

# Minnesota Pollution Control Agency

## Environmental Analysis and Outcomes Division

### REQUEST FOR COMMENTS on Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2, *Minnesota Rules* chapter 7050, Revisor’s ID Number R-04692

**NOTICE IS HEREBY GIVEN** that the Minnesota Pollution Control Agency (MPCA) is requesting comments on planned amendments to water rules, *Minnesota Rules*, Chapter 7050 (Waters of the State). This rulemaking is referred to as the 2021-2022 Class 2 Use Designation Rule. This rulemaking will update designated uses for some state waters to improve their restoration and protection. Assigning the appropriate beneficial use is an important first step in the process to assure the goals for each water body are attainable and can be protected. Comments should be submitted in writing according to the Public Comment section below.

**Plain English Summary.** This Request for Comments is the MPCA’s legal notice of its intent to begin rulemaking. This is the first of several opportunities for public comment and input. At this stage, we do not yet have a draft of new rule language. We want your feedback to inform us about the ideas described below in the Subject of Rules. This is an opportunity to provide comments on the MPCA’s planned amendments to the rules and an opportunity for you to provide comment or information on any relevant issues related to this rulemaking. For example, if you have information on costs to regulated parties related to these use classifications or data related to this rulemaking that you wish to share with us to inform our decisions, please submit that information in writing. Submitting your ideas and information at this early stage in rulemaking allows more time to address issues that may come up, and helps to ensure informed decision-making on our part.

**Subject of Rules.** Minnesota’s surface waters are currently assigned, or designated, a number of possible beneficial uses (e.g. drinking water, aquatic life, and recreation such as fishing and swimming) based on which beneficial uses are or should be attained in those waters. Different physical and chemical criteria apply depending on the beneficial uses that need to be protected in each water. The MPCA routinely reviews use designations to ensure that assigned beneficial uses are protective and attainable as defined by the Clean Water Act and Minnesota Rule. As the result of routine monitoring by the MPCA and rule changes by the Minnesota Department of Natural Resources, the MPCA has identified reaches where the currently designated beneficial use does not accurately reflect an attainable use. The designated beneficial use for each water body must be correct and appropriate because the designated use affects many water quality protection and restoration efforts (e.g. assessment, stressor identification, National Pollution Discharge Elimination System permitting, and Watershed Restoration and Protection Strategies).

Most use designations are the result of routine use reviews that are performed as part of the MPCA’s Intensive Watershed Monitoring (IWM) effort. The IWM approach assesses watersheds for aquatic life, aquatic recreation, and aquatic consumption uses in Minnesota’s streams; each of the state’s 80 major watersheds are assessed on a rotating 10-year cycle. The MPCA expects to conduct rulemaking every two years to update designated uses based in part on the IWM effort. The most recent use designation rules (Class 2 and Class 7) were adopted in April 2020 (44 SR 1416).

These rule amendments will make updates and corrections to Class 2 (Aquatic Life) beneficial use designations or classifications for streams. These updates fall into two groups: 1) reviewing streams

for appropriate classification as cold or warm water habitats; and 2) reviewing streams under the tiered aquatic life use (TALU) framework. The TALU rules, approved by United States Environmental Protection Agency, are a framework for classifying streams based on the aquatic life each supports or has the potential to support, and builds upon existing water quality standards.

This rulemaking focuses on assigning appropriate beneficial use designations and does not change numeric criteria or existing designated use frameworks. Planned changes include updating the designated uses for approximately 233 stream reaches and revising the documents incorporated by reference in Minn. R. 7050.0470 that list these specific use designations.

The state rulemaking process requires agencies to consider several specific topics as it develops rules. The MPCA requests any information pertinent to the subject of the rule amendments, and specifically requests any information on:

- 1) Whether the cost of complying with the rule in the first year after the rule takes effect will exceed \$25,000 for one small city or business (*Minnesota Statutes*, section 14.127).
- 2) Whether local governments might be required to adopt or amend an ordinance or other regulation in response to the changes (*Minnesota Statutes*, section 14.128).
- 3) The cumulative effect of the rule amendments with other federal and state regulations as related to the specific purpose of the rule (*Minnesota Statutes*, section 14.131(8)). Cumulative effect means the incremental impacts that result from the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules.

**Persons Affected.** Amendments to these rules potentially affect all persons working with or interested in Water Quality Standards, such as persons working in planning, natural resource management, soil and water conservation, and environmental protection. Because the rule amendments will result in a more accurate classification of waters and more efficient, effective assessment and implementation of Water Quality Standards, persons with a general interest in the quality of Minnesota's waters, such as fishing and tourism, may also be affected.

**Where to Get More Information.** The webpage for this rulemaking at <https://www.pca.state.mn.us/water/amendments-water-quality-standards-use-classification-2> provides information about updates to the beneficial use designations. The MPCA will post rulemaking documents on this webpage as they become available. As stated above, we do not yet have a draft of new rule language. However, a technical support document that provides information about the planned changes is available on the rule webpage.

If you are interested in being notified when the draft rules are available for review and of other activities relating to this (or other MPCA rulemakings) register for GovDelivery bulletins at <https://public.govdelivery.com/accounts/MNPCA/subscriber/new>. The checkbox for the 2021-2022 Class 2 Use Designation Rule is located under the topic heading "Public Notices and Rulemaking."

**Statutory Authority.** *Minnesota Statutes*, section 115.03, subdivision 1 grants the MPCA general authority to promulgate and/or revise rules relating to pollution of waters of the state, classify waters of the state, and to adopt water quality standards. *Minnesota Statutes*, section 115.44 grants the MPCA additional authority to group designated waters of the state into classes.

**Public Comment.** Interested persons or groups may submit written comments on these planned rule amendments and on other information related to this rulemaking until **4:30 p.m. on May 7, 2021.**

Submit written comments or information to the Office of Administrative Hearings Rulemaking e-Comments website at <https://minnesotaoah.granicusideas.com>. Any questions about submitting comments via the Rulemaking e-Comments website should be directed to Denise Collins, Office of Administrative Hearings, telephone 651-361-7875 and [denise.collins@state.mn.us](mailto:denise.collins@state.mn.us). All comments received are public and will be available for review at the Office of Administrative Hearings. The MPCA will not publish a notice of intent to adopt rules until more than 60 days have elapsed from the date of this request for comments. The MPCA does not plan to appoint an advisory committee to comment on the planned rule amendments.

**MPCA Contact Person.** The MPCA contact person is Mary H. Lynn at the MPCA, 520 Lafayette Road North, St. Paul, MN 55155-4194; telephone 651-757-2439; and [mary.lynn@state.mn.us](mailto:mary.lynn@state.mn.us). Technical questions on the planned rule amendments should be directed to Will Bouchard at the MPCA, telephone 651-757-2333, and [will.bouchard@state.mn.us](mailto:will.bouchard@state.mn.us). You may also call the MPCA at 651-296-6300 or 800-657-3864 or use your preferred relay service [info.pca@state.mn.us](mailto:info.pca@state.mn.us).

**Alternative Format.** Upon request, the information in this notice can be made available in an alternative format, such as large print, braille, or audio. To make such a request, please contact the MPCA contact person via the contact information listed above.

**Note:** Comments received in response to this notice will not necessarily be included in the formal rulemaking record submitted to the Administrative Law Judge if and when the MPCA starts a proceeding to adopt rules. The MPCA is required to submit to the Administrative Law Judge only those written comments received in response to the draft rules after they are proposed. If you submit comments during the development of the rules and you want to ensure that the Administrative Law Judge reviews your comments, you must resubmit the comments after the rules are formally proposed.

\_\_\_ March 23, 2021 \_\_\_\_\_  
Date

  
\_\_\_\_\_  
Laura Bishop, Commissioner  
Minnesota Pollution Control Agency

# Adopted Rules

A rule becomes effective after the requirements of *Minnesota Statutes* §§ 14.05-14.28 have been met and five working days after the rule is published in the *State Register*, unless a later date is required by statutes or specified in the rule. If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed. If an adopted rule differs from its proposed form, language which has been deleted will be printed with strikeouts and new language will be underlined. The rule's previous *State Register* publication will be cited.

**KEY: Proposed Rules** - Underlining indicates additions to existing rule language. ~~Strikeouts~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."  
**Adopted Rules** - Underlining indicates additions to proposed rule language. Strikeout indicates deletions from proposed rule language.

## Minnesota Pollution Control Agency (MPCA) Adopted Permanent Rules Relating to Standards for Water Quality

The rules proposed and published at State Register, Volume 44, Number 13, pages 405-411, September 23, 2019 (44 SR 405), are adopted with the following modifications:

### 7050.0420 COLD WATER HABITAT WATERS.

B. Cold water habitat waters identified as class 2A, 2Ae, or 2Ag in part 7050.0470 must reflect an existing beneficial use or a feasibly attainable beneficial use, according to Code of Federal Regulations, title 40, section 131.10, that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats. For purposes of this subpart, "existing beneficial use" means a beneficial use that was attained in a water body on or after November 28, 1975.

