

Minnesota Attorney General: Administrative Rules Proceedings

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Proposed Changes

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OFFICE OF HEARING EXAMINERS

DEPARTMENT OF NATURAL RESOURCES

PROPOSED RULES

STATE WATER BANK PROGRAM

NR 5300 BASIC PROVISIONS

A. AUTHORITY AND SCOPE

These rules are promulgated under the authority of Minnesota Statutes, Sections 105.392, Subdivision 2, and 105.415. Their purpose is to implement and make specific the state water bank program and the indemnification process established by Minnesota Statutes, Section 105.391, Subdivision 3 for the purpose of compensating farmers for not converting certain kinds of wetlands to cropland.

B. DEFINITIONS

1. Commissioner means the Commissioner of the Department of Natural Resources or his designated agents.

2. Drain means to conduct drainage activities that will remove or reduce the surface water from the basin. Acts constituting draining include, but are not limited to pumping, lowering the outlet, enlarging the outlet, tiling or reducing the amount of water entering the basin. (Drainage does not include temporary water level reduction for conservation purposes.)

3. Public waters for purposes of these rules means waters of the state so designated in a county by the process described in Minnesota Statutes, Section 105.391 and those waters that have been determined to be public waters or navigable waters by the district court or if appealed, by the State or Federal supreme court.

4. Adjacent land means any lands abutting a basin that is eligible for inclusion in the state water bank program.

5. Less than 50 acres in area means the area of a plane bounded by the ordinary high water mark which is a mark delineating the highest water level which has been maintained for a sufficient period of time to leave evidence upon the landscape. The ordinary high water mark is commonly that point where the vegetation changes from predominantly aquatic to predominantly terrestrial.

6. Fair market value is an estimate of a property's value based upon standard and accepted land appraisal methods. The appraisal for eligible wetlands will estimate the potential value of the area as agricultural cropland less the cost of drainage.

7. Professional Soil Classifier is a person who qualifies as a professional soil classifier on the basis of criteria specified by the Minnesota Association of Professional Soil Classifiers. The requirements are a Bachelor of Science degree in Soil Science or adequate credits (15 semester or 23 quarter hours) in Soil Science, and four years of field experience in mapping soils.

C. PROCEDURES

1. Application for a permit to drain basins that are potentially eligible for compensation from the Department because of being declared public waters shall be made on such forms as the Commissioner may provide and shall include all data specified by the form and any required application fees.

a. The applicant shall include the following information to enable the Commissioner to determine the feasibility, practicality, and lawfulness of the proposed drainage:

(1) A statement by the owner that there are no burdens on the property or agreements which drainage would violate.

(2) A demonstration by the owner that the right to use the outlet can be obtained.

(3) A description of the proposed drainage project.

(4) A demonstration of the project costs, showing how the costs were estimated, together with an explanation of why the investment would be profitable.

b. A statement by a Professional Soil Classifier that the basin would be high quality cropland. The determination shall be based on the following criteria:

The kinds of soils that will qualify as high quality cropland are based on the following method arranged from best to poorest.

Rating Value	Soil Properties
1.	Loamy or clayey mineral soils (loamy or clayey average particle size in the control section.)
2.	Deep organic soils (Typic subgroups,) and shallow organic soils with a loamy or clayey substratum (Terric subgroups with loamy or clayey particle size.)
3.	Shallow organic soils with a sandy or gravelly substratus (Terric subgroups with sandy or sandy skeletal particle size.)
4.	Sandy or gravelly mineral soils (Aquents, aquepts, and Aquolls with sandy or sandy skeletal average particle size in the control section.)
5.	Other soils (mostly soils with limnic materials dominating the control section.)

Growing degree days (GDD) will be used as a climatic parameter to use for assessing soil quality. The groups from best to poorest are:

Rating Value	Climate Parameter
1.	More than 4400 GDD
2.	3400 - 4400 GDD
4.	Less than 3400 GDD

The following counties fall within the individual climate parameters:

More than 4400 GDD

Anoka	Lac Qui Parle	Rice
Big Stone	Le Sueur	Rock
Blue Earth	Lincoln	Scott
Brown	Lyon	Sibley
Carver	McLeod	Steele
Chippewa	Martin	Stevens
Cottonwood	Meeker	Swift
Dakota	Mower	Traverse
Dodge	Murray	Wabasha
Faribault	Nicollet	Waseca
Fillmore	Nobles	Washington
Freeborn	Olmsted	Watonwan
Goodhue	Pipestone	Wilkin
Hennepin	Ramsey	Winona
Houston	Redwood	Wright
Jackson	Renville	Yellow Medicine
Kandiyohi		

3400 - 4400 GDD

Aitkin	Hubbard	Otter Tail
Becker	Isanti	Pennington
Beltrami	Itasca	Pine
Benton	Kanabec	Polk
Carlton	Kittson	Pope
Cass	Koochiching	Red Lake
Chisago	Lake of the Woods	Roseau
Clay	Mahnomen	Sherburne
Clearwater	Marshall	Stearns
Crow Wing	Mille Lacs	Todd
Douglas	Morrison	Wadena
Grant	Norman	

Less than 3400 GDD

Cook	Lake	St. Louis

To arrive at a value, an index is determined by multiplying the soil property rating by the GDD rating. A value of four or less shall be considered high quality cropland.

