

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

In the Matter of the Proposed
Amendment to Rules
Governing Fish and Aquatic Wildlife.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

A hearing regarding the above rules was conducted by Administrative Law Judge George A. Beck beginning at 2:00 p.m., and reconvening at 6:30 p.m., on July 15, 2003, at the Kelly Inn, at 100 Fourth Avenue, St. Cloud, Minnesota.

The hearing and this report are required by the Minnesota Administrative Procedure Act¹ as part of a dual notice rulemaking process when a sufficient number of persons request a hearing. The legislature designed this process to insure that state agencies meet all requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that (1) the proposed rules are necessary and reasonable, (2) they are within statutory authority and (3) the language of the rule, in cases where rule modifications were made after initial publication, does not differ substantially from the original published language.

The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Department.

The hearing panel for the Department of Natural Resources included Linda Erickson-Eastwood, Program Manager, Richard Baker, Research Coordinator for Ecological Resources and Kathy Lewis, Staff Attorney.

Approximately twenty-two people attended the hearing and sixteen signed the hearing register. Thirteen people spoke at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard on the proposed rules and rule amendments.

Prior to the hearing, a large number of public comments were submitted. The majority of these comments concerned changes in taking of sturgeon on the Minnesota-

¹ Minn. Stat. §§ 14.131 through 14.20.

Canada border waters, minnow trap specifications and numerous aspects of turtle trapping. The remainder concerned general restrictions, commercial fishing, the use of leeches in some trout streams and Lake Superior. At the hearing virtually all comments were directed towards the commercial harvesting of turtles. After the hearing ended, the Administrative Law Judge kept the record open for the maximum 20 calendar days until August 4, 2003, to allow interested persons and the Department of Natural Resources an opportunity to submit written comments. During this initial period the Administrative Law Judge received written comments from the Department of Natural Resources and 31 public comments.

Following the initial comment period the Administrative Procedure Act requires that the hearing record remain open for another five days to allow interested parties and the agency to respond to any written comment. The agency did respond and two other timely comments were received. The hearing record closed for all purposes on August 11, 2003.

SUMMARY OF CONCLUSIONS

1. The DNR has statutory authority to adopt the rules.
2. The Department failed to establish the need and reasonableness of the 48 hour checking requirement for painted turtles in 6256.0500, Subpt. 4:
3. The rules have otherwise been shown to be needed and reasonable.
4. The modifications proposed by the Department in its Ex. 15 are not substantially different from the originally published rules.

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

FINDINGS OF FACT

Procedural Requirements

1. On August 13, 2001, the Department published a Request for Comment on Planned Amendments to the Rules Governing Fish and Aquatic Wildlife in the State Register. The request indicated the Department was considering rule changes that would affect anglers, Lake Superior charter boat captains, aquatic fish farms, commercial bait harvesters and commercial turtle operators. The Department also indicated the changes might affect individuals or businesses, such as (1) resorts, motels, stores and guides providing services to anglers; (2) buyers and sellers of exotic species of aquatic plants for ornamental or consumption purposes; (3) users of Minnesota waters; and (4) owners of

property on Minnesota waters. The request for comments was published at 26 State Register 192.²

2. By a letter dated April 23, 2003, the Department requested OAH review and approval of its dual notice plan. The notice provided for adoption of the rules without a public hearing, unless twenty-five or more persons requested a public hearing. Enclosures with that letter included (1) the proposed rules as approved by the Revisor of Statutes, (2) a draft of the Statement of Need and Reasonableness (SONAR) and (3) a draft of the dual notice of intent to adopt rules.

3. In a letter dated April 30, 2003, Administrative Law Judge Steve M. Mihalchick approved the dual notice and additional notice plan.³

4. On May 15, 2003, the Department mailed the Notice of Intent to Adopt Rules and the proposed rules to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan.⁴

5. On May 19, 2003, the Department mailed a Notice of Intent to adopt Rules to the legislators specified in Minn. Stat. § 14.116.⁵

6. On May 9, 2003, the Department delivered a copy of the Statement of Need and Reasonableness (SONAR) to the legislative reference library.⁶

7. On June 2, 2003, a copy of the proposed rules and rule amendments and the dual notice of hearing was published at 27 State Register 1760-74.⁷

8. The Department received more than 25 requests for a hearing in this matter. A notice of Hearing was mailed on July 3, 2003 to all those who requested a hearing.⁸

9. On the day of the hearing the Department placed the following documents in the record:

- (a) The Request for Comments, as published in the State Register on August 13, 2001.

