This file contains documents relevant to the water quality variance rulemaking. Documents are listed sequentially by date order.	

#### **AGENDA**

# STAKEHOLDER INFORMATION MEETING PRELIMINARY DRAFT OF THE WATER QUALITY VARIANCE RULES

Date: July 22, 2013

Time: 9:00 a.m. - 11:00 a.m.

**Location:** MPCA Citizens' Board Room, MPCA Office, St. Paul; and Webcast

Meeting Objective: Share draft rule language and clarify intent of rulemaking so that stakeholders are				
· ·	able to provide:			
Verbal input at the meeting				
· W	<ul> <li>Written, informal comments by August 5, 2013</li> </ul>			
9:00	Introduction and Goal of Meeting – Katrina Kessler or Shannon Lotthammer			
	Meeting logistics and format			
	· Introductions			
	Purpose of rulemaking			
9:10	Overview of the Rule Process – Mary H Lynn			
	Rule process and schedule			
9:20	Background on Rules – Elise Doucette			
9:35	Discussion and Walk Through Draft Rule Changes – Elise Doucette			
	Questions and stakeholder input by rule parts:			
	Applicability			
	Notice of variances			
	Conditions for granting			
	Submittal and notice requirements			
	Agency final decision; variance requirements			
	• Renewal			
	Time frame and review			
10:55	Next Steps – Mary H Lynn			
11:00	Adjourn			

### HOW TO SUBMIT WRITTEN COMMENTS ON THE PRELIMINARY DRAFT OF THE WATER QUALITY VARIANCE RULES

After the July 22, 2013, meeting, stakeholders may submit any additional written feedback on the draft rules no later than end of day August 5, 2013, to <a href="mary.lynn@state.mn.us">mary.lynn@state.mn.us</a>.

Please identify the rule parts you are commenting on, explain why you agree or disagree, suggest alternatives or provide examples if possible to illustrate your ideas. Please note that we are gathering input informally at this point and will not be responding in writing to comments received.

#### MPCA Rulemaking: Water Quality Variance Rules

Stakeholder Information Meeting on Preliminary Draft Rule Amendments MPCA St. Paul and Webcast

July 22, 2013

#### Agenda

- Introduction and Goal of Meeting
- Overview of Rule Process
- Background on Rules
- Discussion of Rule Changes
  - Questions and Stakeholder Input
- Next Steps



#### Introduction and Goal of Meeting

- Katrina Kessler Water Assessment Section Manager
- Elise Doucette Rule Technical
- Mary H. Lynn Rule Coordinator
- Meeting participants

# Overview of the Rule Revision Process | Adoption | Ado

#### Rule Schedule (proposed)

- Request for Comments 10/2012, 3/2013
- Develop rules and Statement of Need & Reasonableness (SONAR)
- ▶ Publish notice of proposed rules 1/2014
- Final adoption of rules -
  - Without a hearing 3 months after notice
  - With a hearing 6 months after notice
    - Late spring 2014

#### **Background on Rules**

- Clean Water Act allows for water quality variances
- Rule effort to make Minnesota's variance rules consistent with Federal Regulations
- MPCA is updating water quality variance rules
  - Changes in federal regulations and policy for variances
     Some rules date back to 1960s
- MPCA process improvement project in June 2012 identified need to update water quality variance rules

#### **Background on Rules**

Updates to the rules are needed to -

- Provide consistency statewide between the different state water variance rules
- Align state water variance rules with federal quidance
- Provide clarity and transparency in variance decision-making and process

#### **Background on Rules**

- MPCA is <u>not</u> making variance approval easier
- Variances are temporary
- Provide clarity and transparency in variance process
- Under the Clean Water Act, variances must protect beneficial uses
  - (e.g. swimming and fishing)
- Variances cannot remove an existing use
- Variances issued through NPDES permits

#### Discussion of Rule Changes

Format for discussion -

- Purpose of the proposed change
- Why the change is being made
- Answer questions

#### Discussion of Rule Changes

Focus of discussion -

- Minn. R. 7050.0190 statewide standards, not including Lake Superior Basin
- Minn. R. 7052.0280 Lake Superior Basin
- Minn. R. 7053 Treatment system requirements and state discharge restrictions

#### Discussion of Rule Changes

Subparts to serve as a guide -

- Applicability
- Notice of variances
- Conditions for granting
- Submittal and notice requirements
- Agency final decision; variance requirements
- Renewal
- > Time frame and review

#### **Next Steps**

- Send written comments on preliminary draft rule by 8/5/13 to Mary H. Lynn at mary.lynn@state.mn.us
- MPCA staff review and consider comments; revise draft rules as needed, based on input
   Complete SONAR
- Public notice proposed rules January 2014

#### Questions?

Send e-mail questions to: mary.lynn@state.mn.us



#### Focus of Rule:

#### Amendments to Rules Governing the Issuance of Water Quality Variances

The Minnesota Pollution Control Agency (MPCA) is updating its water quality variance rules. Variance provisions currently exist in several different water quality rules and the procedures under which a variance may be granted are different in each rule. Some parts of Minnesota's rules date back to the 1960's. Since then, the U.S. Environmental Protection Agency has made changes to its federal regulations and policy concerning variances.

This effort will make Minnesota's variance rules consistent with the Clean Water Act. Revisions to the rules are needed to: 1) provide consistency statewide between the different state water variance rules; 2) align state water rules with federal guidance; and 3) provide clarity and transparency in variance decision-making and process.

This document contains preliminary draft rule language for variances to water quality standards and effluent discharge restrictions. The MPCA is not making approval of a variance easier. The conditions for granting a variance, based on federal guidance, remain the same. These rules will maintain the rigorous review all variances have received in the past.

- This document contains draft rule language that is currently being considered by the MPCA.
   This is not final language and it is the Agency's intent to seek formal comments from stakeholders during the formal public comment period on the proposed rule.
- Underlined text generally indicates proposed language, deleted language is struck-out, and current rule language is plain.

