



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

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September 13, 2016

VIA EMAIL ONLY

Elizabeth P. Carlson
500 Lafayette Rd Box 10
Saint Paul, MN 55155
Beth.Carlson@state.mn.us

R. Gordon Nesvig
Attorney at Law
PO Box 255
Cottage Grove MN 55016

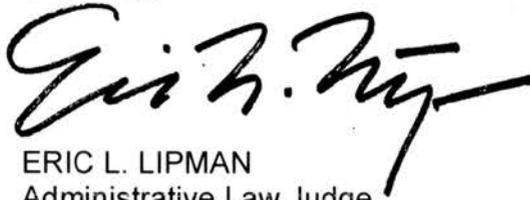
**Re: *In the Matter of the Proposed Rules Relating to the Mississippi River
Corridor Critical Area***
OAH 8-9014-33236

Dear Ms. Carlson and Mr. Nesvig:

Enclosed and served upon you please find the **ORDER ON REQUEST FOR
RECONSIDERATION** in the above-entitled matter.

If you have any questions, please contact my legal assistant Katie Lin at
(651) 361-7911, katie.lin@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



ERIC L. LIPMAN
Administrative Law Judge

ELL:kjl
Enclosure

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
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
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Katie Lin, certifies that on September 13, 2016 she served the true and correct **ORDER ON REQUEST FOR RECONSIDERATION** 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 EMAIL ONLY

Elizabeth P. Carlson
500 Lafayette Rd Box 10
Saint Paul, MN 55155
Beth.Carlson@state.mn.us

R. Gordon Nesvig
Attorney at Law
PO Box 255
Cottage Grove MN 55016-255

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 ON REQUEST
FOR RECONSIDERATION**

This matter came before Administrative Law Judge Eric L. Lipman on September 7, 2016, with receipt of R. Gordon Nesvig's request for reconsideration.

Mr. Nesvig objected to the Minnesota Department of Natural Resources' (Department) proposed designation of certain parcels within the City of Saint Paul Park as a Rural and Open Space District in its draft regulations on management of uses within the Mississippi River Critical Corridor Area (MRCCA). The MRCCA is a specially-designated, 72-mile portion of the Mississippi River that extends from Dayton Township, at its northern edge, to Ravena Township, Minnesota in the south.¹

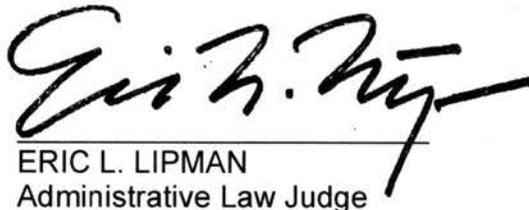
Mr. Nesvig maintains that the Department should have designated his parcels as within the River Neighborhood District instead of a Rural and Open Space District, in the proposed regulations.

Based upon the contents of the rulemaking record and the Memorandum that follows below,

IT IS HEREBY ORDERED:

Mr. Nesvig's Motion for Reconsideration is **DENIED**.

Dated: September 13, 2016


ERIC L. LIPMAN
Administrative Law Judge

¹ (Exhibit (Ex.) 3, at 1-2 (STATEMENT OF NEED AND REASONABLENESS or SONAR)).

Factual Background

In early 2016, the Department circulated a set of draft administrative rules (Revisor R-4240) to update the administrative provisions, districts, and standards contained in Executive Order 79-19. For more than three decades, the structure and provisions of this Executive Order, as implemented through subsidiary local land use plans and zoning ordinances, has regulated uses within the MRCCA.