# Executive Orders

The governor has the authority to issue written statements or orders, called Executive Orders, as well as Emergency Executive Orders. The governor's authority is specified in the Constitution of the State of Minnesota, Article V, and in *Minnesota Statutes* § 4.035. Emergency Executive Orders, for protection from an imminent threat to health and safety, become effective immediately, are filed with the secretary of state, and published in the *State Register* as soon as possible after they are issued. Other Executive Orders become effective 15 days after publication in the *State Register* and filing with the secretary of state. Unless otherwise specified, an executive order expires 90 days after the date the governor who issued the order vacates office.

## Office of the Governor

### Emergency Executive Order 20-62: Amending Executive Order 20-56 to Allow Worship, Weddings, and Funerals to Proceed as Safely as Possible during the COVID-19 Peacetime Emergency

I, **Tim Walz, Governor of the State of Minnesota**, by the authority vested in me by the Constitution and applicable statutes, issue the following Executive Order:

The COVID-19 pandemic continues to present an unprecedented and rapidly evolving challenge to our State. Since the World Health Organization ("WHO") characterized the COVID-19 outbreak as a pandemic on March 11, 2020, confirmed cases of COVID-19 in Minnesota have rapidly increased. On March 15, 2020, Minnesota detected the first confirmed cases caused by "community spread"—infections not epidemiologically linked to overseas travel. By March 17, 2020, all fifty states had reported a confirmed case of COVID-19, and on March 21, 2020, the Minnesota Department of Health ("MDH") announced Minnesota's first COVID-19 fatality.

This file contains documents relevant to the MPCA rulemaking for Water Quality Standards – 2021-2022 Class 2 Use Designation Rule

Included are:

- Comments received in response to the Request for Comments on Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2 (45 SR 1087)

# 37415 Pollution Control Agency Request for Comments

Closed May 07, 2021 · Discussion · 4 Participants · 1 Topics · 6 Answers · 0 Replies · 0 Votes

4

PARTICIPANTS

1

TOPICS

6

ANSWERS

0

REPLIES

0

VOTES

## SUMMARY OF TOPICS

### SUBMIT A COMMENT

 6 Answers · 0 Replies

Important: All comments will be made available to the public. Please only submit information that you wish to make available publicly. The Office of Administrative Hearings does not edit or delete submissions that include personal information. We reserve the right to remove any comments we deem offensive, intimidating, belligerent, harassing, or bullying, or that contain any other inappropriate or aggressive behavior without prior notification.

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**Howard Markus** · Citizen · (Postal Code: unknown) · Apr 16, 2021 4:02 pm

 0 Votes

Thank you for the opportunity to comment, which is attached as a Word document.

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**BROOKE DAVIS** · Citizen · (Postal Code: unknown) · Apr 22, 2021 11:45 am

 0 Votes

Water is one of the most essential substances in our life. assisted living near me Everyone must have water to survive. Also, it has an important role in one's health. Drinking water helps increase metabolism, clean the body. Water quality is one of the dilemmas nowadays.

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**Howard Markus** · Citizen · (Postal Code: unknown) · May 07, 2021 8:53 am

 0 Votes

To restate my posting from three weeks ago, fish aquaculture and paddy rice are commodity-driven resources and both clearly belong in Class 4 with its associated water quality standards to provide use protections. Wild fish and wild rice are not commodity-driven resources and both clearly belong in Class 2 with its associated water quality standards to provide use protections.

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**Aaron Johnson** · Citizen · (Postal Code: unknown) · May 07, 2021 12:51 pm

 0 Votes

EPA Region 5 submits the attached comments on MPCA's draft revisions to Minnesota

## 37415 Pollution Control Agency Request for Comments

Closed May 07, 2021 · Discussion · 4 Participants · 1 Topics · 6 Answers · 0 Replies · 0 Votes

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Rules, Chapter 7050 regarding Class 2 use designations.

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**Paula Maccabee** · Citizen · (Postal Code: unknown) · May 07, 2021 3:00 pm

 0 Votes

WaterLegacy submits the attached comments on the MPCA's planned revisions of rules regarding Class 2 use designations. Thank you.

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**Paula Maccabee** · Citizen · (Postal Code: unknown) · May 07, 2021 3:00 pm

 0 Votes

WaterLegacy submits the attached comments on the MPCA's planned revisions of rules regarding Class 2 use designations. Thank you.

**REQUEST FOR COMMENTS on Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2, Minnesota Rules chapter 7050, Revisor’s ID Number R-04692**

Thank you for the opportunity to provide comments on the MPCA’s potential rule changes to Mn Rules Chapter 7050, Class 2.

**The Clear intent of Class 2 and Class 4 language:**

**7050.0222 SPECIFIC WATER QUALITY STANDARDS FOR CLASS 2 WATERS OF THE STATE; AQUATIC LIFE AND RECREATION.**

Subpart 1. **General.**

- A. The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the **aquatic life and recreation designated public uses and benefits.**

**7050.0224 SPECIFIC WATER QUALITY STANDARDS FOR CLASS 4 WATERS OF THE STATE; AGRICULTURE AND WILDLIFE.**

Subpart 1. **General.**

The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits. **Wild rice is an aquatic plant resource found in certain waters within the state. The harvest and use of grains from this plant serve as a food source for wildlife and humans. In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR] and listed in part 7050.0470, subpart 1.**

Class 4A waters.

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

The language in Class 2 is very clear - **The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the aquatic life and recreation designated public uses and benefits.**

**## Class 2 is written to protect aquatic animal and plant communities and ecosystems by protecting their water quality.**



Class 4 is equally very clear – **The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits.**

**## Class 4 is written to protect agriculture and wildlife.**

And Class 4A further describes the purpose of this class - **The quality of class 4A waters of the state shall be such as to permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area, including truck garden crops.**

**## Class 4A is clearly written to protect commodity crops by protecting irrigation water.**

**My specific concern is directed at the language specific to wild rice in the Class 4 introduction - Wild rice is an aquatic plant resource found in certain waters within the state. The harvest and use of grains from this plant serve as a food source for wildlife and humans. In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR]**

By reading the clear intent of the language in Classes 2 & 4, aquaculture-raised fish are protected in Class 4 and wild fish are protected in Class 2. In the exact same way, paddy-raised rice should be protected in Class 4 and wild rice should be protected in Class 2.

Wild rice belongs in Class 2, similar to the protection provided to wild fish. It was a mistake in the past to put wild rice protection in Class 4 that must be corrected in this rulemaking.

Wild rice is mistakenly described in Class 4 as a commodity equivalent to paddy rice; clearly wild rice is not a commodity. The MPCA language recognizes the valuable and important ecological attributes that wild rice plays as an ecosystem keystone community. This clearly belongs in Class 2 and must be moved there.

**To that end I request that the MPCA move wild rice water quality standards, and its accompanying language from Class 4 to Class 2.**

### **My background**

I have a strong background in the areas of water quality standards and rules development and the role they play in meeting the mission of the MPCA. I have a Ph.D. in Water Resources from Iowa State University [ISU] with an emphasis on the relationships between nutrients and algae.

I am also a retired Professional Engineer, with a focus on ecological engineering. My engineering degree was from the University of Missouri – Rolla, previously named the Missouri School of Mines.

Subsequently, I worked for about ten years at the Missouri Department of Natural Resources, studying wastewater discharges on downstream water resources and the use of constructed wetlands for further cleaning wastewater discharges, as well as Mississippi River Basin planning.

I then was employed by the Minnesota Pollution Control Agency starting in 1990 and retiring in 2013. Over my 22+ years employment, I had numerous responsibilities, some of which are as follows:

- Algal ecologist
- Coordinated the development of the Total Maximum Daily Load [TMDL] Impaired Water List from 1997 to 2010
- Developed the statewide Mercury TMDL
- Used several complex large river water quality models, such as WASP and QUAL2e to study the Mississippi and Minnesota Rivers in the Metro area
- Worked on many water quality standards rule developments, including, as examples, the following: wetlands, Index of Biotic Integrity (IBI), lake and river phosphorus, and turbidity

Again, thank you very much for being given the opportunity to provide comments. I appreciate it very much.

Respectfully,

A handwritten signature in black ink that reads "Howard D. Markus". The signature is written in a cursive, slightly slanted style.

Howard D. Markus, Ph.D.; P.E. [retired]  
9175 Pinehurst Road  
Woodbury, MN 55125

**RECEIVED**

By: OAH on 05/07/2021 @12:51pr

Aaron Johnson Attachment



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

**WW-16J**

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

Dear Judge Lipman:

On April 5, 2021, the Minnesota Pollution Control Agency (MPCA) published public notice of a public comment period on “Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2, *Minnesota Rules* chapter 7050, Revisor’s ID Number R-04692.”

The U.S. Environmental Protection Agency reviewed the draft rules and supporting documents posted on MPCA’s website for consistency with the requirements of Section 303(c) of the Clean Water Act and federal regulations at 40 CFR Part 131. EPA’s comments are enclosed. These comments do not constitute final Agency action, but are provided for your consideration as you develop your water quality standards revisions for adoption and subsequent submittal for EPA review under Section 303(c) of the Clean Water Act.

Thank you for the opportunity to comment on MPCA’s amended use designation rules. If you have any questions regarding our comments, please contact Aaron Johnson of my staff at 312-886-6845 or [johnson.aaronk@epa.gov](mailto:johnson.aaronk@epa.gov).

