OAH 82-9003-32864
Revisor R-4136

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Proposed Rules Relating to Water Quality Variance

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Barbara J. Case conducted a hearing in this rulemaking proceeding commencing at 3:30 p.m. on February 4, 2016, at the Minnesota Pollution Control Agency (MPCA or Agency), 520 Lafayette Road North, St. Paul, Minnesota. The hearing was broadcast via interactive video conference to the regional office of the MPCA located in Duluth. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act (MAPA).[1] The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one or when ordered by the agency. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to consider public comment regarding the impact of the proposed rules and what changes might be appropriate.

Adonis Neblett, General Counsel, represented the MPCA at the hearing. The members of the MPCA's hearing panel (Agency Panel) included Mary Lynn, Rulemaking Coordinator; and Elise Doucette, MPCA staff.

Two members of the public were present at the Duluth location and both offered oral comments.[2] Ten members of the public signed the hearing register in St. Paul and five offered oral comments.[3]

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[1] Minn. Stat. §§ 14.131-.20 (2014).
[2] Testifying in Duluth: Debra Topping, Interested Party; Korey Northrup, Interested Party.
[3] Testifying in St. Paul: Bob Tammen, Interested Party; Paula Maccabee, WaterLegacy (WaterLegacy); Albert Ettinger, Minnesota Center for Environmental Advocacy (MCEA); Louis Knieper, Southern Minnesota Beet Sugar Cooperative (SMBSC); Daniel Marx, Minnesota Environmental Science and Economic Review Board (MESERB).

The Agency received six written comments on the proposed rules prior to the hearing. These written comments contained 52 requests for a hearing.[4] After the hearing, the Administrative Law Judge kept the administrative record open for an additional 20 calendar days, until February 24, 2016, to allow interested members of the public and the Agency to submit written comments. Six comments, some signed by multiple interested persons or organizations, were submitted into the record. Thereafter, the record remained[5] open for an additional five business days, until March 2, 2016, to allow interested members of the public and the Agency to file a written response to any comments received during the initial comment period.[6] During that post-hearing rebuttal period three comments were received into the record. The Agency and the Administrative Law Judge also heard comments from members of the public at the public hearing. The Agency considered and responded to all comments in its Post-Hearing Preliminary Response of February 24, 2016 and its Final Response dated March 2, 2016. To aid the public in participating in this matter, comments and all documents relevant to this matter were clearly posted and easily accessed on the MPCA's website. The hearing record closed for all purposes on March 2, 2016.[7]

SUMMARY OF CONCLUSIONS

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

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. The MPCA may grant variances to the Water Quality Standards (WQS) in Minnesota Rules chapters 7050 and 7052 (2015), and to the effluent limits and discharge restrictions in chapter 7053 (2015), the procedures under which a variance may be granted are different in each rule. In this rulemaking proceeding, the Agency proposes to amend its rules relating to the issuance of variances in order to make the procedures more clear and consistent with each other and with federal law.

2. A water quality variance is a short-term deviation from meeting otherwise applicable WQS and their associated water quality-based effluent limits (WQBELs). Variances are temporary and apply to a specific pollutant.[8] A variance allows a

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[4] Exhibit (Ex.) I.
[5] MPCA preliminary response, at 3 (Feb. 24, 2016).
[6] *See* Minn. Stat. § 14.15, subd. 1.
[7] The Chief Administrative Law Judge extended the time period for issuance of the Administrative Law Judge's Report on this rule.
[8] SONAR, at 5.

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permittee discharging wastewater, such as a municipal wastewater treatment facility or industrial facility, additional time to meet the otherwise applicable WQS.[9]

3. The demand for variances historically has been low. However, the MPCA anticipates an increase in variance requests due to new WQS and lowered method detection limits that permitted facilities may be unable to immediately meet.[10] Therefore, in 2012 the MPCA implemented a process improvement project for WQS variances to improve the process for reviewing variance requests.[11]

4. The MPCA states that the rule amendments are needed because differences between each of the rule chapters are confusing to the regulated community and, as a result, complicate the MPCA's ability to maintain consistent statewide application of variances and compliance with federal restrictions on issuing variances. The MPCA further asserts that amending the variance procedures will not result in more, or less, restrictive WQS. The MPCA's intent is that the rule amendments will provide a clearer variance process for the regulated community, consistency among the state's variance rules and with federal requirements, and improved efficiency in the MPCA's processing of variance requests.[12]

5. The MPCA summarizes the subject of the proposed rules as follows: chapter 7050 applies to variances related to WQS for all waters outside of the Lake Superior Basin (LSB); chapter 7052 applies to variances to WQS for those portions of the LSB within the boundaries of the State of Minnesota; and chapter 7053 applies to variances related to the safe discharge restrictions and minimum treatment requirements established under chapter 7053.[13]

6. During this rulemaking proceeding, the MPCA has proposed modifications to the proposed rules in several respects. These proposed modifications are discussed in the rule-by-rule analysis below.

II. Rulemaking Legal Standards

7. In a rulemaking proceeding, the agency must establish the need for and reasonableness of the proposed rules by an affirmative presentation of facts.[14] In support of a rule, an agency may rely on legislative facts, including general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute or stated policy preferences.[15]

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[9] *Id.* at 5.
[10] *Id.* at 5, 6.
[11] *Id.* at 5.
[12] *Id.*
[13] MPCA preliminary response, at 38.
[14] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100 (2015).
[15] *See Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

ED_005808A_00005818-00003

8. The MPCA prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the Agency primarily relied upon the SONAR as its affirmative presentation of facts in support of the proposed rules.

9. The SONAR was supplemented by the MPCA's hearing presentation, written post-hearing submissions, and comments and responses to questions from the public made by members of the Agency panel during the public hearing.

10. A rule must be "rationally related to the objective sought to be achieved."[16] Thus, any inquiry as to a rule's reasonableness requires "a searching and careful inquiry of the record to ensure that the agency action has a rational basis."[17] The agency must "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[18]

11. Although reasonable minds might disagree about the wisdom of a certain course of action, it is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency.[19] Therefore, "a reviewing court will not substitute its judgment if an agency can demonstrate that it has complied with rulemaking procedures and made a considered and rational decision."[20]

12. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Agency complied with the rule-adoption procedure, the proposed rules grant undue discretion, the Agency has statutory authority to adopt the rules, the rules are unconstitutional or illegal, the rules involve an undue delegation of authority to another entity, or the proposed language is not a rule.[21]

13. If changes to the proposed rule are made by the Agency or suggested by the Administrative Law Judge after original publication of the rule language 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. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if 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; the differences are a logical outgrowth of the contents of the notice of hearing and the comments submitted in response to the notice;

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[16] *Builders Ass'n of Twin Cities v. Minn. Dep't of Labor and Industry*, 872 N.W.2d 263, 268 (Minn. Ct. App. 2015) (quotation omitted).
[17] *Id.* (quotation omitted).
[18] *Pettersen*, 347 N.W.2d at 244.
[19] *See Minn. Envtl. Science and Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 102 (Minn. Ct. App. 2015) ("An agency decision, including rulemaking, enjoys a presumption of correctness and a court should defer to an agency's expertise and special knowledge." (quotation omitted)).
[20] *Id.* at 98.
[21] Minn. R. 1400.2100.

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and the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.[22]

14. In determining whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests; 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 the effects of the rule differ from the effects of the proposed rule contained in the notice of hearing.[23]

15. This Report discusses the portions of the proposed rules that received significant critical comment or otherwise require examination. Accordingly, this Report will not discuss each proposed rule, nor will it respond to each comment that was submitted. Every submission has been read and considered. The Administrative Law Judge finds that the Agency has demonstrated the need for and reasonableness of all provisions of the rules that are not discussed in this Report, that such provisions are within the Agency's statutory authority, and that there are no other problems that prevent their adoption.

III. Procedural Requirements of Chapter 14

16. The MAPA[24] and the rules of the Office of Administrative Hearings (OAH)[25] set forth certain procedural requirements that are to be followed during agency rulemaking.

17. On October 1, 2012, the Agency published a Request for Comments on Planned Amendments to Rules Governing Water Quality Variances in the State Register.[26] The same notice was also posted on the MPCA's public notice webpage. This notice was issued prior to the amendments being written and pertained to Chapters 7050 and 7053.[27]

18. Notice of the Request for Comments was also sent electronically via GovDelivery on October 1, 2012, to approximately 722 interested persons who were registered with GovDelivery to receive information on these rules.[28]

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[22] Minn. Stat. § 14.05, subd. 2(b) (2014).
[23] *Id.*, subd. 2(c) (2014).
[24] The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-.47 (2014).
[25] The OAH rules governing rulemaking proceedings are set forth in Minn. R. 1400.2000-.2240 (2015).
[26] Ex. A.1. The Request for Comments was published at 37 Minn. Reg. 492 (Oct. 1, 2012).
[27] Ex. A.1.
[28] Ex. D1; SONAR, at 37-38.

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19. On March 4, 2013, the MPCA published a second notice of a Request for Comments on Planned Amendments to the Rules Governing Water Quality Variances to include Minnesota Rules Chapter 7052 in the State Register.[29]

20. The Commissioner of the MPCA signed the SONAR on June 8, 2015.[30]

21. On June 9, 2015, the Agency sent copies of the proposed rule and the SONAR to the Commissioner of Minnesota Management and Budget (MMB) and requested an evaluation of the fiscal impact and benefits of the proposed rules on local units of government as required by Minn. Stat. § 14.131.[31]

22. On June 19, 2015, MMB's Executive Budget Officer issued a memorandum which concluded that "[t]he proposed rule changes will only impact the permittees that choose to pursue a variance. As these rules clarify existing rules, no cost is anticipated. Additionally, the MPCA is the delegated authority enforcing water quality standards, meaning there will be no costs for local governments."[32]

23. On June 9, 2015, the MPCA sent copies of the proposed rules and SONAR to the Commissioner of the Minnesota Department of Agriculture (MDA), noting that the MPCA does not believe this rulemaking will affect agricultural land or farming operations.[33]

24. On June 13, 2015, during Special Session, the Minnesota Legislature disbanded the MPCA's Citizens Board, effective July 1, 2015. The MPCA, therefore, revised its SONAR to reflect the disbandment of the Citizens Board. The SONAR Addendum, dated July 20, 2015, strikes references to the Citizens Board from the June 8, 2015, SONAR.[34]

25. The Minnesota Office of the Revisor of Statutes approved the rules for publication in the State Register on July 6, 2015.[35]

26. On October 7, 2015, the Agency filed with the Office of Administrative Hearings a proposed notice of its intent to adopt the rules without a public hearing unless 25 or more persons request a hearing, and its intent to adopt the rules with a public hearing if a sufficient number of persons requested a hearing (Dual Notice). The

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[29] Ex. A2. This Request for Comments was published at 37 Minn. Reg. 1292 (Mar. 4, 2013).
[30] Ex. D.1.
[31] Ex. K.1; *see* Minn. Stat. § 14.131 ("The agency must consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.")
[32] Ex. K.1.
[33] Ex. K.2; *see* Minn. Stat. § 14.111 ("Before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule change to the commissioner of agriculture, no later than 30 days prior to publication of the proposed rule in the State Register.").
[34] Ex. D.2.
[35] Ex. C; *see* Minn. Stat. § 14.28 ("No rule shall be filed with the secretary of state or published in the State Register unless the revisor of statutes has certified that the rule is approved as to form.").

