

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Planned Amendments to
Rules Governing Water Quality Standards -
Use Classification 3 and 4, Minnesota Rules,
chapters 7050 and 7053

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on February 4, 2021. Because of the Peacetime Emergency, and the need to safeguard public health against transmission of the COVID-19 virus, the public hearing was held by way of an interactive video conference on the WebEx platform.

As detailed below, the Minnesota Pollution Control Agency (MPCA or agency) proposes to amend its administrative rules in Minn. R. Part 7050 (2019) relating “Class 3” waters. Class 3 relates to uses of water for industrial processes and cooling. Additionally, MPCA proposes revisions to Minn. R. Part 7053 (2019), relating “Class 4” waters. Class 4 relates to uses of state water by agriculture and wildlife.

The public hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process so as to ensure that state agencies have met 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 provides the general public an opportunity to review, discuss and critique the proposed rules.

As described more fully below, the agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency’s statutory authority; and that any modifications that the agency may have made after the proposed rules were initially noticed in the *State Register* are within the scope of the matter that was originally announced.

SUMMARY OF CONCLUSION

The MPCA has established that it has the statutory authority to adopt the proposed rules, as amended, and that the proposed rules are needed and reasonable.

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. Under the federal regulations implementing the Clean Water Act (CWA), the MPCA is responsible for establishing, reviewing, and revising water quality standards.¹

2. Federal law defines “water quality standards” to “consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are intended to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.”²

3. Water quality standards promulgated by the states “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.”³

4. Minnesota Rules, chapter 7050 (2019) establishes water quality standards for “all waters of the state, both surface and underground.”⁴

5. This chapter sets out a classification system for the beneficial uses of waters, includes numeric and narrative water quality standards, and other provisions to protect the physical, chemical, and biological integrity of waters of the state.⁵

6. Water use classifications, the accompanying narrative and numeric standards and the antidegradation provisions, combine to make up the state’s set of water quality standards.⁶

7. Water quality standards are submitted to the U.S. Environmental Protection Agency (EPA) to assure that current beneficial uses of water – including uses of water for consumption, fishing and recreation – are not degraded by later pollution.⁷

8. Additionally, under state and federal law, the MPCA is charged with the administration and enforcement of the provisions of the CWA.⁸

9. The standards for enforcement actions – past, present and future – are at the heart of the controversies in this rulemaking. The agency maintains that the updates it has made to its scientific models and regulatory approaches will strengthen its claims in future enforcement actions. The MPCA argues that the current standards were drawn

¹ 40 C.F.R. § 131.4(a) (2019).

² 40 C.F.R. § 131.3(i) (2019).

³ 40 C.F.R. § 131.11(a)(1) (2019); *see also* 40 C.F.R. § 131.5(a)(2) (2019).

⁴ Minn. R. 7050.0110 (2019).

⁵ *Id.*

⁶ *Id.*

⁷ 40 C.F.R. § 131.6(a)-(e) (2019); 40 C.F.R. § 131.12(1)-(4) (2019).

⁸ *See generally* 33 U.S.C. § 1313(a)-(c) (2020); 40 C.F.R. § 123.25(a) (2019); Minn. Stat. § 115.03, subds. 1, 5 (2020).

from research that is outdated; a matter that makes it difficult for the agency to press for favored approaches in permit-related disputes.⁹ The agency may believe its approaches are needed and appropriate, but it does not have the support of the most-current science when making such claims.

10. As the agency explains in its Statement of Need and Reasonableness (SONAR):

A major drawback of the existing industrial, irrigation, and livestock and wildlife standards is a lack of available documentation of the scientific basis used to derive the standards in 1967. It is important that MPCA is able to demonstrate that standards are based on sound science.

When questions about the appropriateness of the current standards arose in the 2000s, the MPCA decided to review the existing standards and how they fit with a current understanding of the water quality needs of water used for industrial and agricultural purposes.¹⁰

11. Additionally, when the agency asked a panel of external peer reviewers about the support for the current standards in the scientific literature “none of the reviewers were aware of[,] or provided examples of[,] professional or technical guidelines that supported the use of the existing Class 3A-Class 3C numeric values.”¹¹

12. Contested case disputes with those who apply for, or hold, wastewater discharge permits can be very costly to the agency – both in terms of actual dollars spent on litigation as well as the “opportunity costs” of important work that must be postponed while staff are performing litigation-related tasks. As the agency describes:

Contested case hearings and litigation are very consuming of staff resources; a single contested case hearing on a wastewater permit can require up to several hundred hours of cumulative staff time to address. This reduces the staff time and resources that can be spent on other parts of the permitting workload, causing additional difficulties in issuing wastewater permits on time.¹²

13. An important objective of this rulemaking for MPCA is to develop a sturdier set of regulatory standards that will be more defensible when challenged. If the MPCA is successful in this effort, it projects that the “proposed rule will likely reduce workload related to effluent limit development, contested case hearings, and litigation of permits surrounding these water quality standards.”¹³

⁹ See Exhibit (Ex.) D at 2, 48, 93, 104; Transcript (Tr.) 39 (Kyser); see also Tr. 74 (Paulson).

¹⁰ Ex. D at 2.

¹¹ *Id.*, Appendix S-7, Attachment B at 3.

¹² *Id.* at 101.

¹³ *Id.*

14. The proposed changes thus reflect a considered policy judgment on how best to use the agency's resources to protect the state's waters. In breaking with the predecessor rules, the MPCA declares: "It is more reasonable to expend effort working with facilities on how to comply with well-supported standards than to expend effort attempting to apply standards that are not scientifically well-supported."¹⁴

II. Rulemaking Authority

15. The MPCA cites two statutes as sources of its authority to adopt the proposed rules: Minn. Stat. §§ 115.03, subd. 1 and 115.44, subd. 2 (2020).¹⁵

16. Minn. Stat. § 115.03, subd. 1, grants the MPCA the authority to:

(c) to establish and alter such reasonable pollution standards for any waters of the state in relation to the public use to which they are or may be put as it shall deem necessary for the purposes of this chapter and, with respect to the pollution of waters of the state;

....

(e) to adopt ... standards, rules ... in order to prevent, control or abate water pollution¹⁶

17. Minn. Stat. § 115.44, subs. 2 and 3, provide in part:

In order to attain the objectives of sections 115.41 to 115.53, the agency after proper study, and after conducting public hearing upon due notice, shall, as soon as practicable, group the designated waters of the state into classes, and adopt classifications and standards of purity and quality therefor. Such classification shall be made in accordance with considerations of best usage in the interest of the public and with regard to the considerations mentioned in subdivision 3 hereof.

Adoption of classification. In adopting the classification of waters and the standards of purity and quality above mentioned, the agency shall give consideration to:

- (1) the size, depth, surface area covered, volume, direction and rate of flow, stream gradient and temperature of the water;
- (2) the character of the district bordering said waters and its peculiar suitability for the particular uses, and with a view to conserving the value of the same and encouraging the most

¹⁴ MPCA's Preliminary Response to Comments, at 4.

¹⁵ Ex. D at 26-27.