Sincerely,

David Pfeifer, Chief  
Wetlands and Watersheds Branch

Enclosure

cc: Will Bouchard, MPCA (electronic)

**Enclosure – Comments on Minnesota’s “Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2, *Minnesota Rules* chapter 7050, Revisor’s ID Number R-04692”**

**Comment 1.** For most of the proposed re-designations based on a cold water review, the draft technical support document (*Amendments to aquatic life (Class 2) use designations for streams*, December 2020, hereinafter referred to as “draft TSD”) provides data about the aquatic biota and/or the thermal regime found in that water body to document whether that water body either currently supports or would be expected to support cold water aquatic biota. However, for several of the proposed re-designations based on a cold water review, the draft TSD indicates that no MPCA biological data were available to perform a full cold water use review and no thermal data from the stream were provided. Based on the draft TSD, it appears that the primary reason that these streams are being proposed for re-designation is that the initial designation of these streams as Class 2A (cold water aquatic biota) was erroneous.

Regardless of the basis for the initial designation of a stream, federal regulations at 40 CFR § 131.10(g) require that states demonstrate that attaining the current use is not feasible because of one of the six factors found in that section whenever designating a use based on a required use attainability analysis. Because Minnesota’s WQS apply less stringent criteria for the Class 2B and 2Bd (cool and warm water aquatic biota) aquatic life subclasses than for the Class 2A aquatic life subclass, a use attainability analysis is required whenever re-designating a water body from Class 2A to Class 2B or 2Bd, per 40 CFR § 131.10(j)(2).

For the streams listed in Table 1 below, please provide further information and explanation to support MPCA’s determination that these streams do not currently support and would not be expected to support a cold water aquatic community consistent with Minnesota’s Class 2A aquatic life use subclass. Based on discussions with MPCA, EPA understands that MPCA considered the aquatic communities in downstream segments and the relevant segment’s hydrologic connection to those downstream segments. Such information would be relevant to this determination.

**Table 1.** List of waterbodies proposed to re-designated from Class 2A to Class 2B or 2Bd where the draft TSD indicates that no biological data were available to perform a full cold water use review.

<b>Watershed</b>	<b>Segment Name</b>	<b>Water Body Identification</b>
Lake Superior-North	Unnamed creek (Greenwood River Tributary)	04010101-A01
Lake Superior-North	Unnamed creek (Sugar Loaf Creek)	04010101-D87
Lake Superior-North	Unnamed creek (Greenwood Tributary)	04010101-D97
Lake Superior-South	Unnamed creek (Encampment River Tributary)	04010102-678
Lake Superior-South	Unnamed creek (Skunk Creek Tributary)	04010102-A25
Lake Superior-South	Unnamed creek (Split Rock River Tributary)	04010102-A39
Lake Superior-South	Unnamed creek	04010102-B70
Lake Superior-South	Unnamed creek (Encampment River Tributary)	04010102-C46
Nemadji River	Spring Creek	04010301-763
Nemadji River	Unnamed creek (Skunk Creek Tributary)	04010301-765

<b>Watershed</b>	<b>Segment Name</b>	<b>Water Body Identification</b>
Nemadji River	Unnamed creek (Skunk Creek Tributary)	04010301-767
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-874
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-875
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-876
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-877
Rainy River-Headwaters	Unnamed creek (Blackduck River Tributary)	09030001-887
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-924
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-929
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-932
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-A29
Rainy River-Headwaters	Unnamed creek (Blackduck River Tributary)	09030001-A30
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-A32
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-A34
Little Fork River	Unnamed creek (Lost River Tributary)	09030005-545
Little Fork River	Unnamed creek (Lost River Tributary)	09030005-546
Otter Tail River	Unnamed creek (Toad River Tributary)	09020103-665
Minnesota River-Mankato	Unnamed creek (Minnesota River Tributary)	07020007-627



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By: OAH on 05/07/2021 @3:00pm

Paula Maccabee Attachment

**Paula Goodman Maccabee, Advocacy Director and Counsel**

1961 Selby Ave., St. Paul, MN 55104 (651-646-8890)

[paula@waterlegacy.org](mailto:paula@waterlegacy.org) or [pmaccabee@justchangelaw.com](mailto:pmaccabee@justchangelaw.com)

May 7, 2021

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

RE: MPCA Planned Amendments to Rules Governing Water Quality Standards  
Use Classification 2, *Minnesota Rules* chapter 7050, Revisor's ID Number R-04692

Dear Judge Lipman,

WaterLegacy submits this letter as comments on the Minnesota Pollution Control Agency (MPCA) Planned Amendments to Rules Governing Water Quality Standards for Use Classification 2. In brief:

1. WaterLegacy supports the MPCA's plans to upgrade certain waters from Class 2B (cool and warm water aquatic communities) to Class 2A (cold water aquatic communities) and from Class 2Bg general use to Class 2Be exceptional use.
2. Water Legacy opposes the MPCA's plans to downgrade certain waters from Class 2A to Class 2B and from Class 2Bg general use to Class 2Bm modified use. The MPCA has failed to assume its burden of proof or provide the analysis required under the Clean Water Act (CWA) in order to remove designated uses of waters, particularly aquatic life uses protected under CWA Section 101(a)(2).

WaterLegacy commends the MPCA for proposing additional protection for certain waters that can support cold water aquatic communities and exceptional uses. We agree with the MPCA that its findings of cold water aquatic fish or invertebrates in a waterbody are sufficient to establish a Class 2A use and that a high Index of Biological Integrity (IBI) score or Minnesota Stream Habitat Assessment (MSHA) score is sufficient to establish a Class 2Be exceptional aquatic use level. We would propose that the MPCA proceed to rulemaking to upgrade waters without delay. However, we believe that the MPCA's plan to downgrade waters from Class 2A to Class 2B or from Class 2Bg to Class 2Bm fails to meet CWA requirements and must be rejected at this time.

### **Clean Water Act Standards**

The standard of proof for proposing a new or more protective designation under the CWA is simple. A state must only submit documentation justifying how its consideration of the use and value of water for supports the State's action. 40 C.F.R. § 131.10(a); *see also* §131.6(a). The

MPCA in its documentation supporting the Class 2 use amendments<sup>1</sup> has met this requirement under regulations implementing the CWA.

However, the MPCA's planned amendments to downgrade water bodies from Class 2A to Class 2B and from Class 2Bg general use to Class 2Bm modified use are legally insufficient under the CWA and its implementing regulations. If adopted, the planned amendments would reduce protection of the downgraded water bodies.

The MPCA's planned Class 2 amendments would downgrade 65 water bodies as identified by water body identification (WID) codes, representing 145.2 miles of river and stream reaches from waters protected for Class 2A trout/cold water communities to Class 2B waters not protected for cold water aquatic communities. (MPCA Class 2 Use Amendments, p. 2).

The planned amendments would also downgrade 123 WIDs, representing 539 river miles from Class 2Bg general use to Class 2Bm modified use, where expectations for fish and macroinvertebrate assemblages would be diminished. (*Id.* at 14). The MPCA's planned Class 2 Use Amendments propose far more downgrades than upgrades to use designations. MPCA's proposal would upgrade 24 WIDs reflecting 66.9 river miles from Class 2B to Class 2A, less than half of the waters and miles proposed to be removed as cold water aquatic community streams. (*Id.* at 2). The proposal would upgrade 19 WIDs representing 114.1 river miles from Class 2B general use to Class 2B exceptional use, constituting less than one-sixth as many waters and less than one-fourth as many river miles. (*Id.*).

The MPCA's planned downgrading of uses does not comply with the CWA and its implementing regulations. Federal requirements for upgrading and downgrading use protections are *not* symmetrical. To propose a new designated use, a state "must submit documentation justifying how their consideration of the use and value of water for those uses listed in this paragraph appropriately supports the State's action." 40 C.F.R. § 131.10(a); *see also* §131.6(a). To upgrade a designated use, that is all the MPCA must do. CWA regulations specifically state that states may remove an existing designated use if "a use requiring more stringent criteria is added." 40 C.F.R. § 131.10(h)(1). Documentation for the upgrade of certain waters in the MPCA's draft planned Class 2 Use Amendments is legally sufficient.

However, the CWA and its implementing regulations strongly disfavor removing existing and designated uses of water, particularly for aquatic life, which is a CWA section 101(a)(2) use. States may not remove an "existing use" actually attained at any time on or after November 28, 1975 and replace it with a use that does not provide more stringent criteria. 40 C.F.R. § 131.10(h)(1). There is no wiggle room in this prohibition.

A protected use includes an "existing" use of waters dating back to November 28, 1975. 40 C.F.R. 131.3(e); Minn. R. 7050.0255, subp. 15. In the case of Class 2A, the protected use is for a "community of cold water aquatic biota and their habitats." Minn. R. 7050.0420(B). "Aquatic

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<sup>1</sup> MPCA, Amendments to aquatic life (Class 2) use designations for streams (Dec. 2020) ("MPCA Class 2 Use Amendments") <https://www.pca.state.mn.us/sites/default/files/wq-rule4-21aa.pdf>

biota” for a cold water community are not just trout, but “game and nongame fish, minnows and other small fish, mollusks, insects, crustaceans and other invertebrates, submerged or emergent rooted vegetation, suspended or floating algae, substrate-attached algae, microscopic organisms, and other aquatic-dependent organisms.” Minn. R. 7050.0150, subp. 4(C).