² Dept. Ex. 1.

³ Dept. Ex. 7.

⁴ Dept. Ex. 8.

⁵ Dept. Ex. 9.

⁶ Dept. Ex. 4.

⁷ Dept. Ex. 6.

⁸ Dept. Ex. 13.

- (b) A copy of the proposed rule as certified by the Revisor of Statutes, dated April 16, 2003.
- (c) The final Statement of Need and Reasonableness, signed and dated May 7, 2003.
- (d) The transmittal letter and the certificate of mailing the Statement of Need and Reasonableness (SONAR) to the legislative reference library.
- (e) Copies of the dual notice as mailed on May 7, 2003 and as published in the State Register on June 2, 2003.
- (f) A copy of both the letter from the Department requesting approval of the Department's notice plan and the letter from the Office of Administrative Hearings approving that plan.
- (g) Certificates regarding the accuracy of both the mailing list and giving additional notice.
- (h) A certificate of sending notice to legislators.
- (i) A copy of the letter and rules sent to the Commissioner of Agriculture as required by Minnesota Statutes, section 14.111.
- (j) A copy of the statewide news release, dated May 29, 2003, announcing the proposed rules, and a copy of information on the rules from the Department's web page, pursuant to the notice plan.
- (k) Comments received by the Minnesota Department of Natural Resources during the comment period.
- (l) Certificate of mailing the Notice of Hearing to those who requested a hearing.
- (m) The Department's prepared hearing remarks.
- (n) The proposed modifications to the originally published rules.

Nature of the Proposed Rules

10. The proposed rules as originally proposed relate to numerous aspects of fish and aquatic wildlife regulation, specifically:

- a. 6216.0250 - Prohibited exotic species;
- b. 6216.0260 - Regulated exotic species;
- c. 6254.0300 - Waters closed to commercial taking of minnows;
- d. 6254.0510 - Use of minnow traps, hoop nets, and trap nets;
- e. 6256.0500 - (Commercial) Taking of Turtles;
- f. 6256.0600 - Closed (season for snapping turtles) turtle seasons;
- g. 6256.0900 - Turtle propagation;
- h. 6260.0500 - Required notification of operations;
- i. 6260.2000 - Commercial fishing on inland waters;
- j. 6262.0100 - General restrictions on taking fish;
- k. 6262.0300 - Fishing regulations for Lake Superior;
- l. 6262.0500 - Waters closed to taking fish;
- m. 6262.0575 - Waters with restrictions on taking fish;
- n. 6262.0800 - Open seasons for taking whitefish and ciscoes;
- o. 6262.3300 - Exemption from fish transportation requirements;
- p. 6264.0050 - Restrictions on designated trout lakes and streams;
- q. 6264.0300 - Designated experimental waters;
- r. 6266.0100 - General regulations for taking fish on boundary waters with adjacent states;
- s. 6266.0500 - Taking of fish on Minnesota-Wisconsin boundary waters;
- t. 6266.0600 - Minnesota-Wisconsin boundary waters commercial regulations;
- u. 6266.0700 - Taking of fish on Minnesota-Canada boundary waters;
- v. 6266.0100 - General regulations for taking fish on boundary waters with adjacent states;
- w. 6266.0500 - Taking of fish on Minnesota-Wisconsin boundary waters;
- x. 6266.0600 - Minnesota-Wisconsin boundary waters commercial regulations,
- y. 6266.0700 - Taking of fish on Minnesota-Canada boundary waters;
- z. Repeal of several rule parts.⁹

Some of the proposed rules are merely clarifications, technical corrections, attempts to conform state law with federal laws already in place, or relocation of existing language to facilitate notice and compliance. Repeal of several parts and emergency amendments were required to conform to rule or legislative changes, both present and past. The remaining proposed rules change existing rules in significant aspects.

⁹ 27 State Register 1760-74.

Statutory Authority

11. Various Minnesota Statutes provide statutory authority for the commissioner to adopt rules relating to fish and aquatic wildlife. The statutes relevant to the rules that were contested in this proceeding are as follows:

Statutory authority applicable to the commercial taking of minnows in Rule 6254.0300:

Closing waters. The commissioner may close any state waters for commercially taking minnows if a survey is conducted and the commissioner determines it is necessary to close the waters to prevent depletion or extinction of the minnows.

Minn. Stat. § 97C.505, subd. 3.

