

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File #657

12/2 M. Clapp requested to send original of order Adopting
12/4 rec'd original order

Permanent Rule X

Temporary Rule

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 11/25 DUE DATE 12/15

Resubmitted and Received

a. Returned to Agency w/o Filing w/Secretary of State
b. Approved Date Sent Back to Agency 12-5-80

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1. Rules as Adopted ✓
2. Rules as Proposed ✓ see as in SR.
3. Certificate of Board's Authorizing Resolution, where applicable N/A
4. Order for Hearing ✓
5. Notice of Hearing ✓ 8.19.80
   Sufficiency ? but see HE 3
6. Secretary of State's List ✓ (one copy only)
7. Certificate of Acquisition of Secretary of State's List not submitted
8. Secretary of State's Certification of Delivery of Secretary of State's List to Agency ✓
9. Affidavit of Mailing ✓
   At least 30 days prior to hearing ✓ 7.14.80
10. Publication in State Register ✓
    At least 30 days prior to hearing ✓ 7.14.80
11. Statement of Need and Evidence ✓
12. Hearing Examiner's Report ✓
13. Agency's Findings of Fact ✓
    + transmittal memo to CHE
14. Certificate of Board's Resolution Adopting Rules, where applicable N/A
15. Order Adopting ?
16. Reports of Chief Hearing Examiner A) ✓ 10.13.80 (attached to HE rpt)
    B) 11.20.80
17. Order Approving Incorporation by Reference, where applicable ✓
18. Certificate of Compliance with Rulemaking Procedures ✓
19. Copy of Notice of Intent to Solicit Outside Opinion, where applicable N/A
20. Petition by Public, where applicable N/A

ADMIN 1000 (Rev. 1-73)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : JOSEPH N. ALEXANDER, Commissioner
Department of Natural Resources
Centennial Office Building

DATE Dec. 5, 1980

ATTN: A.W. CLAPP, III, S.A.A.G.

FROM : JERRY S. ANDERSON
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: Rules as Approved In the Matter of Rules for Water Surface Use Management.

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Note that they have NOT been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages of the rules in the approved set.

Directly following the approved rules is a complete set of required documents and transcript which must be retained with the rules by you or your agency.

If you have any questions in this regard, please contact me.

JSA/bw
Encl.
cc: Duane Harves
Susan Robertson

RECEIVED
NOV 5 1980
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

- - - - - - -

In the Matter of Rules for
Water Surface Use Management

ORDER
ADOPTING
RULES

- - - - - - -

WHEREAS public hearing in this matter has been properly noticed and held, and whereas I have adopted Findings which incorporate the examiner's findings and recommendations except as indicated,

NOW THEREFORE IT IS ORDERED that the proposed rules published in the State Register are adopted, with the changes indicated by the FINDINGS OF THE COMMISSIONER.

Dated 3 Nov, 1980.

Joseph N. Alexander

JOSEPH N. ALEXANDER
Commissioner

Department of Natural Resources

Rules for Water Surface Use Management

Rules As Adopted

6 MCAR § 1.0220 General.

A. Policy. It is the policy of this state to promote full use and enjoyment of waters of the state, to promote safety for persons and property in connection with such use, and to promote uniformity of laws relating to such use.

B. Scope. As part of implementing that policy, Minn. Stat. §§ 378.32 and 459.20 authorize counties, cities, and towns to regulate by ordinance the use of surface waters by watercraft, upon approval of any such ordinance by the commissioner. Minn. Stat. § 361.26, subd. 2a authorizes the commissioner to regulate such use by rule, upon request of a county, city, or town, and after the rule is approved by the majority of the counties affected. These rules, however, shall not apply to units of government other than counties, cities and towns, or to counties, cities or towns adopting ordinances identical to and on the same body of water as a lake conservation district ordinance.

C. Goal. The goal of water surface use management shall be to enhance the recreational use, safety, and enjoyment of the water surface of Minnesota and to preserve these water resources in a way that reflects the state's paramount concern for the protection of its natural resources. In pursuit of that goal, an ordinance or rule shall:

1. Where practical and feasible accommodate all compatible recreational uses.

2. Minimize adverse impact on natural resources.

3. Minimize conflicts between users in a way that provides for maximum use, safety and enjoyment.

4. Conform to the standards set in 6 MCAR § 1.0222.

D. Authority. These rules are required by Minn. Stat. § 361.25. They provide procedures for the development and approval of rules and ordinances for resolving water surface use conflict by regulating:

1. Type and size of watercraft.

2. Type and horsepower of motors.

3. Speed of watercraft.

4. Time of use.

5. Area of use.

6. The conduct of other activities on the water body where necessary to secure the safety of the public and the most general public use.

E. Jurisdiction

1. The commissioner shall exercise his discretion under Minn. Stat. § 361.26, subd. 2 to regulate a water body when so requested by a county, city, or town only when the water body

a. is traversed by a state or international boundary; or

b. is within the jurisdiction of two or more counties which cannot agree on the content of ordinances; and

c. regulation is necessary to achieve the goals in 6 MCAR § 1.0220 C.

2. In all other cases, water surface use regulation shall be by county, city, or town ordinance as specified in Minn. Stat. §§ 378.32 and 459.20. If a body of water is located within the jurisdiction of two or more cities or towns which cannot agree on the content of ordinances, any such city or town may petition the county in which they are located to adopt an ordinance.

F. Existing ordinances and rules. All existing ordinances and rules adopted on or after January 1, 1975 affecting water surface use shall be brought into compliance with these rules within a reasonable time period after promulgation of these rules.

6 MCAR § 1.0221 Assessment of conditions.

A. Factors to consider. The commissioner or any governmental unit formulating, amending or deleting controls for surface waters shall acquire and consider the following information, noting factors that are not relevant:

1. Physical characteristics.

a. Size - normal surface acreage, if available, or the basin acreage listed in the Division of Waters Bulletin No. 25, "An Inventory of Minnesota Lakes."

b. Crowding potential - expressed as a ratio of water surface area to length of shoreline.

c. Bottom topography and water depth.

d. Shore soils and bottom sediments.

e. Aquatic flora and fauna.

f. Water circulation - for lakes, the existence and locations of strong currents, inlets, and large water level fluctuations; for rivers and streams, velocity and water level fluctuations.

g. Natural and artificial obstructions or hazards to navigation, including but not limited to points, bars, rocks, stumps, weed beds, docks, piers, dams, diving platforms, and buoys.

h. Regional relationship - the locations and the level of recreational use of other water bodies in the area.

2. Existing development.

a. Private - to include number, location, and occupany characteristics of permanent homes, seasonal homes, apartments, planned unit developments, resorts, marinas, campgrounds, and other residential, commercial, and industrial uses.

b. Public - to include type, location, size, facilities, and parking capacity of parks, beaches, and watercraft launching facilities.

3. Ownership of shoreland - to include the location and managing governmental unit of shoreline in federal, state, county, or city ownership as well as private, semi-public, or corporate lands.

4. Public regulations and management - to include federal, state or local regulations and management plans and activities having direct effects on watercraft use of surface waters.

5. History of accidents which have occurred on the surface waters.

6. Watercraft use - to include information obtained in the morning, afternoon, and evening on at least one weekday and one weekend day, concerning the number and types of watercraft in each of the following categories.

a. Kept or used by riparians.

b. Rented by or gaining access through resorts or marinas.

c. Using each public watercraft launching facility.

d. In use on the waterbody.

7. Conflict perception and control preferences - to include opinions gained by surveys or through public meetings or hearings of riparians, transients, local residents, and the public at large.

B. Written statement. Any governmental unit formulating, amending or deleting controls for surface waters shall submit to the commissioner the following:

1. The information requested in 6 MCAR § 1.0221 A., portrayed on a map to the extent reasonable.

2. A statement evaluating whether the information reveals significant conflicts and explaining why the particular controls proposed were selected.

3. The proposed ordinance.

4. A description of public hearings held concerning the proposed controls, including an account of the statement of each person testifying.

C. Commissioner review and approval.

1. The commissioner shall require the ordinance proposer to provide additional information of the kind described in 6 MCAR § 1.0221 A., when needed in order to make an informed decision. The commissioner shall approved the ordinance if it conforms with these rules.

6 MCAR § 1.0222 Water surface management standards. To promote uniformity of ordinances or rules on the use of watercraft on surface waters of this state, to encourage compliance and to ease enforcement, the commissioner and any

government unit formulating such ordinances or rules shall follow these standards. When formulating an ordinance or rule, it is not required that all the standards listed below be incorporated into every ordinance or rule. Rather, the commissioner or governmental unit shall select from the standards listed below such standard(s) as are needed to regulate the surface use of waters.

A. Watercraft type and size. Controls may be formulated concerning the type and/or size of watercraft permissible for use on surface water body(ies) or portions thereof.

B. Motor type and size. Controls, if any, concerning the maximum total horsepower of motor(s) powering watercraft on surface waters shall utilize one or more of the following horsepower cutoffs or motor types.

1. 25 H.P.
2. 10 H.P.
3. Electric motors
4. No motors

C. Direction of travel. Directional controls, if used, shall mandate watercraft to follow a counter-clockwise path of travel.

D. Speed limits. Controls, if any, concerning the maximum speeds allowable for watercraft on surface waters shall utilize one or more of the following miles-per-hour cutoffs:

1. Slow-No Wake. "Slow-No Wake" means operation of a watercraft at the slowest possible speed necessary to maintain steerage and in no case greater than 5 mph.
2. 15 mph.
3. 40 mph.

E. Effective time.

1. Controls must use one or more of the following time periods.
   a. Sunrise-sunset or sunset-sunrise the following day.
   b. 9:00 a.m.-6:00 p.m. or 6:00 p.m.-9:00 a.m. the following day.

c. Noon-6:00 p.m. or 6:00 p.m.-noon the following day.

d. All 24 hrs. of the day.

2. Controls must be in effect during one of the following calendar divisions:

a. All year.

b. Memorial Day weekend through Labor Day weekend.

c. On all weekends and legal holidays occurring within period b.

3. Controls governing the use of watercraft may be adopted which are placed into effect based upon specific water elevations.

F. Area zoning.

1. Controls shall clearly specify which portion of the water body is affected by such controls.

2. Area controls may be formulated concerning any of the subject matter covered in the water surface management standards A-H.

3. Controls concerning a "Slow-No Wake" shall be established for the entire water body or portion thereof according to the following criteria:

a. Within 100 ft. or 150 ft. from the shore; or

b. Where watercraft speed or wake constitutes a hazard to persons, property or the natural resources; or

c. Where it has been determined that such control(s) would enhance the recreational use and enjoyment of the majority of users.

G. Conduct of other activities on a body of water. Controls formulated by a governmental unit which restricts other activities (such as swimming, or SCUBA diving) shall conform to 6 MCAR § 1.0220 C.

H. Emergencies. In situations of local emergency, temporary special controls may be enacted by a county, city or town for a period of not more than five days without the commissioner's approval. The commissioner shall be notified, however, as soon as practicable during this five day period.

I. A government unit may submit additional evidence if it feels that

variance from the afore stated standards is necessary to best address a particular problem. The commissioner will review such evidence and shall grant a variance if there are circumstances peculiar to the body or bodies of water in question of such magnitude as to overshadown the goal of uniformity.

6 MCAR § 1.0223 Administrative provisions.

A. Enforcement and penalties.

1. Any government unit adopting ordinances pursuant to Minn. Stat. §§ 378.32 and 459.20 shall provide for their enforcement and prescribe penalties for non-compliance. Rules established pursuant to Minn. Stat. § 361.26 shall be enforced by conservation officers of the Department of Natural Resources and the sheriff of each county.

2. Rules or ordinances shall contain a provision exempting authorized resource management, emergency and enforcement personnel when acting in the performance of their assigned duties. They may also provide for temporary exemptions from controls through the use of permits issued by the unit of government adopting the ordinance or rule.

B. Commissioner's approval.

1. Any governmental unit formulating ordinances or desiring amendments and deletions to existing ordinances shall submit the written statement required by these rules with the proposed ordinance to the commissioner pursuant to Minn. Stat. § 378.32 for his approval or disapproval. Determination of approval or disapproval shall be based upon the written statement and the compatibility of the ordinance with these rules. If the proposed ordinance is disapproved by the commissioner and a satisfactory compromise cannot be established, the governmental unit may initiate a contested case hearing to settle the matter.

2. The commissioner shall notify the governmental unit in writing of his approval or disapproval of proposed ordinances within 120 days after receiving them pursuant to Minn. Stat. § 378.32. Failure to so notify shall be considered approval.

C. Notification.

1. Any governmental unit adopting ordinances shall provide for adequate notification of the public, which shall include placement of a sign at each public watercraft launching facility outlining essential elements of such ordinances, as well as the placement of necessary buoys and signs. All such signs and buoys shall meet requirements specified in Minn. Stat. § 361 and NR § 204-207.

2. The commissioner shall publish and update at his discretion a listing of watercraft use rules and ordinances on surface waters of the state for distribution to the public.

APPROVED AS TO FORM AND LEGALITY

12-5 1980

WARREN SPANNAUS, ATTORNEY GENERAL

BY Jerry Anderson

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
DEC - 5 1980
Joan Anderson Growe
Secretary of State
10:00 AM

RECEIVED
NOV 5 1980
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Rules for Water Surface Use Management

FINDINGS OF THE COMMISSIONER

I have read the Report of the Hearing Examiner, and the comments on it from the Hennepin County Park Reserve District. I concur with the findings and recommendations of the examiner, and adopt them as my own, except as follows.

1. The legal conclusion reached by the examiner in his Finding #17 is unclear. The statutory authority under which these rules are adopted concerns only the Commissioner and counties, cities, and towns. Neither lake conservation districts nor park reserve districts are required to have their water surface use controls approved by the Commissioner, nor is the Commissioner authorized to adopt controls at their request. The difference between the lake conservation districts and the park reserve district, vis a vis these rules, is that within the jurisdiction of the former, counties, cities, and towns can only adopt water surface ordinances that are identical to those of the former. No such relationship between the park reserve district and counties, cities and towns is described in the statute; therefore it is those counties, cities, and towns, not the park reserve district itself, that cannot be exempted.

2. Because I am incorporating the language recommended by the examiner near the end of his Finding #23, I do not accept his conclusion in Finding #24 that "may" must be changed to "shall" in § 1.0222A. The "may" has the same meaning as the phrases "if any" and "if used" in paragraphs B, C, and D immediately following. "Shall" would be in direct conflict with the permission to select given in the aforementioned added language.

For the same reason, I do not accept Finding #28. As stated in the added language, a § 1.0222 E.3 control shall be selected if needed, and the criteria for need are set out in § 1.0220 C. See HE28 + P.6

3. Contrary to Finding #26, I conclude that the Department has the authority to establish the standards for direction of travel set out in § 1.0222 C. Local governments do establish directions of travel on lakes, usually where the volume of high-speed traffic is high in relation to the size of the water body. It is done for the same reason that everyone goes the same direction on a race track or a street lane. And for the same reason that (in the United States) the race runs counterclockwise and the cars travel on the right side of the street, it is important that direction-of-travel controls on water bodies always specify the same direction. For the reasons given in the Statement of Need and Reasonableness, the appropriate direction is counterclockwise.

Since counties, cities and towns can (See Minn. Stat. § 378.32 subds. 8 and 9) and do establish directions of travel, and since a uniform direction is needed and reasonable, and since Minn. Stat. § 378.32 subd. 1 requires consistency of local ordinances with rules promulgated under § 361.25, and since § 361.25 allows the Commissioner to adopt "such other regulations as he deems necessary to carry out the provisions of this chapter", I conclude that § 1.0222 C is within the authority of the statute. This concludion is bolstered by the provisions of § 361.26 subd. 2 clause (C) for speed of watercraft and distance between watercraft. Two boats each travelling 30 mph, when going in the same direction are motionless relative to each other, while if headed at each other are closing at 60 mph. And it is obviously easier to maintain safe distances when travelling together than

when coming at each other. Think of how much easier it is to maintain both speed and distance on a highway than it is in a shopping mall parking lot where cars are going every which way.

