MINNESOTA
OFFICE OF
ADMINISTRATIVE
HEARINGS

PO Box 64620
Saint Paul, MN 55164-0620
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PH (651) 361-7900
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August 11, 2016

VIA E-FILING ONLY
Elizabeth P. Carlson
500 Lafayette Rd Box 10
Saint Paul, MN 55155

Re: ***In the Matter of the Proposed Rules Relating to the Mississippi River Corridor Critical Area***
OAH 8-9014-33236; Revisor R-4240

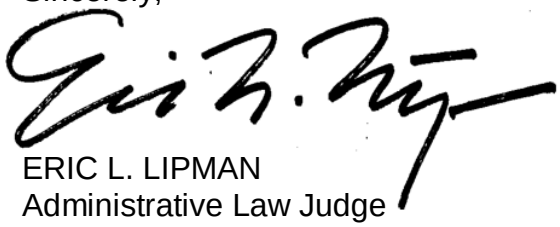
Dear Ms. Carlson:

Enclosed please find the Report of the Chief Administrative Law Judge in the above-entitled matter and the Report of Administrative Law Judge Eric L. Lipman. The Department may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval.

If the Agency chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Department must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any questions regarding this matter, please contact Katie Lin at (651) 361-7911 or katie.lin@state.mn.us.

Sincerely,



ERIC L. LIPMAN
Administrative Law Judge

Enclosure
cc: Office of the Governor
Office of the Revisor of Statutes (paul.marinac@revisor.mn.gov)
Legislative Coordinating Commission (lcc@lcc.leg.mn)

[77620/1]

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August 11, 2016

Representative Tim Sanders, Chair
Committee on Government Operations
553 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Senator Patricia Torres Ray, Chair
State and Local Government Committee
309 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1606

Re: In the Matter of the Proposed Rules Relating to the Mississippi River Corridor Critical Area
OAH 8-9014-33236; Revisor R-4240

Dear Representative Sanders and Senator Torres Ray:

Pursuant to Minn. Stat. § 14.26, the Office of Administrative Hearings is required to send to the legislative policy committees with primary jurisdiction over state governmental operations a copy of the statement of reasons for disapproval of agency rules. Enclosed please find the Report of the Chief Administrative Law Judge and Administrative Law Judge Eric L. Lipman's Report on review of rules and memorandum for the above-referenced rules.

Under Minnesota law, the Department may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Department does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects found, the Department may follow the process outlined in Minn. Stat. § 14.26, subd. 3(c).

Sincerely,

/s/Katie Lin

KATIE J. LIN
State Program Administrator Intermediate
Telephone: (651) 361-7911

Enclosure
cc: Elizabeth P. Carlson

[77620/1]

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

In the Matter of the Proposed Rules Relating to the Mississippi River Corridor Critical Area	OAH Docket No. 8-9014-33236 R-4240

Katie Lin, certifies that on August 11, 2016, she served a true and correct copy of the attached **ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE** and **REPORT OF THE ADMINISTRATIVE LAW JUDGE**; by courier service, by placing it in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

VIA E-FILING ONLY
Elizabeth P. Carlson
500 Lafayette Rd Box 10
Saint Paul, MN 55155

Elizabeth Dressel
Policy Coordinator
Office of Governor Mark Dayton
20 W Twelfth St Ste 116
St Paul, MN 55155

Legislative Coordinating Commission
(lcc@lcc.leg.mn)

Paul Marinac
Office of the Revisor of Statutes
paul.marinac@revisor.mn.gov

Representative Tim Sanders
Chair
Committee on Government Operations
553 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Senator Patricia Torres Ray
Chair
State and Local Government Committee
309 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1606

OAH 8-9014-33236
Revisor R-4240

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Relating to Mississippi River Corridor Critical Area, *Minnesota Rules* Part 6106

ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2016). Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves in all respects the findings in the Report of the Administrative Law Judge dated August 10, 2016.

In order to correct the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall make changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2016).

If the agency chooses to make changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: August 11, 2016

TAMMY L. PUST
Chief Administrative Law Judge

OAH 8-9014-33236
Revisor R-4240

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Relating to Mississippi River Corridor Critical Area, *Minnesota Rules* Part 6106

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on three different occasions in June of 2016: at Schaar's Bluff Gathering Center in Hastings, Minnesota, on Tuesday, June 14; at Greenhaven Event Center in Anoka, Minnesota, on Wednesday, June 15; and at the offices of the Mississippi Watershed Management Organization in Minneapolis, Minnesota, on Thursday, June 16.

The Department of Natural Resources (Department or Agency) proposes a set of permanent rules that would replace the performance standards promulgated, in 1979, under Executive Order 79-19. The regulations would guide land use and planning for parcels within the Mississippi River Critical Corridor Area (MRCCA), a specially-designated, 72-mile portion of the Mississippi River that extends between Dayton and Ramsey Townships, at its northern edge, to Ravena Township, Minnesota in the south.[1]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[2] The Minnesota Legislature designed this process so as to ensure that state agencies meet all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provided the general public an opportunity to review, discuss and critique the proposed rules.

The Department must establish that the proposed rules are within the Department's statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications that the Department made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[3]

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[1] Exhibit (Ex.) 3 at 1-2 (Statement of Need and Reasonableness or SONAR).
[2] *See* Minn. Stat. §§ 14.131-.20 (2016).
[3] Minn. Stat. §§ 14.05, 14.23, 14.25, 14.50 (2016).

The agency panel at the public hearings included Sherry A. Enzler, Jennifer Shillcox, Daniel Petrik, and Suzanne Rhees.[4]

One hundred and three people attended one or more of the three public hearings and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Forty-five members of the public made statements or asked questions during the hearings.[5]

After the close of the last of the three hearings, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days - until Wednesday, July 6, 2016 - to permit interested persons and the Department to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Department an opportunity to reply to earlier-submitted comments.[6] The hearing record closed on Wednesday, July 13, 2016.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules, that it followed the legal requirements to promulgate those rules, and that, with one exception, the proposed rules are needed and reasonable.

The Department's revision of proposed Minn. R. 6106.0050, subp. 39, however, remains unduly vague and defective. While there are a number of possible cures to this defect, as it is drafted, this regulatory definition is improper.