Even if a designated Class 2 use hasn’t been attained at any time since November 28, 1975, it cannot be removed without a detailed use attainability analysis (UAA) determining that attainment of the use is not feasible. 40 C.F.R. § 131.10(g), (j), (k). For example, in the case of human caused conditions, a UAA must demonstrate that the conditions preventing attainment “cannot be remedied.” 40 C.F.R § 131.10(g)(3). In the case of hydrologic modifications that prevent attainment of the use, the UAA must demonstrate that “is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use.” 40 C.F.R § 131.10 (g)(4). These CWA regulations are mirrored in Minnesota rules constraining variances from water quality standards, Minn. R. 7050.0190, and are referenced in rules setting criteria for “modified” Class 2 uses. Minn. R. 7050.0222, subp. 3c(D)(1).

### **Failure to Comply with Clean Water Act in Downgrading Classifications**

Applying the requirements of the CWA and the definitions in Minnesota rules, the MPCA’s draft Class 2 Use Amendments to downgrade waters are legally insufficient. Three brief examples are provided below:

04010201-617 **Spider Creek** (Lake Superior watershed) is proposed for downgrading from 2Ag to 2Bdg based on DNR use review. The DNR removed Spider Creek from the trout waters list in 2008 due to temperature logs from 2003-2005 and “since its designation in the 1960s there has been no evidence of trout reproduction or any return from trout stocking efforts.” (MPCA Class 2 Use Amendments, p. 26). In 2009, MPCA found a cold water fish species and three cold water macroinvertebrate taxa, and “marginally cold” water temperatures. The draft states that “it is reasonable to remove” the Class 2A designation and the Class 2A designation of tributaries to this reach. (*Id.* at 26-27). However, the MPCA has made no finding that use for cold water biota was not an “existing use” at any time since November 28, 1975.

09030002-648 **East Two River** (Vermillion River Watershed) is proposed for downgrading from 2Ag to 2Bdg based on cold water review (CWR). The East Two River analysis for WID (07020006-513)<sup>2</sup> states that surveys in 2016 did not sample any cold water species, although a 1992 DNR survey found at least one cold water fish species for the same reach. (*Id.* at 38) Based on this information and the fact that a 2015 temperature log found water temperatures in the stressful range for trout during part of the summer, the draft states “it is reasonable to remove” the class 2A designation although the upstream WID retains a cold water habitat designation. (*Id.*) However, the MPCA made no finding that use for cold water biota was not an “existing use” at any time since November 28, 1975. (*Id.* at 38-39)

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<sup>2</sup> The MPCA Class 2 Use Amendments draft, p. 2 and p. 38-39, seems to use inconsistent WID numbers for the East Two River.



07010204-557 **Silver Creek** (North Fork Crow River Watershed) is proposed for downgrading from 2Bg to 2Bm based on data collected from one station in 2007 and 2017 showing that this reach “does not meet aquatic life use goals for General Use” waters. (*Id.* at 77) The scant data provided suggested that the reach Minnesota Stream Habitat Assessment (MSHA) may have declined between 2007 and 2017 and at least one measurement for phosphorus and dissolved oxygen exceeded water quality standard thresholds. (*Id.*). Despite the water quality exceedances, the MPCA concluded that “poor habitat” was the limiting factor. The MPCA then summarily noted, “The poor habitat condition cannot be reversed at this time and is not likely to recover naturally due to drainage maintenance.” (*Id.*). The MPCA noted that the creek was maintained for drainage before November 28, 1975 and stated that “no evidence indicates that either the fish or macroinvertebrate assemblages attained the aquatic life use goals for General Use on or after November 28, 1975,” effectively presuming the non-existence of a general class 2 use. (*Id.*)

The MPCA’s proposals to remove Class 2A uses for Spider Creek and East Two River are legally insufficient. In neither case did the MPCA make the minimum necessary finding to remove a Class 2A classification: that the water body has at no time since November 28, 1975 had an existing use for a cold water aquatic community. In fact, even the minimal information provided for these two water bodies suggests that such a conclusion would be unsupported. For Spider Creek, the MPCA found a cold water fish species, three cold water macroinvertebrate taxa and marginally cold temperatures in 2009. The lack of return on trout stocking efforts does not allow removal of protection for other cold water community species.

For the East Two River, a 1992 DNR survey found at least one cold water species and an upstream WID retains a cold water habitat designation. This evidence suggests that Class 2A use for cold water species was an existing use at some time since November 28, 1975. If species were present in 1992, but not found in 2016, it also raises the question about what factors in 2016 may have affected cold water species. The downgrading of Class 2A waters ensures that this question will not be asked or answered.

These are just two examples where the MPCA has planned to remove Class 2A designation without making the two requisite findings: first, that cold water aquatic life use has never been an existing use since November 28, 1975 and, second, that attainment of a cold water aquatic life use is not feasible as demonstrated with a UAA.

Silver Creek is just one of many examples where the MPCA has proposed a conclusory determination that the creek is only suitable for modified aquatic life use, Class 2Bm, rather than general aquatic life use, 2Bg. The scant data cited by the MPCA suggests that habitat may have declined between 2007 and 2017 and that biological stressors from pollution, as well as from habitat conditions, may contribute to low IBI scores.

Silver Creek is one of many waters where the MPCA has failed to meet the requirements of a UAA before proposing to downgrade a water body to “modified” use. In fact, approximately 90 times in the MPCA’s Class 2 Use Amendments draft, the MPCA presumes that Class 2B used

were not attained on the basis that the stream has been used for drainage since before November 28, 1975 as suggested by aerial imagery. Similarly, the summary conclusions that attainment is infeasible due to “poor habitat” that “cannot be reversed at this time and is not likely to recover naturally” found in the Silver Creek example are repeated verbatim dozens of times in the MPCA’s Class 2 Use Amendments. No evidence is provided in any individual case to support these conclusions, other than statements that a stream has long been used for drainage.

In the Triennial Review hearing on March 9, 2021, MPCA staff testified that some streams used for drainage support a general Class 2B use and some can be restored.<sup>3</sup> (TR Hrg. 38:17-40). But the draft Class 2 Use Amendments describe no criteria by which the MPCA has assessed for any specific water body whether conditions preventing attainment can be “remedied,” the water body “restored,” or operations modified to attain general Class 2 uses, as required under regulations implementing the CWA. 40 C.F.R § 131.10(g); Minn. R. 7050.0222, subp. 3c(D)(1). The MPCA may not simply presume that a designated Class 2B water body cannot sustain general aquatic life, without evaluating the contributions of pollutants to low IBI scores and developing standards for remedy, restoration, or modified operations to protect designated aquatic life uses.

### **Consequences for Protection of Waters**

The proposed Class 2 Use Amendments would affect the level of protection given to water bodies that are downgraded. The MPCA’s draft Class 2 Use Amendments suggest that some of the waters downgraded from Class 2A to Class 2B would be classified as Class 2Bdg and also “protected as a source of drinking water.” (*See, e.g.*, MPCA Class 2 Use Amendments p. 22). However, under existing rules, no drinking water standards apply to Class 2Bdg waters. See Minn. R. 7050.0222, subp. 4a. Waters downgraded to Class 2Bdg would be afforded no protection as sources of drinking water.

Under existing rules, Class 1B drinking water standards apply to Class 2A waters. Minn. R. 7050.0222, subp. 3a. The MPCA is not considering expanding this protection to include Class 2Bdg waters. In fact, the MPCA is reviewing whether to remove Class 1B protection from Class 2A waters. (MPCA Class 2 Use Amendments, p. 19, fn.10). Removing drinking water standards from Class 2A waters is only one more, seemingly inexorable, plan by the MPCA to remove or reduce protection of waters from sulfate and other pollutants.

The effects of downgrading water bodies from Class 2Bg to Class 2Bm are not explained in the MPCA’s planned Class 2 Use Amendments. It is likely this removal of general aquatic uses would have major consequences in determining whether any efforts will be made to remediate or improve waters that are impaired due to pollution and anthropogenic alterations.

In addition to listing waters as impaired when pollutant concentrations exceed water quality standards, the MPCA lists waters as impaired under CWA section 303(d) when the Index of Biological Integrity (IBI) for fish or macroinvertebrates falls below a target score. The trigger

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<sup>3</sup> MPCA, Triennial Review Hearing, Mar. 9, 2021 (“TR Hrg.”) videotape at about 38:17-40, at <https://minnesota.webex.com/recordingservice/sites/minnesota/recording/fa7eb6f037e74e4bb509e31308db8158/playback>.

IBI score depends both on the type of stream and its classification, as illustrated in the chart on the next page, copied from the MPCA’s Class 2 Use Amendments, page 17. In a Low Gradient stream, for example, the IBI criterion for fish is 42 for general use and 15 for modified use. With a downgraded classification, a stream with a fish IBI of 19 would go from being impaired as a “general” use to meeting the low criterion of a “modified” use. Thus, no inquiry would be made to determine stressors or institute practices to mitigate adverse conditions.

