

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATERS

IN THE MATTER OF PROPOSED ADOPTION OF
RULES RELATING TO THE
PUBLIC WATERS WORK PERMIT PROGRAM

STATEMENT OF NEED AND REASONABLENESS

MAY 14, 2002

I. INTRODUCTION

Purpose

This rule is being converted from exempt rule to permanent rules as required by Laws of 2000, Chapter 382, Section 20. Without new permanent rules being adopted, the current exempt rules expire on July 30, 2002, and rule language will revert back to the 1983 permanent version of the rules. This proposed permanent rule also includes changes proposed since adoption of the previously adopted exempt rule.

In 2000 and again in 2001, the legislature made a number of significant changes to the public water and wetland regulation statutes within the state. Because of these changes, both the Minnesota Department of Natural Resources (DNR) and the Minnesota Board of Water and Soil Resources (BWSR) are required to revise existing rules and to adopt new rules concerning the regulation of these areas within the state.

History

The primary purpose of the public waters work permit rules is to balance the right of riparian landowners seeking access and use of these waters with the rights of the public to conserve and use the water resources of the state in the best interests of its people.

The initial version of the public waters work permit rules was adopted in 1978, and was based on existing procedures developed by the DNR since the inception of the Public Waters Work Permit Program in 1937. The rules were amended in 1983, due to concerns raised during implementation of the Public Waters Inventory starting in 1979.

In 1998, legislation was proposed to reclassify all public water wetlands identified on the DNR Public Water Inventory as wetlands and to make these areas subject to the provisions of the Wetland Conservation Act. This initial proposal was amended and resulted in passage of language contained in Laws of Minnesota 1998, Chapter 312, Section 7 that required:

“By March 1, 1999, the commissioner of natural resources, in conjunction with the executive director of the board of water and soil resources, shall submit a report to the house and senate environment and natural resources committees regarding the simplification of wetland law by consolidating public waters wetland laws with the wetlands conservation act. The report shall include a discussion of the problems and benefits of a consolidation.”

This report was submitted and a bill addressing the relationship of the Public Waters Work Permit Program and the Wetland Conservation Act was passed in the 1999 session by the Senate, but the House did not take final action. After the 1999 session, the DNR and BWSR met with affected interest groups to seek additional areas of agreement upon which legislation could be based. The 2000 legislative session addressed this with the passage of Laws of 2000, Chapter 382.

The 2000 legislation made several changes to Public Waters Work Permit Program implemented by the DNR, and the Wetland Conservation Act implemented by local units of government with oversight from BWSR. The legislation included language authorizing both the Department and the Board to adopt rules exempt from the rulemaking provisions of *Minnesota Statutes*, chapter 14, except that *Minnesota Statutes*, section 14.386, applies. The proposed rules were submitted to the members of the senate and house environment and natural resource and agriculture policy committees at least 30 days prior to being

published in the State Register. The amended rules were published in the State Register on July 31, 2000 and are effective for two years from the date of publication unless they are superseded by permanent rules.

In 2001, additional legislation was passed as Laws of 2001, Chapter 146 which addressed additional areas of wetland law consolidation not addressed in the 2000 legislation. Section 5 of this Law added an addition to the types of public waters wetlands that could be reclassified as a public waters. Section 9 of this Law added language that allows the Department to waive public waters work permit authority to local units of government for public transportation projects impacting wetland areas of public waters.

Scope

The proposed amendments to the DNR Public Waters Work Permit rules can be divided into two areas of modifications. The first area contains modifications in rule language due to legislative amendments. The second area of modifications includes revisions being proposed by the Department using the rule making authority found in *Minnesota Statutes*, section 103G.315, subdivision 15.

Within the first area of modifications, the following proposals are being made to make permanent the exempt rules adopted by the Department pursuant to Minnesota Laws of 2000, Chapter 382 that became effective on July 31, 2000 and that expire on July 30, 2002. These modifications were published in the State Register, Volume 25, Number 5, on Monday, July 31, 2000, and are located on pages 143-152. These proposals include:

1. amendments due to the repeal of *Minnesota Statutes*, chapter 105, and recodification in *Minnesota Statutes*, chapter 103G that occurred with Laws of 1990, Chapter 391;
2. replacing the use of protected waters terminology with the use of public waters and public waters wetlands terminology to distinguish these waters from wetlands subject to provision of the Wetland Conservation Act as passed in Laws of 1991, Chapter 354;
3. clarifying terms to make it clear that activities subject to existing DNR aquatic plant management, water aeration system, watercraft, and water appropriation permits that are regulated by the DNR under other statutes and rules do not require separate and additional public waters work permits;
4. amendments to reflect Laws of 1997, Chapter 246 granting the Department authority to regulate boathouses;
5. definition clarifications, including modifying the definition of a marina to make it a commercial facility; clarifying the use of ordinary high water terminology to make it consistent with Department practices; and adding new definitions on permits, projects, public water wetlands, local government unit and projects that are consistent with the definitions used in the Wetland Conservation Act rules;
6. amendments to reflect Laws of 1996, Chapter 407 granting the Department additional authority to regulate permanent lake level controls;
7. amendments in public waters permit processing, including recognition of the general permit authority authorized by Laws of 1995, Chapter 218 and Laws of 1996, Chapter 443, language to implement the waiver of public waters wetland permit requirements

authorized by Laws of 2000, Chapter 382 and Laws of 2001, Chapter 146, and language to incorporate permit sequencing and replacement as authorized in section 103G.45, subdivision 7;

8. amendments changes in enforcement authority authorized by Laws of 2000, Chapter 382;
9. amendments in the permit review procedures authorized by Laws of 2000, Chapter 382 to establish new procedures for developing written agreements between the local government unit administering provisions of the Wetland Conservation Act and the commissioner. These agreements can be written where the local government unit waives the requirement for a wetland replacement plan, no-loss or exemption determination to the DNR for projects where a public waters work permit is also required and the commissioner includes the provisions of *Minnesota Statutes*, sections 103A.201, 103B.3355 and 103G.222 to 103G.2372 and the rules adopted to these same sections in the public waters work permit; and
10. amendments to implement language contained in Minnesota Laws of 2001, Chapter 146 that gives the commissioner the authority to waive the requirement for a public waters work permit for projects affecting wetland areas of public waters affected by a public transportation project to the local government unit administering the Wetland Conservation Act.

The other broad area of modifications includes proposals initiated within the Department under the authority found in *Minnesota Statutes*, section 103G.315, subdivision 15 to adopt rules. These proposals include language relating to:

1. the addition of provisions to address the sequencing concepts of impact avoidance, minimization and compensation comparable to language found in the Wetland Conservation Act program rules (Minnesota Rules, Chapter 8420.0520);
2. the addition of provisions to determine when compensation for a major change in the public waters resource is necessary;
3. the replacement of the term "protected vegetation" with a reference to the broader authority the commissioner currently has to regulate the taking of threatened or endangered species listed pursuant to *Minnesota Statutes*, section 84.0895 and Minnesota Rules, chapter 6134;
4. providing procedures that allow plans developed and adopted on a local basis that are approved by the commissioner to form the basis for public water work permit decisions taking place within the area identified in the approved plan;
5. clarifying that docks under eight feet in width that are installed in compliance with city or county zoning ordinances do not require additional DNR permit authorization, and to clarify breakwater and mooring facility development criteria; and
6. the addition of a new section to the rules to address natural resource restoration projects and by adding new language to define the terms of ice ridge, local origin and native plants.

Notification to Persons and Classes of Persons Affected by the Proposed Rules

The proposed rule changes may affect landowners owning land abutting public waters or public water wetlands, state agencies, and local units of government and federal agencies required to obtain or willingly applying for a public waters work permit. Individuals or businesses, such as consultants, engineering firms, land surveyors, builders, and contractors, that provide goods or services to landowners, state agencies, local units of government and specific federal agencies may also be affected.

A request for comments was published in the State Register on June 25, 2001 (Volume 25, Number 25, pages 1973-1975). This notice described the specific areas of the proposed rule, the statutory authority for the proposed change, and the parties what could be affected by the proposed rule. The Department also provided additional notice to people who could be affected by the rule by sending the request for comments and additional information to a number of development and environmental organizations, individuals and legislators. The Department also published a statewide news release that also described major parts of the proposed rule change with instructions on how to provide comments. The DNR web site forum was used to take comments directly related to the rule.

In addition to the request for comments period, a series of meetings was held with the stakeholder interest groups involved with the development of the legislation that was enacted in 2000 and 2001. The first meeting was held on August 22, 2001 at the Minnesota Department of Transportation Arden Hills Training Facility in conjunction with BWSR. Thirty-one individuals attended that stakeholders meeting, including seven from DNR and BWSR, with twenty-one organizations represented.

Organizations that attended the first stakeholders meeting included:

- Allete
- Audubon Minnesota
- Blue Earth County
- Builders Association of Minnesota
- Ducks Unlimited
- Farm Bureau
- League of Minnesota Cities
- Metropolitan Council
- Minnesota Association of Watershed Districts
- Minnesota Center for Environmental Advocacy
- Minnesota Department of Transportation
- Minnesota Pollution Control Agency
- Minnesota Power
- Minnesota State Historic Preservation Office
- Rinke-Noonan
- St. Louis County
- Short, Elliot, Hendrickson
- Senate Republican Caucus
- US Steel, Minntac
- Wetland Delineators Association
- WSB and Associates

On September 20, 2001, the Department made a presentation on the proposed rules to the Agriculture and Transportation committees of the Association of Minnesota Counties.

