

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

mjc

File No. 1525 Docket No. 05-2009-0575

DATE RECEIVED 10/17/88 ADOPTED W/O HEARING ✓

REVIEW DATE 10/26/88 EMERGENCY RULE _____

DUE DATE 10/31/88 * REVISOR APPROVED ✓

APPROVED 10/31/88 mjc REVISOR DISAPPROVED _____

DISAPPROVED _____ FILED W/SEC. OF STATE 11/1/88

WITHDRAWN _____ RETURNED TO AGENCY 11/1/88

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)

10/19/87 Date published in State Register
yes Comments

_____ Petition for Adoption of a Rule (if applicable)

✓ Board's Authorizing Resolution

_____ Date adopted

✓ Proposed Rule

yes Revisor's Certificate

✓ Notice of Intent to Adopt Rule

M.S. ch 184 + HF 909 subd 5 Statutory Authority
yes Small Business Statement
yes Expenditure of public money statement
yes Signature

✓ Statement of Need and Reasonableness (if applicable)

yes Small Business Statement
n/a Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule

7/13/88 Date (30)/25 days before adoption
ok Notice attached
_____ ~~Copy of rule or summary attached~~

✓ Publication in State Register

7/18/88 Date (30)/25 days before adoption

✓ 180-day deadline from: See RMD comments

8/12/88 end of comment period (§ 14.26) (rules without hearing)

_____ ~~effective date of statutory authority (§ 14.29) (emergency rules)~~

_____ Resolution Adopting

_____ Date adopted

✓ Findings of Fact, Conclusions & Order Adopting

10/17/88 Date

✓ Written requests, submissions or comments (52)

✓ Declaration of attorney

A.W. Clapp Name of SAAG representing agency

✓ ~~Notice of Submission to Atty. Gen. (if applicable)~~
Comments received at public input meeting

_____ ~~Aff. of Mailing Notice to Atty. Gen. (if applicable)~~

SF-00006-05 (4/86)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT : ATTORNEY GENERAL

DATE : November 1, 1988

TO : A. W. "Bill" Clapp III
Special Assistant Attorney General
Suite 200, 520 Lafayette Rd., St. Paul MN 55155

FROM : MARTHA J. CASSERLY MJCasserly
Special Assistant Attorney General
515 Transportation Bldg., St. Paul MN 55155

PHONE : 6-6839

SUBJECT : In the Matter of the Adopted Rule Relating to Permit Requirements for Water Aeration Systems

The above-referenced rule has been approved as to its legality by the Attorney General on October 31, 1988.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

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

MJC:bbl
Enclosures

cc: Maryanne Hruby
William Brown

Department of Natural Resources

Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Rules as Adopted

6116.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the following terms have the meanings given them.

Subp. 2. **Aeration system.** "Aeration system" means a bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water. The purpose of the system includes, but is not limited to:

A. preventing fish winterkill;

B. keeping areas free of ice to aid navigation, keeping mooring facilities open, or protecting structures in the water from ice damage;

C. maintaining open water for captive waterfowl;

D. rehabilitating lake water quality by methods such as destratification and hypolimnetic aeration; and

E. protecting shoreline from damage due to ice expansion.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Department of Natural Resources, or a duly authorized representative.

Subp. 4. **Management plan.** A plan approved by the commissioner that specifies actions related to water aeration systems.

Subp. 5. **Protected waters.** "Protected waters" means those waters of the state identified as public waters or wetlands under Minnesota Statutes, section 105.37, subdivision 14, or 105.391, subdivision 1.

Subp. 6. **Public access.** "Public access" means any designated public access or any public riparian lands where public access to the protected water is not prohibited.

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Subp. 7. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.

6116.0020 PERMIT.

Subpart 1. **Required.** All aeration systems installed and operated in protected waters require a permit issued by the commissioner of the Department of Natural Resources, unless the system is used exclusively for and is no larger than the minimum size adequate to keep dams, structures, or mooring areas free of ice. No permit issued pursuant to this part shall be construed to satisfy the need for permits required by other governmental entities.

Subp. 2. **Issuance prohibited.** No aeration permit shall be issued:

A. for the purpose of attracting or delaying the migration of wild waterfowl, except for waterfowl management practices approved by the United States Fish and Wildlife Service or the Minnesota Department of Natural Resources, Division of Fish and Wildlife;

B. for protected waters designated for wildlife management under Minnesota Statutes, section 97A.101, subdivision 2, unless the aeration system is included as part of the management plan;

C. for protected waters proposed by the commissioner for designation for wildlife management purposes under Minnesota Statutes, section 97A.01, subdivision 2, until the designation process is terminated or completed;

D. for protected waters designated as scientific and natural areas under Minnesota Statutes, section 84.033; or

E. for protected waters without a management plan, unless:

(1) the protected waters are designated for use under a fish farm or hatchery license issued by the commissioner; or

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(2) the protected waters do not have public access.

Subp. 3. **Winter operation.** An aeration permit shall not be issued for winter operation of a system where the diffusers are placed in a configuration where more than one open water area is created during ordinary winter weather~~, except that the system may be specifically allowed when~~ unless:

A. there is no public access; and

B. the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water; or

C. the commissioner has first determined that ~~it~~ such a system will provide substantial benefit to the lake resource.

6116.0030 APPLICATION FOR PERMIT.

Subpart 1. **Term.** No permit shall be issued for a period of more than one year.

Subp. 2. **Criteria for granting a permit.** The commissioner shall grant a permit for an aeration system when the commissioner concludes that:

A. operation of a system will result in substantial benefit to the lake resource; and

B. the objectives of the system are compatible with natural resources management and public safety goals for the body of water.

Subp. 3. **Form contents.** Applications for permits shall be submitted on forms provided by the commissioner and shall include:

A. the reason the system is needed;

B. a description of the system, including but not limited to location, size, and number of devices to be used;

C. a sketch of the proposed system, indicating the compass direction "north," location on the lake, roads in the vicinity, pertinent fire numbers, noteworthy landmarks, and enough detail so the system can be located for inspection, and

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emergency access, shall accompany all new applications;

D. the proposed operating schedule; and

E. further information the commissioner needs in order to assess the need for and effectiveness of the proposed aeration system.

Subp. 4. **Private hatchery or fish farm license holders.** Beginning March 1, 1989, a private fish farm or hatchery license may contain authorization for the operation of aeration systems on protected waters without public access if the licensee owns all riparian land or all of the possessory rights to the riparian lands. A private hatchery or fish farm license application requesting authorization for aeration system operation shall be subject to the same review as the aeration permit application. The license application shall include:

A. the legal description and Division of Waters inventory number of each water body;

B. location of the aeration system in each water body;

C. enough detail so the systems can be located for inspection and emergency access; and

D. a signed statement attesting that the requirements of this subpart are met.

Subp. ~~4~~ 5. **Public input.** Upon receipt of a new application for installation and operation of an aeration system on protected waters with public access the commissioner shall issue public notice and may conduct a public meeting to assist in deciding whether to issue, deny, or modify a permit. Reissuance of permits for existing permitted aeration systems does not require a public meeting, however, upon request of 25 or more residents of the state a public meeting will be held.

Subp. ~~5~~ 6. **Applicants.** The applicant shall be a governmental entity such as a county, city, town, watershed district, or lake improvement district; or a private person, group, or entity.

Subp. ~~6~~ 7. **Financial responsibility.** All permittees, except those permittees operating an aeration system in

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protected waters without public access, where the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water, and state agencies subject to the State Tort Claims Act or municipalities subject to the Muncipal Tort Claims Act, must provide proof that the permittee is financially able to meet any liability that should arise from the presence or operation of the system. This shall be done by:

A. posting a bond for $500,000; or

B. providing a certificate of insurance for the current period of operation. An insurance policy of $500,000 (minimum) combined single limit ~~(minimum)~~ general liability coverage must be in effect while the system is in operation during all times any portion of the lake is ice-covered. An insurance binder is adequate until a certificate is issued, at which time the certificate must be delivered to the appropriate regional fisheries manager.

6116.0040 PERMIT CONDITIONS.

Subpart 1. **Objective.** The commissioner may include conditions the commissioner considers reasonable and necessary for the design, installation, and operation of the system, and provisions for monitoring the system and its effects by the permittee or the commissioner.

Subp. 2. **Workshops.** Permittees shall attend workshops to be held at designated locations throughout the state as determined by the commissioner. New permittees shall attend a workshop before initial start-up of systems.

Subp. 3. **Inspections.** The permittee shall allow the inspection of the aeration system by the commissioner or a designee at all reasonable times. Each aeration system shall be inspected by the permittee often enough to ensure that the requirements of this part and conditions of the permit are met at all times. All deficiencies shall be promptly corrected. The permittee must inspect the aeration system not less than

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by Revisor _____

once every seven days.

Subp. 4. **Aeration periods.** The start-up and stopping dates for aerating during periods of ice cover shall be determined by the regional fisheries manager and shall be specified in the permit. ~~Unless specifically permitted,~~ No aeration system ~~shall~~ will be operated during the ~~freeze-up~~ period of ice formation until sufficient ice has formed so that marking requirements can be safely met, unless the permittee has posted the approximate area of the open water before ice formation by using signs placed on buoys or posts driven into the lake bottom or by other methods approved by the commissioner.

Subp. 5. **Hold harmless.** Permittee agrees to assume the entire responsibility and liability for all damages or injury to all persons and to all property arising out of, resulting from, or in any manner connected with the design, construction, installation, operation, maintenance, supervision, or inspection of the permitted aeration system. Permittee agrees to indemnify, defend, and hold harmless the state of Minnesota, its agents and employees, from all claims, damages, or injury except those arising from the state's own negligence to the extent authorized by Minnesota Statutes, section 3.736, the Minnesota Tort Claims Act. This indemnity agreement includes, but is not limited to, claims that the permittee was negligent or otherwise liable for allowing, designing, constructing, installing, operating, inspecting, maintaining, supervising, or approving the permitted aeration system, or failing to do so.

Subp. 6. **Revocations.** The commissioner may revoke a permit without prior notice whenever, in the commissioner's opinion, revocation is necessary ~~to protect the interests of the public,~~ to protect human life or natural resources~~, or for violation of this part or any permit issued hereunder~~.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

Permittees shall post signs and publish notice of operation as required by Minnesota Statutes, section 378.22.

Approved
by Revisor _____

6116.0060 WAIVER.

The commissioner may waive any provision of parts 6116.0010 to 6116.0040, when there is:

A. an emergency involving either:

(1) an unanticipated winterkill of a desirable fish population; or

(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

6116.0070 APPEAL.

The terms, conditions, ~~or~~ denial, or revocation of any permit issued pursuant to parts 6116.0010 to 6116.0060 may, within 30 days of receipt of written notice, be appealed to the commissioner by filing a written request for review. If written request is not submitted within 30 days, the permit decision becomes final.

Approved
by Revisor _____

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

NOV 11988

Joan Anderson Growe

Secretary of State

2:55 PM

APPROVED AS TO FORM AND LEGALITY

October 31 19 88

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY MJ Cassedy

SPECIAL ASSISTANT ATTORNEY GENERAL

Department of Natural Resources

Division of Fish and Wildlife

Notice of Intent to Solicit Outside Opinion Regarding Creation of Rules on the Issuance of Permits for Aeration and Similar Systems in Public Waters

Notice is hereby given that the Minnesota Department of Natural Resources is seeking information or opinions from sources outside the agency in preparing to promulgate rules regarding the issuance of permits to operate aeration or similar systems in public waters. Creation of rules relating to the issuance of permits for aeration, bubbler, water circulation, and similar systems used to increase dissolved oxygen or to maintain open water on the ice of public waters is required by Chapter 184 of the 1987 Regular Session Laws.

In the past, lake aeration has been regulated by the Department of Natural Resources by Commissioner's Orders; it is currently regulated by Commissioner's Order Number 2194, as amended by Commissioner's Order Number 2258. The purpose of creating rules to regulate aeration is to clarify permitting requirements and procedures. Copies of the current Commissioner's Orders may be obtained by writing or telephoning the office of the Division of Fish and Wildlife.

The Minnesota Department of Natural Resources requests information and comments concerning the subject matter of these rules. Interested or affected persons or groups may submit statements of information or comment orally or in writing. Written statements shall be addressed to:

Larry R. Shannon, Director
Division of Fish and Wildlife
Department of Natural Resources
500 Lafayette Road, Box 20
St. Paul, MN 55155-4020

Oral statements will be received during regular business hours over the telephone at (612) 296-2835 and in person at the above address.

All statements of information and comment shall be accepted until December 31, 1987. Any written material received by the Department of Natural Resources shall become part of the record.

Dated: 12 October 1987

Joseph N. Alexander, Commissioner
Department of Natural Resources

AG Rule

Department of Natural Resources

Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Rules as Adopted

6116.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the following terms have the meanings given them.

Subp. 2. **Aeration system.** "Aeration system" means a bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water. The purpose of the system includes, but is not limited to:

A. preventing fish winterkill;

B. keeping areas free of ice to aid navigation, keeping mooring facilities open, or protecting structures in the water from ice damage;

C. maintaining open water for captive waterfowl;

D. rehabilitating lake water quality by methods such as destratification and hypolimnetic aeration; and

E. protecting shoreline from damage due to ice expansion.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Department of Natural Resources, or a duly authorized representative.

Subp. 4. **Management plan.** A plan approved by the commissioner that specifies actions related to water aeration systems.

Subp. 5. **Protected waters.** "Protected waters" means those waters of the state identified as public waters or wetlands under Minnesota Statutes, section 105.37, subdivision 14, or 105.391, subdivision 1.

Subp. 6. **Public access.** "Public access" means any designated public access or any public riparian lands where public access to the protected water is not prohibited.

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Subp. 7. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.

6116.0020 PERMIT.

Subpart 1. **Required.** All aeration systems installed and operated in protected waters require a permit issued by the commissioner of the Department of Natural Resources, unless the system is used exclusively for and is no larger than the minimum size adequate to keep dams, structures, or mooring areas free of ice. No permit issued pursuant to this part shall be construed to satisfy the need for permits required by other governmental entities.

