

January 13, 2010

Legislative Reference Library
Attention: Jess Hopeman
645 State Office Building
100 Constitution Avenue
St. Paul, Minnesota 55155

Re: In The Matter of the Proposed Rules of the State Department of Natural Resources
Relating to Aquatic Plant Permit Fees; Governor's Tracking #AR 423

Dear Librarian:

The Minnesota Department of Natural Resources intends to adopt rules relating to Aquatic Plant Permit Fees. The Notice of Hearing was published in the December 28, 2009, State Register.

The Department has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, the Department is sending the Library an electronic copy of the Statement of Need and Reasonableness at the same time we are mailing our Notice of Hearing.

If you have questions, please contact me at 651-259-5092.

Yours very truly,

Steve Enger
Aquatic plant management program coordinator

Enclosure: Statement of Need and Reasonableness

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF ECOLOGICAL RESOURCES

IN THE MATTER OF PROPOSED ADOPTION OF

AQUATIC PLANT PERMIT FEE RULES

STATEMENT OF NEED AND REASONABLENESS

November 18, 2009

Minnesota Department of Natural Resources

STATEMENT OF NEED AND REASONABLENESS

Proposed Amendments to Rules Relating to Aquatic Plant Permit Fees, *Minnesota Rules*, chapter 6280

GENERAL PROVISIONS

INTRODUCTION

This proposed rulemaking would amend 13 subparts of the aquatic plant management (APM) rules in chapter 6280. This document explains the need and reasonableness of proposed amendments to the Department of Natural Resource (DNR) rules governing aquatic plant permit fees and other aquatic plant management activities. This document summarizes the evidence and arguments that the DNR is relying upon to justify the proposed amendments. It has been prepared to satisfy the requirements of Minn. Stat., sec. 14.131, and Minnesota Rules, part 1400.2070.

A. Aquatic Plant Management

The Department of Natural Resources (DNR), Division of Ecological Resources administers a diverse group of rules governing natural resources. The primary purpose of the APM rules is to provide riparian landowners access to open water, while protecting the aquatic habitat and water quality values provided by aquatic plants. The DNR has authority to set APM permit fees by rule (Minn. Stat., sec. 103G.615, subd. 2). The 2008 legislature expanded this authority by eliminating the only two permit fees incorporated in statute; a \$35 statutory fee for control of rooted aquatic vegetation for a parcel of shoreline and a \$750 maximum fee for APM permits (Minn. Stat., sec.103G.615 Subd. 2, or Laws 2008, ch. 363, art. 5, sec. 22).

The 2008 legislature also directed the DNR to set fees to recover the costs of administering and enforcing the APM permit program and required that any fee increases may not go into affect until 45 legislative days after it has been reported to the legislature. Because APM permit fees only recovered about one-third of the cost of administering and enforcing the APM permit program when this new requirement became effective in July 2008, the DNR initiated a rulemaking effort specifically focused on meeting the legislative requirement. The proposed amendments to existing rules increase APM permit fees in order to comply with this legislative directive.

While drafting revisions to the fee rules it became apparent that the permit fee changes would require changes to other portions of the rule. The proposed amendments to existing rules address a number of issues related aquatic plant management including: definitions for "free-floating aquatic plants," "invasive aquatic plants," and "invasive aquatic plant management permit." Changes are also proposed to standards for aquatic plant management permit issuance; when inspections should be required for renewal permits; landowner approval for aquatic plant

control adjacent to their property; duration of APM permits; APM permit application fees; annual report; commercial harvest of aquatic plants and commercial mechanical control. Because some of these changes expanded the scope of the rule-making beyond the fee portion of the rule, a second notice to request comments was published in the State Register on July 6, 2009.

B. Public Comment and Development of the Proposed Amendments

1. Request for Comments

The DNR published a Request for Comments in the *State Register* on July 28, 2008, related to the possible rule revision governing fees for aquatic plant management permits. The 60-day comment period ended on October 3, 2008. This notice described the legislative requirement that the DNR recover the costs of the APM permit program through permit fees, identified the persons affected by the proposed rules, and the statutory authority for the proposed rules. A copy of the request for comments and a cover letter was sent to persons and associations who have requested to be notified of DNR rulemaking as provided by Minn. Stat., sec. 14.14, subd. 1a. In addition, a copy of the request for comments and a cover letter were sent to individuals and organizations who could be affected by or would have interest in the proposed rules including: the approximately 3,900 individuals who received an aquatic plant management permit in 2005-2008; individuals with commercial aquatic pest control licenses and commercial aquatic plant harvest permits; conservation districts; aquatic- and plant-related professional societies; watershed districts; and conservation and environmental organizations.

While drafting revisions to the fee rules the DNR noticed additional changes that it wished to make to the APM rules. The DNR published a 2nd Request for Comments on July 6, 2009. In addition to the proposed APM permit fee changes, this notice described other changes that the DNR is proposing such as; adding definitions to clarify terms used in the proposed rules, clarifying when site inspections are required prior to permit issuance, clarifying when signatures on an application for permit may remain valid for longer than a single season, allowing aquatic plant control after September 1, clarifying reporting requirements, and other changes that may arise during this rulemaking effort. The notice explained that the scope of the rule making effort was being broadened and that policy and fee changes would be addressed together. The 39 day comment period for the second notice ended on August 14, 2009. This notice was mailed to the same groups described above.

The DNR received responses from 228 groups and individuals in response to the requests for comment, most of which were related to fees. Because the two notices were sent to the same groups of people the comments received in response to the mailings were similar. Of the comments received from the two notices, 6 groups or individuals were generally supportive of recovering the costs of the program through permit fees, thirteen people commented that the DNR should keep the increase reasonable, and 93 people stated that they were opposed to the increase in aquatic plant permit fees. The comments received from both notices are summarized below. Since many of the responses included multiple comments, the number of comments is greater than the total number of responses.

The comments have been organized by category to facilitate identifying the areas of common concern:

- i. High fees will discourage participation:**
 - The most common comment was that the higher fees will discourage participation in the permit program, but lakeshore property owners would continue to use herbicides without permit (75).
 - 19 people responded that high fees will discourage property owner management of invasive species.
 - Four people commented that if the fees are too high the state will lose revenue [because fewer people will participate in the program].
 - Five people stated that if the fees are too high they will discontinue their WeedRoller use. The fee increase constitutes a hardship.

- ii. DNR should reduce program costs:**
 - 28 people responded that the DNR should reduce program costs by lengthening the duration of permits, using technology, and tying the permit to the property [not the owner] reducing the need to re-inspect [when property ownership changed].
 - Three people stated that DNR should eliminate the permit requirement for the WeedRoller (AAPCD).
 - One person stated that there should be no permit and no fee required until a certain threshold is reached.

- iii. DNR should alter the structure of the permit fee schedule**
 - One person commented that multi-year permits should be eliminated.
 - 20 people commented that they understood that the initial cost for a permit is high due to the required inspections, but felt that renewals should be much less.
 - Eight people commented that the DNR should keep incentives for group permits, and that eliminating the permit fee cap makes permits too costly.
 - One person commented that the DNR should offer incentives (lower fees) to people who maintain a buffer strip between the lake and their lawn.
 - Two people commented that the permit fee should be tied to the size of the permitted area.
 - One person stated that the number of pesticide applications should be considered in the fee, the more treatments performed the greater the fee.
 - Three people stated that if fees go up they should get to control a larger area.
 - Six people stated that lake size, lakes where there are restrictions on motorized watercraft, and the number of property owners living on the lake should be considered in the permit fee structure.

- iv. DNR should find other sources of revenue/others benefit from lakeshore owner control/unfair to charge lakeshore property owner for monitoring and enforcement.**

- 22 people responded that DNR should get revenue from other sources like hunting and fishing licenses, watercraft registration fees, fees for lake use, and fines for APM violations.
 - 18 people stated that it is unfair to pass all costs of the program on to the homeowner. DNR should eliminate costs for enforcement, monitoring and analysis.
 - Seven people commented that everyone that has a stake in the lakes condition should bear the cost of the program (the state should bear the cost). The aquatic plant management program provides a benefit to the resource beyond what lakeshore homeowners should be expected to pay.
- v. **Permits that benefit the lake should be issued at no charge.**
- Seven people commented that fees for lake-wide invasive species control should be waived or separated from elective control [control adjacent to private property for access].
 - Two people commented that there should be no fee for restoration permits.
 - The Washington Conservation District commented that the permit fee exemption for state and federal agencies should be extended to conservation districts.
 - The Washington Conservation District commented that permit requirements should be removed for projects designed to improve ecological stability.
 - The Washington Conservation District commented that plants on the invasive species list should be excluded from permit requirements.
- vi. **Comments were made about the amount of the permit fee.**
- 10 people commented that renewal permits should be kept at or near the current fee.
 - One person commented that the fee for WeedRollers is too low, it should be \$200 or [WeedRollers] should be banned.
 - Two people stated that permit fees should stay below \$100.
 - One person felt that the permit fee could be increased to \$40 or \$50.
 - One other person stated that DNR should increase \$4.00 permits to \$15.00.
 - Five people stated that a much lower (modest 10-15%) increase would be fair.
 - Two people stated that DNR could reduce the impact of the fee increase by gradually increasing the permit fee over time.
 - One person stated that former WeedRoller owners should be "grandfathered" [at the current fee].
- vii. **People in support of recovering program costs through permit fees had the following comments:**
- Two people commented that lakeshore property owners should pay because they benefit most from aquatic plant control.
 - Two people commented the value of habitat lost and degraded water quality should be considered in permit fees.
 - Two people commented that an increase in permit fee may help people think twice about using chemicals.