**Table 4: Biological criteria for Exceptional, General, and Modified Uses (MPCA 2014a; Abbreviations: RR = high gradient, GP = low gradient).**

Class #	Class Name	Exceptional Use	General Use	Modified Use
<b>Fish</b>				
1	Southern Rivers	71	49	NA
2	Southern Streams	66	50	35
3	Southern Headwaters	74	55	33
4	Northern Rivers	67	38	NA
5	Northern Streams	61	47	35
6	Northern Headwaters	68	42	23
7	Low Gradient Streams	70	42	15
10	Southern Coldwater	82	50	NA
11	Northern Coldwater	60	35	NA
<b>Macroinvertebrates</b>				
1	Northern Forest Rivers	77	49	NA
2	Prairie Forest Rivers	63	31	NA
3	Northern Forest Streams RR	82	53	NA
4	Northern Forest Streams GP	76	51	37
5	Southern Streams RR	62	37	24
6	Southern Forest Streams GP	66	43	30
7	Prairie Streams GP	69	41	22
8	Northern Coldwater	52	32	NA
9	Southern Coldwater	72	43	NA

Recommendations:

Based on the foregoing discussion, WaterLegacy makes the following recommendations:

- 1) That the MPCA proceed to rulemaking on planned Class 2 Amendments that would upgrade water bodies from Class 2B to Class 2A uses and from Class 2Bg to Class 2Be uses. These planned changes in designated uses comply with the CWA and its implementing regulations.
- 2) That the MPCA defer planned Class 2 Amendments that would downgrade water bodies from Class 2A to Class 2B uses and from Class 2Bg to Class 2Bm uses. As proposed by MPCA, these removals of designated uses would violate the CWA, its implementing regulations, and state rules incorporating CWA standards.

- 3) That the MPCA discontinue plans to downgrade any Class 2A designations to Class 2B unless MPCA has met its burden of proof under the CWA and implementing regulations to establish individually for each water body:
  - A. That the water body did not support cold water aquatic communities at any time since November 28, 1975.
  - B. That the water body could not feasibly attain a use for cold water aquatic communities applying the criteria of a UAA.
- 4) That the MPCA discontinue plans to downgrade any Class 2Bg designations to Class 2Bm unless MPCA has met its burden of proof under the CWA and implementing regulations to establish individually for each water body:
  - A. That the water body did not support general aquatic use at any time since November 28, 1975.
  - B. That the water body could not feasibly attain general aquatic use applying the criteria of a UAA.
- 5) That for any waters proposed to be downgraded, the MPCA comply with its duty of candor under Minn. R. Minn. 7000.0300 and “with complete truthfulness, accuracy, and candor” disclose the following:
  - A. For each water body proposed to be downgraded from Class 2A to Class 2B disclose that drinking water standards, including the 250 mg/L limit on sulfate, will no longer apply to that water body.
  - B. For each water body proposed to be downgraded from Class 2Bg to Class 2Bm disclose the implications for impaired waters designation and restoration including: i) the IBI score for fish and macroinvertebrate assessments applicable to the water body under the current classification; ii) the IBI score that would apply under the proposed downgraded classification; iii) whether the water body is currently listed as an impaired water due to fish and/or macroinvertebrate assessments; and iv) whether the water body would be removed from Minnesota’s impaired waters list as a result of the reclassification.

WaterLegacy requests that the MPCA reconsider its planned Class 2 Use Amendments in order to comply with the CWA and its implementing regulations as described above.

Respectfully submitted,



Paula G. Maccabee  
WaterLegacy Advocacy Director and Counsel

RECEIVED

By: OAH on 04/19/2021 @10:24am

1441 140<sup>th</sup> Ln NW  
Andover, MN 55304  
April 14, 2021

Dear Judge Lipman:

Re: Weaker Water Quality Standards

ORH APR19 '21 AM10:24

I read with interest the Star Tribune article on which you were asked to make a decision/judgment on weaker water quality standards and I have a comment to make about that decision.

As a retired Ph.D. Analytical Chemist, I have difficulty with replacing "numeric standards" with "narrative description" of water standards. Having worked in the field of water quality during my career "narrative standards" do not work when quality of any item is set, e.g., sulfate analyses or other possible ion. Not knowing the full and complete discussions on either side presented to you, I understand that I may be missing critical data.

I have campaigned/voted for both parties in this wonderful and beautiful country, but I had a suspicion that more than an "objective" decision was reached. The Internet can be extremely helpful, and so while looking for an accurate address for you, I found that you are a republican, N.B., no capital on purpose, but that may explain your decision.

Sincerely,

Lawrence E. Cook

Lawrence E. Cook, Ph.D.

**§ 131.12**

Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

(2) *Toxic pollutants.* States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 35).

(b) Form of criteria: In establishing criteria, States should:

(1) Establish numerical values based on:

- (i) 304(a) Guidance; or
- (ii) 304(a) Guidance modified to reflect site-specific conditions; or
- (iii) Other scientifically defensible methods;

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

**§ 131.12 Antidegradation policy.**

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to

protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

**§ 131.13 General policies.**

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval.

**Subpart C—Procedures for Review and Revision of Water Quality Standards**

**§ 131.20 State review and revision of water quality standards.**

(a) *State review.* The State shall from time to time, but at least once every three years, hold public hearings for

## § 130.20

### WHAT THIS SUBPART COVERS

#### § 130.20 Who must comply with subpart C in this part?

(a) Subpart C applies to States, Territories, and authorized Tribes. The term “you” in this subpart refers to these three governmental entities.

(b) Portions of this subpart apply to the United States Environmental Protection Agency (EPA). When this is the case, the rule specifies EPA’s responsibilities and obligations.

#### § 130.21 What is the purpose of this subpart?

(a) This subpart explains how to identify and list impaired waterbodies and establish TMDLs in accordance with section 303(d) of the Clean Water Act. The subpart also explains how EPA reviews and approves or disapproves your lists and TMDLs. Specifically, the subpart explains how to:

(1) Assemble all existing and readily available water quality-related data and information;

(2) Document your methodology for considering and evaluating all existing and readily available water quality-related data and information to make decisions on your list and provide the methodology to EPA and the public;

(3) Identify impaired waterbodies to be included on the list and decide which of those waterbodies will have TMDLs established for them;

(4) Identify the pollutant or pollutants causing the impairment for all waterbodies on Part 1 of your list;

(5) Develop a prioritized schedule for establishing TMDLs for waterbodies on Part 1 of your list;

(6) Establish TMDLs for waterbodies on Part 1 of your list and submit them to EPA for review;

(7) Provide public notice and an opportunity for public comment on your methodology, your list, and TMDLs prior to final submission to EPA.

(b) It also explains how EPA must:

(1) Review and approve or disapprove your list of impaired waterbodies;

(2) Develop a list where you fail to do so or if EPA disapproves your list;

(3) Review and approve or disapprove your TMDLs;

(4) Establish TMDLs if you have not made substantial progress in estab-

## 40 CFR Ch. I (7–1–01 Edition)

lishing TMDLs in accordance with your approved schedule, or if EPA disapproves your TMDLs .

### LISTING IMPAIRED WATERBODIES, AND DOCUMENTING YOUR METHODOLOGY FOR MAKING LISTING DECISIONS

#### § 130.22 What data and information do you need to assemble and consider to identify and list impaired waterbodies?

(a) You need to assemble and consider all existing and readily available water quality-related data and information when you develop your list of impaired waterbodies.

(b) Existing and readily available water quality-related data and information includes at a minimum the data and information in and forming the basis for the following:

(1) Your most recent EPA approved section 303(d) list;

(2) Your most recent Clean Water Act section 305(b) report;

(3) Clean Water Act section 319 nonpoint source assessments;

(4) Drinking water source water assessments under section 1453 of the Safe Drinking Water Act;

(5) Dilution calculations, trend analyses, or predictive models for determining the physical, chemical or biological integrity of streams, rivers, lakes, and estuaries; and

(6) Data, information, and water quality problems reported from local, State, Territorial, or Federal agencies (especially the U.S. Geological Survey National Water Quality Assessment (NAWQA) and National Stream Quality Accounting Network (NASQAN)), Tribal governments, members of the public, and academic institutions.

#### § 130.23 How do you develop and document your methodology for considering and evaluating all existing and readily available data and information to develop your list?

(a) Your methodology needs to explain how you will consider and evaluate all existing and readily available water quality-related data and information to determine which waterbodies you will include on Parts 1, 2, 3, and 4 of your list, and to determine how you will prioritize your schedule for establishing TMDLs for

## Environmental Protection Agency

## § 130.24

waterbodies on Part 1 of your list. You must develop a draft methodology and notify the public of the availability of the draft methodology for review and comment. You should notify directly those who submit a written request for notification. You must provide the public an opportunity to submit comments on the draft methodology for no less than 60 days. You must provide a summary of all comments received and your responses to significant comments when you provide a copy of the final methodology to EPA, as required by §130.24 of this subpart. You must make your final methodology available to the public when you provide a copy to EPA.