Dated: ~~October~~ 3 Nov, 1980.

JOSEPH N. ALEXANDER
Commissioner

File No.

Date 8-19-80

PROPOSED RULES

Pursuant to Minn. Stat. § 15.0412, subd. 4, agencies must hold public hearings on proposed new rules and/or proposed amendment of existing rules. Notice of intent to hold a hearing must be published in the *State Register* at least 30 days prior to the date set for the hearing, along with the full text of the proposed new rule or amendment. The agency shall make at least one free copy of a proposed rule available to any person requesting it.

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 20 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Public Hearings on Agency Rules
July 21-27, 1980

Date	Agency and Rule Matter	Time & Place
July 24	Peace Officers Standards and Training Board Licensing of Peace Officers, Part-time Officers and Constables Hearing Examiner: Jon Lunde	9:00 a.m., State Office Bldg., 435 Park St., Rm. 83, St. Paul, MN

Department of Natural Resources

Proposed Rules for Water Surface Use Management

Notice of Hearing

Public hearings concerning the proposed new rules will be held at Brainerd on August 19, 1980, at the Crow Wing County Service Building, meeting room #1, lower level, and in St. Paul on August 26, 1980 at the Minnesota Historical Society Building, 640 Cedar Street, in the Weyerhaeuser Room. Each hearing will begin at 10:00 a.m., and again at 7:30 p.m. for those who prefer to come in the evening.

The proposed rules may be modified as a result of the hearing process. Therefore, if you are concerned about the content of the rules, you are urged to participate.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Kent Roberts, hearing examiner, room 300, 1745 University Avenue, St. Paul, MN. 55104, telephone (612) 296-8112 either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417 and 15.052, and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Twenty-five days prior to the hearing, a Statement of Need and Reasonableness will be available for review at Hearing Examiner Roberts' office and at the Office of Hearing Examiners. This Statement of Need and Reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule amendments. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

Minn. Stat. § 361.26, subd. 2, provides that the Commissioner of Natural Resources, when requested by a county, city, or town, may adopt a rule governing the use of a lake or river by watercraft. The rule must be approved by the county. Minn. Stat. §§ 378.32 and 459.20 allow counties, cities, and townships to adopt ordinances for the same purpose. Such an ordinance must be approved by the Commissioner of Natural Resources. The rules now being proposed establish certain requirements that any DNR rule or local ordinance for the use of a body of water by watercraft, must conform with. The rules provide

—that the goal of a water surface use ordinance or rule is to accommodate all compatible recreational uses while minimizing adverse impact on natural resources and minimizing conflicts in a way that provides for maximum use, safety and enjoyment.

—the identification of the limited situations in which the commissioner will entertain a request to adopt a rule for a water body.

—ways to resolve conflicts between governing bodies on water bodies in more than one jurisdiction.

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION** — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

—a list of information that the Commissioner of Natural Resources can require from a county, city or town requesting a rule or adopting an ordinance.

—that horsepower limits, if used, must be set at 25 h.p., 10 h.p., electric motors, or no motors.

—that speed limits, if used, must be set at 40 mph, 15 mph, or slow-no wake, and under what conditions slow-no wake can be used.

—that directional controls, if used, must be counter-clockwise.

—that time periods, if used, must be sunrise-sunset or sunset-sunrise, 9:00 a.m.-6:00 p.m. or 6:00 p.m.-9:00 a.m., or noon-6:00 p.m. or 6:00 p.m.-noon.

—that controls can be in effect all year, or Memorial Day weekend through Labor Day weekend, or on all weekends and legal holidays from Memorial Day weekend through Labor Day weekend.

—that the controls used can apply to all or parts of a water body.

—that other activities, such as swimming, water skiing, and scuba diving can be regulated.

—that the commissioner can grant variances from the requirements of these rules.

—for various enforcement, administrative, and notification matters.

The authority for and subject-matter of the rules are found in Minn. Stat. §§ 361.25, 361.26, and 378.32.

The agency estimates that there will be no cost to local public bodies in the state to implement the amendments for the two years immediately following its adoption, within the meaning of Minn. Stat. § 15.0412, subd. 7 (1978).

Copies of the proposed rule amendments are now available and at least one free copy may be obtained by writing to Duane R. Harves, Chief Hearing Examiner, Room 300, 1745 University Avenue, Saint Paul, Minnesota 55104, telephone (612) 296-8100. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendments, contact Chief Hearing Examiner Harves.

Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

June 30, 1980

Joseph N. Alexander
Commissioner

Rules As Proposed (all new material)

6 MCAR § 1.0220 General.

A. Policy. It is the policy of this state to promote full use and enjoyment of waters of the state, to promote safety for persons and property in connection with such use, and to promote uniformity of laws relating to such use.

B. Scope. As part of implementing that policy, Minn. Stat. §§ 378.32 and 459.20 authorize counties, cities, and towns to regulate by ordinance the use of surface waters by watercraft, upon approval of any such ordinance by the commissioner. Minn. Stat. § 361.26, subd. 2a authorizes the commissioner to regulate such use by rule, upon request of and after the rule is approved by, a county, city, or town.

C. Goal. The goal of water surface use management shall be to enhance the recreational use, safety, and enjoyment of the water surface of Minnesota and to preserve and protect these water resources. In pursuit of that goal, an ordinance or rule shall:

1. Where practical and feasible accommodate all compatible recreational uses.

2. Minimize adverse impact on natural resources.

3. Minimize conflicts in a way that provides for maximum use, safety and enjoyment.

4. Conform to the standards set 6 MCAR § 1.0222.

D. Authority. These rules are required by Minn. Stat. §§ 361.25 and 361.26. They provide procedures for the development and approval of rules and ordinances for resolving water surface use conflict by regulating:

1. Type and size of watercraft.

2. Type and horsepower of motors.

3. Speed of watercraft.

4. Time of use.

5. Area of use.

6. The conduct of other activities on the water body where necessary to secure the safety of the public and the most general public use.

E. Jurisdiction.

1. The commissioner shall exercise his discretion under Minn. Stat. § 361.26, subd. 2 to regulate a water body when so requested by a county, city, or town only when the water body either

a. is traversed by a state or international boundary; or

b. is within the jurisdiction of two or more counties which cannot agree on the content of regulations, and regulations are, in the commissioner's estimation, needed.

2. In all other cases, water surface use regulation shall be by county, city, or town ordinance as specified in Minn. Stat. §§ 378.32 and 459.20. If a body of water is located within the jurisdiction of two or more cities or towns which cannot agree on the content of regulations, they may petition the county in which they are located to adopt regulations.

F. Existing ordinances and rules. All existing ordinances and rules affecting water surface use shall be brought into essential compliance with these guidelines within a reasonable time period after promulgation of this rule.

6 MCAR §§ 1.0221 Assessment of conditions.

A. Factors to consider. Any governmental unit formulating controls for surface waters shall acquire and consider as much of the following information as it deems pertinent.

1. Physical characteristics.

a. Size—normal surface acreage, if available, or the basin acreage listed in the Division of Waters Bulletin No. 25, "An Inventory of Minnesota Lakes."

b. Crowding potential—expressed as a ratio of water surface area to length of shoreline.

c. Bottom topography and water depth.

d. Shore soils and bottom sediments.

e. Aquatic flora and fauna.

f. Water circulation—for lakes, the existence and locations of strong currents, inlets, and large water level fluctuations; for rivers and streams, velocity and water level fluctuations; for rivers and streams, velocity and water level fluctuations.

g. Natural and artificial obstructions or hazards to navigation, including but not limited to points, bars, rocks, stumps, weed beds, docks, piers, dams, diving platforms, and buoys.

h. Regional relationship—the locations and the level of recreational use of other water bodies in the area.

2. Existing development.

a. Private—to include number, location, and occupancy characteristics of permanent homes, seasonal homes, apartments,

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planned unit developments, resorts, marinas, campgrounds, and other residential, commercial, and industrial uses.

b. Public—to include type, location, size, facilities, and parking capacity of parks, beaches, and watercraft launching facilities.

3. Ownership of shoreland—to include the location and managing governmental unit of shoreline in federal, state, county, or city ownership as well as private, semi-public, or corporate lands.

4. Public regulations and management—to include federal, state, or local regulations and management plans and activities having direct effects on watercraft use of surface waters.

5. History of accidents which have occurred on the surface waters.

6. Watercraft use—to include information obtained in the morning, afternoon, and evening on at least one weekday and one weekend day, concerning the number and types of watercraft in each of the following categories.

a. Kept or used by riparians.

b. Rented by or gaining access through resorts or marinas.

c. Using each public watercraft launching facility.

d. In use on the waterbody.

7. Conflict perception and control preferences—to include opinions gained by surveys or through public meetings or hearings of riparians, transients, local residents, and the public at large.

B. Written statement. Any governmental unit formulating controls for surface waters, or requesting the commissioner to do so, shall submit to the commissioner the following:

1. The information requested in 6 MCAR § 1.0221 A., portrayed on a map to the extent reasonable.

2. A statement evaluating whether the information reveals significant conflicts and explaining why the particular controls proposed were selected.

3. The proposed ordinance.

4. A description of public hearings held concerning the proposed controls, including an account of the statement of each person testifying. All riparian landowners must be properly notified in the same manner required for the adoption of other local zoning controls.

C. Commissioner review and approval.

1. The commissioner shall require the ordinance proposer to provide additional information of the kind described in 6 MCAR § 1.0221 A., when needed in order to make an informed decision. The commissioner shall approve the ordinance if it conforms with 6 MCAR § 1.0220 C. and 1.0222.

6 MCAR § 1.0222 Water surface management standards. To promote uniformity of regulations on the use of watercraft on surface waters of this state, to encourage compliance and to ease enforcement, the commissioner and any government unit formulating such regulations shall follow these standards.

A. Watercraft type and size. Controls may be formulated concerning the type and/or size of watercraft permissible for use on surface water body(s) or portions thereof.

B. Motor type and size. Controls concerning the maximum total horsepower of motor(s) powering watercraft on surface waters shall utilize one or more of the following horsepower cutoffs or motor types.

1. 25 H.P.

2. 10 H.P.

3. Electric motors

4. No motors

C. Direction of travel. Directional controls shall mandate watercraft to follow a counter-clockwise path of travel.

D. Speed limits. Controls concerning the maximum speeds allowable for watercraft on surface waters shall utilize one or more of the following miles-per-hour cutoffs:

1. Slow-No Wake. "Slow-No Wake" means operation of a watercraft at the slowest possible speed necessary to maintain steerage and in no case greater than 5 mph.

2. 15 mph.

3. 40 mph.

E. Effective time.

1. Controls must use one or more of the following time periods.

a. Sunrise-sunset or sunset-sunrise the following day.

b. 9:00 a.m.-6:00 p.m. or 6:00 p.m.-9:00 a.m. the following day.

c. Noon-6:00 p.m. or 6:00 p.m.-noon the following day.

d. All 24 hrs. of the day.

2. Controls must be in effect during one of the following calendar divisions:

a. All year.

b. Memorial Day weekend through Labor Day weekend.

c. On all weekends and legal holidays occurring within period b.

3. Controls governing the use of watercraft may be adopted which are placed into effect based upon specific water elevations.

F. Area zoning.

1. Controls shall clearly specify which portion of the water body is affected by such controls.

2. Area controls may be formulated concerning any of the subject matter covered in the water surface management guidelines A-H.

3. Controls concerning a "Slow-No Wake"—maximum of 5 mph if utilized, shall be established for the entire water body or portion thereof according to the following criteria:

a. Within 100 ft. or 150 ft. from the shore; or

b. Where watercraft speed or wake constitutes a hazard to persons, property or the natural resources; or

c. Where it has been determined that such controls(s) would enhance the recreational experience of the majority of users.

G. Conduct of other activities on a body of water. Controls formulated by a governmental unit which restricts other activities (such as swimming, or SCUBA diving) shall conform to 6 MCAR § 1.0220 C.

H. Emergencies. In situations of local emergency, temporary special controls may be enacted by a county, city or town for a period of not more than five days without the commissioner's approval. The commissioner shall be notified, however, as soon as practicable during this five day period.

I. A government unit may submit additional evidence if it feels that variance from the afore stated standards is necessary to best address a particular problem. The commissioner will review such evidence and may grant a variance if justified.

6 MCAR § 1.0223 Administrative provisions.

A. Enforcement and penalties.

1. Any government unit adopting controls purusant to Minn. Stat. §§ 378.32 and 459.20 shall provide for their enforcement and prescribe penalties for non-compliance. Controls established pursuant to Minn. Stat. § 361.26 shall be enforced by conservation officers of the Department of Natural Resources and the sheriff of each county.

2. Controls adopted by any governmental unit shall contain a provision exempting authorized resource management, emergency and enforcement personnel when acting in the performance of their assigned duties. They may also provide for temporary exemptions from controls through the use of permits issued by the unit of government adopting the ordinance or rule.

B. Commissioner's approval.

1. Any governmental unit formulating controls or desiring amendments and deletions to existing controls shall submit the written statement required by these rules with the proposed controls to the commissioner pursuant to Minn. Stat. § 378.32 for his approval or disapproval. Determination of approval or disapproval shall be based upon the written statement and the compatibility of the ordinance with these rules. If proposed controls are disapproved by the commissioner and a satisfactory compromise cannot be established, the governmental unit may initiate a contested case hearing to settle the matter.

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike-outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION** — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

2. The commissioner shall notify the governmental unit in writing of his approval or disapproval of proposed controls within 120 days after receiving them pursuant to Minn. Stat. § 378.32. Failure to so notify shall be considered approval.

C. Notification.

1. Any governmental unit adopting controls shall provide for adequate notification of the public, which shall include placement of a sign at each public watercraft launching facility outlining essential elements of such controls, as well as the placement of necessary buoys and signs. All such signs and buoys shall meet requirements specified in Minn. Stat. § 361 and 6 MCAR §§ 1.0205, 1.0206, and 1.0207.

2. The commissioner shall publish and update at his discretion a listing of watercraft use controls on surface waters of the state for distribution to the public.

ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 15.0412, subd. 4, have been met and five working days after the rule is published in the *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strike outs and new language will be underlined, and the rule's previous *State Register* publication will be cited.

A temporary rule becomes effective upon the approval of the Attorney General as specified in Minn. Stat. § 15.0412, subd. 5. Notice of his decision will be published as soon as practicable, and the adopted temporary rule will be published in the manner provided for adopted rules under subd. 4.

Board of Teaching

Adopted Rules Governing Elementary School Counselors, Secondary School Counselors, Counselors in Middle Schools

The Minnesota Board of Teaching proposed and published the following rules at *State Register*, Volume 4, Number 14, pp. 543-552, October 8, 1979, (4 S.R. 543).

Of these rules:

5 MCAR § 3.114 Counselors in middle schools. is now adopted as proposed.

5 MCAR § 3.102 School counselors, secondary. is now adopted, with the following amendments:

5 MCAR § 3.102 A.1.d. Have completed ~~two years~~ one year of secondary classroom teaching experience. Candidates holding a valid Minnesota secondary classroom teaching license but who have not completed ~~two years~~ one year of teaching experience shall complete the equivalent of a full-time, one school year internship in school guidance and counseling at the secondary school level. The internship shall be under the supervision of a practicing, resident, licensed secondary school counselor who has at least two years of counseling experience at the secondary school level. Supervision shall also be provided by counselor educators from an approved college guidance and counseling program. The internship shall be based on a written agreement among the intern, the approved school counselor preparation institution, and the school district in which the internship is completed.