The determination of soil properties shall be done by a Professional Soil Classifier with at least one observation of soil properties to depths of 50 inches for each ten acres of the wetland. Points of observations should be located systematically in the wetland, recorded on a map, and a

log of soil made for each observation. The information shall be included with the permit application.

2. If the public waterbasin is eligible for compensation the Commissioner shall mail to the applicant, within 60 days of written receipt of an application for a permit to drain, the various choices of indemnification, to include:

a. An offer

(1) To place the basin in the state water bank program, together with a sample water bank agreement.

(2) To acquire the basin and such interest as is necessary to make entry upon the acquired area available to the public.

(3) To acquire an easement in the nature of a conservation restriction as described by Minnesota Statutes, Sections 84.64 and 84.65 together with a sample of such an easement.

(4) To acquire a lease on the basin, together with a sample lease agreement.

b. A statement

(1) If such be the case, that the wetland appears to be eligible for the federal water bank program and who the landowner should contact. The state program, however, does not incur any obligations on the federal program and if the landowner chooses to select this option he will be subject to the federal program's priorities and procedures.

(2) That the landowner may suggest any other appropriate indemnification method, along with the proposed terms and conditions that he would like to have included.

(3) That the landowner and commissioner may agree to include adjacent property in the terms of the agreements.

(4) That the landowner has his choice of any one of

the indemnification offers or any other method of indemnification that the Commissioner will agree to.

c. An explanation of the balance of these procedures in order to establish the dollar amount of each offer as soon as the landowner specifies what adjacent land, if any, he would like to have included.

3. If the area is ineligible for compensation the Commissioner will so inform the applicant and advise him that a Minnesota Statute, Section 105.44, hearing on the issue of eligibility may be demanded.

4. If within 60 days of receipt of an application for a permit to drain, the Commissioner does not mail the landowner his choice of indemnification, the landowner is entitled to drain the basin.

5. Upon receipt of an offer of indemnification, the landowner shall inform the Commissioner of the amount (if any) and location of adjacent land that he would like to have included in the agreement, and what alternative (if any) methods of indemnification he would like the Commissioner to consider.

6. Within 60 days of receiving the above information the Commissioner shall complete an appraisal of the property and submit it to the Department of Administration for certification. If it is not so submitted within the 60 day period, the landowner may drain the basin.

7. When an appraisal has been certified, the Commissioner shall inform the landowner of the dollar amount of each offer, and begin negotiations. The outcome of the negotiations can be either;

a. The landowner accepts one of the offers made or agreed to by the Commissioner.

b. The landowner places the basin in a federal water bank program.

c. The landowner signs a consent to condemnation pursuant to Minnesota Statutes, Section 84.027, Subdivision 9, specifying which of the methods of indemnification offered or agreed to by the Commissioner he has selected; or

d. The landowner does none of the above, in which case the basin cannot be drained unless and until a new application for a permit to drain is submitted and the Commissioner does not make an offer of indemnification.

8. If the landowner chooses to sell the basin and access area to the Commissioner he shall obtain from the County Board of Commissioners the approval to sell the property as required by Minnesota Statutes, Section 97.481. The Commissioner must be supplied with a copy of the Board's resolution and if the County Board refuses approval, the applicant must select from among those options not requiring County Board approval. This procedure does not apply in those counties where blanket approval to sell the property to the State has been granted to those landowners who are eligible for compensation under Minnesota Statutes, Section 105.391, Subdivision 3.

9. Water bank, lease and easements obtained on an area shall be recorded and indexed in the office of the county recorder in the county where the basin lies.

D. EFFECTIVE DATE

1. These rules apply to applications for permits to drain received after the waterbasin involved has been designated a public water pursuant to Minnesota Statutes, Section 105.391 or has been identified as public waters or navigable waters by a district court or if appealed, by the state or federal supreme court.

E. PAYMENT RATES

1. Annual payment rates for the state water bank program will

be determined by multiplying the fair market value of the waterbasin and any adjacent lands by four percent.

2. Annual lease payments for the waterbasin and any adjacent lands will be based on a fair market rental rate.

3. Conservation restrictions in the form of easements will be established by an appraisal and their lengths will be subject to negotiation.

4. The rate for any other method of indemnification that is agreed to will be negotiated with the landowner and judged on its merits based upon the proposed restrictions and their relationship to the other payment rates.

F. TERMS FOR THE WATER BANK AND LEASE AGREEMENTS

1. Agreement period and beginning date

a. Eligible basins are placed in the state water bank program for a period of ten calendar years and under a lease agreement for twenty calendar years.

b. The lease agreement is continuous and shall transfer with the property if ownership changes during the time of the lease agreement.

c. A water bank or lease agreement finalized during the current calendar year shall be effective January 1 of that year. Exception: In cases where compliance with the terms of agreement cannot be rendered during the current calendar year, the beginning date of the agreement shall be January 1 of the following year.

d. Water bank or lease payments for the first year of an agreement will be made as soon as possible after an agreement has been finalized. Payments for the duration of a water bank or lease agreement will be made on or about August 1 of each continuous year thereafter.

