

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendment to and Repeal of Rules Governing Minnesota's List of Endangered, Threatened, and Special Concern Species in, *Minnesota Rules* Chapter 6134.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge James E. LaFave for rulemaking hearings on January 29, January 30, February 5, February 6 and February 7, 2013. The public hearing on January 29, 2013, was held at the Ramada Hotel and Conference Room, 1517 16th Street SW, Rochester, MN 55902. The public hearing on January 30, 2013, was held at the New Ulm Community Center, 600 North German, New Ulm, MN 56073. The public hearing on February 5, 2013, was held at the Sanford Center – Bemidji Regional Event Center, 1111 Event Center Drive NE, Bemidji, MN 56601. The public hearing on February 6, 2013, was held at the Gitchee Gumee Conference Center, U.S. Environmental Protection Agency Mid-Continent Ecology Division, 6201 Congdon Boulevard, Duluth, MN 55804. The last public hearing was held on February 7, 2013, at the Best Western Plus Kelly Inn, 2705 North Annapolis Lane, Plymouth, MN 55441.

The Minnesota Department of Natural Resources (DNR or Department) proposes to amend the rules governing Minnesota's list of endangered, threatened, and special concern species by changing the status of 302 species of mammals, birds, reptiles and amphibians, fish, mollusks, jumping spiders, butterflies and moths, caddisflies, tiger beetles, leaf hoppers, dragonflies, vascular plants, lichens, mosses and liverworts, and fungi.¹

The hearings and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.² The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearings were conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

¹ Ex. 3 at 2 (Statement of Need and Reasonableness – “SONAR”).

² See, Minn. Stat. §§ 14.131 through 14.20.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.³

The agency panel at the public hearings included Rich Baker (Endangered Species Coordinator for the DNR), joining Mr. Baker, in Rochester Jaime Edwards (Regional Nongame Wildlife Specialist), in New Ulm Robert Collett (Regional Manager), in Bemidji Becky Marti (Regional Plant Ecologist), in Duluth Bruce Carlson (regional Plant Ecologist) and in Plymouth Hannah Texler (Regional Plant Ecologist).⁴

Approximately 195 people attended the hearings. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Sixty-eight members of the public made statements or asked questions during the hearings.⁵

After the close of the hearing held on February 7, 2013, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until February 27, 2013 – to permit interested persons and the Department to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Department an opportunity to reply to earlier-submitted comments.⁶ The hearing record closed on March 6, 2013.⁷

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

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

³ Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

⁴ Ex. 11 at 3.

⁵ Hearing *Transcript*, at 3 (January 29, 2013). Hearing *Transcript*, at 3 (January 30, 2013). Hearing *Transcript*, at 3 (February 5, 2013). Hearing *Transcript*, at 3 (February 6, 2013). Hearing *Transcript*, at 3 (February 7, 2013).

⁶ See, Minn. Stat. § 14.15, subd. 1.

⁷ On April 5, 2013, the Chief Administrative Law Judge granted an extension of the time to complete this report until April 12, 2013. On April 12, 2013, the Chief Administrative Law Judge granted an extension of time to complete this report until April 16, 2013. See, Minn. Stat. § 14.15, subd. 2.

FINDINGS OF FACT

I. Legislative Background to the Proposed Rules

1. Minnesota's law pertaining to endangered species dates back to the Laws of Minnesota 1971, Ch. 825, which listed several animal species as endangered and granted authority to the DNR's commissioner to add or delete animals by rule.⁸

2. Laws of Minnesota 1974, Ch. 465, added a threatened category to the statute and dropped the listing of specific species in the statute.⁹

3. Laws of Minnesota 1981, Ch. 285, added a special concern category to the statute, and added plants to the statute's protection. The statute, entitled *Protection of Threatened and Endangered Species*, was codified into its current form in 1986.¹⁰

4. The 1981 amendment required the DNR commissioner to promulgate by rule a list of Minnesota's endangered, threatened and special concern species (List). The List was ultimately adopted on March 5, 1984 and amended in 1996. The List has not been amended since that time.¹¹

5. The 1981 amendment also required that "The commissioner reevaluate the designated species list every three years after it is first adopted and make appropriate changes."¹² In 1987 the DNR published a notice in the State Register stating in part that "the 1984 list remains an accurate statement of the status of Minnesota's native fauna and flora and therefore the current list will remain in effect through 1990."¹³

6. Revision of the List was initiated again in 1990 and the resulting revised rule became effective on July 1, 1996.¹⁴

7. The DNR began the current process of revising Minnesota's List of Endangered, Threatened and Special Concern Species in 1999. In December 1999, the DNR commissioner requested permission from the Governor's Office to publish a Request for Comments in the State Register. Permission was received and a Request for Comments was published in the State Register in January of 2000. However, subsequent staffing and workload changes diverted staff attention and little progress was made until 2004.¹⁵

⁸ Ex. 3 at 1 (SONAR).

⁹ *Id.*

¹⁰ See, Minn. State. § 84.0895 and Laws of Minnesota 1986, Ch. 386, art. 4, § 9.

¹¹ Ex. 3 at 1 and 3 (SONAR).

¹² Minn. Stat. § 84.0895, subd. 3(c).

¹³ 12 S.R. 1266, December 21, 2987; Ex. 3. at 3 (SONAR).

¹⁴ Ex. 3 at 3 and 4 (SONAR).

¹⁵ Ex. 3 at 4 (SONAR).

8. DNR staff developed a draft amendment to the List between July 2004 and December 2006. For species where DNR staff had expertise, staff was relied upon to identify those species for which new information warranted a change in status. For those species groups where new information was available but DNR expertise was insufficient, external experts were identified and consulted.¹⁶

9. On December 1, 2006, the DNR Commissioner informed the Governor's Office that the rulemaking initiated in 2000 was being renewed and requested to republish a Request for Comments in the State Register. Permission was received and a Request for Comments was published in the State Register on January 2, 2007.

10. Also on January 2, 2007, the DNR published Draft Amendments to Minnesota's List of Endangered, Threatened and Special Concern Species (The Draft) on its web site. The Draft recommended changes to the status of 273 species of plants, animals, and provided brief explanations for each recommended change. The Draft was simultaneously publicized through press releases, e-mails, and notices sent through the U.S. Mail to a list of stakeholders compiled from various in-house mailing lists, persons and organizations who had previously expressed interest in this rulemaking and all persons and organizations that are registered with the DNR for the purposes of receiving notices of rulemaking proceedings.¹⁷

11. Between January 2007 and November 2009, the DNR has received 423 comments on the status of 199 species from 151 commentators. The DNR staff carefully evaluated each comment and made many adjustments to the 2007 Draft in response to the new information received through this process.¹⁸

12. The DNR staff exercised its professional judgment in evaluating whether a species met the statutory definition of "endangered," "threatened" or "of special concern" in developing the proposed amendments to the List.¹⁹

13. Minnesota law defines "endangered," "threatened" or "of special concern" as follows:

Designation. (a) the commissioner shall adopted rules under Chapter 14, to designate a species of wild animal or plant as:

- (1) endangered, if the species is threatened with extinction throughout all or a significant portion of its range;
- (2) threatened, if the species is likely to becomes endangered within the foreseeable future throughout all or a significant portion of its range; or

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ex. 3 at 4; See Minn. Stat. § 84.0895, subds. 3(a) and 3(b).