A second external stakeholders meeting was held on October 10, 2001 at the Shoreview Community Center to present interested individuals and organizations with draft rule language from both the DNR and BWSR on their respective program rule drafts. Thirty-seven individuals attended that stakeholders meeting, including fourteen from DNR and BWSR, with twenty-three organizations represented. Organizations that attended the second stakeholders meeting included:

- Anoka SWCD
- Association of Minnesota Counties
- Audubon
- Builders Association of Minnesota
- Blue Earth County
- Campbell Knutson, P.A.
- Coon Creek Watershed District
- Farm Bureau
- Hennepin Conservation District
- Minnesota Association of County Auditors
- Minnesota Association of Soil and Water Conservation Districts
- Minnesota Association of Watershed Districts
- Minnesota Board of Water and Soil Resources
- Minnesota Center for Environmental Advocacy
- Minnesota Department of Natural Resources
- Minnesota Legislature, House Environment Committee
- Minnesota Rural County Caucus
- Minnesota State Historic Preservation Office
- Rinke-Noonan
- Short, Elliot Hendrickson
- St. Louis County
- US Steel
- Wright SWCD

A third stakeholders meeting was held on January 4, 2002 at the Shoreview Community Center to present interested individuals and organizations with "near final" draft rule language from both the DNR and BWSR on their respective program rule drafts. Thirty-six individuals attended that stakeholders meeting, including nine from DNR and BWSR, with twenty-three organizations represented. All stakeholder meetings were held in conjunction with BWSR as both agencies are addressing rule changes affecting water and wetland program management rules. Organizations that attended the third stakeholders meeting included:

- Association of Minnesota Counties
- Audubon
- Builders Association of Minnesota
- Blue Earth County
- Bonestroo Engineering
- Ducks Unlimited
- Kjollhaug Environmental
- Minnesota Association of County Auditors
- Minnesota Association of Watershed Districts
- Minnesota Board of Water and Soil Resources
- Minnesota Center for Environmental Advocacy
- Minnesota Department of Agriculture

Minnesota Department of Natural Resources
Minnesota Department of Transportation
Minnesota Legislature, House Environment Committee
Minnesota Pollution Control Agency
Minnesota Power and Light Company
Peterson Environmental Consulting Inc.
Plymouth, City of
Rinke-Noonan
St. Louis County
Todd County
US Steel

In conjunction with BWSR, the DNR participated in a series of public information meetings designed to acquaint local government, soil and water conservation district, watershed district, and agency staff of the proposed BWSR Wetland Conservation Act and DNR Public Waters Work Permit rule changes. These meetings were held as noted:

<u>Location</u>	<u>Date</u>
St. Cloud	February 12, 2002
Bemidji	February 13, 2002
Duluth	February 14, 2002
Bloomington	February 26, 2002
Rochester	February 27, 2002
Morton	February 28, 2002

In addition to these meetings, the public notice published in the State Register, the press releases sent out to newspapers and the DNR website generated additional comments, and requests for rule drafts when released by the DNR. A total of 25 comments were received through these notices.

Notice Plan for Dual Notice

The Department is developing a dual notice for notifying the public of the Department's intent to adopt rules. The dual notice allows for the Department to proceed to adoption without the requirement for holding a public hearing, if less than 25 requests for hearing are received, or for adopting the rules using the hearing process, should more than 25 requests for a hearing be received. This dual notice will be mailed to those parties on the Department's rulemaking notice list, to the state legislators as required by *Minnesota Statutes*, Section 14.116A, Subdivision 1a, and to the list of people who have requested that they receive notice, and will be emailed to the list of those attending the stakeholder meetings that the Department held in conjunction with staff from BWSR, and to the list of people who have requested that they receive email notice. The notice will also be published in the State Register.

A press release will be sent to all organizations on the mailing list used by the Department's Information, Education and Licensing Bureau to reach newspapers and publications. A notice will also be posted on the Department's web site at www.dnr.state.mn.us that will also provide information about the proposed rules.

Statutory Authority

The statutory authority for the proposed rules is listed as follows:

Rules Part

6115.0150 - 6115.0280

Minnesota Statutes, section

103G.315, subdivision 15

Laws of Minnesota 2000, Chapter 382

II. REGULATORY ANALYSIS

Description of the Classes of Persons Affected by the Proposed Rules

The proposed rules may affect landowners owning land abutting public waters or public water wetlands, state agencies, local units of government, and federal agencies required to obtain or willingly applying for a public waters work permit. Individuals or businesses, such as consultants, engineering firms, land surveyors, builders, and contractors, that provide goods or services to landowners, state agencies, local units of government and specific federal agencies may also be affected.

Generally landowners bear the costs of the proposed rule changes, either through direct regulation by the Department or by local unit of government regulations that are supported by local tax dollars.

The benefits of the public waters work permit program accrue to the public and the riparian owners adjacent to public waters. Activities such as the proper sizing of bridges and culverts to address flooding concerns and navigation, the regulation of fill, excavation, and structures within public waters in a manner to protect the public and to continue to allow the public the use and enjoyment of the water surface for activities such as boating, fishing, and hunting are all subject to the public waters work permit program.

Probable Costs to the Agency or Other Agencies from the Proposed Rules

The proposed rules will result in costs to the Department to develop the rules, to conduct any public hearings that may result as part of the rule making process, and to conduct an increased number of contested case hearings that might be brought to the Department as part of future permit decision made by the Department actions that might be appealed. Department project development costs may increase to the extent that Department public waters work permit decisions made in the future will require the Department to provide additional mitigation for impacts allowed under permit to public waters and public water wetlands. This may directly affect the construction of public accesses, trails, parks and forest roads. It is expected that these changes in costs will be minimal when compared to the total project development costs.

Determination of Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rules

Existing statutory authority allows the Department to issue general permits to individuals, agencies or local units of government to address classes of activities having minor environmental impacts within public waters or public water wetlands. Some additional activity is contemplated in this area, but the room for a major expansion in this type of activity is limited.

Existing statutory authority also allows the Department to delegate to local units of government the permit authority now vested with the commissioner to issue or deny public water work permits for

activities taking place in public waters and public water wetlands. To date, no local unit of government has requested delegation. The reason for this lack of requests is thought due to the fact that no state funding is available to the local units of government to assume the program costs. Without a funding structure it is unlikely there will be requests for delegation of permit authority.

The Department continues to work with the U.S. Army Corps of Engineers through the use of a Memorandum of Agreement to reduce the costs to permit applicants having to secure a separate federal Clean Water Act Section 404 permit or Section 10 permit from the U.S. Army Corps of Engineers. The Memorandum of Agreement sets forth procedures where the Department and the Corps share copies of permit applications and decisions, and this is used as the basis for the Corps issuing their GP-01-MN which provides federal authorization for projects authorized by the Department. Exceptions in project scope are provided for in GP-01-MN that prohibit its application for projects that exceed three acres of impact, involve the use of the dam safety rules, or alter more than 500 feet of a natural watercourse by channelization, bank stabilization or diversion. The St. Paul District, Corps of Engineers indicates that these exceptions do not result in but a few additional individual permit applications to the Corps per year.

The final mechanisms available to the Department to address less costly alternative methods of permit program delivery are addressed in the proposed rule, namely, waiver of permit authority to local units of government following Wetland Conservation Act procedures, and the ability of interested local units of government to work with affected Department resource managers in the development of local plans, if approved by the commissioner, that will take the place of the standard public water work permit rules. This local plan process will be able to address unique water resource conditions or concerns that exist at the local level that are difficult if not impossible to address with a rule having statewide application.

Description of Alternative Methods Considered for Achieving the Purpose of the Proposed Rules

Existing statutory authority exists for local units of government to request delegation of the permit authority of the commissioner for public waters and public water wetlands within that local unit of government. To date, no local unit of government has directly requested this authority. The Department does not anticipate receiving requests in the future for delegation of permit authority as there is no funding available to local units of government to defray the costs of program assumption.

The Department has worked with a number of local governmental units and agencies in the development of state general permits to address projects having only minor impacts to public waters and public water wetlands. The primary focus of existing general permits that the Department has issued has been county highway department bridge and culvert projects, and shore and stream bank stabilization and erosion control projects.

Probable Costs of Complying with the Proposed Rules

The Department estimates that the direct costs of complying with the proposed rules in terms of permit fees should not increase. The indirect costs of complying with the proposed rules may vary according to project type and location. Adoption of sequencing standards utilized by the Wetland Conservation Act to first avoid the impact to the public water or wetland, then minimize the project impact when the project cannot totally avoid impacting the public water or public water wetland, and then replacing unavoidable impacts when it is determined that a major change to the public water or public water wetland is warranted will, in most instances, serve to reduce project costs within the public waters or public water wetlands area by reducing the size of the project, and may result in a reduction of the permit application cost to the applicant.

Assessment of Differences between the Proposed Rules and Existing Federal Regulations

The proposed rule reduces the differences between the existing Federal Clean Water Act, Section 404 Permit Program and the Minnesota Public Waters Work Permit Program by incorporation of common sequencing and mitigation language.

Regulatory, Licensure, or Other Charges in the Proposed Rules

The proposed rules do not involve any new regulatory, licensure or permit fees.

Proposed Rules Effect on Farming Operations

The proposed rule contains changes that update the citations to public drainage laws, and contains explanatory language that the public drainage authority must sponsor public ditch repairs exempt from the rules. This proposed change is consistent with past Department interpretation of this language. The other rule changes being proposed by the Department do not otherwise impact farming operations on existing fields and pastures.

Description of How the Agency Considered and Implemented the Policy to Adopt rules that Emphasize Superior Achievement in Meeting the Agency's Regulatory Objective and Maximum Flexibility for the Regulated Party and the Agency in Meeting these Goals

In developing the proposed rules, the agency sought to make the rules more consistent with the state rules adopted by the Board of Water and Soil Resources for use by local units of government that are implementing the Minnesota Wetland Conservation Act, and the federal rules adopted to implement the Clean Water Act, Section 404 Permit Program administered by the U.S. Army Corps of Engineers.

Because of the nature of the regulations (similar to a building code), and because the regulated parties are individual landowners and local units of government, the rules need to be understandable as applied to individual parcels of shorelines of lakes, streams and wetlands.

One area that has been included in the rules to address flexibility of regulations is proposed part 6115.0250, subpart 8, whereby locally developed plans and controls that are approved by the commissioner may be substituted for the existing statewide rule language.

III. RULE-BY-RULE ANALYSIS

This section discusses the changes proposed to the rules. It also sets forth the circumstances that created the need for the changes and why the proposed changes are reasonable solutions for meeting the need.

Parts 6115.0150 - 6115.0280

Within this part of Minnesota Rules, amendments have been made consistent with the concordance table prepared by the Legislative Revisor of Statutes Office to recognize the state statute citation changes enacted with passage of Laws of 1990, Chapter 391. Among these amendments were included the repeal of *Minnesota Statutes*, chapters 105, 106A, 110, and 112 and their recodification in *Minnesota Statutes*, chapters 103G, 103E, 103G, and 103D. See Laws of 1990, Chapter 391 for specific

details. The impact of these changes will not be noticed.

Parts 6115.0150 - 6115.0280

Within this part of Minnesota Rules, amendments are proposed to reflect the statutory definitions of public waters and public water wetlands within the rules by deleting the existing rule reference to protected waters and protected wetlands. During the time period the Department was conducting the Public Water Inventory, the protected terminology was preferred by the Department as a means to identify the waters subject to the Department's water permit program. With the passage of the Wetland Conservation Act in 1991, all water bodies were "protected", either by the Department or by the local unit of government implementing the Wetland Conservation Act. This change has led the Department back to use of the statutory definitions for identifying public waters and public water wetlands. The impact of these changes as noticed by landowners will be the ability to better distinguish the application of the public waters work permit program on public waters and public water wetlands from the application of the Wetland Conservation Act on wetlands that is administered by the local unit of government.

Parts 6115.0150 - 6115.0280

Within this part of Minnesota Rules, amendments are proposed to update the rules with language consistent with *Minnesota Rules: Drafting Manual with Styles and Forms*. These proposed changes have been suggested to the Department by the Office of the Revisor of Statutes.

