



Minnesota.
Department of Natural Resources.
Administrative Rules Proceedings Files:
Mississippi River Corridor Critical Area
(MRCCA).

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FINAL STEPS ON RULEMAKING AND WAIVER

MRCCA Rulemaking R-04240

Prepared by Beth Carlson, DNR Rules Coordinator –12/19/2016 VERSION

Dept of Natural Resources: RULEMAKING STEPS TO FINISH	COMPLETED	Governor's Office: WAIVER STEPS to finish
	TARGET	
<p>SUBMIT FINAL RULE FORM TO GOVERNOR'S OFFICE Rules Coordinator submits the <i>Final Rule Form</i> to governor's office along with the <i>proposed Order Adopting Rules</i> and copies of the ALJ report and the rules (including modifications). Governor's office approves proposed Order Adopting Rules</p>	<p>10/31/16</p> <p>11/27/16</p>	<p>DNR SUBMITS WAIVER RATIONALE AND PROPOSED WAIVER TEXT TO GOVERNOR'S OFFICE FOR REVIEW</p> <p>14.127 LEGISLATIVE APPROVAL REQUIRED. (e) Subdivision 3 does not apply if the governor waives application of subdivision 3. The governor may issue a waiver at any time, either before or after the rule would take effect, but for the requirement of legislative approval. As soon as possible after issuing a waiver under this paragraph, the governor must send notice of the waiver to the speaker of the house and the president of the senate and must publish notice of this determination in the State Register.</p>
<p>REQUEST CERTIFIED VERSION OF RULES WITH MODIFICATIONS FROM REVISOR. Rules Coordinator obtains "stripped" (clean) version of rules showing just the modifications for the Chief ALJ. (The revisor's office has already set up a preliminary copy for us and is ready to certify it.)</p>	<p>11/28/16</p>	
<p>RESUBMIT RULES TO THE OAH. Rules Coordinator requests final approval of rules as to legality. Chief ALJ has five working days to approve or disapprove. DNR receives ALJ order approving rules as to legality</p>	<p>11/30/16</p> <p>12/07/16</p>	
<p>ADOPT RULES. Rules Coordinator obtains commissioner's signature on <i>Order Adopting Rules</i> and emails a copy to the OAH.</p>	<p>12/08/16</p>	<p>DNR NOTIFIES GOVERNOR'S OFFICE OF RULE ADOPTION AND PROVIDES A PROJECTED TIMETABLE FOR REMAINING STEPS</p>
<p>FILING. OAH submits rules to the Office of the Secretary of State, which sends copies as filed to governor's office, OAH, and DNR Rules Coordinator. Rule is filed. DNR sends same-day notice of filing to those who requested notice on the hearing registers.</p>	<p>12/14/2016 (sent US mail)</p> <p>12/19/2016</p>	
<p>CONFIRM THAT RULES WILL NOT BE VETOED. DNR requests approval from governor's office to submit the Notice of Adoption for publication. This is a verification that the rules will not be vetoed under Minn. Stat. § 14.05, subd. 6. Required in writing (email) for the official rule record. In this case, also coordinate publication of waiver. Governor's office confirms that rules will not be vetoed</p>	<p>12/19/2016</p>	<p>Governor's Waiver is signed</p>
<p>PUBLICATION. Revisor provides the notice of adoption (including modifications to previously published rule language) to the DNR for publication, which must be submitted to the State Register within 180 days of the ALJ's Report. DNR submits print order to State Register. → State Register publication date → Rules effective date (5 working days after publication) →</p>	<p>12/19/2016</p> <p>12/19/2016</p> <p>12/20/2016</p> <p>12/27/2016</p> <p>01/04/2017</p>	<p>PUBLICATION AND NOTICE</p> <p>← Governor's office submits print order to State Register and sends notice to House Speaker and Pres of Senate.</p> <p>← State Register publication date</p>

STATE OF MINNESOTA
EXECUTIVE DEPARTMENT



MARK DAYTON
GOVERNOR

Waiver

Pursuant to Minnesota Statutes, Section 14.127, Subdivision 4(e)