- (3) species of special concern, if although the species is not endangered or threatened, it is extremely uncommon in this state, or has unique or highly specific habitat requirements and deserves careful monitoring of its status. Species on the periphery of their range that are not listed as threatened may be included in this category along with those species that were once threatened or endangered but now have increasing or protected, stable populations.

(b) The range of a species in this state is a factor in determining its status as endangered, threatened or of special concern. A designation by the secretary of the interior that a species is threatened or endangered is a prima facie showing under this section.

14. The DNR made two assumptions in applying the statutory standard in an effort to reinforce the Legislature's intent that the DNR prevent the extinction and restore the viability of species within the bounds of the state.

- (1) The phrase 'species of wild animal or plant' refers only to species that are believed to reproduce within the state at the present, and thus only these species are considered to be eligible for designation as endangered, threatened, or of special concern. Given the limited resources of the DNR for use in funding research and management of listed species, this assumption allows the DNR to focus on those species for which there is some evidence of the potential for population viability and species recovery. Without this assumption, the species evaluation process would have had to consider any accidental or vagrant species that has been observed, however, infrequently in the state.
- (2) The use of the word 'range' within the phrase 'all or a significant portion of its range' refers to a species' geographic distribution within this state, given that the state's jurisdiction is limited to the territory within the state's boundaries. This interpretation is supported by the sentence 'The range of the species in this state is a factor in determining its status as endangered, threatened, or of special concern.' (Minn. Stat. sec. 84.0895, subd. 3(b)). In keeping with this statutory language, whether a species is more or less common outside the state than it is within the state was considered to be of only minor significance in the species evaluation process. Thus, whether Minnesota's population of a species was peripheral, central or otherwise related to the species' continental range was also considered to be of only minor significance in the species evaluation process. In fact, due to Minnesota's location at the

intersection of three major continental biomes (prairie, boreal forest, deciduous forest), the vast majority of the state's species are at the periphery of their range, but this may or may not affect whether a species is at risk of extinction.²⁰

15. The DNR staff, based on its deliberation, produced the set of proposed amendments to Minn. R. 6134 presented in the SONAR.²¹

II. Rulemaking Authority

16. The Department cites Minn. Stat. § 84.0895, subd. 3(a), as its source of statutory authority for these proposed rules. This statute grants the DNR Commissioner the authority to “adopt rules under chapter 14, to designate species of wild animal or plant as: (1) endangered ... (2) threatened ... or (3) of special concern.”²²

17. The statute further provides that “The range of the species in this state shall be a factor in determining its status as endangered, threatened, or of special concern.” The statute specifically directs the “commissioner shall reevaluate the designated species list every three years after it is first adopted and make appropriate changes.”²³

18. The Administrative Law Judge concludes that the Department has the statutory authority to adopt rules governing Minnesota's List of Endangered, Threatened, and Special Concern Species.

III. Procedural Requirements of Chapter 14

A. Publications

19. On January 18, 2000, the Department published in the *State Register* a Request for Comments seeking comments on its planned amendments to the rules that designate species as state endangered, threatened, or of special concern. The Request for Comments specifically noted that the amendments may contain any of the following adjusts to the List:

- 1) addition of a species to a designation;
- 2) removal of a species from a designation;
- 3) transfer of a species from one designation to another; or
- 4) updating the name of a designated species with or without change to designation.²⁴

²⁰ Ex. 3 at 5 (SONAR).

²¹ *Id.*

²² Minn. Stat. § 84.0895, subd. 3(a).

²³ Minn. Stat. § 84.0895, subd. 3(b) and 3(c).

²⁴ 24 *State Register* 1055 (January 18, 2000).

20. On January 2, 2007, the Department published in the *State Register* a Request for Comments seeking comments on its planned amendments to the rules that designate species as state endangered, threatened, or of special concern. The Request for Comments specifically noted that the amendments may contain any of the following adjustments to the List:

- 1) addition of a species to a designation;
- 2) removal of a species from a designation;
- 3) transfer of a species from one designation to another; or
- 4) updating the name of a designated species with or without change to designation.²⁵

21. On November 16, 2012, the Department requested a rules hearing under Minn. Stat. §§ 14.131 to 14.20, and it requested approval of its Additional Notice Plan.²⁶

22. By way of an Order dated November 27, 2012, Administrative Law Judge James E. LaFave approved the Additional Notice Plan and Hearing Notice.

23. The Notice of Hearing was signed, mailed and dated November 27, 2012 and published in the *State Register* on December 10, 2012.²⁷

24. From December 10-14, 2012, the Department delivered the Notice of Hearing to all persons and associations on the rulemaking mailing list established by Minn. Stat. § 14.14, subd. 1(a). It likewise sent notice to all persons, groups and organizations identified in the Additional Notice Plan, submitted a news release for general circulation newspapers statewide and posted copies of the SONAR, Notice of Hearing and Proposed Rules on the Department's website.²⁸

25. On December 13, 2012, the Department mailed a copy of the Notice of Hearing and the SONAR to the chairs and ranking members of the legislative policy and budget committees with jurisdiction over the proposed rules.²⁹

26. On December 13, 2012, when the SONAR became available to the public, the Department submitted an electronic copy of the SONAR to the Legislative Reference Library via e-mail to sonars@lrl.leg.mn to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.

27. The Notice of Hearing identified the dates and locations of the hearings in this matter.³⁰

²⁵ 31 *State Register* 868-69 (January 2, 2007).

²⁶ Ex. 8.

²⁷ Ex. 5; 37

²⁸ Ex. 7.

²⁹ Ex. 9.

³⁰ Ex. 5.