In regard to Rules 6254.0300, 6256.0600, relating to (1) the commercial taking of minnows, and (2) closed turtle seasons, (for snapping turtles) the commissioner may protect wild animals by adjustments in seasons or reductions in limits as provided by statute:

The commissioner may protect a species of wild animal in addition to the protection provided by the game and fish laws, by further limiting or closing seasons or areas of the state, or by reducing limits in areas of the state, if the commissioner determines the action is necessary to prevent unnecessary depletion or extinction, or to promote the propagation and reproduction of the animal.

Minn. Stat. § 97A.045, subd. 2(a).

The statute further provides for emergency measures including emergency rules, prohibitions or limits on taking as follows:

The commissioner may protect a species of wild animal in the state by emergency rule adopted under section 84.027, subdivision 13, by prohibiting or allowing taking of the animal whether or not the animal is protected under the game and fish laws. The commissioner must make findings of the necessity of a rule authorized under this paragraph and may authorize taking by special permit with or without fee under conditions prescribed in the rule by the commissioner.

Minn. Stat. § 97A.045, subd. 2(b).

Importing, transporting or possessing may also be addressed by emergency rule; the applicable statute states:

The commissioner may protect a species of wild animal in the state by emergency rule adopted under section 84.027, subdivision 13, by allowing importation, transportation, or possession of the wild animal or prohibiting these activities except by special permit with or without fee under conditions prescribed in the rule by the commissioner.

Minn. Stat. § 97A.045, subd. 2(c).

Furthermore, these general restrictions apply:

A person may not take, buy, sell, transport, or possess a protected wild animal unless allowed by the game and fish laws. The ownership of all wild animals is in the state, unless the wild animal has been lawfully acquired under the game and fish laws. The ownership of a wild animal that is lawfully acquired reverts to the state if a law relating to sale, transportation, or possession of the wild animal is violated.

Minn. Stat. § 97A.501, subd. 1.

Where a species is endangered, the following statutory language applies:

A person may not take, import, transport, or sell an endangered species of wild animal, or sell, or possess with intent to sell an article made from the parts of a wild animal, except as provided in section 84.0895.

Minn. Stat. § 97A.501, subd. 2.

Regarding minnows, the following language applies:

Authority to take, possess, buy, and sell...(b) The commissioner may adopt rules for the taking, possession, purchase, sale, and transportation of minnows.

Minn. Stat. § 97C.505, subd. 1.

Approved equipment required. A person must use equipment approved by the commissioner to possess or transport minnows for sale.

Minn. Stat. § 97A.501, subd. 2 (emphasis added).

With respect to the taking of turtles and closing turtle or snapping turtle seasons, the following language applies:

(a) A person may take turtles in any manner, except by the use of...(2) traps, except as provided in paragraph (b) and rules adopted under this section;...(4) commercial equipment, except as provided in rules adopted under this section.

(b) Until new rules are adopted under this section, a person with a turtle seller's license may take turtles with a floating trap...

Minn. Stat. § 97C.605, subd. 3.

With regard to turtle propagation, the following statutory language applies:

The commissioner may adopt rules that are consistent with sections 17.4981 to 17.4996.

Minn. Stat. § 17.4997.

12. The Department has established its general statutory authority to adopt rules in the areas covered in this rule proceeding.

Regulatory Analysis

13. The Administrative Procedure Act requires an agency adopting rules to consider six factors in its Statement of Need and Reasonableness. The first factor requires:

- (1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

The Department recognizes that a large number of people including anglers, Lake Superior charter boat captains, aquatic fish farms, commercial bait harvesters, commercial turtle operators and individuals or businesses such as (1) resorts, motels, stores, and guides providing services to anglers; (2) buyers and sellers of exotic species of aquatic plants for ornamental or consumption purposes; (3) users and managers of Minnesota waters; (4) owners of property on Minnesota waters; and (4) research and educational institutions may be affected. The Department sees the beneficiaries of the rule revisions as Minnesotans who enjoy wildlife-related and water-recreational activities; riparian property owners; angling/boating related businesses; and angling, conservation and environmental groups.

According to the Department, the proposed changes related to turtles would have varying degrees of effect on turtle harvesters and associated businesses. The proposed change dealing with trap design specifications is less restrictive. However, the number of traps allowed per turtle license (40 floating and 40 submerged) is more restrictive than a judge's recent interpretation of the law that allows unlimited use of floating traps and 40 submerged. The proposed change for the number of traps is less restrictive than what the

DNR had enforced (40 traps total regardless of design) prior to the judge's interpretation. The list of commercial species, size limits, and closed seasons are more restrictive. Tagging of traps and reporting are already required. The Department believes that the proposed language for turtle eggs, nests, and propagation should be beneficial to the industry since they would now be allowed to possess, sell, take, and propagate turtles and eggs as long as other state and federal laws are followed.

