7-2000-10569-1

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

In the Matter of Proposed Amendments to Exotic Species Rules, Minn. Rules 6216.0100 to 6216.0600

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis. The hearing was held on two evenings. The first scheduled hearing was held on January 14, 1998 at the Holiday Inn in Arden Hills, Minnesota. Approximately 21 people attended the hearing and 8 persons signed the hearing register.

The Agency Panel appearing at the first scheduled hearing were David Iverson, Assistant Attorney General, Jay Rendall, Exotic Species Program Coordinator of the Department of Natural Resources (DNR), Steve Hirsch, Fisheries Program Manager of the DNR, and Charles (Chip) Welling, Eurasian Water Milfoil Program Coordinator of the DNR.

The second scheduled hearing was held on January 15, 1998 at the Holiday Inn in Brainerd, Minnesota. Approximately 30 people attended the hearing and 16 persons signed the hearing register.

The Agency Panel appearing at the Brainerd hearing were the same as those at Arden Hills, with the addition of Roy Johannes, Commercial Fisheries Program Coordinator of the DNR.

NOTICE

The Commissioner of Natural 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 parties 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 Commissioner of the actions which will correct the defects and the Commissioner 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 Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure

the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Coordinating Commission for the Commission's advice and comment.

If the Commissioner elects to adopt the actions suggested by 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 Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then he 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 Commissioner files the rule with the Secretary of State, he shall give notice on the day of the filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On October 7, 1998, the DNR filed with the Chief Administrative Law Judge the following documents for review by the Administrative Law Judge:

(a) The Statement of Need and Reasonableness (SONAR);

(b) A copy of the Proposed Rules, with a certification of approval as to form by the Revisor of Statutes attached;

(c) The Notice of Hearing proposed to be issued.

2. At the January 14 and 15, 1998 hearing, the Department placed into the hearing record the following documents:

(a) Office of Administrative Hearings' additional approval of notice plan for dual notice, as signed and dated June 6, 1997; and the Department's request for prior approval of notice plan;

(b) Request for Comments as published on June 24, 1996, at 20 S.R. 2801;

(c) The Certificates of Mailing the Request for Comments, signed and dated June 18 and 19, 1997;

(d) The proposed rule, including the Revisor of Statutes approval, dated Oct. 13, 1997;

(e) The Statement of Need and Reasonableness, dated Oct. 10, 1997;

(f) Certification of Mailing the Statement of Need and Reasonableness to the Legislative Reference Library, dated Oct. 13, 1997;

(g) The Dual Notice of Intent to Adopt Rules, signed and dated Oct. 16, 1997, as mailed;

(h) The Dual Notice of Intent to Adopt Rules, signed and dated Oct. 21, 1997, as mailed and news release dated Oct. 29, 1997;

(i) The Dual Notice of Intent to Adopt Rules, as published at 22 S.R. 651 on October 27, 1997;

(j) The Office of Administrative Hearings' additional approval of Notice Plan for Dual Notice, as signed and dated October 9, 1997; and the Department's request for prior approval of notice plan;

(k) Written comments on the proposed rule and written requests for a hearing;

(l) The Certificate of Mailing the Notice of Hearing to all persons who requested a rule hearing, dated and signed December 31, 1997; and

(m) The notations on telephone comments on the proposed rule during the public comment period, dated November 7, 1997;

3. The documents noted in the preceding Findings were available for examination at the Office of Administrative Hearings from the date of filing through the close of the record.

4. The comment period was extended for 20 days following the date of the hearing, to February 4, 1998. The record in the matter closed at the end of the response period (five working days) on February 11, 1998.

Background and Nature of the Proposed Amendments

5. In 1996, the DNR adopted rules (Minn. Rules 6216.0100 - .0600) governing exotic species and infested waters.

6. In 1996, the Minnesota Legislature revised and expanded the harmful exotic species statute (Minn. Stat. chapter 84D), mandating the Department to establish rules: 1) designating prohibited, regulated, and unregulated exotic species; 2) governing the application for and issuance of permits; 3) governing notification in the event of an unauthorized release or escape of exotic species; and 4) designating, and governing the marking and use of, limited infestations of Eurasian Water Milfoil.

Under this mandate, the Department proposes to amend the current exotic species rules to address adequately current and potential threats to Minnesota's natural resources. Current laws are not adequate to address the increasing numbers of harmful exotic species and the various pathways of spread. Although the Department recognizes that not all pathways can be controlled, the goal of the rule is preventative rather than curative -- to preserve native species and communities of wild animals and aquatic plants as well as affording continued recreational uses of natural resources in Minnesota.