#### 7050.0190 VARIANCE FROM STANDARDS.

Subpart 1. Variance. Applicability. In any case where, upon application of the responsible person or persons, the agency finds that by reason of exceptional circumstances the strict enforcement of any provision of these standards would cause undue hardship, that disposal of the sewage, industrial waste, or other waste is necessary for the public health, safety, or welfare; and that strict conformity with the standards would be unreasonable, impractical, or not feasible under the circumstances; the agency in its discretion may grant a variance therefrom upon such conditions as it may prescribe for prevention, control, or abatement of pollution in harmony with the general purposes of these classifications and standards and the intent of the applicable state and federal laws. This part applies to variance requests from individual point source discharges to surface waters of the state for any provision of this chapter that is included in a permit. The United States Environmental Protection Agency shall be advised of any permits that may be issued under this part, together with information as to the need therefore for the variance. A water quality standards or criteria variance must not be granted if:

- A. the variance would jeopardize the continued existence of any endangered or threatened species listed under chapter 6134 or section 4 of the Endangered Species Act, United States Code, title 16, section 1533, or result in destruction or adverse modification of such species' critical habitat; or
- B. standards or criteria will be attained by implementing effluent limitations required under sections 301(b) and 306 of the Clean Water Act, United States Code, title 33, sections 1311(b) and 1316, and by the permittee implementing cost-effective and reasonable best management practices for nonpoint sources under the permittee's control as established under state authority.
- **Subp. 2**. **Listing. Notice of variances.** By October 1 each year, the commissioner shall prepare a list of the variances in effect granted by the agency under this part. The list must be available for public inspection and must be provided to the United States Environmental Protection Agency. The list must identify the person granted the variance, the rule from which the variance was granted, the water affected, the year granted, and any restrictions that apply in lieu of the rule requirement.

**Subp.3.** Review. Variances from water quality standards granted by the agency under this part shall be subject to agency and public review at least every three years. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195. Variances may be modified or suspended under the procedures in part 7000.7000.

## **Subp. 4. Conditions for granting.** The agency may grant a variance if the permittee:

- A. <u>demonstrates to the agency that attaining the water quality standard or criterion is not feasible because:</u>
- (1) <u>naturally occurring pollutant concentrations prevent attainment of</u> the water quality standard or criterion;
- (2) natural, ephemeral, intermittent, or low-flow conditions or water levels prevent the attainment of water quality standards or criteria, unless these conditions may be compensated for by discharging sufficient volume of effluent to enable water quality standards or criteria to be met without violating the water conservation requirements of Minnesota Statutes, chapter 103G;
- (3) <u>human-caused conditions or sources of pollution prevent the</u>

  attainment of water quality standards or criteria and the conditions or sources cannot be remedied, or would cause more environmental damage to correct than to leave in place;
- (4) dams, diversions, or other types of hydrologic modifications preclude the attainment of water quality standards or criteria, and it is not feasible to restore the waterbody to its original condition or to operate the modification in a way that would result in attainment of the water quality standard;
- (5) physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate cover, flow, depth, pools, riffles, and the like, unrelated to chemical water quality, preclude attainment of water quality standards or criteria; or
- (6) controls more stringent than those required under sections 301(b) and 306 of the Clean Water Act, United States Code, title 33, sections 1311(b) and 1316, would result in substantial and widespread negative economic and social impacts;

- B. shows that the variance conforms with parts 7050.0180 and 7050.0185; and
- C. characterizes the extent of any increased risk to human health and the environment associated with granting the variance, such that the agency is able to conclude that any increased risk is consistent with the protection of the public health, safety, and welfare.
- **Subp. 5. Submittal and notice requirements.** Variance application submittal, public notice of preliminary determination, and notice requirements must conform to part 7000.7000.
- **Subp. 6. Agency final decision: variance requirements.** The agency must issue a final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000. If a variance is granted, it must include and incorporate into the permit:
- A. an effluent limitation representing currently achievable treatment conditions based on discharge monitoring or projected effluent quality that is no less stringent than that achieved under the previous permit;
- B. <u>a schedule of compliance activities for attaining water quality standards or criteria;</u>
- C. an effluent limitation sufficient to meet the underlying water quality standard or criterion, upon the expiration of the variance, when the duration of the variance is shorter than the duration of the permit; and
- D. <u>a provision allowing the agency to reopen and modify the permit based on agency triennial water quality standards revisions applicable to the variance.</u>
- **Subp. 7. Renewal.** The renewal of a variance is subject to the requirements of subparts 1 to 6.
- Subp. 8. Time frame and review. A variance from a water quality standard or criteria for toxic pollutants is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to

subpart 7. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195.

# 7052.0280 VARIANCES FROM WATER QUALITY STANDARDS OR CRITERIA.

**Subpart 1. Applicability.** This part applies to GLI pollutant-specific variance requests from individual point source dischargers to surface waters of the state in the Lake Superior Basin for WQBELs which are included in a permit. This part does not apply to new dischargers, unless the proposed discharge is necessary to alleviate an imminent and substantial danger to public health and welfare. A water quality standards or criteria variance must not be granted if any of the following conditions exist:

A. if it the variance would jeopardize the continued existence of any endangered or threatened species listed under chapter 6134 or section 4 of the Endangered Species Act, United States Code, title 16, section 1533, or result in destruction or adverse modification of such species' critical habitat; or

B. if-standards or criteria will be attained by implementing effluent limitations required under sections 301(b) and 306 of the Clean Water Act, United States Code, title 33, sections 1311(b) and 1316, and by the permittee implementing cost-effective and reasonable best management practices for nonpoint sources under the permitte's control as established under state authority.

Subp. 2. Maximum Ttime frame and review. A variance must not exceed five years or the term of the permit, whichever is less. A GLI pollutant-specific variance is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to subpart 6. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195.

**Subp. 3. Conditions to grant a variance for granting.** The agency-must may grant a variance if the following conditions are met permittee:

A. the permittee demonstrates to the agency that attaining the water quality standard or criterion is not feasible because:

- (1) naturally occurring GLI pollutant concentrations prevent attainment of the water quality standard or criterion;
- (2) natural, ephemeral, intermittent, or low-flow conditions or water levels prevent the attainment of water quality standards or criteria, unless these conditions may be compensated for by discharging sufficient volume of effluent to enable water quality standards or criteria to be met without violating the water conservation requirements of Minnesota Statutes, chapter 103G;
- (3) human-caused conditions or sources of pollution prevent the attainment of water quality standards or criteria and cannot be remedied, or would cause more environmental damage to correct than to leave in place;
- (4) dams, diversions, or other types of hydrologic modifications preclude the attainment of water quality standards or criteria, and it is not feasible to restore the waterbody to its original condition or to operate the modification in a way that would result in attainment of the water quality standard;
- (5) physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate cover, flow, depth, pools, riffles, and the like, unrelated to chemical water quality, preclude attainment of water quality standards or criteria; or
- (6) controls more stringent than those required under sections 301(b) and 306 of the Clean Water Act, United States Code, title 33, sections 1311(b) and 1316, would result in substantial and widespread economic and social impact;
- B. the permittee shows that the variance conforms with agency nondegradation procedures parts 7050.0180 and 7050.0185; and
- C. the permittee characterizes the extent of any increased risk to human health and the environment associated with granting the variance, such that the agency is able to conclude that any increased risk is consistent with the protection of the public health, safety, and welfare.

