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Honorable Jessica A. Palmer-Denig
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

Re: Proposed Rules Governing Groundwater Protection, *Minnesota Rules*, 153
Revisor's ID Number RD4337
OAH Docket No. 71-9024-35205

Dear Judge Palmer-Denig:

The Minnesota Corn Growers Association submits the following written rebuttal comments with respect to Proposed Rules Governing Groundwater Protection that were published by the Minnesota Department of Agriculture.

I. **The Minnesota Department of Agriculture May Not Expand the Proposed Groundwater Protection Rule to Impose Regulatory Requirements Based on Private Well Testing Without Publishing a New Notice and Conducting Additional Public Hearings.**

Under the Minnesota Administrative Procedures Act, "an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing." Minn. Stat. § 14.05, subd. 2(a) (2017). Here, the Groundwater Protection Act as proposed by the Minnesota Department of Agriculture in the Notice of Hearing is comprised of two distinct parts:

- Part One of the proposed Groundwater Protection Act generally prohibits the fall application of nitrogen fertilizer to cropland located in certain drinking water supply management areas or in vulnerable groundwater areas; and

- Part Two of the proposed Groundwater Protection Act generally authorizes the Commissioner to assign mitigation level designations to certain drinking water supply management areas and, depending on the designated mitigation level, to impose a water resource protection requirements order for a particular area.

In describing the proposed rule, the Department of Agriculture specifically emphasized the limited areas of cropland to which the requirements would apply and that the department was not proposing any regulations based on township testing results.

Nonetheless, a few public comments from environmental interest groups assert that the proposed Groundwater Protection Act is arbitrary and/or unreasonable because it excludes townships/private wells, and these comments (either explicitly or implicitly) urge the Department of Agriculture to modify the proposed rule to impose restrictions on the application of nitrogen fertilizer and authorize the Commissioner to impose additional regulatory requirements in additional areas based on the results of private well tests. These proposals would expand the scope of the geographic areas to which the proposed rule applies. And in order to implement any such expansion of the proposed rule, the Department would be required to adopt rules to conduct and verify the results of private well testing, establish criteria under which additional regulatory requirements would arise, and define the restrictions that could be imposed in such areas. None of these provisions were subject to public review or comment in the public hearings or written comments in this rulemaking process.

Because any modification of the proposed Groundwater Protection Act to cover townships and/or private wells would thus dramatically expand the scope of the proposed rule without a meaningful opportunity for public testimony or comment in this rulemaking process, any such modification would result in a rule that is substantially different from the proposed rule and would therefore be prohibited under the Minnesota Administrative Procedures Act unless the Department of Agriculture issued a new notice of intent to adopt rules or notice of hearing and conducted additional public hearings with respect to such requirements.

II. The Minnesota Department of Agriculture's Decision Not to Impose Regulatory Requirements Based on Private Well Testing Does Not Violate the Equal Protection Clauses of the Federal and Minnesota Constitutions.

A few public comments from environmental and private well owner interest groups also argue that the proposed Groundwater Protection Rule violates the equal protection clauses of the Federal and Minnesota Constitutions because the application of

the proposed rule is limited to drinking water supply management areas and does not include additional areas based on private well testing. But “an equal protection challenge to a regulation” may only be sustained “if the distinction between two similarly situated groups is arbitrary and capricious and bears no relation to any legitimate regulatory purpose.” *Rocco Altobelli, Inc. v. Minn. Dep’t of Commerce*, 524 N.W.2d 30, 37 (Minn. Ct. App. 1994).

With respect to the proposed Groundwater Protection Rule, the Minnesota Department of Agriculture has stated that it limited the scope of the proposed rule to drinking water supply management areas because the regulation of these areas would provide the greatest benefit to the most people and because the Department does not have adequate resources to implement and enforce regulations across the entire state. The Department’s decision to target its finite resources to particular areas that will produce the greatest benefit is rationally related to the Department’s stated purpose and is not arbitrary or capricious.