I, Mark Dayton, Governor of the State of Minnesota, by virtue of the power vested in me by the Constitution and applicable statutes, do hereby issue this Waiver:

Whereas, the State of Minnesota is committed to protecting the key resources and features of the Mississippi River, including the portion that runs through the Twin Cities metropolitan area;

Whereas, the Minnesota Legislature, under Minnesota Statutes, section 116G.15, directed the Minnesota Department of Natural Resources to establish permanent rules to replace the performance standards promulgated in 1979 by Executive Order 79-19 that currently guide land use and development for property within the Mississippi River Corridor Critical Area, a specially-designated 72-mile portion of the Mississippi River that extends from the cities of Dayton and Ramsey in the north to Ravenna Township in the south;

Whereas, the Minnesota Department of Natural Resources is adopting Minnesota Rules, Chapter 6106, to guide land use and development in the MRCCA in accordance with Minnesota Statutes, section 116G.15;

Whereas, Minnesota Rules, Chapter 6106, is expected to take effect on January 4, 2017;

Whereas, pursuant to Minnesota Statutes, section 14.127, the Minnesota Department of Natural Resources determined that the cost of complying with Minnesota Rules, Chapter 6106, in the first year after the rule takes effect would not exceed \$25,000 for a small business or a small city;

Whereas, the Administrative Law Judge assigned to review the rulemaking pursuant to Minnesota Statutes, Chapter 14, disapproved the agency's cost determination under Minnesota Statutes, section 14.127;

Whereas, the Administrative Law Judge's disapproval of the agency's cost determination triggers the application of Minnesota Statutes, section 14.127, subdivision 3, which enables a small business or a small city to claim a temporary exemption from Minnesota Rules, Chapter 6106, until the Minnesota Legislature enacts a law approving the rules;

Whereas, Minnesota Statutes, section 14.127, subdivision 4, grants the governor authority to issue a waiver of the application of Minnesota Statutes, section 14.127, subdivision 3;

Whereas, the State of Minnesota recognizes that claims of temporary exemptions from Minnesota Rules, Chapter 6106, would undermine the purpose of the rule, the intent of the Legislature in directing the Minnesota Department of Natural Resources to make rules, and the commitment of the State of Minnesota to protect the key features and resources of the Mississippi River Corridor Critical Area; and

Whereas, temporary exemptions would undermine local zoning authority and deregulate businesses and land already subject to critical area protections.

Now, Therefore, I hereby waive application of Minnesota Statutes, section 14.127, subdivision 3, to Minnesota Rules, Chapter 6106. This waiver is effective January 4, 2017.

In Testimony Whereof, I have set my hand on this 19th day of December, 2016.



Mark Dayton
Governor

Carlson, Beth P (DNR)

From: Carlson, Beth P (DNR)
Sent: Monday, December 19, 2016 12:57 PM
To: Naramore, Barb (DNR); Shillcox, Jennifer (DNR)
Cc: Enzler, Sherry (DNR); Petrik, Daniel (DNR); Baumeister, Paula (DNR)
Subject: MRCCA - progress on final steps
Attachments: FINAL STEPS ON RULEMAKING AND WAIVER.docx

Copy of the Final Steps status is attached.

Today the MRCCA rule was filed at the Sec of State and I delivered the Gov Office's copy to their office.

The Revisor's office picked up their copy and promptly produced the notice of the adoption for the rule, so that's ready for the State Register.

I completed and signed the Notice of Filing for the list of people who requested notice at the hearings. 21 only provided a mailing address and those copies will go out in today's mail. I just emailed a saved PDF to those who provided an email address; six bounced back. I will check to see if our transcription of any email addresses was in error and try a resend if that's the case. If not, I will make a minimal effort to see if we have more current addresses for recognized names.

We've reminded Gov staff that I need an emailed confirmation of no veto in order to submit my print order for the notice of adoption of the rules.