- **Subp. 4.** Variance application submittal, public notice of preliminary determination, Submittal and notice requirements. Variance application submittal, public notice of preliminary determination, and notice requirements must conform to part 7000.7000.
- **Subp. 5. Agency final decision; variance requirements.** The agency must issue a final decision regarding the variance request that conforms to the procedural requirements in part <u>7000.7000</u>. If a variance is granted, it must include and incorporate into the permit the following conditions:

A. an effluent limitation representing currently achievable treatment conditions based on discharge monitoring or projected effluent quality. If the variance is being considered for renewal, the effluent limitation shall be which is no less stringent than that achieved under the previous permit;

B. a schedule of compliance activities for attaining water quality standards or criteria:

C. an effluent limitation sufficient to meet the underlying water quality standard or criterion, upon the expiration of the variance, when the duration of the variance is shorter than the duration of the permit;

D. a provision allowing the agency to reopen and modify the permit based on agency triennial water quality standards revisions applicable to the variance; and

E. for BCCs, a GLI pollutant minimization program consistent with part <u>7052.0250</u>, subpart 4.

- **Subp. 6. Renewal of variance.** The renewal of a variance is subject to the requirements of subparts 1 to 5.
- **Subp. 7. Notice of variances.** The agency must list all variances to state water quality standards as required in part <u>7050.0190</u>, subpart 2.

#### 7053.0195 VARIANCE FROM TREATMENT REQUIREMENTS.

**Subpart 1. Variance.** <u>Applicability</u>. In any case when, upon application of the responsible person or persons, the agency finds that by reason of exceptional

circumstances the strict enforcement of any provision of this chapter would cause undue hardship; that disposal of the sewage, industrial waste, or other waste is necessary for the public health, safety, or welfare; and that strict conformity with the effluent limits would be unreasonable, impractical, or not feasible under the circumstances, the agency in its discretion may grant a variance upon conditions it prescribes for prevention, control, or abatement of pollution in harmony with the general purposes of this chapter and the intent of the applicable state and federal laws. The United States Environmental Protection Agency shall be advised of any permits that may be issued under this subpart, together with information as to the need for the variance. This part applies to variance requests from individual point source dischargers to surface waters of the state for any provisions of this chapter that is included in a permit. The United States Environmental Protection Agency shall be advised of any permits that may be issued under this part, together with information as to the need for the variance. An effluent limit variance must not be granted if any of the conditions specified in part 7050.0190, subpart 1, items A and B, exist.

**Subp. 2. Listing. Notice of variances.** By October 1 each year The commissioner shall prepare a list of the variances in effect granted by the agency under this part <u>as</u> required in part 7050.0190, subpart 2. The list must be available for public inspection and must be provided to the United States Environmental Protection Agency. The list must identify the person granted the variance, the rule from which the variance was granted, the water affected, the year granted, and any restrictions that apply in lieu of the rule

**Subp. 3. Review** Variances from discharge effluent limits or treatment requirements granted by the agency under this part are subject to agency and public review at least every five years. Variances from water quality standards are granted by the agency under parts 7000.7000 and 7050.0190. Variances may be modified or suspended under the procedures in part 7000.7000.

**Subp. 4. Conditions for granting.** The conditions to grant a variance under this part are specified in part 7050.0190, subpart 4.

Subp. 5. Submittal and notice requirements. Variance application submittal, public notice of preliminary determination, and notice requirements must conform to part 7000.7000.

Subp. 6. Agency final decision; variance requirements. The agency must issue a final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000. If a variance is granted, it must include and incorporate into the permit the provisions specified in part 7050.0190, subpart 6.

**Subp. 7. Renewal.** The renewal of a variance is subject to the requirements of subparts 1 to 6.

Subp. 8. Time frame and review. A variance from a discharge effluent limit or treatment requirement is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to subpart 7. Variances from water quality standards are granted by the agency under parts 7000.7000 and 7050.0190.



#### UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5 77 WEST JACKSON BOULEVARD CHICAGO, IL 60604-3590

JUL 19 2013

REPLY TO THE ATTENTION OF: WQ-16J

Ms. Elise Doucette Environmental Analysis and Outcomes Division Minnesota Pollution Control Agency 520 Lafayette Road North St. Paul. Minnesota 55155

Dear Ms. Doucette:

Recently, the Minnesota Pollution Control Agency (MPCA) published a request for comments on draft amendments to Minnesota's Administrative Rules governing water quality standards variances at 7050.0190 and 7052.0280. The U.S. Environmental Protection Agency has reviewed the revisions to chapters 7050.0190 and 7052.0280 for consistency with the requirements of section 303(c) of the Clean Water Act (CWA) and federal regulations at 40 CFR 131 and 132. Our comments are enclosed. We did not review amendments to chapter 7053.0195 as the variances contemplated by 7053.0195 are not from water quality standards and are therefore not subject to review and approval by EPA under section 303(c) of the CWA. These comments do not constitute formal Agency action but are provided for your consideration as you prepare your rules for submittal for review and approval by EPA under section 303(c) of the CWA.

Thank you for the opportunity to provide input on MPCA's draft rule revisions. If you have any questions, please contact me at (312) 886-6758, or Robie Anson of my staff, at (312) 886-1502 or anson.robie@epa.gov.

Sincerely,

Linda Holst, Chief

Water Quality Branch

Luda Holst

Enclosure

#### **Enclosure**

#### General comments on the proposed revisions to Minnesota's variance rules:

Outside of the Great Lakes basin, state variance rules must be consistent with the provisions of 40 CFR 131 pertaining to designating uses (40 CFR 131.10). Within the Great Lakes basin there are specific variance provisions in the Great Lakes Water Quality Guidance at 40 CFR 132, Appendix F, Procedure 2, for variances from standards required by the guidance to protect aquatic life, human health and wildlife within the Great Lakes basin. Since the applicable federal regulations differ according to geography and standards, MN should ensure that the revised rules are clear on the circumstances that are subject to the requirements of 7050.0190 and those that are subject to the requirements of 7052.0280. EPA's comments below attempt to provide this clarification where we believe it to be appropriate. It will be important to revisit this issue as Minnesota revises the proposed rules in response to public comments received.

#### Revisions to 7050.0190

General comment: EPA's understanding is that Minnesota's rules at 7050.0190 apply to all variances from water quality standards except for standards, criteria, and values adopted or derived pursuant to Minnesota's water quality standards for the Lake Superior basin in Minnesota's rules at Chapter 7052, adopted by Minnesota to comply with requirements of the Great Lakes Water Quality Guidance at 40 CFR 132, and approved by EPA pursuant to the requirements of section 118 of the Clean Water Act and the Federal regulations at 40 CFR 132.