Additionally, while the agency made the cost determination required by Minn. Stat. § 14.127 (2016), the Administrative Law Judge concludes that this determination is not adequately supported in the rulemaking record.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. On October 18, 1976, Governor Wendell R. Anderson designated the boundaries of the MRCCA through Executive Order 130. The purpose of the Executive Order was to block "unregulated development and uncoordinated planning . . . without adequate regard for protecting the regional interest in the regional resource." To that

[4] *See Transcript Volume I* at 14-15.
[5] *See Public Hearing Rosters*.
[6] *See* Minn. Stat. § 14.15, subd. 1.

end, Executive Order 130 promulgated a set of standards and guidelines for development occurring within the MRCCA.[7]

2. On February 26, 1979, Governor Albert Quie renewed the earlier designation of the MRCCA and temporary rules through Executive Order 79-19.[8]

3. By the early 1980s, all local governments within the MRCCA had adopted MRCCA plans and most had adopted MRCCA-related development ordinances. Those communities without their own MRCCA ordinances were subject to the Interim Development Regulations under Executive Order 79-19.[9]

4. In 1988, the United States Congress designated the Mississippi National River and Recreation Area (MNRRA) as a unit within the National Park System. Not only does the MNRRA share the same boundaries as the MRCCA, but also the National Park Service determined that it would not separately acquire significant land holdings or establish land use regulations for the MNRRA; instead relying upon state and local administration of Executive Order 79-19 to protect the federally-designated resources.[10]

5. In this respect, Minnesota's regulatory program for the MRCCA forms part of a significant (and uncommon) example of "cooperative federalism" - the federal sovereign is forbearing from promulgating its own regulatory standards for areas within the river corridor, preferring instead, to play a supportive role in the development of "resource management standards" that are issued byMinnesota in the first instance.[11]

6. Yet, Congress's continued forbearance in this respect is not assured. Going forward, it is dependent upon Congress's judgment as to the ability of Minnesota's regulatory programs to "protect, preserve and enhance the significant values of the waters and land of the Mississippi River Corridor …."[12]

II. Rulemaking Authority

7. The Department cites Minn. Stat. § 116G.15 (2016) as its source of statutory authority for these proposed rules.

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[7] Executive Order 130 at 4 (October 18, 1976); Executive Order 130, Attachment A, *Standards and Guidelines for Preparing Plans and Regulations* at 1-2.

[8] Executive Order 79-19 (February 26, 1979).

[9] Ex. 3 at 3.

[10] 16 U.S.C. § 460zz-1(a) (2012), Ex. 3 at 3.

[11] 16 U.S.C. § 460zz(b)(3) (2012); *See generally*, 54 U.S.C. § 100101(a) *et seq*. (2012).

[12] *See* 16 U.S.C. § 460zz(b)(1) (2012); *Transcript I* at 39 (Comments of United States Senator David Durenberger) ("What makes it unique public policy is simply this: By statute [the Congress] created a state and local government compact, a compact by which Minnesota guarantees to protect national resources, which happen to be in our 72-mile course of the Mississippi River, for the enjoyment of everyone and every future generation. As a consequence, like any shared system, but particularly this one, the Mississippi River resources, natural and economic, must be governed at a higher level than the purely local interests that make up its parts."); *Transcript III* at 191 (Comments of Superintendent John Anfinson) ("The agreement or compact between the State of Minnesota and the Department of the Interior is an experiment....We can demonstrate that this model, this partnership can work to protect places of national significance.").

8. Minn. Stat. § 116G.15, subd. 2(a), provides in part:

> The commissioner of natural resources, after consultation with affected local units of government within the Mississippi River corridor critical area, may adopt rules under chapter 14 as are necessary for the administration of the Mississippi River corridor critical area program.[13]

Additionally, Minn. Stat. § 116G.15, subd. 7, directs that:

> The commissioner shall adopt rules to ensure compliance with this section. By January 15, 2010, the commissioner shall begin the rulemaking required by this section under chapter 14. Notwithstanding sections 14.125 and 14.128, the authority to adopt these rules does not expire.[14]

9. The Administrative Law Judge concludes that the Department has the statutory authority to adopt rules governing uses, planning and the development of property within the MRCCA.

III. Procedural Requirements of Chapter 14

A. Publications

10. The Department published two Requests for Comments in the *State Register.* The first Request for Comments was published on December 14, 2009. A second, renewed Request was published on June 2, 2014.[15]

11. On February 24, 2016, the Department requested review and approval of its Notice of Hearing and Additional Notice Plan.[16]

12. By way of 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.[17]

13. In the second of the two Orders, issued on March 17, 2016, the Administrative Law Judge explained that the purpose of this directive was to make clear to stakeholders that they would have "the opportunity to submit post-hearing comments

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[13] Minn. Stat. § 116.15, subd. 2(a).
[14] Minn. Stat. § 116.15, subd. 7.
[15] 34 *State Register* 848 (December 14, 2009); 38 *State Register* 1597 (June 2, 2014).
[16] Ex. 10 at 1.
[17] *See* Minn. R. 1400.2080, subps. 1, 2(H), 4(D) (2015).

on the proposed rules and rebuttal through the Office of Administrative Hearings' e-Comment system."[18]

14. 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 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.[19]

15. On March 31, 2016, for reasons detailed in that Order, the Administrative Law Judge approved the third proposed Notice of Hearing, notwithstanding the imprecision regarding use of the e-Comment system during the post-hearing comment period.[20]

16. On April 11, 2016, the Department published a Notice of Hearing stating its intention to adopt rules following the receipt of input from the public. In the Notice, it announced a series of three public hearings scheduled for June 14, 15 and 16, 2016.[21]

17. On April 11, 2016, the Department mailed a copy of the Notice of Hearing to all persons and associations who had registered their names with it for the purpose of receiving such notice and to all persons and associations identified in the Additional Notice Plan.[22]

18. On April 28, 2016, The Department mailed a copy of the Notice of Heairng and the SONAR to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over environmental policy and finance.[23]

19. On April 28, 2016, The Department mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.[24]

20. The Notice of Hearing identified the dates and locations of the hearing in this matter.[25]

21. At the hearing on June 14, 2016, the Department filed copies of the following documents as required by Minn. R. 1400.2220 (2015):

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[18] *See* SECOND ORDER ON REVIEW OF NOTICE, OAH 8-9014-33236 at 3 (March 17, 2016).
[19] *See* THIRD ORDER ON REVIEW OF NOTICE, OAH 8-9014-33236 at 1-2 (March 31, 2016).
[20] *Id.* at 1-3.
[21] 40 *State Register* 1359 (April 11, 2009).
[22] Ex. 6.
[23] Ex. 8.
[24] *Id*.
[25] Ex. 5.