Like the predecessor Executive Order, the proposed rules established a set of districts for particular portions of the MRCCA with accompanying land use and building standards for each district.² For example, within an area designated as a Rural and Open Space District, a new structure may not be placed closer than 200 feet from the Mississippi River. By contrast, new structures may be placed 101 feet or more from the Mississippi River in an area designated as a River Neighborhood District.³

Because of these kind of impacts to land uses and viewsheds under the proposed standards, during the rulemaking proceeding there were a number of requests to adjust the boundaries of particular districts within the corridor – including the suggestion from Mr. Nesvig.⁴ Some commentators urged the Department to promulgate rules that allowed greater building height or density within particular areas, while others recommended more stringent restrictions on building height and density be applied to parcels that are adjacent to the Mississippi River.⁵

Mr. Nesvig has, for many years, been active in development of a set of parcels, some of which are in, and adjacent to, the Mississippi River.⁶

² See Ex. 2, at 34-35, 38-42.

³ See Ex. 2, at 40 (proposed Minn. R. 6106.0120, subp. 3 (A)(1), (2)).

⁴ REPORT OF THE ADMINISTRATIVE LAW JUDGE, at 25 (August 10, 2016) (Finding 116); Comments of R. Gordon Nesvig (July 5, 2016).

⁵ *Id.*

⁶ See *Minnesota Ctr. for Env'tl. Advocacy v. City of St. Paul Park*, 711 N.W.2d 526, 528 (Minn. Ct. App. 2006) ([The] proposed development [is] a 667-acre parcel of land owned by respondent R. Gordon Nesvig. The property sits along the east bank of the Mississippi River in Washington County and is located within Grey Cloud Island Township and the City of St. Paul Park. The majority of the property consists of agricultural fields, old fields, and pastures. But woods, bluffs, oak savanna, and limited prairie remnants also exist, and the property includes islands, backwaters, and open water on the Mississippi River."); *In the Matter of the Petition for the Annexation of Certain Land to the City Of St. Paul Park, Pursuant to Minnesota Statutes*, 414 (A-7212), 2005 WL 3964407, at 7-10 (Off. of Admin. Hrgs. 2005) ("The current concept plan proposes a total of 1,920 units to be built on the Nesvig property, which is known as the "Rivers Edge" project. Of those, 653 units would be built in the current proposed annexation area, consisting of 83 single-family houses, 22 twinhomes, 24 detached townhomes, 116 attached townhomes, and 408 multi-family units, including condominiums for senior housing. The Rivers Edge project also includes some commercial space for neighborhood retail uses, such as coffee shops and dry cleaners, and also a community center, parks, and open space where people could gather. The developer anticipates that complete build-out of the Rivers Edge project will take approximately ten years."); See also *In re Annexation of Land to City of St. Paul Park Pursuant to Minnesota Statute 414 (A-7212)*, A06-1738, 2007 WL 2177910, at *1 (Minn. Ct. App. July 31, 2007) (unpublished) ("The property is also located within the Mississippi River Corridor Critical Area, which was established by the 1979 executive order").

The Administrative Law Judge concluded that the districts, as modified by the Department during the proceedings, were adequately supported by the rulemaking record.⁷

In his report, the Administrative Law Judge found one legal defect – unrelated to the issues raised by Mr. Nesvig – and likewise disagreed with the Department’s assessment of the cost impact of the new rules on small businesses and small cities.⁸ By way of a later written order, the Chief Administrative Law Judge affirmed those determinations.⁹

For his part, Mr. Nesvig maintains that prior rulings by the Office of Administrative Hearings and the Minnesota Court of Appeals oblige a designation of his parcels as a part of a River Neighborhood District and not a Rural and Open Space District.¹⁰

Legal Analysis

As a threshold matter, the Administrative Law Judge doubts that there is a procedure available to Mr. Nesvig to seek “reconsideration” of the tribunal’s findings in a rulemaking proceeding.

Minn. R. 1400.2240, subp. 4 (2015) permits an “agency” to request that the Chief Administrative Law Judge reconsider an Administrative Law Judge’s disapproval of a proposed rule, but neither of those elements are present here. Mr. Nesvig is not a state “agency,”¹¹ and the rules about which Mr. Nesvig complains were not disapproved.