**Subpart 1.** Applicability. New text: "This part applies to variance requests from individual point source discharges to surface waters of the state for any provision of this chapter that is included in a permit."

**Comment:** This language is very broad and may need to be refined to ensure that it does not authorize variances from elements of Minnesota's water quality standards that go beyond what is contemplated by the Clean Water Act and applicable Federal regulations, which is limited to situations where a use is demonstrated not to be attainable for a defined period of time. For example, EPA cannot approve a variance from protection of existing uses or a variance from having to do an antidegradation review.

[Revised text] Subp. 2. Listing. Notice of variances. By October 1 each year, the commissioner shall prepare a list of the variances in effect granted by the agency under this part. The list must be available for public inspection and must be provided to the United States Environmental Protection Agency. The list must identify the person granted the variance, the

rule from which the variance was granted, the water affected, the year granted, and any restrictions that apply in lieu of the rule requirement.

Comments: The revised rules should explicitly state that variances are revisions to Minnesota's water quality standards, and, consistent with Federal regulations at 40 CFR 131.20 and 131.21 must be submitted to and approved by EPA in accordance with 303(c) before they can become effective. In the past, Minnesota has provided EPA with an annual list of variances. If the intent of this subpart is only to address this annual reporting, then it would be appropriate to acknowledge the requirement for submittal to and approval by EPA of variances elsewhere in the revised rules, perhaps at subpart 6. For the annual reporting, including the expiration date for the variances from water quality standards reported would increase the value of this reporting to EPA.

**Subp.3. Review. Deleted text:** Variances from water quality standards granted by the agency under this part shall be subject to agency and public review at least every three years. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195. Variances may be modified or suspended under the procedures in part 7000.7000.

Comment: To ensure consistency with the CWA, variances should be reviewed periodically, at least once every three years, consistent with the Federal regulations at 131.20 which require that any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Clean Water Act be re-examined every three years to determine if any new information indicates that the uses specified in section 101(a)(2) of the Clean Water Act are attainable. Procedure 2 in Appendix F of the Great Lakes Guidance at 40 CFR 132 addresses this requirement, stating, "[a] state shall review, and modify as necessary, WQS variances as part of each water quality standards review pursuant to section 303(c) of the CWA."

[New text] Subp. 4. Conditions for granting. The agency may grant a variance if the permittee:

A. demonstrates to the agency that attaining the water quality standard or criterion is not feasible because:

**Comments:** Subpart 4 addresses the issue of attainability of water quality standards. Minnesota should ensure that the information provided by an applicant for a variance from water quality standards also includes sufficient information to allow Minnesota to determine the water quality currently attained by the applicant and the best water quality attainable over the lifespan of the variance. This information is important in evaluating the proposed variance for protection of existing uses and in establishing permit conditions to implement the variance if the variance is approved by EPA. Also, EPA believes that, in the context of Subp. 4. A. (1-6) and elsewhere

(e.g., Subp. 6. B., Subp. 8.), Minnesota intends the term "criteria" to refer to water quality values that are derived using the procedures in Minnesota's rules as a numeric expression of Minnesota's approved narrative water quality criteria. Clarification may be appropriate to prevent misinterpretation later.

[New text] Subp. 4. A. (5) physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate cover, flow, depth, pools, riffles, and the like, unrelated to chemical water quality, preclude attainment of water quality standards or criteria; or

**Comment:** In the federal regulations, use of this factor is limited to variances or UAAs from aquatic life uses/criteria.

[New text] Subp. 4. B.: a schedule of compliance activities for attaining water quality standards or criteria;

**Comment:** EPA's experience with variances for more intractable water quality standards attainment issues such as mercury suggests that a clear path to the ultimate attainment of the unvaried water quality standards may not be apparent in all situations, although to the extent that a path to attainment is known, it should be presented. In either case, variances should include a plan for improving water quality and moving towards attainment of the unvaried water quality standards. It may be appropriate for Minnesota to consider the proposed revisions to this provision in light of Minnesota's response to EPA's comments on 7050.0190 Subp. 8.

[New text] Subp. 5. Submittal and notice requirements. Variance application submittal, public notice of preliminary determination, and notice requirements must conform to part 7000.7000.

**Comments:** Minnesota's rules at chapter 7000.7000 of Minnesota's Administrative Rules refer to a "permanent variance." Variances from water quality standards under Federal regulations at 40 CFR 131 and 132 are necessarily temporary with a specified expiration date, to distinguish a variance from a revision of water quality standards to modify or remove a use that is shown to be not attainable consistent with the processes described in the Federal regulations 40 CFR 131.10.

Minnesota's rules at 7000.7000 also require variance applicants to submit a comprehensive plan to reduce discharges to "the lowest limits practical." As discussed in the comments on Subp. 4. above, variances from water quality standards submitted to EPA for review and approval must include an evaluation of the highest water quality achievable during the period of the variance by the applicant for the variance and describe a plan by which that water quality will be achieved.

[New text] Subp. 6. Agency final decision; variance requirements. The agency must issue a final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000. If a variance is granted, it must include and incorporate into the permit:

Comment: Replace "and incorporate into the permit" with "for incorporation into the permit"

[New text] Subp. 6.B. a schedule of compliance activities for attaining water quality standards or criteria;

Comment: See comment on Subp. 4. B. above.

[New text] Subp. 8. Time frame and review. A variance from a water quality standard or criteria for toxic pollutants is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to subpart 7. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195.

**Comments:** As stated in the comment on Subp. 5. above, all variances from water quality standards are temporary and must specify a specific expiration date.

The reason for the use of the term, "toxic" in this paragraph is unclear.

#### Revisions to 7052.0280

#### General comment:

EPA's understanding is that Minnesota's rules at 7052.0280 apply to all variances from water quality standards, criteria, and values adopted or derived pursuant to Minnesota's water quality standards for the Lake Superior basin in Minnesota's rules at Chapter 7052, adopted by Minnesota to comply with requirements of the Great Lakes Water Quality Guidance at 40 CFR 132, and approved by EPA pursuant to the requirements of section 118 of the Clean Water Act and the Federal regulations at 40 CFR 132.

## [Revised text] 7052.0280 VARIANCES FROM WATER QUALITY STANDARDS OR CRITERIA.

[Revised text] Subpart 1. Applicability. This part applies to GLI pollutant-specific variance requests from individual point source dischargers to surface waters of the state in the Lake Superior Basin for WQBELs which are included in a permit. This part does not apply to new dischargers, unless the proposed discharge is necessary to alleviate an imminent and substantial danger to public health and welfare. A water quality standards or criteria variance must not be granted if any of the following conditions exist:

**Comments:** Minnesota's proposed deletion of the sentence prohibiting variances for new discharges appears to conflict with the requirements of 40 CFR 132, Appendix F, Procedure 2 and would appear to be a barrier to EPA approval of this change.