2. Terms

a. Waterbasins

(1) In return for receipt of an annual payment the land-

owner must agree not to adopt any practice which would tend to defeat the purposes of the agreement. At a minimum, the designated basin may not be:

(aa) drained, burned, filled, clipped, or otherwise used in such a manner that would effect its wetland character. Exception: Noxious weeds may be controlled by the landowner by spot clipping and spot spraying. If cutting is used the area should not be clipped closer than 6 inches so as to protect nesting wildlife;

(bb) harvested for agricultural purposes;

(cc) grazed;

(dd) used as a source of irrigation water;

(ee) used as a receptacle for draining other wetlands. Exception: The Commissioner may approve designated acreage to receive limited drainage waters if such use is in keeping with sound wetlands management and prescribed in a mutually agreed upon conservation plan.

b. Adjacent Lands

(1) If the Commissioner finds it desirable he may mutually agree with the landowner upon the amount and location of adjacent lands to include in the agreement.

(aa) Up to one acre of adjacent land may be obtained for each acre of waterbasin.

(bb) The Commissioner may negotiate and outline a conservation plan for the waterbasin and adjacent lands. Upon signing the agreement, the landowner shall agree to effectuate the wetland conservation and development plan. Terms that may be included are:

(i) development of food and/or cover plots,

(ii) specified planting and harvesting dates,

(iii) areas desirable for permanent cover,

(iv) habitat improvement methods such as:

(aaa) clearing

(bbb) tilling

(ccc) re-establishment of former wetlands or the creation of new wetlands.

(ddd) fencing to protect the area

(v) advice on conservation and development practices,

(vi) any other mutually agreed upon practice that would effectuate wetland conservation and development.

3. Signatures

a. The agreement shall be on forms provided by the Commissioner and shall be signed by:

(1) the owner of the designated acreage, and

(2) the Commissioner

G. MODIFICATIONS OF WATER BANK AND LEASE AGREEMENTS

The Commissioner and the land owner may mutually agree to any modification of agreement terms that may be desirable to carry out the purposes of the program or facilitate its administration. Exception: No changes in payment rates for acreage under agreement is authorized during the term of the water bank or lease agreement.

1. Change in ownership of lands underlying public waters

a. All landowners shall notify the Commissioner of the sale of property that is covered by the water bank or lease agreement.

b. Upon transfer of an individual's right and interest in lands subject to a water bank agreement during the agreement period, the former land owner forfeits all rights to further payments under the agreement and refunds to the state all payments received thereunder during that year of the transfer. Forfeiture of payments is not required for those participating in a lease agreement nor if the transferee of any such land

agrees with the Commissioner to assume all obligations of the former owner.

(1) The new land owner may choose not to participate in the water bank program; however, any water declared public shall not be drained. If an alternative form of indemnification is desired, or if the new owner wishes to have payment rates adjusted on the existing water bank agreement, a permit application will have to be submitted to the Commissioner to initiate the procedures in these rules. The requirement for soils information and borings shall be waived on those basins that have been determined eligible for the water bank program by previous permit applications.

c. When two or more farms are combined that share mutual public waters the land owner who is adding to his property shall have the option of adding the new property to his original agreement, continuing the former owners' agreement, or decide not to participate in the program and not be able to drain the basin.

d. When a transfer of ownership occurs on or before August 1 of the current calendar year and the new owner agrees to continue the former owner's obligation, payments due will be made to the new owner.

2. Registration of Modification

a. All modifications will be completed on amendment forms provided by the Commissioner.

b. Modifications will be noted on the original agreement and the original amendment forms will be retained by the Commissioner.

H. AGREEMENT TERMINATIONS

1. Upon termination of an agreement the landowner shall forfeit all rights to further payments.

2. The Commissioner may terminate any agreement with mutual consent of the landowner if the Commissioner determines that termination would be in the public interest. If such be the case, no refund of payments made under the agreement is required.

3. The landowner must refund to the state all payments, partial or in full, received under the agreement upon any violation of the agreement terms during the time that the landowner has control of the property.

a. Subject to the Commissioner's determination that the violation is material and of the nature that warrants termination of the agreement the landowner shall:

(1) Refund, to the state, all payments received,

(2) Forfeit all rights to further payments,

(3) Not be entitled to drain the affected basin, and

(4) Not have the basin considered for a permit to drain or be allowed compensation under Minnesota Statutes, Section 105.391, Subdivision 3, until a transfer of ownership has taken place.

b. Subject to the Commissioner's determination that the violation does not warrant termination of the agreement, the Commissioner may require partial refunds or make payment adjustments as he deems appropriate.

4. Termination Action

a. The Commissioner shall notify each party to the agreement of the termination. The notice shall state:

(1) The reason for termination,

(2) The amount of payment refund due, and

(3) That the landowner is no longer required to comply with the agreement terms and that the public waters cannot be drained.

b. The landowner may challenge the termination by demanding a hearing under Minnesota Statutes, Section 105.44.

I. EXTENSION OF WATER BANK OR LEASE AGREEMENT

1. At the end of an agreement period the Commissioner shall offer the landowner his choice of the five indemnification offers without requiring a new application for a permit to drain.

2. The landowner has 60 days to notify the Commissioner, in writing, if he will be:

a. continuing the former agreement terms, subject to any rate redetermination, or

b. dissolving the former agreement, and

c. changing to another form of indemnification, or

d. deciding not to participate in the program with the knowledge that the basin cannot be drained.