ED_005808A_00005818-00006

Agency also filed a copy of the proposed rules and a draft of the SONAR and requested approval of its Additional Notice Plan.

27. On October 9, 2015, the Administrative Law Judge approved the Dual Notice and the Additional Notice Plan.[36]

28. On November 9, 2015, the MPCA electronically submitted a copy of the SONAR to the Legislative Reference Library as required by law.[37]

29. On November 9, 2015, the MPCA published the Dual Notice of Intent to Adopt Rules and the text of the proposed rules in the State Register.[38] The notice stated that a hearing on the proposed rules would be held on February 4, 2016, if 25 or more persons submitted requests for a hearing.[39]

30. On November 9, 2015, the Agency notified all persons who had requested that their names be on the MPCA's GovDelivery system for the purpose of receiving notice of rule proceedings.[40]

31. Thereafter, the MPCA determined that, although it considered the proposed rules to be procedural in nature, there was a possibility the U.S. Environmental Protection Agency (USEPA) would view the rules as a WQS under the Clean Water Act (CWA) and would disapprove the rules if they were adopted without a public hearing.[41] Therefore, the MPCA decided to give notice that it would proceed with a hearing on the proposed rules on February 4, 2016, as described in the Dual Notice.

32. The MPCA submitted a proposed Notice of Hearing to the Administrative Law Judge who approved it on December 10, 2015.[42]

33. On December 28, 2015, the MPCA electronically submitted a copy of the Notice of Hearing to the Legislative Reference Library.[43]

34. On December 28, 2015, the MPCA published the Notice of Hearing in the State Register and on the MPCA's webpage.[44]

35. On December 28, 2015, the Agency electronically provided a copy of the Notice of Hearing to all persons who had requested their names be on the MPCA

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[36] Order (Oct. 9, 2015).
[37] Ex. E.1; *see* Minn. Stat. § 14.23.
[38] 40 Minn. Reg. 531 (Nov. 9, 2015).
[39] Ex. F.1.
[40] Ex. G.1; *see* Minn. Stat. § 14.14, subd. 1a.
[41] Ex. F.2.
[42] Ex. K.
[43] Ex. E.2.
[44] Ex. F.1. The Notice of Hearing was published in the State Register at 40 Minn. Reg. 714-15 (Dec. 28, 2015).

GovDelivery system for the purpose of receiving notice of rule proceedings of the fact that the hearing would be held.[45]

36. On December 28, 2015, the Agency gave notice in accordance with its Additional Notice Plan approved by the Office of Administrative Hearings on October 9, 2015. This plan included providing notice to 1,643 people through the GovDelivery system referenced above. The Agency notified numerous other interested parties as well as county, municipal and business associations. In addition, the Agency notified the Air and Water Tribal Contacts for the eleven federally recognized tribes in Minnesota, the four facilities with existing water quality variances, and the USEPA.[46]

37. The hearing on the proposed rules was held on February 4, 2016, in St. Paul, Minnesota, and broadcast via interactive video conference to the Agency's regional office in Duluth, Minnesota. During the hearing, the following documents were received into the hearing record:

A.1. Request for Comments published in the *Minnesota State Register* on the planned amendments to rules governing water quality variances chapters 7050 and 7053 as published on October 1, 2012;

A.2. Request for Comments published in the *Minnesota State Register* on planned amendments to rule governing water quality variances to include chapter 7052 as published on March 4, 2013;

B. A petition for rulemaking. This is not included because no petition was filed regarding rules;

C. Proposed rules dated July 6, 2015, including the Revisor's approval;

D.1. SONAR signed by the Commissioner of the MPCA dated July 8, 2015;

D.2. Addendum to the SONAR reflecting deletions to references of the now disbanded the MPCA Citizens' Board, dated July 20, 2015;

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[45] Ex. G.2.

[46] Ex. H.2. The following is the complete list of those notified under the additional notice plan: all parties who have registered via GovDelivery with the MPCA for the purpose of receiving notice of rule proceedings; individuals and representatives of associations the MPCA has on file as interested and affected parties that do not wish to receive electronic notification; chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules; Association of Metropolitan Municipalities; Association of Minnesota Counties Coalition of Greater Minnesota Cities; Iron Mining Association of Minnesota; League of Minnesota Cities; Metropolitan Council; Minnesota Chamber of Commerce; Minnesota City/County Management Association; Minnesota Environmental Science and Economic Review Board; Minnesota Municipal Utilities Association; Minnesota On-Site Wastewater Association; Minnesota Wastewater Operators Association; Minnesota Center for Environmental Advocacy; Minnesota Environmental Partnership; Clean Water Minnesota Isaak Walton League (Minnesota Division); Sierra Club North Star Chapter; Water Legacy; and NPDES/SDS permit holders with existing water quality variances.

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E.1. Certificate of mailing a copy of the SONAR to the Legislative Reference Library on November 9, 2015;

E.2. Letter to the Legislative Reference Library with Certificate of Mailing the Notice of Hearing to the Legislative Reference Library, and a copy of the transmittal e-mail dated December 28, 2015;

F.1. Dual Notice of Intent to Adopt Rules, as mailed, and the Dual Notice of Intent to Adopt Rules, as published in the *State Register* on November 9, 2015, and posted on the MPCA public notice webpage.

F.2. Notice of Hearing, as mailed, and the Notice of Hearing, as published in the *State Register* on December 28, 2015, and posted on the MPCA public notice webpage.

G.1. Certificate of Mailing the Dual Notice of Intent to Adopt Rules, and Certificate of Accuracy of the Mailing List.

G.2. Certificate of Mailing the Notice of Hearing, and Certificate of Accuracy of the Mailing List.

H.1. Certificate of Giving Additional Notice under the Additional Notice Plan, as identified in the Additional Notice Plan and approved by the OAH on October 9, 2015.

H.2. Certificate of Giving Additional Notice under the Additional Notice Plan, as identified in the Additional Notice Plan and approved by the OAH on October 9, 2015.

I. All written comments on the proposed rules that the MPCA received during the comment period. The Agency received six written comments, which include 52 requests for a hearing.

J. Letter from the Chief Administrative Law Judge authorizing the MPCA to omit the text of the proposed rules from the Dual Notice of Intent to Adopt Rules published in the *State Register*. NOTE: This is not included because the MPCA included the text of the proposed rules with the November 9, 2015, Dual Notice of Intent to Adopt Rules, and the December 28, 2015, Notice of Hearing published in the *State Register*. See Exhibits F.1.and F.2.

K.1. Certificate of Consulting with the Commissioner of MMB with a copy of the letter dated June 8, 2015, from MPCA Commissioner John Linc Stine to MMB Commissioner Myron Frans; a copy of the e-mail dated June 9, 2015, to MMB Executive Budget Officer Ms. Michelle Mitchell regarding the letter to Commissioner Frans; and a copy of MMB's response memorandum dated June 19, 2015;

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K.2. Certificate of Sending the Rules and the SONAR to the Commissioner of MDA with a copy of the letter from MPCA Commissioner John Linc Stine dated June 8, 2015, to MDA Commissioner David J. Frederickson; and a copy of the e-mail dated June 9, 2015, to MDA Commissioner Frederickson and the five persons listed as "cc" on the above referenced letter to Commissioner Frederickson.

K.3. Letter from the MPCA, dated October 7, 2015, to Chief Administrative Law Judge Tammy L. Pust, with a request to schedule a rules hearing, assign an Administrative Law Judge, and to review the Dual Notice of Intent to Adopt Rules and the Additional Notice Plan. Enclosed with the letter are the documents for the Administrative Law Judge review: the proposed Dual Notice of Intent to Adopt Rules, a copy of the proposed rules, a final signed copy of the SONAR for the proposed rules, and the addendum to the SONAR.

K.4. Letter from Administrative Law Judge Barbara J. Case, dated October 9, 2015, approving the MPCA's Dual Notice and the Additional Notice Plan.

K.5. Letter from Administrative Law Judge Barbara J. Case, dated October 20, 2015, approving the Dual Notice with a minor revision as requested by the MPCA.

K.6. Certificate of Sending the Notice and SONAR to Legislators and to the Legislative Coordinating Commission (LCC), a copy of the letter to the legislators and LCC dated November 6, 2015, a copy of the email to the legislators dated November 9, 2015, and a copy of the e-mail to the LCC dated November 9, 2015.

K.7. Letter from the MPCA, dated December 3, 2015, to Administrative Law Judge Barbara J. Case, with a request to review a Notice of Hearing.

K.8. Letter from Administrative Law Judge Barbara J. Case, dated December 10, 2015, approving the Notice of Hearing contingent upon revision of the text in the Notice of Hearing from the reference to rulecomments@state.mn.us to https://minnesotaoah.granicusideas.com/.

K.9. Certificate of Sending the Notice of Hearing to Legislators and to the Legislative Coordinating Commission (LCC), a copy of the letter to the legislators and LCC dated December 23, 2015, a copy of the e-mail to the legislators dated December 28, 2015, and a copy of the e-mail to the LCC dated December 28, 2015.

L. MPCA PowerPoint presentation "Amended Rules for Water Quality Variance Procedures" for the February 4, 2016, Rule Hearing.

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M. MPCA "Proposed Changes to the Proposed Amendments to Rules Governing Water Quality Variances" for the February 4, 2016, Rule Hearing.

N. USEPA Water Quality Standards Regulatory Revisions; Final Rule, Federal Register, August 21, 2015 (80 FR 51019).

O. USEPA Water Quality Standards Regulatory Revisions: Final Rule, Title 40, Code of Federal Regulations, Part 131 (40 C.F.R. 131)

1. Written copy of presentation made by the MPCA at the hearing.

38. The Administrative Law Judge finds the Agency has met the procedural requirements imposed by applicable laws and rules.