5 MCAR § 3.102 A.2.e. Have at least ~~200~~ 2000 hours of accumulated work experience outside of the field of education.

5 MCAR § 3.103 School counselors, elementary. is now adopted, with the following amendments:

5 MCAR § 3.103 A.1.d. Have completed ~~two years~~ one year of elementary classroom teaching experience. Candidates holding a valid Minnesota elementary classroom teaching license but who have not completed ~~two years~~ one year of teaching experience shall complete the equivalent of a full-time, one school year internship in school guidance and counseling at the elementary school level. The internship shall be under the supervision of a practicing, resident, licensed elementary school counselor who has at least two years of counseling experience at the elementary school level. Supervision shall also be provided by counselor educators from an approved college guidance and counseling program. The internship shall be based on a written agreement among the intern, the approved school counselor preparation institution, and the school district in which the internship is completed.

DNR-81-001-KR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules
for Water Surface Use Management.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Kent B. Roberts, Hearing Examiner, on Tuesday, August 19, 1980, at the Crow Wing County Service Building in Brainerd, Minnesota; and, on Tuesday, August 26, 1980, at the Minnesota Historical Society Building, 640 Cedar Street in Saint Paul, Minnesota. Each hearing began at 10:00 a.m. and 7:30 p.m.

This Report is part of a rulemaking procedure pursuant to Minn. Stat. Ch. 15 to determine whether proposed rules governing the use of water surfaces should be adopted.

Representing the Department of Natural Resources (hereinafter the "Agency" or the "Department") were A. W. Clapp, III, Special Assistant Attorney General, and Kim A. Elverum, Boat and Water Safety Coordinator for the Agency.

Approximately 47 persons signed the hearing registers and approximately nine persons spoke at the hearings. The record of the hearings remained open until September 12, 1980, by order of the Hearing Examiner.

The Commissioner must wait at least five working days before taking any final action on the rule; during that period, this Report must be made available to all interested persons upon request. Pursuant to the provisions of Laws of Minnesota 1980, Ch. 615, § 6, subd. 4d, this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in the cases where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the recommendations, he may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Laws of Minnesota 1980, Ch. 615, § 6, subd. 4d.

If the Commissioner elects to adopt the recommendations of the Hearing Examiner and makes no other changes, then he shall submit the rule to the Attorney General for his review of form and legality. However, if the Commissioner makes changes in the rule other than those recommended by the Hearing Examiner, then he shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in subdivision 4e of the same statute.

Whenever the Commissioner submits the rule to the Attorney General, he shall give notice on the day of submission, to all persons who requested that they be informed of the submission to the Attorney General.

Based on the records and proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On July 14, 1980, a Notice of Hearing and a copy of the proposed rules were published at 5 State Register 21. On the same date, 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.

2. The Department did not file any of the documents in 9 MCAR § 2.102 A-D prior to publishing and mailing the Notice of Hearing. One of the purposes of filing these documents is to allow the Hearing Examiner to advise the Department as to whether or not the Notice of Hearing was indeed proper as to form and substance. The Department's failure to file the documents is a technical procedural defect. However, as the Minnesota Supreme Court recently commented:

> . . . the law does not mandate in all cases strict and literal compliance with all procedural requirements. Technical defects in compliance which do not reflect bad faith, undermine the purposes of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action . . . . City of Minneapolis v. Wurtele, et al., 291 N.W.2d 386 (Minn. 1980).

There is no evidence of bad faith or prejudice to the rights of individuals intended to be protected in the course of this rulemaking proceeding as a result of this defect. The purpose of the rulemaking proceeding has not been undermined.

3. The Notice of Hearing as published and as mailed contained three errors.[1] In the absence of any indication that anyone was prejudiced or held out of the rulemaking process by these Departmental errors, the Hearing Examiner believes that no such consequences resulted therefrom. Therefore, the Notice is not defective, Wurtele, et al., supra.

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1 First, the Notice of Hearing incorrectly states that persons could contact the Chief Hearing Examiner to obtain at least one free copy of the proposed rules. This is violative of Minn. Stat. § 15.042, subd. 4 (1978), which requires that the agency make at least one free copy of the proposed rules. All requests for copies of the proposed rules were referred to the Department. Second, the Notice of Hearing erroneously stated that the Statement of Need and Reasonableness is available for review with the Hearing Examiner and at the Office of Hearing Examiners. According to 9 MCAR § 2.102 C.9., the Statement of Need and Reasonableness will be available for review at the agency and at the Office of Hearing Examiners. Persons who requested the Statement of Need and Reasonableness were advised that they could also review and obtain a copy of the document at the Department. Finally, the Notice of Hearing erroneously stated that if persons have questions about the "content" of the proposed rules, they should contact the Chief Hearing Examiner. This is violative of Minn. Stat. § 15.052, subd. 3 (1978) and 9 MCAR § 2.106 L., since pursuant to these provisions the Hearing Examiner is to see to it that all

4. On July 15, 1980, the Department filed the Notice of Hearing as mailed.

5. On July 23, 1980, the Department filed the Statement of Need and Reasonableness.

6. On July 30, 1980, the Department filed the following documents:

(a) The Order for Hearing.
(b) The Certificate of the Secretary of State.
(c) An Affidavit of Mailing the Notice to all persons on the Secretary of State's list.
(d) A copy of the proposed rules.

Items (a) and (c) must be filed at least 25 days prior to the date and time of the hearing under 9 MCAR § 2.105. These items were filed late. The purpose of the "25-day" rule is to assure that all parties with a potential interest in the rulemaking proceeding in question have received proper notice of the Agency's intent. Other documents, timely filed, such as the Notice of Hearing and the Statement of Need and Reasonableness, put the public on substantial notice of the proposals involved in this proceeding. The record is clear that all publication and mailings were performed in accordance with the 30-day notice requirement of Minn. Stat. § 15.0412, subd. 4 (1978). The receipt by the Hearing Examiner of numerous leters from members of the public requesting proposed rules further demonstrates that notice was given. The Hearing Examiner would recommend non-adoption of the proposed rules at this point if he thought that the notice to the public was so deficient as to be prejudicial to parties that would have a potential interest in the proposed rules, but no evidence of such a deficiency exists. No one inquired with the Hearing Examiner desiring to inspect the preliminary filings and no complaint has been made about lack of notice. The failure of the Department to comply with the letter of 9 MCAR § 2.105 in this instance does not reflect bad faith, does not undermine the purpose of rulemaking and did not prejudice the rights of those intended to be protected in the course of this proceeding, Wurtele, et al., supra. Said failure is insufficient to make this rulemaking proceeding defective.

7. The documents listed above were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

8. On August 19, 1980, at the hearing in Brainerd, the Department entered into the record the following documents:

(a) Order for Hearing.
(b) Certificate of Delivery of Secretary of State's list dated July 3, 1980.
(c) Affidavit of Mailing of Notice of Hearing to persons on the Secretary of State's list executed on July 14, 1980.
(d) Notice of Hearing.

(Continuation of n. 1)

hearings are conducted in a fair and impartial manner. Any discussions with the public on the "content" of the proposed rules could raise suspicions as to the Hearing Examiner's role as an impartial adjudicator. The public notice should have directed inquiries to the agency. However, no inquiries about the content of the proposed rules were received by the Hearing Examiner or the Chief Hearing Examiner as a result of the Notice.

(e) A copy of Volume 5, No. 2 of the State Register, in which were published at pp. 21-26 on Monday, July 14, 1980, the Notice of Hearing and the proposed rules.
(f) A copy of the proposed rules.
(g) Statement of Need and Reasonableness.
(h) A copy of Minnesota 1980 Waters and Watercraft Safety Laws and Boat and Water Safety Rules and Regulations.
(i) Excerpts from Division of Waters Bulletin No. 25, "An Inventory of Minnesota Lakes" prepared by the staff of the Waters Section, Division of Waters, Soils, and Minerals, Minnesota Conservation Department (St. Paul, Minn., 1968).

9. On August 21, 1980, the Department submitted a request pursuant to 9 MCAR § 2.108 to the Chief Hearing Examiner for approval of the incorporation by reference of a document, Division of Waters Bulletin No. 25, "An Inventory of Minnesota Lakes", referred to in proposed rule 6 MCAR § 1.0221 A.1.a. The Chief Hearing Examiner determined that said document met the criteria of Laws of Minn. 1980, Ch. 615, § 6, § 15.0412, subd. 4a. By an Order, dated August 28, 1980, the Chief Hearing Examiner approved the incorporation by reference of said document in the proposed rules. Although Laws of Minn. 1980, Ch. 615, § 6, § 15.0412, subd. 4a. and Minn. Rule 9 MCAR § 2.108 state that such a request should be made before publication of the rules in the State Register, the Hearing Examiner received no objection to the inclusion of this document in the record. Therefore, no reason exists to believe that any member of the public was prejudiced by the delay in the request.

10. On August 26, 1980, at the hearings in Saint Paul, the Department introduced into the record the following documents:

(a) The Secretary of State's mailing list.
(b) Lakes in Ramsey County: Recreational Resource, Use Policy Implications, Report No. 4 (Minnesota Land Management Information System Study, Minneapolis: University of Minnesota, Center for Urban and Regional Affairs, March 1973).

11. The Department failed to enter into the record a document disclosing the names of agency personnel who would represent the agency at the hearing together with the names of any other witnesses solicited by the agency to appear on its behalf, as required by 9 MCAR § 2.105 H. The Department, at the Saint Paul hearing, did call on agency personnel, present in the public audience, to testify in support of portions of their proposed rules.

At least one of the purposes of filing the § 2.105 H. document is to allow persons with an interest in the rulemaking proceeding to have a reasonable opportunity, prior to the hearing, to prepare questions, documents, expert testimony and any other evidence in opposition to the agency's position. Surprise testimony by agency personnel or witnesses is thereby eliminated. Since no one inquired with the Hearing Examiner in advance of the hearings to inspect this preliminary document or objected at the hearing to the testimony presented by the Department personnel, the failure of the Department to file this document is not deemed to be a fatal error. No prejudice to those intended to be protected by 9 MCAR § 2.105 H. has been demonstrated, Wurtele, et al., supra.

12. The record remained open through Friday, September 12, 1980, for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 17 calendar days following the last hearing.

Statutory Authority

13. The Department has cited Minn. Stat. §§ 361.25, 361.26 and 378.32 as its authority to adopt the proposed rules. Because the Hearing Examiner is faced with resolving an issue involving statutory construction, it is necessary and helpful at the outset to quote at length from the applicable statutes. The issue of statutory construction presented in this case is one in which the Hearing Examiner must seek the intent of the Legislature from the words and structure of the statutes and their legislative history.

a. Minn. Stat. § 361.25 (1978) provides, in part:

361.25 Regulations.

. . . ; and in accordance with section 361.26, subdivision 2, clause (c), the commissioner shall by no later than January 1, 1975, adopt rules and regulations relating to the use of surface waters of this state by watercraft including but not limited to (1) standards and criteria for resolving conflicts in the use of water surfaces by watercraft, (2) procedures for dealing with problems involving more than one local governmental unit, (3) procedures for local enforcement and (4) procedures for carrying out the provisions of section 361.26, subdivision 2; and such other regulations as he deems necessary to carry out the provisions of chapter 361.

b. Minn. Stat. § 361.26 (1978) provides, in part:

361.26 Application of state law; local regulations; surface use regulations of the commissioner.

Subdivision 1. . . . Nothing in chapter 361 shall be construed as limiting the authority of any political subdivision of this state to adopt regulations, not inconsistent with chapter 361 and the regulations of the commissioner, relating to the use of waters of this state which are wholly or partly within the territorial boundaries of a county, or entirely within the boundaries of a city. A city of the first class of over 200,000 or the park board thereof, may forbid the use of motorboats or boats with motors attached thereto on its lakes.

Subd. 1a. On or before January 1, 1975, the commissioner shall develop and publish guidelines to assist counties when adopting water surface use ordinances for waters within their jurisdiction.

Subd. 2. (a) Upon request of a county, city or town, the commissioner may, if he determines it to be in the public interest, establish regulations relating to the use of watercraft on waters of this state which border upon or are within, in whole or in part, the territorial boundaries of the governmental unit.

(b) Such regulations shall be established in the manner provided by Minnesota Statutes 1969, Sections 15.0411 to 15.0422, but shall not be submitted to the attorney general nor filed with the secretary of state until first approved by resolutions of the county boards of a majority of the counties affected by the proposed regulations.

(c) Such regulations may restrict any or all of the following: (1) the type and size of watercraft and size of motor which may use the waters affected by the regulation, (2) the areas of water which may be used by watercraft, (3) speed of watercraft, (4) times permitted for use of watercraft, or (5) minimum distance between watercraft. When establishing regulations the commissioner shall consider the physical characteristics of the waters affected, their historical uses, shoreland uses and classification, and any other features unique to the waters affected by the regulations.

* * *

(f) Regulations or ordinances relating to the use of waters of this state enacted by a local governmental unit before January 1, 1972 shall continue in effect until repealed by the local governmental unit or superseded by a regulation of the commissioner promulgated pursuant to this subdivision.

c. Minn. Stat. § 378.32 (1978) provides:

378.32 Water surface use regulations.

Subdivision 1. The county board of every county may by ordinance regulate the surface use of any bodies of water situated wholly or partly within the boundaries of the county and not situated entirely within the boundaries of a single city or lake conservation district established by law, except that where a body of water lies in more than one county no such ordinance shall be effective until adopted by the county boards of all the counties in which the body of water lies pursuant to section 471.59 or placed into effect by order of the commissioner of natural resources pursuant to section 361.26. With the authorization of the affected city or lake conservation district, a county board may assume and exercise the powers set forth in this section with respect to bodies of water lying wholly within that city or lake conservation district. The regulation by the county of the surface use of any portion of a body of water situated within the boundaries of a city shall be consistent with any regulation existing on May 25, 1973 of the surface use of that portion of the body of water, by the city. After January 1, 1975, any such ordinance shall be consistent with the provisions of chapter 361 and rules and regulations of the commissioner promulgated pursuant to section 361.25. Any surface use zoning ordinances adopted pursuant to this section by a local governmental unit subsequent to May 25, 1973 is invalid unless it is approved by the commissioner. Proposed surface use zoning ordinances shall be submitted to the commissioner for his review and approval prior to adoption. The commissioner shall approve or disapprove the proposed ordinance within 120 days after receiving it. If the commissioner disapproves the proposed ordinance, he shall return it to the local governmental unit with a written statement of his reasons for disapproval. The county board shall have power:

Subd. 2. To regulate and police public beaches, public docks and other public facilities for access to the body of water, except that a county board may not regulate state accesses and a municipality may by ordinance forbid the exercise of this power within its jurisdiction;

Subd. 3. To regulate the construction, confirguration, size, location and maintenance of commercial marinas and their related facilities including parking areas and sanitary facilities. The regulation shall be consistent with state law and the regulations of the department of natural resources, the pollution control agency, and the department of health, and with the applicable municipal building codes and zoning ordinances where the marinas are situated;

Subd. 4. To regulate the construction, installation and maintenance of permanent and temporary docks and moorings consistent with state and federal law and sections 105.42, 361.07 and 361.21;

Subd. 5. To regulate the construction and use of mechanical and chemical means of deicing the body of water and to regulate the mechanical and chemical means of removal of weeds and algae from the body of water consistent with the regulations of the department of natural resources;

Subd. 6. To regulate the type and size of watercraft, as defined in section 361.02, subdivision 7, permitted to use the body of water and set access fees;

Subd. 7. To limit the types and horsepower of motors used on the body of water;

Subd. 8. To limit the use of the body of water at various times and the use of various parts of the body of water;

Subd. 9. To regulate the speed of watercraft on the body of water and the conduct of other activities on the body of water to secure the safety of the public and the most general public use;

Subd. 10. To contract with other law enforcement agencies to police the body of water and its shore.