- (2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Department estimates that no costs are associated with amending parts 6216.0250 and 6216.0260 and that in time, those amendments will actually reduce costs to the Department. The remaining rules were estimated to add no additional cost because the Department already has extensive monitoring in place.

- (3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department described the proposed change in the number of turtle traps, as less restrictive than current language. An option considered and rejected for protecting turtle populations was to eliminate a harvest. Season restrictions and size limits could achieve the necessary protection of turtle populations and would be less intrusive than closing the harvest. Closing the harvest would have eliminated commercial opportunity and would have had a greater economic impact than the proposed season and size limit reductions.

- (4) A description of any alternative methods for achieving the purpose of the proposed rules that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rules.

The Department believes that the major alternatives to size limits and possession limits being applied to fish and turtles are: 1) quotas where a certain level of harvest is allowed after which all harvest activity is curtailed for the remainder of the season; and 2) limited entry where only a certain number of anglers or commercial operators are allowed to engage in harvest activities. These alternatives could achieve the purpose of the proposed rules. However, quotas and limited entry are not proposed because they are considered to be unnecessarily intrusive and would require more monitoring from the DNR to determine when harvest limits were reached.

- (5) The probable costs of complying with the proposed rules.

None of the contested rules were determined by the Department to have increased costs or financial losses to the public.

- (6) An assessment of any differences between the proposed rules and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The Department noted that Title 21, Code of Federal Regulations, Part 1240.62 (21 CFR 1240.62), which bans the sale or commercial distribution of viable turtle eggs and live turtles with a carapace length of less than four inches, already regulates turtle eggs and live turtles and that the proposed turtle rules comply with the federal regulation. In respect to closing minnow harvest, the proposed rules comply with existing Federal Endangered Species regulations.

Performance Based Rules

14. Under the Administrative Procedure Act,¹⁰ an agency must describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.¹¹ The Department states its intent is to reach its objective while maintaining flexibility. The agency states that its objective with regard to recreational fishing, commercial fishing, and exotic species regulation is to provide for resource conservation, public safety, and equitable use, while maintaining flexibility for anglers and businesses to participate in a variety of opportunities for use and enjoyment of the aquatic resources consistent with state and federal law. To the extent possible, the DNR attempts to maintain simplicity and understandability of regulations, balanced against the demand for more specialized regulations to protect resources and provide additional opportunities for use of these resources. The agency states that it also attempts to balance the economic and social impacts against the biological requirements necessary to meet goals that conserve and protect the aquatic resources.

Rulemaking Legal Standards

15. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has

¹⁰ Minn. Stat. § 14.131.

¹¹ Minn. Stat. § 14.002.

established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. To support a rule, an agency may rely on (1) legislative facts, namely general facts concerning questions of law, policy and discretion, (2) interpretation of a statute or (3) stated policy preferences.¹² The Department prepared a Statement of Need and Reasonableness to support the proposed rules. At the hearing, the Department primarily relied on the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by comments made by Department staff members and members of the public at the public hearing and in written post-hearing submissions.

16. For a rule to be reasonable, the rulemaking record must demonstrate a rational basis rather than an arbitrary one. Minnesota case law has equated an arbitrary rule with an unreasonable rule.¹³ In general, a rule is reasonable if it is rationally related to the end sought in the governing statute.¹⁴ The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹⁵

17. In addition to need and reasonableness, the Administrative Law Judge must also assess (1) whether the rule adoption procedure was complied with, (2) whether the rule grants undue discretion, (3) whether the Department has statutory authority to adopt the rule, (4) whether the rule is unconstitutional or illegal, (5) whether the rule constitutes an undue delegation of authority to another entity or (6) whether the proposed language is not a rule.¹⁶ In this case, the Department has proposed changes to the rule after publication of the rule language in the *State Register*. These changes require the Administrative Law Judge to determine whether the new language is substantially different from the language originally proposed.¹⁷

18. Minnesota Statute section 14.05, subd. 2 contains the standards for determining whether new language in a rule is substantially different from the original published language. Modifications which avoid being substantially different are

...[1] within the scope of the matter announced...in the notice of hearing...[2] in character with the issues raised in that notice...and...[3] a logical outgrowth of the contents of

¹² *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

¹³ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

¹⁴ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹⁵ *Manufactured Housing Institute*, supra, 347 N.W. 2d at 244.