7. The proposed amendments address the following: a) to revise the rules to reflect the current statute; b) to add and expand definitions used in the rules; c) to specify the source of nomenclature used for the scientific names in the rules; d) to classify and designate species as prohibited, regulated and unregulated exotic species using the criteria pursuant to Minn. Stat. chapter 84D; e) to set conditions and procedures for issuance of permits for the propagation, possession, importation and purchase or transport of a prohibited exotic species, or for purposes of disposal, control, research or education; f) to set conditions and procedures for issuance of permits for the introduction of a regulated exotic species; g) to establish the process and information required for the review of unlisted exotic species and their designations to an appropriate classification; h) to place the current emergency rule designating infested waters into a permanent rule; i) to add a prohibition on taking wild animals from infested waters for aquatic farm purposes; j) to amend the current rule to allow the transport of fish and water from infested waters under a permit; k) to allow the use of artificial basins with regulated or prohibited exotic species for aquatic farms or private hatcheries under license by the Department; and l) to require that nets, traps, buoys, stakes and other equipment be dried or frozen after notification that the waters are infested with prohibited or regulated exotic species.

Statutory Authority for the Proposed Rules

8. The existing Exotic Species Rules and the proposed amendments were developed under the authority of Minn. Stat. Chap. 84D, secs. 84D.01 to 84D.14. Specific rulemaking authority is granted under 84D.12. Subd. 1 requires rules for (1) designating prohibited, regulated, unlisted and unregulated exotic species; (2) the application for and issuance of permits; and (4)

designating, and governing the marking and use of, limited infestations of Eurasian Milfoil. Subd. 2 authorizes discretionary rulemaking for regulating (1) the possession, importation, purchase, sale, propagation, transport and introduction of harmful exotic species; and (2) regulating the appropriation, use, and transportation of water from infested waters. General rulemaking authority of the DNR Commissioner in this area is granted under Minn. Stat. sec. 84.027, subd. 13(3).

It is found that the Department of Natural resources has both general and specific statutory authority to adopt the proposed rule amendments.

Procedural Requirements

9. Adequate Notice. At the hearing and during the comment period, bait dealers and aquaculturalists expressed concerns that only a small portion of their statewide counterparts had notice of the proposed rule amendments. For example, only ten percent of the statewide bait dealers belong to the Bait Dealers Association, which had notice. First, under Minn. Stat. § 14.22, the DNR is required to "make *reasonable* efforts to notify persons or classes who may be significantly affected by the rules . . .". (emphasis added). The DNR met this statutory requirement by publication of the proposed amended rules in the State Register, notification through mailing lists, additional discretionary mailing pursuant to a notice plan approved by the Administrative Law Judge and a media release. Second, it is noted that the bait dealers and aquaculturalists that commented at the hearing represented themselves and their absent counterparts well, both at the hearing and by filing written comments. It is found that the bait dealers and aquaculturalists absent were not prejudiced. Those who commented addressed many concerns dealing with the proposed amendments and existing rules. The hearing lasted approximately fourteen hours, the great bulk of which was testimony from bait dealers and persons in the aquaculture business.

As noted by the DNR in its February 4 Comments, the ALJ approved its plan for additional discretionary notice in October, 1997. Under Minn. Stat. § 14.51 and Minn. Rule 1400.2060, subp. 4, that approval is final and binding. Noted also is that at least 78 persons in the bait or aquaculture businesses filed written requests for hearing on or before November 26 in response to the dual notice issued on October 27, 1997. It is reasonable to assume from that response that many more members of the "regulated" public were aware of the hearings by mid-January.

10. It is found that Minn. Stat. sec. 17.497, titled Exotic species importation; rules, is not applicable to this rulemaking process. During the hearing and comment period there were questions as to whether the DNR is required to consult with the Minnesota Department of Agriculture (MDA) and

aquaculture advisory committee under section 17.497 when designating a particular species of fish as prohibited. The record establishes that compliance with this statute was achieved, so far as feasible. However, it is found that the requirements of Minn. Stat. § 17.497 no longer apply.

In 1991, the Minnesota legislature passed the provisions of chapter 17 relating to the emerging business of aquaculture in Minnesota. In House committee, bill co-author Representative Wally Sparby testified that this statute was needed to accommodate this new business base and to "control attempts to bring in foreign species to mess up our ecology." (Session tapes). Although aquaculture would be governed mainly by the Minnesota Department of Agriculture (Minn. Stat. chapter 17), other agencies, such as the DNR would still regulate under their mandated purpose which included transportation permits and the promulgation of importation of exotic species rules. Cooperation between the agencies was foreseen.