Citizens may “petition an agency requesting the adoption, amendment, or repeal of any rule”¹² and may also “petition for a declaratory judgment ... addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner.”¹³ Also, in this instance, the proposed rules themselves include a procedure for adjusting district designations and boundaries.¹⁴ Yet, none of these methods involve a review by an Administrative Law Judge.

Lastly, neither the earlier annexation proceedings nor the later challenge to the alternative urban area-wide review completed on Mr. Nesvig’s property, resulted in a determination that his property should be placed into a particular MRCCA district. The decisions in those cases preceded the Department’s latest rulemaking (and proposal of

⁷ *Id.* (Finding 117).

⁸ REPORT OF THE ADMINISTRATIVE LAW JUDGE, *supra*, at 2.

⁹ ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE, at 1 (August 11, 2016).

¹⁰ REQUEST FOR RECONSIDERATION, at 1 (September 7, 2016).

¹¹ Minn. Stat. § 14.02, subd. 2 (2016) (“Agency” means any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases. ‘Agency’ also means the Capitol Area Architectural and Planning Board.”).

¹² Minn. Stat. § 14.09 (2016).

¹³ Minn. Stat. § 14.44 (2016).

¹⁴ Ex. 2, at 34-35 (proposed Minn. R. 6106.0100, subp. 9(C)).

district lines) by nine years. Further, far from establishing that it was an error to describe Mr. Nesvig's properties as within part of an area that is

characterized by rural and low-density development patterns and land uses, and includes land that is riparian or visible from the river, as well as large, undeveloped tracts of high ecological and scenic value, floodplain, and undeveloped islands

as set forth in proposed rule 6106.0100, subpart 3(A), the cited cases bolster that conclusion. As Judge Shumaker summarized in *Minnesota Center for Environmental Advocacy v. City of St. Paul Park*,

The majority of the property consists of agricultural fields, old fields, and pastures. But woods, bluffs, oak savanna, and limited prairie remnants also exist, and the property includes islands, backwaters, and open water on the Mississippi River. The cliffs along the bluffs are unusual in Minnesota. There are seeps and springs along the bluffs. A bald eagle nests on the property, and two other eagle nests are within a mile of the property. Two endangered and one threatened species of mussels, along with many native species of plants, animals, and birds, are found on the property.

Part of the property is located within the Mississippi River Critical Area Corridor, permanently established in 1979 by executive order of the governor and designated as a "rural open space district." Local government units are directed to protect the Critical Area's resources, prevent and mitigate irreversible damage, and enhance its public value. According to the executive order, rural open-space districts "shall be used and developed to preserve their open, scenic and natural characteristics and ecological and economic functions." Part of the property is also located within the Mississippi National River and Recreation Area, a 72-mile corridor which is part of the National Park System. Throughout the development, the boundary of the Recreation Area is the same as the Critical Area. As part of the Recreation Area, National Park Service activities are carried out in the corridor with the cooperation of 25 local government units, including Grey Cloud Island Township and St. Paul Park, and several federal and state agencies.

The cited cases do not stand for the proposition that the proposed rule, or inclusion of Mr. Nesvig's property in a Rural and Open Space District, is unlawful.¹⁵

For all of these reasons, the request for reconsideration must be denied.

E. L. L.

¹⁵ See generally *Manufactured Housing Institute v. Petterson*, 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).

April 12, 2016

RECEIVED

APR 14 2016

**BY ELECTRONIC MAIL
AND FIRST CLASS MAIL**

Sherry A. Enzler, Esq.
General Counsel
Office of the Commissioner
Minnesota Department of Natural Resources
500 Lafayette Rd Box 37
Saint Paul, Minnesota 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 Counselor:

I am in receipt of your letter dated April 7, 2016. It was good to hear from you.

In response to your inquiries about the proper procedural practice in this matter, I have included both your inquiries and my replies, below.