Subp. 2. **Issuance prohibited.** No aeration permit shall be issued:

A. for the purpose of attracting or delaying the migration of wild waterfowl, except for waterfowl management practices approved by the United States Fish and Wildlife Service or the Minnesota Department of Natural Resources, Division of Fish and Wildlife;

B. for protected waters designated for wildlife management under Minnesota Statutes, section 97A.101, subdivision 2, unless the aeration system is included as part of the management plan;

C. for protected waters proposed by the commissioner for designation for wildlife management purposes under Minnesota Statutes, section 97A.01, subdivision 2, until the designation process is terminated or completed;

D. for protected waters designated as scientific and natural areas under Minnesota Statutes, section 84.033; or

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(1) the protected waters are designated for use under a fish farm or hatchery license issued by the commissioner; or

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B. the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water; or

C. the commissioner has first determined that ~~it~~ such a system will provide substantial benefit to the lake resource.

6116.0030 APPLICATION FOR PERMIT.

Subpart 1. **Term.** No permit shall be issued for a period of more than one year.

Subp. 2. **Criteria for granting a permit.** The commissioner shall grant a permit for an aeration system when the commissioner concludes that:

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B. the objectives of the system are compatible with natural resources management and public safety goals for the body of water.

Subp. 3. **Form contents.** Applications for permits shall be submitted on forms provided by the commissioner and shall include:

A. the reason the system is needed;

B. a description of the system, including but not limited to location, size, and number of devices to be used;

C. a sketch of the proposed system, indicating the compass direction "north," location on the lake, roads in the vicinity, pertinent fire numbers, noteworthy landmarks, and enough detail so the system can be located for inspection, and

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emergency access, shall accompany all new applications;

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A. posting a bond for $500,000; or

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A. an emergency involving either:

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(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

6116.0070 APPEAL.

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Department of Natural Resources

Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Rules as Adopted

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C. enough detail so the systems can be located for inspection and emergency access; and

D. a signed statement attesting that the requirements of this subpart are met.

Subp. ~~4~~ 5. **Public input.** Upon receipt of a new application for installation and operation of an aeration system on protected waters with public access the commissioner shall issue public notice and may conduct a public meeting to assist in deciding whether to issue, deny, or modify a permit. Reissuance of permits for existing permitted aeration systems does not require a public meeting, however, upon request of 25 or more residents of the state a public meeting will be held.

Subp. ~~5~~ 6. **Applicants.** The applicant shall be a governmental entity such as a county, city, town, watershed district, or lake improvement district; or a private person, group, or entity.

Subp. ~~6~~ 7. **Financial responsibility.** All permittees, except those permittees operating an aeration system in

Approved by Revisor _____

protected waters without public access, where the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water, and state agencies subject to the State Tort Claims Act or municipalities subject to the Muncipal Tort Claims Act, must provide proof that the permittee is financially able to meet any liability that should arise from the presence or operation of the system. This shall be done by:

A. posting a bond for $500,000; or

B. providing a certificate of insurance for the current period of operation. An insurance policy of $500,000 (minimum) combined single limit ~~(minimum)~~ general liability coverage must be in effect while the system is in operation during all times any portion of the lake is ice-covered. An insurance binder is adequate until a certificate is issued, at which time the certificate must be delivered to the appropriate regional fisheries manager.

6116.0040 PERMIT CONDITIONS.

Subpart 1. **Objective.** The commissioner may include conditions the commissioner considers reasonable and necessary for the design, installation, and operation of the system, and provisions for monitoring the system and its effects by the permittee or the commissioner.

Subp. 2. **Workshops.** Permittees shall attend workshops to be held at designated locations throughout the state as determined by the commissioner. New permittees shall attend a workshop before initial start-up of systems.

Subp. 3. **Inspections.** The permittee shall allow the inspection of the aeration system by the commissioner or a designee at all reasonable times. Each aeration system shall be inspected by the permittee often enough to ensure that the requirements of this part and conditions of the permit are met at all times. All deficiencies shall be promptly corrected. The permittee must inspect the aeration system not less than

Approved
by Revisor _____

once every seven days.

Subp. 4. **Aeration periods.** The start-up and stopping dates for aerating during periods of ice cover shall be determined by the regional fisheries manager and shall be specified in the permit. ~~Unless specifically permitted,~~ No aeration system ~~shall~~ will be operated during the ~~freeze-up~~ period of ice formation until sufficient ice has formed so that marking requirements can be safely met, unless the permittee has posted the approximate area of the open water before ice formation by using signs placed on buoys or posts driven into the lake bottom or by other methods approved by the commissioner.

Subp. 5. **Hold harmless.** Permittee agrees to assume the entire responsibility and liability for all damages or injury to all persons and to all property arising out of, resulting from, or in any manner connected with the design, construction, installation, operation, maintenance, supervision, or inspection of the permitted aeration system. Permittee agrees to indemnify, defend, and hold harmless the state of Minnesota, its agents and employees, from all claims, damages, or injury except those arising from the state's own negligence to the extent authorized by Minnesota Statutes, section 3.736, the Minnesota Tort Claims Act. This indemnity agreement includes, but is not limited to, claims that the permittee was negligent or otherwise liable for allowing, designing, constructing, installing, operating, inspecting, maintaining, supervising, or approving the permitted aeration system, or failing to do so.

Subp. 6. **Revocations.** The commissioner may revoke a permit without prior notice whenever, in the commissioner's opinion, revocation is necessary to protect the interests of the public, to protect human life or natural resources, or for violation of this part or any permit issued hereunder.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

Permittees shall post signs and publish notice of operation as required by Minnesota Statutes, section 378.22.

Approved
by Revisor _____

6116.0060 WAIVER.

The commissioner may waive any provision of parts 6116.0010 to 6116.0040, when there is:

A. an emergency involving either:

(1) an unanticipated winterkill of a desirable fish population; or

(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

6116.0070 APPEAL.

The terms, conditions, or denial of any permit issued pursuant to parts 6116.0010 to 6116.0060 may, within 30 days of receipt of written notice, be appealed to the commissioner by filing a written request for review. If written request is not submitted within 30 days, the permit decision becomes final.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

AGENCY: Department of Natural Resources

MINNESOTA RULES: Chapter 6116

The attached rules are approved for filing with the Secretary of State

Paul E. Rohde
Senior Assistant Revisor

Department of Natural Resources

Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Rules as Adopted

6116.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the following terms have the meanings given them.

Subp. 2. **Aeration system.** "Aeration system" means a bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water. The purpose of the system includes, but is not limited to:

A. preventing fish winterkill;

B. keeping areas free of ice to aid navigation, keeping mooring facilities open, or protecting structures in the water from ice damage;

C. maintaining open water for captive waterfowl;

D. rehabilitating lake water quality by methods such as destratification and hypolimnetic aeration; and

E. protecting shoreline from damage due to ice expansion.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Department of Natural Resources, or a duly authorized representative.

Subp. 4. **Management plan.** A plan approved by the commissioner that specifies actions related to water aeration systems.

Subp. 5. **Protected waters.** "Protected waters" means those waters of the state identified as public waters or wetlands under Minnesota Statutes, section 105.37, subdivision 14, or 105.391, subdivision 1.

Subp. 6. **Public access.** "Public access" means any designated public access or any public riparian lands where public access to the protected water is not prohibited.

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Subp. 7. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.

6116.0020 PERMIT.

Subpart 1. **Required.** All aeration systems installed and operated in protected waters require a permit issued by the commissioner of the Department of Natural Resources, unless the system is used exclusively for and is no larger than the minimum size adequate to keep dams, structures, or mooring areas free of ice. No permit issued pursuant to this part shall be construed to satisfy the need for permits required by other governmental entities.

Subp. 2. **Issuance prohibited.** No aeration permit shall be issued:

A. for the purpose of attracting or delaying the migration of wild waterfowl, except for waterfowl management practices approved by the United States Fish and Wildlife Service or the Minnesota Department of Natural Resources, Division of Fish and Wildlife;

B. for protected waters designated for wildlife management under Minnesota Statutes, section 97A.101, subdivision 2, unless the aeration system is included as part of the management plan;

C. for protected waters proposed by the commissioner for designation for wildlife management purposes under Minnesota Statutes, section 97A.01, subdivision 2, until the designation process is terminated or completed;

D. for protected waters designated as scientific and natural areas under Minnesota Statutes, section 84.033; or

E. for protected waters without a management plan, unless:

(1) the protected waters are designated for use under a fish farm or hatchery license issued by the commissioner; or

Approved
by Revisor _____

(2) the protected waters do not have public access.

Subp. 3. **Winter operation.** An aeration permit shall not be issued for winter operation of a system where the diffusers are placed in a configuration where more than one open water area is created during ordinary winter weather~~, except that the system may be specifically allowed when~~ unless:

A. there is no public access; and

B. the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water; or

C. the commissioner has first determined that ~~it~~ such a system will provide substantial benefit to the lake resource.

6116.0030 APPLICATION FOR PERMIT.

Subpart 1. **Term.** No permit shall be issued for a period of more than one year.

Subp. 2. **Criteria for granting a permit.** The commissioner shall grant a permit for an aeration system when the commissioner concludes that:

A. operation of a system will result in substantial benefit to the lake resource; and

B. the objectives of the system are compatible with natural resources management and public safety goals for the body of water.

Subp. 3. **Form contents.** Applications for permits shall be submitted on forms provided by the commissioner and shall include:

A. the reason the system is needed;

B. a description of the system, including but not limited to location, size, and number of devices to be used;

C. a sketch of the proposed system, indicating the compass direction "north," location on the lake, roads in the vicinity, pertinent fire numbers, noteworthy landmarks, and enough detail so the system can be located for inspection, and

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emergency access, shall accompany all new applications;

D. the proposed operating schedule; and

E. further information the commissioner needs in order to assess the need for and effectiveness of the proposed aeration system.

Subp. 4. **Private hatchery or fish farm license holders.** Beginning March 1, 1989, a private fish farm or hatchery license may contain authorization for the operation of aeration systems on protected waters without public access if the licensee owns all riparian land or all of the possessory rights to the riparian lands. A private hatchery or fish farm license application requesting authorization for aeration system operation shall be subject to the same review as the aeration permit application. The license application shall include:

A. the legal description and Division of Waters inventory number of each water body;

B. location of the aeration system in each water body;

C. enough detail so the systems can be located for inspection and emergency access; and

D. a signed statement attesting that the requirements of this subpart are met.

Subp. ~~4~~ 5. **Public input.** Upon receipt of a new application for installation and operation of an aeration system on protected waters with public access the commissioner shall issue public notice and may conduct a public meeting to assist in deciding whether to issue, deny, or modify a permit. Reissuance of permits for existing permitted aeration systems does not require a public meeting, however, upon request of 25 or more residents of the state a public meeting will be held.

Subp. ~~5~~ 6. **Applicants.** The applicant shall be a governmental entity such as a county, city, town, watershed district, or lake improvement district; or a private person, group, or entity.

Subp. ~~6~~ 7. **Financial responsibility.** All permittees, except those permittees operating an aeration system in

Approved
by Revisor _____

protected waters without public access, where the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water, and state agencies subject to the State Tort Claims Act or municipalities subject to the Muncipal Tort Claims Act, must provide proof that the permittee is financially able to meet any liability that should arise from the presence or operation of the system. This shall be done by:

A. posting a bond for $500,000; or

B. providing a certificate of insurance for the current period of operation. An insurance policy of $500,000 (minimum) combined single limit ~~(minimum)~~ general liability coverage must be in effect while the system is in operation during all times any portion of the lake is ice-covered. An insurance binder is adequate until a certificate is issued, at which time the certificate must be delivered to the appropriate regional fisheries manager.

6116.0040 PERMIT CONDITIONS.

Subpart 1. **Objective.** The commissioner may include conditions the commissioner considers reasonable and necessary for the design, installation, and operation of the system, and provisions for monitoring the system and its effects by the permittee or the commissioner.

Subp. 2. **Workshops.** Permittees shall attend workshops to be held at designated locations throughout the state as determined by the commissioner. New permittees shall attend a workshop before initial start-up of systems.

Subp. 3. **Inspections.** The permittee shall allow the inspection of the aeration system by the commissioner or a designee at all reasonable times. Each aeration system shall be inspected by the permittee often enough to ensure that the requirements of this part and conditions of the permit are met at all times. All deficiencies shall be promptly corrected. The permittee must inspect the aeration system not less than

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by Revisor _____

once every seven days.

Subp. 4. **Aeration periods.** The start-up and stopping dates for aerating during periods of ice cover shall be determined by the regional fisheries manager and shall be specified in the permit. ~~Unless specifically permitted,~~ No aeration system ~~shall~~ will be operated during the ~~freeze-up~~ period of ice formation until sufficient ice has formed so that marking requirements can be safely met, unless the permittee has posted the approximate area of the open water before ice formation by using signs placed on buoys or posts driven into the lake bottom or by other methods approved by the commissioner.

Subp. 5. **Hold harmless.** Permittee agrees to assume the entire responsibility and liability for all damages or injury to all persons and to all property arising out of, resulting from, or in any manner connected with the design, construction, installation, operation, maintenance, supervision, or inspection of the permitted aeration system. Permittee agrees to indemnify, defend, and hold harmless the state of Minnesota, its agents and employees, from all claims, damages, or injury except those arising from the state's own negligence to the extent authorized by Minnesota Statutes, section 3.736, the Minnesota Tort Claims Act. This indemnity agreement includes, but is not limited to, claims that the permittee was negligent or otherwise liable for allowing, designing, constructing, installing, operating, inspecting, maintaining, supervising, or approving the permitted aeration system, or failing to do so.

Subp. 6. **Revocations.** The commissioner may revoke a permit without prior notice whenever, in the commissioner's opinion, revocation is necessary to protect the interests of the public, to protect human life or natural resources, or for violation of this part or any permit issued hereunder.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

Permittees shall post signs and publish notice of operation as required by Minnesota Statutes, section 378.22.

Approved
by Revisor _____

6116.0060 WAIVER.

The commissioner may waive any provision of parts 6116.0010 to 6116.0040, when there is:

A. an emergency involving either:

(1) an unanticipated winterkill of a desirable fish population; or

(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

6116.0070 APPEAL.

The terms, conditions, or denial of any permit issued pursuant to parts 6116.0010 to 6116.0060 may, within 30 days of receipt of written notice, be appealed to the commissioner by filing a written request for review. If written request is not submitted within 30 days, the permit decision becomes final.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

AGENCY: Department of Natural Resources

MINNESOTA RULES: Chapter 6116

The attached rules are approved for filing with the Secretary of State

Paul E. Rohde
Senior Assistant Revisor

Department of Natural Resources

Adopted Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Rules as Adopted

6116.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the following terms have the meanings given them.