IV. Additional Notice

39. Minn. Stat. §§ 14.131 and 14.23 require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules.

40. As of May 21, 2014 the Agency had provided notice to subscribers through the GovDelivery system.[47] In addition, and in order to increase awareness of this rulemaking before notice of the Request for Comments was published, on September 12, 2012, the Agency alerted 990 persons subscribed to receive notification of new rulemaking activities that a new rule topic, "Water Quality Variance Rulemaking," had been added to the "New Rules" topic list.[48]

41. The Agency certified that on November 9, 2015, it had provided notice of the proposed rules to all individuals and organizations who had requested that their names be on the MPCA's GovDelivery system for the purpose of receiving notice of the rule proceedings as required by Minnesota Statutes.[49]

42. In accord with its Additional Notice Plan, the Agency also gave notice on November 9, 2015, to the four facilities with existing water quality variances, sent notification via email to the MPCA list of Air and Water Tribal Contacts for the 11 federally recognized tribes in Minnesota; sent notification via email to the United States Environmental Protection Agency (USEPA); and completed all other notice activities detailed in its Dual Notice Plan.[50]

43. During the development of the proposed rules the Agency took numerous other steps such as public presentations and stakeholder meetings to assure that

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[47] Ex. D.1.; SONAR, at 37.
[48] Ex. D.1; SONAR, at 37.
[49] Ex. G.1.
[50] Ex. H.1.

interested parties were notified of the rulemaking proceedings and to solicit their input on the draft rule language.[51]

44. The Agency also created and maintained a website dedicated to the proposed rules. The website is clearly organized and provides individual links to the proposed rules, the SONAR, hearing exhibits, pre-hearing, hearing and post-hearing comments, a transcript of the hearing and other relevant documents.[52]

45. The Administrative Law Judge finds that the Agency has fulfilled its additional notice requirements.

V. Statutory Authority

46. The Agency relies upon Minn. Stat. § 115.03, specifically subdivisions 1(c) and 1(e) (2014), as the source of its statutory authority to adopt and implement these rules.[53]

47. Minnesota Statutes, section 115.03, subd. 1(c), states that the Agency has the authority

> 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, chapter 116;

48. Minnesota Statutes, section 115.03, subdivision 1(e), authorizes the Agency to

> adopt, issue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, rules, schedules of compliance, and stipulation agreements, under such conditions as it may prescribe, in order to prevent, control or abate water pollution…

49. Additionally, the Agency cites its authority under Minn. Stat. § 115.03, subd. 5 (2014), to

> perform any and all acts minimally necessary including, but not limited to, the establishment and application of standards, procedures, rules, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the national pollutant discharge elimination system (NPDES) . . . .

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[51] SONAR, at 11-12.
[52] https://www.pca.state.mn.us/water/amended-rules-water-quality-variances#schedule-f025c570.
[53] SONAR, at 12.

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50. Finally, the Agency cites its authority under Minn. Stat. § 116.07, subd. 5 (2014), to grant variances. Subdivision 5 states:

> The Pollution Control Agency may grant variances from its rules as provided in section 14.05, subdivision 4, in order to avoid undue hardship and to promote the effective and reasonable application and enforcement of laws, rules, and standards for prevention, abatement and control of water, air, noise, and land pollution. The variance rules shall provide for notice and opportunity for hearing before a variance is granted

51. The Administrative Law Judge concludes that the Agency has statutory authority to adopt the proposed rules.

52. The rulemaking is an amendment of rules for which the Legislature has not revised the statutory authority. Therefore, Minn. Stat. 14.125 (2014) does not apply.

VI. Impact on Farming Operations

53. Minnesota Statutes, section 14.111, requires that notice be given to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

54. MPCA does not expect that the proposed rules will affect farming operations or agricultural land.[54] However, the Agency did provide notice to the Commissioner of Agriculture more than thirty days before the proposed rules were published in the State Register,[55] and the hearing in this matter was broadcast to the MPCA's regional office in Duluth. As a result, the Administrative Law Judge concludes that the Agency has complied with Minn. Stat. § 14.14, subd. 1b.

VII. Regulatory Analysis

55. Minnesota Statutes, section 14.131, requires an agency adopting rules to consider eight factors in its SONAR. Each of these factors, and the Agency's analyses, are discussed below.

(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.

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[54] *Id.* at 40.

[55] Ex. K.2. The proposed rules were published in the State Register at 40 Minn. Reg. 531 (Nov. 9, 2015).

56. In its SONAR the MPCA indicated that the classes of persons who will probably be affected by the proposed rule changes are "regulated entities that have an NPDES/SDS permit."[56]

57. The MPCA stated that: "[a]ffected parties include those permitted facilities that produce and/or treat wastewater but are unable to comply with a discharge effluent limit, treatment requirement, or a water quality effluent limit based on an underlying WQS. These include both large and small municipal and industrial wastewater facilities, industrial wastewater facilities and others."[57]

58. Testimony at the hearing and comments received demonstrate that the entities identified by the Agency as likely affected parties also identify themselves as such.[58]

(2) 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.

59. The Agency explains that "[t]he cost of complying with these rules is born by the Permittee requesting the variance."[59]

60. The Administrative Law Judge finds that the Agency has satisfied the requirements of Minn. Stat. § 14.131, item 2.

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

61. The MPCA stated in its SONAR that there are no less costly methods or less intrusive methods for achieving the purpose of the proposed rule. The Agency explained that its flexibility concerning variances is limited by USEPA's requirement that a state's program be consistent with USEPA rules and policy. The USEPA does not provide for a less intrusive or less costly methods of implementing variances.[60]

62. The Administrative Law Judge finds that the Agency has satisfied the requirements of Minn. Stat. §14.131, item 3.

(4) A description of any alternative methods for achieving the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

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[56] SONAR, at 31.
[57] *Id.*
[58] Hearing transcript and comments.
[59] SONAR, at 31.
[60] *Id.* at 33.

ED_005808A_00005818-00014

63. The MPCA considered leaving the existing variance rules as written but determined that such action would not achieve the purposes of the proposed rules including: compliance with federal regulations; consistency between state water quality variance rules; and clear expectations for permittees that request a variance. Accordingly, the Agency rejected the option of not amending the existing rules in favor of the proposed rule amendments.[61]

64. The Administrative Law Judge finds that the Agency has satisfied the requirements of Minn. Stat. § 14.131, item 4.

(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.

65. The Agency estimated the costs of complying with the proposed rules. Facilities able to meet the underlying WQS will not incur costs associated with this proposed rule.

66. The Agency's costs associated with the implementation and enforcement of the proposed rules include MPCA staff time and staff resources related to reviewing a variance request. Though costs differ with the complexity of the specific variance request, the USEPA estimates that a single variance request will require, on average, 165 to 195 labor hours.[62] The Agency believes this value to be a conservative estimate and the time required may be much higher.[63]

67. The USEPA currently estimates each state will receive three variance requests per year.[64]

68. Other than the MPCA, no other agencies will incur costs unless they were requesting a variance under the rule. To date, no state agencies have requested a variance.[65]

69. The MPCA noted that "the costs include the collection of information requested by the MPCA and USEPA including, but not limited to, increased monitoring, pollution prevention and reduction plans and activities, and possible treatment system upgrades." Costs may vary depending on the pollutant for which the variance is requested. For example, the cost of testing to obtain information about the pollutant mercury would be more costly than obtaining information about phosphorus.[66]

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[61] *Id.*
[62] *Id.*
[63] *Id.* at 32.
[64] *Id.*
[65] *Id.* at 33.
[66] *Id.* at 31.

ED_005808A_00005818-00015

70. The MPCA noted that "[a] permittee may request a variance on a single factor or a combination of factors, including a cost consideration."

71. The Minnesota Environmental Science and Economic Review Board (MESERB) commented that "costs associated with seeking a variance will prevent cities and sanitary districts from applying" for a variance.[67] MESERB noted that "[p]ursuant to the MPCA point system, an application for a variance is valued at 35 points, which equals $10,850. This application fee, in addition to the professional costs associated with demonstrating eligibility, serves as an actual and potential bar for communities and sanitary districts to apply for variances."[68] MESERB asserted that this cost constitutes an unreasonable amount for smaller communities.[69]

72. MESERB also challenged the Agency's estimate that the cost of applying for a variance is less than $25,000. "The combined legal and engineering costs to apply for a variance could easily exceed $15,000, especially because the variance seeker carries the burden to prove eligibility. Thus, combined with the filing fee, we do not believe this is an accurate estimate and the Agency should revisit this calculation in the event it does not change the present approach."[70]

73. In response to MESERB's comments regarding costs, the Agency explained that "changes regarding fees are beyond the scope of this rulemaking. Any fee changes, including a sliding fee scale, would need to be considered by the legislature and incorporated in Minn. R. ch. 7002."[71]

74. The MPCA also stated that, while applications for variances entail costs, "[w]ithout variances as a tool to comply with WQS, costs to the permittee and customers would be higher because the cost impacts to comply would be immediate."[72]

75. The MPCA explained that variance permits are intended to benefit the environment by allowing the MPCA to introduce new, more restrictive requirements for multiple pollutant parameters that will result in water quality improvement where feasible. Where improvements are not immediately feasible, potential solutions for water quality improvements may be explored.[73]

76. The MPCA maintained that, in addition to allowing permittees to delay incurring the increased costs of compliance while planning how to achieve it, permittees benefit from the avoidance of fines issued for noncompliance. These fines can cost permittees up to $10,000 per violation per day.[74]

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[67] MESERB comments, at 2 (Dec. 29, 2015).
[68] *Id.* at 3.
[69] *Id.*
[70] *Id.*
[71] MPCA preliminary response, at 19.
[72] SONAR, at 31.
[73] *Id.* at 32.
[74] *Id.*

ED_005808A_00005818-00016

77. The MPCA also noted that the proposed rule changes benefit other MPCA customers by making the review and processing of variances more efficient, thus freeing up MPCA staff time for other priority work.[75]

78. The Administrative Law Judge finds that the Agency has satisfied the requirements of Minn. Stat. § 14.131, item 5.

(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.

79. The Agency noted that if the proposed rules are not adopted, the MPCA will continue to incur costs in processing variance requests based on the current state rules, which are subject to federal rules and may or may not be eligible for approval by USEPA.[76]

80. The MPCA stated that its intent is that all stakeholders realize some time and cost savings through the alignment of state and federal requirements, which will reduce the duplication of effort to process variances under two different sets of regulatory requirements.[77]

81. The Administrative Law Judge finds that the Agency has satisfied the requirements of Minn. Stat. § 14.131, item 6.

(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.