¹⁶ Minn. Stat. § 115.03, subd. 1(c), (e); see also Minn. Stat. 115.03, subd. 1(g) (2020).

appropriate use of lands bordering said waters, for residential, agricultural, industrial, or recreational purposes;

- (3) the uses which have been made, are being made, or may be made of said waters for transportation, domestic and industrial consumption, bathing, fishing and fish culture, fire prevention, the disposal of sewage, industrial wastes and other wastes or other uses within this state, and, at the discretion of the agency, any such uses in another state on interstate waters flowing through or originating in this state;
- (4) the extent of present defilement or fouling of said waters which has already occurred or resulted from past discharges therein;
- (5) the need for standards for effluent from disposal systems entering waters of the state;
- (6) such other considerations as the agency deems proper.¹⁷

18. The MPCA also points to its statutory duty under the CWA to adopt, and submit for review by the EPA, water quality standards and state implementation plans. Minnesota must submit its water quality standards for review at least triennially and every time that it modifies these standards.¹⁸

19. The Administrative Law Judge concludes that the MPCA has the statutory authority to adopt rules governing standards of water quality and purity.¹⁹

III. Procedural Requirements of Chapter 14

A. Applications, Meetings, Publications and Mailings

20. On February 8, 2016, the MPCA published in the *State Register* a Request for Comments. The MPCA sought comments on “on possible amendments to rules governing water quality standards for industrial (Class 3) and agricultural and wildlife usage (Class 4)”.²⁰

21. On March 11, 2019, the MPCA published a second Request for Comments in the *State Register*. The second request renewed its earlier call for feedback on possible amendments to water quality standards for Class 3 and Class 4 water. However, with the later request, the agency included a draft Technical Support Document.²¹

¹⁷ Minn. Stat. § 115.44, subds. 2, 3.

¹⁸ 33 U.S.C. § 1313(a)-(c).

¹⁹ Minn. Stat. § 115.03, subd. 1(c), (e); Minn. Stat. § 115.44, subds. 2, 3.

²⁰ 40 *State Register* 965 (February 8, 2016).

²¹ 43 *State Register* 1067, 1068-68 (March 11, 2019).

22. On October 30, 2020, the MPCA provided a copy of the proposed rule changes to the Commissioner of the Minnesota Department of Agriculture.²²

23. On November 13, 2020, the MPCA requested approval of its Notice of Hearing and its Additional Notice Plan.²³

24. By way of an Order dated December 7, 2020, the Honorable Ann C. O'Reilly approved the MPCA's Notice of Hearing.²⁴

25. The Notice of Hearing, published in the *State Register* on December 7, 2020, set the hearing date as February 4, 2021, at 2:00p.m.²⁵

26. Following this publication, on December 28, 2020, the agency published a second, supplemental notice in the *State Register*. This notice apprised stakeholders that the rulemaking hearing scheduled for February 4, 2021, would extend "from 2:00 p.m. to 8:30 p.m., or until all parties present are heard, whichever occurs first."²⁶

27. On December 14, 2020, the MPCA sent a copy of the Notice of Hearing to all persons and associations who had registered their names with the MPCA for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.²⁷

28. On December 14, 2020, the MPCA sent a copy of the Notice of Hearing and the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over water quality standards, prevention of pollution and the operations of the MPCA.²⁸

29. On December 14, 2020, the MPCA mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131, .23 (2020).²⁹

30. The Notice of Hearing identified the date and process for the rulemaking hearing in this matter.³⁰

31. The Notice of Hearing, and supplemental notice, were posted to the MPCA's website and the MPCA has maintained these materials continuously since they were posted.³¹

²² Ex. D at 174; Ex. K-1.

²³ Letter from Claudia Hochstein (January 13, 2020).

²⁴ Order Approving Additional Notice Plan and Notice of Hearing, OAH 65-9003-37102 (December 7, 2020).

²⁵ 45 *State Register* 577 (December 14, 2020).

²⁶ 45 *State Register* 711 (December 28, 2020).

²⁷ Ex. G-1.

²⁸ Ex. K-2.

²⁹ Ex. E.

³⁰ Exs. F-1 through F-4.

32. MPCA staff participated in approximately seven meetings with stakeholder groups, as detailed on SONAR pages 18 and 19, regarding this rulemaking and possible reforms to Class 3 and Class 4 water quality standards.³²

33. In advance of the hearing on February 4, 2021, the MPCA filed copies of the documents required by Minn. R. 1400.2220 (2019).³³

B. Notice Practice

1. Notice to the MPCA's Rulemaking List

34. Minn. Stat. § 14.23 and Minn. R. 1400.2080, subp. 6 (2019), require the MPCA to mail the Notice of Hearing “at least 33 days before ... the start of the hearing” to “all persons on its [rulemaking] list”³⁴

35. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities under Minn. Stat. § 14.23 and Minn. R. 1400.2080, subp. 6.³⁵

2. Additional Notice Requirements

36. Minn. Stat. §§ 14.131, .23, requires 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.³⁶

37. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intention to adopt rules on the unit and program approval process.³⁷

3. Notice to Legislators

38. Minn. Stat. § 14.116 (2020) requires the agency to send a copy of the Notice of Hearing 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.³⁸

³¹ See generally MPCA Webpage: Amendments to Water Quality Standards: Use classifications 3 and 4 (<https://www.pca.state.mn.us/water/amendments-water-quality-standards-use-classifications-3-and-4>).

³² Ex. D at 18-19.

³³ Exs. A – M (January 29, 2021).

³⁴ Minn. Stat. § 14.23 and Minn. R. 1400.2080, subp. 6.

³⁵ Exs. F, G and H.

³⁶ Minn. Stat. §§ 14.131, .23.

³⁷ Ex. D at 175-176; Ex. H.

³⁸ Minn. Stat. § 14.116.

39. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities, to notify designated legislators of the rulemaking hearing “at least 33 days before ... the start of the hearing.”³⁹

4. Notice to the Legislative Reference Library

40. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.⁴⁰

41. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities, to mail the Dual Notice “at least 33 days before ... the start of the hearing.”⁴¹

5. Notice to Commissioner of Agriculture

42. Minn. Stat. § 14.111 (2020) 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*.⁴²

43. The Administrative Law Judge finds that the required notice was completed, and the agency’s obligation was fulfilled, on October 30, 2020. The notice was provided more than 30 days prior to publication of the Notice of Hearing.⁴³

C. Statutory Requirements for the SONAR

44. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.⁴⁴

45. Those factors are:

- (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;

³⁹ K-2.

⁴⁰ Minn. Stat. § 14.23.

⁴¹ Ex. E.

⁴² Minn. Stat. § 14.23.

⁴³ Ex. D at 174; Ex. K-1.

⁴⁴ Minn. Stat. § 14.131 (2020).

- (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.⁴⁵

1. The MPCA'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.**

46. The agency's regulatory analysis focuses on the impacts to three large, but important classes of persons: (1) regulated parties, particularly those who discharge wastewater to a water body; (2) residents of Minnesota in their capacities as users of fresh and treated drinking water and taxpayers who underwrite the costs of water treatment infrastructure; and (3) persons who enjoy the waters and beneficial uses that are protected by Minnesota's water quality standards (WQS), including uses that support local industries, irrigation of crops, watering of livestock, and the flourishing of wildlife.⁴⁶

47. Additionally, as part of the agency's environmental justice initiative, it analyzed potential impacts of enforcement of the proposed water quality standards in "census tracts where the population is 50 percent or more people of color and

⁴⁵ *Id.*

⁴⁶ Ex. D at 99-100.

indigenous people or where 40 percent or more of the population has a household income less than 185 percent of the federal poverty level.”⁴⁷

48. The MPCA maintains that the proposed standards will not have a disproportionately negative impact upon at-risk communities, but rather “result in more effluent limits being applied to facilities that appropriate waters close to those areas of potential concern.”⁴⁸

(b) The probable costs to the MPCA and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

49. The MPCA maintains that the proposed revisions will have an impact upon agency costs and state revenues, but at the margins, and at rates that are difficult to accurately forecast. The agency hopes to reduce the costs of administering the existing regulatory regime, which is complex and frequently results in requests that the stated standard not be applied. Requests for removal of use designations, requests for variances, and litigation, are commonplace and are consumptive of agency resources.⁴⁹

50. While MPCA notes that implementing its proposed narrative standard will slightly increase the amount of staff time needed to review some permit applications, it also points to recent advances in automating the process to determine whether an effluent limit is needed for its proposed narrative standards. The agency concludes that “the proposed revisions will only slightly increase the MPCA’s current administrative costs to issue permits by adding approximately one to six hours of work per permit to calculate and document the need for effluent limits in an individual wastewater permit.”⁵⁰

51. Similarly, the impacts to state revenues following promulgation of the proposed standards is difficult to forecast with precision. Among the impacts that MPCA asserts are possible, if not likely, are increases in tax-revenue from tourism-related enterprises as well as the many professional firms and manufacturers that assist dischargers in obtaining compliance with environmental standards.⁵¹

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

52. The MPCA maintains that because the existing water quality standard were promulgated by rule, updating those standards to reflect developments in

⁴⁷ *Id.* at 178.