In 1992, the Minnesota Legislature passed Minn. Stat. § 17.4986, titled Importation of aquatic life. In committee, bill author Senator Charlie Berg was asked why 17.4986 plus other sections was needed and not resolved by rules promulgation. Senator Berg testified that he had "set guideposts" for the rules promulgation, but the process was not fast enough for this expanding industry. And, that over 29 million dollars was sitting in out-of-state banks waiting to be invested in Minnesota aquaculture ventures. However, investors were reluctant to release the money because no adequate regulatory structure existed and due to fears that the DNR would over-regulate the industry. Thus, the aquaculture industry was largely responsible for 17.4986 and other related sections. The DNR at that time had serious concerns about the initial proposed language, whereupon Senator Berg promised a compromise that resulted in the statute. (Session tapes).

Along with section 17.4986, section 17.4981 was passed in the same session (See Minn. Laws 1992, Chapter 566). It provides that the purposes of sections 17.4981 to 17.4997 include to "(2) prevent against release of nonindigenous or exotic species into public waters . . . [and] (4) protect existing natural aquatic habitats and wildlife dependent upon them." Finally, in 1997, "nonindigenous species" was defined under § 17.4982 as "a species of fish or other aquatic life that is: (1) not known to have been historically present in the state; (2) not known to have been naturally occurring in a particular part of the state; or (3) *designated by rule as a prohibited or restricted species.*" (emphasis added).

In response to the 1992 chapter 17 legislation, the DNR promulgated Minn. Rules Part 6250, which mirrored and subjected private hatcheries to chapter 17. After having to change the rules every time chapter 17 was changed, the DNR repealed most of 6250 and incorporated chapter 17 by

reference to include private hatcheries. Therefore, it is found that Minn. Stat. 17.497 was fulfilled upon the Legislature's enactment of Minn. Stat. 17.4986 and promulgation of Minn. Rules 6250. The fact that section 17.497 has not been repealed is unremarkable because many sections of statutes go unnoticed for some time.

Even if section 17.497 is applicable to the present rulemaking process, the DNR requested comments from the Minnesota Aquaculture Association (whose members are normally part of the aquaculture advisory committee) and Mr. Dwight Robinson of the MDA, liaison to the DNR. It is noted that the aquaculture advisory committee has been inactive as a formal body for some years. DNR Comments, 2/4/98. Therefore, section 17.497 requirements were met. It is found that even if § 17.497 still applies, the DNR need only consult with the MDA and "aquaculture advisory committee" (such as it is) to the extent of informing and advising in order to comply with that section, because the DNR, under the mandate of Minn. Stat. Chapter 84D, ultimately designates prohibited exotic species.

11. Notwithstanding the DNR's misconstruction that aquaculture is not a "farming operation" (detailed below) and certain procedural irregularities, it is found that the DNR has complied with all requirements of Minn. Stat. secs. 14.111 and 14.14, subd. 1b. The record very nearly supports a finding of less than good faith effort on the part of the DNR with respect to its duty under § 14.111 to inform the Commissioner of Agriculture when it seeks to adopt rules affecting "farming operations."

First, the DNR contends it sought a definition of "farming" from the MDA for rulemaking purposes to determine whether sections 14.111 and 14.14 were applicable to exotic species rulemaking. The DNR contends that the response they received from the MDA office was not a definition of farming. It appears that because a specific "farming" definition was absent in the agricultural statutes, specifically from chapter 17, governing aquaculture, the DNR reasoned that aquaculture was not farming in the conventional sense. Therefore, it decided that sections 14.111 and 14.14 were inapplicable.

Minn. Stat. sec. 17.47, subd. 3, defines "Aquatic Farm." Sec. 17.491 states that Aquaculture is an agricultural pursuit. Section 17.4983, Aquatic Farm Operations, provides for the acquisition and sale of private aquatic life, methods to harvest aquatic life, and ownership of aquatic life which encompasses state waters. Although aquaculture is not farming in the conventional sense, it is contrary to Chapter 17 and common sense not to construe aquaculture as a farming operation.

Regarding whether the Agriculture Commissioner was "informed" under § 14.111, the DNR stated that it faxed a copy of the proposed rules to Mr. Dwight

Robinson thirty days before publication in the State Register. "Following the fax of the proposed rules, the MDA did not indicate they thought the rules affected farming." (DNR Comments of 2/4/98, referring to an attached copy of fax cover to Mr. Robinson, p. 4). It notes further that copies "were also sent to Mr. Richard Ying Ji, the MDA's aquaculture specialist." (DNR Comments, 2/4/98, p. 4). Nowhere has the DNR shown that it asked Mr. Robinson or Mr. Ying Ji if aquaculture was "farming." Moreover, the DNR has not shown documentary evidence (such as being named on a mailing list) that Mr. Ying Ji was sent a copy of the proposed rules separately, as it contends.