[Revised text] Subp. 2. Maximum Ttime frame and review. A variance must not exceed five years or the term of the permit, whichever is less. A GLI pollutant-specific variance is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to subpart 6. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195.

**Comment:** Federal regulations at 40 CFR 132 explicitly state that variances can be granted for no longer than 5 years. The revisions proposed are not consistent with the five-year restriction on duration of variances from the water quality standards adopted by Minnesota pursuant to 40 CFR 132. Minnesota should retain the unrevised langage of Subp. 2.

[Revised text] Subp. 5. Agency final decision; variance requirements. The agency must issue a final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000. If a variance is granted, it must include and incorporate into the permit-the following conditions:

Comment: Replace "and incorporate into the permit" with "for incorporation into the permit"

[Existing text] Subp. 5. B.: a schedule of compliance activities for attaining water quality standards or criteria;

**Comment:** Is this provision intended to correspond to the requirement at 40 CFR 132 Appendix F, Procedure 2(F)(2) that "reasonable progress be made toward attaining the water quality standards for the waterbody as a whole through appropriate conditions?" Depending upon Minnesota's intent, it may be appropriate for Minnesota to consider the proposed revisions to this provision in light Minnesota's response to EPA's comments on Subp. 2.

[Revised text] Subp. 5. C.: an effluent limitation sufficient to meet the underlying water quality standard or criterion, upon the expiration of the variance, when the duration of the variance is shorter than the duration of the permit;

**Comment:** It may be appropriate for Minnesota to consider the proposed revisions to this provision in light of Minnesota's response to EPA's comments on Subp. 2.

[Revised text] Subp. 6. Renewal of variance. The renewal of a variance is subject to the requirements of subparts 1 to 5.

**Comment:** Federal regulations at 40 CFR 132, Appendix F, Procedure 2.H. allow states to consider the permittee's history of compliance with the conditions of a preceding variance in evaluating whether or not to grant a renewal.



1326 E. Skyline Parkway Duluth, Minnesota 55805 jane.reyer@gmail.com

August 5, 2013

Elise Doucette Minnesota Pollution Control Agency 520 Lafayette Rd. St. Paul, MN 55155

Re: Water Quality Variance Rulemaking

Dear Ms. Doucette,

Thank you for the opportunity to hear about the proposed changes to Minnesota's water quality variance regulations on July 22. This letter is a follow-up to my comments at that meeting, and is written on behalf of Save Our Sky Blue Waters (SOSBW), an organization dedicated to protecting the waters, ecosystems, and wildlife of Minnesota's Arrowhead region. The points we feel most strongly about were also brought up by the U.S. EPA in its letter of July 19. I reiterate them to support the EPA's objections.

The language of 7050.0190 (1), "This part applies to variance requests . . . for any provision of this chapter" may lead to arguments that variances are available for requirements that cannot be circumvented. The EPA mentions the protection of existing uses and antidegradation review; I would add the prohibition on new or increased discharges to impaired waters without a TMDL.

Rule 7050.0190(8) states that if a facility has submitted an application for permit and variance renewal, a variance remains in effect until the MPCA acts on the application. Permit renewals and variance applications sometimes languish for years, with no movement toward meeting water quality standards. We support EPA's insistence that variances must include a specific expiration date.

Most importantly, we agree with EPA that deletion of the 7052.0280 (1) language, "This part does not apply to new dischargers" conflicts with federal regulations, and thus cannot be approved.

We would like to suggest that in the interest of conformity throughout the state (one of the goals of this rulemaking) and of cleaner water, MPCA extend the prohibition on variances for new discharges to the rest of the state. If the regulations are interpreted correctly, there should be no situation in which a new discharger meets the variance requirements. For example, the most commonly-used variance provision is "controls would result in substantial and widespread negative economic and social impacts." This language makes sense when applied to, for example, the impact of shutting down an existing industry. It does not make sense when applied to a new industry that does not actually exist yet. Any negative impacts an area experiences are a result of what has happened in its past, not of the virtually unlimited number of things that may or may not come to town in the future. These regulations were drafted by the EPA to apply to a situation in which variances are not available to new discharges, as a review of the EPA economic guidance makes clear. They become nonsensical when applied to new discharges.

I would like to reiterate SOSBW's disappointment in general with MPCA's failure to require that dischargers do everything possible to meet water quality standards. We believe that several dischargers with variances could meet the standards, but have stonewalled because they simply do not want to spend the money, and MPCA has allowed them to continue. In particular, we are repeatedly disappointed in variances that require studies and monitoring, but no actual movement toward cleaner discharges. We encourage MCPA to start including schedules of specific actions that improve water quality (such as building a new treatment plant, if that is what is needed) in variances. Variances should be treated more as a means to give a discharger an extension of time to comply with standards, and less as a means to wiggle out of them for another permit term.

Finally, Save Our Sky Blue Waters supports Water Legacy's request that the language stating that existing uses must be maintained be included in the regulatory language. This is a federal requirement that MCPA clearly intends to follow, and it seems to serve no purpose other than obfuscation not to state it explicitly in the regulations.

In general, we agree that the current non-Lake Superior regulations are unintelligible and need to be amended, and thus we support this effort. We hope it will result in cleaner water.

Sincerely,	
Jane Reyer	



August 5, 2013

Ms. Mary Lynn Minnesota Pollution Control Agency 520 Lafayette Road St. Paul, MN 55155-4194

Re: Request For Comments on Planned Amendments to Rules Governing Water Quality Variances, Minnesota Rules Chapters 7050 and 7053

Dear Ms. Lynn:

The Minnesota Chamber of Commerce (Chamber) is pleased to provide these comments on the draft amendments to rules governing water quality variances. The Chamber thinks that the following changes are helpful and should be adopted:

Updating variance rules to align with federal rules and recent case law

Overall, the agency appears to want to align state variance rules with federal rules and recent case law. That is commendable, but as noted below, needs to be a precise alignment, and not a paraphrased alignment as appears to occur throughout the draft rules.

 Aligning variances to permits, and allowing variances to continue with permit reissuance (with the required 3-year review separate from permit issuance or reissuance)

The proposed changes to MN Rules 7050.0190, Subp 8 are appropriate, particularly as variances will be reviewed as part of the triennial water quality standards review every three years:

"Subp. 8. Time frame and review. A variance from a water quality standard or criteria for toxic pollutants is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the

discharger requests a renewal of the variance according to subpart 7. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195." (Emphasis added).