- One person commented that permit fees need to include all program costs including education and enforcement.
- One person suggested that if the alternative shoreline standards were used permits could be issued under the existing fee structure, people who choose not to use the alternative shoreline standards would pay the higher fee.

viii. Other comments received in response to the second notice to request comments were:

- Rules should clarify if collecting seed or plant tissue is considered under aquatic plant harvest. Clarify when incidental removal of dead plant material is a violation of the rule.
- The rule should allow commercial interests to obtain permits.
- The rule should require commercial applicators and mechanical control companies to receive training every two years.
- One person commented that to ensure compliance with the APM permit and rules a cash surety of \$1,000 dollars should be required of people obtaining APM permits.
- Inspections should be required where there have been past complaints.
- DNR should prepare written reports of the results of complaint investigations and make reports available to the public.
- The Rule should be revised to allow treatments after September 1.
- Signatures should be required periodically like before [previously the rule provided that homeowner signatures authorizing treatment could remain valid for up to three years].

2. Public Consultation Process

The DNR formed an external advisory group of stakeholders to get input on how the APM permit fee structure should be modified to generate the additional revenue. The advisory group included representatives from three lake associations, a representative from Minnesota Waters and Minnesotan's for Healthy Lakes, a commercial plant harvester, two commercial aquatic pesticide applicator companies, and a manufacturer of automated aquatic plant control devices. The advisory group met twice (October 1 and October 23, 2008). SONAR exhibit 1 summarizes this consultation process.

The input we received from the advisory group was to keep the permit fees low and simple. External stakeholders believed that a permit fee in excess of fifty or sixty dollars would be a disincentive for property owners to comply with the APM rules. Some of the external stakeholders were willing to eliminate permit fee incentives for group permits and multi-year permits to keep the fee as low as possible for individuals. Others believed that the cap on permit fees was important and that a reduction in APM permit fees (by maintaining a cap) was a large incentive for lakeshore owners to join and retain lake association members. Because a large part of the cost of issuing a permit for the first time is the site inspection some members of the group thought that an inspection fee for first time permit holders would more equitably recover the program costs. Others agreed that inspections are a real cost but felt that an inspection fee would

be a disincentive for first time applicants. Finally, some members of the group recommended that the DNR reduce program costs. They suggested that administrative savings could be realized by reducing paperwork, automating the permit process, and reducing the numbers of inspections required. They also suggested that time spent on education and technical assistance should be tracked and those expenses removed from program costs. In addition, some members of the advisory group felt that permits for the control of invasive aquatic plants should be exempt from permit fees.

In response to the input received the DNR considered several different permit fee options to recover program costs. Those included:

i) Keep the current fee structure but proportionally increase all existing permit fees to raise the necessary revenue. That option would have increased the basic \$35 permit fee (that previously was in statute) to \$110 and the maximum group permit fee to \$2,200. The advisory group felt that this option was too expensive for the individual permit holder. DNR staff felt that a cap or maximum fee would add to the administrative complexity of issuing the permit resulting in errors and delays in permit issuance. DNR also believes that it is not a good policy to offer group discounts to an activity that reduces aquatic habitat.

ii) Charge a higher fee for permits that require a site inspection. The APM rule requires site inspections for properties requesting an aquatic plant management permit with no previous permit history and for properties where there is a change in the control area, method of control, or plant type among other things. The DNR aquatic plant management staff conduct about 2,000 site inspections per year. The site inspections are important to determine that the area and method requested are appropriate for the site and habitat present. Site inspections require DNR staff to travel to the site where APM work is proposed, which increases the agency's cost of issuing the permit. Once a property has been inspected and a permit issued, future permits generally do not require an inspection and are less costly to administer. However, the advisory group believed that the expense of the initial permit under this option, \$130 (\$75 permit fee + \$55 inspection fee), would be a strong disincentive for lakeshore homeowners to obtain a permit. DNR staff believed that an inspection fee would increase the complexity of calculating the correct fee resulting in more mistakes in permit applications, delay in issuance of some permits, and increased DNR administrative costs. This option was not chosen because of its administrative complexity and the high initial cost for first-time APM permit applicants.

iii) Create a fee structure that is as simple and uniform as possible, by eliminating or reducing existing incentives in the fee structure to reduce the magnitude of the fee increase for individuals. This is the fee structure preferred by both DNR staff and some members of the advisory group. However, the advisory group believed that \$50 or \$60 dollars would be the tipping point for property owner participation.

STATUTORY AUTHORITY

The Commissioner's authority for this rulemaking has two components: 1) the general authority to adopt rules for aquatic plant management under Minnesota Statutes, section

103G.615, subdivision 2; and, 2) the specific 2008 legislative directive (Laws 2008, ch. 363, art. 5, sec. 22), to establish a fee schedule for APM permits.

The scope of the 2008 directive was limited to establishing the fee structure. After review and public involvement, the DNR recognized the need for a broader rule revision than a revision of fees. Consequently, the DNR formally expanded the scope of rulemaking to include other issues, such as reporting and inspections, when it published an amended Request for Comments in July 2009. Thus, the revisions to the rules beyond the scope of the fee structure are undertaken pursuant to the broader rulemaking authorities in Minnesota Statutes, section 103G.615, subdivision 3.

Minnesota Statutes, section 103G.615, subdivision 2, was adopted and effective prior to January 1, 1996, and so Minnesota Statutes, section 14.125, does not apply to the rule amendments proposed under that authority. Laws 2008, chapter 363, article 5, section 22, was effective July 1, 2008 and the requirement under Minnesota Statutes, section 14.125, to publish a notice of hearing regarding a proposed fee schedule will expire on December 31, 2009.

REGULATORY ANALYSIS

A. Regulatory Analysis

Minn. Stat., sec. 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and then give the DNR's response.

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

As with the existing rules, the proposed amendments to the rules would affect people who own shoreline properties that are affected by the growth of aquatic plants or other aquatic nuisance organisms, government units or private organizations that coordinate aquatic plant management efforts, individuals and companies that control aquatic plants for hire or harvest aquatic plants for sale in retail or wholesale markets, and recreational users of public waters including boaters, anglers, and hunters.

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

Current costs to the DNR result primarily from administration of the APM permitting program and enforcement of APM regulations. Costs are largely dependent on the number of permits requested and issued, and the amount of enforcement effort. The proposed rules would not require an increase in permitting or enforcement activity. The proposed revisions do not create new categories of APM permit, nor are standards for permit issuance made more

restrictive. The proposed rules would increase permit fees, in order to recover the cost of APM program administration, but do not increase the administrative burden necessary to issue permits. However, the proposed rules would eliminate permit fees for lake or bay-wide control of invasive aquatic plants using selective methods, which would reduce permit revenue, but would also reduce costs for agencies or organizations obtaining permits for invasive aquatic plant management.

The current rule exempts state and federal agencies from the fees in these rules (M.R. chapter 6280.0450, subp. 5.). The DNR is not proposing any changes to that part of the rule.

The DNR is also proposing to relax the current rule requirement that permit holders obtain annual approval for treatment from riparian owners that live adjacent to areas of the lake proposed for lakewide or bay-wide treatment of invasive aquatic plants. The relaxed approval requirement is intended to reduce administrative costs for groups or agencies applying for an invasive aquatic plant management permit.

APM permits issued by the DNR authorize the use of pesticides for many aquatic plant control activities in public waters in Minnesota. The Minnesota Department of Agriculture (MDA) is the state agency that has oversight responsibility for pesticide use in Minnesota. However, MDA has chosen to share that responsibility with the DNR. The DNR, as part of its APM permit program, inspects aquatic pesticide applications to insure that permit and pesticide label requirements are being followed and responds to reports of the misuse of pesticides. Because the proposed rules do not require an increase in enforcement activity, there will not be any increased cost to the Department of Agriculture as a result of these rules.

The proposed rules will increase state revenue. As described above, the 2008 legislature required that permit fees be increased to cover the cost of administering and enforcing the APM permit program. The proposed rules are designed to increase revenue by \$700,000 per year, the difference between current permit revenue and program implementation costs (see p. 24 for a projection of revenues under the new rule structure). Those revenues will be deposited in the Water Recreation Account. The actual amount of revenue increase may be more or less than \$700,000. The number and type of APM permits issued varies from year to year. That variation may reflect differences in the amount or timing of aquatic plant growth or weather conditions that influence how much time riparian owner spend using their lake front. Based on comments the DNR received from the advisory group and from the request for public comments, higher APM permit fees may also influence the number or type of APM permit requests the DNR receives.