82. In its SONAR, the MPCA stated that one of the main goals of the proposed rules is to better align state rules with federal regulation and policy.[78]

83. The MPCA made a reasonable effort to assess the differences between its proposed rule and the proposed federal rule at the time it prepared its SONAR and sought approval to publish notice of its intent to adopt the proposed amendments to the water quality variance rules. The MPCA received approval to publish its notice to adopt the proposed rules prior to USEPA finalizing its WQS Rules for variances. The proposed rules are based in large part on USEPA's proposed WQS Rules as published on September 4, 2013 (78 FR 54518).

84. The MPCA began its evaluation of state variance procedural rules in 2012 and, with stakeholders, concluded that the rules needed to be amended to be more

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[75] *Id.*
[76] *Id.* at 34.
[77] *Id.*
[78] *Id.*

ED_005808A_00005818-00017

consistent with federal requirements. The resulting state rulemaking began in October 2012 with an initial Request for Comments published in September 2013.[79]

85. In September 2012, USEPA made its proposed variance procedures available. The MPCA modelled its draft variance rule language on the proposed federal variance procedures.[80]

86. In September 2013, the USEPA published its proposed rules and the MPCA drafted its rules in alignment with the USEPA's proposed rules.[81]

87. USEPA's final WQS rules differed from its proposed rules. The MPCA noted in its October 2015 fact sheet, titled "Draft Amended Rules for Water Quality Variances," that the "final federal rules for WQS variances are compatible with the proposed state rules in many areas; however, there are some differences and the MPCA is currently working with USEPA to better understand the final federal rules and to determine whether the proposed rules will need to be modified." Conversations between the MPCA and USEPA after the August 2015 publication of the federal final WQS Rule, and in advance of the November 2015 publication of the MPCA's proposed amendments, indicated that the minor differences between the final federal and proposed state rule could be addressed as necessary during the rulemaking process. Rather than further delay this rulemaking, the MPCA decided to proceed with the rules as proposed. In the Dual Notice for the proposed rules, the MPCA specifically requested comment on the proposed rules' conformance with applicable requirements of the final federal rules, including proposed rule language regarding variance term, expiration, renewal, and review provisions.[82]

88. The USEPA published its final rules in August 2015. Because of changes to the USEPA's draft rules, some of the Agency's proposed rules were not in alignment with the USEPA's final rules. The Agency has addressed the issues of nonalignment in proposed changes to its proposed rules.[83]

89. The Agency has addressed the need for and reasonableness of each difference with the federal regulations through its SONAR, the hearing, and subsequent submissions. The Agency has gone beyond the requirement that it ascertain to the extent possible the differences between its proposed rules and the federal regulations by continuing to seek information and guidance from interested parties and the USEPA and by providing detailed assessments of the differences between the two in a number of forms and forums.[84] Moreover, the USEPA has commented on the Agency's proposed rules and where, in a limited number of items, the USEPA has suggested language changes to the Agency's rules, the Agency has made those changes.

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[79] Ex. 1.
[80] *Id.*
[81] *Id.*
[82] MPCA preliminary response, at 7.
[83] *Id.*
[84] *Id.* at 7-12 (in narrative form); Attachment 2 to the MPCA Post-Hearing Response (in tabular form); MPCA's presentation at hearing.

90. All parties interested in this rulemaking proceeding have had the benefit of being able to comment on the Agency's proposed rules in light of the final USEPA rules. Minn. Stat. § 14.131 does not require that an agency continually rewrite its SONAR during a rule process. The Agency's decision to move forward with its rulemaking while communicating with USEPA to ascertain if it anticipated conflicts with the Agency's proposed rules, and its approach to the challenges posed by the parallel rulemaking proceedings, were reasonable. The Agency's actions did not deprive any stakeholder of an opportunity to compare and comment on the differences between the federal regulations and the state's proposed rules.

91. The Agency adequately assessed the differences between its proposed rule and the existing federal regulations. The Administrative Law Judge finds that the Agency has satisfied the requirements of section 14.131, item 7.

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

92. In its SONAR, the MPCA explained that:

> [t]he main purpose of amending the existing water quality variance rules in the three chapters is to provide clarity and consistency between the rules, and to better align state rules with the most current federal variance policies. These rule amendments will reduce (with a goal to eliminate) duplication in variance information submitted to USEPA. These rule amendments will also streamline the review process by clarifying expectations for permittees. The proposed rules include conditions for determining eligibility for USEPA approval of a variance, and variance application submittal and notice requirements; they do not include additional or new requirements for entities requesting a variance.[85]

93. The MPCA stated that because it is proposing these rule amendments primarily to provide clarity and consistency for those permittees that choose to request a variance, there should be minimal cumulative impacts for those permittees or their facilities.[86]

94. The Administrative Law Judge finds that the Agency has satisfied the requirements of Minn. Stat. § 14.131, item 8.

VIII. Performance-Based Regulation

95. The Administrative Procedure Act also requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting

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[85] SONAR, at 35.
[86] *Id.*

ED_005808A_00005818-00019

performance-based regulatory systems set forth in Minn. Stat. § 14.002.[87] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and provides maximum flexibility for the regulated party and the agency in meeting those goals.[88]

96. The MPCA stated that it is mindful of the economic resources needed for permittees to request a variance, and therefore has sought to be more flexible and less prescriptive in developing these rule amendments. The Agency explains that the nature of variances is to allow flexibility for permittees who need additional time to meet an underlying WQS. The granting of variances move the permittee towards the ultimate goal of complying with the WQS. Therefore the objectives of the Agency are met while allowing maximum flexibility.[89]

97. The Agency states that the proposed rules afford the flexibility to adopt a variance that temporarily serves as the basis for the permit limit.[90]

98. Affected permittees can determine how they will demonstrate that attaining the WQS is not feasible, providing the justification for the condition(s) that the permittee determines is most applicable to their affected facility.[91]

99. The Administrative Law Judge finds that the Agency has met the requirements set forth in section 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

IX. Consultation with the Commissioner of Management and Budget

100. Under Minn. Stat. § 14.131, the Agency is required to "consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

101. On June 9, 2015, the Agency sent the proposed rule and the SONAR to the Commissioner of MMB and requested an evaluation of the fiscal impact and benefits of the proposed rules on local units of government as required by Minn. Stat. § 14.131.[92]

102. In a memorandum dated November 21, 2013, Michelle Mitchell, Executive Budget Officer for MMB, noted that she had reviewed the Agency's proposed rule changes and consulted with Agency staff to determine the fiscal impact of the rule changes as proposed on local units of government. Ms. Mitchell noted that the purpose of the proposed rules is to correct inconsistencies among the rules governing water quality variances. She further observed that a stakeholder group had convened to improve the variance process and the group had identified the need to make the rules

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[87] Minn. Stat. § 14.131.
[88] Minn. Stat. § 14.002.
[89] SONAR, at 35-36.
[90] *Id* at 36.
[91] *Id.*
[92] Ex. K.1.

ED_005808A_00005818-00020

consistent across chapters and align rules with federal requirements. She found that the proposed rules will only impact permittees that choose to pursue a variance. Ms. Mitchell concluded that because these proposed rules clarify existing rules, no cost is anticipated. Additionally, she noted that there will be no costs for local governments because the MPCA is the delegated authority enforcing water quality standards.[93]

103. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131.

X. Compliance Costs for Small Businesses

104. The MPCA evaluated the possible costs of these proposed rules to a small business or a small city, and determined that the cost of complying with the rules in the first year after the rules take effect will not exceed $25,000 for any small business or small city.

105. The costs to a small business or small city are based on the probable cost of complying with the proposed rules are as described above in items (5) and (6) of the Regulatory Analysis. As the option to request a variance is completely voluntary, no additional cost is incurred if the facility can meet permit limits. If the permittee wishes to pursue a variance, the cost of ultimately meeting the underlying WQS is delayed while economics and technology are considered by the permittee.

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

XI. Reasonableness of the Proposed Rules as a Whole

A. Objections to the Process and SONAR

107. The Minnesota Chamber of Commerce (Chamber) and the Southern Minnesota Beet Sugar Cooperative (SMBSC) commented that the SONAR for the proposed rules does not meet the statutory requirement to provide 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.[94] The Minnesota Center for Environmental Advocacy (MCEA) also commented on the SONAR's lack of this assessment with regard to the recently finalized federal regulations.[95]

108. These comments are addressed above under the regulatory analysis of Minn. Stat. § 14.131(7).

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[93] *Id.*
[94] Chamber rebuttal comments (Mar. 2, 2016); SMBSC rebuttal comments (Mar. 2, 2016).
[95] MCEA comments (Dec. 29, 2105).

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B. The Omission or Inclusion of Federal Language in the Proposed Rules

109. A number of commenters indicated that they wanted the inclusion of particular federal requirements in the state rules, for example the requirement for public hearings before the granting of a variance. Other commentators asserted that where specific language from federal law was included, for example references to the Endangered Species Act, it misaligned the proposed rules with the federal regulations.

110. The Agency makes the reasonable assertion that "[i]t is not necessary for every federal requirement a state is bound to follow be mirrored or duplicated in state rule. If we fail to meet our obligation, we will be accountable to USEPA and interested parties."[96]

111. The Agency further noted that the state must comply with all applicable CWA and federal rule requirements whether or not they are cited specifically in the federal final WQS Rules for variances. Additionally, it is important to realize that a "difference" does not necessarily mean that the state rule is more or less stringent than the federal rules; "difference" can mean the state rule and federal rule use different terms that have substantially the same meaning.[97]

112. Relatedly, WaterLegacy noted that "the requirement for consistency with federal regulations is not symmetrical. Although Minnesota rules to protect water quality may not be less stringent than federal law, they may be more protective than federal law and may include additional state concerns."[98]

113. The Agency is in the best position to determine what to include or omit from its rules so as to provide the greatest clarity to those subject to the rules while adhering to the legislature's statement of the purposes for rules and its expectation that "better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained."[99] The Minnesota Supreme Court's conclusion regarding agency discretion over its own and related federal rules is applicable here: "The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing."[100]

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[96] MPCA preliminary response, at 35.
[97] *Id.* at 8.
[98] WaterLegacy comments, at 2 (Feb. 12, 2016).
[99] Minn. Stat. § 14.001.
[100] *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 512 (Minn. 2007)

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C. Objections to the Agency using the term "water quality standard" not "use"

114. The SMBSC commented that the MPCA misunderstands "the connection and relationship between WQS or Criterion and Designated Use...and that this misunderstanding will create significant difficulties where proposed regulations address impacts on lesser use waters."[101]