⁴⁸ *Id.* at 182.

⁴⁹ *Id.* at 101-02.

⁵⁰ *Id.* at 101.

⁵¹ *Id.* at 103-04.

environmental science and “specific tailoring of the level of protection to the uses” likewise requires rulemaking.⁵²

53. From these facts, the MPCA concluded that there are not less costly or less intrusive methods for achieving the purposes of the proposed rule, other than by rulemaking to change those rules.⁵³

(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.

54. The MPCA states that it seriously considered three alternatives to revising the existing rules through rulemaking: (1) delaying the rulemaking or not undertaking rulemaking at all; (2) linking beneficial uses for aquatic life and drinking water to beneficial uses in Class 3 and Class 4; and (3) developing site-specific water quality standards.⁵⁴ As noted below, the agency rejected all of these alternatives as inferior to the proposed revisions of chapters 7050 and 7053.

55. MPCA rejected the alternative of not changing the existing rules, or postponing revisions further into the future, on the grounds that it would leave in place ambiguities in the current rules. The agency concluded that the number and breadth of those ambiguities was too great and that “the greater the gaps that need to be filled[,] the more likely the [agency’s] interpretations are to raise concerns and challenges and increase future conflict.”⁵⁵

56. MPCA similarly discounted linking beneficial uses for aquatic life and drinking water to beneficial uses in Class 3 and Class 4. Some stakeholders urged such a linkage, on the grounds that if water quality was suitable for drinking water or aquatic life it should also be suitable for industry, irrigation, livestock or wildlife. MPCA disagreed, however, reasoning that “there are many more differences than similarities with regards to water quality needs between the beneficial uses (*i.e.*, industrial consumers, irrigators, livestock and wildlife all have different salinity related water quality needs).”⁵⁶

57. The agency also expressed concern that once linked, the water quality standards would be more difficult to update in the future. It concluded that if “every rulemaking package to change a human health based water quality standard also had

⁵² *Id.* at 104.

⁵³ *Id.* See also Minn. Stat. 115.03, subd. 1(g) (2020) (“The agency is hereby given and charged with the following powers and duties ... to prescribe and alter rules, not inconsistent with law, for the conduct of the agency and other matters within the scope of the powers granted to and imposed upon it by this chapter and, with respect to pollution of waters of the state, in chapter 116”).

⁵⁴ *Id.* at 104-06.

⁵⁵ *Id.* at 104-05; see also Ex. D at 1 (“the MPCA has concluded that the existing standards are not based on the best current information about what is needed to protect waters for these beneficial uses”).

⁵⁶ Ex. D at 105.

to also justify how the standard was protective of aquatic life ... then it would be much harder to adopt new criteria, even when clearly needed for one beneficial use.”⁵⁷

58. Lastly, the MPCA declined to develop a series of site-specific standards to meet its water quality objectives. The agency concluded that the workload needed to establish standards for each site would be much higher than proceeding to ordinary rulemaking. For example, in order to establish site specific standards on irrigation water quality – which is a small subset of the standards needed in Class 4 – the agency estimated that “between several hundred and several thousand site-specific standards would be needed to achieve the purpose of this proposed rule”⁵⁸

(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.

59. The MPCA maintains that the probable costs of the proposed rule will affect different users of waters differently. The agency projects that some users will likely experience a sharp increase in costs, while others will experience very little cost impact when compared to the present day, and still others will incur lower costs in the future.⁵⁹ Each of these segments is described below.

60. The MPCA forecasts that as a result of new standards regulating the discharge of chlorides and sulfates into state waters, perhaps two dozen large agribusiness, food processing, mining and other companies will face an increase in compliance costs.⁶⁰

61. The agency also projects that those entities with a National Pollutant Discharge Elimination System (NPDES) permit to discharge chlorides into Class 3 waters, boron into Class 4A waters, or nitrate into Class 4B waters, will not likely experience an increase in compliance costs. Similarly, MPCA maintains that if the proposed rules are adopted those firms with NPDES permits that have strict numeric pH standards for Class 3, 4A and 4B waters will face the same kind compliance costs as they do now, if the proposed rules are adopted.⁶¹

62. Lastly, MPCA estimates that removal of specific numeric standards for the hardness of effluent in Class 3 waters, bicarbonate in Class 4A waters, specific conductance and total dissolved solids in Class 4A waters, and sodium standards for Class 4A waters, will have an impact on future permits. The MPCA projects that it “will likely result in fewer and less restrictive limits in permits, thereby decreasing the cost of

⁵⁷ *Id.* at 106.

⁵⁸ *Id.*

⁵⁹ *Id.* at 106-18.

⁶⁰ *Id.* at 112-116.

⁶¹ *Id.* at 108-09.

complying with the Class 3 and 4 [water quality standard] compared to the current rules.”⁶²

(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.

63. The MPCA argues that without the regulatory reforms included in the proposed rules many smaller communities in Minnesota will make sizeable investments in wastewater infrastructure to remove chlorides from water streams – investments that are not necessary and will not contribute to overall water quality. The agency asserts:

Without facing effluent limits based on the current Class 3 and 4 WQS, these facilities could go install technologies that reduce chloride. Close to 80 cities are in this position of likely being able to take steps to comply with the chloride limits, but not limits derived from the current Class 3 and 4 water quality standards. For these cities in particular, the proposed revisions to the Class 3 and 4 WQS represent significant cost savings.⁶³

64. Additionally, the agency notes that several taconite mines will be affected by the proposed 600 mg/L sulfate standard and are likely to receive new effluent limits in their permits as a result of the proposed rule.⁶⁴

(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.

65. Minn. Stat. § 14.131, together with Minn. Stat. § 116.07, subd. 2(f) (2020), requires an assessment of differences between the proposed rule amendments and corresponding federal requirements, in states bordering Minnesota, and states within EPA Region 5.⁶⁵

66. The MPCA maintains that because there are no federal criteria established for industrial, irrigation, or livestock and wildlife watering uses, the standards adopted by different states vary widely. Some neighboring states, do not have specific numeric standards to protect the industrial or irrigation designated uses. Other states within EPA Region 5, have numeric protections for industrial and irrigation designated uses, but the specific values vary among these states.⁶⁶

⁶² *Id.* at 108, 109-112.

⁶³ *Id.* at 120.

⁶⁴ *Id.* at 117.

⁶⁵ Minn. Stat. §§ 14.131, 116.07, subd. 2(f).

⁶⁶ Ex. D at 165-67, Table 37.