3. If the landowner chooses to select another indemnification method, the choice must be specified in the landowner's notice to the Commissioner.

4. If the notification of the landowners intent to continue in the program is not given, the landowner will be required to submit an application for a permit to drain the basin to establish future eligibility to the water bank program.

5. Upon receipt of the landowner's choice, the Commissioner shall conduct an appraisal to establish the fair market value of the property. Once completed, the agreement may be finalized.

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF
RULES FOR THE STATE
WATERBANK PROGRAM

ORDER
ADOPTING
RULE

WHEREAS, public hearings on the above-captioned matter have been held, and

WHEREAS, the REPORT OF HEARING EXAMINER finds all statutory and regulatory requirements have been met, and

WHEREAS, the proposed final rule drafted per the FINDINGS AND CONCLUSIONS OF THE COMMISSIONER has been approved by the chief hearing examiner,

NOW THEREFORE, pursuant to the authority vested in me by Minnesota Statutes Section 105.392, I adopt the rules identified as Minnesota Department of Natural Resources Rules NR 5300, State Waterbank Program.

Dated: Jan. 26, 1978

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

William B. Nye

William B. Nye, Commissioner

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Adoption of Proposed Rules for the State Water Bank Program.	CERTIFICATE OF COMPLIANCE

I have examined the proposed rules and all related documents, and based on them and my familiarity with applicable laws and rules, declare they have been followed.

Dated: January 30, 1978.

A. W. Clapp III

A. W. CLAPP III
Special Assistant Attorney General

DNR 78-002-HK

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF THE ADOPTION)
OF PROPOSED RULES FOR STATE)
WATER BANK PROGRAM.)

REPORT OF THE
CHIEF HEARING EXAMINER

WHEREAS, hearings were held on September 26 and 28, 1977 before Howard L. Kaibel, Jr., a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Natural Resources on November 14, 1977; and

WHEREAS, the Department of Natural Resources has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Department of Natural Resources has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Natural Resources has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Natural Resources has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 13th day
of January, 1978.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF THE ADOPTION OF PROPOSED RULES FOR THE STATE WATERBANK PROGRAM.

FINDINGS OF THE COMMISSIONER

I have read the report of the Hearing Examiner and concur with his findings and conclusions and adopt them as my own, with the following exceptions:

I cannot agree with finding 7(e) which finds the three group division of Growing Degree Days as being arbitrary and capricious. The climatic conditions and the growing season in Minnesota are determined by weather records and were mapped by D. G. Baker and J. H. Stub in Technical Bulletin 248, University of Minnesota Agricultural Experiment Station, entitled - Climate of Minnesota, Part III, Temperature and Its Application, 1965. By dividing the state into five Climate Zones and assigning rating values to each, as suggested, the system becomes more complicated. Application of five zones, with subsequent "squaring off" to county boundaries would reduce the number of potentially eligible basins below the number originally proposed by the department. Secondly, growing degree days and the crops that are raised on a particular soil type do not conform to county boundaries. The recommendation to determine high quality cropland was made by the Federal Soil Conservation Service and is based on their knowledge of Minnesota soils and the yields that can be obtained on them. See Ex2, as marked by Mr. Howard Kaibel, for support and further explanation. A copy is attached.

Additionally, 7(c) is confusing and it appears that the Hearing Examiner overlooked the proposal submitted by the Commissioner in Comm P. Please note C Procedures 7c. I quote:

> The landowner signs a consent to condemnation pursuant to Minnesota Statutes, Section 84.027, Subdivision 9, specifying which of the methods of indemnification offered or agreed to by the Commissioner he has selected.

This is a special statute that authorizes "the Chapter 117 condemnation process" which was a major concern and desire that Mr. Malecki and legislators and other members of the public desired.

Dated: January 26, 1978.

William B. Nye

WILLIAM B. NYE, Commissioner
Department of Natural Resources

DNR-78-002-HK

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Adoption of Proposed Rules for State Water Bank Program

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Hearing Examiner Howard L. Kaibel, Jr. of the Minnesota Office of Hearing Examiners on the 26th day of September, 1977, in the Student Union, Mankato State University, Mankato, Minnesota, commencing at approximately at 9:30 a.m. in Marshall, and September 28, 1977, at 9:30 a.m. in Fergus Falls.

William Augustus Clapp, III, Special Assistant Attorney General, represented the Department of Natural Resources. Mr. James Malecki of New Ulm appeared representing Tilney Farms of Lewisville, Minnesota and the Minnesota Concrete Drain Tile Producers Association. The hearings continued until all representatives of associations or other interested groups or persons had an opportunity to participate and be heard concerning the adoption of the proposed rule. The time for submitting written comments was extended to October 12, 1977, by the Hearing Examiner in response to concerns expressed by the public, at which time the record was closed.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

The Department shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall also clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Department on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Department shall be responsible for filing the

rules with the Attorney General.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On August 5, 1977 the Department filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing;
(c) A proposed Notice of Hearing; and
(d) A Statement of the estimated length and number of people attending the hearing.