Subp. 2. **Aeration system.** "Aeration system" means a bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water. The purpose of the system includes, but is not limited to:

A. preventing fish winterkill;

B. keeping areas free of ice to aid navigation, keeping mooring facilities open, or protecting structures in the water from ice damage;

C. maintaining open water for captive waterfowl;

D. rehabilitating lake water quality by methods such as destratification and hypolimnetic aeration; and

E. protecting shoreline from damage due to ice expansion.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Department of Natural Resources, or a duly authorized representative.

Subp. 4. **Management plan.** A plan approved by the commissioner that specifies actions related to water aeration systems.

Subp. 5. **Protected waters.** "Protected waters" means those waters of the state identified as public waters or wetlands under Minnesota Statutes, section 105.37, subdivision 14, or 105.391, subdivision 1.

Subp. 6. **Public access.** "Public access" means any designated public access or any public riparian lands where public access to the protected water is not prohibited.

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Subp. 7. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.

6116.0020 PERMIT.

Subpart 1. **Required.** All aeration systems installed and operated in protected waters require a permit issued by the commissioner of the Department of Natural Resources, unless the system is used exclusively for and is no larger than the minimum size adequate to keep dams, structures, or mooring areas free of ice. No permit issued pursuant to this part shall be construed to satisfy the need for permits required by other governmental entities.

Subp. 2. **Issuance prohibited.** No aeration permit shall be issued:

A. for the purpose of attracting or delaying the migration of wild waterfowl, except for waterfowl management practices approved by the United States Fish and Wildlife Service or the Minnesota Department of Natural Resources, Division of Fish and Wildlife;

B. for protected waters designated for wildlife management under Minnesota Statutes, section 97A.101, subdivision 2, unless the aeration system is included as part of the management plan;

C. for protected waters proposed by the commissioner for designation for wildlife management purposes under Minnesota Statutes, section 97A.01, subdivision 2, until the designation process is terminated or completed;

D. for protected waters designated as scientific and natural areas under Minnesota Statutes, section 84.033; or

E. for protected waters without a management plan, unless:

(1) the protected waters are designated for use under a fish farm or hatchery license issued by the commissioner; or

Approved
by Revisor _____

(2) the protected waters do not have public access.

Subp. 3. **Winter operation.** An aeration permit shall not be issued for winter operation of a system where the diffusers are placed in a configuration where more than one open water area is created during ordinary winter weather~~, except that the system may be specifically allowed when~~ unless:

A. there is no public access; and

B. the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water; or

C. the commissioner has first determined that ~~it~~ such a system will provide substantial benefit to the lake resource.

6116.0030 APPLICATION FOR PERMIT.

Subpart 1. **Term.** No permit shall be issued for a period of more than one year.

Subp. 2. **Criteria for granting a permit.** The commissioner shall grant a permit for an aeration system when the commissioner concludes that:

A. operation of a system will result in substantial benefit to the lake resource; and

B. the objectives of the system are compatible with natural resources management and public safety goals for the body of water.

Subp. 3. **Form contents.** Applications for permits shall be submitted on forms provided by the commissioner and shall include:

A. the reason the system is needed;

B. a description of the system, including but not limited to location, size, and number of devices to be used;

C. a sketch of the proposed system, indicating the compass direction "north," location on the lake, roads in the vicinity, pertinent fire numbers, noteworthy landmarks, and enough detail so the system can be located for inspection, and

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by Revisor _____

emergency access, shall accompany all new applications;

D. the proposed operating schedule; and

E. further information the commissioner needs in order to assess the need for and effectiveness of the proposed aeration system.

Subp. 4. **Private hatchery or fish farm license holders.** Beginning March 1, 1989, a private fish farm or hatchery license may contain authorization for the operation of aeration systems on protected waters without public access if the licensee owns all riparian land or all of the possessory rights to the riparian lands. A private hatchery or fish farm license application requesting authorization for aeration system operation shall be subject to the same review as the aeration permit application. The license application shall include:

A. the legal description and Division of Waters inventory number of each water body;

B. location of the aeration system in each water body;

C. enough detail so the systems can be located for inspection and emergency access; and

D. a signed statement attesting that the requirements of this subpart are met.

Subp. ~~4~~ 5. **Public input.** Upon receipt of a new application for installation and operation of an aeration system on protected waters with public access the commissioner shall issue public notice and may conduct a public meeting to assist in deciding whether to issue, deny, or modify a permit. Reissuance of permits for existing permitted aeration systems does not require a public meeting, however, upon request of 25 or more residents of the state a public meeting will be held.

Subp. ~~5~~ 6. **Applicants.** The applicant shall be a governmental entity such as a county, city, town, watershed district, or lake improvement district; or a private person, group, or entity.

Subp. ~~6~~ 7. **Financial responsibility.** All permittees, except those permittees operating an aeration system in

Approved
by Revisor _____

protected waters without public access, where the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water, and state agencies subject to the State Tort Claims Act or municipalities subject to the Muncipal Tort Claims Act, must provide proof that the permittee is financially able to meet any liability that should arise from the presence or operation of the system. This shall be done by:

A. posting a bond for $500,000; or

B. providing a certificate of insurance for the current period of operation. An insurance policy of $500,000 (minimum) combined single limit ~~(minimum)~~ general liability coverage must be in effect while the system is in operation during all times any portion of the lake is ice-covered. An insurance binder is adequate until a certificate is issued, at which time the certificate must be delivered to the appropriate regional fisheries manager.

6116.0040 PERMIT CONDITIONS.

Subpart 1. **Objective.** The commissioner may include conditions the commissioner considers reasonable and necessary for the design, installation, and operation of the system, and provisions for monitoring the system and its effects by the permittee or the commissioner.

Subp. 2. **Workshops.** Permittees shall attend workshops to be held at designated locations throughout the state as determined by the commissioner. New permittees shall attend a workshop before initial start-up of systems.

Subp. 3. **Inspections.** The permittee shall allow the inspection of the aeration system by the commissioner or a designee at all reasonable times. Each aeration system shall be inspected by the permittee often enough to ensure that the requirements of this part and conditions of the permit are met at all times. All deficiencies shall be promptly corrected. The permittee must inspect the aeration system not less than

Approved
by Revisor _____

once every seven days.

Subp. 4. **Aeration periods.** The start-up and stopping dates for aerating during periods of ice cover shall be determined by the regional fisheries manager and shall be specified in the permit. ~~Unless specifically permitted,~~ No aeration system ~~shall~~ will be operated during the ~~freeze-up~~ period of ice formation until sufficient ice has formed so that marking requirements can be safely met, unless the permittee has posted the approximate area of the open water before ice formation by using signs placed on buoys or posts driven into the lake bottom or by other methods approved by the commissioner.

Subp. 5. **Hold harmless.** Permittee agrees to assume the entire responsibility and liability for all damages or injury to all persons and to all property arising out of, resulting from, or in any manner connected with the design, construction, installation, operation, maintenance, supervision, or inspection of the permitted aeration system. Permittee agrees to indemnify, defend, and hold harmless the state of Minnesota, its agents and employees, from all claims, damages, or injury except those arising from the state's own negligence to the extent authorized by Minnesota Statutes, section 3.736, the Minnesota Tort Claims Act. This indemnity agreement includes, but is not limited to, claims that the permittee was negligent or otherwise liable for allowing, designing, constructing, installing, operating, inspecting, maintaining, supervising, or approving the permitted aeration system, or failing to do so.

Subp. 6. **Revocations.** The commissioner may revoke a permit without prior notice whenever, in the commissioner's opinion, revocation is necessary to protect the interests of the public, to protect human life or natural resources, or for violation of this part or any permit issued hereunder.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

Permittees shall post signs and publish notice of operation as required by Minnesota Statutes, section 378.22.

Approved
by Revisor _____

6116.0060 WAIVER.

The commissioner may waive any provision of parts 6116.0010 to 6116.0040, when there is:

A. an emergency involving either:

(1) an unanticipated winterkill of a desirable fish population; or

(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

6116.0070 APPEAL.

The terms, conditions, or denial of any permit issued pursuant to parts 6116.0010 to 6116.0060 may, within 30 days of receipt of written notice, be appealed to the commissioner by filing a written request for review. If written request is not submitted within 30 days, the permit decision becomes final.

Approved
by Revisor _____

Office of the Revisor of Statutes
Administrative Rules

Paul E. Rohde
Senior Assistant Revisor
296-0953

700 State Office Building
100 Constitution Avenue
St. Paul, MN 55155-1297

July 6, 1988

Mr. Howard F. Krosch
Department of Natural Resources
2XX Department of Natural Resources Building
Saint Paul, Minnesota 55155

RE: RD1224

Dear Mr. Krosch:

I am enclosing six copies of your rules, approved as to form. Please submit two copies to the State Register for publication.

If you have any questions, please call me.

Very truly yours,

Paul E. Rohde

Paul E. Rohde

PER/cf
Encl.

Department of Natural Resources

Proposed Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Rules as Proposed (all new material)

6116.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the following terms have the meanings given them.

Subp. 2. **Aeration system.** "Aeration system" means a bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water. The purpose of the system includes, but is not limited to:

A. preventing fish winterkill;

B. keeping areas free of ice to aid navigation, keeping mooring facilities open, or protecting structures in the water from ice damage;

C. maintaining open water for captive waterfowl;

D. rehabilitating lake water quality by methods such as destratification and hypolimnetic aeration; and

E. protecting shoreline from damage due to ice expansion.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Department of Natural Resources, or a duly authorized representative.

Subp. 4. **Management plan.** A plan approved by the commissioner that specifies actions related to water aeration systems.

Subp. 5. **Protected waters.** "Protected waters" means those waters of the state identified as public waters or wetlands under Minnesota Statutes, section 105.37, subdivision 14, or 105.391, subdivision 1.

Subp. 6. **Public access.** "Public access" means any designated public access or any public riparian lands where public access to the protected water is not prohibited.

Approved by Revisor PER

Subp. 7. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.

6116.0020 PERMIT.

Subpart 1. **Required.** All aeration systems installed and operated in protected waters require a permit issued by the commissioner of the Department of Natural Resources, unless the system is used exclusively for and is no larger than the minimum size adequate to keep dams, structures, or mooring areas free of ice. No permit issued pursuant to this part shall be construed to satisfy the need for permits required by other governmental entities.

Subp. 2. **Issuance prohibited.** No aeration permit shall be issued:

A. for the purpose of attracting or delaying the migration of wild waterfowl, except for waterfowl management practices approved by the United States Fish and Wildlife Service or the Minnesota Department of Natural Resources, Division of Fish and Wildlife;

B. for protected waters designated for wildlife management under Minnesota Statutes, section 97A.101, subdivision 2, unless the aeration system is included as part of the management plan;

C. for protected waters proposed by the commissioner for designation for wildlife management purposes under Minnesota Statutes, section 97A.01, subdivision 2, until the designation process is terminated or completed;

D. for protected waters designated as scientific and natural areas under Minnesota Statutes, section 84.033; or

E. for protected waters without a management plan, unless:

(1) the protected waters are designated for use under a fish farm or hatchery license issued by the commissioner; or

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(2) the protected waters do not have public access.

Subp. 3. **Winter operation.** An aeration permit shall not be issued for winter operation of a system where the diffusers are placed in a configuration where more than one open water area is created during ordinary winter weather, except that the system may be specifically allowed when the commissioner has first determined that it will provide substantial benefit to the lake resource.

6116.0030 APPLICATION FOR PERMIT.

Subpart 1. **Term.** No permit shall be issued for a period of more than one year.

Subp. 2. **Criteria for granting a permit.** The commissioner shall grant a permit for an aeration system when the commissioner concludes that:

A. operation of a system will result in substantial benefit to the lake resource;

B. the objectives of the system are compatible with natural resources management and public safety goals for the body of water.

Subp. 3. **Form contents.** Applications for permits shall be submitted on forms provided by the commissioner and shall include:

A. the reason the system is needed;

B. a description of the system, including but not limited to location, size, and number of devices to be used;

C. a sketch of the proposed system, indicating the compass direction "north," location on the lake, roads in the vicinity, pertinent fire numbers, noteworthy landmarks, and enough detail so the system can be located for inspection, and emergency access, shall accompany all new applications;

D. the proposed operating schedule; and

E. further information the commissioner needs in order to assess the need for and effectiveness of the proposed aeration system.

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by Revisor _____

Subp. 4. **Public input.** Upon receipt of a new application for installation and operation of an aeration system on protected waters with public access the commissioner shall issue public notice and may conduct a public meeting to assist in deciding whether to issue, deny, or modify a permit. Reissuance of permits for existing permitted aeration systems does not require a public meeting, however, upon request of 25 or more residents of the state a public meeting will be held.

Subp. 5. **Applicants.** The applicant shall be a governmental entity such as a county, city, town, watershed district, or lake improvement district; or a private person, group, or entity.

Subp. 6. **Financial responsibility.** All permittees, except those permittees operating an aeration system in protected waters without public access, where the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water, and state agencies subject to the State Tort Claims Act or municipalities subject to the Muncipal Tort Claims Act, must provide proof that the permittee is financially able to meet any liability that should arise from the presence or operation of the system. This shall be done by:

A. posting a bond for $500,000; or

B. providing a certificate of insurance for the current period of operation. An insurance policy of $500,000 combined single limit (minimum) coverage must be in effect while the system is in operation during all times any portion of the lake is ice-covered. An insurance binder is adequate until a certificate is issued, at which time the certificate must be delivered to the appropriate regional fisheries manager.

6116.0040 PERMIT CONDITIONS.

Subpart 1. **Objective.** The commissioner may include conditions the commissioner considers reasonable and necessary for the design, installation, and operation of the system, and provisions for monitoring the system and its effects by the

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permittee or the commissioner.

Subp. 2. **Workshops.** Permittees shall attend workshops to be held at designated locations throughout the state as determined by the commissioner. New permittees shall attend a workshop before initial start-up of systems.