67. In the MPCA's view, the variation in methods and approaches among the states within EPA Region 5, reflects both the design of the CWA and the reality that protective standards will differ in order to respond to "state-specific conditions and needs."⁶⁷

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

68. The MPCA states that under current law, wastewater treatment facilities have been required to meet certain technology-based effluent limits (TBELs) as well as to calculate and meet water quality based effluent limits (WQBELs).⁶⁸

69. The agency further maintains that while the obligation to remove pollutants from wastewater remains, "the current understanding of the pollutant" and what is required in order to protect beneficial uses, has changed as its own research, and the field of environmental science, has advanced.⁶⁹

70. Thus, the agency asserts that while the proposals differ from existing standards, the "proposed revisions do not duplicate an existing rule on either a state or federal level," and that "the overall effect of the rulemaking is to reduce the cumulative effect or burden of treating wastewater"⁷⁰

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

71. As required by Minn. Stat. § 14.131, on November 9, 2020, the agency requested that the Commissioner of Minnesota Management and Budget (MMB) evaluate the fiscal impact and benefit of the proposed rules on local units of government.⁷¹

72. MMB reviewed the MPCA's proposed rules and, in a Memorandum dated November 17, 2020, Executive Budget Coordinator Liz Connor made a series of findings; including: (a) ten local governments operating municipal wastewater treatment plants would likely have new effluent limits in their discharge permits as a result of the proposed sulfate standards; (b) based on the EPA's affordability criteria, each of these local units of government would likely qualify for an economic variance; and (c) the MPCA has pledged to waive the ordinary variance application fee from the impacted municipalities.⁷²

⁶⁷ *Id.* at 165.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ex. K-3 at 1-3.

⁷² *Id.* at 7.

73. Based upon this information and consultation with agency staff, Ms. Connor concluded that “the rule amendments proposed will not have costs to local units of government.”⁷³

3. Performance-Based Regulation

74. The Administrative Procedure Act also requires that 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 agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁷⁴

75. The MPCA responds that “Minnesota’s existing water quality standards, including the existing Class 3 and 4 standards, are a performance-based regulatory system”⁷⁵

76. The agency argues that these features are carried through with the proposed rules. The rules “move to narrative standards with implementation procedures that are tailored to the specific environmental conditions” Such a result allows “maximum flexibility to regulated parties in choosing how to meet the standards”⁷⁶

4. Summary

77. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. §§ 14.131 for assessing the impacts of the proposed rules, including the potential regulatory impacts on regulated parties and local units of government.⁷⁷

78. The Administrative Law Judge also finds that the MPCA has met its obligation to complete the nine assessments within the SONAR.⁷⁸

D. Costs to Small Businesses and Cities under Minn. Stat. § 14.127 (2020)

79. Minn. Stat. § 14.127, requires the MPCA 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 agency must make this determination before the close of the hearing record, and the

⁷³ *Id.*

⁷⁴ Minn. Stat. §§ 14.002, .131 (2020).

⁷⁵ Ex D at 169.

⁷⁶ *Id.*

⁷⁷ See Section I.C(1)-(3) above.

⁷⁸ *Id.*

Administrative Law Judge must review the determination and approve or disapprove it.⁷⁹

80. MPCA determined that “in at least some cases, the cost of proposed revisions could exceed the regulatory threshold in the year after adoption,” specifically because “new effluent limits ... could impose new costs for wastewater dischargers.”⁸⁰

81. The Administrative Law Judge finds that the MPCA has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.⁸¹

E. Adoption or Amendment of Local Ordinances

82. Under Minn. Stat. § 14.128 (2020), the agency 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 agency 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.⁸²

83. The MPCA concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The MPCA’s proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.⁸³

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

F. Consideration of Commercial, Economic and Tax Impacts

85. In exercising its powers, the MPCA is required by parallel provisions in Minn. Stat. § 115.43, subd. 1 (2020) and Minn. Stat. § 116.07, subd. 6 (2020), to give due consideration to:

the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result there from, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances....⁸⁵

⁷⁹ Minn. Stat. § 14.127, subds. 1, 2.

⁸⁰ Ex. D at 170-71.

⁸¹ *Id.*

⁸² Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2, 3.

⁸³ Ex. D at 171.

⁸⁴ *Id.*

⁸⁵ Minn. Stat. § 115.43, subd. 1; see *also* Minn. Stat. § 116.07, subd. 6.

86. The MPCA has considered the effect of the proposed revisions as they relate to MPCA's permit process for both industrial dischargers and municipal dischargers. The MPCA maintains that because the proposed narrative translator methods will tailor implementation to local conditions, the revised standards will result in more cost-effective permitting.⁸⁶

G. Peer Review of the Technical Support for New Standards

87. Minn. Stat. § 115.035 (2020) requires that the MPCA: (1) conduct an external peer review as part of the process of promulgating water quality standards; (2) make that review available to the public; and (3) document its compliance with these requirements in any related SONAR. Minn. Stat. § 115.035(a) (2020) states in part:

Every new or revised numeric water quality standard must be supported by a technical support document that provides the scientific basis for the proposed standard and that has undergone external, scientific peer review.... Documentation of the external peer review panel, including the name or names of the peer reviewer or reviewers, must be included in the statement of need and reasonableness for the water quality standard.⁸⁷

88. The MPCA has met these requirements by commissioning an external peer review of the draft Technical Support Document and circulating the peer review report for public comment.⁸⁸

H. Public Hearing Practice

89. The agency panel at the public hearing included Jean L. Coleman, counsel for the MPCA, Scott Kyser, a Research Scientist with the agency, and Claudia E. Hochstein a senior planner for the MPCA.⁸⁹

90. Approximately 100 people attended the rulemaking hearing. The proceedings continued until 8:30 p.m. Forty-one members of the public made statements or asked questions during the hearing.⁹⁰

91. After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until Monday, February 22, 2021 – to permit interested persons and the MPCA to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the MPCA an opportunity to reply to earlier-submitted comments.⁹¹ The hearing record closed on March 3, 2021.

⁸⁶ Ex. D at 172.

⁸⁷ Minn. Stat. § 115.035(a).

⁸⁸ Ex. D at 3, 19, 173; Ex. S-8.

⁸⁹ Tr. 9-10.

⁹⁰ Tr. at 3, 6, 245.

⁹¹ See Minn. Stat. § 14.15, subd. 1.

92. By the close of the initial comment period on February 24, 2021, there were approximately 100 comments submitted to the OAH eComments website.⁹²

93. Additionally, OAH received approximately 60 written comments. Within these 60 comments, some commentators attached other remarks or signatures from other persons. For example, the Sierra Club attached 856 signatures opposing the proposed rules; Water Legacy attached 765 comments and 21 video comments; and the Minnesota Center for Environmental Advocacy (MCEA) attached 395 signatures of persons who were opposed to adoption of the proposed rules.⁹³

94. By the close of the rebuttal comment period on March 3, 2021, seven rebuttal comments were received, including rebuttal comments from the MPCA.⁹⁴

IV. Rulemaking Legal Standards

95. 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.⁹⁵

96. Under Minn. Stat. § 14.14, subd. 2 (2020), and Minn. R. 1400.2100 (2019), the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts.⁹⁶

97. 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.”⁹⁷

98. 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.”⁹⁸

99. When establishing the need and reasonableness of a proposed rule, the agency may rely upon materials included the hearing record.⁹⁹

⁹² See eComment Report on Initial Comments.

⁹³ Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100.

⁹⁴ See eComment Report on Rebuttal Comments.

⁹⁵ See Minn. R. 1400.2100.

⁹⁶ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

⁹⁷ *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁹⁸ 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).