28. At the hearing on February 5, 2013, the Department filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Department's Request for Comments as published in the *State Register* on January 18, 2000 and the Department's Request for Comments as published in the *State Register* on January 18, 2007;³¹
- b. the proposed rules dated November 16, 2012, including the Revisor's approval;³²
- c. the Department's Statement of Need and Reasonableness (SONAR);³³
- d. the Certificate of Mailing the SONAR to the Legislative Reference Library on December 13, 2012;³⁴
- e. the Notice of Hearing as mailed, signed and dated November 27, 2012 and as published in the *State Register* on December 10, 2012;³⁵
- f. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List and Giving Additional Notice Under the Additional Notice Plan, copies of the Department's statewide news release and the Department's informational webpage Certificate of Accuracy of Mailing List;³⁶
- g. a copy of the transmittal letter showing the Department consulted with the Minnesota Department of Management and Budget and the Minnesota Department of Management and Budget's memo dated September , 2012, in response;³⁷
- h. the Office of Administrative Hearings' approval of notice plan for notice of hearing, as signed and dated November 27, 2012, and the Department's request for prior approval of notice plan dated November 16, 2012;³⁸
- i. the Certificate showing the Department sent the Notice of Hearing and SONAR to legislators as required by Minn. Stat. § 14.116; and

³¹ Ex. 1.

³² Ex. 2.

³³ Ex. 3.

³⁴ Ex. 4.

³⁵ Ex. 5.

³⁶ Ex. 7.

³⁷ Ex. 8.

³⁸ *Id.*

- j. a copy of the transmittal letter showing the Department sent the Notice of Hearing and SONAR to the Commissioner of Agriculture in accordance with Minn. Stat. § 14.111.

B. Additional Notice Requirements

29. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

30. Between December 10 and 14, 2012, the Department provided the Notice of Hearing in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- The Notice of Hearing was delivered to all persons and associations on the rulemaking mailing list established by Minn. Stat. § 14.14, subd. 1(a), by either sending an electronic copy via e-mail when an e-mail address had been provided to the Department or by United States mail with postage prepaid. In the e-mail or letter the Department provided instructions for obtaining electronic access to the SONAR and the proposed rules.³⁹
- The Notice of Hearing and a copy of the proposed rules was delivered to the groups and organizations listed in the attachments to Ex. 7. This included all persons, groups and organizations identified in the Additional Notice Plan. Delivery was accomplished by either sending an electronic copy via e-mail when an e-mail address had been provided to the Department or by United States mail postage prepaid. In the e-mail or letter the Department provided instructions for obtaining electronic access to the SONAR and the proposed rules.⁴⁰
- The Department submitted a news release for general circulation newspapers statewide.⁴¹
- Copies of the Notice of Hearing, SONAR and the proposed rules were posted on the Department's website at <http://www.dnr.state.mn.us/ets/rulesrevision.html>.⁴²

³⁹ Ex. 7.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

C. Notice Practice

1. Notice to Stakeholders

31. Between December 10 and December 14, 2012, the Department provided a copy of the Notice of Hearing to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.⁴³

32. The first hearing on the proposed rules was held on January 29, 2013.⁴⁴

33. There are 46 days between December 14, 2012 and January 29, 2013.

34. The Administrative Law Judge concludes that the Agency did fulfill its responsibilities, under Minn. R. 1400.2080, subp. 6, to mail the Notice of Hearing “at least 33 days before the ... start of the hearing.”

2. Notice to Legislators

35. On December 13, 2012, the Agency sent a copy of the Notice of Hearing and the SONAR to Legislators as required by Minn. Stat. § 14.116.⁴⁵

36. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Hearing and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.

37. The Administrative Law Judge concludes that the Agency did fulfill its responsibilities to mail the Notice of Hearing “at least 33 days before the ... start of the hearing.”

3. Notice to the Legislative Reference Library

38. On December 13, 2012, when the SONAR became available to the public, the Department submitted an electronic copy of the SONAR to the Legislative Reference Library via e-mail to sonars@lrl.leg.mn.

39. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

40. The Administrative Law Judge concludes that the Department did fulfill its responsibilities to mail the Notice of Hearing “at least 33 days before the ... start of the hearing.”

⁴³ Ex. 7

⁴⁴ Ex. 6.

⁴⁵ Ex. 9.

D. Impact on Farming Operations

41. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

42. On October 31, 2012, the Department sent the Commissioner of Agriculture notice that the DNR intended to update the List. The notice provided instruction on how to electronically access the SONAR.⁴⁶

43. The proposed rules were published in the *State Register* on December 10, 2012.⁴⁷

44. There are 40 days between October 31, 2012 and December 10, 2012.

45. The proposed rules, however, do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Agency was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

46. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness.⁴⁸ Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

⁴⁶ Ex. 10.

⁴⁷ 37 *State Register* 875 (December 10, 2012).

⁴⁸ Minn. Stat. § 14.131.

- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

1. The Department's Regulatory Analysis

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

47. The Department asserts that two broad categories of persons will be affected by the proposed rules. First, persons whose activities may result in the prohibited acts of taking, possessing, importing, transporting, or selling any portion of a species that is proposed to be added to or removed from the endangered or threatened status.⁴⁹

48. Second, the Department asserts the proposed rules have the potential to impact persons whose activities might affect a species that is proposed to be added or special concern status. Those activities could include forest management, mining, infrastructure (e.g., road, bridge, railroad, pipeline, power generation, landfill, airport, wastewater treatment) construction, and maintenance, residential or commercial land development, environmental consulting, propagation and sale of horticulture species, aquatic plants management, falconry, minnow harvest, education, and research.⁵⁰

⁴⁹ Ex. 3 at 5 (SONAR).

⁵⁰ *Id.*

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

49. There will be additional costs to the Department as a result of the proposed rules. The Department claims that since the number of endangered and threatened species is increasing from 197 to 293 there may be an increase in the amount of DNR effort in endangered species review and in permit issuance. They assert however, that because most of the endangered species exist in the same locations as do other already listed endangered and threatened species the increase in staff effort will be much less than proportionate to the increase in the number of protected species.⁵¹

50. The Department asserts the Minnesota Department of Transportation (MnDOT) will incur minimal increase in projects costs as a result of the proposed rules. The proposed rules will increase the number of mussel species receiving endangered or threatened status from 20 to 23. The DNR and MnDOT work together when a proposed bridge project may result in the taking of protected mussels. However, the mussel species proposed for endangered or threatened status generally exist in the same locations as do other already listed endangered or threatened species so the Department believes the effect on MnDOT project costs will be minimal.⁵²

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

51. The Department asserts there are no less costly methods of achieving the purposes of the proposed rules. The proposed rules identify the species that meet the statutory definition of “endangered,” “threatened” and “of special concern.” These designations put resource managers, landowners and the public on notice of species in jeopardy so that activities can be reviewed and prioritized to help preserve Minnesota’s flora and fauna. There are no less costly or less intrusive methods for achieving this outcome.⁵³

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

52. The designation of endangered, threatened and of special concern provides resource management agencies, landowners and the public with a list of species that merit attention in order to avoid their extinction. Without the focus provided

⁵¹ Ex. 3 at 5-6 (SONAR).

⁵² Ex. 3 at 6 (SONAR).

