

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules of the
Pollution Control Agency for Rule
Amendments Governing Water Quality
Standards - River Eutrophication, Total
Suspended Solids and Minor Corrections
and Clarifications to Minnesota Rules 7050
and 7053

**ORDER REOPENING
ADMINISTRATIVE RECORD FOR
LIMITED PERIOD**

This rulemaking proceeding came before Administrative Law Judge James E. LaFave upon the Minnesota Environmental Science and Economic Review Board's (MESERB) Motion to Supplement the Administrative Record.

Steven W. Nyhus, Flaherty–Hood, P.A. represented the MESERB. Jean Coleman, Attorney – Legal Services Unit, represented the Minnesota Pollution Control Agency (MPCA).

Two rulemaking hearings were held on January 8, 2018. The public hearings were held at 9:00 a.m. and 6:00 p.m., in Training Room #2 in the Minnesota Pollution Control Agency's St. Paul Office, 520 Lafayette Road, St. Paul, MN 55155, as well as by video conference to locations in Duluth, Brainerd, Marshall, Rochester and Detroit Lakes.

After the close of the hearings, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days to permit interested persons and the MPCA to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the MPCA an opportunity to reply to earlier-submitted comments.¹ All comments were to be posted on the MPCA's River Eutrophication/TSS Water Quality Standards webpage.

On February 7, 2014, the Administrative Law Judge was informed that two comments made within the original 20-day comment period were inadvertently not posted. By Order dated February 11, 2014, the Administrative Law Judge required the comments be posted to the webpage and allowed an additional five business days for

¹ See, Minn. Stat. § 14.15, subd. 1.

interested parties and the MPCA to comment on those two specific posts. The hearing record closed on February 20, 2014.²

On March 13, 2014, MESERB filed a Motion to Supplement the Administrative Record. On March 18, 2014, the MPCA filed a Memorandum Opposing the Motion to Supplement the Administrative Record. Both documents were posted on the MPCA's Rulemaking Documents website for this docket. No other comments were received.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED as follows:

1. The comment period in this matter is reopened as of March 24, 2014 and shall remain open until **4:30 p.m. on March 28, 2014**.

2. Following the reopened comment period, the hearing record will remain open for an additional five business days, until **4:30 p.m. on April 4, 2014** so as to allow all interested parties and the MPCA an opportunity to reply to comments submitted between March 24, 2014 and March 28, 2014.³

3. The MPCA shall, by **4:30 p.m. on March 29, 2014**, make reasonable efforts to notify all parties who submitted comments during the initial comment period, all persons on the MPCA's official rulemaking list for this rule and any other commentators in this rulemaking process of the additional comment opportunity.

4. During the reopened comment period, the MPCA shall file with the Office of Administrative Hearings certifications that it complied with the Additional Notice Plan and that it provided a copy of the proposed rule change to the Commissioner of Agriculture as required by applicable law.

5. During the reopened comment period, interested persons may submit any comments and other information relevant to any topic addressed in the rulemaking proceeding.

6. Given the import of this Order, the MESERB's Motion to Supplement the Administrative Record is dismissed as moot.

Dated: March 25, 2014

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

² See, Order on the Minnesota Environmental and Economic Review Board and the Minnesota Soybean Growers Association's Comments (February 11, 2014).

³ See, Minn. Stat. § 14.15, subd. 1.

MEMORANDUM

Re-opening the record in a rulemaking proceeding is and should be an extremely rare event. As a general rule, the record in a rulemaking proceeding closes at the end of the rebuttal period.⁴ In unique circumstances, however, considerations of justice, fairness and economy dictate that the record be re-opened and that all interested parties have the opportunity to comment on all new submissions.⁵

Minnesota law requires that an agency submit and follow an additional notice plan in rulemaking proceedings.⁶ If the proposed rule might impact farming operations, the law requires that the agency notify the commissioner of agriculture at least 30 days in advance of publishing the proposed rules in the *State Register*.⁷

The MPCA did not introduce evidence into the record that it complied with the additional notice plan. Also, in the SONAR, the MPCA acknowledged that the rules “may have a limited effect on agricultural practices.”⁸ That declaration alone is sufficient to trigger the requirement that the MPCA notify the Commissioner of Agriculture.⁹ The MPCA did not introduce evidence in the record that it notified the Commissioner of Agriculture as required by the statute.

In a rulemaking proceeding, an Administrative Law Judge is empowered to promote justice, fairness and economy.¹⁰ The rulemaking process requires that an agency notify certain people and governmental agencies to ensure that everyone who may be affected by the proposed rules has the opportunity to meaningfully participate in the process. An agency’s failure to follow the prescribed notification procedures could result in the Administrative Law Judge disapproving the rule.

In the interest of justice, fairness, and economy, the MPCA should be allowed to submit additional information to permit the Administrative Law Judge to determine whether the agency’s failure to satisfy the procedural requirements constitutes “harmless error” under the law.¹¹ When the record is re-opened, the same interests of justice, fairness and judicial economy require that other interested parties be allowed to submit additional comments on topics relevant to the rulemaking proceedings.

J. E. L.

⁴ See, Minn. R. 1400.2230, subp. 3.

⁵ See, IN THE MATTER OF THE PROPOSED AMENDMENT TO RULES RELATING TO PASSING SCORES FOR STATE BASIC SKILLS TESTS, MINNESOTA RULES 3501.0180, SUBP. 2 AND 3, Report of the Administrative Law Judge (A.W. Klein) dated January 10, 2000.

⁶ See, Minn. Stat. §§ 14.131, 14.14, 14.22 and 14.24; Min. R. 1400.2060.

⁷ Minn. Stat. § 14.111.

⁸ Ex. 3, at 20.

⁹ Minn. Stat. § 14.111.

¹⁰ Minn. R. 1400.2210, subp. 8.

¹¹ See, Minn. Stat. § 14.15, subd. 5.