115. The Chamber argued this point in greater detail stating that a water quality standard contains two components: a "use"; and a "criterion" applicable to that use. The Chamber asserts that a variance "provides a temporary exception to the use and criterion that would otherwise apply."[102] The Chamber stated that the USEPA explains that a WQS variance (WQSV) is a "designated use **and** criterion reflecting the highest attainable condition applicable throughout the term of the WQS variance...."[103] The Chamber concluded that "[u]nder federal law, the only means to achieve a *temporary* change in standards is to promulgate a water quality standards variance, which requires modification of *both* the use and the relevant criteria."[104]

116. The Chamber's position is specifically addressed and contradicted by the USEPA which states:

> USEPA received comments suggesting that identifying both an interim use and interim criterion for a WQS variance is unnecessary. USEPA agrees that the level of protection afforded by meeting the highest attainable criterion in the immediate area of the discharge(s) results in the highest attainable interim use at that location. Therefore, the highest attainable interim criterion is a reasonable surrogate for both the highest attainable interim use and interim criterion when the WQS variance applies to a specific discharger(s).[105]

117. The MPCA supports its position by explaining that "[m]ultiple WQSs protect a given use; for example Minnesota has many WQS like chloride and ammonia that are designed to protect water for use by aquatic life. Granting a variance from one chemical[-]specific WQS does not grant a variance from the protection of the use. Federal regulations are clear that variances cannot remove uses."[106]

118. The MPCA's choosing to use the term "water quality standard" rather than the term "use" best maintains consistency within state rules and provides a more specific standard; it is therefore reasonable.[107]

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[101] SMBSC rebuttal comments.
[102] Chamber rebuttal comments (emphasis in original).
[103] *Id.* (citing 80 Fed. Reg. 51020, 51035 (Aug. 21, 2015)) (emphasis in original).
[104] *Id.* (emphasis in original).
[105] Water Quality Standards Regulatory Revisions, 80 Fed. Reg. 51020-01 (Aug. 21, 2015).
[105] Water Quality Standards Regulatory Revisions, 80 Fed. Reg. 51020-01 (Aug. 21, 2015).
[106] MPCA preliminary response, at 21.
[107] *Id.*

D. Length of Time for the Term of the Variance

119. Between the time it published its proposed regulations and its final regulations, the USEPA deleted a ten-year term limit for a variance and replaced it with a provision that, among other things: requires that a variance with a term greater than five years must be reevaluated at least every five years or expire; and the term of a WQS variance must be "only as long as necessary to achieve the highest attainable condition."[108]

120. The MPCA revised its proposed rules to be consistent with the term of the WQS variance. Comments about specific rule parts related to the variance terms are addressed within the applicable subparts.

XII. Part-by-Part Analysis of the Rules

A. Chapter 7050, Waters of the State

121. The Agency explains that "Chapter 7050 applies to all waters of the state...[and] includes a classification system of beneficial uses...[and] narrative and numeric WQS that protect specific uses, nondegradation provisions, and other provisions to protect the physical, chemical, and biological integrity of waters of the state."[109]

B. Proposed Rule Part 7050.0190 Variance from Standards

122. It is the Agency's intent that Proposed Rule 7050.0190 be amended to be "consistent with the USEPA's threshold criteria that Permittees must meet to be eligible for a variance and for the USEPA to approve a variance under 40 C.F.R. § 132."[110]

1. 7050.0190 Subpart 1 - Applicability

123. The title of Subpart 1 is changed to reflect that the section establishes who may request a variance and under what conditions.

124. The Agency explained that the Subpart is revised to define what a variance is as it applies to 7050.0190: "a temporary change in a state WQS for a specified pollutant that reflects the highest attainable conditions for a permittee during the term of the variance."

125. Subpart 1 is also amended so that it applies to "variance requests from individual point source discharges to surface waters of the state for any water-quality based effluent limit based on a water quality standard of this chapter that is included in a permit." The Agency explains that "...it is reasonable to state these characteristics so

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[108] 40 C.F.R. § 131.14 (2015).
[109] SONAR, at 15.
[110] *Id.* at 14.

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that affected Permittees understand its intended use and that variances are discharge and pollutant specific, and temporary in nature."[111] The terms "point source" and "discharge" are defined in state statute.[112]

126. Proposed Subpart 1 generated no comments or controversy throughout the public part of rule making process.

127. Proposed Subpart 1 is more specific and clear than the deleted section and the Agency has established that it is needed and reasonable "as it offers clarification concerning whom the rule impacts."[113]

2. 7050.0190 Subpart 1, Items A-C

128. Proposed Subpart 1, items A-C, define what conditions a permittee must demonstrate to the agency it has met in order to be eligible for a water quality variance.

129. Proposed items A-C generated significant comments and so are addressed individually.

a. Subpart 1, Item A

130. The Agency explained that proposed Subpart 1, Item A,

> is added to establish that to be eligible for a variance, the permittee must demonstrate that the continued existence of endangered or threatened species would not be jeopardized or the species' critical habitat destroyed or adversely modified. This condition aligns with 40 C.F.R. § 132, procedure 2 of Appendix F and existing Minn. R. 7052.0280, subpart 1.[114]

131. MESERB commented that parts of proposed rule 7050.0190 imposed standards are taken from the standards for the Great Lakes System (GLS) and that GLS standards should not be applied outside the Lake Superior Basin. The MESERB further commented that requiring a permittee to demonstrate that a variance would not jeopardize endangered or threatened species is "inconsistent with the applicable federal rule and is unnecessarily limiting."[115]

132. The Agency explained that though the specific language is not included in the variance rules 40 C.F.R. § 131.14, it still applies and all variances approved by USEPA must not violate the Endangered Species Act. The Agency included this language to be consistent in the variance application process statewide, provide for

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[111] *Id.* at 15.
[112] Minn. Stat. § 115.01, subds. 4, 11.
[113] SONAR, at 15.
[114] *Id.* at 16.
[115] MESERB comments.

statewide protection of water quality, and be consistent through the three variance rule chapters.[116] The Agency also explained that:

> [t]his condition is based on adoption of the state rule in 1997-1998 as a result of USEPA consultation with the United States Fish and Wildlife Service under the Endangered Species Act. This condition is intended to protect endangered or threatened species and their habitat. It is reasonable to add item A because it informs Permittees that compliance with these federal regulations will have a bearing on whether or not a variance is approved by USEPA.[117]

133. The Agency has shown that the proposed rule part is needed and reasonable to achieve consistency in the variance application process and to assist permittees to comply with federal regulations and the USEPA's requirements.

b. Subpart 1, Item B

134. The Agency explained that Item B is added to establish that the permittee must implement effluent limitations required under sections 301(b) and 306 of the CWA, codified in United State Code title 33, sections 1311(b) and 1316, and that "[t]hese regulations include such requirements as secondary treatment, pretreatment and toxic controls for Publicly Owned Treatment Works and effluent limits for...non-Publicly Owned Treatment Works...."[118] "Item B also addresses nonpoint sources under the Permittee's control...."[119]

135. MCEA agreed that a variance may not be granted if the standard can be achieved through technology-based requirements or reasonable Best Management Practices (BMP), but did not agree that a variance may be granted in the case in which WQS could be met through implementation of BMPs that are not within the permittee's control.[120]

136. The Agency responded by pointing out that it has authority and tools to address nonpoint sources outside of the control of the permittee but does not have the authority to grant a variance predicated on actions that are outside the permittee's control.[121]

137. The Agency has shown that this proposed rule part is needed and reasonable to inform permittees of the effluent limitations they are required to implement and that they are responsible to implement BMPs for nonpoint sources of pollution under their control.

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[116] MPCA preliminary response, at 20.
[117] SONAR, at 16.
[118] *Id.* at 16-17.
[119] *Id.* at 17.
[120] MCEA comments, at 2-3.
[121] MPCA preliminary response, at 20-21.

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c. Subpart 1, Item C

138. The Agency explained that Item C is added to establish that a permittee will not be eligible for a variance if the variance would remove an existing use. This is based on 40 C.F.R. § 131.10(g), which does not allow the removal of a designated use if that use is considered "existing." The term "existing" is defined in 40 C.F.R. § 131.3(e) as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards. It is reasonable to alert the Permittee of this restriction on eligibility for a variance."[122]

139. MCEA commented that because variances "assume maintenance of use designations and are focused on reaching the highest attainable use during the period until all designated uses can be achieved" the proposed language should instead read that no variance should be allowed that would not "maintain and protect existing uses."[123] MCEA pointed out that the new federal variance rules state that a variance "'shall not result in the lowering of currently attained ambient water quality' unless necessary to facilitate lake, wetland or stream restoration."[124]

140. MESERB commented that the proposed language should be deleted because it "lacks consistency with the applicable federal rule on variances and is duplicative as the bar against removing existing uses exists elsewhere in both state and federal statutes."[125]

141. The Agency explained:

> Approval of a variance involves the same substantive and procedural requirements analysis as removing a designated use (40 C.F.R. § 131.10(g)). However, unlike use removal, variances are both discharge and pollutant specific, are time-limited, and do not forego the current designated use. Because a variance is temporary, it actively supports water quality improvements and it can, under appropriate circumstances, serve as an environmentally preferable alternative to what otherwise might become a permanent change; that is, removal of a designated use....The principal difference between a variance and a designated use (a change in use to one with a less stringent standard) is that a variance is temporary. The USEPA found this approach acceptable as it would lead to only a temporary change in WQS rather than a permanent downgrade.[126]

142. The Agency further explained that adding Item C is reasonable because it aligns state and federal regulations. It also allows for a case-by-case analysis to be conducted for all discharges, whether in the GLS or other waters of the state. Variances are not permanent; rather, they are restricted through being only as long as necessary

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[122] SONAR, at 17.
[123] MCEA comments, at 4.
[124] *Id.* (citing 40 C.F.R. § 131.14(b)(1)(ii)).
[125] MESERB comments, at 4 (citing Minn. R. 7050.0180 (2015); 40 C.F.R. § 131.11 (2015)).
[126] SONAR at 7-8.

to achieve the highest attainable condition and through required reevaluation every five years, thereby allowing the designated use to be maintained in the long term.[127] Finally, it allows the MPCA to review requests from facilities that discharge, with respect to both new and existing discharges, for pollutants where the permit limit would cause "substantial and widespread negative economic and social impacts."[128]

143. Given the Agency's responsibility to enforce and administer the CWA as well as related Minnesota law, its decision to propose language to make clear that a variance may not remove an existing use is reasonable and in alignment with its purpose to make the process for variance applications more clear and consistent.

3. 7050.0190 Subpart 2 - Listing

144. The existing subpart establishes the requirement for the MPCA to prepare a list of the variances in effect and granted by the Agency under this part, make the list available for public inspection, and provide the list to USEPA.

