank was optional, it was not illogical to limit it to the more promising type of wetlands. SONAR, p. 39. Representative Munger indicated that wetland banking was discussed by the Legislature as a system

for banking restored wetlands only. He did not support the use of created wetlands for banking because they do not function well as wetlands. Tr. 809. Other reasons for avoiding created wetlands are that it makes it very easy to convert numerous small losses into one large replacement ("clumping"), particularly when a dam or dike is built to impound a watercourse. DNR letter of January 8. In oral testimony, the DNR argued that there are more than nine million acres of drained wetlands available for restoration, and restoration should be favored. Tr. 841. The Department went on to state that if created wetlands were allowed to be banked, they should be limited to excavations, rather than impoundments, because impoundments often inundate existing wetlands and also have the undesirable "clumping effect".

113. Testimony at the hearings, and in written comments, favored the use of created wetlands as a major relief valve for mitigation in certain parts of the State. Urban real estate, for example, may be difficult to acquire and extremely expensive; taking lands away from woodlands or open spaces is a public detriment which should be weighed in the balance. Letter of Raymond D. Haik on behalf of Minnesota Association of Watershed Districts dated December 23. Counties with very high percentages of their wetlands never having been drained (counties like Lake and Cook have had less than five percent of their presettlement wetlands drained), have very few opportunities to restore wetlands locally, and thus would be forced to purchase restoration credits from the south and western parts of the State where there are many

opportunities for restoration. Many argued that allowing created wetlands to be banked would be fairer to all counties. Advocates also argued that the statute specifically allows created wetlands to be used in replacement plans, and since banking is simply an alternative process for achieving replacement, creation should not be excluded from the bank. MNDOT, along with virtually every county highway department, argued that there have been numerous examples of successful wetland creations and that many of the Board's own wetland replacement standards are taken from MNDOT design guidelines. Letter of December 24. Proponents of created wetlands also argued that there will be thorough, site-specific review by the LGU, the technical evaluation panel, and other interested parties, and this should heighten the chances for success. They point to the limitations in the proposed rules which require that only functioning wetlands can be deposited in the bank to begin with, and suggest that nonfunctioning created wetlands can be avoided by that mechanism.

114. In its post-hearing submission, the Board proposed a compromise, essentially based on the DNR position. The Board pointed out that the record did contain actual examples of good created wetlands, as well as a number of suggestions for limiting the use of created wetlands so as to maximize the chances for their success. The Board recommended allowing created wetlands to be banked, but proposed limitations on the use of created wetlands. The primary one is that they would either have to be constructed by excavation or, if they were constructed by impoundment, they would have to be limited to less than ten acres in size, The Board also proposed to impose a longer "waiting period" for created wetlands before they could be approved (by the technical panel) for deposit in the bank.

115. The Administrative Law Judge concludes that the Board has demonstrated the reasonableness of its position to allow banking of created wetlands. There is no question but that there have been some created wetlands in other states which have been environmental failures, but with the

limitations and safeguards present in these rules, the risk of that occurring here have been reduced. The equities to some parts of the State, and the efficiencies for mitigating very small impacts, outweigh the small risk remaining that created banking will be a detriment to the biological diversity required by the Act.

116. Another typographical error occurred in the rules at page 77, line 10. It is part of a provision designed to avoid "clumping" which provides that as an incentive to encourage the restoration of small wetlands, the LGU shall "devalue" restored acreages greater than ten acres by ten percent, while restorations of zero to ten acres would receive 100% credit for their acreage. The rule as published went on to provide:

The local government unit may modify the credit given, up to a maximum of 100%, if unanimously agreed to by the technical panel.

The word "unanimously" should have been removed from the version of the rule as published, but it was not. Both the Board and the utility industry (Tr. 766 and Minnesota Power letter of December 30) noted that the Wetland Heritage Advisory Committee had stricken the word, but that it inadvertently had reappeared in the Revisor's draft of the rule. The Administrative Law Judge has reviewed the minutes of the Advisory Committee meeting, and agrees that those minutes reflect that the word was removed. It is appropriate that

it be removed from the final version of the rule in light of this history. It is a harmless error, and its removal is not a substantial change.

117. There were complaints registered about the "devaluation", primarily because it is not in the statute. MNDOT letter of December 24. The Administrative Law Judge reads the statutory provisions for banking to be extremely general, granting the Board a greater degree of latitude than some of the detailed statutory provisions in other sections. Therefore, the fact that the "devaluation" is not mentioned in the statute does not prohibit its use in the rule. Moreover, in light of the concerns over clumping which can result from the use of created wetlands and banking, this ten percent devaluation is not unreasonable. The Board did consider some of the alternatives proposed during the hearing, but could not agree with any of them. Under the circumstances, the Board's position is reasonable.

118. Some counties and municipalities have implemented their own banks under the interim rules, and some have positive balances. The Cass Soil & Water Conservation District introduced into the record a memo dated November 23, 1992, from a Board employee which stated that any positive balances in local banks would have to be "zeroed out" by July 1, 1993. Ex. 27. Cass County had established a local bank pursuant to a county board resolution, and urged that any wetland acres banked using the criteria in the permanent rules be allowed to carry over into the new state bank without penalty. Tr. 415. See also, Tr. 858.

119. The Board responded with a proposal that would allow certain replacement credits into the bank under limited conditions. The proposal would allow the following:

Also, wetland replacement that has been completed and deposited in a local government unit bank prior to the effective date of these rules and after January 1, 1992 is eligible for deposit into the statewide banking system if the project meets all of the criteria in subpart 8420.0700 to 8420.0760 based on a site inspection and review by the board and the commissioner.