Part 6115.0160 Scope

Within this part of Minnesota Rules, clarifications have been made to the language that exempts certain already regulated activities from the scope of the rules from part 6115.0150 to 6115.0280. These changes are reasonable in that activities that are otherwise regulated by the Department such as the aquatic plant management program (Minnesota Rules, parts 6280.0100 to 6280.1200), water aeration system permits (Minnesota Rules, parts 6116.0010 to 6116.0070), and water appropriation permits (Minnesota Rules, parts 6115.0600 to 6115.0810) will not require a separate public waters work permits if the activity is regulated and authorized by that program. Watercraft, buoys, and other structures that are regulated under *Minnesota Statutes*, section 86B.111, 86B.211, or 86B.401 and rules adopted thereunder (Minnesota Rules, parts 6110.0100 to 6110.4200) are also exempted from the scope of Minnesota Rules, parts 6115.0150 to 6115.0280.

The impact of these changes will mean that in some instances there will be a reduction in the number of permits a landowner would need to secure to conduct activities within public waters or public water wetlands. There will not be an increase in the number of permits required of landowners as a result of these changes.

Language is also being proposed to explain that public waters include public waterbasins, public watercourses, and public water wetlands, and that language found in *Minnesota Statutes*, section 103G.205 is added to make it clear that designation of these waters as public waters does not grant the public additional or great right of access to the waters, diminish the right of ownership or usage of the beds underlying the designated public waters, affect state law forbidding trespass on private lands, or require the commissioner to acquire access to the designated public waters under section 97A.141.

Part 6115.0170 Definitions

Subpart 3. Beds of public waters. Within this part of the rule, the definition is modified to

make the language consistent with the statutory definition of public waters found in *Minnesota Statutes*, section 103G.005, subdivision 15 and with the definition of “ordinary high water level” found in *Minnesota Statutes*, section 103G.005, subdivision 14.

Subpart 3a. Boat storage structure. Within this part of the rule, a new definition is being added to address non-floating structures within public waters identified that, before 1997, were identified as boathouses. These structures are used to store boats and do not fit the current definition of a boathouse that was specifically defined with the passage of Laws of 1997, Chapter 346. This definition is reasonable as it addresses the 1997 statute changes that granted the Department authority to regulate boathouses. The use of the term “boat storage structure” in part 6115.0210, subpart 3 prohibits the placement of these types of structures.

Subpart 3b. Boathouse. Within this part of the rule, a new definition is being added to address boathouses that can be allowed under the statutory authority granted to the Department in Laws of 1997, Chapter 247. This law defines the term “boathouse” as a floating structure that may be intended for habitation and has walls, a roof, and either an open well for boats or a floor from wall to wall. The legislation then authorizes the Department to specifically issue permits for boathouses when the boathouse is located in an area of historic boathouse use, the boathouse is approved by the local unit of government and the boathouse was in existence on public waters before January 1, 1997. The rules specifically address this in part 6115.0211, subpart 6a.

Subpart 7. Dock. Within this part of the rule, language is added to identify that docks are structures designed to provide access to moored watercraft or seaplanes or to provide access to deeper water for water-oriented recreational activities. This definition is reasonable as the purpose of a dock is to provide a means of gaining access for the use of the water surface.

Subpart 8. Drainage. Within this part of the rule, language is amended to reflect the change of terminology from “protected waterbasins” and “wetlands” to “public waters” and “public water wetlands”. This change is reasonable as it will enable landowners and the general public to better distinguish the application of public water work permit program from the application of the Wetland Conservation Act.

Subpart 9a. Ecology of the waters. Within this part of the rule, a new definition is being added to address when permits can be denied instead of using a reference to fish and wildlife habitat, navigation, water supply, and storm water retention. This language reflects the reference found in *Minnesota Statutes*, section 103G.245, subdivision 7 that specifies that “a public waters work permit may be issued only if the project will involve a minimum encroachment, change or damage to the environment, particularly the ecology of the waterway.”

The Department interprets the term “ecology of the waterway” to mean the natural aquatic environment, including the organisms within that environment, the physical characteristics of the environment and the organisms, and the interactions between and among the organisms and their surroundings. This proposal is reasonable when used in conjunction with the “sequencing” language proposed in part 6115.0240 that would require permit applicants to demonstrate that proposed activities would comply with the following principles in descending order of priority: avoidance of impacts; minimization of impacts; rectification of impacts, reduction of impacts through preservation and maintenance, and replacement of unavoidable impacts when a major change in public waters is authorized under a public waters work permit.

Subpart 9b. Energy exchanger. Within this part of the rules a new definition is being added to address structures used for exchanging the energy within the public waters for heating or cooling purposes.

Energy exchangers typically consist of a closed loop of tubes or coiled tubing laid on the bed of the public water through which fluid is pumped and the energy is exchanged in a heat pump or refrigeration unit located outside of public waters. These structures are addressed in part 6115.0210 and 6115.0211, subpart 6b.

Subpart 13. Floating structure. Within this part of the rule, the existing definition of floating structure is modified by deleting specific examples of floating structures, exempting boathouses, watercraft and seaplanes from the definition, and specifying that floating structures can be removed from public waters during the winter by either skidding the structure out of the water or by removing the structure with the use of hand tools. The proposed change in language is reasonable as these specific types of structures or objects are either defined separately, or are designed for movement over the surface of public waters.

Subpart 16a. Houseboat. Within this part of the rule, a new definition is being added to address houseboats that were identified in the statutory authority granted to the Department in Laws of 1997, Chapter 247 to regulate boathouses. A houseboat is a motorboat that has either a pontoon or a flat-bottomed hull configuration and a permanent enclosed superstructure that houses, at a minimum, built-in sleeping, cooking, and toilet facilities and is subject to licensing as a watercraft. This law distinguishes between the terms “boathouse” and “houseboat” and then authorizes the Department to specifically issue permits for boathouses when the boathouse is located in an area of historic boathouse use, the boathouse is approved by the local unit of government and the boathouse was in existence on public waters before January 1, 1997. These structures are addressed in part 6115.0211, subpart 6a.

Subpart 16b. Ice ridge. Within this part of the rule, a new definition is being added to address ice ridges as linear mounds of lakebed materials pushed up onto the lakeshore by the action of ice. Ice ridges are then addressed in the new section proposed on Restoration of Public Waters in part 6115.0215, subpart 4.

Subpart 18a. Local government unit. Within this part of the rule, a new definition is being added that references the definition used with the Wetland Conservation Act in part 8420.0110, subpart 30. This definition is used in part 6115.0250, subpart 5 when public waters work permit applications affecting public water wetlands are waived to the local unit of government responsible for implementation of the Wetland Conservation Act.

Subpart 18b. Local origin. Within this part of the rule, a new definition is being added to provide a location reference for plant materials being used for restoration of public waters. Local origin of plant materials is addressed in the new section proposed on Restoration of Public Waters in part 6115.0215, subpart 4.

Subpart 20. Marina. Within this part of the rule, the definition of “marina” is being changed from an inland or offshore structure for the concentrated mooring of five or more watercraft to a mooring facility for seven or more watercraft or seaplanes. The change in numbers of watercraft and seaplanes from five to seven reasonable because it brings the public waters rule language into conformance with the rules previously adopted to administer the shoreland management program. Minnesota Rule, part 6120.3300, subpart 2., E. (1) specifically addresses the use of lots intended for controlled accesses to public waters or recreation areas for use by owners of nonriparian lots within subdivisions. An additional change is also being proposed to define a marina as a mooring facility that provides for commercial ancillary services. This change to focus on the commercial nature of a marina will allow non-commercial structures authorized under state-approved shoreland controls to be installed without requiring a separate public waters work permit.

Subpart 23a. Mooring facility. Within this part of the rule, a new definition is being added to define a mooring facility as a concentrated area intended for the mooring or containment of seven or more watercraft or seaplanes by docks, mooring buoys or other means. This definition is reasonable because the focus is the area where the concentration of watercraft or seaplanes is located and where general public use of the water surface area is restricted or limited due to the occupation of the area by the mooring facility.

Subpart 23b. Native plants. Within this part of the rule, a new definition is being added to refer to plant species being present in Minnesota prior to European settlement for purposes of restoration projects. Native plants are addressed in the new section proposed on Restoration of Public Waters in part 6115.0215, subpart 4.

Subpart 24. Offshore. Within this part of the rule, the definition is amended to make the language consistent with the definition of "ordinary high water level" found in *Minnesota Statutes*, section 103G.005, subpart 14.

Subpart 25. Ordinary High Water Level. Within this part of the rule, the definition is being amended from "ordinary high water mark" to "ordinary high water level". This change in terminology is being made to make it consistent with the definition found in *Minnesota Statutes*, section 103G.005, subdivision 14.

Subpart 26. Permanent dock. Within this part of the rule, language is being repealed making references to permanent docks. It is reasonable that differences are being deleted in the proposed rules that distinguish between seasonal and permanent docks as it has been found that there are not differential impacts to public waters as a result of dock type.

Subpart 26a. Permit. Within this part of the rule, a definition is being added to make reference to the statutory authority for public waters work permits as required under *Minnesota Statutes*, section 103G.245.

Subpart 30a. Project. Within this part of the rule, a new definition is being added to make reference to the statutory definition of "project" as found in *Minnesota Statutes*, section 103G.005, subpart 14d, and adds language found in the Wetland Conservation Act rules definition for "projects" in part 8420.0110, subpart 35 so that the definitions are synonymous for both the public waters work permit program and the Wetland Conservation Act program.

Subpart 31. Public waters or public water. Within this part of the rule, language is revised to mean those waters of the state identified under *Minnesota Statutes*, section 103G.005, subdivision 15 or 15a, and the public waters inventory identified in *Minnesota Statutes*, section 103G.201. This clarification is reasonable since it reduces potential confusion over terminology.

Subpart 31a. Public waterbasins. Within this part of the rule, a new definition is being added to make reference to the statutory definition of public waterbasins identified under *Minnesota Statutes*, section 103G.005, subdivision 15, subitems (1) to (8) or section 103G.201 as shown on the public water inventory maps. Additional language is included to include as public waterbasins those public water wetlands reclassified as public waters pursuant to the procedures included in section 103G.201 that were included in the Laws of 2000, Chapter 382, section 3 and Law of 2001, Chapter 146, section 5. This definition is reasonable since it reduces potential confusion over terminology.

Subpart 31b. Public watercourses. Within this part of the rule, a new definition is being added to make reference to the statutory definition of public watercourses found in *Minnesota Statutes*, section

103G.005, subdivision 15, subitems (9) and (10), or section 103G.201 as shown on the public water inventory maps. This definition is reasonable since it reduces potential confusion over terminology.