2. On August 22, 1977 a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 287.

3. On August 23, 1977 the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. On September 1, 1977 the Department filed the following documents:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Secretary of State's Certificate and list;
(f) The Statement of Need; and
(g) The Statement of Evidence, including the names of witnesses to be called;
(h) The names of Department personnel who will represent the agency.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

5. The record remained open through October 12, 1977 for the receipt of written comments and statements.

6. Authority for adoption of the rule proposed herein is found in Minn. Stat. § 105.392.

7. No specific recitation of all the facts and comments introduced by the DNR and the public with regard to the proposed rule is necessary as a specific finding in this Report. Those facts and comments, including the specific responses of the Department of Natural Resources to the concerns voiced by the public, are contained in the record, which exceeds 400 pages. Most of the concerns

and criticisms voiced at the hearing and in written comments were dealt with by the Department in a redraft of the proposed rule which is attached hereto, and incorporated herein by reference. Except as hereinafter discussed in this Finding, the redraft is specifically found to be needed, reasonable and statutorily authorized. The rule is required generally to uniformly and equitably compensate certain farmers for not draining certain public waterbasins and to fully explain the program to potentially eligible recipients. The need for and reasonableness of the specific subsections is adequately explained in the agency Statement of Need contained in Exhibit One. The changes in the redraft are specifically found to be insubstantial changes as that term is defined in Minn. Rule HE 108. Virtually all of the other public concerns, such as the 50 acre and 10 year limitations, are statutory and cannot be varied in these rules. The following areas of concern, however, do require specific comment and further insubstantial revision:

(a) The rate of compensation (four percent of fair market value) is specifically found to be inadequate. The rate was universally objected to by persons commenting and the evidence introduced by the Department supports a higher rate of at least five percent. The four percent figure proposed by the Department was the low end of a statewide average rent, including low quality crop land, while this program is specifically limited to high quality acreage. The average rents used as a basis for the four percent figure involve short-term leases freely renegotiable. This program, by statute, requires long-term 10 year leases which specifically cannot be renegotiated until the close of the 10 year period. The four percent figure is neither needed nor reasonable.

(b) No evidence was introduced to support the need for or the reasonableness of a 20 year limitation on the lease alternative as proposed herein. The limitation is contrary to the concern expressed by Representative Rod Searle and other members of the public "for more flexibility." (Comment G) The only justification for any limitation is to prevent the commissioner from offering a lease that would be for a term of years that would be so long as

to be prohibitive. This can be accomplished by qualifying the proposed language allowing a lease "not to exceed 20 years" which would leave the Commissioner the discretion to offer a lease of a lesser period in the event that experience demonstrates that an offer of a shorter lease will better serve the purposes of the Legislature.

(c) The Department did not document either the need for or reasonableness of limiting administrative hearings to decisions "determining the wetlands eligibility and termination action" as suggested in the Department's final submission. (Comment P) The public made repeated reference to the difficulty of seeking legal action and the reluctance of farmers to do so. The central concern of Mr. Malecki and others was developing a simple, inexpensive means of resolving differences over fair market value determinations. Mr. Malecki and legislators and other members of the public were clearly left with the impression at the hearing that some sort of administrative hearing process would be available on fair market value determinations at the Mankato hearing (T. 124). Both Minn. Stat. § 105.44 permit hearings and "the chapter 117 condemnation process" were suggested as possible mechanisms for guaranteeing due process to applicants on this important determination. Requiring a District Court challenge as is suggested in the Department's final submission without any opportunity for administrative review would appear to be a substantial departure from the rules as proposed and understood by hearing participants.

(d) Subsection H(4)(b) setting forth the right to a termination hearing should be renumbered as H(4)(a)(4) so that the right to a hearing is clearly stated in the Notice of Termination. (The "a" under H(4) should then, of course, be eliminated and 1, 2, 3, and 4 should become a, b, c, and d.)

(e) The recommendation of Senator Wayne Olhoft (Comment A) that the State should be divided into at least five groups based on Growing Degree Days should be carefully considered by the Department upon final adoption. The recommendation would make the rule function

in a less arbitrary and capricious fashion without doing violence to the basic approach which is fundamentally reasonable. Based upon the map submitted as part of Exhibit 1, the following breakdown would appear to be reasonable: Less than 3400, 3400 - 4000, 4000 - 4400, 4400 - 4700, 4800 and over.

(f) The numeral "1" in subsection d should be eliminated as it is superfluous.

(g) The word "written" in subsection c (2) should be stricken as the concept of "written receipt of an application" has never been defined or explained.

CONCLUSIONS

1. That the hearing in this matter was held pursuant to proper notice, authority and substantive procedures of law and rule.

2. That the Department of Natural Resources duly acquired and now has jurisdiction over the within proceeding.

3. That the Department of Natural Resources proposed rule with the modifications herein recommended complies with all statutory and rule requirements relating thereto.

4. That the rule hereinafter recommended for adoption will properly implement the legislative mandate of the water bank program.

5. That there is a need for the adoption of the proposed rule as hereinafter recommended.

6. That the rule as hereinafter recommended for adoption is a reasonable implementation of the Legislature's delegated responsibility.

RECOMMENDATION

It is hereby recommended: That the proposed rule of the Department of Natural Resources be promulgated, approved and adopted after attention to the modifications suggested by the Findings.

Dated this 14TH day of November, 1977.