(a) the Department's Requests for Comments as published in the *State Register* on December 14, 2009 and June 2, 2014;[26]

(b) the proposed rules dated January 28, 2016, including the Revisor's approval;[27]

(c) the Department's Statement of Need and Reasonableness (SONAR);[28]

(d) the Certificate of Mailing the SONAR to the Legislative Reference Library on April 28, 2016;[29]

(e) the Notice of Hearing as mailed and as published in the *State Register* on April 11, 2016;[30]

(f) the Certificate of Mailing the Notice of Hearing to the rulemaking mailing list on April 11, 2016, and the Certificate of Accuracy of the Mailing List;[31]

(g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on several dates between April 11 and April 20, 2016;[32]

(h) the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on April 28, 2016;[33] and,

(i) an February 23, 2016 memorandum from Minnesota Management and Budget.[34]

B. Additional Notice Requirements

22. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

[26] Ex. 1.
[27] Ex. 2.
[28] Ex. 3.
[29] Ex. 8.
[30] Ex. 5.
[31] Ex. 6.
[32] Ex. 7.
[33] Ex. 8.
[34] Ex. 9.

23. On April 11, 2016, the Department provided the Notice of Hearing in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

(a) The Notice of Hearing was posted on its website and the Department has maintained these materials continuously since they were posted.[35]

(b) Notice of the rulemaking was sent by first class mail to 627 individuals - including property owners within the MRCCA; stakeholders who submitted comments in response to the Request for Comments; and attendees of the open houses hosted by the Department in 2010 and 2014.[36]

(c) A copy of the Notice of Hearing was sent by Electronic Mail to more than 6,000 subscribers to the GovDelivery system and 37 legislators whose legislative districts include some portion of the MRCCA.[37]

(d) Agency staff included notice of the rulemaking in a number of public presentations that they made to stakeholders.[38]

C. Notice Practice

1. Notice to Stakeholders

24. Between April 11 and April 20, 2016, the Department provided a copy of the Notice of Hearing to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.[39]

25. There are 55 days between April 20, 2016 and June 14, 2016.

26. The Administrative Law Judge concludes that the Department fulfilled its responsibilities under Minn. R. 1400.2080, subp. 6 (2015), to mail the Notice of Hearing "at least 33 days before … the start of the hearing …."

2. Notice to Legislators

27. On April 28, 2016, The Department sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to legislators as required by Minn. Stat. § 14.116 (2016).[40]

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[35] Ex. 7.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] Exs. 5, 7.
[40] Ex. 8.

28. Minn. Stat. § 14.116 requires the Department to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its Additional Notice Plan.[41]

29. The Administrative Law Judge concludes that the Department fulfilled its responsibilities, to mail the Notice of Hearing "at least 33 days before … the start of the hearing …."[42]

3. Notice to the Legislative Reference Library

30. On April 28, 2016, the Department mailed a copy of the SONAR to the Legislative Reference Library.[43]

31. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Hearing is mailed.

32. The Administrative Law Judge concludes that the Department fulfilled its responsibilities to mail the Notice of Hearing "at least 33 days before … the start of the hearing …."[44]

D. Impact on Farming Operations

33. Minn. Stat. § 14.111 (2016) imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

34. While the proposed rules do not directly impose restrictions on farming operations, as opposed to other uses, the Department provided the Commissioner of Agriculture with a copy of the proposed rules and notice of its intention to adopt the same. This notice was provided on February 24, 2016, 47 days prior to the Department's publication of the Notice of Hearing in the *State Register.*[45]

35. The Administrative Law Judge concludes that the Department fulfilled its responsibilities under Minn. Stat. § 14.111.

E. Statutory Requirements for the SONAR

36. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.[46] Those factors are:

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[41] Minn. Stat. § 14.116(b).
[42] Minn. R. 1400.2080, subp. 6.
[43] Ex. 8.
[44] Minn. R. 1400.2080, subp. 6.
[45] Ex. 6.
[46] Minn. Stat. § 14.131.

(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;

(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;

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

(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;

(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;

(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;

(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; and**,**

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

1. The Agency's Regulatory Analysis

(a) 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.

37. The Department asserts that the proposed rules will "establish standards to guide new development and redevelopment in the corridor," they "will directly affect all local governments having jurisdiction over or owning and managing land within the MRCCA," and "all persons who own, manage, or develop lands within the MRCCA …." This regulation of uses and development is intended to conserve the "scenic,

environmental, recreational, mineral, economic, cultural, and historic resources and functions of the river corridor …."[47]

38. Specifically, local governments within the boundaries of the MRCCA are obliged to "update their local plans and ordinances to incorporate the new standards" and "establish a permit program for vegetation management and land alterations in specific environmentally sensitive areas."[48]

39. Additionally, within the MRCCA, use of certain reaches of the river for water supply and as a "receiving water" for treated sewage, stormwater and industrial waste effluents, is regulated for "protection and preservation of the biological and ecological functions of the MRCCA."[49]

(b) 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.

40. The Department maintains that the probable costs to administer the review of locally-developed "plans and ordinances," for conformance with the new performance and design standards, will be "no greater under the proposed rules than under the Executive Order [79-19] and, therefore, does not require an increase in DNR costs …."[50]

41. Moreover, the Department maintains that it will undertake a number of measures intended to mitigate the cost and budgetary impact of administering the review process; including: issuing "model plans and ordinances, model mitigation measures, maps, and other tools to aid local implementation"; providing "guidance, training and resources to local governments"; and implementing a staggered schedule of notification and plan adoption with local units of government.[51]

42. Further, the Department projects that state and regional agencies, such as the Minnesota Department of Transportation and the Metropolitan Airports Commission may incur nominal costs, in order to ensure that their site plans and projects comply with the new rules.[52]

43. For these reasons, the Department does not project that the proposed rules will have an impact, either positively or negatively, on state revenues.[53]

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[47] Ex. 3 at 9-10.
[48] *Id.* at 9.
[49] *Id.* at 10.
[50] *Id.*
[51] *Id.* at 10-11.
[52] *Id.* at 11.
[53] *Id*.