Comments submitted by the Minnesota Aquaculture Association indicate a failure to comply with the statutory requirement. Mr. Gerald Heil, Director of Agricultural Marketing and Development for the MDA, writes that neither the Commissioner, Commissioner's counsel, nor the MDA's rulemaking coordinator received a copy of the rules or a notice of the hearing.

Despite its apparent failure to comply with the Administrative Procedure Act's mandate to notify the Agriculture Commissioner when farming operations are involved, the DNR does not have to start this rulemaking process over.

Under Minn. Stat. § 14.111, an agency's failure to comply with providing notice to the Commissioner of Agriculture is forgiven if a "good faith effort" was made to comply. It is found that timely provision of the notice and proposed rules to Dwight Robinson, MDA's liaison to the DNR, fulfills the good faith requirement. It is not DNR's duty to assure that the notice and proposed rules actually reached the commissioner of another agency after service was provided to the designated official in the other agency.

Under Minn. Stat. § 14.15, subd. 5, entitled "Harmless error.", the ALJ "shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds: (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process . . ." Although the DNR did not support its allegation of mailing of the proposed rules directly or of any other direct notice to Mr. Ying Ji of the MDA, it appears he did obtain a copy of the proposed rules and SONAR, because he did participate meaningfully on behalf of the Department of Agriculture by expressing concerns during a telephone comment on November 7, 1997 and by filing a post-hearing Comment on February 4, 1998. By receiving from the DNR a copy of the proposed rules and the SONAR, Mr. Robinson was also given an opportunity to make comments.

Section 14.14, subd. 1b requires that any rule hearing with a subject affecting farming operations be held in an "agricultural" region of the state. Brainerd was an appropriate location for this hearing because many of the

parties who commented at length were bait dealers or aquaculturalists, and Brainerd is a central location for persons engaged in that type of agriculture or farming.

It is found that the DNR's apparent failure to inform the Commissioner of Agriculture of this rulemaking proceeding, even absent (which has not been found) a good faith effort to do so, is "harmless error" within the meaning of Minn. Stat. § 14.15, subd. 5 because, in the end, the appropriate official of the Department of Agriculture did participate meaningfully in this process. See the February 4, 1998 Comments of Richard Ying Ji.

Compliance with Minn. Stat. Sec. 14.131

12. Minn. Stat. sec. 14.131 requires agencies to include certain information in their Statement of Need and Reasonableness. It is found that the Statement of Need and Reasonableness in this matter complies with those requirements, as follows:

> (a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that bear the costs of the proposed rule and classes that will benefit from the proposed rule. The SONAR states that the rules may affect many users, such as: plant harvesters; boaters; anglers and other recreationists; individuals and business bait harvesters; commercial fishing operators; lake associations; riparian owners; irrigators, businesses, industries and governmental agencies who acquire water from infested waters; zoos; pet stores; aquarium merchants; private aquaculture; horticultural interests; research and educational institutions; game farm licensees and their customers; shooting preserves; bird rehabilitators; and organizers of exotic species sales.
>
> The SONAR states that the rules will likely affect the following: parties who release or allow escape of exotic species into a free-living state; businesses and individuals dealing with aquaculture; and businesses, groups, individuals or any other parties identified in the future as pathways of introduction and spread of harmful exotic species.
>
> The SONAR states that the following classes of persons will bear the costs: persons possessing prohibited or regulated exotic species which escape or are otherwise

introduced into the wild; persons requesting to introduce unlisted exotic species into a free-living state; and persons possessing, importing, propagating, or selling exotic species that are now proposed to be designated as prohibited exotic species, who may experience financial losses if they had intended to sell those species.

(b) The probable costs to the agency or other agencies of the implementation and enforcement of the proposed rules and any anticipated effect on state revenues. The SONAR states that the Department will incur costs for implementation and enforcement of the proposed rule. Costs relating to posting notice of infested waters and watercraft inspections at infested waters will not significantly affect the current annual costs because the infested waters are already posted and watercraft inspections are governed by statute. Department costs include staff time required to review requests for approval of prior unlisted and regulated exotic species for introduction into the wild, and costs incurred from requests for prohibited species permits.

The SONAR states that the proposed rule will not affect state revenues significantly, either positively or negatively.

(c) A determination of whether or not there are less costly methods or less intrusive methods for achieving the purpose of the proposed rules. The SONAR notes that a less intrusive approach would be to classify or designate fewer species or designate them at a lesser classification. This alternative was rejected because it would conflict with the criteria established by statute and would expose the state's natural resources to a higher degree of risk.