Subpart 31c. Public waters wetlands. Within this part of the rule, a new definition is being added to make reference to the statutory definition of public water wetlands found in *Minnesota Statutes*, section 103G.005, subdivision 15a, or section 103G.201 as shown on the public water inventory maps. This definition is reasonable since it reduces potential confusion over terminology.

Subpart 31d. Public waters inventory or protected waters inventory. Within this part of the rule, a new definition is being added to make reference to the map prepared by the commissioner that is on file with the auditor of the county under *Minnesota Statutes*, section 103G.201. The map identifies the public waterbasins, public watercourses, and public water wetlands subject to the provisions of the public waters work permit program identified in *Minnesota Statutes*, section 103G.245. The public water inventory maps was prepared on a county basis and includes a map and a list of public waters. The inventory documents are available for viewing at the county soil and water conservation district office, watershed district office if present, and DNR field offices. Copies can usually be found for viewing at the county zoning office, county highway department office, and in the planning and zoning office of larger cities. Copies of these maps can be purchased from Minnesota's Bookstore, 117 University Avenue, St. Paul, MN 55155 1-800-657-3757 or can be viewed on the Internet by accessing <http://www.dnr.state.mn.us/waters/pwi/index.html> and locating the county or counties of interest. This definition is reasonable since it reduces potential confusion over terminology.

Subpart 31e. Public waters work permit. Within this part of the rule, a new definition is being added to make reference to the permit issued by the commissioner under *Minnesota Statutes*, section 103G.2245. The issuance or denial of this permit is governed by the standards found in these rules. This definition is reasonable since it reduces potential confusion over terminology.

Subpart 36. Seasonal dock. Within this part of the rule, language is being repealed that makes references to seasonal docks. It is reasonable that differences are being deleted in the proposed rules that distinguish between seasonal and permanent docks as it has been found that there are not differential impacts to public waters as a result of dock type.

Subpart 36a. Shoreline zone. Within this part of the rule, new language is being added to identify the shoreline zone of a public water as an area immediately waterward to the ordinary high water level that may include the littoral area of a water body. The shoreline zone of a public water is further addressed in the section 6115.0215 of these rules being proposed for restoration of public waters.

Subpart 37. Structure. Within this part of the rule, the existing reference to structures permanently attached to the bed or bank of public waters is being proposed for deletion. This change is consistent with the changes being proposed in the definition of temporary structures, and in deleting the references to temporary and permanent docks. Also proposed within this part of the rule are additional language references to docks, bridges, and culverts over or under the bed of public waters as examples of structures. This change is reasonable as it will clarify rule terminology and improve consistency of the rule language pertaining to structures, which is found in sections 6115.0210 and 6115.0211.

Subpart 40. Temporary structure. Within this part of the rule, changes are being proposed to better define examples of temporary structures as docks, floating structures, watercraft lifts, watercraft canopies or other structures that can be removed by skidding intact, or by disassembly by hand tools from public waters. This change is reasonable as it will clarify rule terminology and improve consistency of the rule language pertaining to structures, which is found in sections 6115.0210 and 6115.0211.

Subpart 42a. Watercraft canopy. Within this part of the rule, new language is being proposed to identify a watercraft canopy as a structure or device with a fabric covered roof and without walls or a floor that is designed to shelter watercraft that is placed on the bed of a public water, and is designed and constructed so that it may be removed from the lake or stream bed on a seasonal basis. All components such as supports and protective cover must be capable of removal by skidding intact or by disassembly with hand tools. This change is reasonable as it will clarify rule terminology and improve consistency of the rule language pertaining to structures, which is found in sections 6115.0210 and 6115.0211.

Subpart 42b. Watercraft lift. Within this part of the rule, new language is being proposed to identify watercraft lifts as devices without walls that are placed on the bed of public waters and that are designed to lift watercraft above the level of the public waters when not in use, and is designed and constructed to allow for the removal of the lift from public water on a seasonal basis. All components such as supports and protective cover must be capable of removal by skidding intact, or by disassembly by hand tools. A watercraft lift may be designed to include a fabric-covered roof. This change is reasonable as it will clarify rule terminology and improve consistency of the rule language pertaining to structures, which is found in sections 6115.0210 and 6115.0211.

6115.0190 Filling Into Public Waters

Subpart 3. Nonpermitted placement. Within part E of this subdivision language is being amended to reflect the change in the definition of “ordinary high water mark” to “ordinary high water level.”

Subpart 4. No permit required. New language is being inserted in item A. to promote consistency between part 6115.0190, subpart 3. A. and the Aquatic Plant Management Program by specifying that beach sand blankets installed without a permit must not cover emergent aquatic vegetation, unless authorized by an aquatic plant management permit. This proposed change is reasonable as part 6115.0190, subpart 3 prohibits filling to achieve vegetation control.

Part C. of this rule that addresses installation of riprap shore protection is being deleted here and then is being reinserted with comparable language in the proposed Natural Resource Restoration section of the rules, part 6115.0215, subpart 4. E.

Subpart 5. Permits required. Language is being revised in item A. to reflect the reference found in *Minnesota Statutes*, section 103G.245, subdivision 7 that specifies that a public waters work permit may be issued only if the project will involve a minimum encroachment, change or damage to the environment, particularly the ecology of the waterway, and deletes the current references to fish and wildlife habitat, navigation, water supply and storm water retention. This proposed change is reasonable, as the standard for issuance of a permit in item A. now will match the statutory language.

6115.0191 Specific Standards; Filling

Subpart 2. Riprap shore protection. This part of the rule is being deleted from this subpart and comparable language is being reinserted in the proposed Natural Resource Restoration section of the rules, part 6115.0216, subpart 2.

Subpart 4. Shoreline lost by erosion. This part of the rule has new language being added to identify that permits can be issued to recover up to four hundred square of eroded area, consistent with the Wetland Conservation Act de minimis fill exemption for type 3, 4 and 5 wetlands (see part 8420.0122,

subpart 9. This language is reasonable to address situations when the erosion has occurred due to reasons other than water level changes and when existing developments are not threatened. An example is the loss of a large tree and root ball on the shoreline, and this change would allow the shoreline dimensions to be recreated.

6115.0200 Excavation of Public Waters

Subpart 2. Scope. Within this subdivision language is being changed to reflect the change in the definition of “ordinary high water mark” to “ordinary high water level.”

Subpart 3. Nonpermitted excavation. New language is being inserted in items C. and D. of this subpart to delete the reference to protected vegetation where mitigation was not feasible, practical or ecologically acceptable and to substitute language where threatened or endangered species listed in chapter 6134 would be taken without authorization from the commissioner pursuant to parts 6212.1800 to 6212.2300. This change affirms and documents the existence of related environmental regulations that may be overlooked by persons or entities proposing to do work in public waters. The standard is objective - either the applicant: a) does not require permission to take listed species; b) needs permission and has a valid permit; or c) needs permission and has not yet received it.

Subpart 4. No permitted required. Item C. is being revised to make it consistent with the language contained in Laws of 1990, Chapter 391 that recodified *Minnesota Statutes*, chapter 106A and 112 to chapter 103E and 103D.

Subpart 5. Permits required. Within item B of this subpart, language is being changed to reflect the change in the definition of “ordinary high water mark” to “ordinary high water level.”

Within item C of this subpart, language is being added to reflect the reference found in *Minnesota Statutes*, section 103G.245, subdivision 7 that specifies that a public waters work permit may be issued only if the project will involve a minimum encroachment, change or damage to the environment, particularly the ecology of the waterway. This proposed change is reasonable, as the standard for issuance of a permit in item A. will match the statutory language.

6115.0201 Specific Standards; Excavation

Within Subpart 5, item E, language is being added to connect the sizing of harbors and boat slips being excavated under permit for residential or commercial planned unit developments with shoreland controls found in part 6120.3800. This proposed change is reasonable as the standards for these facilities will be consistent with those allowed under shoreland controls (see part 6120.3800).

6115.0210 Structures in Public Waters

Subpart 3. Placement of structures not permitted. Language is added to this subpart to clarify the Department’s current interpretation of this subpart to mean that the prohibition of structures applies equally to structures, temporary structures and floating structures.

Language in item B referring to the prohibition of structures where the structure will be detrimental to protected vegetation is being deleted and substitute language is being proposed in item E to prohibit structures where threatened or endangered species listed in chapter 6134 would be taken without authorization from the commissioner pursuant to part 6212.1800 to 6212.2300. This change is reasonable in that it will enable public waters work permit decisions to be made more objectively using county

biological survey and natural heritage inventory data, studies and other information.

Within item C. of this subpart, new language is being added to restore the prohibition of structures allowed for the storage of boats, formerly identified prior to 1997 as boathouses, and now being proposed for identification as boat storage structures, consistent with the rule language prior to adoption of the exempt rules on July 31, 2000.

Subpart 4. No permit required. Within item A. of this subpart, new language is being proposed to clarify that docks, floating or temporary structures, watercraft lifts and mooring facilities can be installed without requiring a separate DNR public waters work permit if the structure is not a marina and if it is allowed or is consistent with local land-use controls. This clarification is reasonable as it allows docking consistent with land uses allowed by the local unit of government and maintains the requirement for a public waters work permit for commercial marinas. Existing provisions in *Minnesota Statutes*, sections 459.20 and 86B.205 provide the authority to counties and cities to regulate the construction of commercial marinas, permanent and temporary docks and moorings if additional local controls are desired. The reference to fuel-handling facilities is being proposed for deletion as these installations are regulated by the Minnesota Pollution Control Agency under chapter 7100.

New items are being added to this subpart to restrict the allowable structure length to only that necessary to accomplish its intended purpose, which is generally reaching navigable depths of water, to restrict dock width to eight feet, to restrict the combining of structures to make up a larger structure, and to restrict docks placed on rock filled cribs to waters where the bed is predominantly bedrock which is incapable of supporting pilings. These changes are reasonable to restrict the size of structures to that necessary for reasonable access to navigable water, to prevent the construction of decks or other facilities without a public waters work permit and to use rock filled crib construction methods only on those waters where the use of pilings or other supports is precluded because of bedrock problems. The change being proposed in the maximum dock width allowed without a permit is reasonable as it is consistent with the dimensions used by the Department for public fishing docks that provide a stable platform for handicapped access.

Item B. of this subpart is being proposed for deletion, as the concerns regarding width, length, and location of rock filled cribs are being addressed in the language being proposed for item A. of this subpart.

New language is being proposed to be added to subitems (1), (2), and (3) of item C. of this subpart. These changes are reasonable to make the procedures for locating privately owned ramps consistent with publicly owned ramps, and to make the dimensions and construction of publicly owned ramps consistent with current dimensional standards utilized by the Department's Trails and Waterways Division.