⁵³ *Id.*

by the designations there is no assurance these species will receive the protection they need. The Department maintains no alternative to the designations of species as endangered, threatened or of special concern will achieve the mandated outcomes.⁵⁴

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

53. The Department identified four areas where one could incur costs in complying with the proposed rules. First, when a proposed activity has the potential to take an endangered or threatened species, the activity may need to be modified. This avoidance of a taking may result in additional costs to the proposed activity. The Department has no data to quantify the costs of avoidance since it occurs in the design phase of the activity and cannot be separated from other costs.⁵⁵

54. Second, the cost of mitigation actions where the taking of endangered or threatened freshwater mussels could not be avoided. Over the past decade 20 taking permits have been issued for proposed bridge or pipeline projects. In most cases the person proposing the project was required to remove and transplant the mussels to a nearby location at their expense. A typical mussel relocation project costs from \$5,000 to \$60,000. In four recent cases, the DNR chose to apply the cost of mussel relocation to other mussel conservation activities. Those mitigation payments ranged from \$34,993 to \$90,000.⁵⁶

55. Third, 20 taking permits have been issued over the past 10 years for proposed projects in which the taking of endangered or threatened plants could not be avoided. In each of these cases the entity proposing to take an action was a land development, utility, mining or waste management company, a county, an airport authority, or MnDOT. In several cases experimental relocation of the plants was accepted as mitigation, but in most cases the funds were accepted by the DNR to acquire and protect land supporting a plant population equivalent to the size of the plant population being taken by the project. The Cost of compensatory mitigation in those cases ranged from \$12,000 to \$500,000.⁵⁷

56. Finally, the proposed rules will impact a limited number of businesses engaging in the prohibited acts of taking, importing, transporting, selling, purchasing, disposing or possessing any portion of a species proposed as endangered or threatened. This business may include taxidermists, pet dealers, crafts persons, tree nurseries, landscapers, and loggers. These businesses may be required to consult with the DNR, get a permit to continue the activity or cease the activity all together. While there is no cost to obtain a permit, the modification or prohibition of the activity may result in a cost to these businesses. The DNR has no way to estimate what those costs might be.⁵⁸

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 7 (SONAR).

⁵⁷ *Id.*

⁵⁸ *Id.*

- (f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

57. The Department asserts if the proposed rules are not adopted, the species that are the subject of the rule would not get the protection they deserve and the DNR would default on its obligation under Minn. Stat. § 84.0895.⁵⁹

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

58. The Department points out the Federal Endangered Species Act⁶⁰ requires the U.S. Department of Interior to designate species as endangered or threatened according to a set of definitions and criteria that are distinct from those in state law. The Federal designation reflects a regional, national or global scale, while the designations proposed in the rule condenses a species' at-risk status only at the state scale, regardless of the species' status outside Minnesota. The Department argues the difference in scale analysis is reasonable because the intent of the state law is to prevent extinction within Minnesota; while the intent of the federal designation is prevent extinction at the regional, national or global scale.⁶¹

59. The Administrative Law Judge finds the Department has met its obligation as to assessing the differences between the proposed rule and federal regulation and the reasonableness of each difference.

- (h) Assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.**

60. "Cumulative effect" means the incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.⁶²

61. The Department maintains the proposed rule has no cumulative effect. It notes that no other state regulation specifically designates species as endangered, threatened, or of special concern. The designation of endangered or threatened grants

⁵⁹ *Id.*

⁶⁰ 16 U.S.C. § 1531-1544.

⁶¹ *Id.*

⁶² Minn. Stat. § 14.131.

the species regulatory protection. The Department, however, observed that other state laws also afford regulatory protection to certain species. For example, most vertebrates are designated as “protected wild animal(s)” and there is some regulatory protection for those species.⁶³

62. The Department argues that the protection given endangered and threatened species is not cumulative with the protection given wild animals. Because the protection given endangered and threatened species is more restrictive than the statutory protection given to wild animals, the designation of endangered and threatened substitutes for the lower protection given to wild animals.⁶⁴

63. There is also additional statutory protection for certain species of wild flowers.⁶⁵ The Department asserts, as with the case of wild animals, the endangered and threatened species status is more restrictive, thus offering more protection and hence is not cumulative with the existing state law.⁶⁶

64. Finally, the Department points out the Federal Endangered Species Act (FESA) requires the U.S. Department of the Interior to designate species as endangered or threatened.⁶⁷ However, those designations are based on criteria that are different from those in Minnesota law. The Department notes that only 13 of Minnesota’s thousands of animal and plant species are on the FESA.⁶⁸

65. The Department observes that the animals designated under the FESA receive greater regulatory protection than a similar designation under the proposed rule. Also, that plants receiving a designation under the FESA are only protected if the plant is growing on federal land. The Department argues the protections afforded by the FESA are a substitute for and work in conjunction with the proposed rule and that there is no cumulative effect with any federal regulations.

66. The Administrative Law Judge finds the Department has met its obligation as to assessing the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the proposed rule.

Performance-Based Regulation

67. The Administrative Procedure Act⁶⁹ also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior

⁶³ *Id.* at 7-8 (SONAR); See Minn. Stat §§ 97A.015, subd. 39 and 97A.405.

⁶⁴ Ex. 3 at 7-8 (SONAR).

⁶⁵ See, Minn. Stat. § 18H.18.

⁶⁶ Ex. 3 at 8 (SONAR).

⁶⁷ See, 16 U.S.C. 1531 – 1544.

⁶⁸ Ex. 3 at 8 (SONR).

⁶⁹ Minn. Stat. § 14.131.

achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁷⁰

68. The Department states that the regulatory objective of the proposed rules is to identify as accurately as possible those species that meet the statutory definition of "endangered," "threatened" or "of special concern." It states the DNR staff and external advisors who produced the proposed rules are highly trained experts who make an on-going effort to keep informed on the species on which they focus. The Department maintains it accepts recommendations from the public and other regulated parties regarding a change in the designation of a species at any time and the DNR will continue to revise the List as new information becomes available.

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

69. As required by Minn. Stat. § 14.131, by letter dated September 4, 2012, the Commissioner of Minnesota Management and Budget (MMB) responded to a request by the Department to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Department's proposed rules and concluded that the changes will have "minimal fiscal impact upon local units of government."⁷¹

70. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

4. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

71. Minn. Stat. § 14.127, requires the Agency to:

[d]etermine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.

The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁷²

72. The Department determined that it was "unlikely" that in the first year after the rules take effect that the cost of complying with the proposed rule changes will

⁷⁰ Minn. Stat. § 14.002.

⁷¹ Ex. 8.

⁷² Minn. Stat. § 14.127, subs. 1 and 2.

exceed \$25,000 for any small business or any small city. The Department believes that if in the unlikely event a small business or small city needs to make modifications in its activities to comply with the proposed rules, it will cost less than \$25,000. The Department points out that in the past decade there have been no cases where mitigation was required of a small business or small city.