14. By the early 1970s, many of Minnesota's lakes were experiencing a number of water safety and environmental problems due to increasing recreational use. Crowding, conflicts among watercraft users, boating accidents, pollution, recreation uses that conflicted with the natural resources were commonplace. In order to ameliorate the water safety problems and to preserve Minnesota's valuable natural resources, the 1971 Legislature enacted Minn. Stat. § 361.26, subd. 2, authorizing the Commissioner to regulate the use of surface waters by watercraft. Under the statute, upon request by a local governmental unit (a county, city, village, borough, or town) and a showing that the rule would be in the public interest, the Commissioner could establish "regulations"[2] to govern the use of watercraft on state waters, Minn. Stat. § 361.26, subd. 2(a). Prior to taking effect, the "regulations" must be approved by a majority of the affected counties, Minn. Stat. § 361.26, subd. 2(b). The statute specifically described the kinds of "regulations" which could be considered. According to Minn. Stat. § 361.26, subd. 2(c) (1971), the "regulations" were envisioned to include restrictions on:

> (1) the type and size of watercraft which may use the waters affected by the regulation, (2) the areas of water which may be used by watercraft, (3) speed of watercraft, (4) times permitted for use of watercraft, or (5) minimum distance between watercraft.[3]

The decision that surface water zoning rules be drafted at the state level in every instance proved to be ineffectual and cumbersome. For, as a practical matter, in a state such as Minnesota with a proportionately large number of water areas, state level regulation of lakes (through § 361.26, subd. 2) could not be achieved without a sizable increase in trained personnel and the

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2 Under Minn. Stat. § 15.0412, subd. 1 (1971), agencies were authorized to promulgate "rules and regulations" to carry out the duties and powers imposed upon and granted to it. Now, agencies can only adopt "rules" pursuant to the authority delegated by law, Minn. Stat. § 15.0412, subd. 1 (Laws of Minnesota 1980, Ch. 615). Therefore, where the statutes cited in this Report authorize that "regulations" or "rules and regulations" be promulgated, established or adopted, it is understood that the Commissioner is authorized only to adopt "rules".

3 A 1974 amendment provided for the regulation of "motor size" in paragraph (c)(1) of subd. 2 (see Finding 13b.).

expenditure of considerable time, energy and expense. Moreover, a centralized state level water surface use management program was unable to appreciate all the needs and divergent interests of the regional populace or transients who use local water areas. Thus, in the 1973 Legislative session, additional statutes were enacted to supplement existing Department power by granting to local governmental units (counties, cities or towns)[4] the authority to regulate use of surface waters, Minn. Stat. §§ 378.32, 459.20.[5] Local governmental units could adopt ordinances, subject to prior Commissioner review and approval.[6] Essentially, the 1973 statutes decentralized the Department's exclusive authority to regulate and vested in the local governmental units many of the same powers to regulate the use of surface waters as were conferred on the Commissioner.[7] The decentralized approach is perhaps more practical since local governments are closest to local problems and can make decisions relatively quickly and perhaps more accurately than the Department; and, there is the added advantage of allowing a wider range of local interests to participate in the development of a workable and enforceable local water surface use ordinance.

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4 Laws 1973, c. 123, art. 5, § 7, provided for the consolidation of the terms "village" and "borough" into the term "city" or the substitution of the term "statutory cities" for "villages" and/or "boroughs".

"Local governmental unit" or "local government", as used in this Report, shall mean only a "county, city or town".

5 Minn. Stat. § 459.20 (1978) states:

459.20 Authority over public waters

The governing body of any home rule charter or statutory city or town in the state has, with respect to any body of water situated wholly within its boundaries, all the powers to improve and regulate the use of such body of water as are conferred on county boards by sections 378.31 and 378.32, and to establish and administer lake improvement districts under sections 378.41 to 378.57. With respect to any body of water situated wholly within the contiguous boundaries of two or more home rule charter or statutory cities or towns or any combination thereof, the city councils and town boards may, under the provisions of section 471.59, jointly exercise such powers to improve and regulate the use of the body of water as are conferred on county boards by sections 378.31 and 378.32, and to establish and administer lake improvement districts as provided under sections 378.41 to 378.57, provided that, no home rule charter or statutory city or town may establish and administer a lake improvement district or exercise any of the powers granted in this section if a lake improvement district covering the same territory has been created by a county board under sections 378.41 to 378.57. References in sections 378.31 to 378.35 and 378.41 to 378.57 to the county board shall be construed to refer to the governing body of a home rule charter or statutory city or the board of supervisors of a town. [Emphasis added.]

6 Minn. Stat. § 378.32, subd. 1.

7 See Minn. Stat. § 378.32, subd. 6-9 (Finding 13c). Cf. Minn. Stat. § 361.26, subd. 2(c) (Finding 13b).

Even though local governments can adopt surface water zoning ordinances, the Legislature did intend that the Department, in some way--by rules and/or guidelines--direct the local governments in developing ordinances.[8] Thus, the threshold issue is whether the Legislature intended the Department to adopt rules which local ordinances must comply with, or merely guidelines?

There is a significant distinction between "rules" and "guidelines". Rules are mandatory in Minnesota and have the force and effect of law, Laws of Minnesota 1980, Ch. 615, § 12, § 15.0413, subd. 1. In contrast, guidelines are advisory and lack the force and effect of law.

In proposing 6 MCAR §§ 1.0220 - 1.0223, the Department contends that they are rules. If the Department's contention is correct, then § 361.26, subd. 2 rules and § 378.32, subd. 1 ordinances must conform to these Department rules.[9] If, however, any section(s) of 6 MCAR §§ 1.0220-1.0223 are characterized as guidelines, local governments would not be required to conform their ordinances to such sections.

The outcome of this issue is determined, in part, by the holding of a recent Minnesota case.

The Minnesota Supreme Court, in Can Manufactures Institute, Inc., et al. v. State of Minnesota, 289 N.W.2d 416 (Minn. 1979), addressed, among other issues, the difference between "regulations" [rules] and "guidelines". In Can Manufacturers, plaintiffs (industry associations and manufacturers of packages, containers and closures) brought an action challenging the regulations adopted by the Minnesota Pollution Control Agency (MPCA) under the Minnesota Package Review Act (Minn. Stat. § 116F.06).[10] Briefly, the statute provided that the MPCA review new and revised packages and prohibit their sale in the state if the Agency found, after a hearing, that the package would constitute a solid waste disposal problem or be inconsistent with state environmental policies. The statute also provided that the MPCA "shall adopt . . . guidelines identifying the types of new or revised containers and packaging that

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8 For example, Minn. Stat. § 361.26, subd. 1a. states that:

"the commissioner shall develop and publish guidelines to assist counties when adopting water surface use ordinances for waters within their jurisdiction." [Emphasis added.]

And, Minn. Stat. § 378.32, subd. 1 provides, in pertinent part:

". . . any . . . ordinance [enacted by a local governmental unit] shall be consistent with the provisions of chapter 361 and rules and regulations of the commissioner promulgated pursuant to 361.25. [Emphasis added.]

9 6 MCAR § 1.0222 provides various standards for horsepower and speed limits and directional controls. If 6 MCAR §§ 1.0220-1.0223 are rules, then any local surface water zoning ordinance regulating, for example, horsepower, must conform to the horsepower standards in 6 MCAR § 1.0222.

10 Minn. Stat. § 116F (the Act) was enacted for the purpose of encouraging both the reduction of the amount and kind of materials entering the solid waste stream and the reuse and recycling of materials. The Act was a recognition that solid waste represents discarded materials and energy resources and constitutes an economic burden to persons of this state.

are subject to review . . ." (Minn. Stat. § 116F.06, subd. 3) [Emphasis added]. The MPCA did not adopt "guidelines", but did adopt "regulations". The regulations detailed the factors the MPCA considered in reviewing a new package, the review procedure, the information about the package the MPCA required in order to conduct its review, and the type of package exempted from review by the MPCA. A manufacturer's failure to submit the information required by the regulations meant that the package may be banned and a misdemeanor committed.

Plaintiffs contended that since Minn. Stat. § 116F.06, subd. 3 only authorized the adoption of "guidelines" to identify packages subject to Agency review, the Agency could not instead adopt "regulations". The Minnesota Supreme Court agreed, stating that the:

> absence of a specific provision in § 116F.06 authorizing the MPCA to promulgate regulations with the force and effect of law is, in our view, the critical factor in issue. The legislative history of 116F.06 indicates the omission of authority to promulgate regulations with the force and effect of law was deliberate. The Bill, as first introduced in the House of Representatives . . . would have authorized regulations . . . . On May 4, 1973, this section [which became § 116F.06, subd. 3] was amended to delete reference to "regulations" and to replace it with "guidelines" . . . . The legislature's decision to permit the MPCA to adopt guidelines and its refusal to grant the MPCA authority to adopt regulations with the force and effect of law indicate the legislature intended to restrict the MPCA's legislative rulemaking power. 289 N.W.2d 416, 424.

In reaching its decision that the Agency had exceeded the bounds of its statutory authority, the Court emphasized two facts. First, the statute contained no reference to Agency authority to promulgate regulations. Second, the legislative history demonstrated that this omission was deliberate.

In the instant case, there are convincing arguments for the proposition that the Department has statutory authority to require conformity between local ordinances and the purported rules under consideration. Minn. Stat. § 378.32, subd. 1 unequivocally states that if the local government proposes a surface use zoning ordinance, the ordinance must be consistent with the rules of the Commissioner "promulgated pursuant to § 361.25".[11] Section 378.32 also requires the Commissioner to review surface use zoning ordinances proposed by local governments. Any proposed ordinance disapproved by the Commissioner is returned to the local government with a written statement of the

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11 Minn. Stat. § 361.25 authorizes the Commissioner "in accordance with § 361.26, subd. 2, clause (c)" to adopt rules and regulations relating to the use of surface waters by watercraft. The reference to § 361.26, subd. 2(c) is not considered to limit the authority of the Commissioner to adopt rules and regulations for just the situation in § 361.26, subd. 2. Minn. Stat. § 361.25 only is stating that the rules and regulations are limited in scope to those specific areas enumerated in § 361.26, subd. 2(c).

An interpretation of Minn. Stat. § 361.25 that only permits the Commissioner to promulgate rules and regulations for the narrow situation in § 361.26, subd. 2(a) totally ignores the provisions of Minn. Stat. § 378.32, subd. 1. For, as discussed further in the text, the Commissioner must have rules by which to determine whether the local government ordinances are acceptable. And, the rules needed by the Commissioner are the rules of § 361.25, as is specifically stated in Minn. Stat. § 378.32, subd. 1.

reasons for disapproval. In order for the Commissioner to review proposed surface use zoning ordinances, the legislature must have intended that there be rules to determine whether the ordinances are acceptable.[12] For, without rules, the Commissioner's review process collapses; he must have standards and criteria against which to evaluate proposed ordinances, but if he is to be allowed to use those standards and criteria, they must be adopted as rules.

Policy considerations also support the contention that the Department has the authority to adopt rules. Minn. Stat. §§ 361.25, 361.26 and 378.32 represent an attempt to develop a workable program for regulating water surface use. Throughout these statutes, there is an implied theme that water surface use regulation must be a cooperative venture, with the state (i.e., the Department) and local governments working in concert to accomplish mutually desired objectives. Retained control by the state, through the veto authority of the Commissioner, is broad enough to discourage ill-advised, haphazard or irresponsible local action. Yet, such control is limited to the review of the proposed ordinances and is not designed to usurp primary responsibility for administration of the water surface use program from the local governments. Neither the statutes nor the proposed rules require local governments to adopt ordinances; neither do they permit the Department to require local ordinances. But, if a local government chooses to adopt an ordinance, state involvement is triggered.

Only Minn. Stat. § 361.26, subd. 1a. casts a shadow of doubt that the Department has statutory authority to adopt rules. As noted in footnote 8, § 361.26, subd. 1a. authorizes the Commissioner to develop guidelines to assist counties when adopting water surface use zoning ordinances. An examination of the legislative history of Minn. Stat. § 361.26, subd. 1a. is necessary to understand what the Legislature intended by this section.

The Bill, as first introduced in the Senate, S.F. 1029, would have authorized the Commissioner to:

> develop and publish a series of model water surface use ordinance provisions to assist counties when adopting water surface use ordinances for waters within their jurisdiction. [Section 3.]

On April 16, 1973, in the Senate Natural Resources and Agriculture Subcommittee on Environmental Protection, this section was amended by deleting "a series of model water surface use ordinance provisions" and inserting therein "guidelines". The Bill was passed as amended, without any further change in this section.

If the Department had been required to draft model ordinances and tailor the ordinances to fit all the unique factors in the counties, the Department most certainly would have faced an onerous task in developing perhaps endless combinations of ordinances. And, most likely, the Department would be heavily

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12 One other statute, Minn. Stat. § 361.26, subd. 1 notes that when any political subdivision adopts regulations relating to the use of surface waters, the local regulations must be consistent with the Commissioner's regulations. This is yet another example that the Legislature intended the Department retain control, via rules, over the local water surface use management program.

involved in the drafting of local ordinances, thereby defeating the policy considerations in Minn. Stat. § 378.32, subd. 1--to shift the burden of proposing ordinances to local governments.

The "guidelines" approach allows for more flexibility. By publishing "guidelines", the Department assists and disseminates information[13] of importance to local governments seeking to draft surface water zoning ordinances. Often, local personnel lack the training or experience to develop a proper water surface ordinance. The informal guidance by the state through the guidelines simplifies the local governments task and seems likely therefore to have some impact in shaping local ordinances. Moreover, the Department avoids direct involvement in drafting the ordinance.

When § 361.26, subd. 1a. is read in conjunction with the other statutes, it is clear that the Department has the authority to adopt rules establishing certain requirements which any § 361.26, subd. 2(a) rule or § 378.32, subd. 1 ordinance must conform with. Furthermore, Can Manufacturers Institute, Inc., supra, is distinguished in that there are explicit references in the statutes for the Department to adopt rules. And, the legislative history demonstrates that the use of the term "guidelines" in § 361.26, subd. 1a. was not meant to restrict the Department's rulemaking power.

15. It is specifically found that Minn. Stat. §§ 361.25, 361.26 and 378.32 grant to the Commissioner statutory authority to adopt 6 MCAR §§ 1.0220-1.0223 as rules.

The Proposed Rules

16. Many of the provisions and sections of the proposed rules were not opposed, and this Report is generally limited to those that were. A detailed discussion of each section of the sections of the proposed rules is believed to be unnecessary on this record. Such an analysis is contained in the Statement of Need and Reasonableness submitted by the Department (DNR Ex. 7). The Hearing Examiner notes at this point that sections not commented on in this Report are hereby found to be needed and reasonable and that the Department has documented this by an affirmative presentation of facts. With respect to the sections commented on in this Report, all of the concerns discussed on the record and in written coments have been carefully considered. In addition, the Hearing Examiner has taken a "hard look"[14] at the factual basis supporting some of the more controversial sections and at discretionary language not objected to by the public.

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13 In fulfillment of its statutory duty to develop and publish guidelines, the "agency intends to develop a "model" ordinance and a manual of suggestions on the kinds of regulation that are appropriate to various classes of lakes", DNR Ex. 12. The Department submitted Lakes in Ramsey County: Recreational Resource Use Policy Implications (DNR Ex. 11) as an example of the type of manual that would be developed.

14 The Hearing Examiner's review of the proposed rules is governed by Laws of Minn. 1980, Ch. 615, § 28, § 15.052, subd. 3(4)(iii), which require the Examiner to determine, and state in his Report, whether the agency has "demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts". The need and reasonableness of the rule that must be established does not mean that the rule is the best possible rule that could be adopted or that

17. 6 MCAR § 1.0220 B. Scope.