Subp. 3. **Inspections.** The permittee shall allow the inspection of the aeration system by the commissioner or a designee at all reasonable times. Each aeration system shall be inspected by the permittee often enough to ensure that the requirements of this part and conditions of the permit are met at all times. All deficiencies shall be promptly corrected. The permittee must inspect the aeration system not less than once every seven days.

Subp. 4. **Aeration periods.** The start-up and stopping dates for aerating during periods of ice cover shall be determined by the regional fisheries manager and shall be specified in the permit. Unless specifically permitted, no aeration system shall be operated during the freeze-up period until sufficient ice has formed so that marking requirements can be safely met.

Subp. 5. **Hold harmless.** Permittee agrees to assume the entire responsibility and liability for all damages or injury to all persons and to all property arising out of, resulting from, or in any manner connected with the design, construction, installation, operation, maintenance, supervision, or inspection of the permitted aeration system. Permittee agrees to indemnify, defend, and hold harmless the state of Minnesota, its agents and employees, from all claims, damages, or injury. This indemnity agreement includes, but is not limited to, claims that the permittee was negligent or otherwise liable for allowing, designing, constructing, installing, operating, inspecting, maintaining, supervising, or approving the permitted aeration system, or failing to do so.

Subp. 6. **Revocations.** The commissioner may revoke a permit without prior notice whenever, in the commissioner's opinion, revocation is necessary to protect the interests of the

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public, to protect human life or natural resources, or for violation of this part or any permit issued hereunder.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

Permittees shall post signs and publish notice of operation as required by Minnesota Statutes, section 378.22.

6116.0060 WAIVER.

The commissioner may waive any provision of parts 6116.0010 to 6116.0040, when there is:

A. an emergency involving either:

(1) an unanticipated winterkill of a desirable fish population; or

(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

6116.0070 APPEAL.

The terms, conditions, or denial of any permit issued pursuant to parts 6116.0010 to 6116.0060 may, within 30 days of receipt of written notice, be appealed to the commissioner by filing a written request for review. If written request is not submitted within 30 days, the permit decision becomes final.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Permit Requirements for Water Aeration Systems

AGENCY: Department of Natural Resources

MINNESOTA RULES: Chapter 6116

The attached rules are approved for publication in the State Register

Paul E. Rohde

Paul E. Rohde
Senior Assistant Revisor

STATE OF
MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

500 LAFAYETTE ROAD • ST. PAUL, MINNESOTA • 55155-40_____

DNR INFORMATION
(612) 296-6157

Department of Natural Resources
Division of Fish and Wildlife

Proposed Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Notice of Intent to Adopt Rules Without a Public Hearing

Notice is hereby given that the Minnesota Department of Natural Resources intends to adopt the above entitled rules without a public hearing following the procedures set forth in the Administrative Procedures Act for adopted rules without a public hearing in Minnesota Statues, Section .22-14.28. Authority for the adoption of these rules is contained in Minnesota Statutes Chapter 184, H.F. No. 909, subd. 5.

All persons have 30 days to submit comments in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in substantial change. Note that part 6116.0050 references Minnesota Statute Section, 378.22. Statute cannot be addressed in the rule making procedure of Minnesota Statutes Chapter 14.

Any person may make a written request for a public hearing within the 30 day comment period. If 25 or more persons submit a written request for a public hearing within the 30 day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the department will proceed pursuant to Minnesota Statutes, Section 14.13 to 14.20.

Persons who wish to submit comments or a written request for a public hearing should submit them to:

Larry R. Shannon, Director
Division of Fish and Wildlife
Department of Natural Resources
500 Lafayette Road, Box 20
St. Paul, MN 55155-4020

A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available from Larry Shannon upon request.

Pursuant to Minnesota Statutes Section 14.115, subdivision 2, the impact on small business has been considered in the promulgation of these rules. Anyone wishing to present evidence or argument as to the rules effect on small business may do so. The department position regarding the impact of rules on small business is set forth in the Statement of Need and Reasonableness.

The adoption of these rules will not require the expenditure of money by local public bodies within the meaning of Minnesota Statutes, Section 14.11.

If no hearing is required, upon adoption of the rule the rule and the required supporting documents will be submitted to the Attorney General for approval as to form and legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Larry Shannon.

Joseph N. Alexander, Commissioner
Department of Natural Resources

Rules as Proposed

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF FISH AND WILDLIFE

IN THE MATTER OF THE PROPOSED ADOPTION OF

RULES FOR LAKE AERATION

STATEMENT OF NEED AND REASONABLENESS

July 12, 1988

Statement of Need and Reasonableness

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Preface

The DNR is responsible for managing Minnesota's aquatic resources for the purposes for which they are best suited. As the state's population grows greater demands for recreational and commercial use of lakes and wetlands will occur. Undoubtedly, aeration will continue to be a popular means of expanding fishing and recreational opportunities (see figure 1). These new demands may conflict with existing recreational uses or diminish some wildlife or fisheries values. Based on the potential for a continuing increase in the number of aeration systems (figure 2), greater public exposure to the hazard created by these systems, and the legislative mandate to promulgate rules, the DNR has prepared these rules for the regulation of aeration systems on protected waters.

Introduction

Winterkill of fish often occurs in ice covered lakes when dissolved oxygen is depleted and toxic gasses build up due to the decomposition of organic matter. Snow cover on frozen lakes reduces light penetration which limits photosynthesis, the major source of dissolved oxygen during the winter months. Under these conditions oxygen input is virtually eliminated but oxygen consumption by decomposition and plant and animal respiration continues. If demand exceeds the supply the oxygen concentration may drop below levels required by fish, resulting in winterkill.

Winterkill is seldom, if ever, complete. In some cases it can be beneficial by eliminating undesirable fish populations or reducing overcrowding in stunted panfish populations. More often it is detrimental because the more tolerant, less desirable fish species, such as the black bullhead, survive to repopulate the lake.

Scidmore (1970) estimated that approximately 2,600 of the 6,100 fishing lakes in Minnesota have the potential for winterkill. During the worst winterkill season of record (1955-56), 308 lakes or about 5% of all fishing lakes winterkilled. Although this does not appear to be a significant number on a statewide basis, the importance of winterkill in Minnesota is related not only to the number of lakes, but also to their location and the number of other quality fishing lakes nearby. In the winter of 1969-70, about 95 percent of the winterkill lakes were in the southern half of the state. This area contains only 35 percent of the state's fishing lakes, but has 75 percent of the state's population. "With most of the winterkill lakes concentrated in the region with the fewest number of fishing lakes and the majority of the population, the winterkill problem assumes considerable significance" (ibid.).

Several methods of alleviating winterkill have been tried. Snow removal or plowing has been used with some success on relatively small bodies of water (Paulin 1960). Clearing snow above large areas of vegetation may also work, but in years of frequent heavy snowfall this may not be cost effective (Woods 1961). Another serious disadvantage to plowing is that windrows of snow left by the plow act as snowfences and cause additional drifting. Snow removal, when snow and ice conditions allow, is still a common practice among private hatchery operators on small ponds used to rear bait and gamefish. Where water level manipulation is possible, raising water levels to increase lake volume, or releasing oxygen depleted bottom water commensurate with incoming flow have been successful in preventing winterkill.

Scidmore (1970) suggested that perhaps the most economical management of winterkill lakes is to open them to "promiscuous fishing" i.e. waiving catch limits and restrictions on methods of take when winterkill is imminent, allowing fishermen to maximize use of the fish available. The lake can then be restocked with selected fish species the following spring to take advantage of the reduced competition resulting from winterkill.

Promiscuous fishing and restocking is one way to manage winterkill lakes. In the southern half of the state, where fishing opportunities are limited and many lakes experience frequent winterkill, this alternative is much less appealing to anglers because fish stocked may barely reach acceptable size prior to the next winterkill. Unless winterkill is prevented there is no opportunity for anglers to take larger sized fish from these waters.

In recent years, lake aeration has become the most common and successful method of preventing winterkill. Four methods of aeration, listed below, are commonly used in Minnesota:

1. Sub-surface bubblers: Air is piped to a diffuser on the lake bottom through weighted plastic air lines from a shore-housed air compressor or high-volume, low-pressure blower.

2. Air injection systems: These pontoon-mounted, propellor-type aerators are driven by electric motors of various sizes. Air is injected just beneath the water surface and horizonal currents created by the propellor disperse the air entering the water.

3. Mechanical surface agitators: There are several types of mechanical surface agitators, but all are basically submersible or floating pumps which spray water into the air, producing a fountain-like effect.

4. Pump and baffle systems. These systems function through the direct aeration of a significant portion of the lake volume (Pederson 1982). Water is pumped from the lake to the top of a shore based chute, where it cascades back into the lake over a series of baffles, oxygenating the water and driving off harmful gases.

The oxygen provided to the lake through the operation of the first three systems comes primarily from oxygen transfer at the air-water interface due to the area of open water created (Johnson 1970; Skrypek and Shodeen 1977; Toetz et al. 1972; cited in Pederson 1982). Pump and baffle systems are provided by the Department of Natural Resources (DNR) to municipalities and

citizen groups through the Cooperative Opportunities for Resource Enhancement (CORE) program. In the winter of 1987-88, 30 CORE project pump and baffle systems were permitted statewide.

The first successful lake aeration project documented in Minnesota was in Lake Shetek, Murray County, during the winter of 1974-75 (Johnson and Skrypek 1975). The subsurface bubbler system in Lake Shetek consists of three 7.5 hp electric motor/blowers and 12 Helixor diffusers. By mid-winter this system had created approximately 60 acres of open water. DNR aeration permit records show that three other aeration systems were in operation in 1974.

Prior to 1978, aeration permits were issued by the DNR Division of Waters under the authority of Minnesota Statutes, Section 105.42, which require permits for activities which "... change or diminish the course, current or cross section of any public waters ... by any means, including ... placing of any materials in or on the beds of public waters". In 1978, permit authority was transferred from the DNR Division of Waters to the DNR Division of Fish and Wildlife under authority of Minnesota Statutes Section 84.027 (Commissioner of Natural Resources general powers). This was necessary because of the potential impact on the aquatic environment presented by aeration systems and the need for applicants to consult with fish and wildlife managers and biologists (Pederson 1982). In May 1978, Commissioner's Order (C.O.) 1996 was written, establishing permit and safety requirements for installation and operation of aeration systems. This C.O. has been revised several times, and C.O. 2194, as amended by C.O. 2258, currently regulates lake aeration.

With the advent of aeration, it is now possible to keep fish alive in basins that would frequently winterkill. Many of these basins that provide habitat for waterfowl and furbearers also have fish populations. Fish species such as black bullhead, which can tolerate high water temperature and low dissolved oxygen concentration are often the major component of the fish population in these basins. With virtually no competition these fish rapidly multiply to nuisance proportions and degrade habitat quality by increasing turbidity, which reduces light penetration and in turn growth of rooted vegetation. In shallow lakes frequent winterkill keeps these fish populations in check, benefiting the habitat for use by waterfowl and other wetland wildlife. Natural winterkills should be allowed to continue in many of these basins, particularly those with traditional waterfowl use because of the benefits to waterfowl and furbearer. Aeration should be closely scrutinized if it is to be considered in these shallow basins and then only as part of a comprehensive management plan, which may also include the use of fish toxicants to reclaim the lake, fish barriers to keep undesirable species out and special regulations to reduce user conflicts.

The success of aeration in preventing winterkill is well documented. Certain uses for water quality improvement also exist. Because of the open water hazard created by aeration systems during winter months and dramatic environmental changes which take place as a result of their operation, aeration systems generally should not be operated in lakes which have no history of winterkill or water quality problems.

The aeration program has grown considerably over the last 14 years, from three permits in 1974 to 183 in 1988. The first aeration systems were installed and operated for winterkill prevention only. Aeration systems are now operated for a variety of reasons. The western portion of the state, the "prairie pothole region," is dotted with small shallow ponds and wetlands. Many of these ponds and wetlands are used for commercial bait fish production (Peterson and Hennagir 1980). Twenty seven permits were issued during the winter of 1987-88, allowing private hatchery operators to aerate 126 bodies of water.

Permits were requested for aeration systems operated to protect shoreline property from ice damage on two lakes. One permit was issued to a resort on Leech Lake, Cass County; the other 12 systems are operated in Big Cormorant Lake, Becker County. These systems function by creating open water near shore and in front of the property to be protected. The open water area relieves the pressure normally placed on the shoreline as lake ice expands and contracts.

Aeration systems operated to improve water quality have had some success and can improve several water quality parameters. The water quality parameters that have shown improvement most consistently are dissolved oxygen, ammonium, pH, hydrogen sulfide, and the trace nutrients iron and manganese (Cooke, et al, 1986). The effect of aeration on phosphorous concentration and water transparency is much less predictable. Cooke (1986) noted that in 65% of the lakes he examined there was either no significant change or the phosphorous concentration increased after

aeration. He also found that in over half of the cases studied water transparency worsened after aeration and only 21% showed any improvement. Most often, aeration systems operated to "improve water quality" are of the subsurface bubbler type. These systems break down thermal stratification allowing the lake to "mix" distributing dissolved oxygen throughout the water column. Hypolimnetic aeration systems function in a similar manner; however, hypolimnetic aeration systems are designed to maintain thermal stratification.

During the winter of 1987-88, aeration permits were also issued to provide open water for captive waterfowl and to test experimental systems. However, winterkill prevention is still the primary reason for operating aeration systems. Table 1 provides a breakdown of aeration system operation by region for the winter of 1987-88. Aeration permit issuance by region from 1978 to 1987 is shown in figure 3. Figure 4, displays DNR geographic regions.

Due to heavy recreational use of lakes for ice fishing, snowmobiling, skating, etc., open water areas and or thin ice pose a serious public safety hazard. Water temperatures in winter are very near freezing and can quickly cause hypothermia. From 1974 through 1988, six people have died because of accidents at the site of aeration systems. At least seven other non-fatal accidents have occurred when vehicles broke through thin ice or were driven into the open water at an aeration system site. Numerous other incidents have been reported where people have fallen into the open water while fishing along its edge. The

exact number of accidents that have taken place at aeration sites is unknown because accidents that do not result in serious injury or death are not often reported.