145. Subpart 2 is revised by adding the requirement (deleted from Subpart 1) that USEPA be advised of any variances granted by the Agency under this part, with the information as to the need for the variance.

146. Subpart 2 is further revised to clarify that the list is of variances that are currently in effect and approved by the USEPA or granted by the Agency under part 7053.0195. Water quality standards variances granted by the MPCA under chapters 7050 and 7052 must be submitted to and approved by USEPA; variances from discharge effluent limits granted by the MPCA under chapter 7053 are not required to be submitted to USEPA for approval. Subpart 2 is also revised to specify that the list must identify the person who received the variance, the water body affected, the year approved by USEPA or granted by the Agency, and the date the variance expires.

147. The Agency has demonstrated that the proposed changes are needed and reasonable because they add specificity and clarity to the list requirement. It is also reasonable to provide the information to the public and the USEPA.

4. 7050.0190 Subpart 3 - Review (Repealed)

148. The Agency explained that this existing subpart, which establishes the requirements for review of a variance, is proposed for repeal because the review requirements are being moved to a new Subpart 9 and combined with the requirements for public notice. This revision keeps the numbering of subparts and the subpart topics in the same order in the three rule parts containing water quality variance provisions.[129]

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[128] *Id.* at 17-18.
[129] *Id.* at 18.

149. No comments were received about the repeal of this subpart. It is necessary and reasonable to provide consistency between the variance rules.

5. 7050.0190 Subpart 4 - Conditions for Approval

150. The Agency explained that this new subpart is added to establish that a variance must be submitted to and approved by USEPA before it can become effective.[130] The CWA requires that states submit changes to WQS to the USEPA Regional Administrator for review and approval.[131] The USEPA still requires approval of variances under this federal regulation even though variances do not change the underlying WQS.

151. Comments about this introductory section of the subpart were not concerned with this requirement.

152. This section of the subpart is needed and reasonable because it informs the public about USEPA's role in the approval process.

a. Subpart 4A

153. Subpart 4.A. is a single sentence which introduces a list of six factors, at least one of which, the permittee must demonstrate to the agency makes "attaining the water quality standards" not feasible.

154. The Chamber and SMBSC commented that "in proposing to adopt the language of 40 CFR 131.10(g) ... MPCA has substituted the phrase 'water quality standard(s)' for the word 'use'. This substituted language needlessly causes confusion and the precise federal language must be employed."[132]

155. The Agency responded that "USEPA directs delegated states to adopt 'standards' to protect 'uses'.... Multiple WQSs protect a given use; for example Minnesota has many WQS like chloride and ammonia that are designed to protect water for use by aquatic life. Granting a variance from one chemical specific WQS does not grant a variance from the protection of the use. Federal regulations are clear that variances cannot remove uses."[133]

156. The Agency explained that it grants variances from WQSs and does not grant variances from uses.[134]

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[130] *Id.*
[131] 40 C.F.R. 131.20 (c) (2015).
[132] Chamber comments (Dec. 29, 2015); SMBSC comments, at 3 (Dec. 29, 2015).
[133] MPCA Preliminary Response, at 21.
[134] *Id.*

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157. The terms "use," "existing use" and "water quality standards" are intertwined throughout the CWA but are not synonymous.[135] Administration of the CWA requires scientific expertise. The CWA contains a complex interplay between technical terms that reduce to regulations multi-faceted and interrelated scientific, social and economic factors. In addition to requiring technical expertise, the Agency is required to navigate the enforcement of federal and state water quality laws.

158. The Agency is in the best position to decide which regulatory terms convey all of the required elements and most clearly inform permittees of the standards the Agency will apply when reviewing applications under the proposed rule. Therefore, the Agency's position that choosing to use the term "water quality standard" rather than the term "use" best maintains consistency within state rules and provides a more specific standard is reasonable.[136] In addition, the USEPA commented on the proposed rules and did not identify that any revisions were needed to this proposed rule.[137]

b. 7050.0190, Subpart 4A (1)-(6)

159. The Agency explained: "[t]his subpart also establishes that to be eligible for a preliminary determination by the Agency to grant a WQS variance, the Permittee must demonstrate to the Agency that attaining the WQS and associated water quality-based effluent limit is not feasible according to one of the six conditions listed in item A." With the exception of Subitem 1, Subitems (1) through (6) are the same conditions set forth in existing Minn. R. 7052.0280 for Great Lakes Initiative GLI) pollutant-specific variance requests and that they are the same conditions used for removal of an existing use. The Agency further explained that "[t]he USEPA has supported through legal decisions, guidance, memorandums and approval actions that a variance may be granted if the state demonstrates that the variance meets the same requirements as a permanent designated use change....In 1998 MPCA adopted this federal language into Minn. R. 7052.0280"[138] Therefore, it is reasonable to "include these conditions for granting a variance in chapter 7050 because doing so aligns Minnesota rules and approval procedures with USEPA's procedures and streamlines the process by having the same conditions in the three water quality chapters under which a Permittee may be eligible for a variance."[139]

160. Because it is the permittee, not the Agency, who requests the variance, it is reasonable that the permittee make the demonstration of eligibility for the variance. The permittee must meet the conditions of Items A though D before the MPCA can make a preliminary determination to grant the variance and then submit the variance to USEPA for approval.

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[135] *See* 40 C.F.R. 131(f) (2015) ("Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained."); 40 C.F.R. § 131(i) ("[W]ater quality standards are provisions of State and Federal law which consist of a designated use or uses . . . and water quality criteria based upon such uses.")
[136] MPCA preliminary response, at 21.
[137] USEPA comments (Dec. 28, 2015).
[138] SONAR, at 19.
[139] *Id.*

161. Of Subitems (1)-(6), only Subitem (5) generated comments.

162. The USEPA was the only entity to comment on any of the six factors. The USEPA "identified disagreement between the proposed rule revisions and 40 C.F.R. 131.10(5)."[140] The USEPA noted that:

> 40 C.F.R. 131.10 § (g)(5) states "Physical conditions related to the natural features of the waterbody, such as lack of proper substrate....unrelated to water quality, preclude attainment of aquatic life protection uses." The corresponding provisions in Minnesota proposed rules in chapter 7050 state "physical conditions related to the natural features of the waterbody such as lack of proper substrate cover...preclude attainment of water quality standards."[141]

163. The USEPA recommended that Minnesota's proposed rules be revised to be consistent with the federal regulations. The USEPA warned that "[s]hould Minnesota decline to make the recommended change and submit a variance based on the natural features precluding attainment of the use for other than aquatic life, EPA would be unable to approve such a variance."[142]

164. In response to the USEPA's comment, the Agency proposes to revise part 4.A(5) to clarify that "a variance based on natural features does not preclude attainment of the use for a use other than aquatic life".[143]

165. The Agency's proposed modification is needed and reasonable to make the proposed rules consistent with the federal regulation. In addition, the modification does not result in a rule that is substantially different from the rule as originally proposed.[144]

166. MESERB also commented that the proposed rule should place the disjunctive "or" between each of the six factors, as does the federal rule, instead of just between the fifth factor and the sixth.[145]

167. The Agency explained that the intent of the proposed variance rules is to allow a variance if any one of the six factors can be met. The Agency's use of the disjunctive is a reasonable way to connote that only one of the items in the list need be met by a permittee.

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[140] MPCA preliminary response, at 22.
[141] USEPA comments.
[142] *Id.*
[143] MPCA preliminary response, at 22.
[144] *See* Minn. Stat. § 14.05, subd. 2.
[145] MESERB comments, at 5.

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c. Part 7050.0190, Subpart 4B

168. In Item B, permittees must comply with the state's nondegradation rules.

169. MCEA commented that, because the MPCA has not yet finalized state rules that satisfy the requirements of federal antidegradation law, "it is important that MPCA include compliance with federal antidegradation regulations in this variance rule."[146]

170. MESERB commented that this language requiring an applicant to demonstrate that a variance conforms to Minnesota's non-degradation rules should be deleted because it fails to comport with the applicable federal rule for non-LSB waters at 40 C.F.R. 131.14.[147]

171. The Agency responded that it "must meet federal and state antidegradation regulations when giving preliminary approval to grant a variance." The rule is intended to inform the permittee and the public on the state antidegradation requirements that must be met.[148]

172. The rule part is intended to put permittees and the public on notice of the state antidegradation requirements, and is therefore needed and reasonable.

d. Part 7050.0190, Subpart 4C

173. In Item C, permittees must characterize risk to human health and the environment such that the agency can conclude that the health, safety and welfare of the public will be protected even if a variance is approved.

174. MESERB commented that this item should be deleted because it is inconsistent with the federal rule for non LSB waters and is unduly restrictive.[149]

175. The Agency responded that the requirement of this item is expressly required under existing chapter 7052 for waters in the LSB at part 7052.0280, subp. 3.C. The Agency further noted that this item is required by the USEPA and is not a new condition for approval by USEPA.[150]

176. The Agency stated that the proposed rule is consistent with federal requirements and practices and is needed to add clarity to the variance process.

177. The Agency's proposed rule is needed and reasonable.

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[146] MCEA comments, at 4.
[147] MESERB comments, at 4.
[148] MPCA preliminary response.
[149] MCEA comments, at 4.
[150] MPCA preliminary response, at 23.

6. Part 7050.0190, Subpart 5 - Submittal and Notice Requirements

178. No comments were received about this subpart.

179. This new subpart is needed and reasonable to inform permittees and the public that applications for a variance must conform to the Agency's procedural rules under Minn. R. 7000.7000 (2015).

7. Part 7050.0190, Subpart 6 - Agency Final Decisions; Variance Requirements

180. Regarding Subpart 6, MCEA objected to the fact that Minn. R. 7000.7000 does not require a public hearing, while federal regulations do. The MCEA cited 40 C.F.R. § 131.20(b) and recommended that this section of the rule be revised to state: "final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000 and 40 C.F.R. § 131.20(b)."[151]

181. 40 C.F.R. § 131.20 pertains to the, at least, triennial "state review and revision of water quality standards." Subpart (b) specifically requires that "[t]he State shall hold one or more public hearings for the purpose of reviewing water quality standards as well as when revising water quality standards."