Similarly the proposed changes to MN rules 7052.0280, Subp 2 are also appropriate, for the same reason:

"Subp. 2. Maximum Time frame and review. A variance must not exceed five years or the term of the permit, whichever is less. A GLI pollutant-specific variance is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to subpart 6. Variances from discharge effluent limits and treatment requirements are granted by the agency under parts 7000.7000 and 7053.0195." (Emphasis added)

Finally, the proposed changes to MN Rules 7053.0195, Subp 2 are also appropriate, for the same reasons:

"Subp. 8. Time frame and review. A variance from a discharge effluent limit or treatment requirement is issued through a permit and for no longer than the term of the permit, so that if the facility meets the requirements of part 7001.0160, the variance will continue as a condition of the permit until the agency takes final action. The agency shall review the variance if the discharger requests a renewal of the variance according to subpart 7. Variances from water quality standards are granted by the agency under parts 7000.7000 and 7050.0190." (Emphasis added)

However, there are a number of changes which seem to go beyond the helpful changes, and which contradict or contravene the benefits associated with their adoption:

• Confusing "designated uses" for "water quality standards and criteria"
In adopting the language of 40 CFR 131.10(g), MPCA has substituted the phrase "standard or criterion" for the word "use", and eliminate the word "use". At MN Rules 7050.0190, Subp. 4, the language provides:

"Subp. 4. Conditions for granting. The agency may grant a variance if the permittee:

A. demonstrates to the agency that attaining the water quality **standard or criterion** is not feasible because:

- (1) naturally occurring pollutant concentrations prevent attainment of the water quality standard or criterion;
- (2) natural, ephemeral, intermittent, or low-flow conditions or water levels prevent the attainment of water quality standards or criteria, unless these conditions may be compensated for by discharging sufficient volume of effluent to enable water quality standards or criteria to be met without violating the water conservation requirements of Minnesota Statutes, chapter 103G;
- (3) human-caused conditions or sources of pollution prevent the attainment of water quality standards or criteria and the conditions or sources cannot be remedied, or would cause more environmental damage to correct than to leave in place;
- (4) dams, diversions, or other types of hydrologic modifications preclude the attainment of water quality **standards or criteria**, and it is not feasible to restore the waterbody to its original condition or to operate the modification in a way that would result in attainment of the water quality standard;
- (5) physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate cover, flow, depth, pools, riffles, and the like, unrelated to chemical water quality, preclude attainment of water quality standards or criteria; or
- (6) controls more stringent than those required under sections 301(b) and 306 of the Clean Water Act, United States Code, title 33, sections 1311(b) and 1316, would result in substantial and widespread negative economic and social impacts; "(emphasis added)

This language needlessly causes confusion. The precise requirements in 40 CFR 131.10(g) provides:

- (g) States may remove **a designated use which is not an existing use, as defined in § 131.3**, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:
- (1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
- (2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of **the use**, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
- (3) Human caused conditions or sources of pollution prevent the attainment of **the use** and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

- (4) Dams, diversions or other types of hydrologic modifications preclude the attainment of **the use**, and it 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**; or
- (5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
- (6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact. (Emphasis added)

MPCA is reminded that a variance is a "temporary modification to the designated use and associated water quality criteria that would otherwise apply".¹ As noted in EPA Guidance:

"The legal basis for granting a variance is that the state has fulfilled the same regulatory requirement for removing a designated use (the complete legal history is found in Section 5.3 of EPA's Water Quality Standards Handbook, 1994). As such, a variance is a revised WQS that must be supported on the basis of one of the factors specified in 40 CFR § 131.10(g), and requires EPA review and approval before it can be effective for Clean Water Act (CWA) purposes (40 CFR § 131.21(c))."

While the Chamber approves of adopting the federal standards and policies for approval of variances, the precise federal language must be preserved. The exact language of 40 CFR 131.10(g) must be included, using the word "use" where so in the federal rules, and not the words "standard or criterion".

• Requiring more than "reasonable progress" towards attaining water quality standards during the course of the variance

In proposed MN Rules 7050.0190, subp 6.B, the MPCA sets forth a proposed condition for granting a variance:

"B. a schedule of compliance activities for attaining water quality standards or criteria;"

It is not a requirement of the federal rules that the schedule of compliance results in actual attainment of water quality standards or criteria, but "reasonable progress" for improving water

<sup>&</sup>lt;sup>a</sup> Environmental Protection Agency (EPA), Region 7 Variances to Water Quality Standards Procedural Guidelines

<sup>2</sup> Ibio

quality and moving towards attainment of the unvaried standards or criteria. MPCA should rewrite Subp 6.B of proposed MN Rules 7050.0190 as follows:

"B. a schedule of compliance activities for demonstrating reasonable progress in improving water quality and moving towards attainment of the designated use;"

In proposed MN Rules 7050.0190, subp 6.D, the MPCA appears to be reserving rights which the MPCA has as a matter of course and law. This seems redundant and could be eliminated.

 Applying requirements applicable only in the Great Lakes Basin more broadly throughout the state.

In proposed MN Rules 7050.0190, Subp 1, the MPCA sets forth the following criteria for not granting variances:

"A water quality standards or criteria variance must not be granted if:

A. the variance would jeopardize the continued existence of any endangered or threatened species listed under chapter 6134 or section 4 of the Endangered Species Act, United States Code, title 16, section 1533, or result in destruction or adverse modification of such species' critical habitat; or

B. standards or criteria will be attained by implementing effluent limitations required under sections 301(b) and 306 of the Clean Water Act, United States Code, title 33, sections 1311(b) and 1316, and by the permittee implementing cost-effective and reasonable best management practices for nonpoint sources under the permittee's control as established under state authority."

These criteria, proposed to be applicable to all waters of the state, are a more or less direct quote from 40 CFR 132 Appendix F, Procedure 2. As such, they are applicable to the Great Lakes Basin, and while probably included in proposed MN Rules Chapter 7052, they are an unnecessary expansion of Great Lakes requirements to other waters of the state. These criteria should be removed from proposed MN Rules 7050.0190.

- Including the 3-year review cycle within "Time Frame and Review" section
  In the proposed MN Rules 7050.0190, Subp 8, the MPCA should consider including language that variances will be reviewed on a three-year basis, as part of the triennial review of water quality standards. Alternatively, the section that addresses three year review should be referenced in this section.
- New discharges in Great Lakes Basin

In proposed MN Rules 7052.0280, subp. 1, the MPCA has proposed to delete the following language:

"This part does not apply to new dischargers, unless the proposed discharge is necessary to alleviate an imminent and substantial danger to public health and welfare."

This language appears counter to the requirements of 40 CFR 132, Appendix F, Procedure 2. However, the agency should limit the inability to issue variances to new dischargers to only those pollutants which 40 CFR 132.3, including Tables 1 through 4. The Chamber's view is that only these pollutants are subject to this restriction, which would allow the MPCA to provide variances for other pollutants not subject to 40 CFR 132.