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

44. The Department asserts that the proposed rules represent significant regulatory relief, because the regulations better reflect the differing local conditions along the length of the river corridor than the regulations under Executive Order 79-19. Specifically, the Department maintains that the rules are less costly and less intrusive because they defer to "local governments' underlying zoning where local zoning meets the purposes of the rules, and by providing flexibility to local governments to address special circumstances and still meet the underlying the purpose of the MRCCA."[54]

45. Additionally, the Department posits that "[f]or those issues not adequately addressed by Executive Order 79-19 or that were inadequately addressed by other existing regulations," a modified set of state regulations were necessary to meet the requirements in Minn. Stat. § 116G.15, while minimizing "costs and potential intrusion on local control and property rights …."[55]

(d) 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.

46. During both the 2009 and 2013 legislative sessions, the Minnesota Legislature directed the Department to undertake rulemaking that would establish new districts within the MRCCA, standards and guidelines for development within each district, and rules for administration of the MRCCA program.[56]

47. Because of these directives, the Department could not identify methods, other than rulemaking, to provide the required relief.[57]

(e) 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.

48. The Department estimates that because local units of government and other agencies "already expend resources to comply with the requirements of Executive Order 79-19," the compliance costs associated with the proposed rules will only result in "modest changes" to the amounts that are incurred now.[58]

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[54] *Id.* at 12.
[55] *Id*.
[56] *Id.* at 13.
[57] *Id*.
[58] *Id.*

49. It projects that among the activities that may result in added effort and costs for governmental units are: new permit requirements for vegetation management, land alteration, stormwater management, development of ADA-compliant facilities, aggregate mining and extraction, and wireless communication facilities. Further the additional costs may follow the requirements for notice of certain actions - such as proposed variances, conditional uses, MRCCA plans and new ordinances - to the National Park Service and adjoining communities.[59]

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

50. The Department maintains preservation of water quality and natural landscapes within the MRCCA, through the proposed rules, will avoid costly consequences to parcels along the river corridor. The Department asserts:

> These consequences may include poor water quality, erosion and sedimentation from improperly managed shorelines, less resilient fish and wildlife populations, alteration of scenic resources, limited recreational resources, and the loss of natural shorelines, bluffs, and native plant communities. These consequences, in many cases, translate to economic costs including increased costs of water purification for drinking water, invasive species control, and increased dredging costs to maintain transportation channels.
>
> There may also be indirect costs to the public and property owners if the proposed rules are not adopted, including restoration and remediation expenses for degraded resources, fewer tourism and recreational dollars spent in local communities, and decreased economic development potential.[60]

51. Moreover, the Department argues that continuing the regulatory practices of Executive Order 79-19, extends regulatory inconsistencies and uncertainty, which is costly to developers, stakeholders and regulated parties.[61]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

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[59] *Id.*
[60] *Id.* at 15.
[61] *Id.* at 15-16.

52. As noted above, Congress has refrained, for the time being, from regulating practices and uses within the MRCCA. Thus, the Department maintains that the "proposed rules do not conflict with federal regulations."[62]

53. The Department notes further that as to other conditions, which occur in both the MRCCA and elsewhere, such as the regulation of floodplain practices, the applicable federal standards "would not be affected by the proposed rules."[63]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

54. The Department maintains that as a result of its choice of law provision, in proposed rule 6106.0030, subpart 4, it is working to reduce conflicts with other regulatory provisions. This proposed rule provides: "[i]n case of a conflict between this chapter and any other rule or ordinance, the more protective provision applies." The Department notes:

> For example, in some instances the proposed MRCCA rules have more restrictive standards for structure and bluff setbacks subdivisions, vegetation removal, and land alteration than the shoreland management program. Thus in the MRCCA these standards would take precedence over the shoreland requirements.[64]

55. Moreover, the Department argues that on the occasions when both the proposed MRCCA rules and the shoreland management rules regulate the same subject, such as with stormwater management, it is possible "to fully comply with both rules …."[65]

56. The Administrative Law Judge finds that the Department satisfied the evaluation requirements of Minn. Stat. § 14.131.

2. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

57. As required by Minn. Stat. § 14.131, by letter dated February 23, 2016, the Commissioner of MMB responded to a request by the Department to evaluate the fiscal impact and benefit of the proposed rules on local units of government.[66]

58. MMB reviewed the Department's proposed rules and concluded that as a result of the Department's survey of local governments and assessments of the costs of

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[62] *Id.* at 16.
[63] *Id*.
[64] *Id.* at 16-17.
[65] *Id.* at 17.
[66] Ex. 9.

new requirements that it "adequately analyzed and presented the potential costs and benefits of the proposed rules on local units of government."[67]

3. Performance-Based Regulation

59. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the Department's regulatory objectives and maximum flexibility for the regulated party and the Department in meeting those goals.[68]

60. The Department asserts that the proposed rules meet the state's objectives for flexible, performance-based standards. It maintains that the proposed rules provide "additional flexibility for local governments and property owners" over Executive Order 79-19; include performance-based stormwater runoff reduction standards; and regulatory incentives "to create conservation subdivisions and developments that protect or enhance key features and resources." The Department argues that the proposed rules will "ease implementation, increase efficiency, eliminate ambiguity, and simplify administrative procedures for local governments and agencies to administer."[69]

61. Likewise important, according to an analysis undertaken by the City of Saint Paul, there will be 310 fewer nonconforming structures within the MRCCA under the proposed rules than under the City's current ordinance.[70]

4. Summary

62. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

63. Minn. Stat. § 14.127, requires the Department to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Department must make this determination before the close of the hearing record. The Administrative Law Judge must review the determination and approve or disapprove it.[71]

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[67] *Id.* at 2.
[68] Minn. Stat. §§ 14.002, .131.
[69] Ex. 3 at 17.
[70] DEPARTMENT'S POST-HEARING COMMENTS at 7.
[71] Minn. Stat. § 14.127, subds. 1, 2.