Through oral testimony and in written comments (Pub. Ex. 3), counsels representing a lake conservation district and a park reserve district urged that language be inserted in this section to exempt such districts from the proposed rules. Exemption is permissible only if there is express or implied authority in the statutes.

In Minnesota, only two lake conservation districts exist--Lake Minnetonka Conservation District (LMCD) and White Bear Lake Conservation District (WBLCD). These districts are separate political entities created by special legislative laws.[15] In the statutes establishing lake conservation districts, the Legislature provided that a lake conservation district shall be governed by a board comprising members elected by the cities or towns included in the district.[16] However, the powers to regulate surface waters within the district are derived, not from the cities or towns within the district, but from the Legislature.[17] And, the Legislature has empowered a lake conservation district to regulate by rule, for example, the type of watercraft

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(Continuation of n. 14)

reasonable minds might differ. Where reasonable minds would differ in the need and reasonablenes of the rule, the agency's determination will be affirmed, Thomas Bros. Inc v. Sec. of State, 282 N.W.2d 273 (Mich. App. 1979). Of course, the basis of the decision must be expressed by the Department itself and not supplied by the Hearing Examiner. Nonetheless, a decision of "less than ideal clarity" will be upheld if the Department's rationale "may be reasonably discerned", Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974).

That is not to say, however, that the Hearing Examiner must "rubber stamp" the agency decision as correct. To do so would render the rulemaking process a superfluous (although time consuming) ritual. Rather, the Hearing Examiner must assure himself that the Department's decision was based on a consideration of the relevant facts, St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 251 N.W.2d 350 (Minn. 1977). Therefore, the Hearing Examiner will undertake, in some instances, a close scrutiny of the record to penetrate to the underlying decisions of the Department, to satisfy himself that the Department has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislation intent (see Finding 14). In this same spirit, prior to and at the hearing, the Hearing Examiner asked numerous questions in an attempt to understand enough about the problems confronting the Department to comprehend the meaning of the evidence relied upon and the evidence discarded; the issues addressed by the Department and those bypassed; the choices open to the Department and those made.

The Hearing Examiner recognizes that he cannot substitute his judgment for that of the Department's expert decisionmakers, Pitts v. Perlus, 27 Cal. Rptr. 19, 377, P.2d 83, 89 (1962). To the contrary, the Hearing Examiner must give due deference to the Department's ability to rely on its own developed expertise. The review of the evidence in some sections of the proposed rules is designed solely to enable the Hearing Examiner to determine whether the agency has met its statutory burden--that the proposed rules are needed and reasonable and the Department has documented this by an affirmative presentation of facts. The agency's decision will be affirmed unless it is without a reasonable basis, arbitrary or otherwise illegal, or unless the agency has failed to demonstrate facts in support of its decision.

permitted to use the lakes, the type and horsepower of motors powering watercraft, the time and areas of use by watercraft and the speed of watercraft.[18] Violation of a district rule is a misdemeanor, punishable by imprisonment or a fine.

Minn. Stat. §§ 378.32, 459.20 and 361.26, subd. 2 (1978) confer on a city, county and town and the Commissioner many of the same powers to regulate use of surface waters as were conferred on a lake conservation district. The question is: Do either the Commissioner or a city, county or town have the statutory authority to regulate, by ordinance or rule, the use of surface waters within a lake conservation district?

Minn. Stat. §§ 378.32 and 459.20 (1978) enable a county, city or town to regulate the surface use of bodies of water within their boundaries, provided the water body is not situated entirely within a lake conservation district established by law. Only with the authorization of the lake conservation district may a county board assume and exercise the powers set forth in § 378.32 for regulating a body of water lying wholly within the district. Thus, it is incontrovertible that a city, county or town has no authority, in and of itself, to establish an ordinance governing the use of surface waters entirely within a lake conservation district.

Concerning the Commissioner, there is no specific legislative authority that enables him to establish a surface use zoning rule for a lake conservation district. Only cities, counties or towns can request the Commissioner to establish a § 361.26 rule. A lake conservation district, of course, is not a city, county or town but a "public corporation".[19] Thus, the Commissioner is likewise without statutory authority to regulate the use of surface waters within a lake conservation district under § 361.26, subd. 2.

Although much of the same logic applies to park reserve districts, none of the statutes specifically exempt surface waters in such districts from regulation by the Commissioner or a county, city or town. If the Legislature at some future time elects to specifically exempt park reserve districts from the operation of these rules, it may do so. But at the present time, it has not done so. Therefore, park reserve districts cannot be exempted from these proposed rules.

(Continuation of n. 15)

15 LMCD was established by Laws of Minn. 1967, Ch. 907, as amended by Laws of Minn. 1969, Ch. 272. WBLCD was established by Laws of Minn. 1971, Ch. 335, as amended by Laws of Minn. 1974, Ch. 111.

16 See, for example, Laws of Minn. 1971, Ch. 355, § 2.

17 Id. at § 2.

18 Laws of Minn. 1974, Ch. 111, § 3(a), (b), (d) and (e).

19 Laws of Minn. 1971, Ch. 355, § 10; and 20 C.J.S. Counties § 16, p. 756 states:

> District. "County" is more specific and less elastic than "district", which may be employed to designate an area greater or less than a county, and is not synonymous therewith . . . .

Counsel also argued that if these proposed rules do not govern lake conservation district ordinances, it would also be unnecessary to regulate (by these proposed rules) local governments, located within a lake conservation district, in their adoption of surface use zoning ordinances which are identical to the district's ordinance. Often, local governments located within a lake conservation district, adopt the district's ordinance by reference. These ordinances adopted by local governments would have to comply with these proposed rules, unless specifically exempted. Legally, any lake conservation district ordinance is enforceable vis-à-vis the local governments without adoption by the local entity. As a practical matter, it would be a duplication of effort, both for local governments and for the Commissioner, to require each local government when adopting the district's ordinance by reference to go through the Commissioner's review process of § 378.32, subd. 1.

A representative from the Minnesota-Wisconsin Boundary Area Commission (MWBAC) appeared at the Saint Paul hearing and urged that a 52-mile segment of the lower St. Croix River also be exempted from these rules. The St. Croix River is a component of the National Wild and Scenic River systems and jointly administered by the National Park Service (NPS), the Minnesota Department of Natural Resources (MDNR) and the Wisconsin Department of Natural Resources (WDNR). Existing rules have been adopted separately by each of the three agencies that administer the use of the riverway. The rules are established in such a way that virtually identical rules have to be adopted by both states before the rules are in effect in either state. The Minnesota rule is 6 MCAR § 1.02220 and the Wisconsin rule is N.R. 5.30-5.36 (Pub. Ex. 1). These rules were adopted after a series of public hearings spanning a period of years. The MWBAC representative expressed concern that, if these proposed rules were approved, the MDNR would be required (by 6 MCAR § 1.0220 F.) to amend its rules, then requiring both the WDNR and the NPS to amend their rules. The Department responded that a variance procedure in the proposed rules (§ 1.0222 I.) was available and perhaps appropriate for a situation such as this. The Department stated, and the Hearing Examiner concurs, that there is no authority in Minn. Stat. § 361.26 authorizing an exemption for the lower St. Croix River.

Subsequent to the hearings, the Department made certain amendments to this section. The Hearing Examiner finds that the amendment to this section exempting lake conservation districts and local governments located within such districts from the proposed rules is needed and reasonable and based upon adequate statutory authority. However, the inclusion of an exemption for "park reserve districts" into this proposed rule exceeds statutory authority and must be deleted therefrom. Minn. Stat. § 15.0412, subd. 1 requires an agency to adopt rules "only pursuant to authority delegated by law and in full compliance with its duties and obligations". This section is a substantive requirement imposed on the agency by law. A rule, such as this one, which is beyond statutory authority fails to comply with substantive provisions of law and may not be adopted. None of the amendments to this section constitute a substantial change.

p. 1 + see F of F 1

18. 6 MCAR § 1.0220 C. Goal.

Public comments with respect to this section were few in number. A citizen from the White Bear Lake area and representatives from the Save Minnewawa Association and Itasca County Land Department all raised the same question: Can these proposed rules be used to preseve or protect (by zoning) lakes from environmental harm? The Department responded that one of the goals of this section is to minimize adverse impacts on natural resources (§ 1.0220 C.2.) and to preserve water resources to reflect the state's paramount concern for the protection of its natural resources. The Hearing Examiner concurs with the Department's response, but adds some further comments for further clarification.

6 MCAR § 1.0220 C. should not be interpreted as allowing local and state governments to engage in the balancing of environmental values with, for example, recreational uses, if that balancing would result in "pollution, impairment or destruction" of the environment. People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978). The Minnesota Supreme court in PEER, supra, in interpreting the Minnesota Environmental Rights Act (MERA), stated that the "feasible and prudent alternative" standard in MERA does not allow the traditional balancing of environmental interests with economic considerations.[20] The import of PEER, supra, is that balancing is permitted ony when there are two or more "pollution, impairment or destruction" choices. Balancing compensable and noncompensable harm is not permitted. As the Court noted in PEER, supra, "destruction of protectible environmental resources, however is non-compensable[21] and injurious to all present and

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20 MERA (Minn. Stat. § 116B.01 - .13 (1978)) was adopted in 1971 because traditional balancing tests, employed in pre-MERA days, often led to the destruction of the environment, since the law reflected the belief that our natural resources were limitless and available for any use--or misuse.

MERA allows any citizen to seek judicial relief from conduct that "materially adversely affects or is likely to materially adversely affect the environment," Minn. Stat. § 116B.02(5) (1978). MERA also authorizes suits to enforce existing environmental standards and requirements; intervention in or judicial review of administrative proceedings that concern environmental matters; and suits challenging the adequacy of state environmental standards and actions. Under MERA, once a prima facie case of environmental harm is established:

> the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show . . . that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder. [Emphasis added.] Minn. Stat. § 116B.04 (1978).

Recreational uses inherently involve some economic considerations, M.P.I.R.G. v. White Bear Rod & Gun Club, 257 N.W.2d 762 (Minn. 1977).

future residents of Minnesota."[22] Protection of natural resources is to be given "paramount"[23] consideration and those resources should not be destroyed or impaired unless there are truly unusual factors.

This prohibition against traditional balancing is also expressed in the Minnesota Environmental Protection Act (MEPA) at Minn. Stat. § 116D.04, subd. 6 (1978).[24] MEPA clearly places a statutory duty on all state agencies to consider environmental factors before making decisions that potentially have significant environmental effects. However, in view of PEER, supra, consideration of environmental factors does not sanction utilization of the traditional balancing approach in governmental decisionmaking if such balancing would result in pollution, impairment or destruction of the environment.

6 MCAR § 1.0220 C. cannot be read to allow material environmental interests to be balanced out at the expense of increasing or enhancing recreational use. The clear mandate of MEPA--that the state's paramount concern is for the protection of "its air, water, land and other natural resources[25] from pollution, impairment, or destruction"--prohibits such balancing.

(Continuation of n. 21)

21 In Environmental Law: Challenge to Power Line Routing Decision Under the Minnesota Environmental Rights Act, 63 Minn. L. Rev. 707 (1979), the author noted in a thorough analysis of the PEER decision that the court:

> recognized the distinction between compensable and noncompensable harm. Harm to developed property is considered compensable since its owners can usually be adequately reimbursed financially . . . . Because the value of undeveloped property cannot be accurately expressed in terms of market price, balancing the financial costs of alternatives would invariably lead to decisions having an adverse effect on the environment. The court concluded, therefore, that the prudent and feasible alternative standard generally prohibits attempts to balance, in monetary terms, alternative courses of development when one alternative requires condemnation of developed property and the other destruction of the natural environment. An environmentally destruction action must be rejected unless the alternatives would cause "extraordinary disruption". At 714-15.

22 266 N.W.2d at 869.

23 The word "paramount" as used in Minn. Stat. § 116B.04 (1978) means "superior to all others", Floodwood - Fine Lakes, et al. v. Minnesota Environmental Quality Council, 287 N.W.2d 390 (Minn. 1979) (interpreting "paramount" in Minn. Stat. § 116B.09, subd. 2 (1978)).

24 Subd. 6. No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct. [Emphasis added.]

25 "Natural resources" are defined as follows:

> "Natural resources shall include but not be limited to all mineral, animal, botanical, air, water, land, timber, soil, quietude . . .

This section of the rules, besides protecting Minnesota's natural resources, also seeks to encourage recreational use (§ 1.0220 C.1.) and to minimize conflicts between recreational users (§ 1.0220 C.3.). Testimony at the hearings indicated that, on many of the lakes in the state, there are conflicts between users that, in some instances, are quite acute. John W. Hohncke, Chairman of the Morrison County Planning and Zoning Commission, noted that in his county, there are surface use conflicts between fishermen, waterskiiers, swimmers and canoeists. In his opinion, since there is no ordinance regulating time of use, watercraft size, motor size and the conduct of other activities on lakes, the present situation was "absolute chaos on these smaller lakes". And, with "more and more people [going] to lakes", irrespective of whether the lakes have the capacity for all users, this situation was expected to worsen, unless local controls were imposed. Similar testimony came from Henry Anderson, of the Shoreview Storm Water and Lake Quality Commission, who believed that these proposed rules were needed to help resolve conflicts between recreational users on lakes in his area.

While this rule is needed and reasonable and in conformance with environmental statutes and case law, the Hearing Examiner suggests two amendments. In line 4 of this proposed rule, "it's" should be changed to "its"; and, "these water resources" should be inserted after "preserve" for purposes of clarity and proper grammar. However, the Department may make these changes, or may not make them; it is not required to make them.

19. 6 MCAR § 1.0220 F. Existing ordinances and rules.

This section states that all existing ordinances or rules shall be brought into "essential compliance" with these "rules". The language "essential compliance" creates a vague standard which must either be defined, or standards and criteria, by which determination for compliance will be made, must be added. Minn. Stat. § 15.0411, subd. 3, the definition of "rule", includes the mandate that rules are "made to implement or make specific the law in force or administered" by the Department. The inclusion of a vague and undefined standard does not comply with this requirement. Additionally, it appears that "essential compliance" is adding a standard which goes beyond the statutory standard of Minn. Stat. § 378.32, subd. 1 (1978), which requires that any ordinances "shall be consistent with the rules of the commissioner promulgated pursuant to section 361.25". Minn. Stat. § 15.0412, subd. 1 requires an agency to adopt rules "only pursuant to authority delegated by law and in full compliance with its duties and obligations". Both this section and the above-quoted section of 15.0411, subd. 3 are substantive requirements imposed on the agency by law. A rule, such as this one, which contains nonspecific language and is beyond statutory authority fails to comply with substantive provisions

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(Continuation of n. 25)

> resources. Scenic and aesthetic resources shall also be considered natural resources when owned by any governmental unit or agency." [Minn. Stat. § 116B.02, subd. 4 (1978)]

of law and may not be adopted. Deletion of the word "essential" is necessary to bring the rule into conformity with the statute; then, if an existing rule or ordinance does not comply with these proposed rules, it can be amended (6 MCAR § 1.0221 B.) or exempted by a variance (6 MCAR § 1.0222 I.). complied p. 1

20. 6 MCAR § 1.0221 A. Factors to consider.

Section 1.0220 A. allows the Commissioner (as well as a governmental unit) to acquire and consider as much of the information in A.1.-7. as "it deems pertinent". This language includes no standard that could guide the Commissioner or any person reading the rules as to what additional information could be required. This language appears to allow unbridled discretion to the Commissioner, and for the reasons stated in Finding 19, the Department cannot adopt this rule. The Hearing Examiner recommends that the discretionary language ("as it deems pertinent") be deleted. In making this recommendation, the Hearing Examiner recognizes that the Commissioner or any governmental unit formulating, amending or deleting controls would then be required to consider all of the factors in A.1.-7. However, if one of the factors in A.1.-7. is not relevant in formulating, amending or deleting a control, then it can be so noted. complied p. 2.