The Department’s decision to limit the scope of the proposed Groundwater Protection Rule is also consistent with the applicable statutes. Specifically, the Groundwater Protection Act expressly limits its goal of preventing degradation of groundwater to circumstances where such prevention can “be practicably achieved.” Minn. Stat. § 103H.001 (2017). Consistent with this goal, the statutory definition of best management practices” is limited to “practicable voluntary practices” and requires consideration of the “technical feasibility” and “implementability” of the practices. Minn. Stat. § 103H.005, subd. 4 (2017) (emphasis added). In contrast to the nitrate concentration thresholds suggested by the environmental interests—which the environmental groups do not even attempt to establish as practicable—the thresholds established by the Minnesota Department of Agriculture in the proposed rule recognize the basic requirement that regulatory requirements imposed under the Groundwater Protection Act must be practicable. In short, the public comments do not provide any legitimate basis to challenge the proposed Groundwater Protection Rule based on the fact that its scope is limited to drinking water supply management areas and vulnerable groundwater areas.

III. The Nitrate Concentration Thresholds in the Proposed Groundwater Protection Rule Are Reasonable.

Additionally, a few public comments from environmental interest groups suggest that the Minnesota Department of Agriculture should reduce the nitrate concentration thresholds that trigger the mitigation level designations in Part Two of the proposed Groundwater Protection Rule. But under the Minnesota Administrative Procedures Act, your review of the proposed rule is limited to whether the proposed rule, as drafted, is

reasonable, Minn. Stat. § 14.14, subd. 2 (2017)—this standard does not authorize you to substitute your judgment for that of the Department with respect to whether an alternative proposal may be better or worse from a public policy perspective.

The Department’s decision to use the nitrate concentration threshold of 5.4 mg/L nitrate-nitrogen to designate Drinking Water Supply Management Areas for mitigation level 1 in Part Two of the proposed rule is reasonable. The federal Safe Drinking Water Act includes a process for the Environmental Protection Agency to identify and develop concentrations and associated actions for contaminants in public water supplies. Using well-vetted federal processes for public well protection is reasonable.

Here, the public comments that seek to reduce the nitrate concentration thresholds do not provide any factual or legal argument establishing the existing thresholds proposed by the Department of Agriculture are unreasonable. As such, the lower thresholds proposed in these comments should not be imposed as part of this rulemaking process.

IV. The Minnesota Department of Agriculture May Not Expand the Proposed Groundwater Protection Rule to Impose Regulatory Restrictions on the Rate, Source, or Placement of Nitrogen Fertilizer.

Finally, a few public comments from environmental interest groups seek to expand the scope of Part One of the proposed Groundwater Protection Rule to require the Minnesota Department of Agriculture to mandate restrictions on the rate, source, and placement of nitrogen fertilizer applications in addition to the proposed restrictions on the timing of such applications. As noted above, however, the Minnesota Administrative Procedures Act prohibits an agency from modifying a proposed rule “so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.” Minn. Stat. § 14.05, subd. 2(a). This suggested modification to the proposed rule would dramatically expand the subject-matter scope of the proposed rule. And because the existing Best Management Practices establish suggested practices for the rate, source, and placement of nitrogen fertilizer based on several criteria that are unique to individual farming operations at a particular time (such as the anticipated yield), this suggested expansion of the proposed rule would impose substantial implementation difficulties that are not addressed in the proposed rule. Accordingly, any such modification would result in a rule that is substantially different from the proposed rule and would therefore be prohibited under the Minnesota Administrative Procedures Act unless the Department issued a new notice of intent to adopt rules or notice of hearing and conducted additional public hearings with respect to such requirements.

CONCLUSION

In summary, the Minnesota Corn Growers Association appreciates the opportunity to submit these written rebuttal comments, in addition to its initial written comments, regarding the proposed Groundwater Protection Rule. A review of the administrative record as a whole, however, demonstrates that the provisions of the proposed rule are directed toward agricultural practices that were in place in the past and do not reflect the significant production changes that Minnesota farmers have voluntarily made over the last several years to improve the efficiency with which they apply nitrogen fertilizer. Given the significant lag time between the implementation of on-the-ground practices and measurable results in groundwater, the impact of many of these recent changes has not yet been realized or measured, and the proposed rule is therefore premature. Instead, the voluntary efforts that have already been undertaken by Minnesota farmers should be given the opportunity to produce results. Accordingly, the Department has failed to satisfy its statutory burdens to show that the voluntary implementation of the best management practices has been ineffective or that the proposed rule is needed and reasonable

Thank you for your attention concerning this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kirby Hettver", with a long horizontal flourish extending to the right.

Kirby Hettver
President
Minnesota Corn Growers Association
khettver@hotmail.com