Subpart 5. Permits required; criteria. Language is being revised in item B. to reflect the reference found in *Minnesota Statutes*, section 103G.245, subdivision 7 that specifies that a public waters work permit may be issued only if the project or mooring facility will involve a minimum encroachment, change or damage to the environment, particularly the ecology of the waterway, and it deletes the current references to fish and wildlife habitat, navigation, water supply and storm water retention. This proposed change is reasonable as the standard for issuance of a permit in item B. will more closely follow statutory language.

Language is being added in item F. to reflect a proposed change not to require title-registered permits for mooring facilities and boat ramps, instead of docks and boat ramps. This proposed change is reasonable as the term "mooring facilities" is a more inclusive term than docks since it includes docks,

mooring buoys or other means to moor or contain watercraft or seaplanes.

6115.0211 Specific Standards; Structures

Subpart 2. Docks. This subpart is being proposed to be deleted. This proposed change is reasonable as docks that can be installed without a permit are addressed in proposed part 6115.0210, subpart 4, and those limited numbers of docks not meeting the requirements of part 6115.0210, subpart 4 are proposed to be evaluated under the procedures as proposed in part 6115.0210, subpart 5 and part 6115.0211, subpart 7.

Subpart 4. Breakwaters. Language is being proposed to be removed to restrict the application of this subpart to breakwaters only. Additional language is being proposed to limit breakwaters to those waters where docks are precluded, by examining the occurrence of storms occurring in the area, the number of days per month when the navigation is affected by severe winds, waves or currents, and by examining whether the condition of the site and the watercraft to be moored would preclude the development and use of on-land facilities. This language is reasonable, as the need for permanent breakwater facilities should be examined before allowing for the installation of these permanent types of structures. Permanent breakwater construction results in elimination of public water surface and bed area that is generally a loss to the public's interests and ability to use public waters.

Additional language is also being proposed to restrict the area of all mooring and maneuvering activities of watercraft to an area normally bounded by the property lines of the applicant as extended into public waters in the design of breakwaters and marinas. This language is reasonable as the commissioner can only issue permits for activities where the applicant is the riparian landowner or can comply with the provisions of part 6115.0240, subpart 2, while recognizing that the public has a right to navigate on the surface of public waters after obtaining legal access to those waters.

Subpart 4a. Mooring facilities. A new subpart is being proposed to address the language on marinas formerly found in subpart 4, and to broaden the scope of this subpart to include mooring facilities. As proposed in subpart 4, language is also being included here to restrict the area of all mooring and maneuvering activities of watercraft to an area normally bounded by the property lines of the applicant as extended into public waters in the design of breakwaters and marinas. This language is reasonable as the commissioner can only issue permits for activities where the applicant is the riparian landowner or can comply with the provisions of part 6115.0240, subpart 2, while recognizing that the public has a right to navigate on the surface of public waters after obtaining legal access to those waters.

Additional language is being also being proposed to address private and public mooring facilities. Private mooring facilities not serving as a marina can be allowed under the proposed language if they are consistent with or allowed under local land use controls as determined by the local land use control authority. This language is reasonable as the demand for mooring facility space is governed by the development allowed by the local land use authority. Public mooring facilities not serving as a marina can be allowed under the proposed language if the local unit of government passes a resolution specifying the public interests to be benefitted by the proposal, where the sizing is consistent with the demand for mooring in the area and where the facility is available for use by the general public. This language is reasonable as it recognizes that the public has the opportunity to interact in the development of public proposals to ensure that the facility is appropriately sized and open for public use through local government zoning decisions.

Subpart 5. Retaining walls and erosion and sedimentation control structures. New language is being added to address the change from "ordinary high water mark" to "ordinary high water level."

Subpart 6a. Boathouses. The language being proposed in this new subpart is reasonable to reflect the statutory authority granted to the Department in Laws of 1997, Chapter 247 to specifically issue permits for boathouses when the boathouse is located in an area of historic boathouse use, the boathouse is approved by the local unit of government and the boathouse was in existence on public waters before January 1, 1997. This addition has also resulted in new definitions of “boat storage structure”, “boathouse” and “houseboat” being proposed for addition in the definition section of the rules, specifically part 6115.0170, subpart 3a, part 6115.0170, subpart 3a, and part 6115.0170, subpart 16a.

Subpart 6b. Energy exchangers. The new language being proposed in this new subpart addresses the construction, reconstruction, relocation, or repair of energy exchangers located on the beds of public waters. Several general and specific standards governing energy exchangers are being proposed that the Department believes are reasonable.

The proposed general standards will allow these energy exchangers provided that there are no other feasible and practical alternative sites for the project that would have less environmental impact, that a closed loop design is utilized, and that the facility shall be adequate in relation to appropriate engineering design factors. These proposed standards are reasonable to minimize general site impacts, properly size the proposed facility, and to protect public health, safety and welfare.

The proposed specific standards identify location or design elements. These include restrictions on their use on public waters having additional management or zoning restrictions, specifically prohibit their use in a designated trout stream or lake, designated wild and scenic river or in an outstanding resource value water as defined in part 7050.0180. The design of the energy exchanger also needs to address navigation and specific location concerns the Department has a responsibility to address. These include designing and locating the exchanger in a manner not to cause a navigation hazard, and to minimize the encroachment, change, or damage to the environment, particularly the ecology of the waters. The location of the exchanger must also not take threatened or endangered species identified in chapter 6134 without authorization by the commissioner pursuant to part 6212.1800 to 6212.2300, or contain substances that, if released into public waters, would be detrimental to water quality, plant or animal life forms. These proposed criteria are reasonable to minimize site-specific impacts of the proposed energy exchanger and to protect public health, safety and welfare.

Subpart 7. Other facilities. Within this subpart, language is being added by inserting the words “boat storage structure” to the existing language addressing all other offshore structures, cables other than utility crossings, pilings, or other facilities not covered by specific regulations. This proposed addition is needed to make it clear that a permit is required for the construction, reconstruction, relocation, removal, repair, and abandonment of boat storage structures. This proposed addition is reasonable and is needed with the adoption of the language in subpart 6, the definition of boathouse set forth in Laws of 1997, Chapter 247, and the new definition of boat storage structures proposed for part 6116.0170, subpart 3a.

Additional language is being proposed in item C. to exempt docks and mooring facilities from the language that requires a governmental agency or local unit of government to accept responsibility for future maintenance of the structure or its removal. This proposed addition is reasonable in that it allows these types of structures to be installed with a permit without and does not obligate agencies or local units of government with potential future removal costs or legal burdens.

6115.0215 Restoration Of Public Waters

A new section is being proposed for addition to the rules to address natural resource restoration projects. Previous editions of the public water work permit rules did not address the emerging issues and concerns regarding bank or shoreline zone restorations, ice ridge removal or grading, water level control projects on small watersheds, collection of native aquatic plants, installation of natural rock rip rap, contaminated site cleanup and recovery efforts, restoration of riverine ecosystems when dams are removed, or former channels are restored, and the developing area of bioengineering restoration techniques for less intrusive site erosion control techniques.

The Department believes that this new section of the rules is reasonable to identify the goals of restoration, types of restoration projects that can be installed without a public waters work permit, and to identify the types of restoration projects that need a public waters work permit. The proposed rule language promotes restoration of natural resources and is needed to encourage sound management and stabilization of public waters and their shore areas.

Subpart 1. Goals. This new subpart identifies that the goal of the Department is to encourage the restoration of public waters in order to improve and protect fish and wildlife habitat and the diversity of such habitat, preserve the natural character of public waters and their shoreline zone, encourage the use of natural materials for shoreline zone protection and restoration, limit the removal of natural materials from the beds of public waters, and to prevent erosion and siltation of public waters, while maintaining natural processes.

Subpart 2. Scope. This new subpart addresses the scope of restoration projects as applying to the placement, construction, reconstruction, repair, relocation, abandonment, or other work needed to restore or protect public waters, or to the removal of any materials, structure, fill, woody materials, water level control, excavation, or drainage device placed on or in public waters. New language is being added to define that restoration regulated under part 6115.0215 of these rules means the repair, reconstruction, or re-creation of essentially natural or native conditions of a public water and its shoreline or banks. New language is also included to make it clear that the restoration addressed in part 6115.0215 does not apply to restoration orders issued by the commissioner consistent with part 6115.0255 of these rules.

Subpart 3. Prohibited work. This new subpart addresses prohibited work. The Department believes that it is reasonable to prohibit projects where the work will take threatened or endangered species listed in chapter 6134 without authorization from the commissioner pursuant to parts 6212.1800 to 6212.2300, will obstruct navigation or create a water safety hazard, as determined by the Department, violate the regulations of any local zoning authority or water management agency, result in the creation of land above the ordinary high water level that is not deemed essential by the commissioner as part of the erosion control project, will use materials that are not clean and free of pollutants, nutrients and exotic specie sources, or manipulates water levels solely to satisfy private interests. These prohibitions are reasonable to protect the site and to provide for coordination with local zoning or water management concerns.

Subpart 4. No permit required. This new subpart addresses restoration projects where no public waters work permit would be required if the project complies with the identified dimensional or design criteria. The Department believes it reasonable to encourage restoration projects desired by landowners by identifying the types of projects and the design parameters of projects that have been encouraged and previously permitted by the Department.

The Department is proposing that no permit would be needed for bank or shoreline zone

restoration work using willow wattles, willow posts, brush mattresses, brush layering, fiber roll breakwaters, plant carpets, root wads, and other natural materials for the purpose of shoreline zone restoration work, provided the specified conditions are met. This type of restoration is reasonable to allow without having a permit to encourage the use of plant materials to stabilize shorelines subject to wave or current erosion forces as an alternative to using retaining walls, rock, or other structures that are less effective in deterring erosion and can damage the ecological integrity of the shoreline.

Removal or grading an ice ridge without a permit is being proposed under this subpart provided all of the specified conditions are met. This is reasonable to provide for restoration of shorelines impacted by recent (within one year) ice shoves, and will reduce landowner costs by allowing prompt restoration.

Construction, reconstruction, or abandoning a water level control structure on public watercourses with a contributing watershed of 300 acres or less, except on officially designated trout streams without a permit is being proposed for in this section. This is reasonable to allow for the restoration of formerly drained wetland areas without having to require a public waters work permit, provided the structure does not qualify as a dam under parts 6115.0300 through 6115.00520. The language being proposed here also appears in the water level control section of the rules, part 6115.0220, subpart 4.

Excavation or placing of fill for the purpose of planting or collecting native aquatic plants for restoration purposes without a permit is being proposed in this section. This excavation or filling work is reasonable, provided that planting or collecting of the native aquatic plants is authorized by an Aquatic Plant Management permit.