¹⁶ Minn. R. 1400.2100.

¹⁷ Minn. Stat. § 14.15, subd. 3.

the...notice of hearing and the comments submitted in response to the notice.

Additionally, the notice of hearing must have "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." The Administrative Law Judge must also consider whether

...[1] persons who will be affected by the rule should have understood that the rulemaking proceeding...could affect their interests...and...[2] the effects of the rule differ from the effects of the proposed rule contained in the...notice of hearing.¹⁸

The Department presented several modifications at the hearing.¹⁹ Most of the modifications were the result of technical corrections or compromises arrived at after consideration some of the comments received and discussions with those opposing the original published rule. None of the changes result in a substantially different rule. They are based upon comments received by the DNR and are a logical outgrowth of the rules as originally proposed.

19. This report limits discussion to portions of proposed rules receiving significant comment or otherwise needing to be examined. Where rules were adequately supported by either the SONAR or the Department's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions or portions thereof not specifically discussed are authorized by statute and no other problems exist that would prevent the adoption of those rules.

20. Minnow and turtle trapping received significant comments made in this rulemaking proceeding. The use of leeches in some trout streams also received comment. After the modifications agreed to by the Department, the only remaining rules that were contested relating to commercial turtle harvesting.

6254.0500 – Taking of Turtles

21. **Subpart 2a** deals with submerged turtle traps. The Department originally proposed to amend the rule to provide that the trap must be set in water shallow enough so that the top of the trap is at least three inches above the water surface. The SONAR states

¹⁸ Minn. Stat. § 14.05, subd. 2.

¹⁹ Dept. Ex. 15.

that this provision is intended to allow trapped turtles to breathe by extending their heads above the water surface. The provision was objected to by turtle trappers on the grounds that making the traps more visible makes it more likely that people will tamper with the traps or steal traps, which could result in increased deaths of turtles and an economic burden on the trappers.²⁰

22. In response, at the hearing, the Department proposed a modification that would only require the trap to be level with the water surface.²¹ Given the requirement to empty traps every 48 hours, the Department believes that the modification is adequate to protect turtles from drowning and would minimize tampering and thefts.²² A couple of commenters still supported keeping the traps above water to protect turtles and to make the traps more recognizable to property owners.²³ The Department's analysis based upon the comments submitted establishes the reasonableness of the amendments to subpart 2a as modified. The Department points out that the changes are less restrictive than the original proposal and are responsive to concerns about tampering.²⁴ The modification does not result in a substantially different rule since it is a logical outgrowth of the original proposal.

23. Most of the comment in this rule proceeding was directed toward **subpart 4** of 6256.0500 which provides that a turtle seller licensee may not operate more than 40 submerged turtle traps and 40 floating turtle traps. After a 2000 district court decision, the rule as enforced before this proposed amendment allowed 40 submerged turtle traps and an unlimited number of floating turtle traps. Floating traps are used to capture basking species, primarily western painted turtles, which are the focus of harvest during May and June. In contrast, submerged traps are used for snapping turtles, which are the focus of harvest later in the season. The Department proposes this limit because it believes that a limitation on the harvest is needed in Minnesota. It believes that restricting the number of traps is a reasonable means to limit the commercial turtle harvest because limiting the harvest to a specified number of turtles or pounds per year would be impractical and costly to enforce.²⁵

24. The Turtle Harvesters Association and individual turtle trappers argue that there is no proof that turtles need protection in Minnesota. They state that a painted turtle trapper needs to be able to set 80 to 180 traps per day in order to maintain his business as financially viable. They point out that traps are usually only effective on sunny days, perhaps 40 to 60 days per year, and that there are a large number of public bodies of water in Minnesota where turtles cannot be trapped.²⁶ They suggest that the 40 floating

²⁰ Ex. DD.

²¹ Ex. 15.

²² Ex. 14, p. 4.

²³ Ex. W, X.

²⁴ Ex. 16, p. 6.

²⁵ Ex. 3, p. 19.

²⁶ Exs. AA, DD.

trap limit would destroy the profitability of the painted turtle trapping industry.²⁷ The trappers argue that a reasonable means of conserving turtles would be to create a season for painted turtles, for example in May and June and September and October and a season for snapping turtles in July through August. They also believe that possession limits, pounds in possession and zones in which painted turtles could be taken are more reasonable solutions, if indeed there is a problem.