73. The Administrative Law Judge finds that the Department has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

5. Adoption or Amendment of Local Ordinances

74. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁷³

75. The Agency concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Agency's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.⁷⁴

76. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

77. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.⁷⁵

78. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,⁷⁶ "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which

⁷³ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subs. 2 and 3.

⁷⁴ Ex. 3 at 9 (SONAR).

⁷⁵ See, Minn. R. 1400.2100.

⁷⁶ See, *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

guide the development of law and policy),⁷⁷ and the agency's interpretation of related statutes.⁷⁸

79. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."⁷⁹ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."⁸⁰

80. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.⁸¹ Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.⁸²

81. Because the Department suggested changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

the differences are 'within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice';

the differences are 'a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice'; and

the notice of hearing 'provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.'

82. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether 'persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests';

⁷⁷ Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁷⁸ See, *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁷⁹ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁸⁰ See, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

⁸¹ *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. App. 1999).

⁸² *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

whether the ‘subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing’; and

whether ‘the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.’

V. Analysis of the Proposed Rule

83. The proposed rule consists of a list of the species the Department believes meets the statutory definitions of “endangered,” “threatened” or “of special concern.”⁸³ The proposed rule identifies 302 species of mammals, birds, reptiles, amphibians, fish, mollusks, jumping spiders, butterflies, moths, caddisflies, tiger beetles, leafhoppers, dragonflies, vascular plants, lichens, mosses, liverworts, and fungi for which a change in designation is proposed.⁸⁴ The proposed amendments to the List include reclassification from one designation to another, as well as the designation of previously unlisted species and the removal of previously listed species.⁸⁵

84. The rulemaking record in this matter is voluminous, and contains many thoughtful and detailed comments that reflect the strong commitment and interest of groups and citizens to the endangered, threatened and special concern species in this state.⁸⁶

85. As previously noted, nearly 200 people attended the public hearings and 68 people spoke or asked questions. Over 600 public comments were received, not only from Minnesota, but from 14 other states, 2 Canadian provinces and 8 other countries.⁸⁷

86. In addition to the comments received by individual members of the public, comments were also received from a number of groups, businesses, industry groups and governmental organizations. These include: Howling for Wolves, the Minnesota Timber Producers Association, the W.J. McCabe Chapter IWLA, the Minnesota Chapter of the Society for Conservation Biology, the Center for Biological Diversity, the Minnesota Forest Industries, Blanding Paper, Sappi Paper, Norbord Minnesota, Inc., the Potlatch Corporation, the Minnesota Falconers Association, Audubon Minnesota, the Purple Martin Association, the Leech Lake Band of Ojibwa, Save Our Blue Sky Waters, the Sierra Club North Star Chapter, the Minnesota River Valley Audubon Chapter, the

⁸³ Previously defined as the “List”; See, page 3 at para. 4 above.

⁸⁴ Ex. 11 at 2.

⁸⁵ *Id.*

⁸⁶ Many commentators objected to the wolf hunt which was instituted in the fall of 2012 by the DNR. The propriety of the wolf hunt is outside the scope of this rulemaking process.

⁸⁷ In addition to Minnesota, comments were received from the states of Delaware, Florida, Arizona, Colorado, Wisconsin, California, Oregon, Maryland, Illinois, Iowa, New Hampshire, Oklahoma, Virginia, and Pennsylvania. Comments were also received from Alberta, Canada, Ontario, Canada, the Netherlands, Germany, England, Australia, Spain, Belgium, South Africa, and Switzerland. See, Public Comments.

Chippewa National Forest Supervisor's Office of the United States Department of Agriculture and the United States Department of the Interior Fish and Wildlife Service.⁸⁸

87. This Report is limited to a discussion of the portions of the proposed changes to the List that received significant critical comment or otherwise need to be examined. Most of the proposed changes to the List were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not address each designation or reclassification made to the List. Rather, the discussion that follows below focuses on those portions of the proposed changes to the List as to which commentators prompted a genuine dispute as to the reasonableness of the Department's regulatory choice or otherwise requires closer examination. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered.

88. The Administrative Law Judge finds that the Department has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

89. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

Overview of the Comments Supporting the Proposed Rule

90. A number of groups and individuals expressed support for the proposed rules. The W.J. McCabe Chapter of the Izaak Walton League believes the "proposed revisions look good, and, are reasonable."⁸⁹

91. The United States Department of the Interior, Fish and Wildlife Service applauded the "comprehensiveness of the proposed revisions."⁹⁰ They went on to assert the changes "will have significant value for guiding the conservation of Minnesota's threatened biological diversity."⁹¹

92. The Minnesota Chapter of the Society for Conservation Biology expressed support for the "rigorous process" the Department undertook "to evaluate nearly 450 species in 15 different taxonomic groups in its efforts to update Minnesota's List of Endangered, Threatened, and Special Concern Species." The Society supports and encourages the adoption of the revised List.⁹²

⁸⁸ See, Public Comments.

⁸⁹ E-mail from David Zentner (2/26/13).

⁹⁰ Letter from Tony Sullins (2/27/13).

⁹¹ *Id.*

⁹² Letter from Diane Lynch (2/26/13).

93. The Purple Martin Conservation Association supported the Department's proposal to list the Purple Martin as a species of special concern.⁹³

94. Jason Husveth, a professional ecologist and botanist, regularly conducts surveys throughout the state on species on the current List and the proposed List. He has also followed the current process of revising Minnesota's List of Threatened, Endangered and Special Concern Species. Mr. Husveth believes, as to vascular plants, the proposed rule was "very thoroughly done" and "based on the best and most current scientific data available."⁹⁴

The Gray Wolf

95. The reclassification that sparked the most public comment was the Department's recommendation to move the Gray Wolf from a species "of special concern" status to "none."⁹⁵ Approximately 400 comments were received opposing the reclassification. In addition, the vast majority of the speakers at the public hearings also objected to the proposed rule.⁹⁶

96. The Department argues that in the early 1950s Minnesota's Gray Wolf range encompassed 12,000 square miles in Northern Minnesota and contained 450-700 individuals. As of 2012, the wolf range in Minnesota expanded to an estimated area of over 27,000 square miles and the population had grown to an estimated 3,000 wolves.⁹⁷

97. The Department noted that the Minnesota legislature passed a wolf management bill in 2000 and the DNR completed a comprehensive wolf management plan in 2001. The plan was designed to protect wolves and monitor their population while giving owners of livestock and domestic pets more protection from wolf depredation. The plan established a minimum population of 1,600 wolves to ensure long-term survival. The DNR acknowledged that it intended to implement a wolf hunting and trapping season in the fall of 2012. The Department ultimately concluded that the "data indicated that Minnesota's Gray Wolf population has fully recovered, and special concern status is no longer warranted."⁹⁸

98. Most of the commentators argued the Gray Wolf should remain a species of special concern, while a few argued the status should be increased to "threatened."⁹⁹ For example, Collette Adkins Gaese stated that as a result of the wolf hunt the estimated population had been cut by "at least 25 percent." She maintained "a number of years of data need[s] to be gathered to see how the wolf numbers shake out under

⁹³ Letter from John Tautin (1/29/13).