Howard L. Kaibel

HOWARD L. KAIBEL, JR.
Hearing Examiner

RECEIVED
SEP 1 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF THE PROPOSED
ADOPTION OF RULES OF THE
DEPARTMENT OF NATURAL RESOURCES
CREATING THE STATE WATER BANK
PROGRAM (NR5300)

STATEMENT
OF
NEED

- - - - - - - - - - - - - - - -

JUSTIFICATION.

The Commissioner of Natural Resources is authorized, by statute, to promulgate rules for the administration of the state water bank program. The water bank program is intended to preserve the wetlands of the state and thereby conserve surface waters, preserve wildlife habitat, reduce runoff, provide for floodwater retention, reduce stream sedimentation, contribute to improve subsurface moisture, enhance the natural beauty of the landscape, and promote comprehensive and total water management planning, Minnesota Statutes Section 105.392, Subdivision 1.

Minnesota Statutes, Section 105.391, Subdivision 3, provides eligibility to the water bank program by tying into the designation of Public Waters. It states in part that:

> "... after a state water bank program has been established, a water basin designated public water which is eligible for inclusion in that program may be drained without a permit and without replacement of a water basin of equal or greater public value if the Commissioner does not elect, within 60 days of the receipt of an application for a permit to drain the water basin, to either (1) place the water basin in the state water bank program, or (2) acquire it pursuant to Section 97.481, or (3) indemnify the landowner through any other appropriate means, including but not limited

to conservation restrictions, easements, leases, or any applicable federal program. If the applicant is not offered his choice of any one of all the above alternatives, he is entitled to drain the waters involved."

Minnesota Statutes, Section 105.392, outlines various procedures, restrictions and criteria that must be met before a public water basin is eligible for the water bank program and the landowner can receive indemnification for not being able to drain the area.

EXPLANATION.

Paramount in developing the proposed rules was the desire to create a program that is simple to administer and that will allow eligible landowners to receive their choice of indemnification in an expeditious manner. To succeed however, several requirements had to be adopted that will aid in speeding up the procedures, insure that only those areas that are eligible are included, and allow for a blending together with other department procedures.

It is the departments' intent to include the administrative provisions in the proposed rules so that they lay the ground work for carrying out the state water bank program. This should insure that all potential landowners will know what to expect when enrolling in the program and not leave administrative changes that will facilitate the program to each individual agreement.

The following narrative on each section of the proposed rule describes the reasoning behind their inclusion in NR5300:

A. SCOPE.

The indemnification alternatives that the Commissioner is required to offer the landowner have been narrowed to five. They are the state water bank program, fee title acquisition, the federal water bank program, easement, and leases. The reason being that conservation restrictions are given in the form of an easement (Minnesota Statutes, Section 84.64)

and that no other methods of indemnification could be distinguished.

B. PURPOSE.

Minnesota Statutes, Section 105.392, Subdivision 1, was paraphrased for this section. It offers the reasoning for retaining wetlands and the impetus for the rules.

C. DEFINITIONS.

There are several terms that are used throughout the rules that require clarification. They are included in the definitions section so as to clearly establish their intent.

D. PROCEDURES.

Minnesota Statutes, Section 105.392, Subdivision 2, establishes five criteria that must be met before a basin is eligible for the state water bank program. To assist the Commissioner in his determination the landowner will be required to supply a description of the proposed project, estimations of costs, proof of outlet rights and soils information. Of particular concern is the determination of an area's ability to be high quality cropland if drained. A professional soil classifier is being required to take soil samples and rate the area according to the procedures outlined in the rule. The Department solicited advise from the United States Soil Conservation Service and has used their proposal in its entirety. The method of using a rating value for each general type of soils in the state and multiplying by growing degree days is the best method of quaranteeing that area would provide high quality cropland and should be included for state indemnification.

The Department will be requiring that all landowners riparian to a basin be in agreement on desiring to drain a water basin and sign one application for a permit to drain. This should allow for only one soils investigation which in turn will reduce investigation costs to the applicants. Also, one landowner cannot undertake activities that will drain his portion of a water basin without damaging the riparian rights of the other owners.

To realize the maximum from the program the Department will recognize federal indemnification programs that exist on water basins potentially eligible for the water bank program as restrictions that a landowner must fulfill before they can participate in the state program. For those landowners who choose to drain public waters by replacing it with one that has equal or greater public value the Commissioner will recognize the new area as the landowners choice and not compensate the landowner under the state water bank program. The reason being that the landowner was free to choose either replacing the basin or an indemnification of his choice when contemplating drainage and should not be eligible for both.

Key to the water bank program and the retention of public waters that are less than 50 acres is establishing eligibility to the program and offering the landowner his choice of five indemnification offers. The Commissioner must do this within 60 days of receipt of an application to drain water basins that meet the five eligibility criteria. However, the Department must conduct appraisals to determine the fair market value of any property it proposes to obtain an interest in and the Department of Administration must certify each appraisal (Minnesota Statutes, Section 84.0271.) The process cannot be completed within the 60 day time period so the Department will inform the landowner that the basin is eligible, that he has his choice of all the alternatives, and that an appraisal will be completed and certified as soon as possible. Upon certification the Department will enter into negotiations to inform the landowner of the particulars of each option and then complete the agreement specifics for the landowners selection.