In summary, lake aeration is a tool which has the potential to provide benefit to the resource but poses a serious threat to public safety. It can also create conflicts among lake user groups. If misused, aeration has the potential to degrade waterfowl, furbearer and non-game habitat. Used properly aeration can improve the fishery resource. The fundamental purpose of this rule is to ensure the safe and appropriate use of this technology.

These proposed rules were drafted by a committee representing those disciplines within the DNR that have responsibilities related to aeration. Information used included the foregoing historical data, public input received from 10 public meetings and numerous letters and telephone calls received in response to a mailing to about 1,000 individuals and organizations. The following narrative explains the need and reasonableness of each provision of these proposed rules.

General Provisions

6116.0010 Definitions

This section contains two types of definitions; those that are defined by Minnesota Statutes or rules, and those terms that may not be generally recognized and to which specific meanings are given for the purposes of this rule.

Subpart 2. "Aeration system" is defined to include only those types of equipment designed for and intended to create currents that increase dissolved oxygen concentration and/or maintain open water during periods of ice cover. It is not the intent of this rule to regulate those activities or businesses that may create open water incidentally or as a secondary result of their operation.

The uses for aeration described in subpart 2., items A to E are included to clarify the definition of aeration system and intended uses as pertains to this rule.

Subpart 3. "Commissioner" is defined in Minnesota Statutes, section 93.46, subdivision 8.

Subpart 4. "Management Plan" is a plan approved by the Commissioner that identifies specific management actions that will be used by public agencies or private interests to improve fish, wildlife, water and recreational resources. A management plan is necessary to ensure that an aeration system is a compatible practice because aeration systems can make long-term changes in the biological characteristics and recreational uses of public waters.

Subpart 5. "Protected waters" is defined in Public Water Resources Rules Chapter 6115.0030 item G. [Clarifies the scope of the rule, and MnDNR jurisdiction].

Subpart 6. "Public access" is defined to describe those areas where the general public can legally gain access to protected water.

Subpart 7. "Structures" are defined in Public Water Resources Rule 6115.0170, Subp. 37.

Permit Requirements

6116.0020 PERMIT.

Permit requirements need to be described because there are many different reasons for operating aeration systems and a wide variety of waters where they are used. This section identifies those activities and waters requiring a permit from the Department of Natural Resources before an aeration system is installed and operated. It also identifies those activities and bodies of water where aeration will not be allowed, and those aeration activities that do not require a permit.

Subpart 1. Required.

A permit is required for all aeration systems operated in protected waters because of the potential hazard the public is exposed to during winter months; Department of Natural Resources water resource management responsibilities; and to enforce the posting and public notice regulations established by Minnesota Statute 378.22.

Some aeration bubblers are operated exclusively to de-ice manmade structures in the water to protect them from ice damage. Operations of this type are monitored closely and operated so that the open water does not extend beyond the structure. Due to the privacy of the site, and small area affected, public exposure is minimized. These systems do not have and are not intended to have resource management implications, and may be regulated by local units of government. It is reasonable that they be excluded from the permit process.

Subpart 2. Issuance prohibited. Describes those waters and circumstances where the commissioner shall not allow aeration.

Subpart 2. A. It is state and federal practice not to interrupt or delay the migration of waterfowl except where this technique is used to improve the status of an endangered species or other beneficial waterfowl management practice.

Subpart 2.B. Waters designated for wildlife management are best suited for that purpose. They are generally shallow, and very productive. Water levels fluctuate annually and in some years they are dry. Management objectives are directed towards improved aquatic vegetation and invertebrate production to benefit waterfowl, furbearers and many nongame species. These objectives are often obtained by water level management. Winterkill of fish is usually desirable. These lakes also have high waterfowl use during migration and breeding periods and, therefore, efforts to increase fishing opportunities can encourage conflicts between anglers and waterfowl hunters. It is reasonable to exclude these lakes from aeration unless the management plan clearly identifies that the aeration system will be beneficial to fish without any deterioration to waterfowl and furbearer resources.

Subpart 2.C. Waterfowl lake designation is a lengthy process involving public meetings and extensive watershed management planning. The inventory and designation process results in a management plan that is presented to the public at a public hearing. Upon concurrence from the public, the Commissioner of Natural Resources designates the lake for wildlife management purposes. Actions to improve the lake's natural resources and recreational opportunities are identified in the plan. Premature installation of an aeration system within these lakes will limit the Department's ability to make long-term natural resource improvements for the public good.

Subpart 2.D. This section is based on Minnesota Rule 6135.4800, subp. 2, which states "It is unlawful for any person to destroy injure, damage molest or remove any natural resources within scientific and natural areas including but not limited to.....fish..., and MN Rule 6135.4900 which prohibits fishing in scientific and natural areas. It is reasonable to keep natural areas natural.

Subpart 2. E. It is necessary and reasonable that there be a management plan for an aerated of body water so that identifiable goals can be established and assessed, and to ascertain if these goals can be achieved, whether or not they are compatible with resource management, and if they merit the risk of exposing the public to the open water hazard during the winter. The information required on a hatchery license, fish farm permit and aeration permit application contains some of the essential elements of a management plan. Part 6116.0030. Subp. 3, item E gives the commissioner authority to request any necessary additional information he may require.

Subpart 3. "Winter operation". The operation of an aeration system during the winter creates open water around the device and can also reduce ice thickness. The effectiveness of many aeration systems operated to prevent winterkill is directly related to the size of the open water area maintained. For safe and efficient operation, these systems should create only one open water area. However, there may be certain situations, such as lakes with complex basin morphology, where more than one open water area is required to prevent winterkill. This shall be determined on an individual basis for each body of water.

6116.0030 APPLICATION FOR PERMIT

Rules relating to the operation of aeration systems in protected waters are established primarily to reduce the risk of water-related accidents and to ensure that the operation of the system is appropriate for the body of water in question. The information contained in an application will enable the commissioner to make these determinations.

Subpart 1. Term. There are many variables involved with the operation of an aeration system which are subject to change on an annual basis. Among these variables are: permittee, operator, system type, system location, and operating schedule. Each of these variables has an affect on the safe

and effective operation of the aeration system. Because close cooperation between the permittee and the DNR is necessary for the effective operation of these systems, an annual permit application is necessary.

Subpart 2. Criteria for granting a permit. This subpart and items A and B establish performance criteria for granting an aeration permit. Because aeration systems can cause dramatic changes to the aquatic environment and pose a serious public safety hazard it is reasonable and necessary that the benefit provided outweigh the risk. It is also necessary that the aeration system be installed and operated in a manner which minimizes the public safety hazard, effectively accomplishes its intended purpose, and is compatible with natural resource management goals in the area.

Subpart 3. Form contents. Items A-E describe the information required from the applicant and what constitutes an acceptable form.

Subpart 4. Public Input. Because of the potential hazard and environmental implications area residents need to be informed of, and given the opportunity to, express their support or opposition to the project.

Subpart 5. Applicants. Because of the varied applications for lake aeration it is reasonable and necessary that the opportunity to operate an aeration system be available to private individuals as well as municipalities.

Subpart 6. Financial responsibility. Because of the open water hazard artificially created by the operation of aeration systems during the winter months and the potential for an accident involving fatalities or serious injuries to occur, it is necessary and reasonable that permittees be financially responsible for their actions. The $500,000 combined single limit of liability was chosen because it is a standard coverage commonly used by the insurance industry, and it provides meaningful coverage.

The Tort Claims Act was amended by the 1987 legislature to exclude the State of Minnesota and municipalities from liability at permitted aeration systems.

Subpart 6, items A and B, describe the limits of financial responsibility and options for the permittee to provide proof of financial responsibility.

6116.0040 PERMIT CONDITIONS

This section describes those conditions with which the permittee agrees to comply when granted a permit to operate an aeration system.

Subpart 1. Objective. Because of the diversity of lake types and unique (physical, chemical and biological) characteristics and attributes of each body of water it is reasonable and necessary that the commissioner have the ability to evaluate each proposal for lake aeration and make those conditions which will increase the effectiveness, efficiency and safety of the operation.

Subpart 2. Workshops. Many aeration systems are operated by groups such as sportsmens clubs and lake associations whose membership and duties assigned to members change over the course of the year. Therefore it is necessary to explain the requirements and intent of the rule to avoid misinterpretations. Because of the difficulties involved in maintaining signing requirements it helps to have permittees who have successfully overcome these difficulties discuss their ideas with other permittees. It is also necessary to explain permit requirements to new permittees prior to the operation of an aeration system.

Subpart 3. Inspections. It is the commissioner's responsibility to enforce the regulations governing aeration systems pursuant to this rule, and it is therefore reasonable and necessary that the commissioner or his designee be allowed to inspect aeration systems to monitor, assist and enforce this rule and terms of the permit, and to

check equipment performance where public resources are at stake. Due to extremes in weather and the changing conditions of ice cover it is reasonable and necessary that the permittee inspect the aeration system not less than once every seven days to insure that posting requirements are met and any discrepancies immediately corrected.

Subpart 4. Aeration periods. In order to decrease the public's exposure to the open water hazard during the winter, aeration systems operated for winterkill prevention should not be operated unnecessarily. Therefore, the regional fisheries manager will determine when the aeration system shall be operated. Aeration systems operated to prevent shoreline property damage and to prevent winterkill of commercially reared fish shall be operated at the discretion of the permittee. Because of the heavy recreational use Minnesota's lakes receive during the winter months it is necessary to mark the area of the hazard prior to operation.

Subpart 5. Hold harmless. The operation of an aeration system is strictly voluntary and a permit to install and operate is permissive only. Therefore, it is necessary and reasonable that the permittee accept all responsibility for this activity.

Subpart 6. Revocations. It is necessary to provide the commissioner the authority to revoke a permit when, in his opinion it is necessary to protect human life or natural resources, or for violation of this rule or permit issued hereunder.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

This section refers to Mn. Statutes 378.22 Subdivisions 1 and 2 as amended by laws 1988 Chapter 588, section 15, in order to assure that these statutory safety requirements are not overlooked.

6116.0060 WAIVER. Because of the unpredictable and urgent nature of the winterkill problem it is essential that there be an alternative to the terms of this rule if circumstances dictate immediate action to protect the natural resources of the state.

Aeration has also been shown to be an effective method of reducing shoreline property damage caused by ice expansion. The "waiver" provides a means to expedite the operation of a system for this purpose if circumstances dictate.

The waiver does not relieve the individual of his responsibility but provides the commissioner a means to allow the operation until the emergency is over and the permittee can meet permit requirements.

The commissioner can not waive those portions of the rule which are statutory requirements.

6116.0070 APPEAL. This provision provides the applicant an opportunity for a due process review of a permit condition or denial.

Small Business Consideration In the Rulemaking Process

Minnesota Statutes, section 14.115 (supp. 1983) requires that state agencies adopting rules consider and incorporate rule language to reduce the impact of the rules on small business to the extent that doing so would not be contrary to the statutory objectives that are the basis of the proposed rule. According to the definition of "small business" in Minnesota Statutes, section 14.115, subdivision 1, all commercial aquaculture operations in the state are small business.

The fundamental purpose of this rule is to ensure that public safety is not unduly compromised by the winter operation of aeration systems, and to ensure that the operation of these systems in protected waters

is compatible with DNR resource management objectives. Therefore it is reasonable and necessary that all sections of this rule apply to all protected waters of the state where the public can gain legal access. However, on those protected waters where the public cannot gain legal access and a single individual owns all of the riparian land or all of the possessory rights to the riparian lands or has leased all access rights to the protected water, public exposure and therefore the risk of accident is greatly reduced. Provision has been made to exclude the insurance requirement from permittees and protected waters meeting these criteria.

Prepared by:

Steven Enger, Aquatic Biologist
Ecological Services Section
Division of Fish and Wildlife

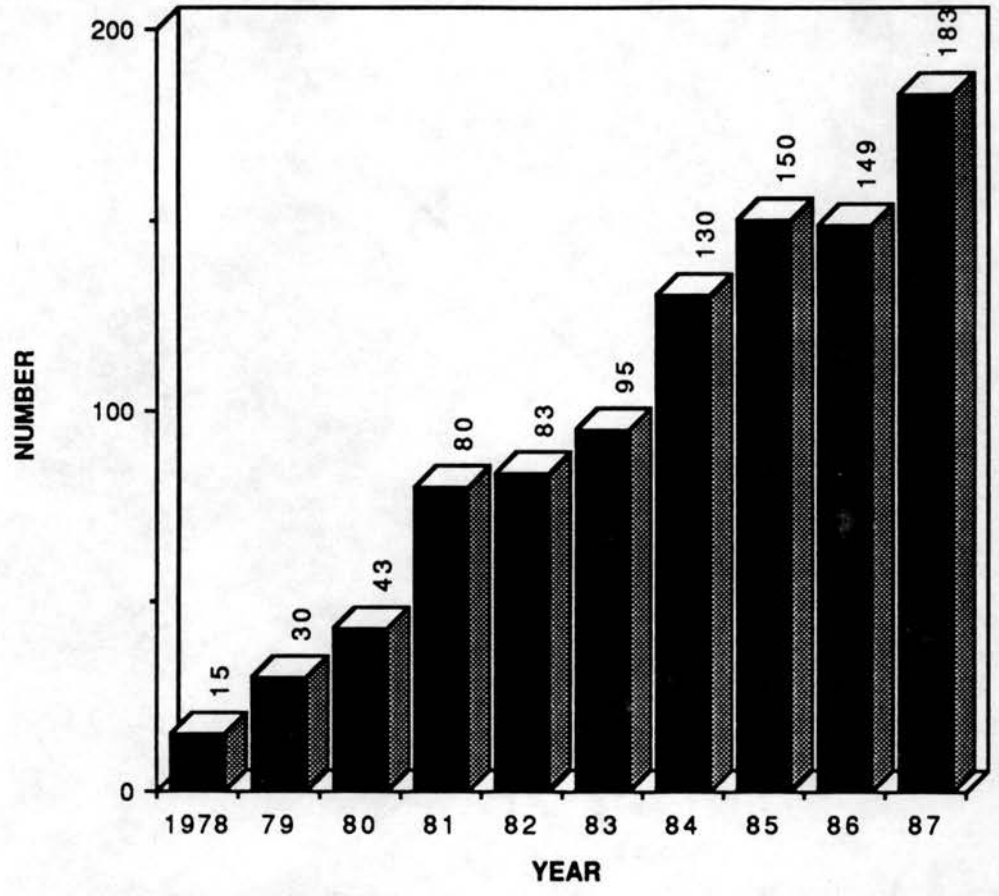
Approved by:

John L. Skrypek, Chief
Ecological Services Section
Division of Fish and Wildlife

Table 1. Purpose of Aeration System Operation 1987-88

	REGIONS						
Purpose	1	2	3	4	5	6	Overall
Winterkill Prevention	13	1	10	63	2	26	115
Improve Water Quality						2	2
Winterkill Prevention & Improve Water Quality			5	4	1	11	21
Provide Open Water for Captive Waterfowl	2		1			1	4
Shoreline Protection	13						13
Experimental						2	2
Winterkill Prevention & Provide Open Water for Waterfowl						1	1
Private Hatchery Operations	18		6	1			25
TOTAL	46	1	22	68	3	43	183

TOTAL NUMBER OF AERATION PERMITS, 1978-87



1978 F&W PERMITS REQUIRED

1984 BAIT DEALERS REQUIRED PERMITS

FIGURE 1.