⁹⁹ See *Manufactured Hous. Inst.*, 347 N.W.2d at 240; *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

100. When establishing the need and reasonableness of a proposed rule, the agency may rely upon “legislative facts” – namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy.¹⁰⁰

101. When establishing the need and reasonableness of a proposed rule, the agency may rely upon the agency’s interpretation of related statutes.¹⁰¹

102. 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.¹⁰²

103. Accordingly, 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.¹⁰³

104. The MPCA and its staff have been making a series of revisions to the proposed rules throughout the rulemaking process.¹⁰⁴

105. Because both the MPCA and the Administrative Law Judge suggested changes to the proposed rules after the rule text was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed.¹⁰⁵

106. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2020). 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

¹⁰⁰ Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

¹⁰¹ See *Mammenga v. Agency of Human Services*, 442 N.W.2d at 789-92; *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

¹⁰² *Peterson v. Minn. Dep’t. of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

¹⁰³ *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

¹⁰⁴ See MPCA’s Initial Post-Hearing Comments at 20-22; MPCA’s Rebuttal Comments at 7.

¹⁰⁵ Minn. Stat. § 14.05, subd. 2(a), (c) (2020).

- (3) the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”¹⁰⁶

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

- (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.”¹⁰⁷

V. Rule by Rule Analysis

108. 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 MPCA’s regulatory choice or otherwise requires closer examination.¹⁰⁸

109. The Administrative Law Judge finds that the MPCA 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.¹⁰⁹

110. 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.¹¹⁰

¹⁰⁶ Minn. Stat. § 14.05, subd. 2.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See e.g.*, Tr. 60 (McCormick), 87-88 (Keough), 90 (Haberman), 92-93 (Maccabee) 98-100 (Cohen); 105 (Herron), 109-110 (Johnson), 139 (Arnosti), 200-01 (DeFoe), 228 (Beaulieu).

¹¹⁰ *See e.g.*, 91 (Maccabee); Tr. 100-101 (Cohen).

111. In this context it is important to emphasize that the role of the Administrative Law Judge during a legal review of rules is not to fashion requirements that the judge regards as best suited for the regulatory purpose. Instead, the judge's role is to determine whether the MPCA has made a reasonable selection among the regulatory options it had. The delegation of rulemaking authority is from the Minnesota Legislature to the MPCA; and not to the judge.¹¹¹

112. Notwithstanding the hours of public testimony, hundreds of comments and thousands of pages of supporting materials in the hearing record, at bottom, there are two principal critiques of the agency's proposals: First, many commentators maintain that key parts of the MPCA's proposal are illegal because they violate one or more protections of the federal Clean Water Act. Second, still other commentators maintain that important parts of agency's proposal do not meet Minnesota's own requirements for a proper rule.¹¹² Each of these critiques is explored in detail below.

A. Background on the Development of Water Quality Standards Under the Clean Water Act

113. A key purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by reducing, and eventually eliminating, the discharge of pollutants into these waters.¹¹³

114. While the states and EPA share duties in achieving this goal, primary responsibility for establishing appropriate water quality standards is left to the states. In fact, the CWA includes a Congressional acknowledgement of the "rights of States to prevent, reduce, and eliminate pollution"¹¹⁴

115. Water quality criteria are a key element of the CWA's protective regulatory mechanisms. The criteria constrain state authority to grant permits for point source

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 e.g., Cleveland-Cliffs Initial Comments at 8; MCEA's Initial Comments at 15, 23; Coalition of Greater Minnesota Cities' Initial Comments, at 2; GEI Consultants' Initial Comments, at 1; Initial Comments from the City of Plainview, at 2; Iron Mining Association's Initial Comments, at 2; Bruce L. Johnson and Maureen K. Johnson's Initial Comments, at 11, 13; Minnesota Chamber of Commerce's Initial Comments, at 2-3; MESERB's Initial Comments, at 7; Sierra Club North Star Chapter's Initial Comments, at 4; Southern Minnesota Beet Sugar Cooperative's Initial Comments, at 2; WaterLegacy's Initial Comments, at 65, 70.

¹¹³ 33 U.S.C. § 1251(a) (2020); see also Upper Sioux Community's Initial Comments, at 2; Joint Initial Comments of the 11 Tribal Entities, at 3.

¹¹⁴ 33 U.S.C. § 1251(b) (2020).

discharges if those discharges would overwhelm a water body's capacity to assimilate pollutants without becoming impaired.¹¹⁵

116. The CWA requires that each state adopt water quality standards for all waters of that state and to review the standards on a triennial basis.¹¹⁶

B. Claimed Violations of the Clean Water Act

1. Deletion of Numeric Standards for Class 3 and 4 Waters in Minn. R. 7050.0220 and 7050.0224

117. The MPCA proposes to delete the numeric standards for some pollutants in Class 3 and Class 4 waters for which there are no corresponding numeric standards in Class 2 waters. Class 2 concerns protections for aquatic life, such as fish and macroinvertebrates.¹¹⁷

118. The agency's proposed rule revision to Minn. R. 7050.0220, subp. 4(a)(A)(16), regulating the hardness of water, is one such example. Hardness of water is a measure of dissolved minerals – most often calcium and magnesium.¹¹⁸

119. The agency proposes the following deletion¹¹⁹ in the context of a broader set of classes of water:

A. MISCELLANEOUS SUBSTANCE, CHARACTERISTIC, OR POLLUTANT							
2Bd CS	2Bd MS	2Bd FAV	1B/1C DC	3A/3B IC	4A IR	4B LS	5 AN
<hr/>							
. . . .							
(16) Hardness, Ca+Mg as CaCO ₃ , mg/L							
--	--	--	--	50/250	--	--	--

120. Dozens of commentators expressed concerns about the future effects of the proposed deletions in this matter, most often with respect to the effects of salts, hardness, and specific conductance on fish and aquatic insects.¹²⁰

¹¹⁵ See generally 33 U.S.C. § 1313 (d) (2020).

¹¹⁶ 33 U.S.C. § 1313 (a), (b), (c)(1) (2020); see also Ex. D at 5.

¹¹⁷ See generally Ex. C at 22-24.

¹¹⁸ Ex. D at 38.

¹¹⁹ Ex. C at 22-24.

121. For example, Trout Unlimited suggested that the MPCA determine the effects to aquatic life and cold-water fish resulting from removal of numeric criteria, and then present the results to the public before proceeding with rulemaking. Still others urged the agency to postpone this rulemaking until numeric standards for these parameters are developed for Class 2 aquatic life uses; or alternatively, to move the numeric standards from Class 3 and 4A into the standards for Class 2 as part of this rulemaking.¹²¹

122. The MPCA asserts that it will make any needed revisions to the water quality standards for aquatic life (Class 2) in a separate rulemaking.¹²²

123. In fact, on April 5, 2021, the agency published a Request for Comments in the *State Register* seeking feedback on “on assigning appropriate beneficial use designations” in Class 2 waters. The MPCA noted:

These rule amendments will make updates and corrections to Class 2 (Aquatic Life) beneficial use designations or classifications for streams. These updates fall into two groups: 1) reviewing streams for appropriate classification as cold or warm water habitats; and 2) reviewing streams under the tiered aquatic life use (TALU) framework.¹²³

124. Underlying the many recommendations to maintain the existing numeric criteria in the Class 3 and 4 standards, is the view that those standards provide an essential “backstop” for protecting aquatic life in Class 2 waters. The key claim is that removal of the numeric criteria in Classes 3 and 4 will result in degradation of Class 2 waters and that such degradation would be illegal under the CWA.¹²⁴

125. MPCA disagrees that a single set of standards across classes of waters is well-grounded in the underlying science. As MPCA Research Scientist Peter Keyser testified at the rulemaking hearing:

So, there's a singular designated criteria and a singular designated use and they must be paired, that is what the statute said. And the reason for that is what I mentioned before, that the science necessary to protect a specific designated use using a criteria, for example, the science to protect aquatic life is not the same science that is needed to protect the

¹²⁰ Ex. D at 21; see e.g., Joint Initial Comments of the 11 Tribal Entities, at 7; Initial Comments of: Caitlin Addison-Howard; Marcia Bergstrom; Courtney Blake; Chris Chookiatsirichai; Liz Dahl; Dan and Mary Hooley; Caitlin Addison-Howard; Jennifer Ilse; Elizabeth Kenison; Carolyn Law; Joan Janus; Robert Lamp; Karen Lunde; Mara Mccollor; April Narcisse; Judy Urban; Video Comments of: Jaci Christenson; Julie Cox; Dr. Jesse Coenen; Judy Dufficy; Judith Derauff; Dan Engelhart; Svea Frantzich; Timothy Frantzich; Nancy Giguere; Robert Hale; Bill Hansen; Kendall Kramer; Mary Lastovich; Theresa Lastovich; Emily Levang; Margaret Monson; Dr. Jen Pearson; Dianne Polasik (and Charlie, Libby and Benny); Allen Richardson; Clare Shirley; Wendy Ward.