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

It is not feasible to provide adequate protection for aquatic plants without suitable permitting and enforcement programs. The DNR believes a permitting and enforcement program is necessary because of the high values aquatic plants provide to lakes and to fish and wildlife habitat, the degree to which aquatic plants can interfere with or present a nuisance to individuals wishing to use a lake resource for recreation, and the natural variability of lakeshores

and aquatic plant populations. The DNR places a high value on maintaining the aquatic habitat and water quality benefits provided by aquatic plants and has presented documentation to support that position in previous APM rule making efforts.

Nevertheless, many members of the public, the popular press, and companies that sell aquatic plant control products or services, routinely refer to aquatic plants growing in lakes as "aquatic weeds" or "weeds." In fact, the common name of some of the high-valued aquatic plants that grow in Minnesota lakes include the term "weed", e.g., large-leaf pondweed. Aquatic plants can and do, in spite of the values they provide to lakes and lake ecosystems, interfere with access and use of lakes for boating, swimming, fishing, and other recreational activities. Therefore it is not hard to imagine why some lakeshore residents would want to get rid of all the "weeds" that inhabit the lake adjacent to their property and why they may not have a basis for understanding how their control effort could impact the lake as a whole.

The permit program allows the DNR to articulate how the balance between control activities to facilitate recreational use and habitat protection will be achieved. The other critical aspect in this assessment is that lakeshores across Minnesota differ dramatically. For example, bottom type (e.g., rock, sand, mud), the slope of the bottom (steep or shallow), the types and abundance of aquatic vegetation, the value of particular plant species to the lake ecosystem, the presence of invasive species, may vary from lake to lake and from shoreline to shoreline within a lake.

The DNR has designed its permitting program to collect and incorporate site-specific information on shoreline condition into the APM permit decision process to insure that the APM control methods chosen are appropriate for the habitat conditions that exist. These rules need to maintain the existing permitting and enforcement programs to provide adequate protection for aquatic plants because less costly or less intrusive methods would not be sufficient to achieve the desired site-specific habitat management approach.

The 2008 Legislature directed the DNR to recover the costs of the APM program through permit fees. The existing aquatic plant management permit fee structure recovers approximately 30% of program costs. The costs of the program include the cost of receiving, processing, analyzing, and issuing the permit and additional costs incurred after the application to inspect and monitor the activities authorized by the permit, and enforce aquatic plant management rules and permit requirements. Although the amendment to the rules would increase permit fees in order to comply with the legislative directive to recover program costs, they are not more intrusive because there are no changes that would require permits for activities that are currently allowed without a permit. These changes are necessary and reasonable to comply with the legislative directive to recover these program costs through permit fees.

Other rule revisions that the DNR is proposing are intended to reduce costs and administrative efforts for persons or agencies affected by the proposed rules. The DNR is proposing to eliminate permit fees for lake or bay-wide invasive aquatic plant management permits. The DNR is also proposing to relax the lakeshore property owner approval requirement for these permits. The DNR is proposing to extend the expiration date of APM permits to December 31; this will reduce administration when control of aquatic plants beyond the current

expiration date of September 1 is appropriate. To increase efficiency and reduce administrative costs the DNR is proposing to clarify that inspections of previously permitted properties, where the permit has been allowed to lapse, will not require re-inspection unless the permit lapses for 3 or more years. The current rule requires annual reports from all persons conducting aquatic plant control activities under an APM or commercial aquatic plant control permit. The DNR is proposing a rule change that would give it flexibility to require reports from selected permit holders to reduce the costs of monitoring aquatic plant management in public waters. These changes are necessary to reduce costs and administration of the APM permit program and they are reasonable because they will not interfere with achieving the purpose of the proposed rules.

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

The primary purpose of the proposed rules is to revise fees to recover the costs of administering and enforcing the APM permit program, as directed by the 2008 Legislature. Those fees are to be based upon the costs of receiving, processing, analyzing, and issuing the permit and additional costs incurred after the application to inspect and monitor activities authorized by the permit, and enforce aquatic plant management rules and permit requirements. The current fee structure only covers 30% of the program costs.

There are a number of non-rulemaking methods to achieve some of the purposes of the proposed rule, including education, and incentives. Each method is described below:

Education: The DNR and other organizations have long sought to educate shoreland owners about the need to limit shoreline disturbance and the importance of maintaining shorelines in their natural condition. These efforts have been effective and will continue even post-rulemaking, but they do not always influence human attitudes and behavior, nor has education provided sufficient incentive to effect significant changes in aquatic plant control on a broad scale.

Incentives: Incentives could be an effective way to encourage shoreland owners to leave aquatic plant communities and habitat intact, but there are insufficient financial incentives to offer them broadly.

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The proposed amendment to the rules would increase fees for APM permits and establish fees for commercial mechanical control and commercial harvest permits. The average annual cost of administering and enforcing the APM permitting program for fiscal years 2006-2008 was approximately \$1,030,000. The average annual revenues collected from permit fees during the same time period was approximately \$300,000 (DNR fiscal data). Therefore, to maintain the current DNR efforts for administering and enforcing the APM permit program the increased cost to people wishing to destroy or control aquatic plants would total about \$700,000 per year.

The proposed rule will increase permit costs for the individual riparian property owner performing near-shore aquatic plant or nuisance control activities that require a permit. It is important to note that if a riparian property owner is performing more than one category of control adjacent to their shoreline only the larger of the fees applies. For example if a lakeshore property owner requests a permit to control submersed aquatic vegetation with herbicides, a \$90 permit fee, and also requests swimmer's itch control using copper sulfate, a \$40 permit fee, the fee for this permit is \$90. In addition, there are aquatic plant control activities that do not require a DNR permit and therefore no permit fee.

The proposed rule will increase permit costs for government units that own riparian property and need to control aquatic vegetation, e.g., a city operated beach, a county operated boat access. Those cost increases will be modest; a permit which costs \$35 today would cost \$90 under the proposed rule revisions.

The proposed rule will increase permit costs for commercial businesses that mechanically control aquatic vegetation or businesses that harvest aquatic plants for sale. Those business are currently required to obtain a permit from the DNR but those permits are issued free of charge. The proposed rules would establish a \$100 permit fee for permits issued to commercial businesses. In addition, the DNR is proposing to charge \$300 to inspect each new basin where commercial harvest of aquatic plants for sale is proposed. There are currently 28 individuals who are permitted to mechanically control aquatic vegetation for hire who need to pay the new \$100 permit fee. There are currently two companies that harvest aquatic plants for sale. One of those companies has four protected waters listed on their permit, the other has three. Their cost under the proposed rules is \$100 plus \$300 for each new basin added to their permit that requires inspection.

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

The major consequence of not adopting the proposed rules would be that APM permit fees would not be sufficient to recover the cost of administering and enforcing the program and DNR would not be in compliance with legislative direction. If DNR were unable to maintain its current level of staffing for the APM program because of inadequate funding a probable consequence of not adopting the proposed rules would be that DNR oversight and input on the removal of aquatic habitat from public waters would be reduced. The quality of near-shore habitat would be diminished, and the benefits that aquatic plants provide to Minnesota lakes would be compromised. Another consequence of not adopting the proposed rules would be that the administrative cost savings, and other efficiencies provided in these proposed changes would not be adopted and lakeshore property owners, the DNR and other agencies would not be able to take advantage of those provisions. Finally, if funds were inadequate the current level of DNR enforcement, and oversight of aquatic plant control in public waters would be reduced.

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

There are no proposed rule revisions that conflict with federal regulations.

B. Proposed Rules Effect on Farming Operations

The proposed rules would not affect farming operations.

C. Performance-based Rules

Minn. Stat., sec. 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

The DNR is proposing to revise the APM permit fee schedule to comply with legislative direction that the APM permit fees recover specified program costs. The DNR considered several possible fee structures. The fee structure proposed simplifies permit fees by placing them into four categories 1) Near-shore plant and nuisance control, 2) Off-shore control of submersed aquatic plants, 3) Lake or bay-wide control of plankton algae and free-floating aquatic plants and 4) APM activities for which no fee is charged. The simplified APM permit fee structure will eliminate confusion among applicants for permit. The simplified structure should reduce DNR administrative costs because there will be fewer mistakes made by applicants which require corrections to the amount of permit fee paid.

The current rule requires inspection when a permit is allowed to lapse. However, the increased permit fees proposed may be an incentive for some property owners to postpone application for permit while they wait to see if aquatic plant conditions develop that will interfere with their lake access. To reduce the number of inspections that may be required by the increase in permit fee the proposed rules will not require re-inspection until an APM permit has lapsed for three or more years.