64. The Department determined that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city.[72]

65. It grounds this analysis on three key contentions, namely that: (a) under Minn. Stat. § 14.38 (2016) a rule is ordinarily effective "five working days after its notice of adoption is published in the State Register"; and (b) "[l]ocal governments within the Mississippi River Corridor Critical Area must adopt, administer, and enforce plans and ordinances consistent" with proposed Part 6106; and (c) "local governments across the MRCCA will not be required to begin work to amend and adopt MRCCA plans and ordinances to meet or exceed the standards set forth in these proposed MRCCA rules until the second year after adoption of these rules, at the earliest."[73]

66. Because of this regulatory lag between publication of the rules in the *State Register,* and the later effective dates of local ordinances that incorporate the new state standards, the Department contends that there will be no costs complying with a proposed rule in the first year after the rule takes effect for small cities or small businesses.[74]

67. In its comments, however, the Department does not set forth all of the relevant features of Minn. Stat. § 14.38, subd. 1. The statute provides:

> Every rule, regardless of whether it might be known as a substantive, procedural, or interpretive rule, which is filed in the Office of the Secretary of State as provided in sections 14.05 to 14.28 shall have the force and effect of law five working days after its notice of adoption is published in the State Register ***unless*** a different date is required by statute or ***a later date is specified in the rule***.[75]

68. In this particular case, the proposed rules do indeed provide for later effective dates of the standards that will regulate uses and development within the MRCCA. This is because the standards regulating uses and development of property come into being through local ordinances; ordinances which only "have the force and effect of law" once they are approved by the Department. As proposed Minn. R. 6106.0060, subp. 3 and Minn. R 6106.0070, subp. 3(H) state:

> Local governments within the Mississippi River Corridor Critical Area **must adopt, administer, and enforce plans and ordinances consistent with this chapter**. Plans and ordinances must be submitted to the Metropolitan Council for review and must be approved by the commissioner before they are adopted as provided under part 6106.0070…. For the purpose of this part, "consistent" means that **each local plan and ordinance**, while it may be structured or worded differently, **meets the** purpose, scope, and

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[72] Ex. 3 at 20.
[73] Ex. 2 at 15; Ex. 3 at 19.
[74] DEPARTMENT'S POST-HEARING COMMENTS, Attachment 1 at 4.
[75] Minn. Stat. § 14.38, subd. 1 (emphasis added).

numeric thresholds and standards set forth in this chapter. Plans and ordinances that are not consistent with this chapter require approval of flexibility, according to part 6106.0070, subpart 6

….

Only those plans and ordinances approved by the commissioner have the force and effect of law.[76]

69. Likewise important, one township - Grey Cloud Island - indicated that local compliance costs associated with the proposed rules will exceed $25,000 within the first year.[77]

1. Construing the Terms of Minn. Stat. § 14.131

70. In the view of the Administrative Law Judge, the Department does not read the provisions Minn. Stat. § 14.127 correctly and has not developed an accurate estimate of the costs that small businesses or small cities will incur in complying with the proposed rules.[78]

71. The legislature's purpose when enacting Minn. Stat. § 14.127, was to better understand the impact of its regulatory delegations. For example, in its 1993 review of Minnesota's rulemaking process, the State Commission on Reform and Efficiency observed that the legislature is often "not aware of the specific costs of preparing and adopting the rules it authorizes or requires" and "lacks cost information when considering bills authorizing rulemaking."[79] In this context, the provisions of Minn. Stat. § 14.127 operate as a self-check against the legislature misjudging the cost of regulatory programs when it delegates rulemaking authority.

72. The structure and text of the exemptions in Minn. Stat. § 14.127, subd. 4, confirm this conclusion. Subdivision 4 provides that there is no safe-harbor from regulatory compliance for small cities and small businesses when:

(a) the Legislature has appropriated sufficient funds for the costs of complying with the proposed rule;

(b) the proposed rule follows from "a specific federal statutory or regulatory mandate";

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[76] Ex. 2 at 15, 19; *see also* Ex. 2 at 16 (Proposed Minn. R 6106.0060, subp. 7(C)) ("Cities must ... adopt, administer, and enforce plans and ordinances as provided under part 6106.0070, subpart 3.").

[77] Ex. 3 at 20; *see also* Comments of the City of Newport at 4 (June 16, 2016) (Requesting a delay in implementation of the proposed regulations until an appropriation from the legislature for defraying local compliance costs.).

[78] *See* Minn. Stat. § 14.127.

[79] *See* Finding 6, *Reforming Minnesota's Administrative Rulemaking System* (State Commission on Reform and Efficiency, 1993.).

(c) the rules were promulgated under the limited exemption of the "good cause exempt" rulemaking procedure;

(d) the Legislature exempted the proposed rules from compliance with Chapter 14 rulemaking procedures;

(e) the rules were promulgated by the Public Utilities Commission; or

(f) the Governor waives the safe-harbor provisions by filing a notice with both houses of the Legislature and publishing the same in the *State Register*.

Individually, and collectively, these exemptions reflect a single underlying assumption: namely, the legislature assumes that when it makes a delegation of rulemaking authority, the newly-authorized rules will not result in compliance costs of more than $25,000 for a small city or small business during the first year. If that cost assumption is not generally true for a particular agency (such as the Public Utilities Commission), or untrue with respect to a particular program (such that appropriation accompanies the rulemaking delegation), one of the listed exemptions will apply. In all other cases, the legislature evidences its desire to renew the discussion of compliance costs, after input from the agency and interested stakeholders.[80]

73. Moreover, to accept the Department's view that the period for assessing compliance costs begins to run from shortly after publication of the rules in the *State Register*, even when the substantive requirements of those rules will not become effective for years later, does real violence to the statutory scheme. It cancels the provisions of Minn. Stat. § 14.38, subd. 1, which provides that substantive standards in administrative rules (such as those in this rulemaking) may become effective on dates different than "five working days after its notice of adoption is published in the State Register …."[81]

74. Likewise, the Department's reading of the statute significantly narrows the protections for small businesses and small cities. Under Minn. Stat. § 14.127, qualifying small cities and small businesses may opt-out of costly regulatory programs until "the rules are approved by a law enacted after the agency determination or administrative law judge disapproval."[82] By contrast, because the Department has structured the rules so that the substantive, cost-driving features of the regulations have "the force and effect of law" more than one calendar year after the rules have been published in *State Register*, the only protection small cities and small businesses have against high compliance costs (if the Department's view is accepted) is a one-year head start on lobbying the Legislature for relief. The difference between a present right to "opt-out" of a regulatory program, and the opportunity to request that those same small cities and

[80] Minn. Stat. § 14.127, subd. 4.
[81] Minn. Stat. § 14.38, subd. 1.
[82] Minn. Stat. § 14.127, subd. 4.

small businesses be exempted from that program in future, is the difference between something very significant and nearly nothing at all.