Last I knew, they were trying for a Gov signature on the waiver late last week.

Beth Carlson, DNR Rules Coordinator
Operations Services Division - Office of Policy and Planning
Minnesota Department of Natural Resources
Phone: 651-259-5531

Carlson, Beth P (DNR)

From: Carlson, Beth P (DNR)
Sent: Friday, December 16, 2016 7:52 PM
To: cindy.maxwell@revisor.mn.gov
Subject: R-04240 MRCCA notice of adoption

Cindy,

The adopted rules for AR4240 are in transit to the Office of the Secretary of State and I am engaged in some meticulous coordination to accomplish a simultaneous publication of our notice of adoption and a waiver document about to be signed by the Governor. AND I just remembered that you have not produced the notice of adoption yet because you don't normally do that until you get your copy of the filed rule.

I ask you to go ahead and prepare that notice of adoption.

Here is how I hope things will go:

1. Nancy Breems gets the rule from OAH in Monday's mail and calls me. (I also have to give same-day notice of filing to a list of people who requested it on the hearing registers.)
2. I will drive over to her office and bring the Gov office copy of the filed rule to the Governor's office myself in order to expedite their "no veto" confirmation so that I can submit my print order for the notice of adoption by the Tuesday 12/20 State Register deadline. Governor's staff has to meet same deadline.
3. Then Sean Plemmons contacts your office for the official electronic version of the notice of adoption (closing that loop).

I think our assistant commissioner is trying to work out a way for the waiver to be signed and remain good even if we have to put off the joint publication for a week because of the print order deadline and the Governor's office being closed for moving, etc.

Sorry to put all of this detail in an email message but I forgot to call you earlier and you might not have been in your office anyway. Yes I am here late on a snowy evening but I have a short drive home and feel better for the office housekeeping I've done.

Beth Carlson, DNR Rules Coordinator

Elizabeth Carlson

Strategic Planning and Policy Administrator | Office of Policy and Planning | Operations Services Division

Minnesota Department of Natural Resources

500 Lafayette Road

Saint Paul, MN 55155-4010

Phone: 651-259-5531

Email: beth.carlson@state.mn.us

mndnr.gov

 **DEPARTMENT OF
NATURAL RESOURCES**





MEMORANDUM

DATE: October ^{31 2016}~~28~~, 2016

TO: Joanna Dornfeld,
Deputy Chief of Staff, Legislative and Policy Affairs
Office of the Governor

Kim Holmes,
General Counsel to Governor Mark Dayton

FROM: Sherry A. Enzler, General Counsel 

PHONE: 651-259-5066

SUBJECT: **Proposed Rules of the Department of Natural Resources Governing Mississippi River
Corridor Critical Area (MRCCA), Revisor's ID Number R-04240**

This transmission contains the following two enclosures:

1. The first item is our Final Rule Form package submitted for your review and approval.
Action Needed: Approval of the Final Rule Form for the MRCCA Rules
2. The second item is a draft governor's waiver and the rationale for the waiver for your consideration.

Action Needed: None at this time.

When the Office of the Secretary of State has sent copies of the filed adopted rule to your office and ours, we will check back with you to confirm for our records that the rules will not be vetoed. At that time we will request that the waiver be signed. In addition, we will ask to coordinate with your office to arrange same-day publications of the waiver and our notice of adoption of the rules in the State Register.

Our summary of the remaining steps in these procedures is outlined on the back page of this memorandum for reference.

c: Barbara Naramore, Assistant Commissioner
Luke Skinner, Ecological and Water Resources Director
Jennifer Shillcox, Ecological and Water Resources Division
Daniel Petrik, Ecological and Water Resources Division
Beth Carlson, DNR Rules Coordinator, Operations Services Division