TREND IN LAKE AERATION PERMIT ISSUANCE 1978-87

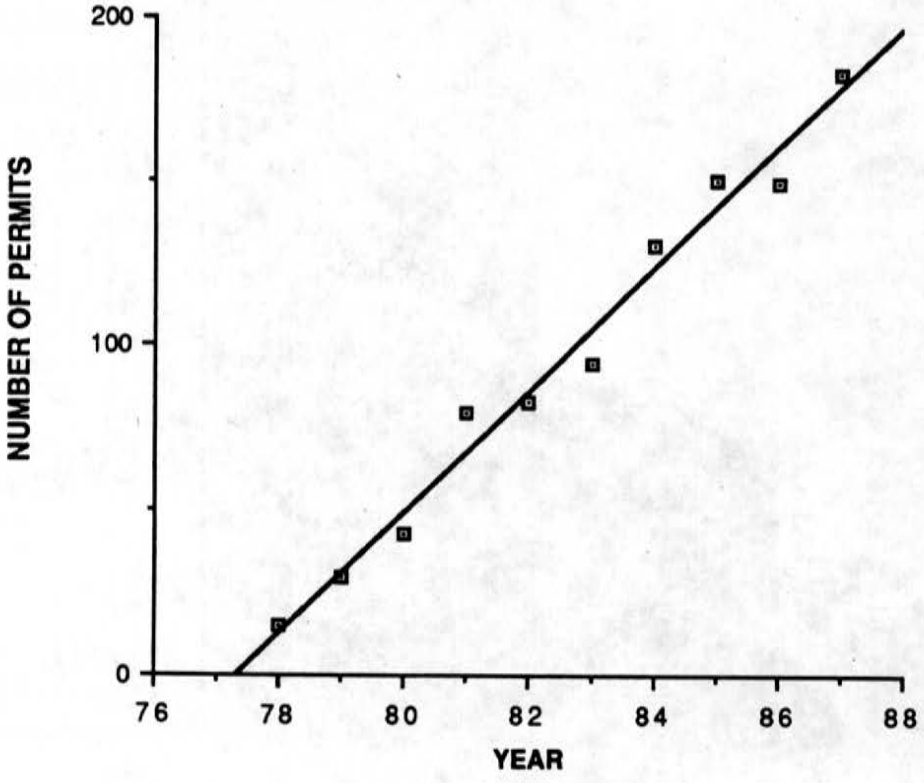


FIGURE 2.

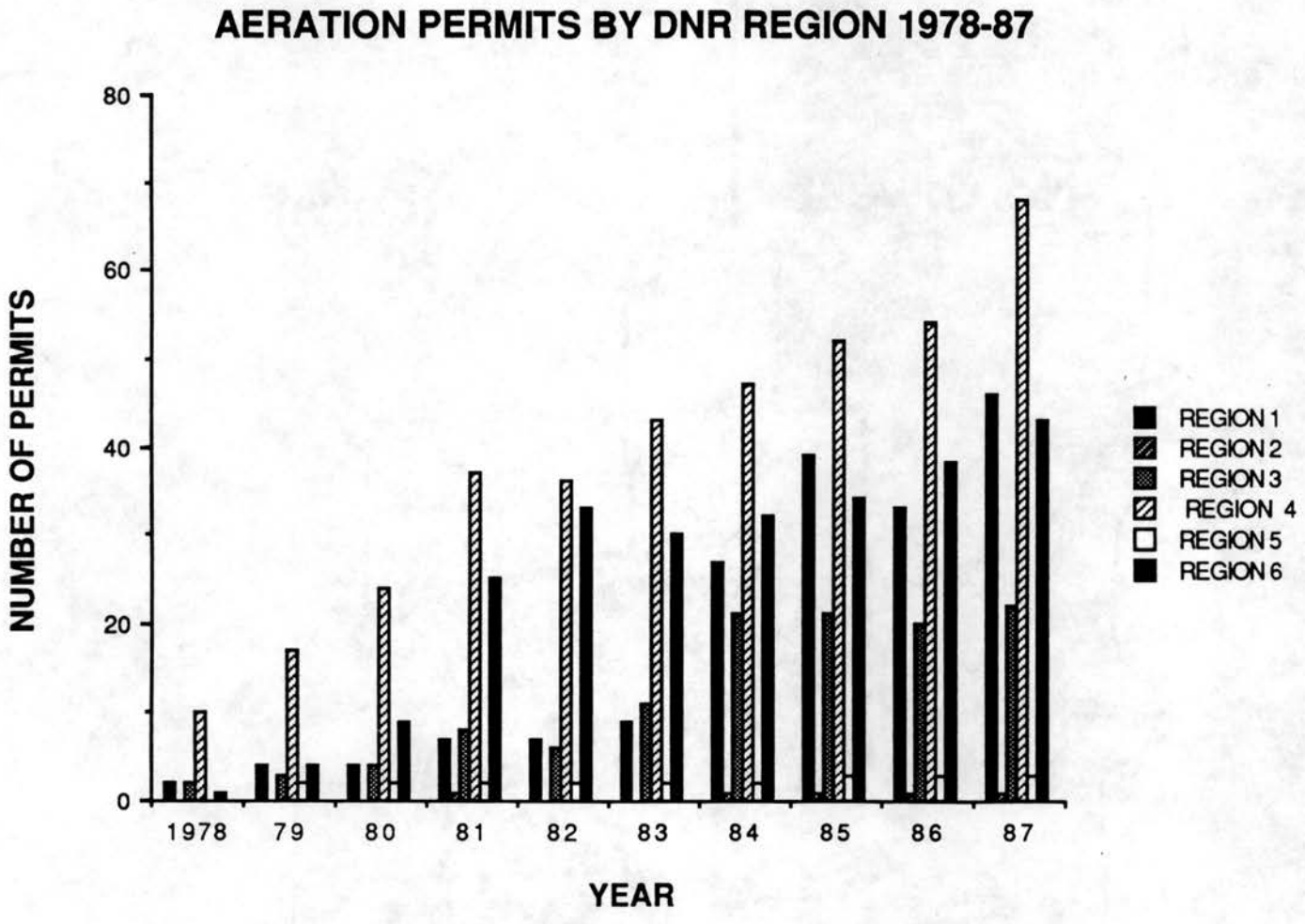

AERATION PERMITS BY DNR REGION 1978-87
NUMBER OF PERMITS
80
60
40
20
0
1978
79
80
81
82
83
84
85
86
87
YEAR
REGION 1
REGION 2
REGION 3
REGION 4
REGION 5
REGION 6

FIGURE 3.

Figure 4

DNR Regions



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STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the matter of the proposed
rule for Permit Requirements for
Waters Aeration Systems

AFFIDAVIT OF MAILING

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

STEVEN M. ENGER deposes and says:

That on the 13 Day of July, 1988, at the City of Saint Paul, County of Ramsey, State of Minnesota, he served the attached NOTICE OF PROPOSAL TO ADOPT RULES WITHOUT A PUBLIC HEARING by depositing in the United States Mail, at said City of Saint Paul, a true and correct copy thereof, properly enveloped, with postage prepaid to all persons and associations at the addresses listed on the attached Certificate of the Commissioner of Natural Resources and attached list.

Steven M Enger

Acknowledged, subscribed and sworn to
before me this 13th day of July, 1988

Kim R. Hennings

KIM R. HENNINGS
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Apr. 15, 1989

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the matter of the proposed rule for Permit Requirements for Water Aeration Systems

CERTIFICATE OF MAILING LIST

Andy Brewer, being sworn says:

I hereby certify that the list of persons and associations who have requested, pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 or 14.30, that their names be placed on the state Department of Natural Resources rulemaking list is accurate, complete, and current as of this 13th day of July, 1988.

Andy Brewer
(Name)
Director, Reg. & Legis. Svcs.
(Title)

Subscribed and sworn to before me this 19th day of Sept., 1988.

Karen L. Singer

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Arlington Sportsmen Club
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Arco Sportsmen's Club
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140 S. Elm Street
Belle Plaine, MN 56011

Blomkest Sportsmen's Club
Blomkest, MN 56216

Boyd Sportsmens Club
Boyd, MN 56218

Breckenridge Sportsmen Club
Breckenridge, MN 56520

Brownton Rod and Gun Club
Brownton, MN 55312

Caledonia Rod and Gun Club
Route 1
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151 Tomson Road
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Barnesville Rod and Gun Club
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Big Toad Lake Improvement Assn.
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Blooming Prairie Gun Club
Blooming Prairie, MN 55917

Bradford Sportsmen's Club
Route 3
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Brimson Sportsmen's Club
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Buffalo Conservation Club
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Bow Bender's Archery
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Brandon Sportsmen Club
Brandon, MN 56315

Broken Arrow Archery
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Buffalo Lake Rod and Gun Club
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Camden Sportsmen's Club
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Carlos Gun and Rod Club
Carlos, MN 56319

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Chisago Lake Sports Club
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Clear Lake Sportsmen's Club
Route 2
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Crookston Archery Club
215 Gorgas
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Dam Lake Sportsmen's Club
Route4
Aitkin, MN 56431

Dawson Sportsmen's Club
Dawson, MN 56232

Central Todd Cty. Sportsmen's Clb
Long Prairie, MN 56347

Chinton Sportsmen's Club
Clinton, MN 56225

Cold Spring Sportsmen's Club
Salzal Carpeting
Cold Spring, MN 56320

Comorant Lake Sportsmen's Club
Aububon, MN 56511

Crookston Conservation Club
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Cross Lake Game and Fish Club
Cross Lake, MN 56422

Current Lake Sportsmen's Club
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Darwin Rod and Gun Club
Darwin, MN 55324

Deer Creek Sportsmen's Club
Deer Creek, MN 56527

Chatfield Fish and Game Club
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Chatfield, MN 55923

Clitherall Sportsmen's Club
Clitherall, MN 56524

Cokato Sportsmen's Club
R.R.2
Cokato, MN 55321

Comstock Gun Club
Comstock, MN 56565

Corteau Des Prairie Muzzleloader
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Crookston, MN 56717

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St. Paul, MN 55104

Dassel Rod and Gun Club
Dassel, MN 55325

Deer River Sportsmen's CLub
Deer River, MN 56630

10,000 Lakes Family Boating Club
1604 Briardale Road NE
Fridley, MN 55432

Bassmasters
1719 West Lane
Anoka, MN 55303

Central Minn. Bassmasters
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Moose Lake, MN 55767

Horseshoe Lake Owners Association
Star Route, Box 150
Merrifield, MN 56465

Lake Region Conservation Club
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Pierz, MN 56364

Lake Vermillion Sportsmen's Assn.
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Cambridge Sportsmen's Club
Cambridge, MN 55008

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Coon Rapids Rod and Reel Club
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15 2D No.
Long Prairie, MN 56347

Avon Commercial Club
Avon, MN 56310

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Brainerd, MN 56401

Clarkfield Sportsmen's Club
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Clarkfield, MN 56223

Crane Lake Commerc Club
Crane Lake, MN 55725

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Dumfries Sportsmen's Club
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Eastern Marshal Cty. Sprtmns Club
Gatze, MN 56724

E. Goodhue Wildlife Club
R.R. 3
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Felton, MN 56536

Delevan Sportsmen's Club
Delevan, MN 56023

Donnely Rod and Gun Club
Donnely, MN 56235

Dundee Rod and Gun Club
Dundee, MN 56125

Eagle Lake Sportsmen's Club
Battle Lake, MN 56515

Elba Sportsmen's Club
Altura, MN 55910

Ellsworth Sportsmen's Club
Ellsworth, MN 56129

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Granada, MN 56039

East Side Sportsmen's Club
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Emily-Outting Sportsmen's Club
Outing, MN 56662

Farmers Sportsmen's Club
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Gopher Campfire Club
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Granite Falls Sportsmen's Club
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Greenwald Sportsmen's Club
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Gully Sportsmen's Club
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German Jefferson
Cleveland, MN 50617

Glencoe Sportsmen's Club
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Guthrie Sportsmen's Club
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Hector Sportsmen's Club
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Hinckley Conservation Club
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High Island Conservation Club
New Auburn, MN 55366

Holloway Sportsmen's Club
Holloway, MN 56249

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Henderson Sportsmen's Club
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Hiawatha Houndsman Assn.
712 Valley Ave.
Spring Valley, MN 55975

Howard Lake Sportsmen's club
Howard Lake, MN 55349

Isle Sportsmen's Club
Isle, MN 56342

Izaak Walton League
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Buffalo Lake, MN 55314

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Lakefield Gun Club
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Reel and Trigger Club
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Lewiston Sportsmen's Club
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Lake Jefferson Association
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Court House
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Lost Dog and Fox Hunters Club
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Morris, MN 56267

New Market Sportsmen's Club
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Lakeville, MN 55044

Izaak Walton League-New Ulm Chap.
New Ulm, MN 56073

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Kelliher, MN 56650

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Zim Sportsmen's Club
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Montevideo Rod and Gun Club
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Morgan Sportsmen's Club
Morgan, MN 56266