The phrase "amending or deleting" must be inserted before, not after, "controls" for reasons of clarity and proper grammar. complied p. 1

In view of the above remarks, 6 MCAR § 1.0221 A. would read as follows:

> A. Factors to consider. The commissioner or any governmental unit formulating, amending or deleting controls for surface waters shall acquire and consider the following information.

21. 6 MCAR § 1.0221 B. Written Statement.

This proposed rule reads, in part:

> B. Any governmental unit formulating, amending or deleting controls for surface waters, or requesting the commissioner to do so, shall submit to the commissioner the following:
>
> 3. The proposed ordinance.
>
> 4. A description of public hearings held concerning the proposed controls, including an account of the statement.

Because of the "shall" language in § 1.0221 B., a governmental unit is required to submit all the information listed in § 1.0221 B.1.-4. when requesting the commissioner to formulate controls for surface waters. One of the requirements in § 1.0221 B. is that public hearings be held (B.4.). Note that Minn. Stat. § 361.26, subd. 2(b) requires that rules "shall be established [referring to subd. 2(a)] in the manner provided by Minnesota Statutes 1969, Sections 15.0411 to 15.0422 . . ."; and, Laws of Minn. 1980, Ch. 615, § 6, § 15.0412, subd. 4 requires that the Department hold a public hearing when the Commissioner is formulating a rule. Therefore, is the Department intending that two public hearings will be held whenever a city, county or town requests the Commissioner to establish a rule? That is, one hearing held by the governmental unit (§ 1.0221 B.4.) prior to requesting the Commissioner to establish a rule and the other held by the Department for the rulemaking process itself (Minn. Stat. § 361.26, subd. 2(b) (1978) and Laws of Minn. 1980, Ch. 615, § 6, § 15.0412, subd. 4)? The Hearing Examiner has no problem

with this "two hearing process", but questions whether the Department really intended that two hearings be held. If the Department intended that only the state hearing be held, then this intent could be achieved by deleting the phrase ", or requesting the commissioner to do so," from § 1.0221 B. deleted p. 2.

The Hearing Examiner does not find the two hearing process unreasonable.

22. 6 MCAR § 1.0221 C.1. Commissioner review and approval.

The problems of the "two hearing process" (Finding 21) spill into § 1.0221 C.1. for the following reasons. This section reads in pertinent part:

> 1. The commissioner shall require the ordinance proposer to provide additional information of the kind described in 6 MCAR § 1.0221 A., when needed in order to make an informed decision. [Emphasis added.]

As § 1.0221 B. currently reads, whenever a local governmental unit requests the Commissioner to formulate, amend or delete a control, the "two hearing process" is triggered. And, in this two hearing process, the local governmental unit, after its public hearing (the first hearing), would be required to submit the "proposed ordinance" (§ 1.0221 B.3.), as well as other information (B.1. 2., 4.), to the Commissioner prior to the Department's § 361.26, subd. 2(b) public hearing (the second hearing). Because the local governmental unit must submit the proposed ordinance, it is an "ordinance proposer" as that term is used in this section, and thus, within the scope of § 1.0221 C.1.

This proposed rule implies review of a proposed ordinance after any public hearing is concluded. And, with respect to the "two hearing process", the Commissioner's review is then subsequent to the second hearing. This proposed rule permits the Commissioner to request "additional information" after the second hearing is completed "in order to make an informed decision". Because the second hearing is governed by Laws of Minn. 1980, Ch. 615, §§ 15.0411 - 15.0417 and § 15.052 (see Minn. Stat. § 36 1.26, subd. 2(b) (1978), the Commissioner is limited to the information on the record developed at the second hearing; requesting additional information after the second hearing is violative of Laws of Minn. 1980, Ch. 615, § 6, § 15.0412, subd. 4c, 4d. Thus, for the reasons stated in Finding 17, the Department cannot adopt this rule. Deletion of the phrase "or requesting the commissioner to do so" from § 1.0221 B. would bring the rule into conformity with the statute. deleted. p. 2

23. 6 MCAR § 1.0222 Water surface management standards.

This entire section generated more public comments and controversy than any other section of the proposed rules. All the comments opposing this section came from competition waterskiiers (Pub. Ex. 6) or members of the American Water Ski Association (AWSA) [Pub. Ex. 2 and 7].

At the Saint Paul hearing, various AWSA members commented that Minnesota is "blessed with an abundance of water" and is thus a key state for waterskiing enthusiasts. The Director of the AWSA referred to Minnesota as the "birthplace of waterskiing" and pointed out that:

> Minnesota has more lakes than any other state; over 12,000 covering 3,000,000 acres . . . .[Minnesota has] the second highest number of boats; 563,85 or 1 boat for every 7 persons. [Pub. Ex. 2, p. 3].

The Director also testified that no other states are proposing or have enacted such strict rules on a statewide basis; and, that decisions made in this state could well affect surface water use decisions elsewhere in the country. Other states may look to Minnesota for guidance.

The primary concern of the AWSA and other waterskiing enthusiasts was that this section, as originally proposed, would have required any ordinance or rule to incorporate all the standards listed in § 1.0222. AWSA members noted that, for example, the horsepower standard, of obvious importance to a waterskiier, would then be limited to 25 HP in every ordinance or rule, thereby severely curtailing the entire sport of waterskiing in this state. Moreover, the AWSA members contended that regulating speed, motor size (HP), time of use and direction of travel in every ordinance or rule is unreasonable.

The Department responded that forthcoming amendments to this section would correct this misunderstanding. At every hearing, the Department stated that they did not intend every ordinance or rule to incorporate a horsepower or speed limit control. Rather, controls would be selected as were needed to remedy or regulate a specific problem on a water body. Although the Department has amended this section to allegedly correct the problems noted by the AWSA, the Hearing Examiner believes, with all due respect to the Department, additional language is necessary for further clarification. The Hearing Examiner suggests the following sentences be inserted into the preamble of § 1.0222, so that the section would read, in part, as follows:

> . . . When formulating an ordinance or rule, it is not required that all the standards listed below be incorporated into every ordinance or rule. Rather, the commissioner or governmental unit shall select from the standards listed below such standard(s) as are needed to regulate the use of watercrafts on surface waters.

inserted p.5.

Of course, it is the Department's prerogative to select other wording. The language proposed above is just one approach. But, some other clarifying language must be inserted for this section to be reasonable.

24. 6 MCAR § 1.0222 A. Watercraft type and size.

Section 1.0222 requires the Commissioner and any local governmental unit formulating an ordinance or rule to follow standards A-I. The use of "may" in § 1.0222 A. creates a discretion problem. For example, when "may" the Commissioner formulate controls for the type and/or size of watercraft? The word "may" must be changed to "shall". Even if additional standards and criteria are set forth to guide this discretion, the word "may" must be changed to "shall" for the Department to adopt this rule.

not changed see F&F. 2

In addition, the Hearing Examiner suggests inserting after the word "watercraft" the following phrase ", as defined in section 361.02, subdivision 7,". Minn. Stat. § 361.02, subd. 7 (1978) defines watercraft as:

not inserted

> "any contrivance used or designed for navigation on water other than (a) duck boat during the duck hunting season, (b) rice boat during the harvest season, or (c) seaplane.

While the rule would be reasonable without this insertion, this change clarifies the rule as to its applicability.

There is a typographical or grammatical error in this section; "body(s)" should be amended to "body(ies)".

corrected p.5

25. 6 MCAR § 1.0222 B. Motor type and size.

Numerous public comments were received with regard to this section and § 1.0222 D. Undoubtedly, questions involving the setting of horsepower and speed limit standards are particularly prone to uncertainty. While a concerned Legislature has passed legislation providing for the development of these standards (§ 361.26, subd. 2(c)(1), (3)), the regulators entrusted with the development of such standards have been burdened with a task in an area which, by its very nature, is open to debate. Some speculation and differences of opinion as to where to "draw the line" typifies the Department's decision. But, speaking realistically, how else can the Department act, given an mandate to develop these proposed rules (§ 361.25), with perhaps only a slight or nonexistent data base upon which to draw? The statutes--and even common sense--demands this regulatory action to prevent harm to both persons and the environment, even if the Department is less than certain that harm is otherwise inevitable. Some persons suggested that anything less than certainty, that any speculation, is irresponsible and unreasonable. But when the statute seeks to avoid harm, should preventive, although uncertain decisions, be so labeled?

Testimony by the Department staff and the public indicated that large motors, which are capable of high speeds, cause problems on all water bodies, particularly on small lakes. The wake from a powerful outboard motor can "tip a canoe" (Henry Anderson, Shoreview Storm Water and Lake Quality Commission); "increase shoreline erosion and churn up bottom sediments" (which increases the turbidity of waters) [George Orning, Manager of the Research and Policy Section for the Department]; "damage shoreline property, such as boats in dock" (Steven Johnson, MWBAC); and generally disturb other activities, such as swimming and fishing (John W. Hohncke, Chairman of the Morrison County Planning and Zoning Commission). The Department commented that a horsepower limitation is an appropriate regulatory tool to remedy these problems.

Also, as noted in the Statement of Need and Reasonableness (page 4, first paragraph), limiting horsepower is the preferred enforcement alternative for reducing or determining a watercraft's speed. According to Kim Elverum, there are currently only two methods for checking the spped of a watercraft: (1) follow the watercraft with a speedometer on your boat, similar to a pacing situation "on the highway"; and (2) radar. The problem with pacing a boat is that speedometers on watercraft are not as accurate or reliable as they are on automobiles. And radar, although still in the experimental stage for use on water bodies, is "few and far between". Elverum commented that a horsepower limit is more of an "indicator for enforcement". For example, if a conservation officer is either on shore or in a boat on a water body with a 15 mph speed limit and observes nothing but small (12-16 foot) open fishing boats (with 10 HP motors), he is not likely to take enforcement action if there are no other factors involved.[26] In many counties, the Department "does not

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26 As noted in the Statement of Need and Reasonableness (page 4, D. Speed limits - 15 mph), 15 mph is about top speed for a 14-16 foot fishing boat with a 10 HP motor.

have enough conservation officers per lake". Elverum testified that Otter Tail County, where there are about 1,033 lakes, has "five or six water enforcement officers". So, the time to observe a lake for violators is limited. Therefore, if among all the small open fishing boats an officer sees a 20-foot runabout with a 75 HP motor operating at full "throttle", enforcement action, such as pacing the runabout or using radar would be triggered.

In support of the horsepower limits selected by the Department, the following evidence was given by way of oral testimony and exhibit (DNR Ex. 7):

1. 25 horsepower. Utilized because of its popularity in Minnesota on larger watercraft (16-18 feet). Twenty-five horsepower is the cutoff for many home insurance policies as well as for the Minnesota watercraft operator's permit requirement, Minn. Stat. § 361.041, subd. 2 (1978). And, the 25 hp. limit is used in certain areas in the Boundary Waters Canoe Area Wilderness (BWCAW) by the U.S. Forest Service, see § 4(c)(1), (4) BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978). Thus, twenty-five horsepower is a reasonable and natural institutional break-off point.

2. 10 horsepower. Utilized because of its popularity on small (12-16 foot) fishing boats in Minnesota. Department licensing figures demonstrate that about 200,000 (as a conservative figure) of 437,000 registered motorized boats fall into the 12-16 foot open utility aluminum outboard class. Experience has shown that a majority of these boats are equipped with a 10 hp. or less outboard. The 10 hp. limit has been used in other states (i.e., Michigan) and in the BWCAW on certain motor routes by the U.S. Forest Service, see § 4(c)(2), (3) BWCAW Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978). Two major manufacturers of outboard motors currently market 10 hp. motors--OMC and Mercury. And, the 10 hp. limit is used in five Department wildlife management areas.

3. Electric motors. The electric motors on the market can move a fishing boat as fast as somebody can row. Provision is made for electric motors because of their widespread use for fishing, lack of objectionable noise and gas-saving features. All lakes and rivers in the state can support this type of motor. This is evidenced by the fact that they are currently allowed on all Minneapolis city lakes.

4. No motors. The Department commented that this option will probably not be used much because of the "advent of the quiet electric motor." Small lakes or lakes showing "extremely unusual circumstances" (e.g., to protect "quietude") are anticipated to be zoned for "no motors".

Of course, the Department could have selected other horsepower limitations--such as 35, 45, 100 or even 300 HP. But, one of the stated purposes of limiting horsepower is to reduce the speed of watercrafts on surface waters, ease enforcement and bring some pattern of uniformity on Minnesota lakes. It is important to note that these horsepower limits are options available to the local governments if they choose to regulate horsepower. No local government is required by these proposed rules to limit horsepower. And, as stated by the Department's counsel, if a local government wants to use a horsepower limit higher than 25, the variance procedure (§ 1.0222 I.) is always available.

The Hearing Examiner finds that horsepower limits in general and the limits selected by the Department in particular are needed and reason- able for the above reasons.

26. 6 MCAR § 1.0222 C. Direction of travel.

Very few comments were received in opposition to this section. The comments received opposed direction controls in general. The Hearing Examiner believes that there are more problems with this section than just a philosophical difference of opinion. The Department has exceeded its statutory authority in proposing this standard. Minn. Stat. § 361.26, subd. 2(c), which limits the scope of the § 361.25 rules (see footnote 11), makes no provision for a "direction of travel" standard. The § 361.26 explicitly sets forth "areas" (subd. 2(c)(1) - (5)) which can be regulated and this standard is not one of them. For the reasons stated in Finding 17, the Department cannot adopt this rule.

Section not deleted p.5 see FoF. 3

27. 6 MCAR § 1.0222 D. Speed limits.

This standard is another example of where reasonable minds can differ on the reasonableness of the selected speed limits. However, the Hearing Examiner finds that the Department has demonstrated the need for and reasonableness of each of the speed limits by the following affirmative facts, Thomas Bros. In. v. Sec. of State, supra.

1. Slow-No Wake - This term is in use throughout the U.S. and is primarily used in harbors, near shore or in channels to reduce problems associated with speed and/or large wakes. Apparently, watercraft wakes cause damage to boats in dock and shoreline. A 5 mph or less speed limit will eliminate or lessen these problems and also reduce the possibility of collisions near shore.

2. 15 mph - This speed limit closely corresponds to the 10 horsepower limit. Fifteen mph is about the top speed for a 14-16 foot fishing boat with a 10 hp. motor.

3. 40 mph - This maximum limit is currently in use on Lake Minnetonka. The Department testified that this is about the top speed for most runabouts; only performance-type craft (generally, fiberglass boats with a low freeboard powered by 75-225 hp motors) are exceeding the 40 mph. One waterskier commented that 36 mph is the maximum speed for competition waterskiing and thus this limit would not be detrimental to this sport.

28. 6 MCAR § 1.0222 E.3.

A problem similar to the one discussed in Finding No. 24 arises in this proposed rule out of the use of the word "may". The use of "may" makes the rule arbitrary and unreasonable. For example, under what circumstances "may" this control "governing the use of watercraft" be adopted? The defect is correctable by substituting the word "shall".

see FoF F1 not changed p.6

29. 6 MCAR § 1.0222 F.2.

This section permits zoning a lake for a variety of recreational activities to avoid interference between those activities. It is found to be both needed and reasonable.

30. 6 MCAR § 1.0223 A.2., C.1.

Throughout these proposed rules, the Department has used the term "local governmental unit" to include a county, city or town and not the Commissioner (see amendments to § 1.0220 B. Scope). Sections 1.0223 A.2. and C.1., which read in part,

A.2. Rules or ordinances adopted by any governmental unit . . . .

