OAH 8-9014-33236
Revisor R-4240

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Minnesota Department of Natural Resources Relating to Mississippi River Corridor Critical Area

SECOND ORDER ON REVIEW OF A NOTICE OF HEARING

This matter came before Administrative Law Judge Eric L. Lipman upon the Minnesota Department of Natural Resources' (Department) request for review of its revised Notice of Hearing. The Department seeks a legal review of its materials under Minn. R. 1400.2080 (2015).

By way of an Order dated March 1, 2016, the Administrative Law Judge conditionally approved an earlier draft Notice of Hearing in this matter, provided that the Department made a few necessary adjustments to that notice. Those adjustments were needed to reflect the public's opportunity to submit comments to the Office of Administrative Hearings in any of the ways that the Office receives those comments – by personal delivery, first class mail, facsimile and the Office's e-Comments system.[1]

As detailed in the memorandum below, the Department agrees to all but one of the adjustments in the rulemaking notice: it does not wish to utilize, or notify stakeholders about the Office of Administrative Hearings' e-Comments system.

Based upon a review of the Department's submissions on March 10, 2016,

IT IS HEREBY ORDERED THAT:

The Notice of Hearing is **CONDITIONALLY APPROVED**, provided that the following sentence, or text of similar meaning, is added to the Notice:

[1] *See* Minn. R. 1400.2080, subps. 1, 2(H), 4(D).

All comments or responses received will be available for review at the Office of Administrative Hearings or online at that Office's e-Comments website: https://minnesotaoah.granicusideas.com/.

Dated: March 17, 2016

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

On March 10, 2016, the Department resubmitted a revised version of its Notice of Hearing, pursuant to Minn. R. 1400.2080, subp. 5. In its submission, it requests that the public comments received in this proceeding be limited to those that are submitted by United States Mail and facsimile.[2]

The Department explains:

> The proposed [Mississippi River Corridor Critical Area] rules are large and complex. It has taken the DNR a number of years working with stakeholders to navigate our way through the rule development process to the rules that are presently before you in this rulemaking process. These new rules are high profile and remain controversial even after our extensive work with stakeholders and members of the public to come to the current proposal. We expect to receive a significant number of detailed comments from technically knowledgeable stakeholders. The DNR has reservations about using the new e-Comment system for this rulemaking process. While we are willing to try the e-Comments system with a smaller and relatively non-controversial rule, we are disinclined to use that system for the MRCCA rulemaking process.
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> ….
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> We believe the comment-on-comments feature will have a chilling effect on commenters. Our stakeholders often have strong feelings on the issues we manage and our past experience has taught us that these emotions can get the better of folks. We are concerned that the comment-on-comment feature might be used as a forum to address comments in a disrespectful manner. We also fear that the thumbs up/thumbs down vote on individual comments may be viewed by potential commenters as a form of judgment on the quality of individual comments. Thus both the comments-on-comments and the voting-like mechanism may have a

[2] *See* LETTER OF SHERRY A. ENZLER, ESQ. OAH Docket No. 8-9014-33236 at 2 (March 10, 2016).

chilling impact on other potential commenters who are fearful of being treated disrespectfully and, therefore, opt not to submit comments.[3]

The Administrative Law Judge shares the Department's goal of developing a thoughtful and comprehensive set of comments following the rulemaking hearings.

In addition to this important objective, the Administrative Procedure Act also directs the Administrative Law Judge to ensure that the hearing process is fair,[4] uniform,[5] and accessible to all Minnesotans.[6] In the view of the Administrative Law Judge, forbidding the submission of electronic rulemaking comments in some proceedings, but not others, as urged by the Department, conflicts with the text and purposes of the Administrative Procedure Act.

The same considerations would apply if, for example, the Department had principled objections to the receipt of hand-delivered materials or items sent to the Administrative Law Judge by facsimile. Notwithstanding the potential for abuse with each of those methods of making comments, the statute directs the Administrative Law Judge to maximize opportunities for public access and participation in the formulation of administrative rules.

In this context, it is important to note that the Act delegates to the Office of Administrative Hearings the role of managing the post-hearing comment process,[7] and the Legislature has approved the use of modern, electronic communication methods in rulemaking matters.[8]

For these reasons, a proper notice must detail the opportunity to submit post-hearing comments on the proposed rules and rebuttal[9] through the Office of Administrative Hearings' e-Comment system.

E. L. L.

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[3] *Id.* at 1.

[4] Minn. Stat. § 14.14, subd. 2a (2014) ("The administrative law judge shall ensure that all persons involved in the rule hearing are treated fairly and impartially"); Minn. R. 1400.2210, subp. 8 (2015) ("Consistent with law, the judge is authorized to do all things necessary and proper to conduct the hearing and to promote justice, fairness, and economy").

[5] Minn. Stat. § 14.001 (3) (2014) ("The purposes of the Administrative Procedure Act are: … (3) to ensure a uniform minimum procedure").

[6] Minn. Stat. § 14.001 (1), (2), (4), (5) (2014) ("The purposes of the Administrative Procedure Act are: (1) to provide oversight of powers and duties delegated to administrative agencies; (2) to increase public accountability of administrative agencies; … (4) to increase public access to governmental information; [and] (5) to increase public participation in the formulation of administrative rules").

[7] Minn. Stat. § 14.15, subd. 1 (2014); Minn. R. 1400.2230, subps. 1, 2 (2015).

[8] *See* Minn. Stat. § 14.05, subd. 7 (Supp. 2015); 2010 Minn. Laws. Ch. 280, § 1.

[9] Minn. Stat. § 14.15, subd. 1.