1. *For the notification to legislators, we propose and ask that you approve that we email a copy of the SONAR under cover letter as our notification to legislators, and in the cover letter refer their attention to the additional SONAR exhibits available on the OAH and DNR websites.*

If the Department's concern is that the SONAR materials are so voluminous that compliance with the requirements of Minn. Stat. § 14.116 (b) (2014) would be burdensome (or that receipt of a lengthy packet would be unwelcome to legislators), my suggestion is that an electronic copy of the materials be sent on a compact disc to "the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules and to the Legislative Coordinating Commission." *Id.* The direction made in section 14.116 to "send a copy of the [Notice of Hearing] and a copy of the statement of need and reasonableness" does admit various interpretations; but the best of those interpretations is that it requires agencies to send materials by first class mail.

While electronic mail was widely used at the State Capitol, and elsewhere, when this provision was enacted in 2001, the statute links the requirement to "send" with the agency's *mailing* of the Notice of Hearing to other stakeholders. If electronic circulation of the SONAR was intended by the legislators that enacted this provision, that intention would be reflected in the statute.

I would note as well, that in 2009, the Minnesota Legislature amended Minn. Stat. § 3.195, so as to provide for the electronic submission of certain written reports from agencies to the Legislature; but it did not include in these changes any revision to the requirements in section 14.116. See 2009 Minn. Laws, Ch. 32. This also leads to the inference that when agencies are instructed (in section 14.116) to communicate with certain, specified legislators, first class mail is best.

2. *We ask the Office of Administrative Hearings to schedule a court reporter for the hearings.*

The request is granted. A request for court reporting services will be submitted by tribunal staff on behalf of the Department. See Minn. Stat. § 14.14, subd. 3 (2014).

Please know that our office observes the state workplace standards for Court Reporters, which oblige, in the ordinary course, a short break for the Reporter after every 90-minute segment of transcription duty. Accordingly, proceedings that are transcribed tend to be organized and assembled in roughly 90-minute blocs.

3. *We ask you to extend the deadline for public comments to 20 calendar days after the last of the three hearings (4:30 p.m. on July 6, 2016), to maximize the public's opportunity to comment on the proposed rules.*

The request is appropriate and is granted. See Minn. Stat. § 14.15, subd. 1 (2014).

4. *At the hearings, we will provide copies of the proposed rules for attendees. We do not currently plan to have more than several copies of the large SONAR document at each hearing for public reference, because the document is quite large. We will have a link to the SONAR on the DNR webpage and the document will be available on the OAH e-Comments system as well. Please advise us if you would like us to handle this in a different manner.*

This is an appropriate practice. Please be advised that following the submission of agency exhibits, and brief introductory remarks from the agency panel, it is my practice to have a short, standing break to allow members of the public to review the agency exhibits, including the SONAR. See Minn. R. 1400.2220, subps. 1 - 3 (2015). It is my experience that posting all of the rulemaking exhibits to the agency's website before the hearing, and having that URL address available on pieces of paper at the hearing, dramatically reduces the amount of time that attendees actually spend inspecting the exhibits during this recess. When agency exhibits are posted online, I make a point to emphasize that attendees have the opportunity to closely review these items, at their leisure, during the post-hearing comment period; and that receiving testimony from attendees is a much better use of hearing time.