Installation of natural rock rip rap and associated filter materials for the purposes of preventing erosion or restoring eroded shoreline zone without a permit is being proposed in this section. This proposed change of emphasis to connect the use of riprap to address erosion problems is reasonable to that the Department does not promote landscaping within public waters to the detriment of natural habitat values when there is not a demonstrated erosion problem. The work allowed is reasonable where there is a demonstrated need for such work, except along the shores of Lake Superior and officially designated trout streams, provided the specified conditions are met. The language addressing the installation of natural rock riprap utilizes the language proposed for deletion in part 6115.0190, subpart C., with an addition of an upper size limit of thirty-six inches being placed on the rock dimensions to preclude the use of riprap as a retaining wall. Limitations on the length of riprap that can be installed without a permit are being included in this proposal, with a limit of 200 feet for public waterbasins and public water wetlands, or five times the width of the public watercourse measured at bank full conditions. These proposed limitations are reasonable in that most platted lakeshore lots are 200 feet or less in width, and the proposed restriction on watercourse riprap projects will focus the riprap on the site having the erosion problem, while minimizing the potential for redirecting erosive river currents without having to evaluate the project through a permit review and analysis process.

Subpart 5. Permits required; criteria. This new subpart addresses when permits are being required for restoration work, and their criteria. Permits are being proposed to be issued that represent the minimal impact solution to a specific need with respect to all other reasonable alternatives, and that achieve one or more of the following purposes: improving navigational or recreational uses; improving or restoring fish or wildlife habitat; exposing sediment in order to remove or eliminate nutrients or contaminants; restoring shorelines or watercourse channels to more natural conditions; improving or restoring water quality; or improving or restoring natural hydrologic conditions.

Other criteria that projects must meet include the requirement that the project will involve: a minimum of encroachment, change, or damage to the environment including but not limited to fish and

wildlife habitat, navigation, water supply, water quality, and storm water retention; that adverse effects on the physical or biological character of the waters shall be subject to feasible and practical measures to mitigate the effects; that the proposed project shall be consistent with applicable floodplain, shoreland, and wild and scenic rivers management standards and ordinances for the waters involved; that the proposed project shall be consistent with water and related land management plans and programs of local and regional governments provided such plans and programs are consistent with state plans and programs; and that the projects that involve the placement of fill to recover shoreland lost by erosion or other natural forces shall be subject to the requirements of 6115.0191, Subpart 4, except that these requirements shall not preclude the issuance of permits to place riprap materials or use other structural and vegetative means for protection of the shoreline zone to prevent continuous erosion.

The use of these criteria when evaluating a permit application is reasonable to address the wide variety of site conditions that exist at restoration sites around the state so that permitted projects fit site conditions and address site erosion or restoration concerns. The criteria are needed in order to provide for equitable standards or review regardless of land ownership, project size or scope, and timing and construction methods

6115.0216 Specific Criteria; Restoration

This new section is being proposed by the Department to address specific criteria necessary for the evaluation of natural resource restoration projects.

Subpart 1. In general. This new subpart indicates that proposed restoration projects must comply with the general provisions of part 6115.0215 as well as any specific language within part 6115.0216.

Subpart 2. Riprap shore protection. This new subpart addresses riprap shore protection, and includes the language deleted in part 6115.0191, subpart 2, plus language allowing for excavation of the toe of the riprap into the bed of the public waters to protect the riprap from wave and ice action. The Department believes it is reasonable that if deemed necessary by the Area Hydrologist, the Area Hydrologist can require engineering studies to certify the adequacy of the riprap project. This proposed language is reasonable to provide that riprap designed for the site will be adequate to reduce future site erosion concerns. Area Hydrologists are staff with at least two years of professional experience in water resource management. It is reasonable to allow their discretion and professional judgment to define when riprap is appropriate.

Subpart 3. Bioengineering projects. This new subpart addresses bioengineering projects that involve the grading or filling of materials below the ordinary high water level. The Department believes it is reasonable to allow these projects provided the methods and materials used must be designed in consultation with Department or local government staff experienced in the use of such materials. The design selected for these types of project must minimize the needed excavation and fill placement and must identify that a separate Aquatic Plant Management permit shall be obtained whenever the project involves the planting of non-woody aquatic plants.

Subpart 4. Structural erosion control projects. This new subpart addresses structural erosion control projects. The Department believes it is reasonable to allow these projects if adequate engineering studies determine the suitability for use of any of these types of erosion control projects, as determined by the Department. Additional factors that are reasonable to require of these types of projects include that the project must not be an aesthetic intrusion upon the area, and that the project must be consistent with all applicable local, state, and federal management plans, programs and ordinances relating to the affected

waterbody. Encroachment below the ordinary high water mark that is allowed must be limited to the minimum necessary for the construction project, and where such projects involve the removal of aquatic plants, a separate APM permit must be obtained. When proposed projects adversely impact native plants, trees, or animals, it is reasonable that they shall not be allowed. In those situations where any proposed structure also meets the definition of “retaining walls” in accordance with 6115.0210 and 6115.0211, it is reasonable to allow these projects only when they can be permitted in accordance with those sections. The construction of retaining wall can increase shoreline instability on adjoining properties by transferring wave energy along the length of the wall.

Subpart 5. Wave breaks. This new subpart addresses wave breaks involving grading filling or excavation of public waters. The Department believes it is reasonable that grading, filling or excavation for these projects should be allowed if the project does not obstruct navigation or the flow of water, that any structures will only be allowed when done in conjunction with an issued Aquatic Plant Management permit, and that temporary (less than 2 years) wave breaks are preferred over more permanent structures, which must also meet all requirements of parts 6115.0210 and 6115.0211.

Subpart 6. Other erosion control projects. This new subpart addresses other erosion control projects. The Department believes it is reasonable to allow these projects if the intended purpose of the project is reasonable with respect to all other alternatives, and that methods of erosion control that are not widely accepted as being effective may be permitted as temporary or experimental projects provided that the project sponsor will totally repair the shoreline zone if the project proves to be unsuccessful within five years. With these temporary or experimental types of projects, a public entity must be a co-sponsor of such projects and must accept responsibility for maintenance, repair and removal of such projects, that all projects must comply with all other federal, state, and local regulations and ordinances, and that all projects must adequately protect public safety and promote the public welfare. This proposed language is reasonable and will allow for the use of innovative techniques that local public entities and the Department agree upon for the restoration of sites currently subject to erosion.

Subpart 7. Contaminated site restoration projects. This new subpart addresses contaminated site restoration projects. The Department believes it is reasonable to allow the restoration of a site contaminated with materials or water determined to be hazardous or toxic through a publicly funded study or site cleanup process. Projects qualifying for restoration under this proposed part of the rules must be accompanied with a study that includes a discussion of the alternative approaches considered to restore the contaminated site, and the Department must have either participated in the development of the site restoration plan or study and concurs with it or participated in the development of the site restoration funding initiative and concurs with the funded initiative. The reference to consultation with the Minnesota Pollution Control Agency will enable the Department to become knowledgeable regarding the liability standards of the Minnesota Environmental Response and Liability Act, Chapter 115B.

This proposed language will assist in efforts to rehabilitate “brown field” or “superfund” types of sites that also have the presence of public waters. While only one of many factors impacting site development decisions, this proposed language is reasonable in that it should reduce pressures to develop new sites that are not polluted or contaminated and that may have significant natural resource value.

6115.0217 Application Of Other Standards; Restoration

This new section is being proposed for addition to the rules to cross reference natural resource restoration projects to the other applicable sections of existing rule language that address filling, excavations, structures, water level controls, bridges and culverts, drainage of public waters, and alterations of public waters for mining. This proposed language is needed and reasonable as previous

editions of the public water work permit rules did not directly address restoration and the emerging issues and concerns regarding contaminated site cleanup and recovery efforts, restoration of riverine ecosystems when dams are removed, or former channels are restored, and the developing area of bioengineering restoration techniques for less intrusive site erosion control techniques.

6115.0220 Water Level Controls

Subpart 1. Goals. New language is being proposed by the Department to identify as an additional goal of the Department is the restoration of natural flow and natural water levels conditions to the maximum feasible extent in addition to the existing goal of maintaining existing flow and water level conditions. A second proposed change is to encourage the construction or retarding structures for the conservation of water in off-channel locations and natural waterbasins instead of being located within watercourses. This proposed change is reasonable as it supports the many agency and private efforts underway to encourage the restoration of previously altered or drained wetlands.

Subpart 5. Permits required. New language is being proposed by the Department to modify subitem F. of this subpart to apply only to public water basins and public water wetlands using the current language and includes language to allow restoration of public waterbasins and public water wetlands to former levels provided the proposed control elevation does not exceed the estimated natural control elevation. New language is also proposed with subitem G. to address the construction or reconstruction of water level control structures or changing the level of an existing structure on watercourses. This proposed language is reasonable, while similar to the language in subitem F., provisions in (3), (4), and (6) are not applicable on watercourses.

6115.0221 Specific Standards; Water Level Controls

Subpart 2. Permanent lake level control facilities. Within this item, language is changed to reflect the change in the definition of “ordinary high water mark” to “ordinary high water level.” This proposed language is reasonable as it is consistent with the definition in *Minnesota Statutes*, section 103G.005, subdivision 14.

Within this subpart of the rule, new language is also being proposed by the Department to reflect legislation granting the Department authority regulate permanent lake level controls. Laws of 1990, Chapter 391, Article 7, Section 39 directed the commissioner to issue a water level control permit to establish control elevations for landlocked lakes up to three feet below the ordinary high water level for the lake if the commissioner finds that control is necessary to prevent flooding of homesteads, other reasonable or cost-effective alternatives are not available and a change in the control elevation is prescribed in an stormwater management plan.

Laws of 1996, Chapter 407, Section 45 amended this language by further directing the commissioner to find that the control is necessary to prevent adverse impacts to the lake or adjoining property, that natural resource or hydrologic conditions exist in the watershed that would limit the potential for continuous discharge of excess waters, the outlet and discharge of excess waters is addressed in an approved stormwater management plan under Chapter 103B or 103D, that the permit applicant shall serve a copy of the application on each county and municipality within which any portion of the lake is located and the lake improvement district, if one exists, if the proposed control elevation is more than 1-1/2 feet below the ordinary high water level, and that the commissioner may not issue a permit below 1-1/2 feet below the ordinary high water level if served with a written notice of objection from any city, county, watershed district or lake improvement district required to be served notice.

Within this subpart of the rule, new language is also added to allow for the restoration of water control elevations up to previous natural outlet elevation as identified in detailed engineering surveys. This proposed language is consistent with the goal statement in part 6115.0220, subpart 1.

Subpart 5. Other controls. Within this item of the rule, language is changed to reflect the name change of the Soil Conservation Service to the Natural Resources Conservation Service.