¹²¹ Ex. D at 21; MCEA's Initial Comments at 17; Tr. 101 (Cohen).

¹²² Ex. D at 21, 164.

¹²³ 45 *State Register* 1087-88 (April 5, 2021).

¹²⁴ Ex. D at 5-6.

irrigation. And it's important that you don't mix and match those science when developing water quality standards.¹²⁵

126. Moreover, the MPCA does not agree that when waters include several use designations – such as when a particular body of water has Class 2, 3 and 4 beneficial uses – every later revision of the water quality standards must address the most sensitive of those uses. As it argued in the SONAR:

Each use class standards are precisely designed for the protection of the beneficial uses in that use class. When developed, consideration is not given to the science related to the protection of other beneficial uses. If water quality standards were designed to protect all beneficial uses at once, then differentiated use classes would not be needed.

....

Generally, human health or aquatic life will be the most sensitive use, resulting in the most stringent standard. However, if every single revision must cover those uses, then essentially there is one single unified water quality standard. This is an unreasonable result, given that the CWA and Minn. Stat. § 115.03, subd. 1(b) and Minn. Stat. § 115.44 specifically reference and direct the creation of different classes of uses.¹²⁶

127. The Administrative Law Judge agrees. This precise question was presented to the U.S. Court of Appeals for the Fourth Circuit in *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395 (4th Cir. 1993). In that case, a number of environmental advocacy organizations filed suit asserting that EPA did not follow the CWA, its regulations, or its own guidelines, when it approved water quality criteria on dioxin levels. The EPA claimed that the criteria were intended to address only one of the statutory uses – specifically, the protection of human health. The Natural Resources Defense Council and others, however, maintained that states are obliged to adopt a single criterion for dioxin that protects against all identifiable effects – effects on human health and also aquatic life and wildlife.¹²⁷

128. The appellate panel rejected this view. It wrote:

[W]e find that use of the term “criteria” in CWA § 303(c)(2)(A) and the regulations means that states may adopt multiple criteria for the same pollutant. Thus, where multiple uses are designated for a body of water, there may be multiple criteria applicable to it, as long as the criteria support the most sensitive use of that particular body of water....

¹²⁵ Tr. at 48 (Keyser).

¹²⁶ *Id.* at 6.

¹²⁷ *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d at 1404.

EPA avers that its review of the Maryland and Virginia standards was limited exclusively to protection of human health against any potential adverse effects (both cancerous and non-cancerous) caused by dioxin.

....

Appellants have failed to cite any convincing authority showing that states have an obligation under the CWA or its accompanying regulations to adopt a single numeric criterion for dioxin that protects against all identifiable effects to human health, aquatic life, and wildlife.¹²⁸

129. A like principle should apply here. The MPCA states that it is proceeding incrementally to address protective standards for Class 3 and Class 4 waters, and that it will proceed to promulgate protective standards for Class 2 waters in a separate rulemaking.¹²⁹ It does not violate the CWA, nor is otherwise unlawful, for the MPCA to remove the numeric criteria for Class 3 and Class 4 waters in Minn. R. 7050.0220 and 7050.0224 and address protections for Class 2 in a subsequent proceeding.

130. With that said, it is important to note that in its initial comments the MPCA has made one small step toward the commentators' position. With respect to Class 2D waters and wetlands, the MPCA proposes revising Minn. R. 7050.0222, subp. 6(A), to provide that "Settleable solids ... [s]hall not be allowed in concentrations sufficient to create significant adverse impacts on *aquatic life*."¹³⁰

2. The Proposal in Minn. R. 7050.0224, subp. 2(B) to Use Seasonal Averages as the "Protective Duration"

131. With two exceptions, that are not at issue here, Minnesota's current rules require that all water quality standards must be protected to "the 7Q10" – a measurement that reflects the lowest 7-day average flow of water that occurs, on average, once every 10 years.¹³¹

132. The 7Q10 reflects waterbody flows under extreme low flow, drought-like conditions – an average flow that would occur in a waterbody roughly one to three percent of the time.¹³²

133. During a period of especially "low flow" conditions there is less water available in the receiving waterbody to dilute pollution discharged by an NPDES permit holder. For that reason, the impacts that would occur during these low flow periods are used to set discharge limits in permits that will safeguard beneficial uses.¹³³

¹²⁸ Ex. D at 6.

¹²⁹ Ex. D at 5-6; 45 *State Register* 1087.

¹³⁰ MPCA's Initial Comments at 22 (emphasis added).

¹³¹ See Ex. D at 35, 43-44; Minn. R. 7053.0205, subp. 7 (2019).

¹³² Ex. D at 44.

¹³³ *Id.* at 35-36.

134. As to waters used for irrigation, the MPCA proposes to revise Minn. R. 7050.0224, subp. 2(B), so as to move from a seven-day average, over ten years, to a “growing season average.”¹³⁴

135. To implement this approach, the MPCA proposes to revise Minn. R. 7053.0205, subp. 7 (2019), to low flows of water over a 122-day period. The “122-day ten-year low flow” or “122Q10” means using a 122-day growing season from June to September as the “period of record” and the lowest flow that occurs, on average, once every ten years.¹³⁵

136. This testing protocol would then oblige water-quality-based effluent limits to protect water quality for irrigation at all flows at or above a “122Q10” critical low flow.¹³⁶

137. The Minnesota Environmental Science and Economic Review Board (MESERB), a municipal joint powers organization of local governmental entities in Greater Minnesota, argues that a 122-day period is too short of a durational period. It contends that the proposed rules understate the length of the actual growing season in Minnesota. It urges including the month of May in the durational period.¹³⁷

138. For its part, WaterLegacy takes the opposite view. It maintains that use of 122-day durational period is far too long and will have distorting effects on the effluent test results. It asserts:

The use of a 122-day averaging formula may mean that when a farmer uses surface water during drought, salts will not be so diluted, and crops will be harmed. If a crop is lost or stunted by saline irrigation, the fact that water later in the season may be more abundant or less salty is not relevant.¹³⁸

139. The MPCA makes the following points in support of its regulatory choice to establish a 122-day “growing season” and a corresponding 122Q10 effluent standard:

- (a) The current 7Q10 flow standard “is inappropriately protective of the irrigation use”
- (b) The 122Q10 is comparable to the recurrence interval used with other flow rates.
- (c) A 122Q10 protocol for Class 4A effluent limit reviews:
 - 1. allows for a more “accurate protection of the irrigation beneficial use;”

¹³⁴ See Ex. C at 58; Ex. D at 92-93.

¹³⁵ Ex. D at 106.

¹³⁶ *Id.* at 110.

¹³⁷ MESERB’s Initial Comments, at 13.

¹³⁸ Water Legacy’s Initial Comments, Attachment 3 at 7-8.

