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

**THIRD 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 earlier Orders, dated March 1 and March 17, 2016, the Administrative Law Judge conditionally approved earlier draft Notices 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]

In the second of the two Orders, issued on March 17, 2016, the Administrative Law Judge directed the Department to include the following language, or language of a similar meaning, in its Notice of Hearing:

> 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/.

As detailed in the Memorandum accompanying that Order, the purpose of this directive was to make clear to stakeholders that they would have "the opportunity to submit post-hearing comments on the proposed rules and rebuttal through the Office of Administrative Hearings' e-Comment system."[2]

Reluctantly, the Department agreed to add the listed text to a revised Notice.

On March 23, 2016, the Department submitted a third proposed notice. Upon review, the Chief Administrative Law Judge pointed out to Department officials that while the additions required by the March 17 Order were included in the third Notice, the

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

[2] *See* SECOND ORDER ON REVIEW OF NOTICE, OAH 8-9014-33236, at 3 (March 17, 2016).

contact information for the Administrative Law Judge did not list the e-Comments website alongside his office mailing address and facsimile number. In the view of the Chief Administrative Law Judge, this omission rendered the notice provisions inconsistent and ambiguous; because the notice implied, incorrectly, that post-hearing comments were only to be submitted by United States Mail or facsimile.

In this proceeding, the Department has maintained that post-hearing comments should only be submitted to the Administrative Law Judge by United States Mail or facsimile. The Orders in this proceeding have rejected that view.

On March 30, 2016, Counsel for the Department requested a conference call with the Administrative Law Judge. During that call, counsel further requested a 24-hour period to confer with senior leadership of the Department. At the conclusion of this period, the Administrative Law Judge issued this Order.

Based upon a review of the Department's submissions on March 23, 2016,

**IT IS HEREBY ORDERED THAT:**

The Department's Third Proposed Notice is **APPROVED**.

Dated: March 31, 2016

ERIC L. LIPMAN
Administrative Law Judge

**MEMORANDUM**

It is true that the Second Order on Review of Notice does not explicitly direct the Department to adjust the Notice language on submitting public comments, so as to reflect the availability of the e-Comments system; and it should have. This was an oversight in the Second Order on Review of Notice in this matter.

With that said, the Administrative Law Judge does not deem it proper to direct the agency make this change on resubmission, when it was not forthrightly stated in the Second Order on Review of Notice.

With that said, the need and desirability of doing so was made unmistakably clear in the Memorandum to the Second Order and in the later colloquies between Department officials and the Chief Administrative Law Judge.

In the view of the Administrative Law Judge, the Department knew that it had submitted a third notice that directed its stakeholders away from providing post-hearing comments by electronic means. And it did so by leveraging a very scrupulous reading of the Second Order on Review of Notice.

But whatever "advantage" is obtained by this approach will not be long-lasting.

The stakeholders who appear at the rulemaking hearings, and the broader public, will be reminded, again and again, about the convenient availability of the e-Comment system.

The real casualty of the Department's efforts to usher stakeholders away from convenient access to the comment process, is to its own reputation for engaging stakeholders and "increas[ing] public participation in the formulation of administrative rules…."[3] The Department's approach does it much more harm than good.

Limiting sources of feedback on rules, in ways that prioritize the needs of agency staff over access by the public, forsakes the most valuable benefits of Minnesota's rulemaking process: Open, transparent and accessible rulemaking provides agencies an opportunity to build broad, lasting public support for their regulatory programs and access to the wide-ranging expertise of interested persons. As the Minnesota Legislature has explained, agencies that conduct themselves with openness, according to our state's procedure, do so with the "expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained."[4] And, as recent history has proved time and again, this expectation is rewarded and fulfilled.

The Department should, in good conscience, make clear in its Notice of Hearing that stakeholders may submit comments by way of the e-Comments system; because it is the right thing to do and, in the long-run, this openness will benefit the agency.

**E. L. L.**

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[3] Minn. Stat. § 14.001 (2014).

[4] *Id*.