E. EFFECTIVE DATE.

The effective date is included to inform possible participants that their water basins are not eligible until the county in which they live has completed their designation of public waters, Minnesota Statutes, Section 105.391, Subdivision 3.

F. PAYMENT RATES.

Minnesota Statutes, Section 105.392, Subdivision 4, states in part that: "In making his determination, the Commissioner shall consider, among other things, the rate of compensation necessary to encourage owners of wetlands to participate in the water bank program." To fulfill this statement the department has selected to use an appraisal of the area's land value and an estimate of cropland rental rates for the water bank and lease options respectively. The values that be determined will allow for variations in property values from north to south in the state and also will give the landowner a fair return on the property in question.

Four percent of an areas fair market value is documented by the University of Minnesota's Agricultural Economists as a rate that landowners in Minnesota will rent their land for.

G. TERMS OF THE WATER BANK AND LEASE AGREEMENT.

To benefit landowners the department will be offering eligibility to the water bank and lease agreement from January 1 of the year that an agreement is finalized. This will relieve the pressure that may arise from the length of time it takes to complete and certify an appraisal. This will only be allowed if the landowner does not change the natural character of the water basin during the time prior to the actual signing of an agreement.

Minnesota Statutes, Section 105.392, Subdivision 2, states that the state water bank program is intended to supplement and complement the federal water bank program. Thus, the terms of the water basin and adjacent lands agreements are adopted from the federal program.

H. MODIFICATIONS OF WATER BANK AND LEASE AGREEMENT.

This section has been included to insure that an administrative procedure is established that provides for changes in ownership of land.

Minnesota Statutes, Section 105.392, Subdivision 3, (5) requires that when the landowner transfers or sells his right to the property during

the water bank agreement period the landowner forfeits all rights to further payments and refunds to the state all payments received during the year of the transfer unless the new owner agrees with the Commissioner to assume all obligations of the agreement.

I. AGREEMENT TERMINATIONS.

The purpose of this section is two fold, (1) to allow landowners the option of dissolving an agreement for any unforeseen reasons and (2) to protect the state's investment and interest against intentional violations of agreements. In either case the water basin remains public and can not be drained.

J. EXTENSION OF WATER BANK OR LEASE AGREEMENT.

To allow for continuation of agreements, the selection of new indemnification alternatives, or deciding not to continue to participate in the program the Extention of Agreement section was included. This will allow for a smooth change over after agreements have expired without requiring new permit applications and extended time delays to establish eligibility to the program.

Gerald D. Seinwill
Director, Division of Waters

RECEIVED
SEP 1 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF NATURAL RESOURCES CREATING THE STATE WATER BANK PROGRAM (NR5300)

STATEMENT OF EVIDENCE

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In addition to the "Statement of Need" which is available for inspection or purchase at the Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104, and in support thereof the Department of Natural Resources will introduce the following evidence:

The department will cite Minnesota Statutes, Section 105.391, Subdivision 3, as the authority for offering the landowner of a water basin that is designated public waters his choice of five indemnification alternatives.

The department will cite Minnesota Statutes, Section 105.392, as the authority to create the Water Bank Program and the specific eligibility criteria.

The determination as to if a water basin is eligible for inclusion in the State Water Bank Program is outlined in Minnesota Statutes, Section 105.392, Subdivision 2. It states that: "Wetland eligible for inclusion in the water bank program shall have all the following characteristics as determined by the Commissioner:

"(a) Types 3 or 4, as defined in U.S. Fish and Wildlife Service Circular No. 39 (1971 edition);
(b) Less than 50 acres in area;
(c) Declared public waters because of its beneficial public value as wildlife habitat;
(d) Its drainage is lawful, feasible, and practical; and
(e) Its drainage would provide high quality cropland and that is the projected land use."

The department will submit Circular 39 and a letter from the United States Department of Agricultures' Soil Conservation Service to explain what type three and four wetlands are and how the department plans

on determining high quality cropland, respectively. The department adopted the proposal of the Soil Conservation Service in its entirety and feels very confident that their judgement as the leading federal agricultural agency will insure that all eligible water basins that are potentially high quality cropland can be included in the program.

Minnesota Statutes, Section 105.392, Subdivision 1 states in part that:

> "This program is intended to supplement and complement the federal water bank program and the payment rates established shall be at least equal to the federal rates existing at the time any agreements are entered into."

The department will submit as evidence the Agricultural Stabilization and Conservation Services Handbook for the Federal Water Bank Program. This shall provide insight into several restrictions that were included in the state program. Also a list of the federal payment rates for all eligible counties will be included.

To justify the payment schedule that the department has established, a report titled "Land Rental Arrangements in Minnesota: Current Status, Guidelines and Procedures" will also be entered as evidence. The report is written by Agricultural Economists at the University of Minnesota and outlines the variations in cropland rental rates from North to South in the State. The department has adopted a value of 4% of the fair market value of the water basin as the payment rate for the Water Bank Program. This is based on the University's report and fits the requirement of Minnesota Statutes, Section 105.392, Subdivision 4 which states in part that:

> "In making his determination the commissioner shall consider, among other things, the rate of compensation necessary to encourage owners of wetlands to participate in the water bank program."

It is felt that the department must offer the landowner a justified income for their loss of right for not being able to drain an eligible wetland.