FINAL STEPS ON RULEMAKING AND WAIVER

MRCCA Rulemaking R-04240

Drafted by Beth Carlson, DNR Rules Coordinator – UPDATED 10/25/2016

RULEMAKING STEPS TO FINISH	WAIVER STEPS
<p>FINAL RULE FORM → governor's office approves proposed Order Adopting Rules.</p> <p>Rules Coordinator submits the <i>Final Rule Form</i> to governor's office along with the proposed <i>Order Adopting Rules</i> and copies of the ALJ report and the rules (including modifications).</p>	<p>DNR SUBMITS WAIVER RATIONALE AND PROPOSED WAIVER TEXT TO GOVERNOR'S OFFICE FOR REVIEW</p>
<p>REQUEST CERTIFIED VERSION OF RULES WITH MODIFICATIONS FROM REVISOR.</p> <p>Rules Coordinator obtains "stripped" (clean) version of rules showing just the modifications for the Chief ALJ. (The revisor's office has already set up a preliminary copy for us and is ready to certify it.)</p>	
<p>RESUBMIT RULES TO THE OAH.</p> <p>Rules Coordinator requests final approval of rules as to legality. Chief ALJ has five working days to approve or disapprove.</p>	
<p>ADOPT RULES.</p> <p>Rules Coordinator obtains commissioner's signature on <i>Order Adopting Rules</i> and emails a copy to the OAH.</p>	
<p>FILING.</p> <p>OAH files rules with the Office of the Secretary of State, which sends copies as filed to governor's office, OAH, and DNR Rules Coordinator.</p>	
<p>CHECK-IN → Governor's office confirms rules will not be vetoed.</p> <p>DNR must get approval from governor's office to submit the Notice of Adoption for publication. This is a verification that the rules will not be vetoed under Minn. Stat. § 14.05, subd. 6. We must get this communication in writing (email) for the official rule record. In this case, also coordinate publication of waiver.</p>	<p>GOVERNOR'S WAIVER IS SIGNED AND READY FOR PUBLICATION</p> <p>14.127 LEGISLATIVE APPROVAL REQUIRED. (e) Subdivision 3 does not apply if the governor waives application of subdivision 3. The governor may issue a waiver at any time, either before or after the rule would take effect, but for the requirement of legislative approval. As soon as possible after issuing a waiver under this paragraph, the governor must send notice of the waiver to the speaker of the house and the president of the senate and must publish notice of this determination in the State Register. <i>[emphasis added]</i></p>
<p>PUBLICATION.</p> <p>Revisor provides the notice of adoption (including modifications to previously published rule language) to the DNR for publication, which must be submitted to the State Register within 180 days of the ALJ's Report. Deadline is 2/07/2017.</p> <p>DNR submits print order to State Register.</p>	<p>PUBLICATION.</p> <p>Governor's office submits print order to State Register and sends required notice to House Speaker and President of the Senate.</p>



PROPOSED

Pursuant to Minnesota Statutes, Section 14.127, Subdivision 4(e)

I, Mark Dayton, Governor of the State of Minnesota, by virtue of the power vested in me by the Constitution and applicable statutes, do hereby issue this Waiver:

Whereas, the State of Minnesota is committed to protecting the key resources and features of the Mississippi River, including the portion that runs through the Twin Cities metropolitan area;

Whereas, the Minnesota Legislature, under Minnesota Statutes, section 116G.15, directed the Minnesota Department of Natural Resources to establish permanent rules to replace the performance standards promulgated in 1979 by Executive Order 79-19 that currently guide land use and development for property within the Mississippi River Corridor Critical Area, a specially-designated 72-mile portion of the Mississippi River that extends from the cities of Dayton and Ramsey in the north to Ravenna Township in the south;

Whereas, the Minnesota Department of Natural Resources is adopting Minnesota Rules, Chapter 6106, to guide land use and development in the MRCCA in accordance with Minnesota Statutes, section 116G.15;

Whereas, Minnesota Rules, Chapter 6106, is expected to take effect on XXXXXX;

Whereas, pursuant to Minnesota Statutes, section 14.127, the Minnesota Department of Natural Resources determined that the cost of complying with Minnesota Rules, Chapter 6106, in the first year after the rule takes effect would not exceed \$25,000 for a small business or a small city;