25. The following table summarizes the annual harvest of painted turtles (*C. picta*) in Minnesota for an eleven-year period and the number of harvesters:

Year	# Harvesters		# <i>C. picta</i>
	Total	<i>C. picta</i>	
1991	62	21	12469
1992	83	33	23084
1993	93	30	14280
1994	70	30	55017
1995	69	28	22886
1996	45	16	10562
1997	67	23	22010
1998	74	37	68852
1999	82	27	44096
2000	60	21	25499
2001	67	21	20799

There are presently 48 registered turtle harvesters in Minnesota. Approximately six to eight trappers currently harvest 90% of the turtles taken each year. One commenter estimated that if all registered turtle harvesters used 40 traps each for 40 to 60 days (an unlikely scenario at present) they would be able to trap 214,400 turtles.²⁸

26. In its post hearing comments the DNR argued that trap limits are the most effectively enforced of the options available given the thousands of lakes and wetlands in Minnesota where trapping can be conducted. It argues that given the limited number of conservation officers, they would rarely be in a position to evaluate an individual's catch of turtles to permit effective enforcement by size, limit or a quota. It also suggests that the use of quotas and zones is possible only because of detail of population and demographic data, which is presently lacking for turtles. The agency points out that detailed demographic data is particularly important when using quotas for long-lived slowly maturing species since the over-harvest of adults may not become apparent for many years, at which point an effective correction may be difficult to achieve. It believes that a closed season to regulate turtle harvest would be relatively ineffective because of the ease with

²⁷ Ex. EE, p. 2.

²⁸ Ex. GG.

which unsustainable numbers of turtles could be captured in an unlimited number of traps.²⁹

27. A recent study of the commercial harvest of painted turtles in Minnesota conducted by students Tony Gamble and Andrew Simons at the University of Minnesota concluded that commercial harvesting has significant effects on the relative abundance of painted turtles. It also found that harvested lakes had larger female turtles overall, presumably the result of harvesters releasing large females. The study noted that delayed reproduction and increased longevity make turtles sensitive to relatively small decreases in adult survivorship. It determined that small increases in painted turtle mortality are within the capability of Minnesota turtle harvesters, that increased harvesting would have a negative effect on population viability and that an annual removal of 4-5% of the female population would make painted turtles susceptible to over-harvest. The authors acknowledged that further study is needed to determine the long-term implications of harvesting, but they endorsed limiting the number of traps and licensees to halt the growth of harvesting.³⁰

28. The study was criticized by writer and biologist Dick Sternberg on the grounds that the lake groups sampled were not comparable, the term of the study was too short, various types of traps should have been used, and individual lakes were not sampled at the same rate.³¹ Looking at the same (adjusted) data in the study, Mr. Sternberg concluded that turtle trapping in Minnesota is not depleting the painted turtle population. He pointed out that the study indicates that both male and female turtles are slightly larger in harvested lakes and that the proportion of females was larger in harvested lakes. Mr. Sternberg noted that research in other states may not be relevant to Minnesota where there is much more water, including interconnected bodies of water that permits repopulation. He observed that the turtle harvest in Minnesota has declined in recent years.

29. Mr. Gamble filed a reply to Mr. Sternberg's comments. He pointed out that differences in lake size were taken into account. Mr. Gamble acknowledged that a longer study would be better but stated that research programs must start somewhere. Mr. Gamble pointed out that the study did feature hoop-trap results and argued that the removal of Black Oak Lake data was appropriate. He concluded that Mr. Sternberg's reworking of the study's data was not appropriate, and commented that a greater number of female turtles may or may not be positive. Mr. Gamble commented that even though the turtle harvest in Minnesota has declined, this could be the result of fewer harvesters or declining turtle populations.³²

30. A survey of turtles in the Weaver Bottoms, adjacent to the Mississippi River in southeastern Minnesota, was conducted in 2001-02. Harvesting of snapping turtles has

²⁹ Ex. 16, p. 2-3.

³⁰ Ex. V.

³¹ Ex. CC.