The current rule requires annual reports from APM permit holders and persons performing commercial aquatic plant control in public waters. The proposed rule would relax reporting requirements for the following groups of permit holders: permits that are valid for three years, permits that are valid for as long as a person owns their property, and permits that authorize a commercial service to perform the aquatic plant control. Permits of multiple year duration allow the same mechanical control to take place each year the permit is valid. Therefore, it is reasonable to require a report on the activity the first year the permit is issued. These permits will be monitored in subsequent years to ensure compliance with the permit. In addition, permit holders that hire commercial firms to perform the aquatic plant control often do not know what products and application rates were used to perform the control. Therefore, it is reasonable and necessary to receive this information from the commercial service. It is also reasonable and necessary to reduce administrative costs by not asking the permit holder (commercial service customer) to complete a survey form when they are unlikely to have the required information.

The DNR is also proposing to extend the expiration date of permits from September 1 to December 31 of the year the permit is issued. The control of invasive species and other types of vegetation like cattails, and floating-leaf vegetation, can be more effective later in the fall. The September 1 expiration date precludes these control strategies without a variance. Extending the expiration date will enable the APM staff to allow fall treatments to occur when appropriate without going through a variance process reducing administrative costs of the APM program.

Invasive aquatic plants are spreading in Minnesota's lakes. The DNR and its constituency are increasingly looking to the APM rules to be adaptable for lakes that have problems with invasive aquatic plants. The proposed rule changes will help to meet the agency's regulatory and management objectives by eliminating permit fees for lake or bay-wide invasive aquatic plant management conducted under an invasive aquatic plant management permit, and by relaxing the signature of approval requirement on lakes where large scale management of invasive aquatic plants can make this requirement particularly burdensome.

In summary the DNR has included performance-based objectives to reduce costs and increase flexibility and efficiency.

ADDITIONAL NOTICE

Additional notice on the proposed rules will be provided to persons or classes of persons who could be affected, using the following methods:

- Sending the Notice of Hearing to the same individuals and groups who were sent the request for comments and to additional individuals and groups who commented after the request for comments was published.
- Distributing a statewide news release announcing the hearing schedule and proposed rules.
- Using DNR web site to inform the public of the hearing schedule and provide access to related documents.

Our Notice Plan also includes giving notice required by statute as follows:

- We will mail the rules and Notice of Hearing to everyone who has registered to be on the Department's rulemaking mailing list under *Minnesota Statutes*, section 14.14, subdivision 1a.
- We will also give notice to the Legislature per *Minnesota Statutes*, section 14.116.

Our Notice Plan does not include notifying the Commissioner of Agriculture because the rules do not affect farming operations per *Minnesota Statutes*, section 14.111.

Our Notice Plan does not include notifying the state Council on Affairs of Chicano/Latino People because the rules do not have their primary effect on Chicano/Latino people per *Minnesota Statutes*, section 3.922.

D. Consult with MMB on Local Government Impact

As required by Minnesota Statutes, section 14.131, the Department has consulted with the Commissioner of Minnesota Management and Budget (formerly Department of Finance). We did this by sending to the Commissioner copies of the documents sent to the Governor's Office for review and approval by the Governor's Office prior to the Department publishing the Notice of Intent to Adopt. The documents included the Governor's Office Proposed Rule and SONAR Form; draft rules; and SONAR. Minnesota Management and Budget's evaluation memo is submitted as a separate exhibit.

In general, the proposed rule changes will not have a substantial impact on local government. Local governments do sometimes obtain APM permits; therefore they will be subject to the higher permit fees proposed in the rules. This would be a negligible cost for a local government.

F. Determination about Rules Requiring Local Implementation

As required by Minnesota Statutes, section 14.128, subdivision 1, the agency has considered whether these proposed rules will require a local government to adopt or amend any ordinance or other regulation in order to comply with these rules. The agency has determined that they do not because the proposed rules do not require local governments to accept any responsibility with regard to aquatic plant management.

G. Cost of Complying for Small Business or Small City

Minnesota Statutes, section 14.127, requires the agency to determine if the cost of complying with proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city. A small business is defined as a business (either for profit or nonprofit) with less than 50 full-time employees and a small city is defined as a city with less than 10 full-time employees. Although the statute does not require that this information be included in the SONAR, the DNR has chosen to put it here, as it is related to the information provided under sections A.5 and A.6 above.

The proposed language also implements a \$100 fee for a commercial mechanical control permit. There is currently no fee for these permits, which allow a person to conduct mechanical aquatic plant control for hire in public waters (M.R. chapter 6280.0700, subp. 2). The DNR provides a one-time training workshop for permit applicants, which costs the agency an average of about \$75 per applicant. In addition, the annual processing charge for these permits is about \$20. It is necessary and reasonable to require permit applicants to attend a workshop, so they can be informed of APM and invasive species regulations and best management practices for preventing the spread of invasive species and protecting aquatic habitat. While the workshop has generally been a one-time cost, there are not good data to determine how many years to apply this cost to, i.e., how long the average permittee stays in business. In addition, follow-up workshops may be required in the future when regulations change or when there are new threats from invasive species. The proposed fee of \$100 is reasonable because it includes the annual processing cost, monitoring, plus a portion of the workshop cost. It is necessary and reasonable to implement a fee for commercial mechanical control permits to help the DNR recover the cost of administering the APM program and enforcing applicable laws.

The current rule requires a permit for persons that harvest aquatic plants from Minnesota waters for commercial sale, but there is no fee for this commercial harvest permit. The DNR has issued only a few of these permits in the past and does not have a good way of determining the administrative cost of these permits. Therefore, the DNR is proposing that the fee be the same as for commercial mechanical control permits, since the costs of providing the information and issuing these permits is likely to be similar. The proposed rule would require a \$100 annual permit fee for a commercial harvester permit. This fee is necessary and reasonable to recover the cost of application review, permit administration, training, monitoring, and maintaining a database of these companies and the waters where they are harvesting aquatic plants

In addition to the permit fee, the rule proposes a basin inspection fee. The fee for the basin inspection is based upon the assumption that basin inspections would require two DNR staff to travel an average of 150 miles round-trip for inspections. Each inspection will take an estimated four hours. Staff time for the inspection would be approximately \$240 and fleet costs approximately \$75. The rule proposes a fee of \$300 to recover costs incurred by the DNR to inspect basins requested for the commercial harvest of aquatic plants. It is necessary and reasonable for the DNR to charge a fee for these permits to help recover the costs of administering permits, conducting inspections of public waters proposed for commercial harvest of aquatic plants, and enforcing applicable laws.

The proposed amendments to the rules would not directly increase costs by more than \$25,000 for small businesses, but could reduce profits for businesses that control aquatic plants for hire if increased fees cause a reduction in the number of APM permits that are applied for. The DNR does not have information that would allow it to estimate the amount of potential profit loss the proposed fee increases may cause for businesses that control aquatic plants. The proposed rules are necessary and reasonable to comply with the legislative directive to recover the cost of administering and enforcing the APM permit program.

RULE-BY-RULE ANALYSIS

A. Introduction

Aquatic plants growing in public waters are owned by the state (Minn. Stat., sec. 84.091, subd. 1) and their control has been regulated by the DNR since the 1940s. The original purpose of the program was to allow shoreline property owners to remove aquatic plants where it was necessary to gain access to open water, while protecting the habitat and water quality values that aquatic plants provide.

The 2008 legislature directed the DNR to establish aquatic plant management (APM) permit fees that recover the full cost of administering and enforcing the APM permit program. As outlined in that legislation, the fees are to be set by rule based upon the costs of receiving, processing, analyzing, and issuing the permit and additional costs incurred after the application to inspect and monitor activities authorized by the permit, and enforce aquatic plant management rules and permit requirements (Minn. Stat., sec. 103G.615, subd. 2). The legislature also eliminated from Minn. Stat., sec. 103G.615 the \$35 permit fee for aquatic plant control at

individual properties and the \$750 maximum amount that can be charged for a group permit. Finally, the legislature directed that the rule must not take effect until 45 legislative days after it has been reported to the legislature.

To determine the cost of administering and enforcing the APM permit program the DNR reviewed costs incurred by the divisions of enforcement, ecological resources, and fish and wildlife from 2006 through 2008. All three divisions have staff involved in APM administrative or enforcement responsibilities. The average program cost from 2006 through 2008 was about \$1,030,000, which is substantially higher than the approximately \$300,000 that is currently collected annually by permit fees.

The DNR developed its proposed fee schedule by first determining the total cost of the APM Permit program. Then the DNR sorted the various types of APM permits into major categories. For example, all permits which authorize the control of aquatic plants and require a DNR inspection of the proposed treatment site/area were put in one category; permits that typically do not require a site inspection were put in another. The DNR then apportioned the approximate cost of administering, assessing, and enforcing the permit program based on the estimated resources required for all permits in that category. Permit fees were adjusted for the various types of control until the total cost of the program was recovered. This approach is necessary and reasonable because it minimizes the number of permit fees and is administratively easy to implement; it reduces that number of occasions when permit applicants submit the wrong permit fee with their application. This approach is reasonable because it simplifies the permit structure, reducing the administrative time DNR spends explaining the fee structure and collecting the correct fee, and therefore helps hold down DNR's administrative costs.