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New Richland Sportsmen's Club
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Matt Drobny
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Nancy Carlson
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PE Annex, 4th and College
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Osage Sportsmen's Club
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Osakis Sportsmen's Club
Osakis, MN 56360

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Pease, MN 56363

Peavey Lake Sportsmen's Club
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Pelican Rapids Sportsmen's Club
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Waterville, MN 56096

Watopa Sportsmen's Club
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Wealthwood Rod And Gun Club
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Dana Yost
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508 Main Street W
Marshall, MN 56258

Bob Schranck
Minneapolis Star and Tribune
425 Portland Avenue
Minneapolis, MN 55488

Ron Schara
Minneapolis Star and Tribune
425 Portland Avenue
Minneapolis, MN 55488

Dean Rebufoni
Minneapolis Star and Tribune
425 Portland Avenue
Minneapolis, MN 55488

John Lohman
Fargo Forum
Moorhead Center Mall
Moorhead, MN 56560

New Ulm Journal
303 Minnesota Street N
New Ulm, MN 56073

Guy Limbeck
People's Press
135 Pearl Street W
Owatonna, MN 55060

Mike Gravedahl
Park Rapids Enterprise
402 Pleasant Ave.
Park Rapids, MN 56470

Dale Kullberg
Republican Eagle
433 3rd Street W
Red Wing, MN 55066

John Weiss
Rochester Post-Bulletin
18 1st Ave. SE
Rochester, MN 55903

Dave Deland
St. Cloud Daily Times
3000 7th Street N.
St. Cloud, MN 56302

Dennis Anderson
St. Paul Pioneer Press
345 Cedar Street
St Paul, MN 55101

Mike Lundgren
Theif River Falls Times
324 Main Ave. N
Thief River Falls, MN 56701

Mitch Tollefson
Mesabi Daily News
704 7th Ave. s
Virginia, MN 55792

Agnes Hollrah
Warroad Pioneer
109 Lake Street E
Warroad, MN 56763

Rand Middleton
West Central Tribune
2208 Trott Ave. W
Willmar, MN 56201

Dave Kramer
Winona Daily Times
601 Franklin Street
Winona, MN 55987

Lew Hudson
Worthington Daily Globe
300 11th Street
Worthington, MN 56187

Doug Stange
The In-Fisherman
P.O. Box 999, 651 Edgewood Rd.
Brainerd, MN 56401

Wahpeton/ Breckenridge Daily
Daily News
129 North 5th St., Box 248
Breckenridge, MN 56520

Editor Stillwater Gazette
102 So. Second Street
Stillwater, MN 55082

Steve Kuffrin

Swift County Monitor
101 12th Street South
Benson, MN 56215

The Waseca County News
P.O. Box 465
Waseca, MN 56093

Lake County News Chronicle
109 Waterfront Dr., Box 158
Two Harbors, MN 55616

Cook County News Herald
11 Broadway Street, Box 157
Grand Marias, MN 55604

Hermantown Star
3819 A Haines Rd.
Hermantown, MN 55811

Ely Echo
2 East Sheridan Street
Ely, MN 55731

Pilot- Independent
Main Street, Box 190
Walker, MN 56484

Lake Region Echo
121 Fifth Avenue W., Box 549
Alexandria, MN 56308

Morrison County Record
70 SE First Ave.
Little Falls, MN 56345

The Hutchinson Leader
36 Washington Ave. W.
Hutchinson, MN 55350

Montevideo American News
320 1st St. N., P.O. Box 736
Monevideo, MN 56265

Mesabi Daily News
P.O. Box 956
Virginia, MN 55792

Independt Review
217 North Sibley, P.O. Box 921
Litchfield, MN 55355

Craig Bihrile
Tri-State Out-of-Doors
P.O. Box 14
Wheaton, MN 56296

Doug Sonnenburg
Minnesota Sportsman
P.O. Box 3003
Oshkosh, WI 54903

Littlefork Times
Littlefork, MN 56653

Liz Fedor
Grand Forks Herald
Box 998
Grand Forks, ND 58206

Cambridge Star
741 Second Ave. SE
Cambridge, MN 55008

Bill Gardner
St. Paul Pioneer Press
345 Cedar Street
St. Paul, MN 55101

Len Libbey
Box 17011 Nokomis Station
Minneapolis, MN 55417





1910.110 "Storage and Handling of Liquified Petroleum Gases" in paragraphs (a)(14), (b)(2)(iii), (c)(5)(i)(g)(1), and (f)(5)(iv)

1910.111 "Storage and Handling of Anhydrous Ammonia" in paragraphs (b)(1)(ii) and (vi)

1910.155 "Fire Protection, Scope/Application" in paragraphs (c)(3)(i) and (iv)(E)

1910.178 "Powered Industrial Trucks" in paragraph (a)(7)

1910.180 "Crawler Locomotive and Truck Cranes" in paragraph (i)(4)(i)

1910.181 "Derricks" in paragraph (j)(4)(i)

1910.251 "Welding, Cutting, and Brazing; Definitions" in paragraph (b)

1910.265 "Sawmills" in paragraph (d)(2)(iv)(c)

1910.266 "Pulpwood Logging" in paragraph (c)(4)(iii) and (iv)

1910.399 "Electrical; Definitions" in paragraph (a)(1)

C) "Grain Handling Facilities; Notice of Approval of Information Collection Requirements and Corrections." On December 31, 1987, Federal OSHA adopted a final standard on grain handling facilities; Minnesota OSHA adopted the standard on May 30, 1988. The new standard included provisions requiring employee protection at grain handling facilities from fires, grain dust explosions, and other safety hazards. At the time the standard was adopted, the information collection provisions in the standard [paragraphs (d) and (i)] had not been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. OMB approved those requirements on February 4, 1988.

This notice adds the OMB control number to 1910.272 to indicate OMB approval and also corrects miscellaneous errors and omissions in the Appendices to the final rule.

By this notice, Minnesota OSHA proposes to adopt the corrections to the Appendices to 1910.272 as published in the *Federal Register* on May 18, 1988. In addition, this notice announces OMB approval of the information collection requirements in paragraphs (d) and (i); those requirements will become effective upon adoption of this notice.

D) "Concrete and Masonry Construction Safety Standards (1926.700-1926.706)." On June 16, 1988, Federal OSHA adopted revisions to the Subpart Q of the Construction Standards (29 CFR Part 1926) for Concrete and Masonry Construction (formerly Concrete, Concrete Forms, and Shoring). The standard removes ambiguities that have existed; closes gaps in coverage; recognizes technological changes; and, where possible, uses language that states the performance to be achieved by the employer without specifying unnecessary details as to how the employer must meet the requirements. Additionally, reference to the American National Standard A10.9-1970 "Safety Requirements for Concrete Construction and Masonry Work" has been removed and the applicable requirements from this standard and the more recent ANSI Standard for Concrete and Masonry Work, ANSI A10.9-1983, have been evaluated and used in developing this final rule. The revised rule is intended to reduce occupational fatalities and injuries in concrete and masonry construction work.

The revised standards set forth requirements to protect construction workers from hazards involving premature removal of formwork, failure to brace masonry walls, and other hazardous situations such as failure to support precast panels, inadvertent operation of equipment, and unguarded reinforcing steel.

In addition, the requirements for concrete testing have been revised allowing employers to use methods other than the one specified in the existing rule. The testing methods listed in Appendix A will provide the employer with the information necessary to determine if the concrete has reached its design strength and, therefore, will reduce the hazards of premature formwork removal.

The requirements for lift-slab operations are not revised as part of this rulemaking. Federal OSHA is reopening the record to receive additional information and evidence since information concerning the use of this construction method was not available to the public rulemaking record at the time this standard was revised. The lift-slab operations requirements will be proposed as a separate rulemaking effort.

By this notice, Minnesota OSHA proposes to adopt the "Concrete and Masonry Construction Safety Standards" as published in the *Federal Register* on June 16, 1988.

Department of Natural Resources

Proposed Permanent Rules Relating to Permit Requirements for Water Aeration Systems

Notice of Intent to Adopt Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Department of Natural Resources intends to adopt the above entitled rules

without a public hearing following the procedures set forth in the Administrative Procedures Act for adopted rules without a public hearing in *Minnesota Statutes*, Section 14.22-14.28. Authority for the adoption of these rules is contained in *Minnesota Statutes*, Chapter 184, H.F. No. 909, subd. 5.

All persons have 30 days to submit comments in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change. Note that part 6116.0050 references *Minnesota Statutes*, Section, 378.22. Statute cannot be addressed in the rulemaking procedure of *Minnesota Statutes*, Chapter 14.

Any person may make a written request for a public hearing within the 30 day comment period. If 25 or more persons submit a written request for a public hearing within the 30 day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the department will proceed pursuant to *Minnesota Statutes*, Sections 14.13 to 14.20.

Persons who wish to submit comments or a written request for a public hearing should submit them to:

Larry R. Shannon, Director
Division of Fish and Wildlife
Department of Natural Resources
500 Lafayette Road, Box 20
St. Paul, MN 55155-4020

A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available from Larry Shannon upon request.

Pursuant to *Minnesota Statutes* Section 14.115, subdivision 2, the impact on small business has been considered in the promulgation of these rules. Anyone wishing to present evidence or argument as to the rules affect on small business may do so. The department position regarding the impact of rules on small business is set forth in the Statement of Need and Reasonableness.

The adoption of these rules will not require the expenditure of money by local public bodies within the meaning of *Minnesota Statutes*, Section 14.11.

If no hearing is required, upon adoption of the rule the rule and the required supporting documents will be submitted to the Attorney General for approval as to form and legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Larry Shannon.

Joseph N. Alexander, Commissioner
Department of Natural Resources

Rules as Proposed (all new material)

6116.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the following terms have the meanings given them.

Subp. 2. **Aeration system.** "Aeration system" means a bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water. The purpose of the system includes, but is not limited to:

A. preventing fish winterkill;

B. keeping areas free of ice to aid navigation, keeping mooring facilities open, or protecting structures in the water from ice damage;

C. maintaining open water for captive waterfowl;

D. rehabilitating lake water quality by methods such as destratification and hypolimnetic aeration; and

E. protecting shoreline from damage due to ice expansion.

KEY: 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." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Department of Natural Resources, or a duly authorized representative.

Subp. 4. **Management plan.** A plan approved by the commissioner that specifies actions related to water aeration systems.

Subp. 5. **Protected waters.** "Protected waters" means those waters of the state identified as public waters or wetlands under *Minnesota Statutes*, section 105.37, subdivision 14, or 105.391, subdivision 1.

Subp. 6. **Public access.** "Public access" means any designated public access or any public riparian lands where public access to the protected water is not prohibited.

Subp. 7. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.

6116.0020 PERMIT.

Subpart 1. **Required.** All aeration systems installed and operated in protected waters require a permit issued by the commissioner of the Department of Natural Resources, unless the system is used exclusively for and is no larger than the minimum size adequate to keep dams, structures, or mooring areas free of ice. No permit issued pursuant to this part shall be construed to satisfy the need for permits required by other governmental entities.

Subp. 2. **Issuance prohibited.** No aeration permit shall be issued:

A. for the purpose of attracting or delaying the migration of wild waterfowl, except for waterfowl management practices approved by the United States Fish and Wildlife Service or the Minnesota Department of Natural Resources, Division of Fish and Wildlife;

B. for protected waters designated for wildlife management under *Minnesota Statutes*, section 97A.101, subdivision 2, unless the aeration system is included as part of the management plan;

C. for protected waters proposed by the commissioner for designation for wildlife management purposes under *Minnesota Statutes*, section 97A.01, subdivision 2, until the designation process is terminated or completed;

D. for protected waters designated as scientific and natural areas under *Minnesota Statutes*, section 84.033; or

E. for protected waters without a management plan, unless:

(1) the protected waters are designated for use under a fish farm or hatchery license issued by the commissioner; or

(2) the protected waters do not have public access.

Subp. 3. **Winter operation.** An aeration permit shall not be issued for winter operation of a system where the diffusers are placed in a configuration where more than one open water area is created during ordinary winter weather, except that the system may be specifically allowed when the commissioner has first determined that it will provide substantial benefit to the lake resource.

6116.0030 APPLICATION FOR PERMIT.

Subpart 1. **Term.** No permit shall be issued for a period of more than one year.

Subp. 2. **Criteria for granting a permit.** The commissioner shall grant a permit for an aeration system when the commissioner concludes that:

A. operation of a system will result in substantial benefit to the lake resource;

B. the objectives of the system are compatible with natural resources management and public safety goals for the body of water.

Subp. 3. **Form contents.** Applications for permits shall be submitted on forms provided by the commissioner and shall include:

A. the reason the system is needed;

B. a description of the system, including but not limited to location, size, and number of devices to be used;

C. a sketch of the proposed system, indicating the compass direction "north," location on the lake, roads in the vicinity, pertinent fire numbers, noteworthy landmarks, and enough detail so the system can be located for inspection, and emergency access, shall accompany all new applications;

D. the proposed operating schedule; and

E. further information the commissioner needs in order to assess the need for and effectiveness of the proposed aeration system.

Subp. 4. **Public input.** Upon receipt of a new application for installation and operation of an aeration system on protected waters with public access the commissioner shall issue public notice and may conduct a public meeting to assist in deciding whether to

issue, deny, or modify a permit. Reissuance of permits for existing permitted aeration systems does not require a public meeting, however, upon request of 25 or more residents of the state a public meeting will be held.

Subp. 5. **Applicants.** The applicant shall be a governmental entity such as a county, city, town, watershed district, or lake improvement district; or a private person, group, or entity.

Subp. 6. **Financial responsibility.** All permittees, except those permittees operating an aeration system in protected waters without public access, where the permittee owns all land riparian to the protected water, or all of the possessory rights to the land riparian to the protected water, or has leased all access rights to the protected water, and state agencies subject to the State Tort Claims Act or municipalities subject to the Muncipal Tort Claims Act, must provide proof that the permittee is financially able to meet any liability that should arise from the presence or operation of the system. This shall be done by:

A. posting a bond for $500,000; or

B. providing a certificate of insurance for the current period of operation. An insurance policy of $500,000 combined single limit (minimum) coverage must be in effect while the system is in operation during all times any portion of the lake is ice-covered. An insurance binder is adequate until a certificate is issued, at which time the certificate must be delivered to the appropriate regional fisheries manager.