Whereas, the Administrative Law Judge assigned to review the rulemaking pursuant to Minnesota Statutes, Chapter 14, disapproved the agency's cost determination under Minnesota Statutes, section 14.127;

Whereas, the Administrative Law Judge's disapproval of the agency's cost determination triggers the application of Minnesota Statutes, section 14.127, subdivision 3, which enables a small business or a small city to claim a temporary exemption from Minnesota Rules, Chapter 6106, until the Minnesota Legislature enacts a law approving the rules;

Whereas, Minnesota Statutes, section 14.127, subdivision 4, grants the governor authority to issue a waiver of the application of Minnesota Statutes, section 14.127, subdivision 3;

Whereas, the State of Minnesota recognizes that claims of temporary exemptions from Minnesota Rules, Chapter 6106, would undermine the purpose of the rule, the intent of the Legislature in directing the DNR to make rules, and the commitment of the State of Minnesota to protect the key features and resources of the Mississippi River Corridor Critical Area; and

Whereas, temporary exemptions would undermine local zoning authority and deregulate businesses and land already subject to critical area protections.

Now, Therefore, I hereby waive application of Minnesota Statutes, section 14.127, subdivision 3, to Minnesota Rules, Chapter 6106. This waiver is effective XXXXX.

In Testimony Whereof, I have set my hand on this XX day of XXX, 2016.

Mark Dayton
Governor

Minn. Stat. § 14.127 Waiver Briefing

Mississippi River Corridor Critical Area (MRCCA) Rules

Background

After an extensive rule making process and a public hearing before an administrative law judge (ALJ) the ALJ issued a report finding that the Minnesota Department of Natural Resources (DNR) has met all requirements to implement the proposed MRCCA rules, with two issues noted:

- A. The ALJ recommended a change to the definition of “native plant communities”. The DNR agrees with this modification.
- B. The ALJ disapproved DNR’s cost analysis for small businesses and small cities required under Chapter 14. This alleged defect is not fatal to the adoption of the rule but has significant implications for rule implementation.

Chapter 14 Cost Analysis Requirement

Minnesota Statute, section 14.127, subd. 1, requires the agency to “determine if the cost of complying with a proposed rule in the first year after the rules 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.” A rule becomes effective five (5) days after publication of the rule in the State Register. Minn. Stat. § 14.38, subd. 1(2014).¹ The DNR concluded that the rule would not have a financial impact over \$25,000 the year after the effective date because:

- A. All existing property uses were permitted to continue under the rules. Thus the rules only affected small businesses that chose to expand in a manner they were inconsistent with the rules and then only after the rules had been adopted by local ordinance.
- B. The schedule for the adoption of the rules was such that local governmental units (LGU) would not be required to adopt the rules for at least a year after the adoption of the rules. This delay in implementation was intended to allow the DNR to take steps to reduce the cost of implementation for LGUs. These steps included:
 - a. Aligning the local MRCCA plan update process with the Met Council planning requirements so that these two process would be synced reducing costs to LGUs.
 - b. The development of model ordinances, mapping layers, training, and other resources by the DNR. The model ordinances and other materials would be provided to LGUs to significantly reduce the cost of plan ordinance adoption.
 - c. To permit the DNR to explore a LGU grant program to help defray implementation costs.
- C. DNR conducted a LGU survey across the MRCCA and all but one small LGU indicated that the cost to adopt the ordinance would exceed \$25,000.

¹ Although Minn. Stat. § 14.128, subd. 2 (2015) provides that rules requiring LGUs to adopt ordinances have longer period between publication and the effective date. There is, however, an exception to this extension of the effective date where, as here, the agency has been mandated to adopt rules. Minn. Stat. § 14.128, subd. 3(2)(2014) and Minn. Stat. 116.15(2015)(directing the DNR to adopt the MRCCA rules.