182. Ii its comments about the MPCA proposed rules, the USEPA clarified that "[n]ew and revised WQS include variances from WQS. Consistent with 40 C.F.R. § 131.20(b), States and Tribes must hold a public hearing consistent with the requirements of 40 part 25 as part of each triennial standards review and prior to adopting any new or revised WQS."[152]

183. The concerns noted by the USEPA and the MCEA are well founded. The proposed rule's reference to part 7000.7000 may give potential applicants and the public the impression that the variance request must conform only with part 7000.7000 when the USEPA makes clear that the public hearing requirements of 40 C.F.R. Part 25 apply to variances from WQS.[153]

184. The Agency takes the position that not every federal requirement must be duplicated in state rule. The Agency is correct. Moreover, the Agency's stated purpose in amending this proposed rule is to have a rule that informs applicants of requirements that pertain to them. The public hearing requirement is a requirement of the Agency, not of the applicant. However, the Agency also stated that the purpose of this rule part was to have consistency between the state rules and "the USEPA's threshold criteria that Permittees must meet to be eligible for a variance and for USEPA to approve a variance under 40 CFR 132."[154] In this case the omission of a significant federal requirement for

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[151] MCEA comments, at 4.
[152] USEPA comments, at 1.
[153] *Id.*
[154] SONAR, at 14.

public notice and hearing does not inform the applicant or public of all of the requirements needed for USEPA approval. This may lead to future disputes over whether public hearings are required.

185. This omission does not make the proposed rule defective, since all of the federal requirements for applications for variances must be completed before a variance can be granted. That is, the Agency's omission of the reference to 40 C.F.R. § 131.20(b) does not negate the fact that the public hearing procedures of 40 C.F.R. § Part 25 are required.

186. The Agency has demonstrated that the proposed rule is needed and reasonable.

187. The proposed rule would be more informative to the public and applicants if it were revised to include the language suggested by the MCEA. Inclusion of this language would not be a substantial change to the rule as proposed. Changing the rule so that the complete list of requirements for an application, including the federal requirement for public hearings, may help avoid potential future litigation on this issue.

188. The Administrative Law Judge recommends that the agency revise the proposed rule in the manner suggested by the MCEA or in another manner to indicate to potential applicants and the public that federal public hearing requirements must be followed by the Agency before an application can be approved by the Agency. Such a modification would not result in a rule that is substantially different from the rule as originally proposed.

a. Part 7050.0190, Subpart 6 A-D - Agency Final Decision; Variance Requirements

189. Item A allows the Agency to incorporate an effluent limit that represents currently achievable treatment conditions or projected effluent quality. It also requires that if a permit renewal is requested, the interim limit must be no less stringent than that covered under the previous permit.[155]

190. Regarding Item A, the MCEA and WaterLegacy commented that the term "currently achievable treatment" is vague and that instead the rule should make clear that the effluent limitation should reflect the greatest pollutant reduction achievable using any feasible pollutant control technology.

191. The Agency responded that "currently achievable treatment" is more clear than the MCEA's proposed language.[156] The Administrative Law Judge agrees that the Agency's proposed word choice provides a clear standard.

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[155] *Id.* at 21.
[156] MPCA preliminary response, at 24.

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192. Item B allows for a schedule of compliance activities to improve water quality and move the permittee towards attainment of the underlying standards.

193. Regarding Item B, the MCEA commented that a Pollution Minimization Program should also be required under certain circumstances.[157]

194. Regarding Item B, MESERB commented that Subparts A and B should be deleted and replaced with the federal language from 40 C.F.R. § 131.14(b)(1).[158]

195. The Agency responded to both comments by noting that its rules must be as stringent as federal rules. In addition, the replacement language MESERB recommended would not achieve the Agency's stated goal of providing rules that make the requirements for permittees clear because the federal regulation intertwines requirements for the Agency and requirements the Agency must apply to permittees.

196. Item D allows the Agency to reopen and modify a permit if a WQS is to change in the triennial review process.

197. Regarding Item D, MCEA commented that the permit should contain a provision allowing for tighter effluent limits if feasible pollutant control technology becomes available.[159]

198. The Agency responded that this concern is addressed by the fact that the variance may only be as long as necessary to achieve the highest attainable condition and that it currently has the authority to reopen or modify permits.[160]

199. The Agency's proposed language is necessary and reasonable.

200. Items A-D identify the variance terms and conditions for a permittee once a variance is approved by the USEPA.

201. The Agency has shown that proposed Subpart 6, including Items A-D, is needed and reasonable because the items provide notice to the permittee of the specific terms and conditions that will be included in a permit issued by the Agency.

8. Part 7050.0190, Subpart 7 - Renewal

202. Subpart 7 establishes that to be eligible for a renewal of a variance the permittee is subject to the same requirements as set forth in Items 1-6 of the rule.[161]

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[157] MCEA comments.
[158] MESERB comments.
[159] MCEA comments, at 5.
[160] MPCA preliminary response, at 25.
[161] SONAR, at 21.

203. MESERB commented that Subpart 7 should be deleted and replaced with 40 C.F.R. § 131.14(b)(iii)-(vi).[162]

204. The Agency responded that it proposes to revise Subpart 8 to incorporate the new federal rule variance term and to make clear the applicability of a variance if reevaluation of the variance is not conducted.[163]

205. The Agency's proposed rule is needed and reasonable to inform permittees of the requirements for possible renewal of a variance.

9. Part 7050.0190, Subpart 8 - Term and Expiration

206. The Agency originally proposed this rule to be in accord with the USEPA proposed regulation that a variance term not exceed ten years.[164] However, the USEPA removed the ten-year language from its final rules.

207. The Agency proposed to revise its originally proposed Subpart 8 in order to incorporate the new federal rule variance term and to make clear the applicability of a variance if reevaluation of the variance is not conducted.

208. The modifications to the proposed rule were made in response to the new federal regulations. The proposed language change does not render the rule substantially different than the rule as originally proposed such that any entity was deprived of an opportunity to comment on the proposed rules. The Agency has shown that the proposed rule, as modified, is needed and reasonable.

C. Chapter 7052 - Lake Superior Basin Water Standards

209. The Agency describes Chapter 7052 as establishing "the aquatic life, human health, and wildlife protective water quality standards and criteria for the GLI pollutants, and nondegradation standards for surface waters of the state in the Lake Superior Basin...and procedures for deriving effluent limits from these standards and criteria."[165]

1. Part 7052.0280 - Variances from Water Quality Standards

a. Part 7052.0280, Subpart 1A-C - Applicability

210. The Agency explained that this subpart is being revised to align with the applicability requirements for variances under Minn. R. 7050.0190 and 7053.0195.[166] Subpart 1 is also revised by removing "or criteria" from the phrase "water quality standards or criteria" because while an applicant may request a variance for the effluent

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[162] MESERB comments, at 5.
[163] MPCA preliminary response, at 25.
[164] SONAR, at 22.
[165] *Id.* at 23
[166] *Id.*

limit, no variance to the procedural criteria from which the effluent limit is developed may be granted.[167]

211. The Agency further explained that "[t]o be eligible for a WQS variance, the permittee must meet the conditions as identified in existing items A to C of this subpart. Because it is the Permittee, and not the Agency, who requests the variance, it is reasonable that the permittee make the demonstration of eligibility for a WQS variance."[168]

212. Regarding specific changes, Item A contains simple grammatical changes for clarity, Item B clarifies that the Permittee "must control the pollutant to the full extent … before eligibility for a variance would be considered," and "Item C is added to establish the condition that a variance must not be approved if the variance would remove an existing use."[169]

213. The Grand Portage Band of Chippewa (GPBC) and the Fond Du Lac Band of Superior Chippewa (FBSC) commented that Subpart 1 should clarify that a variance should not be granted to recommencing discharges unless the proposed discharge is necessary to alleviate an imminent and substantial danger to public health and welfare.[170]

214. The Agency declined to make this change as the new federal regulations do not reference recommencing discharges and are already restricted under 40 C.F.R. § 132, Appendix F.[171]

215. Appendix F makes clear that the granting of variances provision "shall not apply to new Great Lake[s] dischargers or recommencing dischargers."[172] Therefore, the language recommendation from GPBC and FBSC is well-founded and the Administrative Law Judge recommends that the Agency consider making the suggested change to add clarity to the proposed rule.

216. However, the Agency's decision to not incorporate every element of federal law into its rule does not create a conflict with the federal law or otherwise create a defect in the proposed rule. The rule as proposed by the Agency is needed and reasonable.

b. Part 7052.0280, Subpart 3 - Conditions for Approval

217. The Agency explained that proposed Subpart 3 is revised "to establish that a variance must be submitted to and approved by the USEPA before it can become

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[167] *Id.* at 24.
[168] *Id.*
[169] *Id.*
[170] GPBC comments (Feb. 23, 2016); FBSC comments, at 6 (Feb. 23, 2016).
[171] MPCA preliminary response, at 26.
[172] 40 C.F.R. 132, App F (2015).

effective."[173] Subpart 3 is also revised to establish that to be eligible for a preliminary determination by the Agency to grant a WQS variance, the permittee must demonstrate to the Agency that attaining the WQS and associated water-quality based effluent limit is not feasible according to one of the six conditions listed in item A.[174] Item D of Subpart 3 requires a permittee to provide information to allow the Agency to determine if a permittee is doing all they can to achieve the highest attainable condition.[175] Other changes to the subpart are stylistic, grammatical or language updates to make the subpart conform with other proposed rule changes.

218. MCEA commented that the proposed Subpart 3B should reference the associated federal regulation.

219. The MPCA responded that "[t]he MPCA must meet federal and state antidegradation regulations when giving preliminary approval to grant a variance. Adding the federal citation as requested by MCEA does not add value to the antidegradation rules…."[176]

220. The Agency's decision to not incorporate every element of federal law into its rule does not create a conflict with the federal law or otherwise create a defect in the proposed rule. The rule as proposed by the Agency is needed and reasonable.

c. Part 7052.0280, Subpart 5 - Agency Final Decision; Variance Requirements

221. The Agency explained that Subpart 5 is revised to establish that if a variance is granted by the Agency and approved by USEPA, the permit issued by the Agency must include and incorporate into the permit the conditions identified in existing items A through E of this Subpart.[177]

222. MCEA commented that Subpart 5 should reference 40 C.F.R. 131.20(b) to make clear that a public hearing is required before a preliminary grant of a variance is approved and submitted to the USEPA.[178]

223. The Agency again replied that not every federal requirement must be duplicated in state rule. The Agency is again correct. The Agency's stated purpose in amending this proposed rule is to have a rule that informs applicants of requirements that pertain to them. The public hearing requirement is a requirement of the Agency not the applicant. However, the Agency also stated that the purpose of this rule part was to have consistency between the state rules and "the USEPA's threshold criteria that Permittees must meet to be eligible for a variance and for USEPA to approve a variance

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[173] SONAR, at 24.
[174] *Id.* at 25.
[175] *Id.*
[176] *Id.* at 23.
[177] *Id.* at 26.
[178] MCEA comments, at 7.

under 40 CFR 132."[179] In this case the omission of a significant federal requirement for public notice and hearing does not inform the applicant or public of all of the requirements needed for USEPA approval. This may lead to future disputes over whether public hearings are required.