B. Amendments to Definitions at part 6280.0100

1. Subp. 7c. Free-floating aquatic plant.

Plants in this category are free-floating and not rooted to the lake bottom. These plants drift and spread out over the entire surface of the water body, making control in front of an individual's property ineffective, similar to plankton algae control, and different from other aquatic plants that are rooted to the lake bottom. The APM rules treat this group of aquatic plant differently than other groups. This group of plants is addressed in the current rules but the terms "duckweeds" "or non-rooted aquatic plant" is used to represent the group. There are four genera of aquatic plants that fall into the free-floating aquatic plant category: *Wolffia* (common name *watermeal*), *Spirodella* (common name *Greater duckweed*), *Lemna* (common name *duckweed*) and *Azolla* (common name *mosquito fern*). The general term "duckweeds" is insufficient because it does not clearly delineate which aquatic plants fall into the free-floating aquatic plant group. It is therefore reasonable and necessary to have a clear definition of the genera that are floating-leaf aquatic plants.

Subp. 7d. Group APM Permit.

The proposed changes are intended to improve grammar and are not substantive. It is necessary and reasonable to make grammatical improvements so that language is consistent and more easily understood.

3. Subp. 7e. Invasive aquatic plant.

The change is to define the term "invasive aquatic plant". This definition is necessary because this term is used throughout the rule and is directly tied to the use of the term in the invasive species statutes (Minn. Stat., sec. 84D) and rules (M.R. chapter 6216). In the context used in the APM rule it refers to those plants designated as prohibited in Minn. Stat., sec. 84D.01, subd. 13, or regulated in Minn. Stat., sec. 84D.01, subd. 15. Because the aquatic plant species listed as prohibited and regulated can change with time, and because, when those changes occur, they need to be reflected in how the APM rules are implemented, this definition is designed to clarify that linkage and ensure consistency between the two rules. Because the intent in APM rule is to apply this term to specific species of aquatic plant that are already defined in statute it is necessary and reasonable to reference the statutory definition in the APM rule.

3. Subp. 7f. Invasive aquatic plant management permit.

The proposed change is to add a definition for an invasive aquatic plant management permit. Over the last twenty years, efforts to control invasive aquatic plants in Minnesota lakes have expanded (Invasive Species program 2009) This expansion reflects the spread of invasive aquatic plants into more Minnesota lakes as well as a heightened interest in reducing the impacts of invasive aquatic plants on lake systems. A characteristic of many invasive aquatic plant control efforts is their size (they involve both near-shore and offshore control and attempt to control most or all of the invasive aquatic plant growing in a portion of the lake) and the control method chosen (selective control methods which target the invasive aquatic plant but cause limited damage to non-target plants are used). It is therefore, necessary and reasonable to define this type of permit because the intent of the permit is to allow the use of selective methods to reduce the abundance of invasive aquatic plants over an entire lake or bay, and encourage the re-establishment of native aquatic plants. It is necessary to define these permits because they are intended to have a larger management goal than the typical APM permit that is issued to provide riparian owner lake access. It is both reasonable and necessary to define this type of permit because these permits allow control efforts intended to benefit the public and the lake resource and portions of the rule, such as the permit fee and signature requirements, will be waived or reduced for this type of permit.

C. Amendments to 6280.0250 STANDARDS FOR AQUATIC PLANT MANAGEMENT PERMIT ISSUANCE.

1. Subpart 1. Actions not requiring an APM or commercial harvest permit.

The proposed change in item F is to substitute the term "free-floating aquatic plants" for the term duckweed. A definition of the term "free-floating aquatic plants" has been added to the

rule to clarify and replace the term "duckweed." It is necessary and reasonable to replace the general term "duckweed" with the term "free-floating aquatic plants" now defined in rule.

2. Subp. 4. Prohibitions.

Yellow lotus (*Nelumbo lutea*) is offered protection under the wildflower statute (Minn. Stat., sec. 18H.18), which requires written permission from the property owner for collection of this plant. Existing rule language requires the DNR to designate areas for the protection of lotus. The provisions of Minn. Stat., sec. 18H.18 apply to wildflowers growing on public lands, not just those growing in areas designated by the commissioner. Consequently, the proposed rule change is to eliminate the requirement to designate areas for the protection of lotus and to extend its protection to all public waters. This change is necessary to be consistent with the approach used in Minn. Stat., sec. 18H.18. This change is reasonable because a variance for the control of lotus can be granted should a situation arise where control of the plant is necessary.

3. Subp. 7. Inspections.

Current rule language requires a site inspection when "there has been a lapse in permit issuance." The proposed increase in permit fees may cause people to allow permits to lapse if nuisance plant conditions do not develop. In 2008, 14% of the lakeshore property owners performing their own control indicated that their APM permit was not used, because nuisance aquatic plant conditions did not develop (Enger and Hanson, 2009). Under the proposed permit fee these permit holders may wait to see if nuisance conditions develop before they apply for a permit. The proposed change to rule language is to specify that an inspection would not be required until a permit has lapsed for three or more years. The current rule language is not clear about how long a permit can lapse before an inspection is required. It is necessary and reasonable to clarify how long an APM permit can be allowed to lapse before an inspection is required. Because conditions may or may not develop that warrant plant control it is reasonable to allow permits to lapse for 3 or more years before re-inspecting an aquatic plant control site. Allowing a permit to lapse for three years does not preclude an earlier inspection or monitoring of a previously permitted site.

D. Amendments to 6280.0450 APM PERMIT REQUIREMENTS

1. Subp. 1a. Landowner approval.

The current language in this subpart requires signatures of approval from all landowners whose property will be treated, except for lake-wide control of algae where only the majority of homeowners need to provide dated signatures of approval. Because the rule defines two kinds of algae, filamentous algae and plankton algae, it is necessary to clarify which kind of algae this requirement refers to. Filamentous algae grows attached to plants, rocks or other substrate in the lake. Filamentous algae is generally anchored in place and can be effectively controlled in a localized area by an individual homeowner. However, plankton algae is free floating and generally distributed throughout the surface of the entire lake, making small localized treatments largely ineffective. Therefore it is necessary and reasonable to clarify that the kind of lake-wide algae treatment being referred to in this subpart is for the control of plankton algae.

A technical change to this subpart is necessary to except those activities described in the new subp. 1c from the approval requirements described in subp. 1a. The new subp. 1c describes the landowner approval and notification requirements for invasive aquatic plant management permits.

2. Subp. 1c. Landowner approval and notification for invasive aquatic plant management permits.

In general, the DNR believes it is necessary and reasonable to get landowner approval before aquatic plant control occurs adjacent to the landowner's property, because in most cases the control is requested by the lakeshore property owner to improve their lake access. However, when invasive species management is the reason for the control it can be difficult to contact all of the lake shore property owners where control might be desired.

The proposed change is to allow landowner signatures of approval received for lake or bay wide comprehensive control of invasive aquatic plants to remain valid for a period of up to three years unless there is a change in property ownership. When there are numerous property owners adjacent to proposed treatment areas, obtaining signatures from each property owner can become onerous. The proposed change would also allow, the commissioner to waive the signature requirement and allow the permit holder to notify property owners by news release, public notice in a local paper, a public meeting, or by mailing a notice to the most recent addresses of the affected property owners. The notification would be performed annually and it would include the following information: the proposed date of treatment, the target species, the method of control or product being used, and instructions on how the landowner may request that control not occur adjacent to the landowner's property.

The purpose of invasive aquatic plant management permits is to allow the use of selective methods to reduce the abundance of invasive aquatic plants over the entire lake or bay, and encourage the re-establishment of native aquatic plants. These permits allow control efforts intended to benefit the public and the lake resource. The coordination of treatments for the comprehensive control of invasive aquatic plants by lake groups or municipalities requires a significant investment in time and resources. It is necessary and reasonable for the DNR to reduce the administrative burden of collecting signatures of landowner approval for these permits.

3. Subp. 3. Duration of permits.

Current rule language specifies that APM permits expire on September 1 of the year they are issued. The September 1 expiration date does not allow control methods for invasive aquatic plants and other species that may perform better in the fall. The September 1 deadline also precludes the management of an infestation of a new invasive species identified in public waters after September 1. The proposed change to this subpart would allow APM permits to remain valid until December 31 of the year they are issued unless otherwise specified in the APM permit. Because the rule allows the expiration date to be specified in the permit and because

there are management techniques that perform better in the fall, it is reasonable and necessary to extend the permit expiration date to December 31.

4. Subp. 4. APM permit application fees

The current language in item A of this subpart sets fees for aquatic plant management permits. Minn. Stat., sec. 103G.615, subd. 2 gives authority to the DNR commissioner to set fees for APM permits in rule. The 2008 legislation eliminates the \$750.00 cap on permit fees, requires that the fee rules not take effect until 45 legislative days after it has been reported to the legislature, and eliminates the \$35.00 statutory permit fee for control of rooted aquatic vegetation. The legislation requires that the fees must be set by rule and the fees are to be based upon the cost of receiving, processing, analyzing, and issuing the permit, and additional costs incurred after the application to inspect and monitor the activities authorized by the permit, and enforce aquatic plant management rules and permit requirements.