Based on recommendations of the Minnesota Interagency Exotic Species Task Force, the Department considered and rejected a less intrusive alternative of requiring an applicant to supply less of the basic scientific information needed to determine whether to issue permits for possession of prohibited exotic species or for the introduction of regulated species. The task force reasoned that the costs and responsibility (risks) for certifying that an introduction would not result in

ecological harm should be borne by the importer or breeder.

The less intrusive alternative of eliminating the Department's inspection of facilities prior to or after issuance of a permit was rejected because the inspections are preventive, thus, costs of prevention are preferable over costs that arise after introduction.

(d) A description of any alternative methods for achieving the purpose of the proposed rules that were considered seriously by the Agency and the reasons why they were rejected in favor of the proposed amendments. The SONAR emphasizes that the proposed amendments are required by law. The Department considered and rejected an alternative of using the expedited emergency rules to designate exotic species because the emergency rules would be effective only for 18 months and the Department's permanent rulemaking authority would expire by law (see Minn. Stat. § 14.125) if it did not initiate permanent rulemaking mandated by Minn. Stat., sec. 84D.12, subd. 1.

The Department considered two alternatives for selecting the species proposed for designation -- either leaving them as unlisted exotic species or to review information about the species and select an appropriate classification for designation. Both were chosen. Used together, the two approaches would result in a more comprehensive list of classified species and develop increasingly comprehensive lists of species.

The Department considered public comment periods for the proposed introduction of unlisted exotic species. The options were: no public comment period; always seek public comments; and consider the information provided in an application and then determine if a public comment period should be allowed. No public comment period was chosen because the other alternatives would lengthen the period of time for a determination and heighten the potential risk to the state's natural resources.

The Department considered two alternatives to designating infested waters, by emergency rules or

permanent rules. The Department proposes to add or delete infested waters through emergency rulemaking and afford the public a review of the added or deleted infested waters decisions through subsequent permanent rulemaking processes.

The Department considered two alternatives regarding aquatic farms or private hatcheries that have artificial basins with populations of prohibited or regulated exotic species. The first is to require the department to determine if a prohibited or regulated exotic species is present in an artificial basin and notify the licensee. The second is to require the licensee to determine if a prohibited or regulated exotic species is in an artificial basin before the licensee has to dry or freeze nets and other equipment before using them in noninfested waters. The first alternative was chosen because the burden is placed on the Department to identify the species and notify the licensee.

(e) The probable costs of complying with the proposed rules. The SONAR states that the proposed designations of prohibited exotic species could decrease the value to an owner if the species were possessed for sale or propagation of others for sale. Alternatively, the designation of some species as unregulated could increase their value for ornamental or pet use.

The SONAR states that costs of complying with the proposed rules may result because of the process of preparing the permit application and preparing facilities to confine prohibited exotic species, depending on the individual species.

The SONAR states that costs of complying will likely result for applicants who desire to introduce unlisted aquatic plants or wild animals into a free-living state. The costs are borne from information gathering, dependent on a particular species. The information is used to determine approval or denial and the costs of producing it are analogous to costs of pharmaceutical companies registering a new drug. The costs are estimated to range from $200 to $10,000 for information gathering and analysis.

The DNR alleges that the act of designating waters as infested "should not result in increased costs to the public. . .". The ALJ agrees, because these rules merely follow the earlier legislative mandate to designate certain waters as infested. It is noted that the prohibition on removing wild animals from infested waters for bait purposes was adopted as a rule (Minn. Rule 6216.0600, subp. 1) in 1996. The DNR proposes to add a prohibition on taking animals for "aquatic farm purposes" to the subpart, which addition could increase costs for those engaged in aquaculture. In its February 4 Comments, the DNR argued that the impact of including aquaculture operations in this rule was minimal because the state contains numerous waters that provide the opportunity to harvest minnows to use as forage fish on aquatic farms. And, only one waterbody proposed for designation as infested (with Eurasian water milfoil) under Part 6216.0350, Stone Lake in Carver County, is known to have been used for the commercial harvest of minnows. Based on these reasons, it is found that the DNR did not violate Minn. Stat. § 14.131 by failing to note specifically that the amendments proposed would be costly to the aquaculture industry.

(f) An assessment of any difference between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference. The SONAR states that the portion of the proposed rules designating exotic species is similar to federal noxious weed law. Some proposed designated unregulated exotic species are federally listed as noxious weeds. Under federal law, the species would still be prohibited from being transported and sold even if not prohibited by state law. The proposed unregulated species that overlap with federal law cannot naturalize in Minnesota.