(b) The methodology should explain how you will consider and evaluate the following types of data and information when you make listing decisions and develop your prioritized schedule for TMDL establishment:

- (1) Physical data and information;
- (2) Chemical data and information;
- (3) Biological data and information;
- (4) Aquatic and riparian habitat data and information; and
- (5) Other data and information about waterbody impairments, including drinking water susceptibility analyses.

(c) Your methodology should, at a minimum, identify those types of data and information that you will treat as “existing and readily available” and explain how you consider the following factors in making listing decisions and in developing your prioritized schedule for TMDL establishment:

- (1) Data quality and age;
- (2) Degree of confidence you have in the information you use to determine whether waterbodies are impaired, including a description of the quality assurance/quality control factors you will apply to data and information; and
- (3) Number and degree of exceedances of numeric or narrative criteria and periods of nonattainment of designated uses or other factors used to determine whether waterbodies are impaired.

(d) Your methodology should describe the procedures and methods you will use to collect ambient water quality information.

(e) Your methodology should, at a minimum, also include the following:

(1) A description of the selection factors you will use to include and remove waterbodies from your list;

(2) A process for resolving disagreements with other jurisdictions involving waterbodies crossed by State, Territorial, Tribal or international boundaries; and

(3) A description of the method and factors you will use to develop your prioritized schedule for establishing TMDLs.

### § 130.24 When must you provide your methodology to EPA?

(a)(1) If this section is not effective by May 1, 2001, you must provide to EPA a description of the methodology used to develop your 2002 list and a description of the data and information used to identify waters (including a description of the existing and readily available data and information used by the State, Territory, and authorized Tribe) by April 1, 2002. The provisions of §130.23(b) through (e) do not apply to this methodology.

(2) If this section is effective on or before May 1, 2001, you must provide your final methodology for your 2002 list and a summary of public comments on your methodology by November 1, 2001. This methodology will apply to the list required in 2002.

(b) You must provide to EPA the final methodology and a summary of public comments for your 2006 and subsequent lists submitted under §130.30(a) no later than two years before you submit your next list, beginning in the year 2004. For example, you provide to EPA the methodology for your 303(d) list for 2006 on or before April 1, 2004. When providing final methodologies to EPA, you need to provide only the parts of the previous methodology you are revising; however, prior to submitting your final methodology to EPA, the entire methodology must be available to the public.

(c) EPA will review your final methodology and will provide you with comments within 60 days of receiving it. EPA will not approve or disapprove your methodology. EPA will consider your methodology in its review and approval or disapproval of your next list.





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## Proposed Rule – Beneficial Use Designations

### *Water Quality Standards Use Designations (OAC Chapter 3745-1)*

#### **What does OAC Chapter 3745-1 cover?**

Ohio Administrative Code (OAC) Chapter 3745-1 contains Ohio's standards for water quality. Water quality standards are state regulations or rules that protect lakes, rivers, streams and other surface water bodies from pollution. These rules contain: beneficial use designations such as warmwater aquatic life habitat, public water supply and primary contact recreation; numeric levels and narrative statements (water quality criteria) protective of the beneficial use designations; and procedures for applying the water quality criteria to wastewater discharges. This rulemaking involves water body beneficial use designations.

#### **What are beneficial use designations?**

A goal of the Clean Water Act is to achieve fishable and swimmable conditions in water bodies, wherever attainable. The fishable and swimmable goals equate to the warmwater habitat (WWH) and primary contact recreation (PCR) use designations in OAC Chapter 3745-1. The use designations are defined in OAC rule 3745-1-07 and are briefly discussed below. The water quality criteria and values protective of the designated uses are found within OAC Chapter 3745-1.

Beneficial use designations are the water quality goals for lakes, rivers, streams and other water bodies. Designations include such uses as aquatic life habitats (warmwater, coldwater, etc.), recreation (bathing waters, primary contact, secondary contact) and water supplies (public, agricultural, industrial).

Beneficial use designations are assigned to specific water bodies in OAC Chapter 3745-1. Each of the 23 major drainage basins or watersheds in the state is assigned a rule in Chapter 3745-1. Specific water quality criteria are associated with each beneficial use and are the minimum specific target conditions to be maintained in the water bodies. Together the uses and criteria may be the basis for permit limits in wastewater discharge permits and conditions in Section 401 water quality certifications. Changes to designated uses are adopted as water quality standard rule revisions.

#### **Which water quality standards rule is under review at this time?**

This rulemaking consists of a review of the beneficial use designation rule for the Wabash River (OAC 3745-1-29) watershed. The Wabash River, which originates near Fort Recovery in west central Ohio, drains nearly 40,000 square miles as it flows for 509 miles from Ohio through Indiana and along the Indiana-Illinois border southward to its confluence with the Ohio River downstream of Evansville, Indiana. The Wabash River flows from Ohio into Indiana at river mile 466.10 in Mercer County, placing about 43 miles of the river or about 8% of its total length within Ohio (Figure 1). The drainage area at this point is about 309 square miles, which accounts for less than 1% of all the land surface that drains into the Wabash River. The major tributary to the Wabash River within Ohio is Beaver Creek, which enters the Wabash River at river mile 468.82. The Wabash River watershed is also home to Grand Lake St. Marys, Ohio's largest inland lake by surface area, which is hydrologically connected to the Wabash River via Beaver Creek. The Wabash River and its tributaries within Ohio lie within the Eastern Cornbelt Plains (ECBP) ecoregion.

#### **What changes are being proposed?**

State law and the federal Clean Water Act require Ohio EPA to periodically update rules to reflect the latest scientific information. The Agency has evaluated information regarding beneficial use designations for the drainage basin listed above. Three broad types of changes are being proposed:

- 1) Changing beneficial use designations for specific water bodies;
- 2) Adding water bodies that are currently undesignated to the rule; and
- 3) Verifying existing beneficial use designations already listed in the rule.

## Proposed Rule – Beneficial Use Designations November 2017

Changes, additions and verifications of existing beneficial use designations are based upon the findings of biological, habitat, and water quality surveys. Other available pertinent information is also consulted, including information and comments from interested persons. The paragraphs below explain the changes in more detail.

### Aquatic Life Use Designation Changes

The current aquatic life habitat use designations for 16 stream segments are proposed for revision and are highlighted below. The proposed revisions are summarized by drainage basin in Table 1, while specific details are listed in Table 2. Supporting documents containing data and information to support the proposed revisions are available on the Division of Surface Water web page at: <http://epa.ohio.gov/dsw/dswrules.aspx#120473215-proposed-rules>.

Most of the water bodies presently listed in OAC 3745-1-29 were assigned a WWH designation as part of the original designations assigned to water bodies in the State, prior to the development of Ohio's biological assessment program and biological criteria. The vast majority of original designations made in the 1970s and early 1980s was for the WWH use designation. While the reassignment of the aquatic life habitat use designation to a lower use for these water bodies may appear at first glance to be a "downgrade", this actually represents the first scientific assessment of most of these streams.

- Eleven water bodies currently designated WWH are proposed to be redesignated to Modified Warmwater Habitat (MWH). These water bodies are heavily channelized to maintain drainage to accommodate row crop agriculture and, as a result, the habitat quality is insufficient to support a WWH biological community. These streams lack functional pools and riffles, have minimal to no riparian corridors, have poor substrate quality, are deeply entrenched and lack stream energy (flow) due to very low gradient.
- Five water bodies currently designated WWH are proposed for redesignation to Limited Resource Water (LRW). Biological and habitat assessments of these water bodies were conducted for the first time and found not to support or have the potential to support, the WWH use due to pervasive impacts to the habitat associated with channel maintenance activities.
- No revisions are proposed to current aquatic life habitat use designations for any waterbodies tributary to Grand Lake St. Marys.

### Recreational Use Designation Changes

Most water bodies in the state are designated Primary Contact Recreation (PCR), defined as suitable for full-body contact recreation. The PCR designation represents the "swimmable" goals of the Clean Water Act. Some water bodies are designated Secondary Contact Recreation (SCR), defined as suitable for partial body contact. The determination of whether a water body should be designated PCR or SCR is based on a suite of factors such as the size of the water body, accessibility, and potential for use by children. The only numeric water quality criteria applicable to the recreational use designations are for *E. coli* bacteria.

As part of the 5-year basin biological survey cycle, Ohio EPA field staff occasionally sample streams that are in fact too small and too isolated to support the PCR use. In these cases, a recommendation is made to redesignate the water body SCR to reflect the recreational potential based upon field observations and data gathered during the stream survey.

In this rulemaking, thirteen currently undesignated water bodies are proposed for PCR based upon field observations of the water body and consideration of the factors mentioned above.

### Designations Specifically Assigned for the First Time

Only about one-third of surface water bodies in the state are specifically listed in the water quality standards rules. Those water bodies that are not listed are generally small, unnamed tributaries. As these unlisted water bodies are surveyed and appropriate use designations are determined, they are added to the rules.

With the exception of the biological criteria, the aquatic life water quality criteria applicable to water bodies that are not specifically listed in the rules are the same as those criteria associated with the WWH use designation.

Seven currently undesignated water bodies are proposed to be designated LRW as a result of pervasive habitat impacts related to historic and ongoing channel maintenance activities. A portion of one stream is proposed to be designated

## **Proposed Rule – Beneficial Use Designations November 2017**

MWH, also a result of habitat degradation associated with channel maintenance activity. The designation of LRW and MWH will result in the application of less stringent chemical criteria compared to that which applies to undesignated waters.