Sherry Enzler
April 12, 2016
Page 3 of 3

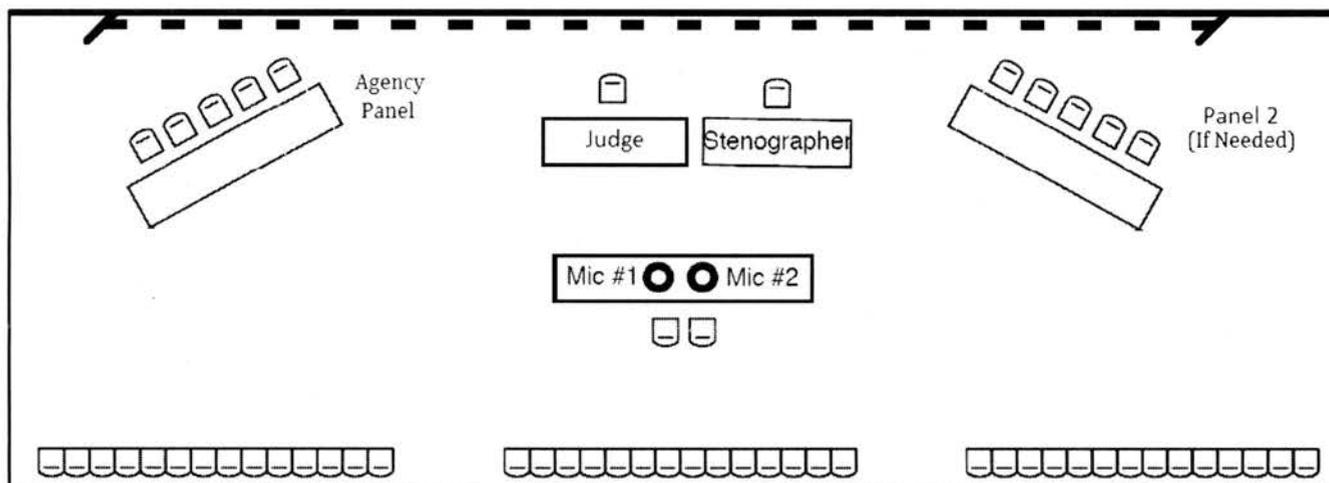
Lastly, I have include below a schematic of my preferred hearing room set-up. It is my experience that if a hearing room includes set of long-tables, arranged at the same heights and facing each other, the later exchanges of information between the panelists, the tribunal and members of the public is courteous, efficient and fair. Additionally, such a set-up maximizes the ability of the Court Reporter to ensure an accurate transcript of proceedings.

Again, thank you for your kind letter of April 7. Please keep in close touch.

Very truly yours,



ERIC L. LIPMAN
Administrative Law Judge





MINNESOTA

OFFICE OF
ADMINISTRATIVE
HEARINGS

PO Box 64620

(651) 361-7900

Saint Paul, MN 55164-0620

(651) 361-7878

mn.gov/oah

(651) 539-0310

April 29, 2016

**BY ELECTRONIC MAIL
AND FIRST CLASS MAIL**

Sherry A. Enzler, General Counsel
Minnesota Department of Natural Resources
500 Lafayette Rd
Box 37
Saint Paul, Minnesota 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 Counselor:

I am in receipt of your letter dated April 15, 2016. It was good to hear from you.

As I understand your inquiry, one of the facilities with whom the department has contracted to provide space for a rulemaking hearing, has generously offered to provide light refreshments to members of the public at no additional cost.

Having reviewed the Code of Conduct for Executive Branch Employees (Minn. Stat. § 43A.38, subds. 2 and 5 (2014)) and the prohibitions on Certain Gifts to Public Officials (Minn. Stat. § 10A.071, subds. 1, 2 and 3(a)(7) (2014)), I conclude that receipt of such hospitality alongside attendees of the hearing would not be problematic. This hospitality would be, as phrased in the cited statutes, of nominal value and on terms that are available to members of the general public.

Again, thank you for your kind letter of April 15. Please keep in close touch.

Very truly yours,

ERIC L. LIPMAN
Administrative Law Judge

Minnesota Department of Natural Resources
500 Lafayette Road Saint Paul, Minnesota 55155-4037
Office of the Commissioner
651-259-5555



April 15, 2016

The Honorable Eric L. Lipman
Chief Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, Minnesota 55164-0620

Re: In the Matter of the Proposed Rules of the Department of Natural Resources Relating to
Mississippi River Corridor Critical Area; Requests Concerning Arrangements for Public Comments
and Hearings; OAH Docket No. 8-9014-33236; Revisor's ID Number R-04240