2. is “protective of water quality and flow rates during the summer growing season when irrigation occurs;”
3. “provides needed clarity on an essential input in the limit-setting process;” and
4. is likely to “reduce future disagreements about how to calculate the need for Class 4A limits in wastewater permits.”¹³⁹

140. The Administrative Law Judge concludes that the agency has demonstrated, by an affirmative presentation of facts, the need and reasonableness of its proposal for a testing standard that includes a 122-day growing season average and a recurrence interval of ten years.¹⁴⁰

3. The Proposal in Minn. R. 7053.0260, subp. 3(B) to Measure Effluent Limits at the Point From Which Water is Withdrawn

141. The MPCA proposes to test for exceedance of water-quality-based effluent limits “at the point at which water is withdrawn” for industrial consumption.¹⁴¹

142. WaterLegacy argues that measuring effluent limits at the point that the water is withdrawn is arbitrary and will result in degradation of state waters. It writes:

Each step required by the Industrial Translator narrows the probability that effluent limits on an upstream discharger might be required to prevent fouling, corrosion, hardness or scaling. As a result, MPCA’s deregulation of class 3 water quality would affect the uses of surface water for industry. This deregulation would also impact community water systems and uses of surface water for wildlife and aquatic life, potentially affecting public health and welfare.

....

By applying the Industrial Translator benchmark at downstream irrigation permit locations rather than at the source where pollution is discharged to surface water, the proposed rule starts with dilution....¹⁴²

143. The MPCA makes the following points in support of its regulatory choice to test water at the point that the water is withdrawn:

¹³⁹ Ex. D at 36-37.

¹⁴⁰ Minn. Stat. § 14.14, subd. 2 (2020).

¹⁴¹ See Ex. C at 109.

¹⁴² Water Legacy’s Initial Comments, Attachment 3 at 7-8.

- (a) The applicable water quality standards apply to all waterbodies within the class, regardless of whether there is a downstream user on a particular waterbody.
- (b) In Minnesota, there are a relatively small and steady number of industrial appropriators of water.
- (c) These firms tend to draw water supplies from larger bodies of water that drain from still broader watersheds; and those watersheds integrate water from different sources of varying quality.
- (d) The firms appropriating water typically have processes and intake structures that account for some variation in water quality. In general, these firms are more concerned about new, large upstream dischargers and wide variability in quality of the water that they take.
- (e) The MPCA included in the Class 3 translator a requirement to evaluate whether a discharging facility needs an effluent limit to ensure that any downstream water quality standards are met.
- (f) Because all stakeholders can know the measuring points before effluent testing is undertaken, the proposed rule results in greater certainty about which waters will be evaluated during NPDES permitting.
- (g) NPDES permits are regularly subject to review and re-issuance on a five-year timetable and MPCA has the authority to re-open permits “mid-cycle,” if need be during the term of the permit.¹⁴³

144. Likewise important, Minnesota rules provide certain antidegradation guarantees and the guarantees of water quality are applicable notwithstanding industrial discharge and dissolution practices. Minn. R. 7053.0205, subp. 5 (2019), states:

The agency, by allowing dilution, shall consider the effect on all uses of the waters of the state into which the effluents are discharged. The extent of dilution allowed regarding any specific discharge as specified in subpart 7 must not violate the applicable water quality standards in chapters 7050 and 7052, including the antidegradation requirements contained in those chapters.¹⁴⁴

¹⁴³ Ex. D at 22, 33-34; Ex. N at 4.

¹⁴⁴ Minn. R. 7053.0205, subp. 5; see *a/so* Ex. C at 109.

145. The Administrative Law Judge concludes that the agency has demonstrated, by an affirmative presentation of facts, the need and reasonableness of its proposed rule to measure effluent limits for Class 3 and Class 4 waters from the point that the water is withdrawn.¹⁴⁵

4. Do the Proposed Rules Result in Unlawful Delisting of Beneficial Uses?

146. As part of its proposed changes to Minn. R. 7050.0024, subp. 2, MPCA would revise the standards for irrigation and agriculture. Its proposal reads in part:

Subp. 2. Class 4A waters. The quality of class 4A waters of the state shall must be such as to permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area,~~including truck garden crops.~~¹⁴⁶

147. WaterLegacy asserts that the removal of the reference to truck garden crops amounts to an unlawful delisting of truck garden crops as a beneficial use of Class 4A waters.¹⁴⁷

148. The Administrative Law Judge disagrees. A better reading of the proposed text, and the agency's expressed intention to "keep the beneficial use substantially the same" following the revision, is that protection of truck garden crops falls under the broader umbrella of safeguarding "*any crops* or vegetation usually grown in the waters or area."¹⁴⁸ The proposed revision does not delist truck garden crops as a beneficial use.

C. Claimed Violations of Minnesota Law

1. Violations of Minn. Stat. § 115.44, subd. 4 (2020)

149. The MPCA has developed detailed translator processes for the proposed Class 3 and 4A narrative standards and is proposing to incorporate these by reference in the proposed rules. The referenced processes detail the steps that will be used to determine the protective value for each facility.¹⁴⁹

150. The MCEA maintains that the proposed use of translator mechanisms violates Minn. Stat. § 115.44, subd. 4, on the grounds that the narrative standards do not "describe polluted conditions" in state waters. Minn. Stat. § 115.44, subd. 4, provides in relevant part:

The agency, after proper study, and in accordance with chapter 14, shall adopt and design standards of quality and purity for each

¹⁴⁵ Minn. Stat. § 14.14, subd. 2 (2020).

¹⁴⁶ Ex. C at 57.

¹⁴⁷ Water Legacy's Initial Comments, Attachment 3 at 23.

¹⁴⁸ Ex. C at 57 (emphasis added); Ex. D at 14.

¹⁴⁹ Ex. D at 3.

classification necessary for the public use or benefit contemplated by the classification. The standards shall prescribe what qualities and properties of water indicate a polluted condition of the waters of the state which is actually or potentially deleterious, harmful, detrimental, or injurious to ... the use of the waters for ... commercial and industrial, agricultural ... or other reasonable purposes, with respect to the various classes established pursuant to subdivision 2.¹⁵⁰

151. As the MCEA reasons, the narrative standards fall short of the statutory requirements because:

MPCA's proposed narrative standards don't describe polluted conditions, or contain 'criteria,' or protect the waters for uses 'to which they . . . may be put,' but instead only protect known users if and when those users may appear. If no specified user is identified, then MPCA's proposed narrative standards are meaningless: dischargers can discharge an unlimited quantity of [salty / ionic constituents], subject only to other numeric standards (to the extent that such standards might apply). Put another way, the translator doesn't translate the narrative standard—it largely eliminates it.¹⁵¹

152. In the view of the Administrative Law Judge the dual critiques that the narrative standards do not describe "polluted conditions" and potentially authorize the discharge of unlimited amounts of pollutants into state waters, are overstated. In this context, it is important to note:

- (a) The specific-pollution related inquiries prompted by the Class 3 translator include whether –
 - 1. a new or expanding discharging facility is likely to cause a net increase in loading of hardness to the surface water;
 - 2. there is an increase of calcium ions being discharged;
 - 3. the discharges might increase the downstream potential for calcium scaling of equipment; and
 - 4. the discharges might increase the downstream potential for calcium scale formation?
- (b) The Class 3 translator also obliges locating "all industrial users appropriating from surface waters that are on the downstream flowpath of the NPDES discharge" and tracing

¹⁵⁰ Minn. Stat. § 115.44, subd. 4; MPCA's Initial Comments at 17.

¹⁵¹ MPCA's Initial Comments at 17.

the “flowpath of the discharge all of the way until the state of Minnesota border.”