These eight water body segments that are proposed to be designated an aquatic life use for the first time, as described above, are also proposed to be designated PCR as well as Agricultural Water Supply (AWS) and Industrial Water Supply (IWS). The PCR, AWS, and IWS designations are also proposed for five additional streams for which an aquatic life use designation is being deferred at the present time pending the collection of additional biological and habitat data. The recreational water quality criteria applicable to water bodies that are not specifically listed in rules are the same as those criteria associated with the PCR use designation.

The AWS use designation is intended to prevent adverse effects occurring from use of surface waters to irrigate crops or to water livestock. There are AWS water quality criteria for fourteen chemicals, mostly heavy metals. The designation of water bodies as AWS will result in the application of those water quality criteria.

The IWS use designation is for the protection against adverse effects of the water on industrial processes. There are no specific IWS water quality criteria. Therefore, the designation of water bodies as IWS will not result in any changes to applicable water quality criteria.

### **Verification of Existing Use Designations**

As part of the stream survey process, the use designations identified in the water quality standards rules for many water bodies are verified to be correct. In this rulemaking, verifications of existing designated uses (typically WWH, AWS, IWS and PCR uses) are proposed for twenty water body segments. For these water bodies, the symbols identifying the use designations in the water quality standards rules will change from asterisks to plus signs to indicate that they are based on the results of stream surveys.

A list of stream designations proposed for verification is in Table 3 at the end of this fact sheet. Verifying stream designations does not result in any changes to applicable water quality criteria.

### **Where does the new information come from?**

The new information supporting the proposed revisions come from water body surveys. Ohio EPA has an ongoing 5-year basin monitoring schedule that rotates monitoring efforts across the state. The monitoring program consists of surveying the chemical, physical and biological characteristics of selected water bodies throughout the state each year, following the 5-year basin cycle. The purposes of these surveys include determining the present health and uses of the water bodies and predicting the potential health and uses of the water bodies if additional pollution controls were imposed. These proposed rule revisions, incorporating the results of a water body survey reflects the Agency's responsibility to assign beneficial water uses.

Although the Agency has used the water body survey approach to determine applicable use designations for over 30 years, many water bodies have still never been surveyed.

In the 1978 water quality standards rules, only a small number of water bodies were listed with their use designations, determined from information available at the time. All other surface water bodies were assigned the WWH and PCR use designations by default (consistent with baseline goals of the Clean Water Act).

The 1985 water quality standards rules listed all water bodies identified in the Ohio Department of Natural Resources Gazetteer of Ohio Streams and clearly identified their assigned use designations. For most water bodies, the WWH and PCR default use designations were carried over. The 1985 water quality standards rules and subsequent rulemakings included use designations resulting from water body surveys.

Since 1985, the water quality standards rules have distinguished between use designations carried over from the 1978 water quality standards (indicated by asterisks) and those based on the results of water body surveys (indicated by plus signs).

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For information on the current conditions of Ohio water bodies and trends in water quality, see the Ohio EPA Integrated Water Quality Monitoring and Assessment Report. It is available on the web at [epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx](http://epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx).

### How many water bodies are involved with these rule changes?

Results of water body surveys, indicate that additions/changes in the current beneficial use designations are needed for 29 water body segments in one drainage basin. In addition, verifications of existing designations are included for 20 water body segments in one drainage basins.

Table 1 lists the rule and identifies the types of changes being proposed. Figure 1 shows the location of the Wabash drainage basin, which is the only part of the state for which changes are being proposed. Specific use designation changes for each water body being considered for revisions and for verifications are listed in Tables 2 and 3, respectively, at the end of this fact sheet.

### How will the changes affect controls placed on water pollution?

Revisions to designated uses can bring about changes to applicable water quality criteria and ultimately can impact permit limits in cases where those limits are water-quality based. In cases where lower use designations result in the application of less stringent chemical criteria, lower effluent limits for wastewater dischargers may be required.

When a water body's use designation becomes less stringent, existing dischargers must continue the same treatment as before. However, if an existing facility expands its operation or a new facility commences discharging, less stringent pollution controls may be needed to meet the water quality standards for the less stringent use designations.

Detailed information regarding the differences between chemical criteria that apply to various use designations can be viewed in Ohio's water quality standards, available on the at [epa.ohio.gov/dsw/rules/3745\\_1.aspx](http://epa.ohio.gov/dsw/rules/3745_1.aspx) as well as on tables summarizing aquatic life and human health criteria, available on the web at [epa.ohio.gov/dsw/wqs/criteria.aspx](http://epa.ohio.gov/dsw/wqs/criteria.aspx).

Overall, there should be no impact as a result of the water body use designation changes, verifications and additions associated with this rulemaking on water pollution controls based upon a review of existing dischargers to these stream segments. This is based on either a lack of change to the criteria that already apply to most of these water bodies, a lack of regulated discharges to water bodies where more stringent criteria would apply, or less stringent criteria that would apply for water bodies where the MWH or LRW aquatic life habitat use is proposed.

### What additional information is the Agency seeking?

The Agency is seeking comments from interested stakeholders (public, local officials, and National Pollutant Discharge Elimination System [NPDES] permit holders, industry sectors, other state agencies, consultants and environmental organizations) who may be impacted by these proposed use designation revisions and additions. General comments and specific factual information are welcome. Data on resident fish and macroinvertebrate communities and the physical habitat conditions of the water body are most pertinent to assignment of the proper aquatic life use designation. Data collection must be consistent with acceptable quality assurance protocols to be considered valid.

### How are the amendments formatted in the proposed rule?

The existing rule will be rescinded in its entirety and marked "To Be Rescinded" at the top of each page. It will be replaced with new rule OAC 3745-1-29, with all text underlined. This is due to revision to more than 50% of the rule.

### What is the rulemaking schedule?

A public hearing on the proposed rules will be held to consider public comments in accordance with Section 119.03 of the Ohio Revised Code. This hearing will be held at the **Ohio EPA Conference Center, Room A, 50 West Town Street, Suite 700, in Columbus, Ohio at 10:30 a.m. on December 18, 2017**. The purpose of the public hearing is to give interested persons the opportunity to present oral or written comments on the proposed rules.

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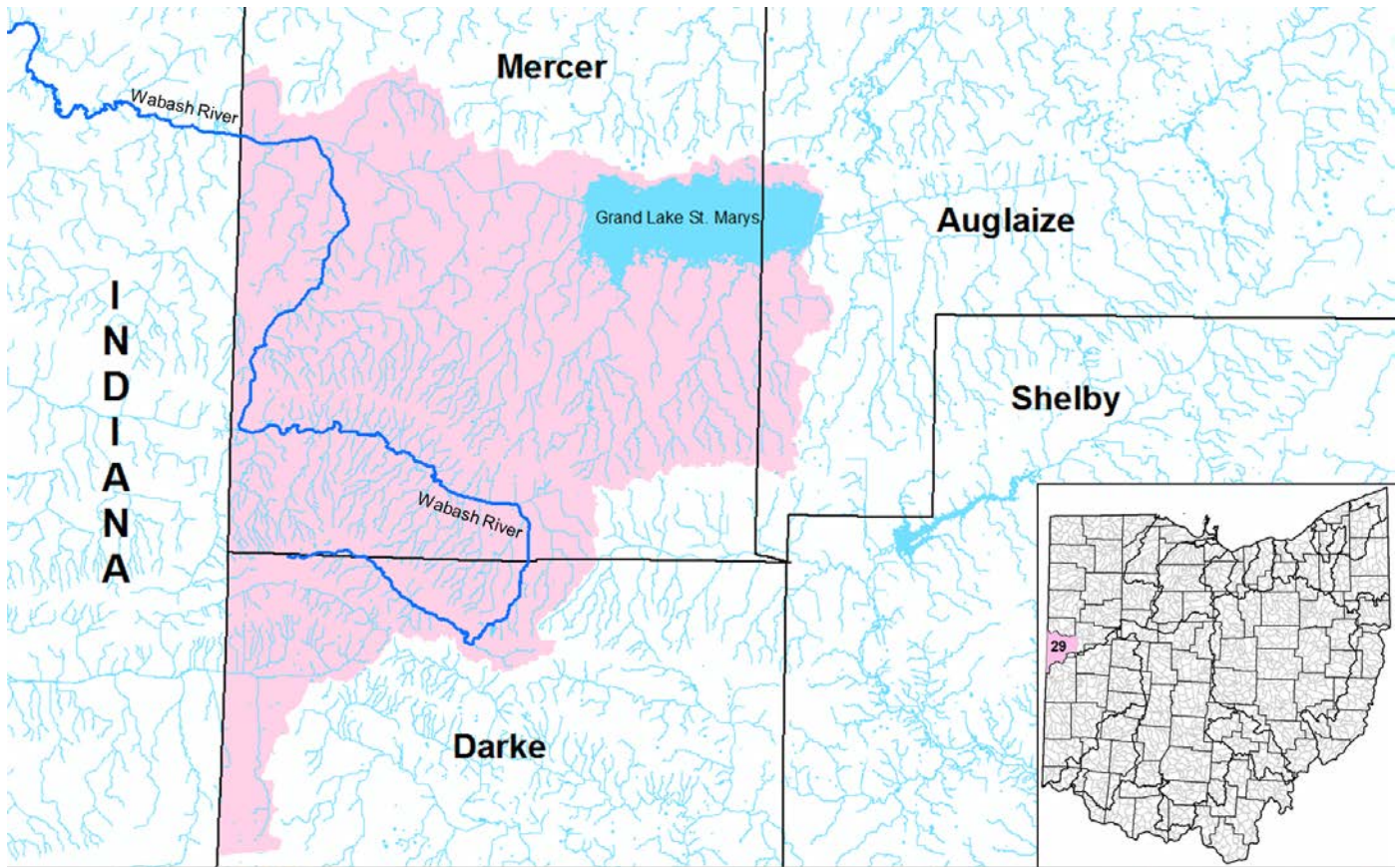
At the close of the public comment period, the Agency will review the comments, make any necessary changes to the rules, and then adopt the rules. This is roughly a two-month process from the close of the comment period. A responsiveness summary will be prepared and sent to everyone who comments on the proposed rules. Final rules could be adopted in early 2018.