⁹⁴ Testimony of Jason Husveth, Public Rules Hearing (February 7, 2013, at 109-111).

⁹⁵ Ex. 3 at 22 (SONAR).

⁹⁶ See, Public Comments.

⁹⁷ Ex. 3 at 22 (SONAR).

⁹⁸ *Id.*

⁹⁹ See, e.g., Dr. Maureen Hackett, 2/27/13.

state management now that there is wolf hunting and other depredation control.”¹⁰⁰ Dr. Maureen Hackett, representing “Howling for Wolves,” observed that the last survey of the wolf population was conducted in 2008. That survey, cited by the Department, found the wolf population to be in a range of 2,921 to 3,500 and that the population had been stable since 1998. Dr. Hackett points out that 413 wolves were taken in the 2012 hunt, an additional 293 were killed as a result of conflicts with livestock, and an unknown number were poached or hit by cars. She argues because we have no baseline data since 2008, we really do not know how many wolves there are.¹⁰¹

99. Many of the comments received listed the same basic arguments against de-listing the wolf. They can be summarized as follows:

- The wolf population had been stable without a hunt since 1998. No baseline data was obtained before the start of the 2012-13 season. Lacking baseline data will make basic determinations about the health of our gray wolf population difficult. It will take years to assess the damage done by the 2012 wolf hunt.
- Minnesota state law allows wolves to be killed when pets, people and livestock are perceived to be threatened. One hundred more wolves were killed as a result of law in 2012 than all previous years. We need additional time to evaluate the impacts of these lightened restrictions for wolf destruction.
- One in four wolves was killed by hunting and trapping in 2012 based on an estimated population of 3,000 wolves when the population was last surveyed in 2007-2008. This significant destruction does not account for the impacts of disease and illness among wolves that will also negatively impact this population.
- Persecutory attitudes and behaviors that drove the gray wolf to the brink of extinction continue today. The DNR has not released information to the public about the sources of wolf death that continue to threaten the population including poaching, illness and car collision.
- The wolf keeps our deer and other wildlife populations in balance so our north woods has a diverse ecology that attracts tourism to our state, including hunting and fishing. Ecotourism is a sustainable \$531 million industry in Minnesota supporting nearly 13,000 jobs.¹⁰²

100. The Department responded to those concerns by stating the Gray Wolf is neither extremely uncommon nor has unique or highly specific habitat requirements in

¹⁰⁰ Testimony of Collette Adkins Gaese Public Rules Hearing (February 7, 2013, at 55).

¹⁰¹ Testimony of Dr. Maureen Hackett, Public Rules Hearing, (January 29, 2013, at 51-57).

¹⁰² See e.g., e-mail from Martha Wavrin, (February 14, 2013).

Minnesota. The wolf's designation was reclassified in 1996 from threatened to "of special concern" and the DNR now believes it is appropriate to remove any designation from the species. The Department asserts no information presented by the commentators refutes this conclusion.

101. The Department also acknowledged the hundreds of passionate statements received in opposition to hunting wolves. The Department noted that neither the designation of the wolf as a species of special concern nor the removal of that designation would have an effect on the DNR's decision of whether to allow hunting of this species. The Department contends, based on corroborating information on population size and trends, that Minnesota's wolf population far exceeds the "extremely uncommon" definition of a species of special concern.¹⁰³

102. The Administrative Law Judge concludes a rational person could reach the position taken by the Department and that its choices are sufficiently grounded in the record.

The Moose

103. The Department proposed to classify the moose as a species of special concern. It maintains Minnesota's northwest moose population represents a significant portion of its range in the state and has experienced a dramatic decline in the past decade. The state's northeastern moose population has not shown as rapid a decline, but is very likely to be dramatically impacted by rising temperatures resulting from climate change. The Department believes this will likely lead to a marked decline in this population within the foreseeable future. Based on those observations and concerns about the moose population, the Department concluded that it was needed and reasonable to designate the moose as a species of special concern.¹⁰⁴

104. Comments were received arguing the Department did not go far enough in its protection of the moose and that the moose should be listed as threatened or endangered.

105. Thomas Casey was representative of those arguing that the moose should be listed as threatened or endangered.¹⁰⁵ He points out when the DNR drafted the SONAR, the moose population was estimated to be 4,230 and based on that estimate the DNR recommended the moose be listed as "of special concern." Mr. Casey argues

¹⁰³ Department's Initial Post-Hearing Response at 5.

¹⁰⁴ Ex. 3 at 21 (SONAR).

¹⁰⁵ Letter from Thomas E. Casey (February 8, 2013). See *also*, e-mail from Rick Olson (January 14, 2013); e-mail from Sharon Gunkel (January 29, 2013); e-mail from JoAnn Hanson (January 16, 2013); e-mail from Nancy Christopher (January 27, 2013); e-mail from Barb Minar (February 10, 2013); letter from Marc Fink and Collette Adkins Giese from the Center for Biological Diversity (February 8, 2013); e-mail from Rachel Muller (undated); letter from Scott Milburn (February 21, 2013); e-mail from Barbara Davidson (February 18, 2013); letter from Suzanne Rohlfing (February 26, 2013); Testimony of Lisa Boulay, Public Rule Hearing (February 5, 2013); Testimony Robert Humphries, Public Rules Hearing (February 7, 2013); letter from Robin Johnson (February 22, 2013).

the population estimate used by the DNR in the SONAR is outdated. He states that since the 2012 estimate the moose population has declined by approximately 35 percent. Based on a January, 2013 aerial survey, the DNR estimated the moose population to be 2,760.¹⁰⁶ Finally, Mr. Casey points out that the Minnesota DNR was quoted in a front-page article in the *Minneapolis Star Tribune* as stating “State wildlife officials say that, at the current rate of decline, moose could be gone from Minnesota in a matter of years.”¹⁰⁷

106. The Department responded that designation as threatened or endangered reflects a species’ foreseeable or imminent risk of extinction. The Department contends evidence does not point to the foreseeable or imminent risk of extinction in Minnesota. For those reasons the Department does not believe the moose meets the statutory definition of threatened or endangered.¹⁰⁸

107. The Administrative Law Judge concludes a rational person could reach the position taken by the Department and that its choices are sufficiently grounded in the record.