³² Ex. FF.

been ongoing in this wetland for decades. The survey found that female snapping turtles were underrepresented, as were large bodied adults, which suggested snapping turtles had been impacted by harvesting.³³ A study of common snapping turtles in southeastern Michigan from 1975 to 1992 concluded that large increases in mortality due to harvesting adults will have a major impact on the population and that because of long generation times, there may be long delays before population responses are detectable.³⁴

31. The proposed rule amendments were generally supported by a number of persons and organizations including the Izaak Walton League, the Minnesota Herpetological Society, the World Chelonian Trust, the St. Cloud Environmental Council, turtle biologists, Professor Jeffrey Lang, J. Whitfield Gibbons, and Madeline Linck³⁵ and turtle researchers such as Michael Pappas, Bruce Brecke, John Moriarty and Justin Congdon.³⁶ Several of these commenters argued that the rules did not go far enough and suggested that commercial harvesting should be prohibited, or at least prohibited during the reproductive season (June 1 to mid-July), and that soft-shell turtles not be harvested. Some suggested a limit on the number of turtles harvested and that records be kept in the trappers' trucks. Some suggested that only painted turtles of 3-4 inches or less be harvested. Some also supported limits on the number or pounds of turtles taken yearly.³⁷ Commenters pointed out that several states, including Wisconsin, Nebraska, and Maine, have banned turtle trapping.³⁸

32. In reply to the criticism of the studies it relies upon, the Department argues that the studies and publications in the record which relate to other turtles or other states, are relevant since their species and locations are similar. Each study expresses concern about the sustainability of commercial turtle harvest in northern latitudes. It notes that it is possible that recent declining harvest numbers actually reflect a reduction in trapping success due to a decline in actual turtle abundance. Or it may simply relate to environmental conditions that affect trapping success or changes in market conditions.³⁹

33. The Department is obligated in this proceeding to make an affirmative presentation of facts demonstrating the need for and reasonableness of its proposed rule amendment. The record as a whole must show that there is a need to limit the painted turtle harvest and that the Department's proposed method of doing so is not arbitrary based upon the record as a whole.⁴⁰

³³ Ex. M.

³⁴ Ex. N.

³⁵ Ex. R, U, W.

³⁶ Ex. 5.

³⁷ Ex. X.

³⁸ Ex. Z.

³⁹ Ex. 17, p. 3.

⁴⁰ See Finding of Fact No. 16.

34. The turtle harvesters argue that the DNR has failed to show a need for a limitation on the number of floating traps. The record does not contain clear and convincing evidence that the number of turtles in Minnesota is declining or that a turtle harvest is not sustainable. Neither does it contain clear and convincing evidence to the contrary. The agency's burden in rulemaking, however, is only to make an affirmative presentation of facts showing a need for regulation. The Minnesota Supreme Court elaborated on an agency's burden when it observed that it may be necessary for an agency to:

make judgments and draw conclusions from 'suspected but not completely substantiated relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not certificate as "fact" and the like."⁴¹

35. The data in the record on the need to limit the harvest of painted turtles is accurately described as "preliminary data not certifiable as fact." The parties agree that more and lengthier studies are needed to produce more accurate data. But the record does contain studies from Minnesota and elsewhere that suggest that an unlimited commercial turtle harvest may not be sustainable in the northern latitudes. Specific criticism of the Minnesota painted turtle study was answered and, recognizing that the study is the beginning of a research effort, it does provide support for a limitation on harvesting. An important factor to be considered is that turtles are a long-lived, slow reproducing species, so that a decline in reproductive success may remain hidden for a decade or so, at which point the reduced adult population may become evident. The need for a limit on the harvest was supported by numerous biologists, academics, and environmental organizations. Even when considering the doubts of trappers that there has been any decline in the turtle population, it must be concluded that the Department has met its burden to show a need for regulation within the parameters set out by the Supreme Court.

36. A separate question is whether the DNR has shown that its proposed solution, a limitation on traps, is reasonable. It did consider limiting the harvest to a specified number of turtles or pounds per year, but concluded that it could not enforce that type of rule given existing resources. Both turtle trappers and some environmentalists supported other methods of regulation, namely, seasons, zones, possession limits, or a requirement that females over six inches in size be returned to the lake. The agency's reply is that it needs to accumulate data before imposing such restrictions. The 2002 statute does itself mention seasons, limits and closed areas as possible solutions. The suggestions made by the commenters may also be reasonable approaches, and they should be considered by the agency for future regulation. However the Department is not legally obligated in this proceeding to show that its approach is the most reasonable

⁴¹ *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

solution.⁴² It has established facts and argument showing that its approach is rational and not arbitrary.