Need for and Reasonableness of the Proposed Rule Amendments

13. Any portion of the rule amendments as proposed finally by the Department in this matter not commented on in this Report are found to be needed and reasonable. Any amendments which are changes from the proposed rules published originally in the State Register on October 27, 1997 and not commented on in this Report are found to be necessary and reasonable and are found not to constitute substantial changes.

14. The Statement of Need and Reasonableness (SONAR) filed by the Department in connection with the proposed amendments provides adequate justification of the need for and reasonableness of the proposed amendments published in the State Register on October 27, 1997. The reader is referred to the SONAR and the supplementary SONAR filed on January 14, 1998 (Department Ex. 16) for the detailed presentation of facts regarding each amendment proposed originally or at the hearing. The balance of this Report will concentrate on the Department's response to comments made at the hearing and written comments submitted before the close of the record. In that regard, the Department has made several changes to the proposals published in the State Register.

15. In part 6216.0200, subp. 3a, "Free-living state" the Department proposes to add the following language: "and

A. in the case of animals other than fish, includes the ability to fly, walk, or swim out of human control;

B. in the case of a fish or aquatic plants, the following locations shall be considered to be in a free-living state:

1. waters identified as public waters;

2. natural or artificial waters that are continually or intermittently connected to public waters; or

3. water using facilities, such as fish hatcheries, aquatic farms, zoos, and minnow retail or wholesale operations, with outflows that provide direct access for species to enter public waters.

In the case of a fish or aquatic plant, the following locations are not considered a free-living state:

1. artificial ponds such as water gardens that have no outlet to public waters;

2. waters whose shorelines are entirely within the land owned by a person, not continually or intermittently connected to public waters, and not identified by the department as public waters; or

3. water using facilities, such as fish hatcheries, aquatic farms, zoos, and minnow retail or wholesale

operations," with outflows that do not provide direct access for species to enter public waters."

It is found that the changes proposed in the preceding paragraphs are necessary and reasonable and do not constitute substantial change because they clarify and correct the original vague language of "means to be confined or outside the control of the person."

16. In part 6216.0200, the Department proposes to add as subp. 7, the definition "'Public Waters' has the meaning given in Minn. Stat. 103G.005, subpart 5 and have been designated as public waters under the public waters inventory pursuant to Minnesota Statutes 103G.201." It is found that the proposed added language is necessary and reasonable and does not constitute a substantial change because it reflects the statutory definition of a term used in the proposed definition of "free-living state."

17. At part 6216.0230. D, the Department proposes to strike out "and" at the end of the sentence. In the same part, under E, "and" would be added to the end of the sentence. In the same part, "F. A. J. Healy and Elizabeth Edgar, Flora of New Zealand (Volume III 1980)." would be added. It is found that these changes are necessary and reasonable and do not constitute substantial changes because they were omitted in the drafting of the rule and are needed to include a source document for two species of aquatic plants referenced in the proposed rules.

18. In part 6216.0260, subp. 2. C, the Department proposes to strike out "with flowers other than white." And add "non-native, hybrid" before "waterlilies" and "with various cultivar names" after "waterlilies." It is found that these changes are necessary and reasonable and do not constitute a substantial change because they clarify the class of waterlilies based on non-native species rather than flower color. There are at least fourteen non-native waterlily hybrids with white flowers that would not have been included in the original language. Because of the multiple (over 100) cultivar species that exist, it is found appropriate to reference only the concept "cultivar".

19. In the same part, at subp. 3. B, the Department proposes to add "koi" after "common carp. . ." In the same subpart, the Department proposes to eliminate D, and strikeout the words "Koi (*Carassius auratus* subspecies or selected strains)." It is found that this change is necessary and reasonable and does not constitute a substantial change because it was subsequently learned from the American Fisheries Society that koi are in fact common carp.

20. In the same part, at subp. 3. F, the Department proposes to move "oneochromis, sartheradon," to place it after "(Tilapia,". It is found that this proposal is needed and reasonable and does not constitute a substantial change

because it merely corrects an error in word order by the Revisor when reviewing the Department's rule draft.

21. At part 6216.0265, subp. 1. the Department proposes to add "A regulated exotic species permit is not required for a person to possess, import, purchase, propagate, transport, own or sell a regulated exotic species." It is found that adding this sentence to the subpart as proposed is necessary and reasonable to clarify that permits are required only for the "introduction" of "regulated" exotics. The proposed addition is found not to constitute a substantial change.

22. At part 6216.0500, subp. 3, the Department proposes to insert "excluding marine sanitary systems," to read "...other boating-related equipment excluding marine sanitary systems holding water, and livewells and bilges by . . .". It is found that this change is necessary and reasonable and does not constitute a substantial change because other laws prohibit such action and it is necessary to prevent the spread of water borne exotic species.