**Table 1. Reasons for Rule Revisions**

<b>Rule #</b>	<b>Drainage Basin</b>	<b>New Additions</b>	<b>Use Designation Changes</b>	<b>Use Designation Verifications</b>	<b># Water Body Segments Added/Changed/Verified</b>
3745-1-29	Wabash River Basin	X	X	X	13/16/20

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Figure 1. Rule and Associated Drainage Basin where Revisions Are Proposed



## How can I comment on the proposed rule?

Please submit your comments in one of the following ways:

- By email: [dsw\\_rulecomments@epa.ohio.gov](mailto:dsw_rulecomments@epa.ohio.gov)
- By fax: (614) 644-2745
- By postal mail:  
Rule Coordinator  
Ohio EPA, Division of Surface Water  
P.O. Box 1049  
Columbus, OH 43216-1049

Comments on the proposed rule must be received no later than 5:00 p.m. **December 18, 2017.**

## How can I get more information?

Copies of this fact sheet, CSI form and the proposed rule are on the Division of Surface Water website at [epa.ohio.gov/dsw/dswrules.aspx](http://epa.ohio.gov/dsw/dswrules.aspx). For additional background information on water quality standards and beneficial uses, please visit the Water Quality Standards Program web page at: [epa.ohio.gov/dsw/wqs/index.aspx](http://epa.ohio.gov/dsw/wqs/index.aspx). The existing rules in OAC Chapter 3745-1 are available at: [epa.ohio.gov/dsw/rules/3745\\_1.aspx](http://epa.ohio.gov/dsw/rules/3745_1.aspx). The biological and water quality studies upon which the rule revisions are based are available at: [epa.ohio.gov/dsw/document\\_index/psdindx.aspx](http://epa.ohio.gov/dsw/document_index/psdindx.aspx).

For more information about these proposed rules, please contact:

Daniel Dudley  
(614) 644-2876  
[daniel.dudley@epa.ohio.gov](mailto:daniel.dudley@epa.ohio.gov)

# Proposed Rule – Beneficial Use Designations

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**Table 2. Summary of Proposed Revisions**

Page #*	Water Body Segment	Existing Designated Uses**	Proposed Revisions
<b>Wabash River Drainage Basin, OAC 3745-1-29</b>			
2	Wabash River – headwaters to Rhynard Fink Road (RM 502.17)	WWH, AWS, IWS, PCR	Designate LRW-SDM in lieu of WWH
2	Wabash River – Rhynard Fink Road (RM 502.17) to Stony Creek (RM 481.40)	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
2	Hickory Branch	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
2	Beaver Creek	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
2	Prairie Creek – headwaters to Erastus Durbin Road (RM 3.08)	None	Designate LRW-SDM, AWS, IWS, PCR
2	Prairie Creek – Erastus Durbin Road (RM 3.08) to the mouth	None	Designate MWH-CM, AWS, IWS, PCR
2	Big Run	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
2	Little Beaver Creek	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
2	Little Bear Creek	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
2	Hardin Creek	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
3	Prairie Creek	None	Designate AWS, IWS, PCR
3	Little Chickasaw Creek <sup>A</sup>	WWH, AWS, IWS, PCR	None <sup>A</sup>
3	Chickasaw Creek <sup>A</sup>	WWH, AWS, IWS, PCR	None <sup>A</sup>
3	East Fork Chickasaw Creek <sup>A</sup>	WWH, AWS, IWS, PCR	None <sup>A</sup>
3	Barnes Creek	None	Designate AWS, IWS, PCR
3	Crab Branch	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
3	Toti Creek	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
3	Unnamed tributary at Toti Creek RM 2.13	None	Designate LRW-SDM, AWS, IWS, PCR
3	Henry Creek	None	Designate AWS, IWS, PCR
3	Fort Creek	None	Designate AWS, IWS, PCR
3	Unnamed tributary at Fort Creek RM 2.17	None	Designate AWS, IWS, PCR
3	Threemile Creek	WWH, AWS, IWS, PCR	Designate LRW-SDM in lieu of WWH
3	Unnamed tributary at Wabash River RM 489.32	None	Designate LRW-SDM, AWS, IWS, PCR
3	Unnamed tributary at Wabash River RM 491.06	None	Designate LRW-SDM, AWS, IWS, PCR
3	Unnamed tributary at Wabash River RM 492.03	None	Designate LRW-SDM, AWS, IWS, PCR
4	Unnamed tributary at Wabash River RM 492.95	None	Designate LRW-SDM, AWS, IWS, PCR
4	Bear Creek (Wabash River RM 494.25) – headwaters to Watkins Road (RM 1.8)	WWH, AWS, IWS, PCR	Designate LRW-SDM in lieu of WWH

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Page #*	Water Body Segment	Existing Designated Uses**	Proposed Revisions
4	Bear Creek (Wabash River RM 494.25) – Watkins Road (RM 1.8) to the mouth	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH
4	Ward Ditch (Wabash River RM 494.77)	WWH, AWS, IWS, PCR	Designate LRW-SDM in lieu of WWH
4	Jordan Ditch	WWH, AWS, IWS, PCR	Designate LRW-SDM in lieu of WWH
4	Unnamed tributary at Mississinewa River RM 109.33	None	Designate LRW-SDM, AWS, IWS, PCR
4	Gray Branch	WWH, AWS, IWS, PCR	Designate MWH-CM in lieu of WWH

\* The page numbers listed in the table refer to page numbers in the amended rules.

\*\* As indicated in OAC 3745-1-29.

^ Stream is being moved to OAC 3745-1-29 since it is a tributary within the Wabash River drainage basin.

### **Index of Acronyms Used**

The following acronyms are used in this table. Designated uses are defined in OAC 3745-1-07.

AWS = Agricultural Water Supply

IWS = Industrial Water Supply

LRW-SDM = Limited Resource Water-Small Drainageway Maintenance

MWH-CM = Modified Warmwater Habitat – Channel Modification

PCR = Primary Contact Recreation

SCR = Secondary Contact Recreation

WWH = Warmwater Habitat

RM = River Mile. The river mile is a point location describing the lineal distance from the downstream terminus (i.e., mouth) and moving in an upstream direction.



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**Table 3. Summary of Existing Use Designations Proposed for Verification**

Page #*	Water Body Segment	Existing Designations Proposed for Verification**
<b>Wabash River Drainage Basin, OAC 3745-1-29</b>		
2	Wabash River – Stony Creek (RM 481.4) to the Indiana state line (RM 466.1)	WWH, AWS, IWS, PCR
2	Wabash River – all other segments	AWS, IWS, PCR
2	Hickory Branch	AWS, IWS, PCR
2	Big Run	AWS, IWS, PCR
2	Little Beaver Creek	PCR
2	Little Bear Creek	AWS, IWS, PCR
2	Hardin Creek	AWS, IWS, PCR
2	Coldwater Creek	AWS, IWS, PCR
2	Burntwood Creek	AWS, IWS, PCR
2	Beaver Creek	AWS, IWS, PCR
2	Crab Creek	AWS, IWS, PCR
2	Toti Creek	AWS, IWS, PCR
2	Stony Creek (Simison Creek)	AWS, IWS, PCR
3	Twomile Creek	AWS, IWS, PCR
3	Threemile Creek	AWS, IWS, PCR
3	Bear Creek (all segments)	AWS, IWS, PCR
3	Ward Ditch	AWS, IWS, PCR
3	Mississinewa River	AWS, IWS
3	Jordan Ditch	AWS, IWS, PCR
3	Grays Branch	AWS, IWS, PCR

\* The page numbers listed in the table refer to page numbers in the amended rules.

\*\* As indicated in OAC 3745-1-29.

## **Index of Acronyms Used**

The following acronyms are used in this table. Designated uses are defined in OAC 3745-1-07.

WWH = Warmwater Habitat

AWS = Agricultural Water Supply

PCR = Primary Contact Recreation

IWS = Industrial Water Supply

RM = River Mile. The river mile is a point location describing the lineal distance from the downstream terminus (i.e., mouth) and moving in an upstream direction.