Because the LGUs would not be required to adopt new ordinances until well after a year of the rules effective date and because of the steps DNR was taking to defray the costs of adoption the DNR argued that the requirements of Minn. Stat. § 14.127 (2016). The ALJ disagreed with the DNR arguing that it was his obligation to apply the “legislature’s intent” rather than apply the statute’s plain language.

Effect of the ALJ § 14.127 Determination

The ALJ determination does not impact the DNR’s ability to adopt the rules, it does, however, create havoc with the ability of LGUs and the DNR to implement the rule across the MRCCA. In light of the ALJ’s determination any small business or LGU meeting the thresholds of Minn. Stat. §14.127, subd.1, as outlined above, can “file a written statement with the agency claiming a temporary exemption from the rules” in which case the rule must be submitted to the legislature for legislative approval. Minn. Stat. § 14.127, subd. 3 (2014). There is no statutory requirement that the business or LGU provide evidence of the adverse financial impact. *Id.* The filing of such an exemption would:

- A. Increase the cost of implementation for LGUs should a business within their jurisdiction file an exemption because the LGU would effectively be required to maintain separate zoning ordinances – one set for the objecting business and another for non-objecting businesses.
- B. Result in inconsistent standards across the MRCCA.
- C. Undermine the hard won consensus around the rules. The adoption of these rules was extremely controversial and took multiple attempts. The current set of rules was the result of over seven years working with stakeholder to develop a set rules that represents the consensus of the vast majority of stakeholders across the corridor. The rule is supported by a broad array of political officials on both sides of the aisle. *See Attachment 1.* Yet the ALJ’s determination permits a single small business owner or a single small LGU to throw the entire rule back to the legislature for a rehash.

DNR Request

For the reasons outlined above the DNR disagrees with the ALJ and believes that MRCCA rule does not meet the § 14.127, subd. 3 thresholds. Minnesota Statute Ch. 14 has no mechanism for a state agency to challenge a finding by the ALJ that the cost of implementing a proposed rule will exceed the financial thresholds set forth in Minn. Stat. § 14.127 (2014). Therefore, the DNR has no ability to object to the ALJ’s determination in this case.

Minnesota Statute does, however, permit the governor to waive the application of the Minn. Stat. § 14.127, subd. 3 exemption by issuing a waiver that is sent to the speaker of the house, the president of the senate and publishing the waiver in the State Register. Because of the hard won consensus supporting the proposed rule, the extensive stakeholder participation, and the havoc that application of § 14.127, subd. 3 will create the DNR requests that the Governor issue a waiver at the time the MRCAA rule is submitted to the State Register for publication. The DNR has attached a draft waiver for your consideration.

Attachment 1: Supporters of the Mississippi River Critical Area Rules

These rules took seven years to develop and have broad support from all affected interests, including strong support from:

1. **Local governments:** Many local governments - including staff and elected officials - commented in favor of the rules, stating that the current districts and standards are outdated and vague, and that the rules will help to ease future administration of the MRCCA program. While some local governments requested changes to specific rule parts or districts, none commented in opposition of the rules as a whole.
2. **National Park Service:** John Anfinson, Superintendent, Mississippi National River & Recreation Area testified on behalf of the rule.
3. **Environmental Interest Groups:** A number of environmental interest groups supported the rule including the Friends of the Mississippi, the Minnesota Center for Environmental Advocacy, and the Izaak Walton League.
4. **Legislators:** Many legislators commented in support of the rules, including:
 - U.S. Congressman Keith Ellison
 - U.S. Congresswoman Betty McCollum
 - U.S. Senator David Durenburger
 - Senator Katie Sieben
 - Senator Jim Abeler
 - Representative Barbara Haake
 - Representative Rick Hansen
 - Senator Sandra Pappas
 - Senator Chris Eaton
 - Senator Greg Clausen
 - Representative Phyllis Kahn
 - Representative Jim Davnie
 - Representative Dan Schoen
 - Senator Barbara Goodwin
 - Senator Richard Cohen
 - Representative Joe Mullery
 - Senator Patricia Torres Ray
 - Senator Alice Johnson