The Bald Eagle

108. The Bald Eagle is currently listed as a species of special concern. The Department proposes to remove the Bald Eagle from the List.¹⁰⁹

109. The Department noted that active Bald Eagle nests have been steadily increasing since 1973. The Department cited a survey conducted in 2005 which documented a 28% increase in the number of nesting Bald Eagles across Minnesota. The 2005 survey also demonstrated the range of Bald Eagles is increasing. Bald Eagle nests were found in 10 counties where none had existed in 2000. The Department also found evidence that Bald Eagles are relatively tolerant of human disturbance allowing them to nest successfully in areas with higher levels of human activity. Based on the continued population increases, range expansion, and evidence of adaptation to human disturbance the Department concluded it was reasonable to remove the Bald Eagle from special concern status.¹¹⁰

110. Audubon Minnesota agreed with the Department’s proposed change for the Bald Eagle. “Audubon believes that the continued increase in Bald Eagle numbers in Minnesota, and the special protection afforded this bird by the Federal Bald and Golden Eagle Protection Act warrant its removal from the Special Concern list.”¹¹¹

¹⁰⁶ Letter from Thomas E. Casey (February 8, 2013).

¹⁰⁷ Casey February 8, 2013, letter at Ex. 2 pp 1 and 7.

¹⁰⁸ Department’s Initial Post-Hearing Response at 5.

¹⁰⁹ Ex. 3 at 37 (SONAR).

¹¹⁰ *Id.*

¹¹¹ Letter from Mark Martell at 3 (February 10, 2013).

111. There were, however, several stakeholders who spoke out against de-listing the Bald Eagle. They argue the development of wind farms are a threat to the Bald Eagle and other Raptors. They maintain, at this point, we do not know the effect of wind farms on the Bald Eagle. They also point out that the Bald Eagle is an important American symbol. De-listing the Bald Eagle will diminish the symbol.¹¹²

112. The Department stands by its determination that the Bald Eagle no longer meets the definition of a species of special concern. The Department argues the commentators provided no information to the contrary.¹¹³

113. The Administrative Law Judge concludes a rational person could reach the position taken by the Department and that its choices are sufficiently grounded in the record.

Snapping Turtle

114. The Department proposed to remove the Snapping Turtle from the list of special concern species.¹¹⁴

115. The Snapping Turtle was listed as a species of special concern in 1984. The driving force in that listing was the effects of commercial harvest on the Snapping Turtle population. Updates to Minnesota's commercial turtle harvesting rules were made and implemented in 1984. The DNR created a database in 2003 to monitor the Snapping Turtle population and the harvest. As a result of the restriction imposed on the Snapping Turtle harvest the Department believes the listing of the Snapping Turtle as a species of special concern is no longer warranted.

116. Several commentators believe the Snapping Turtle should remain as a species of special concern. Despite the Department's position, the commentators have serious concerns about the harvest. In addition, they assert there is a common practice of certain members of the public to intentionally run over Snapping Turtles with their cars.¹¹⁵

¹¹² Testimony of Rochelle Nygaard, Public Rules Hearing (January 9, 2013); Testimony of Mary Brickzin-Gale, Public Rules Hearing (January 29, 2013); Testimony of Carol Overland, Public Rules Hearing (January 29, 2013); Testimony of Suzanne Rohlfing, Public Rules Hearing (January 29, 2013); Testimony of Erin Logan, Public Rules Hearing (January 9, 2013); Testimony of Lisa Boulay, Public Rule Hearing (February 5, 2013); Testimony of Jean Skinway Lawrence, Public Rules Hearing (February 5, 2013); Testimony of Christy Bailly, Public Rules Hearing (February 7, 2013). See, Letter from Suzanne Rohlfing (February 26, 2013); Letter from Kris Davidson (February 18, 2013).

¹¹³ Department's Initial Post-Hearing Response at 8, Department's Post-Hearing Rebuttal at 3.

¹¹⁴ Ex. 3 at 45 (SONAR).

¹¹⁵ Testimony Michael Pappas, Public Rules Hearing (January 29, 2013). See, e-mail from Nancy Christopher (January 27, 2013), e-mail Barb Minor (February 10, 2013).

117. The Department stands by its determination that the Snapping Turtle no longer meets the definition of a species of special concern. The Department argues the commentators provided no information to the contrary.¹¹⁶

118. The Administrative Law Judge concludes a rational person could reach the position taken by the Department and that its choices are sufficiently grounded in the record.

General Challenges to the Proposed Rule

119. Several commentators argued the Department failed to make an “affirmative presentation of facts” as required by Minnesota law to establish the reasonableness of the proposed rule.¹¹⁷

120. The Minnesota Timber Producers Association (MTPA) and the Minnesota Forest Industries (MFI) were representative of these claims. They objected to the classification of 22 different species, including the Northern Goshawk, on the grounds the Department failed to make an “affirmative presentation of facts” to establish the need and reasonableness of the proposed rule and that, in many cases, the Department relied on incorrect data.¹¹⁸

121. The MTPA observed that the Department has been working on the proposed changes to the List for 14 years. They note the result effort is a description of “less than one page per species that is proposed for new or changed status under the rule.”¹¹⁹

122. Both the MTPA and MFI argue the Department presented no specific data on populations of the species or population trends. They maintain that is a failure to make “an affirmative presentation of facts” as required by the statute. The MTPA and MFI also argue the Department relied on incorrect data. For example the SONAR, discussing the Northern Goshawk states “... a recent study found an average net loss of 26% of upland mature/old forest habitat within eight Northern Goshawk territories between 1996 and 2006.”¹²⁰ MFI claims the opposite is true, “Minnesota’s forest lands are getting older at a rapid pace.”¹²¹

123. The Department stands by its presentation of facts. And, while the Department concedes there has been an increase in “upland mature/old forest” in terms

¹¹⁶ Department’s Initial Post-Hearing Response at 9, Department’s Post-Hearing Rebuttal at 4.

¹¹⁷ See, Minn. Stat. § 14.14, subd. 2a.

¹¹⁸ Letter from Wayne E. Bryant (February 25, 2013), Letter from Tim O’Hara (February 25, 2013). See also, Testimony Jack Wallingford, Public Rules Hearing (February 5, 2013); Testimony Quintin Legler, Public Rules Hearing (February 5, 2013); Testimony Gary Erickson, Public Rules Hearing (February 6, 2013); Testimony Gerald Sayers, Public Rules Hearing (February 6, 2013).

¹¹⁹ Letter from Wayne E. Bryant (February 25, 2013, at 1).

¹²⁰ Ex. 3 at 31 (SONAR).

¹²¹ Letter from Tim O’Hara (February 25, 2013, at 3).

of total acreage, it is a fragmented spatial configuration that is spread over a large area. For example, the Goshawk has a “highly specific” preferred habitat. The Department asserts the fragmented spatial configuration found in mature/old growth forest habitat is not ideal for Goshawk reproduction, and therefore of special concern designation is justified. The Department maintains none of the information presented by the MTPA, MFI or other commentators refutes its determinations.¹²²

124. The Administrative Law Judge concludes a rational person could reach the position taken by the Department and that its choices are sufficiently grounded in the record.