23. At the same part, subp. 2, the Department proposes to delete the existing language and insert the following: "In lieu of an additional permit issued under Minnesota Statutes, section 84D.11, permits and licenses under Minnesota Statutes, sections 17.4981 to 17.4994 and chapter 97C, and rules adopted thereunder, may authorize the introduction of regulated exotic species, provided that the conditions specified in those permits and licenses are in accordance with the conditions specified under part 6216.0265." It is found that this change is necessary and reasonable and does not constitute a substantial change because it clarifies that one permit can be issued in lieu of two permits or licenses for the introduction of regulated exotic species. Thus, it decreases the bureaucratic requirements for an aquaculture operator. This change is based on comments during the hearing.

24. At part 6216.0265, subp. 4, item A, the Department proposes to strike out the words "or demonstrate," to read "have experience in the skills necessary for handling potentially harmful species, including . . .". It is found that this change is necessary and reasonable and does not constitute a substantial change because it removes vagueness regarding how to show the skills necessary to handle harmful exotic species. This change is based on comments during the hearing.

25. At the same part, subp. 5, item A, subitem 6, the Department proposes to strike out the word "a" between "of" and "prohibited" and insert "the." In addition, it proposes to strike the language "for which the permit application is submitted," so that the clause will read "a written contingency plan for eradication or recapture of an unauthorized introduction of the prohibited exotic species." It is found that these changes are necessary and reasonable and do not constitute

substantial change because they remove ambiguity by making a grammatical correction in sentence structure. It is suggested that the sentence's grammar would be made more correct by placing the words ". . . if an unauthorized introduction occurs, . . ." before ". . . a written contingency plan for eradication or recapture of the prohibited exotic specimens". Such a change is found to be necessary and reasonable (for further clarity) and does not constitute a substantial change.

26. At the same part, subp. 5, the Department proposes to add a new item C that states "The commissioner shall review the permit applications and respond to the applicant within thirty days of receipt of the application, or the additional information requested in subpart 5 (B)." It is found that these changes are necessary and reasonable and do not constitute a substantial change because it sets a reasonable deadline for the commissioner to review an application for approval or denial of a permit. This ensures that an individual applicant will not be improperly delayed for arbitrary and capricious reasons.

27. In the same part, subp. 10, after the words ". . . possession of the permittee." the Department proposes to eliminate the sentence "A prohibited exotic species or regulated exotic species permittee is solely responsible for damage or injury to persons, domestic or wild animals, plants, and any real or personal property of any kind, resulting from any activities undertaken pursuant to the permit." It is found that this change in the disclaimer subpart, when analyzed separately, is necessary and reasonable and does not constitute a substantial change because without the change there is a presupposition that liability attaches to the permittee, which is a matter for the judicial branch of state government, not an executive branch agency such as the DNR.

28. At proposed Part 6216.0265, subp. 10, the disclaimer of liability finally proposed by the DNR (that is, the first two sentences published originally in the State Register) is still problematic (see Finding 27) because it could be construed to release the Department from liability, which is beyond the scope of its general and specific rulemaking authority. Specifically, the phrase "No liability is *incurred* by the state. . ." (emphasis added) is ambiguous. "Incur" is defined in part as "To become liable or subject to." Black's Law Dictionary, 6th Ed. (1995). Under that definition, the Department is attempting to exempt the state, by rule, from any liability for actions of permittees or exotic species governed by DNR permits. Such an exemption is not found in any of the statutes applicable to this rulemaking, nor is it found in the state Tort Claims Act (Minn. Stat. § 3.786), contrary to the DNR's argument. The Tort Claims Act holds the state liable, as a general rule, for harm caused "where the state, if a private person, would be liable . . .", subject to certain exclusions, listed at subd. 3 of the statute, none of which grant the blanket immunity proposed here.

The Tort Claims Act, at subd. 3(b), makes the state and its employees not liable for losses caused by the performance of discretionary duties, even if the discretion is abused. That statute does not necessarily grant immunity to the DNR in this instance because the permit process under proposed Part 6216.0265 has not been shown by the DNR, as a matter of law, to be discretionary. The governing statute allows for an applicant to contest a denial of a permit (Minn. Stat. § 84D.11, subd. 4). In such a contested hearing, an applicant will be able to argue that, because (s)he has met the requirements for a permit, a permit must be granted. The duty to grant the permit may become ministerial at that point, not discretionary. At that point, the state must exercise due care to avoid liability (see subd. 3(a) of the Tort Claims Act), and the determination of exercise of due care on a case-by-case basis is not a matter that an agency can decide in advance for all cases.