75. Lastly, if the Department's interpretation is accepted it would all but end the continuing, inter-branch dialogue on compliance costs that the legislature hoped for when it enacted Minn. Stat. § 14.127: Agencies would need only to place a calendar year in between the publication of rules, and imposition of very high regulatory costs, in order to avoid greater scrutiny. This is a very simple task for regulators with both patience and modest drafting skills.

76. The Department's reading of Minn. Stat. § 14.127 is too narrow.[83]

77. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127, but that determination is not adequately supported in the rulemaking record. The hearing record does not establish that the total compliance costs for qualifying small city and small business will be less than $25,000 in the first year following the efficacy of the minimum standards in Part 6106 "for use, and development of land within the Mississippi National River and Recreation Area."[84]

78. The cost determination is disapproved under Minn. Stat. § 14.127.

2. The Effect of Disapproving the Cost Calculation

79. As provided in Minn. Stat. § 14.127, subd. 1, qualifying small businesses and small cities may be able to claim a temporary exemption from compliance of the proposed rules. The statute states:

> any business that has less than 50 full-time employees or any statutory or home rule charter city that has less than ten full-time employees may file a written statement with the agency claiming a temporary exemption from the rules. Upon filing of such a statement with the agency, the rules do not apply to that business or that city until the rules are approved by a law enacted after the agency determination or administrative law judge disapproval.[85]

80. Importantly, however, the "safe harbor" provisions will not apply if the Governor waives application of these provisions, sends notice of the waiver "to the

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[83] *See Good Neighbor Care Centers, Inc. v. Minnesota Dep't of Human Servs.,* 428 N.W.2d 397, 401 (Minn. Ct. App. 1988) ("[S]tatutes are to be construed according to the legislative intent, as reflected in the statute's purpose, the consequences of any particular interpretation, and administrative interpretations. It is presumed that the legislature intends the entire statute to be effective, intends to favor the public interest over private interests, and does not intend to violate the constitution or produce an unreasonable result."); Minn. Stat. § 645.17 (1) (2016) ("In ascertaining the intention of the legislature the courts may be guided by the following presumptions ... the legislature does not intend a result that is absurd … or unreasonable.").

[84] *See generally* Ex. 2 at 1 (Proposed Minn. R. 6106.0030).

[85] Minn. Stat. § 14.127, subd. 3.

speaker of the house and the president of the senate" and publishes "publish notice of this determination in the State Register."[86]

G. Adoption or Amendment of Local Ordinances

81. Under Minn. Stat. § 14.128 (2016), the Department must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[87]

82. Generally rules like these proposed rules, which require adoption or amendment of an ordinance, do not take effect upon publication in the *State Register* but require the Department to comply with a statutory waiting period set forth in Minn. Stat §14.128, subds. 1 and 2. In this instance, however, the rules are exempted from the statutory waiting period because the Department was directed by law to adopt rules "as are necessary for the administration of the Mississippi River corridor critical area program." [88]

83. The Department concluded that local governments will need to adopt or amend ordinances in order to comply with the proposed rules.[89]

84. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

85. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[90]

86. Under Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[91] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which

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[86] Minn. Stat. § 14.127, subd. 4.
[87] Minn. Stat. § 14.128, subd. 1.
[88] *See* Minn. Stat. § 14.128, subd. 3(2); Minn. Stat. § 116G.15, subds. 2(a), 3, 4, 7.
[89] Ex. 3 at 18.
[90] *See* Minn. R. 1400.2100.
[91] *See Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

guide the development of law and policy),[92] and the agency's interpretation of related statutes.[93]

87. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[94] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[95]

88. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[96] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[97]

89. Because both the Department and the Administrative Law Judge suggested changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.

90. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2(b). The statute specifies that a modification does not make a proposed rule substantially different if:

(1) "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice";

(2) the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and

(3) the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

91. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

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[92] *Compare generally United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[93] *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[94] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[95] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[96] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[97] *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

(1) "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests";

(2) the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing"; and

(3) "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[98]

V. Rule by Rule Analysis

92. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Department's regulatory choice or otherwise requires closer examination.

93. The Administrative Law Judge finds that the Department has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

94. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Revisions by the Department to Remove Ambiguity and Uncertainty

95. In filings on July 6 and July 13, 2016, the Department submitted a number of revisions to the text of the proposed rules in response to the stakeholder feedback.

96. The Department submitted 19 proposed revisions in its post-hearing comments dated July 6, 2016.[99]

97. The Department submitted seven additional revisions in its rebuttal comments dated July 13, 2016.[100]

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[98] *See* Minn. Stat. § 14.05, subd. 2.

[99] DEPARTMENT'S POST-HEARING COMMENTS at 3-7 (revising proposed Minn. R. 6105.0050, subp. 8(A) (Bluff Definition); 6105.0050, subp. 8(B) (Bluff Definition); 6105.0050, subp. 68 (Shore Impact Zone Definition); 6106.0050 subp. 39 (Native Plant Community Definition); 6106.0050, subp. 72 (Steep Slope Definition); 6106.0060, subp. 3 (Plans and Ordinances); 6106.0060, subp. 5(C) (Duties of Commissioner); 6106.0070, subp. 6(A) (Regulatory Flexibility); 6106.0070, subp. 6(C)(1)(a) (Regulatory Flexibility); 6106.0100, subp. 4 (River Neighborhood District); 6106.0100, subp. 9 (C)(1)(d) (District Boundaries); 6106.0120, subp. 2(A)(4) (Structure Height - SR District); 6106.0130, subp. 8(B) (Public Recreational Facilities); 6106.0130, subp. 8(E) (Public Signs & Kiosks); 6106.0130, subp. 8 (Public Recreational Facilities); 6105.0150 (Vegetation Management); 6106.0160, subp. 4 (Rock Riprap); 6106.0170, subp. 4(J) (Open Space); 6105.0180 (Exemption Table)).

98. None of the Department's 26 revisions would result in a substantial change from the rule as originally proposed, as those terms are used in Minn. Stat. § 14.05, subd. 2(b).