The permit fees were last revised in statute in 2003. The 2003 legislature increased the statutory permit fee from \$20.00 to \$35.00 and the cap on permit fees was increased from \$200.00 to \$750.00. Prior to 1993, APM permit fees, with the exception of the \$200 cap, were found in rule. After the 1993 legislative session, the \$20 permit fee for aquatic plant control was put in Minn. Stat., sec. 103G.615, subd. 2. Permit fees for the control of algae and swimmer's itch have not been revised since Commissioner's Order 2450 was adopted in 1992.

The proposed changes in item A fall into two general categories: 1) regrouping of fee categories; and 2) increases for APM fees. A discussion of these changes follows.

The average annual cost of administering and enforcing the APM permitting program from fiscal years 2006-2008 was about \$ 1,030,000. The average revenues collected from permit fees during the same time period were \$300,000 (DNR fiscal data). Therefore, permit fees currently recover only about 30% of the documented costs of administering and enforcing the APM permit program. It is necessary and reasonable to implement increases for APM permit fees and to establish fees for commercial permits to recover the cost of the APM program and comply with legislative direction.

The current groupings of APM permits and their corresponding fees are: 1) pesticide control of rooted aquatic plants, operating an automated aquatic plant control device, and mechanical control of emergent and floating-leaf rooted aquatic plants (\$35 for each parcel of shoreline up to a maximum of \$750); 2) pesticide control of non-rooted aquatic plants (\$20 for each parcel of shoreline up to a maximum of \$200); 3) mechanical control of submerged rooted aquatic plants in an area larger than 2,500 square feet (\$35 for the first acre or portion of acre and \$2 for each additional acre up to a maximum of \$750); 4) commercial harvest of aquatic plants (no charge); 5) transplant aquatic plants or bog (no charge); 6) control of non-rooted aquatic plants (chara), filamentous algae, snails for swimmer's itch, and leeches (\$4 per 100 feet of shoreline or portion thereof up to a maximum of \$200); 7) lakewide control of algae (\$20 plus 40 cents per acre, up to a maximum of \$200); and 8) purple loosestrife control (no charge).

The proposed changes would implement the following groupings and fees: 1) all near-shore pesticide and mechanical control of aquatic plants, \$90, 2) control of filamentous algae, snails that carry swimmer's itch, or leeches, singly or in combination, \$40 for each contiguous parcel of shoreline with a distinct owner. Item B proposes the permit fee for offshore control of submersed aquatic plants, by pesticide or mechanical means, \$90. Item C sets the permit fee for lakewide plankton algae, and duckweed by application of approved pesticides, \$90. Item D, describes those permitted activities that do not require a permit fee: 1) transplanting aquatic plants (no charge), 2) moving or removing a floating bog (no charge), 3) purple loosestrife control and for invasive aquatic plant control permits (no charge). Item E sets the fee for a commercial mechanical control permit (\$100/year). (A new fee for commercial harvest of aquatic plants is also proposed in part 6280.0500, subp. 5.)

The proposed changes are categorized by near-shore treatments, offshore treatments, lake-wide kinds of treatments, permits for which there is no charge, and commercial permits. The proposed changes in fee categories are necessary and reasonable to simplify the permit fees structure. The proposed rule would increase permit fees for aquatic plant control adjacent to privately owned shoreline from \$35 per parcel of shoreline owned by an owner to \$90. The 2008 Legislature eliminated the \$750 cap on permit fees from Minn. Stat., 103G.615, subd. 2. Likewise, the proposed fee structure does not include a cap on permit fees. Under the existing rule, property owners listed on permits that authorize control for more than 21 properties begin to realize a reduction in permit fee per individual because of the cap on permit fees in the current rule. The more properties authorized on a permit, the greater the fee reduction per property. For example, under the current fee structure, with a \$750 cap on permit fees, the permit fee per individual property owner, on a permit with 50 properties, is \$15. This same permit under the proposed fee structure would cost each property owner \$90. The total cost of the permit would be \$4,500. The amendment eliminates the existing financial incentive associated with group permits. Group permits will still be issued, but there is no reduced permit cost to individuals participating on the permit. It is necessary and reasonable to eliminate the cap on permit fees, so that the cost of the program is spread over a larger number of individuals, and the base fee is as low as possible. It is also reasonable to not have a fee structure that offers group discounts for an activity that removes aquatic habitat.

This proposal maintains the incentive to minimize the removal of emergent vegetation. Individuals requesting permits for only a channel through emergent vegetation will pay \$90 the first year the permit is issued and the permit will remain in effect for as long as they own their property provided certain rule requirements are met. This option also maintains the incentive for three-year permits issued for automated aquatic plant control devices (\$90 for a three-year permit). Incentives were maintained for these two types of permit because of the administrative savings gained by not having to send or receive annual applications. The DNR will continue to monitor these permitted sites for compliance with their permit conditions.

The effect of the proposed changes in fee categories also means that the higher fee for rooted aquatic plants will be applied to non-rooted macro algae such as *Chara* and *Nitella*, defined in the current rule as submersed aquatic plants. Administration of permits to control these macro-algae requires the same level of agency effort as permits to control rooted aquatic plants. It is necessary and reasonable to have the same fees for these non-rooted plants as for

rooted plants to simplify the permitting system and to help recover the cost of APM permit administration.

The proposed change to apply permit fees for filamentous algae, snails that carry swimmer's itch, and leeches to an individual's shoreline property instead of 100 feet of shoreline is necessary and reasonable to be more consistent with the way that other APM permit fees are applied. The current fee for a permit to use copper sulfate to control swimmer's itch and or filamentous algae is \$4 per 100 feet of shoreline to be treated, up to a maximum of \$200. The proposed fee is \$40 per property and the maximum permit fee for multiple property permits is eliminated. Under the current fee structure a lakeshore property owner requesting a permit to control swimmer's itch along 100 feet of shoreline would pay a \$4 permit fee. Under the proposed permit fee structure the same property owner would pay \$40 for the permit. The fee for swimmer's itch and filamentous algae control has not been adjusted since Commissioner's Order 2450 went into effect in 1992. It is necessary and reasonable to recover the costs of administering these permits.

The proposed fee for permits for offshore control of submersed vegetation by mechanical or chemical means is \$90. The current fee for offshore mechanical control of submersed vegetation by mechanical means is \$35 for the first acre or portion of an acre and \$2 for each additional acre. The proposed permit fee for offshore mechanical control of submersed vegetation is \$90 and eliminates the per acre fee. The current fee for offshore chemical control of submersed vegetation is \$35. The proposed fee for offshore chemical control of submersed vegetation is \$90. It is reasonable and necessary to simplify the fee structure and eliminate the disparity between offshore chemical and mechanical control.

The proposed fee for plankton algae or free-floating aquatic plants by lake or bay-wide application of pesticides is \$90. The current fee for non-rooted aquatic plant control is \$20 for each contiguous parcel of shoreline owned by an owner up to a maximum of \$200. The current permit fee for the control of plankton algae is \$20 plus 40 cents per acre to be treated up to a maximum of \$200. Plankton algae and free-floating aquatic plants, like the duckweeds, can cover an entire body of water and, because the plants are free to drift about the water, only lake or bay-wide control is effective. Therefore, it is reasonable and necessary to evaluate applications for these treatments to the entire lake or bay. It is also reasonable that the permit fee be structured consistent with other permit fees. It is reasonable and necessary to simplify the permit fee structure, reducing administrative costs.

The proposed fee structure in item B retains those aquatic plant management activities that do not require a fee under the current rule. No-cost permits are retained to transplant (restore) aquatic vegetation in public waters and remove a floating bog that has lodged against a person's shoreline. This change also clarifies that the free permit will only be issued if the floating bog has not taken root. Aquatic plants naturally spread by seed and fragmentation, it is reasonable and necessary that if a floating bog has remained against a person's shoreline long enough to take root and become established that it be considered emergent vegetation and the normal permit fee would apply.

The proposed fee structure would also eliminate permit fees for invasive aquatic plant management permits. This fee waiver is necessary when Eurasian watermilfoil is the invasive aquatic plant being controlled because M.S 103G.615, Subd. 2, (b) requires that permits for lake-wide Eurasian watermilfoil control programs be issued without charge. The DNR believes that it is reasonable to extend the fee waiver to all treatments which fall under the provisions of the invasive aquatic plant management permit category. The DNR invests heavily in efforts to reduce the introduction of invasive aquatic organisms into Minnesota, minimize their spread between the state's lakes, rivers, and wetlands, enforce invasive species laws, and help local communities manage existing infestations. The costs of management of existing infestations would increase if the DNR were to charge a fee for permits issued to allow treatments of invasive aquatic plants. This in turn may reduce the amount of control that might be done and the desired benefits to lakes. In the case of a project that is supported with a grant from the DNR, charging the grantee a fee for a necessary permit may reduce the amount of control that might be done and is likely to be perceived as avoidable paperwork.