C.1. Any governmental unit adopting rules or ordinances . . . .

create some confusion whether the term "local governmental unit" does include the Commissioner. Local governmental units adopt "ordinances"; and, the Commissioner adopts "rules". By these sections, the Commissioner is included within the definition of "local governmental unit" since rules or ordinances" are adopted by a "local governmental unit". The rule as proposed is reasonable; however, its clarity could be improved.

Improvement made, pg. 27,

31. One final issue needs a brief comment. AWSA members questioned at the Saint Paul hearing whether these proposed rules are needed at this time. The short answer is that these proposed rules are long overdue. According to Minn. Stat. § 361.25 (1978), these proposed rules should have been promulgated by "no later than January 1, 1975". Furthermore, testimony by the Department staff and the public indicated that, without these proposed rules, surface water use conflicts will increase on many lakes throughout the state.

Duane Shodeen, Regional Fishery Supervisor for the Department, testified that without these proposed rules, the opportunity to waterski or to use any of Minnesota's lakes for other recreational uses is not "going to be enhanced . . . but destroyed". Local surface use zoning ordinances are being proposed and submitted to the Department for approval by the Commissioner. Because there are no rules by which to review the proposed ordinances, these ordinances are held in limbo. Shodeen commented that a pattern was developing amongst these proposed ordinances: there was no consistency with horsepower, speed limits or time of use. In fact, in one instance, a group of counties banned the use of all outboard motors on a particular lake, which in the Department's opinion, was unreasonable. Yet, since there are no rules setting forth standards, the Commissioner is unable to determine, as a matter of law, that any proposed ordinance is unreasonable. Thus, in Shodeen's opinion, these proposed rules are absolutely necessary to protect the recreational interests of non-riparian or transient users and to bring some uniformity on regulated water bodies. For, in a state with over 10,000 lakes, if many lakes had widely divergent horsepower or speed limits, use of surface waters by motorized boats would be restricted, not encouraged. Waterskiers and motorized boats would then seek out lakes, if any, which could accommodate them--resulting in overcrowding and more conflicts between users.

Kim Elverum, the Department's Boat and Water Safety Coordinator, also testified that these proposed rules ensure a more complete consideration of various recreational interests because the local government is required to support its decision to adopt an ordinance with corrobative evidence. A local government, in its written statement (§ 1.0221 B.), must: (1) set forth the information requested in § 1.0221 A.; (2) evaluate the information to determine if significant conflicts exist and justify the particular controls proposed; and (3) hold a public hearing. The public hearing affords any surface water users an opportunity to present argument, for or against, the proposed ordinance and to challenge the information acquired by the local government and any inferences drawn therefrom. The Commissioner then reviews the written statement and only approves the proposed ordinance if it complies with the proposed

rules (§ 1.0221 C.1.). However, a variance from any of the standards in § 1.0222 may be granted by the Commissioner (§ 1.0222 I.). Further, an administrative appeals procedure is created under which the local government can challenge the Commissioner's disapproval of an ordinance by initiating a contested case (§ 1.0223 B.1.). Taken together, this process seems to afford a measure of assurance that unwise, arbitrary or unreasonable local action will not be approved.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. That due, timely and legally adequate notice of the hearing in this matter was properly served and published by the Department, except as noted in Finding 3.

2. That the Department has met the procedural requirements of Minn. Laws 1980, Ch. 615, § 6, subds. 4-4f (to be codified as Minn. Stat. § 15.0412, subds. 4-4f) and all other procedural requirements of law or rule; the procedural irregularities noted at Findings 2, 6, 9, and 11 are technical in nature and no corrective action is needed because of the absence of any evidence of prejudice to interested parties.

3. That the Department has demonstrated compliance with substantive and procedural requirements of law or rule within the meaning of Minn. Laws 1980, Ch. 615, § 6, subd. 4c (to be codified as Minn. Stat. § 15.0412, subd. 4c), except as noted at Findings 17, 19, 20, 22, 24, 26 and 28.

4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Laws 1980, Ch. 615, § 6, subd. 4c (to be codified as Minn. Stat. § 15.0412, subd. 4c), except as noted at Finding 23.

5. That the additions to the proposed rules which were proposed after publication of the rules in the State Register are not substantially different from the rules as published in the State Register within the meaning of Minn. Laws 1980, Ch. 615, § 6, subd. 4d (to be codified as Minn. Stat. § 15.0412, subd. 4d).

6. That the Hearing Examiner has suggested action to correct the defects mentioned in Conclusions 3 and 4 as noted at Findings 17, 19, 20, 22, 23, 24, 26 and 28.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Laws 1980, Ch. 615, § 6, subd. 4d (to be codified as Minn. Stat. § 15.0412, subd. 4d).

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rule amendments be adopted consistent with the Findings of Fact and Conclusions made above.

Dated: October 13, 1980.

Kent B. Roberts

KENT B. ROBERTS
Hearing Examiner

EXHIBITS

DNR Ex. 1	Order for Hearing.
DNR Ex. 2	Certificate of Delivery of Secretary of State's list dated July 3, 1980.
DNR Ex. 3	Affidavit of Mailing of Notice of Hearing to persons on the Secretary of State's list executed on July 14, 1980.
DNR Ex. 4	Notice of Hearing.
DNR Ex. 5	A copy of Volume 5, No. 2 of the State Register, in which were published at 21-26 on Monday, July 14, 1980, the Notice of Hearing and the proposed rules.
DNR Ex. 6	A copy of the proposed rules.
DNR Ex. 7	Statement of Need and Reasonableness.
DNR Ex. 8	A copy of Minnesota 1980 Waters and Watercraft Safety Laws and Boat and Water Safety Rules and Regulations.
DNR Ex. 9	Excerpts from Division of Waters Bulletin No. 25, "An Inventory of Minnesota Lakes" prepared by the staff of the Waters Section, Division of Waters, Soils, and Minerals, Minnesota Conversation Department (St. Paul, Minn., 1968).
DNR Ex. 10	The Secretary of State's mailing list.
DNR Ex. 11	Lakes in Ramsey County: Recreational Resource Use Policy Implications, Report No. 4 (Minnesota Land Management Information Systems Study, Minneapolis: University of Minnesota; Center for Urban and Regional Affairs, March 1973).
DNR Ex. 12	Amendments to the proposed rules by the Department, dated August 25, 1980.
DNR Ex. 13	Further Amendments to the proposed rules by the Department, dated September 11, 1980.

PUBLIC EXHIBITS

Pub. Ex. 1	A copy of the Order of the State of Wisconsin Natural Resources Board Creating Rules governing the use of the water surface on the lower St. Croix River. Submitted by Steven P. Johnson from the Minnesota-Wisconsin Boundary Area Commission at the St. Paul hearing.
Pub. Ex. 2	Comments from Nito Quitevis, Director of the American Water Ski Association. These comments were read into the record at the Saint Paul hearing.
Pub. Ex. 3	A letter dated August 25, 1980 from Charles L. LeFevere, Attorney for the Lake Minnetonka Conservation District, urging amendments to the proposed rules.
Pub. Ex. 4	Letter from Roger S. Williams, Acting Director of the Division of Physical Planning (Minnesota State Planning Agency) dated September 4, 1980, supporting proposed rules.
Pub. Ex. 5	Letter to Mr. Joseph Alexander, Commissioner of Department of Natural Resources from Elliott Perovich, Chairman of the Metropolitan Parks and Open Space Commission, dated September 10, 1980, supporting proposed rules but urging one amendment.
Pub. Ex. 6	Letter from Fran Hagen dated September 10, 1980, commenting on how the proposed rules would affect waterskiing.
Pub. Ex. 7	Letter from Hank W. Longo, President of the Minnesota Water Ski Association, received September 12, 1980, opposing the proposed rules.

DNR-81-001-KR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules
For Water Surface Use Management

ORDER OF THE CHIEF
HEARING EXAMINER

(A)

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Laws 1980, Ch. 615, § 6, subd. 4d (to be codified as Minn. Stat. § 15.0412, subd. 4d) which provides in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of section 15.0412, subdivisions 4 through 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change or of failure to comply with Minn. Laws 1980, Ch. 615, § 6 (to be codified as Minn. Stat. § 15.0412, subd. 4-4f), or of failure to establish need for and reasonableness of the proposed rule.

In order to correct the defects enumerated by the Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Exmainer a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defect in

regard to substantial change and the requirements of Minn. Laws 1980, Ch. 615, § 6 (to be codified as Minn. Stat. § 15.0412, subd. 4-4f) have been corrected.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated: October 13, 1980.

DUANE R. HARVES
Chief Hearing Examiner

SF-00006-01

STATE OF MINNESOTA Findings of Fact

Office Memorandum

DEPARTMENT Attorney General
Natural Resources

TO : DUANE HARVES
Chief Hearing Examiner

DATE: 11-4-80 ~~10-29-80~~

FROM : A. W. CLAPP, III AWC III
Special Assistant
Attorney General

PHONE:

RECEIVED
NOV 5 1980
OFFICE OF HEARING EXAMINERS

SUBJECT: Adopted Rules for Water Surface Use Management
File C-67-T

Attached are the Report of the Hearing Examiner, the Findings of the Commissioner of Natural Resources, his Order Adopting Rules, the rules as he has adopted them, exceptions filed by Popham, Haik, and the hearing record. This submission is made pursuant to Laws of Minnesota 1980, Chapter 615, Section 6, Subd. 4e.

The Department has adopted examiner's finding 23, thus making the rule needed and reasonable per examiner's conclusion 4.

Regarding conclusion 3, the Department has adopted examiner's findings 19, 20, and 22, but has varied from findings 17, 24, 26, and 28 as explained in the Findings of the Commissioner. The Department submits that its adopted rules are less different from the proposed rules than they would have been had findings 17, 24, 26 and 28 been concurred with, and therefore in light of the Order of the Chief Hearing Examiner in this matter dated October 13, 1980, cannot now be found substantially different.

AWC-dm
enc.

DNR-81-001-KR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Rules for Water Surface Use Management.

ORDER OF THE CHIEF HEARING EXAMINER

B

On November 5, 1980, pursuant to the provisions of Minn. Stat. § 15.0412, subds. 4d and 4e, the Department of Natural Resources (hereinafter the "Department"), submitted the entire record in the above-entitled matter to the Chief Hearing Examiner for his determination as to whether or not the defects found by the Hearing Examiner and the Chief Hearing Examiner in their Reports dated October 13, 1980, had been corrected and for a determination as to whether any of the corrections constituted a substantial change in the rule.

Based on a review of the files, records and proceedings herein by the Hearing Examiner and the Chief Hearing Examiner, the Chief Hearing Examiner finds the following:

1. That with respect to the impact of these rules upon Park Reserve Districts, both the Hearing Examiner and the Chief Hearing Examiner find that there are no longer any defects in the rules;

2. That with respect to the question of statutory authority to adopt a rule relating to direction of travel, the Chief Hearing Examiner withdraws his approval of the Findings and Conclusion of the Hearing Examiner and finds that there is adequate statutory authority for the proposed rule;

3. That with respect to all other defects and changes, the Hearing Examiner and the Chief Hearing Examiner find that they have been cured and that there are no substantial changes.

NOW, THEREFORE, the Department has the responsibility of submitting the complete hearing record and the rules as adopted to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4e.

Dated this 20th day of November, 1980.

DUANE R. HARVES
Chief Hearing Examiner

DNR-81-001-KR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF THE PROPOSED)
ADOPTION OF RULES RELATING TO)
WATER SURFACE USE MANAGEMENT.)

ORDER OF THE
CHIEF HEARING EXAMINER

incorp by reference

WHEREAS, on August 20, 1980, the Department of Natural Resources (hereinafter "Department"), by its Special Assistant Attorney General A. W. Clapp, III, submitted a request to the Chief Hearing Examiner for approval of the incorporation by reference of a certain document in rules to be proposed; and

WHEREAS, pursuant to Minnesota Statutes 1978, § 15.0412, subd. 4, agencies may incorporate by reference provisions of federal law or rule or other materials from sources which the Chief Hearing Examiner determines are conveniently available for viewing, copying and acquisition by interested persons; and

WHEREAS, the Chief Hearing Examiner has reviewed the Department of Natural Resources, Division of Waters Bulletin No. 25, "An Inventory of Minnesota Lakes", and has found it to be in excess of 3,000 words and has determined that it would exceed five pages of publication in the State Register; and

WHEREAS, the Department has indicated, and the Chief Hearing Examiner thus finds, that the document is conveniently available for viewing, copying and acquisition by interested persons.

NOW, THEREFORE, IT IS ORDERED that the Department shall have the approval of the Chief Hearing Examiner to incorporate by reference in their proposed rules the above-referenced document.

Dated this 28th day
of August, 1980.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

File No. _____

Date 8-19-80

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

RECEIVED
JUL 23 1980
OFFICE OF HEARING

Proposed Rules for
Water Surface Use
Management - 6 MCAR § 1.0220-1.0223

Statements of Need
and Reasonableness

The authority for the Commissioner of Natural Resources to promulgate rules regarding water surface use management is found in Minnesota Statutes § 361.25, 361.26 and 378.32. There are no current rules on this subject.

Minnesota Statute § 361.25 and 361.26 require the Commissioner of the Department of Natural Resources (DNR) to adopt guideline rules relating to the use of water surfaces. These rules will primarily affect counties, cities and towns which are authorized under the law to adopt water surface use ordinances, as well as the department itself.

The Commissioner of Natural Resources proposes the following rules:

6 MCAR § 1.0220 -

A. Policy - This policy statement is taken from Minn. Stat. § 361.01.

B. Scope - This is taken directly from the appropriate statutes.

C. Goal - The goal attempts to provide the controls necessary to protect the public and the resource, while attempting to accommodate all compatible recreational uses utilizing uniform guidelines throughout the state to insure equal treatment for users and easier compliance.

D. Authority - Taken directly from appropriate statutes.

E. Jurisdiction - DNR water surface rules will be promulgated only under the conditions indicated in the rules. With the approval procedure required under Minn. Stat. § 378.32 all ordinances proposed by counties, cities or towns regulating surface water use will be reviewed and either approved or disapproved by the DNR. This procedure of local initiation and enactment after DNR approval provides the best response from a local level with approval based on a set of standards at a state level. This process is also the most economical utilizing the ongoing county, city or town board/council meetings for public input rather than the more expensive and lengthy state public hearing process.

The locally initiated ordinance will be used in the majority of cases and especially on the smaller bodies of water where problems most often occur. If, however, the water body is 1) traversed by a state or international boundary, or 2) is with the jurisdiction of two or more counties which cannot agree upon the content of a joint ordinance, the Commissioner will proceed with the rule-making process as outlined in Minn. Stat. § 361.26 if he feels the rules would be in the public interest.

If a body of water is located in the jurisdiction of two or more cities which cannot agree on the content of an ordinance, a similar procedure is outlined in Subsection 2.

F. Existing ordinances and rules - It is the informal opinion of the Attorney General's office (DNR division) that the statutes (§ 378.25-26 and 378.32) require all rules and ordinances promulgated prior to these rules must come into essential compliance if they were enacted after May 25, 1973.

6 MCAR § 1.0221

A. Factors to consider -

1. Physical characteristics

a. Size - The size of a water body can determine its carrying capacity, types of controls and the type of watercraft utilized on the surface.

b. Crowding potential - The crowding potential gives an idea of the amount of crowding problems that could occur on a lake or river.

c. Bottom topography and water depth - The amount of shallow versus deep water can play an important role in determining the amount of usable area for larger boats.

d. Shore soils and bottom sediments - The consistency of shore soils and bottom sediments can be a factor in shoreline erosion and the churning up of sediments by watercraft. Especially near shore or in other shallow water areas.

e. Aquatic flora and fauna - The amount and type of vegetation and animal or fish life can play a role in protecting these natural resources. Especially important here would be the presence of any threatened or endangered species.

f. Water circulation - This information is desirable, as it can pinpoint problem areas. In addition, water level fluctuations can cause either 1) a decrease in usable surface acres during low water conditions, or 2) a flooding (and subsequent wake problem from watercraft) at higher than normal water levels.

g. Natural and artificial obstructions - These obstructions can and do play an important role in the pathways of watercraft as they travel across the water's surface.

h. Regional relationship - The relationship and use patterns of surrounding water bodies can and do affect the use of the body of water to be regulated. When controls are placed on one body of water it can cause a shift in use to nearby water bodies. This must be taken into account when rules or ordinances are placed into effect.