6115.0230 Bridges and Culverts, Intakes and Outfalls

Subpart 3. Nonpermitted crossings. New language is being proposed by the Department to delete the reference to protected vegetation where mitigation was not feasible, practical or ecologically acceptable, by substituting language where threatened or endangered species listed in chapter 6134 could not be taken unless authorized by the commissioner pursuant to part 6212.1800 to 6212.2300. This change is reasonable as it will enable public waters work permit decisions to be made more objectively and will result in less confusion to permit applicants. Additional language is being proposed to prohibit new private accesses to islands. This language incorporates the current language prohibiting private walkways to islands found in part 6115.0231, subpart 2, item F by incorporating bridges. This is reasonable to minimize impacts to public waters unless public access is determined to be in the public interest. Private access to an island results in a loss or diminishment of the public's ability to use and enjoy the surface area of public waters.

6115.0231 Specific Standards; Bridges, Culverts, Intakes, and Outfalls

Language is being proposed by the Department to revise subpart 2, item D to reflect the change in the definition of "ordinary high water mark" to "ordinary high water level." This language is reasonable as it is consistent with the definition found in *Minnesota Statutes*, section 103G.005, subdivision 14.

New language is being proposed by the Department in subpart 2, item F to address bridges and walkways to islands. Additional language is proposed to address when permits for new public crossings over lakes and wetlands to islands can be issued and when permits for reconstruction of existing crossings can be permitted. It is reasonable and necessary to allow for the reconstruction of existing crossings, both public and private, when they provide access to existing development on the island, when the crossing provides for existing public navigation and is consistent with the natural surroundings. Allowing reconstruction of crossings is reasonable as it recognizes existing landowner rights.

New language is being proposed by the Department in subpart 3, item I to address the pretreatment of water and the removal of floating trash and litter prior to discharge to public waters through an outfall structure. This language is reasonable in that it reflects the conditions currently being attached to permits being issued for outfall structures by the Department and it is consistent with the language being utilized by the Minnesota Pollution Control Agency when issuing storm water discharge permits. The language is needed to prevent accelerated degradation of public waters by sedimentation.

6115.0240 Application for Public Water Work Permits

Subpart 3. Information required. New language is being proposed for addition in Part C of this subpart to address sequencing of project impacts with language adopted from the Wetland Conservation Act Rules part 8420.0520. This language is reasonable in that local units of government currently utilize this language implementing the Wetland Conservation Act, and the Department is required to use this language when the Department is implementing the Wetland Conservation Act for projects on Department land. This language is also consistent with the procedures used by the U.S. Army

Corps of Engineers as administrators of the Federal Clean Water Act Section 404 Permit Program.

The language being proposed for adoption requires that project applicants demonstrate that the proposed activity that is not otherwise prohibited, or allowed without a permit, to comply with all the following principles in descending order of priority: avoiding direct or indirect impacts; minimizing the direct or indirect impacts; rectifying the direct or indirect impacts by repairing, rehabilitating, or restoring the water and related land resources; reducing or eliminating the impacts over time by preservation and maintenance operations; and for a major change in the resource, replacing unavoidable impacts to the water by restoring degraded or impacted public waters having equal or greater public value or, if public waters restoration opportunities are not reasonably available, creating and protecting additional replacement water areas having greater public value.

The language requiring replacement makes specific reference to the wording in *Minnesota Statutes*, section 103G.245, subdivision 7 which contains the requirement for compensation for the detrimental aspects of projects allowed under a public waters work permit when a major change in the resource has been justified.

6115.0250 Permit Review

Subpart 1a. Effect on environment and mitigation. This new subpart of the rule being proposed by the Department contains language referring to the existing language in *Minnesota Statutes*, section 103G.245, subdivision 7(b) requiring compensation for the detrimental aspects of major changes to public waters and public water wetlands allowed under permit. This language is reasonable in that the procedures that can be utilized must be scientifically accepted evaluation methodologies that are accepted by the commissioner. This language, to the extent that the statute requirement allows, is also comparable to the language contained in the Wetland Conservation Act Rules (see part 8420.0549).

Subpart 4. General permits. Within this new subpart of the rule, language is being proposed by the Department to reflect the authority the Department has been granted to issue general permits. This language is reasonable in that language contained in *Minnesota Statutes*, section 103G.245, subdivision 3 (Laws of 1995, Chapter 218, Section 9 and Laws of 1996, Chapter 443, Section 1) states that the commissioner may issue a state general permit to a governmental subdivision or to the general public for classes of activities having minimal impact upon public waters under which more than one project may be conducted under a single permit.

Since enactment of the law changes in 1995 and 1996, this authority has been used by the agency to issue a number of general permits, including permits issued to 63 county transportation authorities for the construction, repair, or replacement of public bridges and culvert, permits issued to 14 soil and water conservation districts for placement of erosion control measures, permits issued to 6 watershed districts for multiple-purpose projects also regulated by watershed districts, and 5 permits issued for the repair of bridges, culverts and structures damaged by flood events. The rule language is needed to clarify the rules and describe the applicable review process.

Subpart 5. Public waters wetland permit processing. Within this new subpart of the rule, item A, the Department is proposing to include language to make it clear that public waters work permit applications for projects within certain public water wetlands will be permitted if authorized by parts 6115.0190 to 6115.0232 or parts 6115.0270 to 6115.0280 of these rules. This applies to public water wetlands that are either: assigned a shoreland classification; classified as lacustrine wetlands or deepwater habitats according to the document under item B, or; where the state or federal government has become titleholder to any of the beds or shores of the public water wetlands, subsequent to the preparation of the

public waters inventory maps on file with the auditor of the county and where the responsible state or federal agency declares that the water is necessary for purposes of public ownership. This language is reasonable as it identifies those types of public water wetlands where activities subject to the public waters work permit program are to be evaluated in a manner consistent with activities taking place in public water basins and is consistent with the purpose and intent of the Laws of 2000, Chapter 382.

Item B contains language being proposed by the Department that identifies that public waters work permit applications for projects within public water wetlands not included in part A. The effect of this language results in three outcomes. The first outcome exempts projects impacting under 400 square feet of public waters wetlands from the requirements of obtaining a public waters work permit. The 400 square foot exemption is reasonable as it is the same as the 400 square foot de minimis exemption for projects impacting types 3, 4 or 5 wetlands subject to the Wetland Conservation Act. The second outcome is for projects that can be permitted if authorized by parts 6115.0190 to 6115.0232 or parts 6115.0270 to 6115.0280 of these rules and if the permit application complies with provisions for sequencing under part 8420.0520, replacement provisions under part 8420.0540 to part 8420.0630 and wetland banking under part 8420.0720, subpart 2, or denied. The third outcome addresses projects that are waived to the local unit of government implementing the Wetland Conservation Act as covered under Part D. This proposed language is reasonable so that the processing of public water wetland permit applications is more similar to the process utilized by the Wetland Conservation Act and is consistent with the language in Laws of 2000, Chapter 382, sections 5 and 9. This is reasonable because the public water wetlands that are subject to these rules are similar in character to wetlands regulated by the Wetland Conservation Act.

Item C contains language being proposed by the Department that incorporates two documents by reference for use within Subpart 5. The first reference is to the "Classification of Wetlands and Deepwater Habitats of the United States", Cowardin, et. al., Fish and Wildlife Service, U.S. Department of the Interior, FWS/OBS-79/31, December, 1979. This is the reference used for wetland typing for purposes of the Wetland Conservation Act and is the document used as the basis for the National Wetland Inventory Maps, copies of which are available for inspection at the respective county soil and water conservation district offices. The second reference is to the "Guidelines for Ordinary High Water Level (OHWL) Determinations" (Minnesota Department of Natural Resources, Division of Waters, June 1993, Technical Paper No. 11) which provides guidance to permit applicants, permit reviewers and staff on the procedures used to locate the ordinary high water level on projects subject to both the Department's Public Waters Work Permit Program and the Wetland Conservation Act.

Item D contains language being proposed by the Department to address procedures on how public waters work permit applications are evaluated within public waters wetlands. The first item identifies the process whereby the commissioner waives the requirement for a public waters work permit in public waters wetlands to the local unit of government administering the Wetland Conservation Act. This language is needed to implement the change in the statutes that occurred in Laws of 2000, Chapter 382. This proposal is reasonable as language is included in this item that allows the commissioner to waive the requirements of the public waters work permit program when the local unit of government administering the Wetland Conservation Act and the permit applicant are provided a notice within 15 days that the Department will waive public waters work permit jurisdiction to the local government unit. Feedback received from Department staff, local units of government and regulated landowners during implementation of the current exempt rules has also pointed out the value of a specific notice process so that Department staff, local units of government and the regulated landowners all know who will be responsible for handling the regulation of the proposed activity. This input was received at meetings of the stakeholders groups and it is reasonable to document the Department's waivers to improve public information and to clarify the regulatory status of specific projects.

Corresponding language found in the Wetland Conservation Act rules in part 8420.0105 obligates the local unit of government to follow Wetland Conservation Act procedures for activities the commissioner has waived to the local unit of government. In some cases, the Department serves as the Wetland Conservation Act local unit of government, and there will also be some situations when the authority of the commissioner to require a public waters work permit will be transferred within the Department to the DNR division having responsibility under provisions of the Wetland Conservation Act. Waivers of the Department's Public Waters Work Permit authority allow for streamlining of the permitting process for landowners and other regulated parties. If the Department waives its Public Waters Work Permit authority, the local government unit that implements the Wetland Conservation Act will require a replacement plan – this results in one regulatory action for the project, rather than two.

The second item in item D addresses exceptions when the waiver of public waters work permit authority to the local unit of government administering the Wetland Conservation Act cannot take place. The first exception is for activities, other than the de minimis exemption of 400 square feet that are otherwise exempt from provisions of the Wetland Conservation Act. This exception is reasonable so that activities that are exempt from the Wetland Conservation Act will continue to be regulated by the Department. The language is needed to assure that there is not a gap in regulation and replacement of public water wetland areas. The other reasonable exceptions when public waters work permit requirements cannot be waived are for activities in the three types of public waters wetlands identified in part A where the commissioner continues to exercise public waters work permit authority. The provision for allowing the de minimis exemption of 400 square feet to be waived upon the Department giving proper notice to both the applicant and the local unit of government within 15 days of receipt of an application for a public waters work permit is reasonable as it is the same for activities in types 3, 4 and 5 wetlands regulated under the Wetland Conservation Act. Therefore, similar projects in similarly typed wetlands whether Public Water Wetlands or Wetland Conservation Act wetlands are regulated equally for similarly (less than 400 square feet) sized projects.

Item E contains language being proposed by the Department that addresses activities undertaken by public road authorities to repair, rehabilitate, reconstruct or replace currently serviceable public roads and that affect public waters wetlands. The authority of the commissioner to require a public waters work permit for these activities affecting less than 10,000 square of public water wetlands is waived to the public road authority under the authority authorized by Laws of 200, Chapter 382, Section 5, upon receipt of the public road authority report submitted to the Board of Water and Soil Resources in compliance with part 8420.0544, item D except for activities in the three types of public water wetlands identified in part A.