224. This omission does not make the proposed rule defective, since all of the federal requirements for applications for variances must be completed before a variance can be granted. That is, the Agency's omission of the reference to 40 C.F.R. § 131.20(b) does not negate the fact that the public hearing procedures of 40 C.F.R. § Part 25 are required.

225. The proposed rule would be more complete, clear and informative to the public and applicants if it was revised to include the language suggested by the MCEA. Inclusion of this language would not be a substantial change to the rule as proposed. Changing the rule so that the complete list of requirements for an application, including the federal requirement for public hearings, may help avoid potential future litigation on this issue.

226. The Administrative Law Judge recommends that the agency revise the proposed rule in the manner suggested by MCEA or in another manner to indicate to potential applicants and the public that federal public hearing requirements must be followed by the Agency before an application can be approved by the Agency. Such a modification would not result in a rule that is substantially different from the rule as originally proposed.

227. In reference to proposed Subpart 5A, MCEA commented that the term "currently achievable treatment" is vague and could be interpreted to mean currently achievable using only the current pollutant control technology.[180] MCEA submitted that the rule should provide that the effluent limitation should reflect the greatest "pollutant reduction achievable" using any "feasible pollutant control technology" that can be identified and make clear that the Agency in its decision will document the relationship between the pollutant control activities and the highest attainable use.[181]

228. The Agency responded that it believes "the terms have the same meaning" and that "the term 'currently achievable treatment' is broader and clearer."[182]

229. The Agency's proposed choice of language is reasonable.

230. In reference to Subpart 5D, the MCEA commented that the permit should also contain a reopener provision allowing for tighter effluent limits when feasible

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[179] SONAR, at 14.
[180] MCEA comments, at 8.
[181] *Id.*
[182] MPCA preliminary response, at 24.

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pollutant control technology becomes available that would allow the receiving water body to attain a higher water quality condition.[183]

231. The Agency responded that this concern is addressed by the fact that the variance may only be as long as necessary to achieve the highest attainable condition and that it currently has the authority to reopen or modify permits.[184]

232. The Agency has demonstrated that the rule as proposed is needed and reasonable.[185]

D. Chapter 7053 - State Waters Discharge Restrictions

233. The Agency explained that Chapter 7053 establishes the effluent limits and treatment requirements that apply to all discharges of sewage, industrial, and other wastes to all waters of the state, both surface and groundwater.[186]

1. Part 7053.0195 - Variance Form Discharge Effluent Limits or Treatment Requirements

234. MCEA commented that it is unclear how this proposed section fits with the balance of the proposal and what the relationship is between this proposal and the proposed language at 7050.0190.[187]

235. The Agency explained that the title of this part is revised[188] by adding "Discharge effluent limits or" and that the revision clarifies that variances from discharge limits or treatment requirements are the subject of this part.

236. The Agency further explained that in revising this rule it proposes to cross reference many of the proposed revisions to Minn. R. 7050.0190 so as to provide consistency in the implementation of these different rules and facilitate understanding of variance request requirements by permittees requesting a variance. Having a variance in both chapters 7050 and 7053 allows the two rules to function independently, as the rules provide for variances to a WQS or a discharge effluent limit or treatment requirement, respectively.[189]

237. The Agency has shown the proposed rule is needed and reasonable.

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[183] MCEA comments, at 8.
[184] MPCA preliminary response, at 25.
[185] The language at issue was not revised; it is the original rule language.
[186] SONAR, at 27.
[187] MCEA comments, at 4.
[188] SONAR, at 28.
[189] *Id.*

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2. Part 7053.0195, Subpart 1 - Applicability

238. The Agency explained that the heading for Subpart 1, "Variance", is deleted and replaced with "Applicability" which more accurately reflects the requirement of this subpart. This subpart establishes who may request a variance from discharge effluent limits or treatment requirements, and the conditions establishing eligibility for a variance.[190]

239. MESERB commented that in light of other deletions it proposed to Minn. R. 7050.0190, the last sentence of proposed 7053.0195, Subpart 1, referring to those other subparts should be deleted.[191] However, the Agency declined to make the earlier proposed deletions.[192]

240. The Agency has shown the proposed rule to be needed and reasonable.

3. Part 7053.0195, Subpart 4 - Conditions for Approval

241. MCEA commented that "this proposed rule could be read to allow MPCA to grant a variance from water quality standards so as to allow a discharger to have a Water Quality Based Effluent Limitation (WQBEL), or no WQBEL at all, without the variance being approved by USEPA. This would be illegal."[193]

242. The Agency responded that it "proposes to revise Subpart 4 to delete the language that USEPA approval does not apply to variances granted by the agency under this part. The MPCA may submit a variance granted under this part to USEPA for review; however, USEPA does not approve variances from discharge effluent limits or treatment requirements."[194]

243. The USEPA did not "address revisions to 7053.0195 as those fall outside the scope of section 303(c)."[195]

244. Proposed Subpart 4 is revised to read: Subp. 4. Conditions for approval. To be eligible for a preliminary determination by the agency to grant the variance, the permittee must meet the conditions specified in part 7050.0190, Subpart 4, items A to D, ~~except the requirement to submit the variance to the United States Environmental Protection Agency for approval does not apply to variances granted by the agency under this part.~~[196]

245. Variances under proposed rule Part 7053 are not subject to the same review as are variances under Parts 7050 and 7052 because "[proposed] variance

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[190] *Id.*
[191] MESERB comments, at 4.
[192] MPCA preliminary response, at 20, 25.
[193] MCEA comments, at 4 (citing 40 C.F.R. § 131.14).
[194] MPCA preliminary response, at 28.
[195] USEPA comments.
[196] MPCA preliminary response, at Attachment 1.

provisions in Chapter 7053 are expressly limited to variances from state discharge restrictions and minimum treatment requirements that are explicitly included in Chapter 7053."[197]

246. The language proposed by the Agency is needed and reasonable to realize its goal of providing clarity and consistency to its various variance procedures. This goal is not eliminated by the fact that Part 7053 variances are not subject to review by the USEPA. Were a variance granted under Part 7053 to meet the definition of a WQS variance under Chapter 7050 or 7052, that variance would be subject to the rules of 7050 or 7052 and would require submission to and approval of the USEPA. The modification does not result in a rule that is substantially different from the rule as originally proposed.

4. Part 7053.0195, Subpart 7 - Renewal

247. Proposed Subpart 7 establishes that the permittee is subject to the requirements of Subparts 1 to 6 of this Part to be eligible for renewal of a variance. The Agency states that it is reasonable that the requirements for renewal of a variance are the same as those for the initial request for a variance and it is reasonable to alert permittees that the same requirements must be met.[198]

248. MESERB commented that Subpart 7 should be deleted and replaced with language consistent with 40 C.F.R. § 131.14(b))iii)-(vi).

249. The Agency addressed MESERB's comments by proposing to modify Subpart 8 in order to incorporate the new federal regulation. Therefore the Agency's decision not to change Subpart 7 as requested by MESERB is reasonable.

250. The Agency has demonstrated that the proposed rule is needed and reasonable.

5. Part 7053.0195, Subpart 8 - Term and Expiration

251. The Agency explained that Subpart 8 establishes that terms and conditions of a variance from a discharge effluent limit or treatment requirement are included and incorporated into the permit issued by the Agency.

252. The Agency explained that in 2013 the USEPA proposed that a variance term not exceed ten years,[199] but that in its final form the federal rule does not impose a maximum duration for a variance but instead requires re-evaluation of a variance every five years.[200] The Agency originally proposed to qualify the duration of the variance by stating that it must be "as short as possible." The Agency states that this language is

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[197] MPCA's Final Response and Proposed Amendments to Minnesota Rules, Chapters 7050, 7052, and 7053 Governing Water Quality Variances, at 7 (Mar. 2, 2016).
[198] SONAR, at 30.
[199] *Id.*
[200] MPCA preliminary response, at 29.

inconsistent with the federal regulation and the Agency's stated objectives regarding flexibility. The applicable federal rule states that "[t]he term of the WQS variance must only be as long as necessary."[201] The Agency proposes to revise Subpart 8 in order to incorporate the new federal rule for variance terms.

253. The Agency's new proposed Subpart 8 reads as follows:

> Subp. 8. **Term and expiration.** The terms and conditions of a variance from a discharge effluent limit or treatment requirement are included and incorporated in the permit issued by the agency. The term of a variance must ~~be as short as possible but must expire no later than ten years after the date the agency grants the variance~~ only be as long as necessary to achieve the highest attainable condition. For a variance with the term greater than five years, the agency shall reevaluate the highest attainable condition using all existing and readily available information every five years after United States Environmental Protection Agency approval.

254. The Agency explained that "[i]t is reasonable to make this change because it makes clear what the permittee must submit in order for the MPCA to grant preliminary approval, and it makes clear that the variance is term limited."[202]

255. The Agency's proposed change is needed and reasonable to attain the Agency's stated purposes of aligning its rules with federal regulations, providing consistency in its variance processes across the three chapters, and providing greater flexibility in the variance process. The modification does not result in a rule that is substantially different from the rule as originally proposed.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Agency has the authority to modify its proposed rules pursuant to Minn. Stat. § 14.05. The Agency's modifications to proposed rules 7050.0190, subparts 4A(5) and 8, and 7053.0195, subparts 4 and 8, were within the scope of the matter announced in the Notice of Intent to Adopt Rule and Notice of Hearing and did not make the proposed rule substantially different according to the factors in Minn. Stat. § 14.05, subd. 2.

2. The Agency gave proper notice of the hearing in this matter. The Agency has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law and rule.

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[201] *Id.* (citing 40 C.F.R. 131.14(b)(vi)-(v)).
[202] *Id.*

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3. The Agency 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.

4. The Administrative Law Judge finds that the Agency has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions within the meaning of Minn. Stat. §§ 14.14, subd. 4, whether or not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions, whether or not specifically discussed, are authorized by statute and there are no other problems that would prevent the adoption of the rules.

5. Any Findings of Fact that might properly be termed Conclusions of Law and any Conclusions of Law that might properly be termed Findings of Fact are hereby adopted as such.

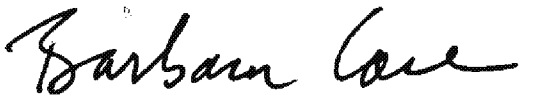
6. A determination of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on the facts appearing in the rule hearing record.

Based on these Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: April 18, 2016



BARBARA J. CASE
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.