2. Existing development - The type and amount of development can affect watercraft use patterns. As an example, summer-only cottage residents have a tendency to concentrate use on weekends with a diminished use during the week. Resort patrons, however, tend to utilize the surface over the entire period of rental.

3. Ownership of shoreland - This is particularly important in determining the shoreline impact of watercraft use.

4. Public regulations and management - Existing plans and regulations affecting watercraft use must be taken into consideration. If regulations are already in effect it should be noted why they are not working.

5. History of accidents - This is important when safety is a consideration in initiating surface use management.

6. Watercraft use - A survey of some type is necessary to determine what the scope of watercraft use is on a lake or river. These figures can be used to compare one body of water to another as well as use patterns at various times on the same body of water.

7. Conflict perception - User opinion is important in determining practical controls on a particular water body. In addition, public input is necessary to obtain all sides of the problem and work out possible solutions.

B. Written Statement - The written statement required under this section is necessary for the DNR to determine if the proposed ordinance will meet the criteria set forth in these rules. Much of this information can be reduced to a form or application that the unit of government can complete and return to the DNR with the proposed ordinance. In addition, a model ordinance will be developed by the DNR for use by local units of government to help standarize the program, as well as providing technical assistance in writing the proposed controls.

The requirement for notification of all riparian landowners does not differ from other local zoning controls.

C. Commissioner review and approval - This section provides for the input of further information from the local unit to the DNR when necessary. It also gives the criteria under which approval will be granted by the commissioner.

6 MCAR § 1.0222 Water surface use management standards - These are required by Minn. Stat. § 361.26 Subd. 1a. and restated in Minn. Stat. § 378.32.

A. Watercraft type and size - Watercraft type (ie: drag boats, hydroplanes, airboats, large sailboats etc.) can be a factor in zoning. This is especially true with larger or faster boats. However, extremely small craft (ie. inflatable rafts etc.) could also be a safety factor on crowded lakes (visibility and collision factors) as well as large lakes (weather and distance factors). No specific types or size of craft is given because of the large variety and new types of constantly being added to the market.

B. Motor type and size - The maximum horsepower or type of motor can play a role in boating. Larger motors, capable of higher speeds can cause problems on a small body of water. Limiting horsepower on small bodies of water can be an easier-to-enforce alternative to a speed limit to reduce speed. The limits were selected as follows:

-10 horsepower - Utilized because of its popularity in Minnesota especially on small (12-16 feet) fishing boats. The 10 hp limit has been used in other states and in the Boundary Waters Canoe Area Wilderness (BWCAW) by the U.S. Forest Service.

-25 horsepower - Utilized because of its popularity on larger craft (16-18 feet) in Minnesota. In addition, 25 horsepower is the cutoff for many home insurance policies as well as for the Minnesota watercraft operator's permit requirement. It is also used in certain areas in the BWCAW by the Forest Service.

-Electric motors - Provision is made for electric motors because of their widespread use for fishing, lack of any objectionable noise and gas-saving features. It is anticipated that nearly all lakes and rivers in the state can support this type of motor. (They are currently allowed on the Minneapolis City lakes.)

-No motors - This final restriction is anticipated to be used very little because of the advent of the quiet electric motor. Only very small lakes or lakes showing extremely unusual circumstances are anticipated to be zoned for no motors at all.

C. Direction of travel - The counter-clockwise direction of travel is generally used on smaller lakes because of the ability of the operator who sits on the right side in runabout type of craft to see other craft approaching from the right (shoreside) into the traffic pattern. This direction of travel is currently in use on Lake Johanna, Lake Marion and Square Lake in Minnesota.

D. Speed limits - The speed limits selected as options were chosen because of their current use or ease of enforceability. Specifically:

-"Slow-No Wake" - This term is in use throughout the U.S. and is primarily used in harbors, near shore or in channels to reduce problems associated with speed and/or large wakes.

-15 mph - After checking with boat and motor manufacturers it was determined that 15 mph was about top speed for a 14-16 foot fishing boat with a 10 hp motor. This is fairly easy to determine by the enforcement officer without measurement, since the type of boat and motor can be utilized to roughly estimate the speed.

-40 mph - This maximum limit is in use currently on Lake Minnetonka. It has been the experience that this is about the top speed for most runabouts and that only performance-type craft are generally exceeding it according to radar surveys.

E. Effective time -

1. Time of day - The times of day were selected as follows:

   a. Sunrise-sunset - These cutoffs utilize a natural break in the day. Generally speed and activity on a water body is reduced at sunset and increases after sunrise.

   b. 9 a.m.-6 p.m./6 p.m.-9 a.m. - These time period pairs allow for higher speed or more active use during the hours most commonly utilized by this type of activity according to at least one survey of water users. It also provides time for low speed or less active users at the times preferred by them.

   c. Noon-6 p.m./6 p.m.-noon - These times were established for essentially the same reasons as above, but they allow further restriction during the three hours before noon.

   d. 24 hours a day - This would be utilized when restriction is placed on a water body at all times.

2. Calendar divisions -

   a. All year - This category will be utilized for restrictions which do not have a bearing on the increase in boating traffic during the summer months. An example would be a "slow no-wake" zone in a channel.

   b. Memorial Day weekend-Labor Day weekend - In many cases restrictions need only be emplaced during this high-use period, leaving the early and late months free from unnecessary restriction.

   c. Weekends and holidays in (b). - In further pinpointing the problem, most problems in water surface use occur only during weekends in the summer. This option provides controls during these peak use times and avoids the need for unnecessary controls during the week.

3. Water levels - This section gives the freedom necessary to enact controls based upon a specific water elevation. The primary concern here is flooding caused by high water levels and the subsequent wake damage to buildings and shoreline. Examples of these problems are the Red River floods and certain lakes in Ramsey County during the last three years.

F. Area zoning - This section allows parts of a water body to be zoned, rather than the whole surface area. Most area zoning will concern the establishment of "slow-no-wake" zones as follows:

1. 100 or 150 feet from shore - This option is provided to keep watercraft away from shorelines, docks, swim areas and moored watercraft. It is currently used on Lake Minnetonka (150 feet) and the St. Croix River (100 feet).

2. Speed & wake constitutes a hazard - Areas such as marinas, harbors, launch ramps channels etc. have traditionally been "slow-no wake" zones. In some cases, however, it has been necessary to officially designate these zones for safety reasons. Speed & wa

3. Inhance experience of users - Certain areas on a body of water are conducive to slow speeds. Examples of areas such as this are shallow areas primarily used for fishing or hunting.

G. Conduct of other activities - Under Minn. Stat. § 378.32 and 459.20 counties, cities and towns can regulate activities other than watercraft. Since these uses can play a role in surface use management as well as safety, provision has been made for them in the rules.

H. Emergencies - This section is provided to cope with unforeseen situations such as flash floods etc. which occur fast enough to preclude the possibility of either application or DNR approval within an effective time period.

I. Variances - If the above standards do not address a particular problem a variance procedure is specified in this section. It is anticipated that the variance will be the exception rather than the rule. If, however, the commissioner refuses to approve a proposed ordinance and subsequently refuses to grant a variance, a contested case hearing procedure is outlined in 6 MCAR § 1.0223 B.1..

6 MCAR § 1.0223 - Administrative provisions

A. Enforcement and penalties -

1. Enforcement officers and penalties - Clarifies the responsibility of local units proposing controls regarding their enforcement. DNR conservation officers are not full peace officers and can enforce only specific statutes or DNR rules, not including local ordinances. It is the assumption that the county sheriff (who has watercraft law enforcement responsibilities already) will become the prime enforcer of these local ordinances, along with the city and town police departments.

2. Exceptions - Provides for exceptions for government personnel on official business. Also provides for temporary exceptions for races, regattas etc. through the governmental unit that enacted the ordinance.

B. Commissioner's approval -

1. Approval procedure - This procedure is dictated by Minn. Stat. § 378.32 and the items to be included can be found in 6 MCAR § 1.0221 A. This section also gives the criteria for approval or disapproval based upon the written statement submitted by the governmental unit and the compatability of the ordinance with these rules. Also included in this section is a contested case hearing procedure where the governmental unit and the DNR cannot agree on the content of the controls. This step can eliminate the need for court proceedings to settle disputes.

2. Notification time - The 120 day notification time is set forth in Minn. Stat. § 378.32.

C. Notification

1. Marking - The unit of government responsible for the controls must adequately inform the users of controls on the water body. This can be done in a variety of ways, but the minimum requirement shall include marking of public launching areas and the placement of buoys or signs conforming to DNR boat and water safety rules. This is especially true in "slow-no wake" zones etc.

2. DNR listing - In order to inform all water users, a publication listing the controls on state lakes and rivers should be produced periodically and updated as necessary. This can be a separate publication or included in the DNR Boating Guide which is reprinted each year.

Date July 23, 1980

Kim A. Elverum

Kim A. Elverum
Boat and Water Safety Coordinator
Minnesota Department of Natural Resources

DNR Exhibit No. 3

File No.

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

Date 8/19/80

RECEIVED
JUL 30 1980
OFFICE OF HEARING EXAMINERS

In the matter of the proposed rules for Water Surface Use Management.

AFFIDAVIT OF MAILING

Kathleen Buttermore, being first duly sworn, deposes and says:

That on the 14th day of July, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, and with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Kathleen Buttermore

Subscribed and sworn to before me this 14th day of July, 1980.

Karen L. Singer

KAREN L. SINGER
NOTARY PUBLIC — MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES MAY 16, 1984

DNR Exhibit No. 2

No. _____

Date 8-19-80

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

RECEIVED
JUL 30 1980
OFFICE OF HEARING EXAMINERS

In the matter of the proposed rules for Water Surface Use Management.

CERTIFICATION

I hereby certify that the attached 345 labels and 3 sheets constitute the complete list of persons, associations, and other interested groups who as of 1:40 o'clock PM, this 3rd day of July, 1980, have requested pursuant to Minnesota Statutes 1978, 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 the subjects captioned above.

Joan Anderson Growe
Secretary of State

Joan Anderson Growe

BY: Nanna Rett

Exhibit No. 1
File No.
Date 8-19-80

RECEIVED
JUL 15 1980
OFFICE OF HEARING EXAMINERS

Department of Natural Resources
Proposed Rules for Water Surface Use Management
Notice of Hearing

2.102 C.1. Public hearings concerning the proposed new rules will be held at Brainerd on August 19, 1980, at the Crow Wing County Service Building, meeting room #1, lower level, and in St. Paul on August 26, 1980 at the Minnesota Historical Society Building, 640 Cedar Street, in the Weyerhaeuser Room. Each hearing will begin at 10:00 a.m., and again at 7:30 p.m. for those who prefer to come in the evening.

The proposed rules may be modified as a result of the hearing process. Therefore, if you are concerned about the content of the rules, you are urged to participate.

2.102 C.2. Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or

2.102 C.5 not an appearance is made at the hearing, written statements or material may be submitted to Kent Roberts, hearing examiner, room 300, 1745 University Avenue, St. Paul, MN. 55104, telephone (612) 296-8112 either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the

2.102 C.7 hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.1417 and 15.052, and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

2.102 C.9. Twenty-five days prior to the hearing, a Statement of Need and Reasonableness will be available for review at ~~Hearing Examiner Robert's office~~ DNR and at the Office of Hearing Examiners. This Statement of Need and Reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule amendments. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

Minn. Stat. § 361.26 subd. 2 provides that the commissioner of natural resources, when requested by a county, city, or town, may adopt a rule governing the use of

2.102 C.3. a lake or river by watercraft. The rule must be approved by the county. Minn. Stat. §§ 378.32 and 459.20 allow counties, cities, and townships to adopt ordinances for the same purpose. Such an ordinance must be approved by the commissioner of natural resources. The rules now being proposed establish certain requirements that any DNR rule or local ordinance for the use of a body of water by watercraft, must conform with. The rules provide

-that the goal of a water surface use ordinance or rule is to accommodate all compatible recreational uses while minimizing adverse impact on natural resources and minimizing conflicts in a way that provides for maximum use, safety and enjoyment.

-the identification of the limited situations in which the commissioner will entertain to adopt a rule for a water body.

-ways to resolve conflicts between governing bodies on water bodies in more than one jurisdiction.

-a list of information that the commissioner of natural resources can require from a county, city or town requesting a rule or adopting an ordinance.

-that horsepower limits, if used, must be set at 25 h.p., 10 h.p., electric motors, or no motors.

-that speed limits, if used, must be set at 40 mph, 15 mph, or slow-no wake, and under what conditions slow-no wake can be used.

-that directional controls, if used, must be counter-clockwise.

-that time periods, if used, must be sunrise-sunset or sunset-sunrise, 9:00 a.m.-6:00 p.m. or 6:00 p.m.-9:00 a.m., or noon-6:00 p.m. or 6:00 p.m.-noon.

-that controls can be in effect all year, or Memorial Day weekend through Labor Day weekend, or on all weekends and legal holidays from Memorial Day weekend through Labor Day weekend.

-that the controls used can apply to all or parts of a water body.

-that other activities, such as swimming, water skiing, and scuba diving can be regulated.

-that the commissioner can grant variances from the requirements of these rules.

-for various enforcement, administrative, and notification matters.

.102 C.4. The authority for and subject-matter of the rules are found in Minn. Stat. §§ 361.25, 361.26, and 378.32.

.102 C.10 The agency estimates that there will be no cost to local public bodies in the State to implement the amendments for the two years immediately following its adoption, within the meaning of Minn. Stat. § 15.0412, subd. 7(1978).

Copies of the proposed rule amendments are now available and at least one free copy may be obtained by writing to Duane R. Harves, Chief Hearing Examiner, Room 300, 1745 University Avenue, Saint Paul, Minnesota 55104, telephone (612)-296-8100. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendments, contact Chief Hearing Examiner Harves.

.102 C.8 Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

102 C.6. Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11(1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative

action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

DNR Exhibit No. 1

File No.

Date 8-19-80

RECEIVED

JUL 30 1980

OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

Rules for Water Surface Use Management

ORDER FOR HEARING

The Department has completed drafting of the rules relating to the use of surface waters by watercraft, which are required by Minn. Stat. §§ 361.25 and 361.26 subd. 1a. It is therefore ORDERED that public hearings be held pursuant to the rule-making provisions of Minn. Stat. chapter 15. Notice shall be published in the State Register and mailed to all who have registered with the Secretary of State for that purpose. The hearing schedule is as follows:

August 19, 1980, Crow Wing County Service Building, Brainerd, Minnesota.

August 26, 1980, Minnesota Historical Society Building, St. Paul, Minnesota.

Each hearing will begin at 10:00 a.m., and again at 7:30 p.m. for those who prefer to come in the evening.

Dated June 30, 1980.

Joseph N. Alexander

JOSEPH N. ALEXANDER
Commissioner

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Rules
for Water Surface Use

STATEMENT OF COMPLIANCE
WITH RULEMAKING PROCEDURE

I, Special Assistant Attorney General A. W. Clapp III have examined the proposed rules and all related documents. Based on that examination and my familiarity with applicable procedures, I declare that the law and rules regarding rule making have been followed.

Dated: November 21, 1980.

A. W. Clapp III

A. W. CLAPP, III
Special Assistant
Attorney General