- Permissive rather than mandatory language for granting variances in the Great Lakes Basin In Proposed MN Rules 7052.0280, Subp 3, MPCA proposes to change the word "must" to "may" in "The agency must may grant a variance if the following conditions are met permittee:". MPCA should be obligated to issue a variance, provided the permittee meets the requirements of Minnesota rule. The word "must" ought to be reinstated.
- Proposed MN Rules Chapter 7053

The inclusion of language in MN Rules Chapter 7053 seems confusing, and seems to reiterate, but in a different form and with different language, the requirements in MN Rules Chapters 7050 and 7052. The Chamber recommends deleting all the language regarding variances from proposed MN Rules Chapter 7053, and rely solely on the more precise language of MN Rules Chapters 7050 and 7052.

#### Fishable Swimmable Uses

A broader issue that we have is applying variances to uses other than "fishable, swimmable" uses. In adopting the federal criteria for use attainability analyses as the criteria for issuing variances (e.g. the criteria at 40 CFR 131.10(g), MPCA should further consider the requirements of 40 CFR 131.10(j) (1 and 2):

- "(j) A State must conduct a use attainability analysis as described in § 131.3(g) whenever:
  - (1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or

(2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to adopt subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria"

Section 101(a)(2) of the Clean Water Act provides for "fishable and swimmable" uses:

"SEC. 101 Declaration of Goals and Policy

(a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act--

...

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;"<sup>8</sup>

The designated uses that appear to be covered by this portion of the Act include only Class 2 uses: "Aquatic life and recreation includes all waters of the state that support or may support fish, other aquatic life, bathing, boating, or other recreational purposes and for which quality control is or may be necessary to protect aquatic or terrestrial life or their habitats or the public health, safety, or welfare"

arguably, Class 4B:

"The quality of Class 4B waters of the state shall be such as to permit their use by livestock and wildlife without inhibition or injurious effects. The standards for substances, characteristics, or pollutants given below shall not be exceeded in the waters of the state"

and perhaps the wild rice requirements of Class 4A:

"Sulfates (SO<sub>4</sub>) 10 mg/L, applicable to water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels."  $^{6}$ 

However, the uses for Class 1 (domestic consumption), Class 3 (industrial consumption), Class 4A (excluding wild rice – irrigation), Class 5 (aesthetic enjoyment and navigation), Class 6 (other uses and protection of border waters) and Class 7 waters (limited resource value waters) are not "uses specified in section 101(a)(2) of the Act". Rather, they are uses specified in section 303(c) of the Clean Water Act.

<sup>&</sup>lt;sup>3</sup> 33 U.S.C. 1251

<sup>4</sup> MN Rules 7050.0140, subpart 3

<sup>&</sup>lt;sup>5</sup> MN Rules 7050.0224, subpart 3

<sup>&</sup>lt;sup>6</sup> MN Rules 7050.0224, subpart 2

As such, they do not require the same level of rigor in granting variances as do those uses specified in Section 101(a) (2) of the Act. Given the MPCA's scarce resources, and given the lack of a mandate in the Clean Water Act, the Chamber suggests that the MPCA include language that the test for granting a variance from the "non-101(a) (2) CWA" uses be based upon the ability to meet the existing water quality standards using the minimum treatment "required by sections 301(b) and 306 of the Act."<sup>7</sup>

Another consideration is that the MPCA has indicated that it intends to modify several of these standards as part of the triennial review of water quality standards (e.g. Class 3B, Class 3C, Class 4A and 4Bo. Until such time as the agency makes a final determination as to whether or what extent it will modify these standards, it does not seem worth the agency's limited resources, or permittees resources to conduct extensive, rigorous variance proceedings to protect these uses, particularly when such proceedings do not appear to be required under the Clean Water Act.

Sincerely

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Director, Environmental Policy

Keith Hanson

Water Quality Subcommittee Chair

<sup>&</sup>lt;sup>7</sup> 40 CFR 131.2



#### Southern Minnesota Beet Sugar Cooperative

P. O. Box 500, 83550 County Road 21, Renville, Minnesota 56284

August 5, 2013

Ms. Mary Lynn Minnesota Pollution Control Agency 520 Lafayette Road N St. Paul, Minnesota 55155-4194

Re: Request For Informal Comments on Preliminary Draft Rules Governing Water Quality Variances (Minnesota Rules Chapters 7050, 7052, and 7053)

Dear Ms. Lynn:

Southern Minnesota Beet Sugar Cooperative (SMBSC) is pleased to have the opportunity to provide informal comments on Minnesota Pollution Control Agency's (MPCA) preliminary draft rules governing water quality variances.

MPCA has provided three reasons for updating the rules at this time:

- 1. Align the state-wide water quality variance conditions to be consistent with federal requirements,
- Streamline review of variances by clarifying the conditions under which a variance is granted, and
- 3. Address inconsistencies in existing rules.

SMBSC's comments are summarized below and addressed in more detail in the following pages:

- As proposed, the duration of the variance should continue for the duration of the permit.
- Because federal requirements are currently undergoing review and being amended, it is SMBSC's opinion that MPCA should not update the rules at this time.
- The draft rules go beyond federal requirements for other uses (uses other than fishable, swimmable).
- The term "water quality standard or criterion" should not be substituted for "use".

Email: info@smbsc.com Website: www.smbsc.com

• The MPCA should acknowledge that certain intractable water quality standard attainment issues exist and that a clear path to attainment may not be known and this understanding should be reflected in the rules.

As proposed, the duration of the variance should continue for the duration of the permit.

The proposed changes to MN Rules 7050.0190, Subp 8 are appropriate, particularly as variances will be reviewed as part of the triennial water quality standards review every three years. The preliminary draft rules provide a transparent articulation of MPCA's current policy. Expressly aligning variance duration with permit duration would minimize difficulties that can arise for both permittees and staff during periods when a variance holder/permittee operates under an expired permit.

Because Federal requirements are currently undergoing review and being amended, it is SMBSC's opinion that MPCA should not update the variance rules at this time.

MPCA, during its July 22 presentation on the preliminary draft rules, indicated that EPA is in the process of revising federal requirements (CFR 131)<sup>1</sup>. The preliminary draft variance rules were created with the stated intent of bringing state variance rules into alignment with federal requirements, specifically CFR 131. In SMBSC's opinion, MPCA cannot accomplish the goal of aligning rules with federal requirements, if the federal requirements (CFR 131) will be modified concurrently or soon after MPCA's rule revision.