This is reasonable as the practical purpose of this language is to allow public road authorities the same ability to report to the Board of Water and Soil Resources on activities affecting less than 10,000 square feet of public waters wetlands as they have for wetlands within 30 days prior to, or 30 days after the minor or emergency repair has taken place and to have the impact replaced in the same manner as wetland impacts are replaced by state funded wetland restoration and wetland creation credits by the Board of Water and Soil Resources. The report to the Board of Water and Soil Resources initiates the wetland replacement process administered by the Board for these projects. This language results in equal regulatory treatment for public road projects affecting similar wetlands whether regulated by the Public Waters Work Permit Program or the Wetland Conservation Act. Waivers of the Department's Public Waters Work Permit authority allow for streamlining of the permitting process for landowners and other regulated parties. If the Department waives its Public Waters Work Permit authority, the local government unit that implements the Wetland Conservation Act will require a replacement plan – this results in one regulatory action for the project, rather than two.

For projects subject to the public road authority report affecting more than 10,000 square feet of

public water wetlands, language is being proposed to allow the commissioner to waive the requirement for a public waters work permit for those projects where the commissioner has received the report being submitted to the Board of Water and Soil Resources and when the commissioner has informed the public road authority of this waiver within 15 days of receipt of the public road authority report. This language is reasonable as it is similar to the language used by the commissioner to waive public waters work permit authority to the local unit of government for proposed projects subject to local unit of government approval under chapter 8420. This language results in equal regulatory treatment for public road projects affecting similar wetlands whether regulated by the Public Waters Work Permit Program or the Wetland Conservation Act. Waivers of the Department's Public Waters Work Permit authority allow for streamlining of the permitting process for landowners and other regulated parties. If the Department waives its Public Waters Work Permit authority, the local government unit that implements the Wetland Conservation Act will require a replacement plan – this results in one regulatory action for the project, rather than two.

Subpart 6. Wetland areas of public waters affected by public road permit projects. Within this new subpart of the rule, language is being proposed by the Department to implement the language in Minnesota Laws of 2001, Chapter 146 that amends section 103G.245, subdivision 5(b). New language is reasonable as it proposes to first identify wetland areas of public waters as those areas of public waterbasins that are contiguous with the ordinary high water level of public waterbasins that generally exhibits emergent vegetation and then allows the commissioner to waive the requirement for a public waters work permit in wetland areas of public waters on an elective basis to the local unit of government if the local unit of government makes a replacement, no-loss, or exemption determination in compliance with part 8420 or to the public road authority for public road activities associated with the repair, rehabilitation, reconstruction, or replacement of currently serviceable public roads.

This additional language is reasonable in that it allows the commissioner to implement this subpart by examining the proposed impact as identified in a notice, application or report received from the public road authority and by providing notice to the local unit of government or to the public road authority within 15 days of receipt of the notice, application or report that the commissioner waives the requirement for a public waters work permit. Waivers of the Department's Public Waters Work Permit authority allow for streamlining of the permitting process for landowners and other regulated parties. If the Department waives its Public Waters Work Permit authority, the local government unit that implements the Wetland Conservation Act will require a replacement plan – this results in one regulatory action for the project, rather than two. Also the waiver will allow transportation project authorities to simplify and streamline wetland replacement efforts by enabling one regulatory process rather than two.

Subpart 7. Written agreements with local government units. Within this new subpart of the rule, language is being proposed by the Department to implement the provisions of *Minnesota Statutes*, section 103G.245, subdivision 5(c) that allow the local government unit and the commissioner, by written agreement, to waive the requirement for a replacement plan, no-loss or exemption determination if a public waters work permit is required and the commissioner includes provisions of sections 103A.201, 103B.3355, and 103G.222 to 103G.2373 and the rules adopted pursuant to these same sections in the public waters work permit. This language is reasonable as it does not obligate the use of these agreements, and when it is determined that these agreements would be beneficial, to allow these agreements to proceed on either a case-by-case basis, or on a predetermined plan basis, depending on the interests of the local government unit and the commissioner. Such agreements could be beneficial to enable greater flexibility of the regulations based on a more comprehensive, holistic analysis of the water resources of a given area.

Proposed language is included to limit the use of these agreements to situations where the commissioner is requiring an individual public waters work permit, the majority of the impacts to public

waters and wetlands are to the public waters, and that the wetland impacts are subject to a wetland replacement plan or a no-loss or exemption determination being approved by the local government unit. Local units of government will participate in the development of the permit language authorized by the commissioner by developing the specific language that addresses the impacts, sequencing and replacement of wetlands or no-loss or exemption determinations within the commissioner's public waters work permit language and agree to assist the commissioner in the event that appeals are brought against the commissioner based on the language addressing wetlands within the public waters work permit.

Subpart 8. Local plan implementation. Within this new subpart of the rule, language is being proposed by the Department to address plans developed and adopted on a local basis that are approved by the commissioner that can deviate from the standard requirements of the public water work permit program. This language is reasonable as it identifies that the commissioner can approve these local plan agreements only if the plan that is developed and adopted on a local basis contains the procedures and criteria for making decisions on public water work permits taking place within the area identified in the approved plan. The local plan must address the specific waters the plan procedures will cover, must be adopted by the local unit of government in either a comprehensive waters or wetlands ordinance or plan or otherwise approved by the commissioner, must specify that the plan will not allow activities that are not allowed under applicable local land use controls, must contain provisions to address replacement of unavoidable water resource losses, and must contain procedures addressing enforcement and procedures for the commissioner to reassume the permit authorities in parts 6115.0150 to 6115.0230. Such agreements could be beneficial to enable greater flexibility of the regulations based on a more comprehensive, holistic analysis of the water resources of a given area.

In addition to these criteria, this subpart includes proposed language requiring the plan sponsor to publish a notice in the State Register to identify who is developing the plan, who has been involved in the development of the local plan, how a copy of the local plan can be obtained and an opportunity for the public to comment on the proposed plan. This language is reasonable as it allows the general public an opportunity to review the proposed plan and to identify factors that may need additional attention before the local plan could be considered for approval by the commissioner.

The last component of this subpart includes language being proposed that would guide the commissioner in determining whether to approve the proposed local plan. This language is reasonable as it requires the proposed plan to explain how changes that deviate from the public waters work permit rules are justified and how the public values that are provided by the public waters subject to the plan are maintained or improved, how the plan is to be reviewed on a periodic basis and how the plan can be modified or terminated, and how nothing in the local plan review and approval process is to prohibit or discourage the local plan sponsor from addressing individual water management standards that can be more restrictive than the general standards found in parts 6115.0150 to 6115.280.

6115.0255 Public Waters Enforcement Procedures.

This new section of the rules is added to specifically compile the public waters enforcement procedures utilized by the Department.

Subpart 1. Enforcement options. This new subpart proposed by the Department identifies the enforcement authorities granted to the Department. This language is reasonable by identifying the criminal proceedings authority provided to the Department under *Minnesota Statutes*, section 103G.141, subdivision 1, the authority to issue orders of the commissioner under *Minnesota Statutes*, section 103G.251 and section 103G.315, and the new authority to issue cease and desist orders, restoration orders and replacement orders under *Minnesota Statutes*, section 103G.2372 that was authorized by Laws of

Subpart 2. Enforcement authorities. This new subpart proposed by the Department identifies the authority in *Minnesota Statutes*, section 103G.2372 that the Department can utilize to issue cease and desist orders, restoration orders and replacement orders. The language in this subpart is reasonable as it identifies who is authorized by statute to issue cease and desist orders, and restoration and replacement orders.

Subpart 3. Cease and desist orders. This new subpart identifies the procedures being proposed by the Department for use by enforcement authorities to issue cease and desist orders. The language in this subpart is reasonable and is based on the language used in the Wetland Conservation Act rule 8420.0290, subpart 2. Additional language is being proposed to the language in the exempt rules that makes it clear that a restoration or replacement order can be issued immediately if the Department determines that an after-the-fact permit application for the activity that has already taken place would be denied in its entirety for being inconsistent with these rules. This is reasonable because it will generally result in reduced legal costs for landowners and the Department while achieving compliance with the law and rules.

Subpart 4. Restoration and replacement orders. This new subpart identifies the procedures being proposed by the Department for use by enforcement authorities to issue restoration and replacement orders. The language this subpart is reasonable and it is based on the language used in the Wetland Conservation Act rule, part 8420.0290, subpart 3. Additional language is being proposed to make clear that a restoration or replacement order can be issued immediately if the Department determines that an after-the-fact permit application submitted for the activity that has already taken place would be denied in its entirety for being inconsistent with these rules, or if it is determined that some combination of restoration of the site or off-site restoration or replacement is necessary.

Subpart 5. Appeals of replacement and restoration orders. This new subpart identifies the procedures being proposed by the Department to address appeals of replacement and restoration orders. The language this subpart is reasonable since it protects the due process interests of those affected by an order and it is based on the language used for appeals of aquatic plan management program decisions made based on the Aquatic Plant Management Program rules at rule 6280.1100. Additional language is being also proposed to make it clear that any appeals subject to review by the Office of Administrative Hearings must be accompanied by the bond provided for in section 103G.311, subdivision 6.

6115.0271 Specific Standards; Drainage.

Language is being proposed in item C., subitem (1) to clarify the intent of the Department to interpret the term "protected waterbasin" as more specifically meaning the terms "public waterbasin" and "public water wetland". This language is reasonable as the language in the remainder of item C. consistently includes both public waterbasins and public water wetlands. The language is needed to clarify the rule's application and to reduce potential confusion over its meaning to all affected parties.

OTHER CONSIDERATIONS

Review of Documents

Sources cited in this document may be reviewed on workdays between 8:00 a.m. and 4:30 p.m. in the DNR Waters office in the DNR building at 500 Lafayette Road, St. Paul, Minnesota.

Upon request, this document and others can be made available in an alternative format, such as large print, Braille, or cassette tape. To make such a request, please contact Bruce Gerbig, by writing to 500 Lafayette Road, Box 32, St. Paul, MN 55155, calling 651-296-4800, or email to bruce.gerbig@dnr.state.mn.us

Witnesses

If the rules go to public hearing, the witnesses below may testify on behalf of the Department of the need and reasonableness of the rules. The witnesses will be available to answer questions about the development and content of the rules. The witnesses for the Department of Natural Resources include:

John Linc Stine, Administrator
Water Management Section
DNR Waters
500 Lafayette Road
St. Paul, MN 55155

Bruce Gerbig
Water Management Section
DNR Waters
500 Lafayette Road
St. Paul, MN 55155

Based on the foregoing, the Department's proposed rules are both necessary and reasonable.

Allen Garber, Commissioner
Department of Natural Resources

By: 

Dated: 5/14/02

References

Guidelines for Ordinary High Water Level (OHWL) Determinations, by John Scherek and Glen Yakel, Minnesota Department of Natural Resources, Division of Waters, June 1993, Technical Paper No. 11, 8 pages.