99. Twenty-five of the twenty-six proposed revisions are needed and reasonable. The sole exception, with respect to proposed Minn. R. 6106.0050, subp. 39, is addressed below.

B. Minn. R. 6106.0050, subp. 39

100. In its January 28, 2016 draft, RD 4240, the Department proposed to define the term "native plant community" as "a plant community that has been mapped as part of the Minnesota biological survey or other scientifically based studies."[101]

101. In a letter dated June 14, 2016, and introduced as an exhibit at the public hearing, the Administrative Law Judge expressed concern that the proposed definition was not sufficiently definite to inform officials and stakeholders which items qualify as native plant communities.[102]

102. In its July 6, 2016 post-hearing comments, the Department proposed to revise proposed rule 6106.0050, subpart 39, as:

> a plant community that has been ~~mapped~~ **identified** as part of the Minnesota biological survey or other scientifically based studies, **such as the USGS National Vegetation Classification or the USGS-NPS Vegetation Characterization Program**.[103]

103. The Department explained the rationale and objectives of the proposed revision in this way:

> The definition is intended to reference studies for use by local governments in identifying/mapping native plant communities, not to provide specifics of what "native plant communities" are.... As such, the DNR thought this phrase was sufficient, but could modify the proposed rules to include examples of the types of "other scientifically based studies," such as the USGS National Vegetation Classification or the USGS-NPS Vegetation Characterization Program.[104]

104. The definition of what qualifies as a "native plant community" is significant because, from this definition a regulatory duty to maintain these plants follows -

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[100] DEPARTMENT'S REBUTTAL COMMENTS at 6-8 (revising proposed Minn. R. 6106.0050, subp. 71 (State or Regional Agency Definition); 6106.0060, subp. 7(D)(3) (Duties of Cities); 6106.0080, subp. 4 (Conditional and Interim Use Permits); 6106.0080, subp. 7 (Accommodating Disabilities); 6106.0120 (Dimensional Standards); 6106.0140, subp. 5 (Stairways, Lifts and Landings); 6105.0160 subp. 3 (Land Alteration)).

[101] Ex. 2 at 7 (Proposed Minn. R. 6106.0050, subp. 39).

[102] PUBLIC HEARING EXHIBIT 20 at 2.

[103] DEPARTMENT'S POST-HEARING COMMENTS at 4.

[104] *Id.,* Attachment 2 at 1.

including a duty to replace any removed items with "vegetation that provides equivalent biological and ecological functions…."[105] Additionally, areas with qualifying native plant communities are slated to receive greater protection under the regulations, in the designation of "primary conservation areas."[106]

105. In the view of the Administrative Law Judge, providing the examples of two "scientifically based studies," does not narrow the otherwise unduly broad definition. The term "scientifically based" presumably means a study that was undertaken according to the scientific method; which *Merriam-Webster's* dictionary defines as:

> principles and procedures for the systematic pursuit of knowledge involving the recognition and formulation of a problem, the collection of data through observation and experiment, and the formulation and testing of hypotheses.[107]

106. There is simply no way for a regulated party to know whether a particular specie of plant has ever been identified by someone else, using data and the empirical testing of hypotheses. In order to meet the regulatory standard, therefore, local landowners would need to guess as to which flora qualifies as a "native plant." Likewise, the standards that the Department might later use in assessing the scientific rigor of an earlier plant identification are neither stated elsewhere in the rule, nor a part of common understanding, so as to make the intended meaning clear.[108]

107. Because the proposed rule fails to provide reasonable notice of when the regulatory standard applies, it is defective.[109]

108. One possible cure to the ambiguity in subpart 39, would be to limit the regulatory definition to:

> a plant community that has been **identified** as part of the Minnesota biological survey or **biological survey issued by a local, state or federal agency.**

Such a revision would be broad enough to include both the USGS National Vegetation Classification and the USGS-NPS Vegetation Characterization Program (each of which

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[105] Ex. 2 at 51-52 (Proposed Minn. R. 6106.0150, subp. 5(D) and 6(B)(1)).
[106] Ex. 2 at 59 (Proposed Minn. R. 6106.0170, subp. 4(C)).
[107] *Merriam-Webster Online Dictionary* (Definition: Scientific Method) (last accessed August 1, 2016) (http://www.merriam-webster.com/dictionary/scientific%20method).
[108] *See, e.g., In the Matter of the Proposed Rules Governing the Licensure of Treatment Programs for Chemical Abuse and Dependency and Detoxification Programs, Minnesota Rules, Chapter 9530,* OAH Docket No. 3-1800-15509-1 (2004) ("The Administrative Law Judge finds the requirement that a program have a particular licensure, and 'any additional certifications required by the department,' to be impermissibly vague and a defect in the rule.").
[109] *See In the Matter of Proposed Amendments to Rules Governing Apprenticeship Wages,* OAH Docket No. 7-1900-17022-1, slip op. at 36 (2006).

are promulgated under the authority of Office of Management and Budget Circular A-16), and the surveys in use by local governments.[110]

109. Such a revision would not result in a substantial change from the rule as originally proposed, as those terms are used in Minn. Stat. § 14.05, subd. 2(b).

VI. Additional Actions Urged By Stakeholders

110. During the three public hearings, and thereafter during the public comment periods, there were five key critiques of the proposed land use standards. Each of these critiques is addressed below.

111. In each of these contexts, however, it bears emphasizing that the role of the Administrative Law Judge is not to fashion requirements that the Judge regards as "the best" for a particular regulatory purpose; but rather, to determine whether the Department has made a reasonable selection among the regulatory options it had. This is because the delegation of rulemaking authority is from the Minnesota Legislature to the Department; and not to the Judge.[111] In each of these instances below, the Department's regulatory choices were needed and reasonable.

A. Bluff Standards - Minn R. 6106.0050, subps. 8-9; and 6106.0120, subp. 3(B)

112. Several early commentators questioned the absence of regulatory standards for mapping of bluff lines and contours in proposed part 6106.[112]

113. The Department persuasively noted that that while an earlier version of Minn. Stat. § 116G.15 obliged the Department to develop a series of bluff maps, this requirement was removed from the law in 2013.[113] Instead, the regulatory definitions and materials separately developed by the Department will be used to guide local governments in mapping bluff areas within their respective jurisdictions.

