

## Glenn Olson

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**From:** Daniel M Marx <DMMarx@flaherty-hood.com>  
**Sent:** Wednesday, April 24, 2019 1:48 PM  
**Subject:** Update on state rulemaking petition appeal and related federal litigation  
**Attachments:** Memorandum re rulemaking petition 4.15.2019.pdf; MN WQS ct opinion.pdf; MN WQS decision.pdf

Dear All:

I am following-up regarding our recommendation to withdraw the pending appeal of the state rulemaking petition as described by the below email and attached memorandum.

We have had discussions and/or email exchanges with representatives of several of the local governments that signed onto the original rulemaking petition that support our recommendation to withdraw the appeal. We also held a (lightly attended) conference call today to discuss the recommendation.

Based on the responses we have received from petitioners supporting the recommendation to withdraw the appeal and the authorization we received from the CGMC Board to do the same, we intended to proceed with the steps necessary to withdraw the appeal—consistent with the previous authorization your City or Sanitary District provided to us in this matter.

Thank you and please contact me at [dmmarx@flaherty-hood.com](mailto:dmmarx@flaherty-hood.com) or at 651-259-1907 if you have any questions or concerns.

Sincerely,  
Daniel

Daniel Marx, Associate Attorney  
Flaherty & Hood, P.A.  
525 Park Street, Suite 470  
St. Paul, MN 55103  
Direct Dial: 651-259-1907  
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**From:** Daniel M Marx  
**Sent:** Monday, April 15, 2019 2:12 PM  
**Subject:** Update on state rulemaking petition appeal and related federal litigation

Dear All:

You are receiving this email because your city and/or sanitary district is among 18 petitioning local governments that elected to participate in the Coalition of Greater Minnesota Cities' ("CGMC") effort to formally correct errors in the

state's river eutrophication water quality standards ("RES") by filing a rulemaking petition with the Minnesota Pollution Control Agency ("MPCA") and the Office of Administrative Hearings ("OAH") on April 16, 2016 pursuant to Minn. Stat. § 14.091. At that time, your city or sanitary district authorized and directed Flaherty & Hood, P.A., to take all necessary actions to represent your interests in this matter.

As you may recall, MPCA and OAH initially denied the rulemaking petition. The CGMC and petitioning local governments ("petitioners") then authorized Flaherty & Hood to file an appeal of that decision to the Minnesota Court of Appeals—which was funded exclusively by the CGMC. That appeal has been stayed since 2016, pending the outcome of related federal litigation that also aimed to correct the RES' erroneous use of two nutrient response variables, five-day biochemical oxygen demand (BOD5) and daily diel dissolved oxygen variation (DO flux).

The federal litigation at issue, *Center for Regulatory Reasonableness, Inc. v. United States Env'tl. Prot. Agency*, which challenged U.S. EPA's approval of the RES has now concluded unsuccessfully. On March 31, 2019, United States District Court for the District of Columbia issued an order upholding the U.S. EPA's approval of the RES (see attached order and opinion).

As discussed in the attached memorandum, the loss of this case effectively eliminates any likelihood of success to formally correct the RES through the still-pending appeal of MPCA's denial of the state rulemaking petition. Further, at a meeting on April 11, 2019, the CGMC Board authorized the withdrawal of the appeal and elected not to fund further litigation on this matter.

As a result of the above, we believe it is in the best interest of your city and or sanitary district to withdraw the pending appeal and rulemaking petition and we intend to do so in the timeframe required by the Court of Appeals—unless instructed otherwise by your city or sanitary district on or before **April 24, 2019**.

This outcome is disappointing, but not surprising given the significant legal burden that exists when challenging technical regulatory decisions made by state and federal agencies. The above strategy, which was also bolstered by the CGMC's legislative efforts to address concerns with the RES, was our last best shot at achieving a formal rule change that fixes the RES' problematic use of BOD5 and DO flux.

Despite the unsatisfactory result in this case, this effort forced MPCA and EPA to take legal positions in their defense of the RES that present favorable interpretations of the rules, which could provide cities more leverage to dissuade or prevent MPCA from applying the problematic components of the RES on a permit-by-permit basis. The litigation effort also played a key role in achieving legislative and policy priorities held by CGMC and MESERB.

Prior to taking any formal legal action to withdraw the appeal of the rulemaking petition we will hold a conference call on **April 24, 2019 at 1:00 p.m.**, to discuss the results of the federal litigation and our recommendation to withdraw the pending appeal.

**Call code information:**

**Number:** 651-259-1913  
**Participant ID:** 290227

In the meantime, please review the attached memorandum and contact me at 651-225-8840 or [dmmarx@flaherty-hood.com](mailto:dmmarx@flaherty-hood.com) if you have any questions or concerns about the above.

Sincerely,

Daniel Marx

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Flaherty & Hood, P.A.

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