Department Modifications

125. Based on comments received from several stakeholders the Department intends to make the following changes to the rule as approved by the Revisor’s Office on November 16, 2012:

- The DNR will withdraw the proposal to reclassify the Henslow’s Sparrow (*Ammodramus henslowii*) from endangered to threatened. A commentator provided significant new information regarding very recent trends in loss of the species habitat, which increases the likelihood that the species may become extinct in the state in the foreseeable future.
- The DNR will withdraw the proposal to designate Plains Emerald Dragonfly (*Somatochlora ensigera*) as a species of special concern. A commentator provided significant new information regarding the known distribution of this species in the state, and the DNR believes that this species no longer meets the statutory definition of special concern.
- Replace the following names of species (without a change in status) to reflect changes in taxonomy or nomenclature:
 - o replace “*Cryptotis parva*, least shrew” with “*Cryptotis parva*, North American least shrew”
 - o replace “*Myotis lucifugus*, little brown bat” with “*Myotis lucifugus*, little brown myotis”
 - o replace “*Perimyotis subflavus*, eastern pipistrelle” with “*Perimyotis subflavus*, tri-colored bat”

¹²² Department’s Initial Post-Hearing Response at 4, 6 and 7; Department’s Post-Hearing Rebuttal at 1.

- replace “*Phenacomys ungava*, heather vole” with “*Phenaconys ungava*, eastern heather vole”
- replace “*Sorex fumeus*, smokey shrew” with “*Sorex fumeus*, smoky shrew”
- replace “*Spermophilus richardsonii*, Richardson’s ground squirrel” with “*Urocitellus richardsonii*, Richardson’s ground squirrel”
- replace “*Ammodramus nelsoni*, Nelson’s sharp-tailed sparrow” with “*Ammodramus nelsoni*, Nelson’s sparrow”
- replace “*Acris crepitans*, northern cricket frog” with “*Acris blanchardi*, Blanchard’s cricket frog”
- replace “*Coluber constrictor*, racer” with “*Coluber constrictor*, North American racer”
- replace “*Pantherophis obsoletus*, ratsnake” with “*Pantherophis obsoletus*, western ratsnake”
- replace “*Plestiodon fasciatus*, five-lined skink” with “*Plestiodon fasciatus*, common five-lined skink”
- replace “*Heterodon nasicus*, western hognose snake” with “*Heterodon nasicus*, plains hog-nosed snake”
- replace “*Cicindela lepida*, little white tiger beetle” with “*Cicindela lepida*, ghost tiger beetle”
- replace “*Dodecatheon meadia* var. *meadia*, prairie shooting star” with “*Dodecatheon meadia*, prairie shooting star”
- replace “*Polemonium occidentale*, western Jacob’s ladder” with “*Polemonium occidentale* ssp. *lacustre*, western Jacob’s ladder.”¹²³

126. The Department asserts the preceding changes are not substantial because they:

¹²³ Department’s Post-Hearing Rebuttal at 7.

- (a) Do not affect classes of persons who could not have reasonable been expected to comment on the proposed rule as originally noticed;
- (b) Do not introduce significant new subject matter which a reasonable person, on the basis of the proposed rule as originally noticed, would not have anticipated would occur during the rulemaking process; and
- (c) Do not make a major substantive change that was not raised by the proposed rule as originally noticed in such a way as to invite reaction.¹²⁴

127. The Department's action revising the text is needed and reasonable and would not be a substantial change from the rule as originally proposed.

Recommended Determination of the Administrative Law Judge regarding the Proposed Rule

128. It is inevitable that there will be disagreement between people about the issues of conservation, the environment and how those relate to the designation of endangered, threatened or of special concern species. Several speakers spoke eloquently about the religious and spiritual connection the Gray Wolf, Bald Eagle and Snapping Turtle have with the Anishinaabe clan. It is apparent that reasonable minds may differ when applying the statutory stands to individual species. However, as noted above, the Department is legally entitled to make choices between possible approaches as long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy is "best" or to substitute his judgment for that of the Department, for that would invade the policy making discretion of the Department. The question is whether the choice made by the Department is one that a rational person could have made.¹²⁵

129. The Administrative Law Judge concludes the Department has shown that there is a rational basis for the proposed changes to Minnesota's List of Endangered, Threatened and Special Concern Species. In compliance with Minnesota Law the Department considered the advice of members of the public, businesses, organizations and other governmental agencies. As described in the SONAR the Department engaged in an extensive review process that lasted several years. The process afforded significant opportunities for input from members of the public, organizations, businesses and others. The Department also sought out experts for species in areas where the Department lacked expertise.

130. The Department's SONAR and post-hearing submission provide an adequate explanation of the need for and reasonableness of the proposed rule, and the

¹²⁴ *Id.* at 8.

¹²⁵ *Federal Sec. Adm'r v. Quaker Oat Co.*, 318 U.S. 218, 233 (1943).

rule falls within the broad authority the legislature has given to the Department to revise the List. The Administrative Law Judge concludes that, in accordance with applicable case law,¹²⁶ the Department has provided ample explanation of the facts on which it is relying and how those facts connect rationally with the approach it has taken in making changes to the List. Specifically, as to the Gray Wolf, the DNR's wolf management plan of 2001 determined that a minimum population of 1,600 wolves are necessary to ensure long-term survival. A reasonable person could conclude that, even though no census of the wolf had been taken since 2008 and taking into account the hunt of 2012, the current wolf population in Minnesota exceeds 1,600. Could others come to a different conclusion? Most certainly, but again, an Administrative Law Judge may not substitute his judgment for that of the Department, if the Department's choice was reasonable.

131. Accordingly, the Administrative Law Judge finds that the Department has demonstrated that the proposed amendments to Minnesota's List of Endangered, threatened and Special Concern Species are needed and reasonable, and there are no other problems that preclude their adoption and no defect are found in the rule as proposed.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Natural Resources gave notice to interested persons in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Administrative Law Judge concludes that the Department has fulfilled its additional notice requirements.
4. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).
5. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness (SONAR) complied with Minn. R. 1400.2080, subp. 5.
6. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.
7. The modification to the proposed rules suggested by the Department after publication of the proposed rules in the *State Register* are not substantially different

¹²⁶ *Manufactured Hous. Inst. V. Pettersen*, 347 N.W.2d 238, 244 (1984).

from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

8. As part of the public comment process, a number of stakeholders urged the Department to adopt other revisions to the rule. In each instance, the Department's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: April 16, 2013

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

Reported: 5 Transcripts.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.