37. Finally, the Department must also establish that its selection of a 40 floating trap limit is reasonable. The record indicates that a trapper can set out and service perhaps 80 to 120 traps each day. The trappers argue that this many traps are needed to make painted turtle trapping profitable. They suggest that the DNR is seeking to destroy commercial turtle trapping rather than just conserving turtles. The Harvesters Association argues that 40 traps a day is rational for snapping turtles but not for harvesting of painted turtles, where more traps can be set out. However, having made an adequate showing of need for a restriction, some limit less than the current practice is justified. The Department choose the same limit as that applied to snapping turtles. It appears that only a few trappers are setting out 80 to 120 traps and would therefore be affected by the restriction. The record also indicates that most trappers have other lines of work and do not depend on turtle trapping as full-time employment. Given the goal of a limitation on the harvest, the 40 floating trap limit is not arbitrary based upon this record. The record would also support a higher limit should the agency decide that it was consistent with a reasonable limitation of the painted turtle harvest. Hopefully, with further study of commercial harvesting in Minnesota, as well as the data accumulated by the DNR, more information will be available in the future to permit amendment of the rule.

38. Subpart 4 also requires that each trap be emptied at intervals not exceeding 48 hours. The trappers argue that this is impractical and is unneeded to protect painted turtles because they can breathe freely in the trap and eat while in the trap. They suggest that checking every 3 to 5 days maximizes the catch without endangering the painted turtles.⁴³ The DNR replied that the 48 hour provision is not within the scope of this rulemaking since it was in the original rule that is being amended.⁴⁴ However, as the harvesters association pointed out, the 48 hour rule was originally adopted for snapping turtles (to prevent drowning) before painted turtle trapping became viable.⁴⁵ A 1995 statute was adopted to address painted turtle trapping but this is the first rulemaking to address turtle trapping since that statute was enacted.

39. There is nothing in the record to justify a 48 hour collection requirement for painted turtles. The record shows that there is a clear difference between snapping turtles and painted turtles as to the danger of drowning. The record does not indicate that this requirement is imposed in order to limit the number of turtles trapped. The Stearns County district court decision indicates that the original rules do not apply to painted turtles. Without facts to support the extension of the 48 hour provision to painted turtles, the Department has failed to make an affirmative presentation showing the need for and

⁴² *Manufactured Housing, supra*, 347 N.W.2d at 246.

⁴³ Exs. DD, EE.

⁴⁴ Ex. 17.

⁴⁵ Ex. EE, p. 4.

reasonableness of its proposal. To correct the defect, the Department could delete this requirement for painted turtles or adopt a checking requirement based upon this record, within the 3 to 5 day period cited by one commenter.

40. **Subpart 7** of Rule 6256.0500 deals with required reporting by turtle sellers and adds recordkeeping. Instead of filing out a form annually, the amendment requires the filing of a form monthly, which sets out a licensee's daily operations including water body location, equipment used, numbers and pounds of each species of turtles taken, and numbers of each species of turtles released. The Department argues this change is necessary so that it can assess the pressure of commercial turtle harvest on local turtle populations. It suggests that licensees can reasonably accomplish recording the location of operation each day.

41. Some trappers argue that this detailed recordkeeping takes time and is unduly burdensome. They challenged the Department to justify this requirement. In its post-hearing comments the DNR stated that the reports on the location of operation, the gear used and the amount of harvest will begin to provide the Department with the type of data that is currently collected for other intensively harvested species of wildlife. The Department suggests that once this data is collected for several years the DNR may begin to be in a position to analyze the effect of harvest on a harvested populations and to develop demographic models that would support the implementation of alternative strategies for sustainable harvest of turtles.⁴⁶ The reporting requirements were not objected to by the Minnesota Turtle Harvesters Association and have been shown to be needed and reasonable and not unduly burdensome based upon this record.

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

CONCLUSIONS

1. The Department of Natural Resources gave proper notice of the hearing in this matter.
2. That the Department of Natural Resources has fulfilled the procedural requirements of Minn. Stat. §§ 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 Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05 (i) and (ii), 14.15, subd. 3 and 14.50(i) and (ii).

⁴⁶ Ex. 13, p. 3.

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii) except as noted at Finding of Fact No. 39.

5. That the amendments and additions to the proposed rules which were suggested by the Department of Natural Resources after publication of the proposed rules in the State Register do not result in rules that are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion No. 4 as noted at Findings of Fact No 39.

7. That due to Conclusion No. 6 this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

8. 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 Department of Natural Resources from 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 5th day of September, 2003



GEORGE A. BECK
Administrative Law Judge

Reported: Tape Recorded, Three Tapes,
No Transcript Prepared.

NOTICE

The Commissioner 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 Minnesota Rules, part 1400.2100 and Minnesota Statutes, section 14.15, subdivisions 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 actions which will correct the defects. If the Commissioner elects to make any changes to the rule, he must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

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 follow the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to follow the suggested actions, he must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State, the Commissioner must give notice on the day of filing to all persons who requested that they be informed of the filing.