Lonnie J. Thomas, Hydrologist will testify as to the contents and reasonableness of this rule. Mr. Thomas coordinated drafting the rule and scheduling the public hearing.

If there are any particular problems it is advisable to bring them to the attention of the department. Inquires should be directed to:

Lonnie Thomas
Minnesota Department of Natural Resources
Division of Waters
Space Center Building
444 Lafayette Road
St. Paul, MN 55101

Dated this 31 day of August, 1977.

Gerald D. Seinwill
Director, Division of Waters

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

RECEIVED
SEP 1 1977
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Adoption of Rules of the Department of Natural Resources Creating the State Water Bank Program.

AFFIDAVIT OF MAILING

LONNIE J THOMAS being first duly sworn, deposes and says:

That on the 23rd day of August, 1977, at the City of Saint Paul. County of Ramsey, State of Minnesota, he served the attached Notice of Hearing by depositing in the United States mail at said City of Saint Paul, a true and correct copy thereof, properly enveloped, and with postage prepaid, to all persons and associations at the addresses on the attached list.

Lonnie Thomas

Subscribed and sworn to before me this 23rd day of August, 1977.

Rose M. Axness

Notary Public

ROSE M. AXNESS
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires March 1, 1984

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

RECEIVED
SEP 1 1977
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Adoption of Rules of the Department of Natural Resources creating the State Water Bank Program.

CERTIFICATE

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I hereby certify that the attached 498 label and 4 sheets constitute the complete list of persons, associations, and other interested groups who as of 1:30 o'clock P. M., this 11th day of August, 1977, have requested pursuant to Minnesota Statutes 1976, Section 15.0412, Subdivision 4, that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearings on proposed rules on subject captioned above.

Joan Anderson Growe

SECRETARY OF STATE
JOAN GROWE

BY: Cheri L. Matteson

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the
Adoption of Proposed
Rules for the State
Water Bank Program.

NOTICE OF HEARING

PLEASE TAKE NOTICE that a public hearing on the above-described rules will be held at the following places and dates:

September 26, 1977 -- Mankato, Minnesota,
Student Union Conference Auditorium
Mankato State University, at 9:30 a.m.

September 27, 1977 -- Marshall, Minnesota,
LC 217 Lecture Center Building,
Southwest State University, at 9:30 a.m.

September 28, 1977 -- Fergus Falls, Minnesota,
Humanities Building Theater, Fergus Falls
Community College, at 9:30 a.m.

All interested persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearings. In addition, written materials may be submitted to:

Howard L. Kaibel, Jr.
Office of Hearing Examiners
1745 University Avenue
Saint Paul, Minnesota 55105

either before the hearing or within five (5) days after the hearing. The hearing will be conducted as described in Minnesota Statutes, Section 15.0412 and in Minnesota Regulations HE 101-109.

The Legislature has provided that when a farmer is denied the right to drain certain kinds of waterbasins which are less than 50 acres in size, he can receive compensation in lieu of the right to drain. These proposed rules establish the methods for determining if a given basin qualifies for compensation, describe the terms of the indemnification alternatives, set payment rates, and prescribe timetables and procedures.

A free copy of the proposed rules may be obtained by writing to the Department of Natural Resources, Division of Waters, Third Floor, Space Center Building, 444 Lafayette Road, Saint Paul, Minnesota 55101. Additional copies will be available at the hearings. The agency's authority to adopt the proposed rules is found in Minnesota Statutes, Section 105.392, subdivision 1. A "statement of need" explaining why the agency feels the proposed rules are necessary, and a "statement of evidence" outlining the testimony they will be introducing will be filed with the Office of Hearing Examiners twenty-five (25) days before the hearing and will be available there for public inspection.

Please be advised that Minnesota Statutes, Chapter 10A, requires each lobbyist to register with the Ethical

Practices Board within five (5) days after he commences lobbying. Lobbying includes attempting to influence rule-making by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, phone (612) 296-5615.

Dated this 9th day of August, 1977.

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

for
WILLIAM B. NYE, Commissioner

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the
Adoption of Proposed Rules
for the State Water Bank
Program.

ORDER FOR HEARING

Minnesota Statutes, Section 105.392, Subdivision 1, requires the Commissioner of Natural Resources to promulgate rules, which shall include procedures and payment rates, for the State water bank program.

Proposed rules have been drafted, and public hearings shall be held on them in the manner provided by the rules-making provisions of Minnesota Statutes, Chapter 15, and the rules of the Office of Hearing Examiners. The hearings shall be held at the following dates and places.

September 26, 1977 -- Mankato, Minnesota,
Student Union Conference Auditorium
Mankato State University, at 9:30 a.m.

September 27, 1977 -- Marshall, Minnesota,
LC 217 Lecture Center Building,
Southwest State University, at 9:30 a.m.

September 28, 1977 -- Fergus Falls, Minnesota,
Humanities Building Theater, Fergus Falls
Community College, at 9:30 a.m.

Prior to the hearings, the Department shall send copies of the rule and the hearings schedule to all Minnesota Legislators, Counties, Soil & Water Conservation Districts and Watershed Districts.

Dated this 9th day of August, 1977.

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

Ronald M. Carlson For
WILLIAM B. NYE, Commissioner