114. Additionally, still other commentators asserted that a single grade standard for the entire MRCCA corridor, before bluff land protections were imposed, was unduly restrictive.[114]

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[110] *See* DEPARTMENT'S POST-HEARING COMMENTS, Attachment 2 at 1.

[111] *See generally, Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs,* 713 N.W.2d 817, 832 (Minn. 2006) ("Our role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making'") (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)); *Manufactured Hous. Inst.*, 347 N.W.2d at 244 ("Agencies must at times make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like") (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976)).

[112] *See generally* Transcript (Tr.) Vol. I at 31-32 (Shillcox).

[113] 2013 Laws of Minnesota, ch. 137, art. 2, §§ 18-21.

[114] *See, e.g.,* Tr. Vol. II at 107 (Tiedeken).

115. The Administrative Law Judge disagrees. The Department's selection of an 18 percent grade standard was adequately supported by its studies on earlier slope failures, Global Information System mapping of the corridor area and review of locally-developed bluff standards that are now in place.[115]

B. District Boundaries - Minn R. 6106.0100

116. There were a number of requests to adjust the designation of particular districts within the corridor - both to urge allowing greater building height or density within particular areas, and conversely, more stringent restrictions on building height and density within districts.[116]

117. The Administrative Law Judge concludes that the proposed districts, as modified by the Department,[117] which are subject to still further adjustment as conditions change,[118] are adequately supported by the rulemaking record.

C. Height Requirements and Tiering - Minn R. 6106.0120

118. Several commentators expressed the view that the Conditional Use Permit (CUP) process provides inadequate protections against harmful development and higher densities within the MRCCA corridor.[119]

119. The Administrative Law Judge concludes that the use of visual impact assessments and local CUP processes,[120] combined with oversight of local permitting decisions by the state courts,[121] is adequately supported by the rulemaking record.

D. Recreational Facilities and Paved Trails - Minn R. 6106.0130, subp. 8

120. Several commentators expressed the view that the standards for recreational facilities, and paved areas within bluff zones, are unduly restrictive.[122]

121. The Administrative Law Judge concludes that the restrictions are related to protection of the integrity of bluff faces, and that site-specific accommodations are

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[115] Ex. 3 at 22-28; Exs. 28, 29; DEPARTMENT'S POST-HEARING COMMENTS, Attachments 6, 8, 9 and 10.

[116] *See, e.g.,* Comments of Aggregate Industries (July 1, 2016); Comments of Building Owners and Managers Association (June 27, 2016); Comments of the City of St. Paul (July 6, 2016); Comments of Cordelia S.C. Pierson (July 6, 2016); Comments of Friends of Mississippi River (July 6 and July 13, 2016); Comments of Friends of the Parks and Trails (June 30, 2016); Comments of Minneapolis Park and Recreation Board (July 6, 2016); Comments of PAS Associates (June 15, 2016); Comments of St. Anthony's Falls Alliance (July 5, 2016).

[117] *See* Ex. 3 at 42-44; DEPARTMENT'S POST-HEARING COMMENTS, Attachment 4.

[118] Ex. 2 at 34-35 (Proposed Minn. R. 6106.0100, subp. 9(C)).

[119] Comments of Dale Herron (July 5, 2016); Comments of Parks and Trails Council of Minnesota (July 1, 2016); Comments of Ronald Vantine (July 4, 2016); Tr. Vol. III at 182-83 (Erstad); Tr. Vol. III at 204-05 (Bernthal); Tr. Vol. III at 207 (Viske); Tr. Vol. III at 229 (Forney); Tr. Vol. III at 250 (Uzarek).

[120] *See* Ex. 3 at 45-47; DEPARTMENT'S POST-HEARING COMMENTS, Attachment 12.

[121] *See* Minn. Stat. § 394.27, subd. 9; Minn. Stat. § 462.361, subd. 1 (2016).

[122] *See, e.g.,* Tr. Vol. II at 110-11 (Tiedeken).

available through requests for local ordinance flexibility and variances.[123] The proposed development limits are adequately supported by the rulemaking record.[124]

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122. A number of commentators maintained that the set-aside requirements for conservation areas should apply to tracts of land smaller than ten acres to provide better protection of corridor resources.[125]

123. The Administrative Law Judge concludes that the minimum acreage requirements adequately balance the need for such conservation areas with the burden that management of these areas places upon local units of government.[126] This is particularly true because there are alternatives to municipal or township management of conservation areas (through deed restrictions or private conservatories) for smaller parcels.[127]

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Department gave notice to interested persons in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Administrative Law Judge concludes that the Department has fulfilled its additional notice requirements.

4. Except as noted in Finding 107, the Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i), (ii).

5. The Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5 (2015).

6. Except as noted in Finding 107, the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, 14.50.

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[123] *See* Exs. 28, 29; DEPARTMENT'S RESPONSE TO COMMENTS, D.1. Attachment 1, Part F.
[124] *See* Ex. 3 at 45-47; DEPARTMENT'S POST-HEARING COMMENTS, Attachment 12.
[125] *See, e.g.,* Comments of Friends of the Parks and Trails (June 30, 2016); Tr. Vol. II at 133 (Diamond); Tr. Vol. III at 253-54 (Clark).
[126] Ex. 3 at 62-66.
[127] *Id.* at 65.

7. The modifications to the proposed rules suggested by the Department after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2; 14.15, subd. 3.

8. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2; 14.15, subd. 3.

9. As part of the public comment process, a number of stakeholders urged the Department to adopt other revisions to Part 6106. In each instance, the Department's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

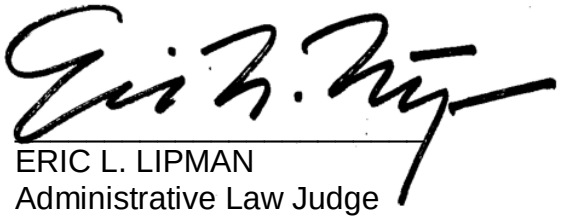
10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Department from further modification of the proposed rules - provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

Except as noted in Finding 107, **IT IS HEREBY RECOMMENDED** that the proposed amended rules be adopted.

Dated: August 10, 2016



ERIC L. LIPMAN
Administrative Law Judge

Reported: 3 Hearing Transcripts.

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Department makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the MPCA, and the MPCA will notify those persons who requested to be informed of their filing.