- (c) The Class 3 translator lists 58 potential uses along the flowpath for dischargers and the MPCA to assess.
- (d) To protect “all waters where industrial consumption is (or potentially is) an existing use,” the MPCA considers both active and inactive water appropriation permit locations and “any industrial users that are not required to have appropriation permits [but who] may be documented and added for future consideration.”
- (e) The Class 4A translator has similar features and rigor. It obliges a detailed assessment of the sodium and chloride content of potential NPDES discharges, the classification of salinization risks of area soils, and a thorough search for “all downstream irrigators.”¹⁵²

153. As noted above, the MCEA speculates that one day, there may be discharges into a waterbody where there is no user downstream. Given the breadth and depth of the agency’s search for such users and uses, this seems like a very remote possibility. No such instances are identified in the rulemaking record. Ordinarily, such speculative possibilities are not enough to undermine the need and reasonableness of regulations that address present-day problems and needs.¹⁵³

154. The proposed water quality standards do not violate Minn. Stat. § 115.44, subd. 4, because those standards “prescribe what qualities and properties of water indicate a polluted condition of the waters of the state which is actually or potentially deleterious, harmful, detrimental, or injurious to ... the use of the waters for ... commercial and industrial, agricultural” uses.¹⁵⁴

¹⁵² Ex. D at 33-35, Attachment S-3 at 2-7, Attachment S-4 at 3-8.

¹⁵³ See e.g., *In the Matter of the Proposed Rules Governing Reading Preparation, Elementary and Middle School Licensure, and Technology-related Licensure for Teachers*, Minnesota Rules Chapter 8710, 11-1302-19880-1, 2009 WL 1912735, at *21 (Minn. Off. Admin. Hrgs. June 23, 2009) (the need and reasonableness of a new licensing category was not undermined by the more speculative claim that a future mandate to hire such professionals would be burdensome); *In the Matter of Proposed Permanent Rules Relating to Preliminary Screening Breath Test Devices*, Minn. Rules Part 7501.0100 To 7501.0500, OAH 1-2400-10676-1, 1997 WL 419533, at *8 (Minn. Off. Admin. Hrgs. January 1997) (the need and reasonableness of the agency’s proposed rule was not undermined by the prospect of a different standard being adopted sometime in the future by the legislature).

¹⁵⁴ Compare Ex. D at 33-35, Attachment S-3 at 2-7, Attachment S-4 at 3-8 with Minn. Stat. § 115.44, subd. 4.

2. Use of the Narrative Translator and the Prohibition on Unpromulgated Rules

155. In an effort to meet the critiques that it does not have “a well-defined policy for implementing the Class 2 aquatic life narrative standard in permits,” the MPCA staff set about to try and develop “an interim translator approach that will allow the development of permit conditions as needed to ensure that aquatic biology is protected from the potential adverse impacts of ionic parameters.”¹⁵⁵

156. By its own estimation, the agency is only part way along in this process. As it explains in the SONAR:

Driven by these comments, the MPCA has developed an interim translator approach that will allow the development of permit conditions as needed to ensure that aquatic biology is protected from the potential adverse impacts of ionic parameters. As part of this rulemaking, **the MPCA has developed the first phase of this process** by reviewing biological data and specific conductance levels, and analyzing those waters most likely to have biology that is adversely impacted by salty parameters. The determination of potentially impacted waters is conducted through a weight of evidence approach that looks at biological data and macroinvertebrate index of biological integrity (MIBI) scores, a conditional probability of IBI impairment based on specific conductance, and specific conductance levels compared to regional benchmarks.¹⁵⁶

157. Yet, the SONAR included such improvident phrases like “the agency has developed an interim approach to protecting aquatic life from the adverse impacts of ionic pollutants,” and this approach “will allow the development of permit conditions ...”¹⁵⁷ To readers participating in this proceeding this sounded a lot like rulemaking.

158. A number of commentators expressed precisely this concern – that Attachment S-5 to the SONAR (solemnly titled *Implementing the Aquatic Life Narrative Standard*), will be a manual standard that will be enforced “as though it were a duly adopted rule.”¹⁵⁸

¹⁵⁵ Ex. D at 7, 185.

¹⁵⁶ *Id.* at 185 (emphasis added); see also Ex. D at 195 (“The work presented in the framework (S-5) may be early work”).

¹⁵⁷ Ex. D at 21.

¹⁵⁸ Compare, e.g., Minn. Stat. § 115.44 with Coalition of Greater Minnesota Cities' Initial Comments at 2; Iron Mining Association's Initial Comments at 5-6; Bruce L. Johnson's and Maureen K. Johnson's Initial Comments at 11, 13; Minnesota Chamber of Commerce's Initial Comments, at 2; MESERB's Initial Comments at 6.

159. While the misapprehension of stakeholders is understandable, in fact, no incorporation of Attachment S-5 is made into, or intended, by the proposed rules.¹⁵⁹

D. Revisions Proposed by the MPCA After Publication in the State Register

160. The agency proposes four modest changes to the rule text, as a result of feedback from stakeholders and the tribunal: (1) adding the words “Industrial Appropriator” to an index of regulatory definitions in the Class 3 translator document; (2) revising the standards on “settleable solids” in Minn. R. 7050.0222, subp. 6, to prohibit “concentrations sufficient to create adverse impacts on aquatic life;” removing the limiting words “watering” and “for watering” in Minn. R. 7050.0224, subp. 3; and (4) incorporating the Class 3 and Class 4A translator documents as of a date certain.¹⁶⁰

161. Each of these changes improves the clarity of the proposed rules and none of the changes results in a rule that is substantially different than was circulated to the public on December 7, 2020.¹⁶¹

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

CONCLUSIONS

1. The MPCA gave notice to interested persons in this matter.
2. The MPCA has fulfilled the procedural requirements of Minn. Stat. § 14.14 (2020) and all other procedural requirements of law or rule.
3. The Administrative Law Judge concludes that the MPCA has fulfilled its additional notice requirements.
4. The MPCA 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; .15, subd. 3; .50 (i), (ii) (2020).
5. The Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5 (2019).

¹⁵⁹ See generally, Ex. C; see also Ex. C at 110, 111; Ex. D at 7 (“Although the [S-5] policy is in support of other promulgated rules, **not the rules being proposed here**, MPCA has provided the policy in response to comments”) (emphasis added); Ex. D at 21-22 (“Although not formally a part of the Class 3 and 4 rulemaking, this approach, which uses Minnesota’s Class 2 narrative water quality standard to protect aquatic life, was developed in response to comments provided in this rulemaking (S-5)”).

¹⁶⁰ MPCA’s Initial Comments at 21; MPCA Rebuttal Comments at 7; Ex. C at 58, 110-111; Ex. D, Attachment S-3 at 6.

¹⁶¹ Compare *id.* with Exs. C and M.

6. The MPCA 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, .50 (2020).

7. The modifications to the proposed rules suggested by the MPCA 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; .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; .15, subd. 3.

9. As part of the public comment process, a number of stakeholders urged the MPCA to adopt other revisions to Chapters 7050 and 7053. In each instance, MPCA's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

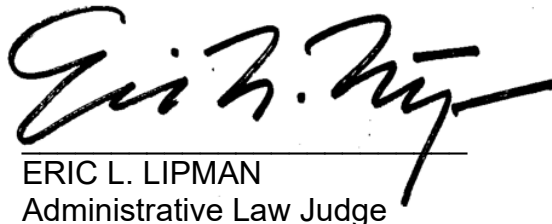
10. A finding or conclusion of need and reasonableness with regard to any particular rule does not preclude, and should not discourage, the MPCA from further modification of the proposed rules – provided that the rule finally adopted is not “substantially different” (under Minn. Stat. § 14.05, subd. 2) and is based upon facts in the rulemaking record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: April 9, 2021


ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The Agency may then adopt the final rules or modify or withdraw its proposed rules. If the Agency makes any changes in the rules, it must submit the rules to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the Agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rules' adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.