As noted in the preceding paragraph, the blanket exclusion proposed by subpart 10 is not necessarily granted by the Tort Claims Act. When rule language purports to create immunity from liability for an agency broader than that provided by the Tort Claims Act, the proposal goes beyond statutory authority and violates substantive principles of law.

Generally, a state agency has no authority to grant immunity to itself by rule. That power lies with the legislature, which can authorize an agency to make such a rule, but our legislature has not done so in this instance. Generally, an agency has only such authority as is granted to it by the legislature specifically. See Leisure Hills of Grand Rapids v. Levine, 366 N.W.2d 302 (Minn. App. 1985), which held that the legislature, not an agency (Department of Human Services in that case), determines the scope of an agency's jurisdiction.

At best, use of the word "incurred" protects the state from bringing liability onto itself by the act of issuing a permit. American Heritage Dictionary, def'n. 2. Under either interpretation, use of the word "incurred" violates substantive principles of law - it either (1) attempts to exercise a power the Commissioner does not possess or (2) the language chosen (the word "incurred") to grant that power is ambiguous and fails to make the statute specific, so it is not a "rule". Minn. Stat. § 14.02.

To correct this defect, it is suggested that the Department eliminate all of subpart 10 or replace the word "incurred" with "assumed." If the Department eliminates this provision or changes it as suggested it would be found a necessary and reasonable rule proposal and would not constitute a substantial change.

29. At part 6216.0270, subp. 4, the Department proposes to eliminate from the list of unregulated exotics the following itemized mammals and their respective Latin names: ass, burro, donkey, camel, cats, cattle, chinchilla, dogs,

farmed Cervidae (deer), gerbil, Guinea pigs, hamster, horse, llamas, alpaca, mouse, house mouse, mule, hinny, sheep, and swine. The only item left would be A. rat (Rattus norvegicus and Rattus rattus). It is found that these changes are necessary and reasonable and do not constitute a substantial change because they are a result of comments at the hearing to exclude non-wild animals from the proposed rules.

30. At the same part, subp. 5, the Department proposes to eliminate the following itemized birds and their respective Latin names from the list of unregulated exotics: chicken, domestic ducks, ostriches, emus, rheas, and other members of the ratitae family, and the domestic turkey. It is found that these changes are necessary and reasonable and do not constitute a substantial change because they are a result of comments at the hearing to exclude non-wild animals from the proposed rules.

31. In part 6216.0300, subp. 3, the Department proposes to strike out the language "water use restrictions have expired" and replace it with "the posting requirements specified in Minnesota Rules part 6280.0600, subp. 2 have been met." It is found that these changes are necessary and reasonable and do not constitute a substantial change because they refer to, and make this part consistent with, the posting requirements of Minn. Rule Part 6280.

32. At the hearing, the wholesale bait industry expressed concern that at part 6216.0250, subp. 1, the DNR should not strike out the language "because they pose a substantial threat to native species in the state." The reasoning is that the phrase provides the industry protection because it places an additional requirement upon the DNR to show why a particular species should be designated as prohibited. However, the 1996 statute (Minn. Stat. § 84D.04) sets out the criteria that the state must use when classifying and designating prohibited and regulated exotic species. The statute does not require a species to pose a substantial threat to native species in order to be classified or prohibited. The language proposed for removal was based on a statute that emphasized protection of native species. That statute has been repealed and replaced by one that requires classification of exotics to be based on "potential adverse impacts on native species and on outdoor recreation, commercial fishing, and other uses of natural resources in the state." Language tying a "prohibited" designation to the threat to native species alone is too narrow an interpretation of the 1996 statute. It is found that the 1996 statute takes precedence over the current rule language, and therefore, the proposed deletion is reasonable and necessary.

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

CONCLUSIONS

1. That the Department of Natural resources gave proper notice of the hearing in this matter.

2. That the DNR has fulfilled the procedural requirements of Minn. Stat. secs. 14.14, subds. 1, 1a, 1b, and 14.14 subds. 2 and 2a, and all other procedural requirements of law or rule.

3. That the DNR 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. secs. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding 28.

4. That the DNR 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. secs. 14.14, subd. 2 and 14.50 (iii).

5. That the amendments and additions to the proposed rules which were suggested by the DNR 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. secs. 14.05, subd. 3 or 4.

6. That the Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3, as noted at Finding 28.

7. That due to conclusions 3 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. sec. 14.15, subd. 3 or 4.

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that 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 13th day of March, 1998.

RICHARD C. LUIS
Administrative Law Judge

Reported: Michelle Skoog and Janet Shaddix Elling
Shaddix and Associates
Transcript Prepared