The heart of MPCA's preliminary draft rule is the insertion of language from 40 CFR 131.10(g) nearly verbatim into the proposed variance rule. According to 40 CFR 131.10(g), States can remove a designated use that is not an existing use, adopt a subcategory of use, or grant a variance, if the state can demonstrate that the designated use is not feasible because of one or more of the factors described in 40 CFR 131.10(g). If MPCA proceeds with the current rule revision, it is very possible and perhaps likely that the new rule will not be in alignment with the concurrently revised EPA requirements. Thus one of MPCA's goals for the current rule revision will not be achieved—the revised rule cannot be consistent with federal requirements if the federal requirements are concurrently being revised.

<sup>&</sup>lt;sup>1</sup> Regulation Identifier Number (RIN) 2040-AF16; Docket Number EPA-HQ-OW-2010-0606; Phase 1--Pre-proposal Phase. Source: <a href="http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2040-AF16?opendocument#1">http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2040-AF16?opendocument#1</a>

It is SMBSC's opinion that MPCA should table the variance rule revision until the federal requirements have been revised. MPCA's current rules along with recently published guidance and variance application forms have already streamlined review of variances by clarifying the conditions under which a variance is granted. This will suffice until EPA clarifies federal requirements. A short term inconsistency is preferable to conducting two rulemakings in quick succession—one now and one later when the federal requirements have been updated.

Further, it is SMBSC's opinion that MPCA should move its revision of Class 3 and Class 4 water quality standards up on the rule-making docket<sup>2</sup>. The pending WQS rule revisions will clarify Class 3 and 4 uses, eliminating the need for variances in waters where designated uses are likely to never be attained. The current rules designate irrigation and industrial use to nearly all Minnesota waters, even though those uses are not attainable, or are at best seasonally attainable. Many past, existing, and future variances in Minnesota are related to irrigation and industrial uses in Class 4 and Class 3. MPCA has been working on WQS rule revisions since 2008, MPCA is not currently providing a timetable for completion<sup>3</sup>. Many Minnesota industrial dischargers (including SMBSC)) and many municipalities that fall under MPCA's NPDES Permitting Strategy for Salty Dischargers<sup>4</sup> find themselves needing to meet water quality based effluent limits (WQBELs) based upon the existing WQSs "as soon as possible" or submit an application for a variance. MPCA's completion of the rule revision for Class 3 and 4 standards would clearly establish future WQSs based upon more realistic designated uses and up-to-date standards.

## The preliminary draft variance rules go beyond federal requirements for other uses (uses other than fishable, swimmable).

MPCA's preliminary draft variance rules extend federal requirements to other uses (uses not associated with fishable swimmable). CFR 131.10(g) is applicable only to Section 101(a)(2) of the CWA—i.e., fishable, swimmable goals. MPCA's use of CFR 131.10(g) in its proposed draft variance rules would then apply these federal requirements to other uses such as irrigation and

<sup>&</sup>lt;sup>2</sup> SMBSC understands that the WQS associated with sulfate and wild-rice requires significant scientific research and public comment—as such, this should be put on a separate path from the other Class 3 and 4 WQS rule revisions.

<sup>&</sup>lt;sup>3</sup> MPCA, July 12, 2013. Public Rulemaking Docket.

<sup>&</sup>lt;sup>4</sup> MPCA, March 2010. NPDES Permitting Strategy for Salty Discharges.

industrial use (i.e., uses added by the states under Section 303(c)(2) of the CWA). MPCA states that its goal with these rule revisions is to align with, not go beyond, federal requirements.

During MPCA's July 22 presentation on the preliminary draft variance rules, MPCA did not clearly state that it intended to exceed federal requirements in this aspect of the rulemaking. If MPCA so intends, then MPCA should be transparent in explaining its intent to the public and should state that the proposed rule revision goes beyond federal requirements. If MPCA does not have such an intent, then MPCA should clarify the rule..

The term "water quality standard or criterion" should not be substituted for "use". In adopting the language of 40 CFR 131.10(g) into MN Rules 7050.0190 Subp. 4, MPCA has substituted the phrase "standard or criterion" for the word "use". This substituted language needlessly causes confusion and the precise federal language should be employed.

MPCA's direct substitution of "water quality" for "use" is confusing, and this confusing quality of the phrasing can be illustrated by the following excerpt from Water Environment Research Foundation (WERF)<sup>5</sup>:

"The question of whether a use is being attained, or could be attained, is often judged solely on the basis of whether the current statewide criteria are or could be met. Although this assessment approach is the simplest and easiest, it is too narrow because sometimes uses can be met even if statewide criteria cannot be met. For example, salmonid spawning or rearing is being attained even though temperatures or metals concentrations in the stream or river exceed statewide criteria. In addition, the opposite can occur where water quality criteria may or could be met, but the designated use cannot be met because of other factors such as poor habitat conditions. This latter example is one condition that UAAs are intended to address. ... In cases where uses are met but criteria are not, development of site-specific criteria... or application of the natural background conditions clause... would appear to make the most sense."

Consequently, if the revised rules are to designed to mimic 40 CFR 131.10(g), then the precise language must be included, using the word "use" where used in the federal rules.

<sup>&</sup>lt;sup>5</sup> WERF, 2005. "Collaborative Water Quality Solutions: Exploring Use Attainability Analyses"; National Association of Clean Water Agencies (NACWA) and the Water Environment Research Federation (WERF).

MPCA should acknowledge that certain intractable water quality standard attainment issues exist and that a clear path to attainment may not be known.

In MN Rule Ch. 7050.0190 Subp. 6.B requires that:

"If a variance is granted, it must include and incorporate into the permit...a schedule of compliance activities *for* attaining water quality standards or criteria" (emphasis added).

As EPA noted in its comment letter<sup>6</sup>, certain intractable water quality issues exist where a clear and technically feasible path may not exist at the time the variance is granted. In these cases, *progress toward* attaining water quality standards is the standard that needs to be required, while still recognizing that all variances are temporary. EPA cites mercury as an example of such an intractable water quality issue. We also reference dissolved minerals and compliance with Class 3 and 4 WQS as additional examples. [Did I understand this point correctly?].

SMBSC suggests the following revision to Subp. 6B to address this concern:

"If a variance is granted, it must include and incorporate into the permit...a schedule of compliance activities *for progress toward* attaining water quality standards or criteria" (emphasis added).

Please do not hesitate to contact me for clarification or discussion at 320-329-4156 or knieperl@smbsc.com.

Respectfully submitted,

Southern Minnesôta Beet Sugar Cooperative

Louis H. Knieper.

Manager of Environmental Affairs

Cc: Brandon Smith, MPCA

Mike Drysdale, Dorsey

Dale Finnesgaard, Barr

<sup>&</sup>lt;sup>6</sup> U.S. EPA Region 5, July 19, 2013 Letter to MPCA, regarding comments on MPCA's preliminary draft variance rules.