The DNR looks to local groups, both private organizations and local government units, to shoulder to major portion of the cost of invasive aquatic plant control programs. The DNR does provide grants to help cover control costs and technical assistance on designing control plans, but local groups pay for the majority of treatment costs. For example, in 2008 the DNR provided grants to support lake-wide control of invasive submersed plants on 14 lakes at a total cost of \$645,363. Grants from the DNR totaled \$230,000 or 36% of the total costs (Invasive Species program 2009). Therefore, although the legislative direction was to increase APM fees to recover permit costs, the DNR believes that it is necessary and reasonable to waive the permit fee for invasive aquatic plant management permits. Issuing these permits does contribute to the total cost of administering and enforcing DNR's APM permit program. Nevertheless, the large-scale management of invasive aquatic plants is a partnership between the DNR and local groups, and local groups are already paying for a significant portion of the cooperative work. Within this context, waiving the permit fee is reasonable.

The proposed language (item C.) also implements a \$100 fee for a commercial mechanical control permit. There is currently no fee for these permits, which allow a person to conduct mechanical aquatic plant control for hire in public waters (part 6280.0700, subp. 2). The DNR provides a one-time training workshop for permit applicants, which costs the agency an average of about \$75 per applicant. In addition, the annual processing charge for these permits is about \$20. It is necessary and reasonable to require permit applicants to attend a workshop, so they can be informed of APM and invasive species regulations and best management practices for preventing the spread of invasive species and protecting aquatic habitat. While the workshop has generally been a one-time cost, there are not good data to determine how many years to apply this cost to, i.e., how long the average permittee stays in business. In addition, follow-up workshops may be required in the future when regulations change or when there are new threats from invasive species. The proposed fee of \$100 is reasonable because it includes the annual processing cost, monitoring, plus a portion of the workshop cost. It is necessary and reasonable to implement a fee for commercial mechanical control permits to help the DNR recover the cost of administering the APM program and enforcing applicable laws.

Table 1. The current fee structure compared to the proposed fee structure.

Control Type	Current Permit fee	Proposed Permit fee
Near shore control:		
Chemical/Mechanical		
Individual	\$35	\$90
Group	\$35 @ to \$750 max	\$90 @ - no max
AAPCD		
1-year	\$35	\$90
3-years	\$35	\$90
Channel permit of continuous duration	\$35	\$90
Swimmer's itch/filamentous algae	\$4/100 ft of shore treated	\$40
Individual	\$4/100 ft of shore treated to	\$40 @ - no max
Group	\$200 max	
Offshore control:		
Mechanical control of submersed vegetation	\$35 first acre + 2.00 each additional acre to \$750 max	\$90
Chemical control	\$35	\$90
Control of free-floating plants:		
Plankton algae or non-rooted aquatic plants (e.g. duckweed) lakewide or bay-wide	\$20 + .40 per acre to be treated to \$200 max	\$90
No Fee Permits – Invasive Species		
Purple loosestrife	\$0	\$0
Eurasian watermilfoil – offshore	\$0	\$0
Invasive Aquatic Plant Permit (lake-wide or bay-wide treatment using selective methods of Eurasian watermilfoil, curly-leaf pondweed, flowering rush, or other prohibited or regulated invasive aquatic plant)	Near shore permit fee (as shown above) plus Offshore permit fee (as shown above)	\$0
No Fee Permits – Others		
Transplant aquatic plants	\$0	\$0
Remove floating bog	\$0	\$0
Commercial permits:		
Mechanically remove aquatic plants for hire	\$0	\$100
Harvest aquatic vegetation for sale	\$0	\$100 + \$300 for each basin applied for that requires an inspection.

The proposed amendments to the fee schedule are necessary and reasonable to recover the costs of receiving, processing, analyzing, and issuing the permit and additional costs incurred after the application to inspect and monitor activities authorized by the permit, and enforce aquatic plant management rules and permit requirements. Table 2 below summarizes the estimated revenues, from the fee structure assuming the number of applications remains consistent.

Table 2. Estimates of potential revenue based on proposed amendments to the rules and the number of permits issued in 2009.

Permit Type	Permittees	Fee (\$)	Total Revenue (\$)
Permits for Nearshore Control, Chara, and Channel	9,770	\$90	\$879,300
Three-year Automated Aquatic Plant Control	515	\$90	\$46,350
Swimmers Itch & Filamentous Algae	401	\$40	\$16,040
Lakewide Plankton	15	\$90	\$1,350
Offshore Chemical & Mechanical	121	\$90	\$10,890
Commercial Mechanical Control Permit	28	\$100	\$2,800
Commercial Harvest for Sale	2	\$100	\$200
Totals	10,852		\$956,930

5. Subp. 6. Annual Report.

The current rule requires annual reports from all permit holders, commercial mechanical control permit holders, and commercial aquatic pesticide applicators. There are approximately 10,500 property owners that receive permits for aquatic plant management each year. The DNR uses information from permit holder reports to track program implementation on an annual basis, identify long-term trends in APM activities, and identify areas where changes are needed. An annual report summarizing the APM regulatory program is produced (reference). However, many permits are issued to groups of property owners and many property owners hire commercial companies to carry out the control activities authorized by their permit. When large group permits are issued, having all members of the group provide an annual report to the DNR on their activities may not be necessary to track program outcomes and could be an inefficient use of DNR's time. Likewise, having commercial firms report on the control work they did and have those property owners who hire a commercial firm report on the same work activities may not be necessary to track program outcomes. To reduce administrative costs it is necessary and reasonable to require reports from the person or company actually performing the aquatic plant control.

E. Amendments to 6280.0500 COMMERCIAL HARVEST OF AQUATIC PLANTS

1. Subp. 5. Permit fee

The current rule requires a permit for persons that harvest aquatic plants from Minnesota waters for commercial sale, but there is no fee for this commercial harvest permit. The DNR has

issued only a few of these permits in the past and does not have a good way of determining the administrative cost of these permits. Therefore, the DNR is proposing that the fee be the same as for commercial mechanical control permits, since the costs of providing the information and issuing these permits is likely to be similar. The proposed rule would require a \$100 annual permit fee for a commercial harvester permit. This fee is necessary and reasonable to recover the cost of application review, permit administration, training, monitoring, and maintaining a database of these companies and the waters where they are harvesting aquatic plants. In addition to the permit fee, the rule proposes a basin inspection fee. The fee for the basin inspection is based upon the assumption that basin inspections would require two DNR staff to travel an average of 150 miles round-trip for inspections. Each inspection will take an estimated four hours. Staff time for the inspection would be approximately \$240 and fleet costs approximately \$75. The rule proposes a fee of \$300 to recover costs incurred by the DNR to inspect basins requested for the commercial harvest of aquatic plants. It is necessary and reasonable for the DNR to charge a fee for these permits to help recover the costs of administering permits, conducting inspections of public waters proposed for commercial harvest of aquatic plants, and enforcing applicable laws. It is necessary and reasonable to use the cost data for mechanical control permits to determine the proposed cost for commercial harvest permits, since the administrative effort to issue these permits is similar and there is insufficient cost data for commercial harvest permits.

F. Amendments to 6280.0700 COMMERCIAL PESTICIDE AND MECHANICAL CONTROL

1. Subp. 2. Commercial mechanical control.

The proposed change is to clarify that permits for the commercial mechanical control of aquatic plants in public waters are valid for one calendar and expire on December 31 of the year they are issued. It is reasonable and necessary to specify the duration of commercial mechanical control permits. The proposed language also prohibits the transfer of a commercial mechanical control permit to another person. The proposed change is necessary to ensure that applicants receive necessary information and training regarding aquatic plant rules and to facilitate enforcement of aquatic plant rules.

Effective Date

The proposed rules would be effective on August 1, 2010. It is necessary and reasonable to implement the proposed changes on this date, to avoid confusion and difficulty that would occur by trying to implement changes during the middle of a permitting season.

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. at the DNR central office, Division of Ecological Services, 500 Lafayette Road, St. Paul, Minnesota, 55155.

Alternate Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request contact Steve Enger, Division of Ecological Services, Department of Natural Resources, 500 Lafayette Road, Saint Paul, Minnesota 55155-4025, telephone: 651-259-5092, facsimile number: 651-296-1811, e-mail: steve.hirsch@dnr.state.mn.us. TTY users may call the Department of Natural Resources at 651-296-5484 or 800-657-3929.

Witnesses

If these rules go to public hearing, the witnesses below may testify on behalf of the DNR in support 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:

Steve Hirsch
DNR Division of Ecological Services
500 Lafayette Road
St. Paul, MN 55155-4025

Steve Enger
DNR Division of Ecological Services
500 Lafayette Road
St. Paul, MN 55155-4025

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

By: Mark Holsten
Mark Holsten, Commissioner
Department of Natural Resources

Dated: 11/18/07

Literature Cited

Enger, S. M., and S. Hanson. 2009. Management of rooted aquatic vegetation, algae, leeches, swimmer's itch. Annual Report for 2008. Staff Report 45 by Minnesota Department of Natural Resources, Division of Ecological Resources, 500 Lafayette Road, St. Paul, MN 55155-4025.