6116.0040 PERMIT CONDITIONS.

Subpart 1. **Objective.** The commissioner may include conditions the commissioner considers reasonable and necessary for the design, installation, and operation of the system, and provisions for monitoring the system and its effects by the permittee or the commissioner.

Subp. 2. **Workshops.** Permittees shall attend workshops to be held at designated locations throughout the state as determined by the commissioner. New permittees shall attend a workshop before initial start-up of systems.

Subp. 3. **Inspections.** The permittee shall allow the inspection of the aeration system by the commissioner or a designee at all reasonable times. Each aeration system shall be inspected by the permittee often enough to ensure that the requirements of this part and conditions of the permit are met at all times. All deficiencies shall be promptly corrected. The permittee must inspect the aeration system not less than once every seven days.

Subp. 4. **Aeration periods.** The start-up and stopping dates for aerating during periods of ice cover shall be determined by the regional fisheries manager and shall be specified in the permit. Unless specifically permitted, no aeration system shall be operated during the freeze-up period until sufficient ice has formed so that marking requirements can be safely met.

Subp. 5. **Hold harmless.** Permittee agrees to assume the entire responsibility and liability for all damages or injury to all persons and to all property arising out of, resulting from, or in any manner connected with the design, construction, installation, operation, maintenance, supervision, or inspection of the permitted aeration system. Permittee agrees to indemnify, defend, and hold harmless the state of Minnesota, its agents and employees, from all claims, damages, or injury. This indemnity agreement includes, but is not limited to, claims that the permittee was negligent or otherwise liable for allowing, designing, constructing, installing, operating, inspecting, maintaining, supervising, or approving the permitted aeration system, or failing to do so.

Subp. 6. **Revocations.** The commissioner may revoke a permit without prior notice whenever, in the commissioner's opinion, revocation is necessary to protect the interests of the public, to protect human life or natural resources, or for violation of this part or any permit issued hereunder.

6116.0050 MARKING REQUIREMENTS AND PUBLICATION OF NOTICE OF OPERATION.

Permittees shall post signs and publish notice of operation as required by *Minnesota Statutes*, section 378.22.

6116.0060 WAIVER.

The commissioner may waive any provision of parts 6116.0010 to 6116.0040, when there is:

A. an emergency involving either:

(1) an unanticipated winterkill of a desirable fish population; or

(2) ice movement causing property damage; and

B. acceptable alternative means of meeting the provisions of parts 6116.0020 to 6116.0040 have been provided by the applicant.

KEY: 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." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

6116.0070 APPEAL.

The terms, conditions, or denial of any permit issued pursuant to parts 6116.0010 to 6116.0060 may, within 30 days of receipt of written notice, be appealed to the commissioner by filing a written request for review. If written request is not submitted within 30 days, the permit decision becomes final.

Adopted Rules

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 14.14-14.28 have been met and five working days after the rule is published in *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 strikeouts and new language will be underlined. The rule's previous *State Register* publication will be cited.

An emergency rule becomes effective five working days after the approval of the Attorney General as specified in Minn. Stat. § 14.33 and upon the approval of the Revisor of Statutes as specified in § 14.36. Notice of approval by the Attorney General will be published as soon as practicable, and the adopted emergency rule will be published in the manner provided for adopted rules under § 14.18.

Higher Education Coordinating Board

Adopted Permanent Rules Relating to Financial Assistance

The rules proposed and published at *State Register*, Volume 12, Number 40, pages 2169-2176, April 4, 1988 (12 S.R. 2169) are adopted with the following modifications:

Supplemental Findings of Fact, Conclusions and Order Adopting Rule Without Public Hearing

This Findings of Fact, Conclusions and Order supplements the Findings of Fact, Conclusions and Order originally submitted to the Attorney General on May 20, 1988. On June 7, 1988 the Higher Education Coordinating Board withdrew the above-entitled rule from consideration by the Attorney General. The above-entitled rule is hereby changed and resubmitted to the Attorney General with the changes noted below because the rule as proposed lacked a standard for establishing an interest rate for the SELF program, for loans made from sources other than the bonds.

Minnesota Rule 4850.0014—Subp. 3 should read as follows:

Interest rate. For loans made from the bonds, the interest rate on the loan must be fixed by the board at a margin in excess of the "index rate" on the bonds. If the bonds bear interest at more than one rate at any one time, the "index rate" will be the weighted average of the interest rates. The "index rate" may change on Thursday of each week. If the "index rate" increases or decreases, the interest rate on the loan increases or decreases automatically on the same day without notice to the borrower. If the board determines that the margin does not reflect the costs of the SELF program, the board ~~may~~ must increase or decrease the margin ~~within limits of law~~. The board shall advise borrowers of changes in the margin.

~~For loans made from sources other than the bonds, the board shall establish interest rates charged to borrowers that are reasonable, competitive, and within the limits of law. Information about how the interest rate is calculated will be available from the board or the financial aid office at the eligible school.~~

For loans made from sources other than the bonds, the interest rate on the loan will be determined by the board at a margin in excess of the "index rate." The "index rate" will be the average rounded to the nearest quarter of one percent of the bond equivalent yield, for auctions of 13-week Treasury Bills, during the preceding calendar quarter. If the "index rate" increases or decreases, the interest rate on the loan will automatically increase or decrease on the same day without notice to the borrower. At no time will the interest rate on the loan increase or decrease more than two percentage points over any four consecutive calendar quarters. The "margin" will be determined by the board to reflect the costs of the SELF program. If the board determines that the margin does not reflect the costs of the SELF program, the board must increase or decrease the margin. The board shall advise borrowers of changes in the margin.

Based on the comments and evidence in the record before the agency, I find the following:

The above-entitled rule, with the changes noted herein, is needed and reasonable.

NOW, THEREFORE, IT IS ORDERED that the rule identified as Definitions for Higher Education Programs, Scholarship and

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES
500 Lafayette Road
St. Paul, Minnesota 55155

In the Matter of Rules
for Water Aeration Systems

FINDINGS AND ORDER
ADOPTING RULES

The proposed rule was published in the State Register on July 18, 1988, and was mailed to those on the agency's rule-making notice list and to those presently holding aeration permits on July 13. A statement of need and reasonableness was available to the public on those dates and thereafter. During the ensuing 30-day period comments were received over the signature of 52 persons. Forty-four of the 52 asked for a hearing. Forty-two of the 44 were from members of the Minnesota Fish Farmers Association (MFFA) on a form provided by the Association. After discussion with MFFA, the Department agreed to some adjustment in the rule, and 21 of the 42 withdrew their requests for hearing, leaving a remainder of 23 outstanding hearing requests.

MFFA asked that their members not be required to obtain an aeration permit. The statute does not allow such an exemption. However, it is reasonable that those who must apply for annual fish farm and fish hatchery licenses from DNR should incorporate their aeration needs into these applications, so that a separate aeration application is made unnecessary. Likewise, it is reasonable that the aeration permit be incorporated into the license issued. The aeration rules will apply to the license

application and license the same as if there were separate forms. These provisions are contained in a new subpart 4 of part 6116.0030, and existing subparts 4, 5, and 6 are renumbered 5, 6, and 7.

The MFFA asked that when a lake is private (all shores owned or controlled by the operator, no public access) that signs around the open water not be required. Because such signs are required by statute, the rule cannot accommodate the request. However, there are ways to post areas where aeration systems are started up earlier in the season than ice formation occurs, and it is reasonable to amend the rules to provide for that, per the changes incorporated into part 6116.0040. This change also responds to the concern of the City of Albert Lea.

Because the open water and thin ice caused by aeration systems are a safety concern, the rules as proposed allowed only one open water area unless there was an important benefit to the resource from more than one opening. However, the safety problem is less when there is no public access and one person owns or controls all the shore; it is reasonable in those settings to allow configurations which generate more than one open-water area. The conformation of some fish farm and hatchery ponds is such that two systems may be advantageous. Part 6116.0020 subpart 3 is changed accordingly.

Prompted by the comment of the City of Bloomington, we have adjusted part 6116.0040 subpart 5 to reflect the fact that

the state is responsible for injuries resulting from the state's negligence, but only to the extent allowed by the state Tort Claims Act.

Robert L. Laing, president of Clean-Flo Laboratories, Inc., proposes that the Department rely on the applicant-supplied opinion of the registered professional engineer, rather than the Department's own judgment. We always welcome expert advice, but we also have our own expertise, and in the end it is our responsibility to make the judgments on managing the public waters of the state.

Warner Watson is concerned that those on unprotected waters will have to have insurance where if on protected waters they would not, because of the word "protected" in part 6116.0030, subpart 6. He need not be concerned: the rules, and therefore the insurance requirements within the rules, apply only to protected waters. See, Minn. Stat. § 378.22, subd. 5. Mr. Gordon (Bud) Parker's observations on the down-side effects of insurance do not lead us to conclude that it would be reasonable to eliminate the financial responsibility provision.

The issue raised by the University of Minnesota's Department of Ecology and Behavioral Biology is covered by part 6116.0030, subpart 2 item A. Where a system is installed, that provides substantial winter-kill benefits, we do not make the system's supplier back up with hard data whatever water quality benefits that he alleges will arise from the system. But

when a system's primary purpose is indeed water quality, we do in fact require the sort of hard data that the comment asks for, per part 6116.0030, subpart 3, item E.

Prompted by our own re-reading of the proposed rule, we have made two adjustments to improve clarity. At the end of part 6116.0030, subp. 2, item A., we have added "and." In part 6116.0030, subp. 7, we relocated "(minimum)" and added "general liability."

With the changes indicated, the rule is needed and reasonable.

NOW THEREFORE, IT IS ORDERED that the rule is proposed, with the changes discussed above and specified on the attached copy of the rule, is ADOPTED, under the authority of Minn. Stat. § 378.22, subdivision 5.

Dated: October 17, 1988.

JOSEPH N. ALEXANDER, Commissioner
Deparment of Natural Resources

In the Matter of Adoption
by the Department of
Natural Resources of Rules
Relating to Water Aeration
Systems

DECLARATION
OF
COUNSEL

I have examined the above-captioned rule and the rulemaking record. Based on that, I conclude that the Administrative Procedure Act and Minnesota Rules, chapter 210 have been followed.

Dated: October 17, 1988

A. W. Clapp III
Special Assistant Attorney General

Suite 200
520 Lafayette Road
St. Paul, Minnesota 55155
Telephone: (612) 296-0686

ATTORNEYS FOR THE DEPARTMENT OF
NATURAL RESOURCES

1. There were 2 responses which requested a hearing.

2. There were 41 responses where the writers assumed that "by responding" they were requesting a hearing. However, a hearing was never requested.

3. There were 10 comments where there was no request for a hearing & no assumption of such.

4. There were 29 withdraws.
   4 were submitted twice
   5. never requested a hearing
   Leaving 20 official withdraws.

5. Technically speaking, only 2 requested a hearing. However it appears the Agency accepted the 41 assumptions & accepted the withdraws. Either way a hearing is Not required!

   41 + 2 = 43 - 20 = 23 outstanding requests for a hearing exist.

6. You will notice the above figures do not match those of the agency, however our results are the same. Good Enough?

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Adoption
by the Department of
Natural Resources of Rules
Relating to Water Aeration
Systems

SUPPLEMENTAL
FINDINGS AND CONCLUSIONS

In reviewing the aeration rules for legality, the Attorney General's office advised that the right to revoke a permit without first having had a right to a public hearing, is perhaps expressed too broadly in part 6116.0040, subpart 6, to reflect due process concerns. We are therefore striking the phrases "to protect the interests of the public" and "or for violation of this part of any permit issued hereunder," leaving the basis for no-notice revocation to be when it "is necessary to protect human life or natural resources."

The Attorney General also pointed out that we had permitted revocation as the basis for a hearing demanded in part 6116.0070. Therefore the part is modified to read "the terms, conditions, denial, or revocation of any permit. . . ."

Dated: October 28, 1988

DEPARTMENT OF NATURAL RESOURCES

p4 lines 6 - 22

Private hatchery or fish farm license was not addressed sep. in proposed but appears in adopted.

Substantial change?

nah - form change only

p5 Lines 20-25

Broad discretion of auth - no guidelines agree - but nevertheless 25d

p5 line 34

"Promptly" Definition? 2 hours? 5 days?

OK under circumstances

p6 lines 8-11

an exemption was added. Subst chng?

if not S.C.: no

line 11: "other methods approved by Comm." Broad discretion?

↳ OK limited to species

p6 line 20-22

an ~~exempt~~ exception was added - understandable but Subst chng?

nope - already implied

p6 line 27-31

Broad discretion of Com. authority?

Office of the Revisor of Statutes
Administrative Rules

Paul E. Rohde
Senior Assistant Revisor
296-0953

700 State Office Building
100 Constitution Avenue
St. Paul, MN 55155-1297

September 29, 1988

RECEIVED
ECOLOGICAL SERVICES
OCT 03 88
DIVISION OF
FISH & WILDLIFE

Howard F. Krosch
Department of Natural Resources
500 Lafayette Road
Saint Paul, Minnesota 55155

RE: AR1224 - Permit Requirement for Aeration Systems

Dear Mr. Krosch:

Enclosed are four copies of your rule with the modifications you requested.

Please submit the rules to the Attorney General or the Office of Administrative Hearings, as appropriate.

If you have any questions or need further modifications, please call me.

Very truly yours,

Paul E. Rohde

PER/ly
Encl.

5-9-0575

Findings

→ No comments re request for notice of submission to A.G.

Comments

44 request for hearing; 52 comments rec'd.
21 withdrew request
23 outstanding requests.

Authority
ch 184 = Employment Agencies
HF 909 subd 5 - not most speech
but rt ch - close call but
015

Authority is cited in NOI:
"Minnesota Statutes Chapter 184, H.F. No. 909 subd 5

Authority is found:
1987 Laws ch 184 Sect 4
"The Commissioner of Natural Resources shall by Sept 1, 1988 adopt rules relating to the issuance of permits for aeration, bubbler, ..."

The question is, how do you interpret that authority
1. Does Rule Making Auth. expire on 9/1/88
→ 2. Was 9/1/88 a date by which the leg. wanted the rules in place - but no penalty assessed if not done by that date.