The Administrative Law Judge finds that given the limitations in the proposed rule, the rule is reasonable and not a substantial change.

120. Criticisms were made that the Statement of Need and Reasonableness failed to properly analyze the impact on agricultural land, as required by Minn. Stat. § 17.83. That statute provides that if an agency proposes to adopt a rule "which it determines may have a direct and substantial adverse effect on agricultural land", then it must include notice of the adverse effects in the Notice of Hearing and include certain material in the Statement of Need and Reasonableness. The term "action which adversely affects" is further defined, however, to be limited to acquisition, permitting, leasing or funding for nonagricultural uses. The thrust of the statute is one of notice, both to the public and to the commissioner of agriculture.

121. The Administrative Law Judge concludes that this statute has been satisfied, both as to its letter and as to its spirit. From a technical standpoint, the statute does not apply at all. These rules do not involve acquisition, permitting, leasing or funding within the meaning of the

statute. But more importantly, as a practical matter, the agricultural community and the commissioner of agriculture have been deeply involved in the drafting and commenting process. The record, for example, contains recommendations from the Commissioner (letter of October 1) which indicates that the Department of Agriculture participated in both the Heritage Advisory Committee and the Rule Drafting Committee. The spirit of the statute has been satisfied, as well as the letter.

122. Criticisms were also leveled at the Board's estimate of the fiscal impact of the rules. See, for example, letter from the Association of Minnesota Counties dated December 30. The law requires that if the adoption of a rule will require the expenditure of public money by local public bodies and the estimated total cost exceeds \$100,000 in either of two years immediately following adoption of the rule, then a fiscal note must be prepared. There is no question but that these rules will require the expenditure of substantial sums of money by LGUs. The Board did prepare a fiscal note. The Board estimates that the total statewide cost for LGU implementation will be four million dollars per year for each of the next two years, or a total of eight million dollars for the biennium. Some entities have criticized this as being a gross underestimate, and provided examples of their own estimates. The Administrative Law Judge concludes, however, that the law has been satisfied because the Board has provided a fiscal note which is in within the realm of reasonableness. The Board asked LGUs to document the cost of implementing the interim phase of the Act, and then selected a geographically representative sample to get a representative estimate of the actual costs. The average for 13 LGUs who responded to the Board's request was \$14,000. The LGUs noted, however, that the interim program was simpler than the final program, and that more money would be required to administer the final one. The Board added \$6,000 to adjust for this change, coming up with a total of \$20,000 as an annual average cost per LGU. Based on the assumption that approximately 200 LGUs would be involved in the program, the Board computed its four million dollar total. This is based on an average,

which ranges from LGUs that may only have three or four or five applications per year to LGUs which will have to deal with more than a hundred applications per year. Since it is based on such a wide variation of activity, it must be viewed as only a rough estimate. But it is adequate for the Legislature and others to get an idea of the fiscal impact of the rule.

General Comments

123. Compensation to landowners for the restrictions imposed upon them by the statute and these rules was a topic brought up by many persons throughout the hearing process. The concept expressed is essentially as follows:

If preserving wetlands is such a great societal benefit, then society ought to compensate those who are burdened by restrictions on the use of their land.

Many people claimed that the statute and rules were unconstitutional in that they failed to provide such compensation. The Attorney General's Office, however, has studied the matter and is of the opinion that neither the statute nor the rules are unconstitutional on their face. Tr. 345. There may be particular situations where particular pieces of land and particular administrative actions may cause an unconstitutional taking requiring

compensation, but those must await resolution on a case-by-case basis. The Administrative Law Judge is not empowered to rule on the facial constitutionality of a rule. *Neeland v. Clearlater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977). Such a claim must be directed to the judicial branch.

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

CONCLUSIONS

1. That the Board gave proper notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subs. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule, except as noted at Finding 7.

3. That the Board 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), except as noted at Findings 61, 73 and 74.

4. That the Board 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), except as noted at Findings 30 and 77.

5. That the amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules 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, and Minn. Rule 1400.1000, subp. I and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the

defects cited in Conclusions 3 and 4, as noted at Findings 30, 73, 74 and 77.

7. That due to Conclusions 2, 3, 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat.

□ 14.15, subd. 3.

B. That any Findings which might 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 Board 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 11th day of February, 1993.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded; Transcript Prepared.

MEMORANDUM

It should be stressed that this Report deals with legal questions, not policy ones. The only way a policy question is discussed is in the context of whether or not the Board has demonstrated the need for and reasonableness of its proposed rules. Therefore, a person should not look to this Report for policy guidance. The fact that a rule is found to be reasonable does not mean that it is the "best rule" from a policy standpoint. It may or may not be the best rule. Policy decisions are left for the Legislature and the Board. Many of the written submissions and some of the oral statements at the hearings suggested that people thought the Administrative Law Judge would force the Board to adopt whatever rule the Judge thought was the best one. That is not the case, and it should be clear that the only question which has been answered with regard to policy is whether or not the Board has justified its policy choices as reasonable. There is a "range of reasonableness" that is broad enough to include many different ideas of how a rule ought to read. So long as the Board's proposal is within that range, the Judge will declare it to be reasonable.

There were numerous suggestions for improvements in the rule which are not mentioned in this Report. This is because discussing them was not

necessary to determine the reasonableness of the Board's rule. Many of them are, however, desirable changes and, to the extent the Board staff has time, it would be worthwhile to review the record (particularly the written submissions) to determine which of them it thinks improve the clarity or working of the rule. As noted in the final conclusion, there are limitations on this process , but there is still a great deal of room for the Board to take advantage of the comments.

A.W.K.