Invasive Species Program. 2009. Invasive Species of Aquatic Plants and Wild Animals in Minnesota: Annual Report for 2008. Minnesota Department of Natural Resources, St. Paul, MN.

External Advisory Group Summary:

The DNR formed an external advisory group of stakeholders to get input on how the APM permit fee structure should be modified to meet the Legislature's direction. The advisory group included representatives from: three lake associations, Minnesota Waters, Minnesotan's for Healthy Lakes, a commercial plant harvester, two commercial aquatic pesticide applicator companies, and a manufacturer of automated aquatic plant control devices. The advisory group met twice (October 1 and October 23, 2008). The DNR provided the following background information to the group on October 1, 2008.

The 2008 Legislature directed the DNR to establish Aquatic Plant Management (APM) permit fees that recover the full cost of administering and enforcement of the APM permit program. The substantive language reads:

Minn. Stat., sec. 103G.615, subd. 2 (Laws 2008, ch. 363, art. 5, sec. 18, subd. 2):

Subd. 2. Fees. (a) The commissioner shall establish a fee schedule for permits to control or harvest aquatic plants other than wild rice. The fees must be set by rule, and section 16A.1283 does not apply, but the rule must not take effect until 45 legislative days after it has been reported to the legislature. The fees shall be based upon the cost of receiving, processing, analyzing, and issuing the permit, and additional costs incurred after the application to inspect and monitor the activities authorized by the permit, and enforce aquatic plant management rules and permit requirements.

The legislature also eliminated the \$35 permit fee for aquatic plant control at individual properties and the \$750 maximum amount that can be charged for a group permit. The following information summarizes the current APM permit program fee structure and the revenues collected from permit fees.

- 1) individuals who do a small amount of submersed aquatic plant removal using mechanical methods do not need a permit and don't pay a fee;
- 2) the permit fee for most APM permits is low (\$35 per individual property owner or less);
- 3) multiple property owners on a single permit (>21) receive a reduced permit fee because of the \$750 fee cap;
- 4) multi-year permits have a permit fee that is lower than consecutive one-year permits;
- 5) when a permit for more than one type of control is issued (e.g. rooted aquatic plants and filamentous algae) only the higher permit fee is charged; and
- 6) permits for some type of invasive aquatic plant control (e.g. purple loosestrife) are free.

Table 1 summarizes the permit fees and fee revenue collected from permits issued for the control of "rooted" aquatic plants adjacent to one or more properties. The majority of these permits have 20 or fewer property owners. These permits generate most of the permit fee revenue.

Table 1. APM Program Revenue Calculations

Permits for control of rooted aquatic plants adjacent to shoreline properties				Revenue (\$)
Type of permit	Permits	Permit Fee (\$)	Fee/property/year	Rounded to the nearest \$1000
Individual permits	1,500	\$35	\$35	\$53,000
Multiple property permits				
2-21	4,440*	\$70-\$735	\$35	\$155,000
22- 40	58	\$750	about \$25	\$44,000
41 - 60	29	\$750	about \$15	\$22,000
61 - 80	6	\$750	about \$11	\$5,000
81 - 100	6	\$750	about \$8	\$5,000
100+	6	\$750	about \$7	\$5,000
Three-year automated plant control device	645	\$35	\$11.67	\$23,000
Total				\$312,000

* The number of permittees is listed to facilitate calculating the revenues generated.

Table 2 shows revenues generated by the other permit categories. Those include control of algae, other types of aquatic nuisances (e.g. swimmer's itch), or control in off-shore areas. The total revenues generated by these activities is minor when compared to those in Table 1.

Table 2. Other Categories of Permits

Permit Type	Acres	Properties or Permits	Permit Fee (\$)	Revenue (\$) Rounded to the nearest \$1000
Swimmers itch	125	316	\$4	\$1,000
Chara	1	27	\$4	<1000
Filamentous algae	4	85	\$4	<1000
Lake-wide Plankton				\$1,000
Offshore Chemical		87	\$35	\$3,000
Offshore Mechanical				\$4,000
Total				\$10,000
Total Rev. (current)	\$322,000			

The total annual revenue generated by the permit program is approximately \$300,000. The DNR spends about \$1,000,000 per year on the APM Program. DNR staff processes applications and issues APM permits, conducts field inspections, monitors activities authorized by the permit, enforces rules and permit requirements, and tracks and analyzes permit activity. Based on the direction received from the 2008 Legislature the DNR needs to increase fees to recover the difference (approximately \$700,000) between the current revenues and the cost of the APM permit program.

The DNR presented the group with a variety of different fee structures for discussion that would raise the appropriate amount of revenue. The initial structure proposed kept the current fee structure but proportionally increased the existing permit fees to raise the necessary revenue. That option would have increased the basic \$35 permit fee to \$110 and the maximum group permit fee to \$2,200. The group felt that this was too costly for individual permit holders.

The DNR presented a fee schedule that utilized a tiered fee structure that offered varying permit price breaks depending upon the numbers of properties listed on the permit. This fee structure started with a \$75 base fee for individual permits and offered breaks in 5 to 10% intervals depending upon the number of properties on the permit and included an inspection fee for permit applications where an inspection would be required. The inspection fees were variable depending upon the amount of the base fee. This structure maintained some features that the group liked: an inspection fee for permits that required an inspection which would reduce fees for renewal permits with no changes, this structure provided cost breaks for large group permits providing an incentive to join and maintain membership with a lake association. However, the group also identified the following issues with this structure: the initial cost of obtaining a permit was considerable and the structure was administratively complex which would likely cause errors that would need to be corrected either through refunds or postponing permit issuance until the correct fee had been received.

Focus group participants offered a number of ideas during the two meetings of which the following suggestions were key:

- a) Everybody who receives a permit should pay.
- b) Keep the permit fee structure simple.
- c) Eliminate fees for lake-wide invasive species management.
- d) Eliminate incentives in order to keep permit fees lower for everyone.
- e) Mixed reactions were offered about adding an inspection fee. Some thought that fees for permits requiring an inspection should be higher. Others believed that an inspection fee would be a disincentive to participate.
- f) A permit fee of \$50 or \$60 seemed the most reasonable. If permit fees are too high, more people will disregard the permit requirement but they will still remove nuisance vegetation.
- g) Find efficiencies in DNR's program to reduce costs (This was the most popular suggestion among the focus group).

Several fee options were considered. The idea of adding an inspection fee for new applicants and for applications where significant changes were requested from previously approved permits seemed fair. If a lakeshore resident doesn't modify their permit request, they pay less. However, to reduce permit fees to \$65 for people already in the program, slightly more than the focus group recommended, an inspection fee of \$150 was necessary to meet the revenue target. The combined costs for new permittees, \$150 for an inspection plus \$65 for a permit, would have been \$215. A cost most of the group considered to be too high. The DNR tested various combinations of permit fees and inspection fees but reached the same conclusion in each case. In addition, adding an inspection fee would require more tracking and administrative effort, at odds with the focus group's recommendation for DNR to deliver its APM permit program as efficiently as possible.

The DNR has taken the focus group ideas and worked to develop a permit fee schedule that reflects the group's suggestions and the legislative mandate. However, our proposal could not incorporate all the suggestions listed above.

Conclusions:

For permits that authorize control adjacent to riparian property the DNR will propose to increase the permit fee for most activities to \$90. Permits for Swimmer's itch and filamentous algae control, because they don't require a site inspection, will be less expensive (\$40 for an annual permit). The proposed fee structure eliminates incentives associated with large group permits, but retains an incentive for three-year permits for automated aquatic plant control devices, and for channel permits. These incentives are incorporated in the APM policy rules and we decided to retain them.

For permits that authorize offshore control of aquatic plants or for lake-wide or bay-wide control of plankton algae or duckweed, the DNR will propose a \$90 annual permit fee. The per acre charges associated with the old fee structure are eliminated.

For permits that authorize commercial activities (the harvesting of aquatic plants for commercial sale or authorization to market mechanical aquatic plant control services in Minnesota), the DNR will propose a \$100 fee. These permits were previously issued for free.

Under the proposed fee schedule the DNR would eliminate the permit fee for lake-wide invasive species management, to match the statutory exclusion for lake-wide Eurasian watermilfoil management programs. In addition, the DNR is proposing to retain the following permits in the no-fee category: 1) transplanting, because these property owners are trying to restore or improve near-shore habitat; and 2) floating bog removal, because floating bogs can cause property damage and may become hazards to navigation.

We believe these changes are consistent with the focus group's recommendations to keep the fee structure simple, ask everyone to pay, and eliminate fees for lake-wide invasive species management. Keeping the permit fee in the \$50 - \$60 range was not possible. Finally, as we developed this proposal, we were mindful of the focus group's recommendation to find efficiencies in DNR's program. We believe the approach proposed will minimize the amount of administrative time needed to manage APM permit applications and fees.