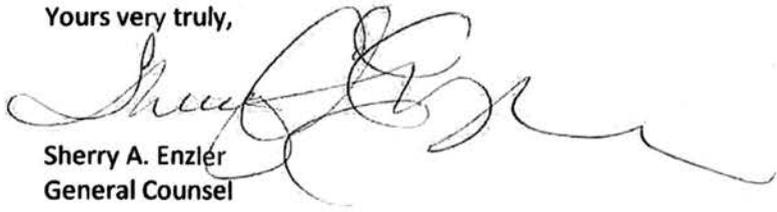
Dear Judge Lipman:

We are in receipt of your letter dated April 12, 2016. Thank you for attending to the logistical details of this rulemaking proceeding.

We have noted your directions regarding notification to legislators and hearing room setup and we are taking the necessary steps to carry out your instructions.

We have been asked by one of the host facilities for the hearings if they can provide light refreshments at no cost to the department. We believe it is most proper to refer this question to you. How would you like us to reply to the facility?

Yours very truly,



Sherry A. Enzler
General Counsel
651-259-5066

c: Beth Carlson, DNR Rules Coordinator
Dan Petrik, Land Use Specialist, Ecological and Water Resources Division
Jennifer Shillcox, Land Use Unit Supervisor, Ecological and Water Resources Division



Discussion: Department of Natural Resources Proposed Rules Governing Mississippi River Corridor Critical Area

OAH Docket No. 8-9014-33236

Presiding Judge: Administrative Law Judge Eric L. Lipman

The Administrative Law Judge Eric L. Lipman will hold three public hearings:

Date: Tuesday, June 14, 2016

Time: 4:30 p.m.

Place: Schaar's Bluff Gathering Center, 8395 127th St E, Hastings, MN 55033

Date: Wednesday, June 15, 2016

Time: 4:30 p.m.

Place: Greenhaven Golf Course Event Center, 2800 Greenhaven Rd, Anoka, MN 55303

Date: Thursday, June 16, 2016

Time: 10:00 a.m.

Place: Mississippi Watershed Management Organization, 2522 Marshall St NE, Minneapolis, MN 55418

Initial Comment Period: through 4:30 pm on Wednesday July 6, 2016

- Comments should relate to agency's proposed rule.
- Comments received after 4:30 pm will not be accepted.

Rebuttal Comment Period:

Thursday July 7, 2016 through 4:30 pm on Wednesday July 13, 2016

- Comments should relate to comments filed by others in the Initial Comment period.
- Comments received after 4:30 pm will not be accepted.

Instructions: To comment, scroll down to "Topic: Submit a Comment" and click "View Topic." Please make sure that your comments:

- Identify the specific part or subpart of the rule you are addressing;
- Specify whether you support or oppose the proposed rule language;
- Give reasons for your views; and
- Be specific and offer language changes to solve the problems you identify.

Attachments and Comments by Mail: Uploading attachments by the public is not currently supported. If you would like to submit comments by mail, please send them to:

Office of Administrative Hearings

Attn: Katie Lin

PO Box 64620

Saint Paul, MN 55164-0620

Fax (651) 539-0310

Important: All comments will be made available to the public. Comments sent by email or mail will be posted to our e-Comments website in the form of a PDF. Please only submit information that you wish to make available publicly. The Office of Administrative Hearings does not edit or delete submissions that include personal information. We reserve the right to remove any comments we deem offensive, intimidating, belligerent, harassing, bullying, or that contain any other inappropriate or aggressive behavior without prior notification.

SIGN UP



email address...

Sign Up



PARTICIPANTS



RECENT ACTIVITY

Brian Huberty answered a Discussion

Thomas Romens answered a Discussion

Gary Thompson answered a Discussion

Roy Gunther answered a Discussion

James Nelson answered a Discussion



DISCUSSIONS

Board of Examiners for Nursing Home Administrators Dual Notice of Intent

Department of Natural Resources Proposed Rules Governing Mississippi River Corridor Critical Area