WaterLegacy
Protecting Minnesota's waters and the communities who rely on them

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February 12, 2016

SENT ELECTRONICALLY
Administrative Law Judge Barbara J. Case (barbara.case@state.mn.us)
Office of Administrative Hearings
600 Robert Street North
St Paul, MN 55101

RE: OAH Rulemaking Docket 82-9003-32864
Proposed Amendments of MPCA Variance Rules, Chapters 7050, 7052 and 7053

Dear Judge Case:

These comments are submitted on behalf of WaterLegacy. WaterLegacy is a Minnesota non-profit formed to protect Minnesota's water resources and the communities that rely on them. We have over 9,000 members and supporters actively engaged in preventing water pollution in the Lake Superior Basin and throughout Minnesota.

We appreciated the opportunity to participate in the hearing conducted on February 4, 2016 regarding the Minnesota Pollution Control Agency's (MPCA) proposed amendments to water quality variance rules. We welcome the chance to provide our analysis and specific recommended language in order to ensure that MPCA proposed variance rules are no less stringent than federal regulations, as is required by law, and that MPCA proposed rules also reflect Minnesota policies to protect clean water.

WaterLegacy's comments pertain only to Chapters 7050 and 7052, under which a variance would be sought to an applicable water quality standard (WQS). The first section of our comments summarizes the asymmetrical legal basis for revising the MPCA's proposed variance rules to meet federal minimum requirements, while supporting additional Minnesota goals. The second section of our comments identifies areas where MPCA's proposed rules fail to comply with minimum federal requirements; WaterLegacy proposes revised text to achieve compliance.

The third section of WaterLegacy's comments supports as reasonable provisions in the MPCA's proposed Chapter 7050 rules that provide consistency with Chapter 7052 not expressly required by federal law. The fourth section of our comments suggests that terms not otherwise defined in Chapters 7050 and 7052 have the meaning provided in federal water quality regulations.

We conclude suggesting that the changes we have proposed require revisions of the MPCA proposed and February 4, 2016 supplemental draft rules for Chapters 7050 and 7052 in order to comply with federal law and the MPCA's enabling statute.

I. Federal law and Minnesota statutes and rules preclude any aspect of the proposed variance rules from being less stringent than federal statutes or regulations.

Under the Minnesota Administrative Procedures Act (APA) and its implementing rules an agency's proposed rule must be disapproved by the judge if it "conflicts with, does not comply with or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law." Minn. R. 1400.2100, item D.

Regulation of surface water in Minnesota must be at least as stringent as the requirements of federal statutes and regulations. The federal Clean Water Act articulates this requirement:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; ***except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter***; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. 33 U.S.C. §1370 (emphasis added).

MPCA's enabling statute affirms this requirement, stating that the agency shall have the authority to establish "standards, procedures, rules, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than" the provisions of applicable federal law. Minn. Stat. §115.03, Subd. 5.

The requirement for consistency with federal regulations is not symmetrical. Although Minnesota rules to protect water quality statewide and in the Lake Superior Basin may not be *less* stringent than federal law, they may be more protective than federal law and may include additional state concerns. States may develop water quality standards more stringent than required by regulations under the Clean Water Act. 40 CFR §131.4(a). Great Lakes States may adopt numeric or narrative water quality or values more stringent than those specified in federal regulations and may adopt implementation procedures more stringent than those set forth in appendix F, which includes requirements for variances in Great Lakes States. 40 CFR §132.4(i).

For example, the MPCA's concern for attaining consistency between Chapters 7050, 7052 and 7053 to reduce confusion for stakeholders, provide a coordinated process within MPCA, and reduce delays in the U.S. Environmental Protection Agency's review and approval process,[1] is a reasonable state goal that may be reflected in Minnesota rules to the extent that such rules are not less stringent than applicable federal regulations.

[1] MPCA, Statement of Need and Reasonableness (hereinafter SONAR), pp. 13-14.

WaterLegacy appreciates the MPCA's stated goal to amend Minnesota variance regulations to comply with minimum requirements of federal regulations. We also appreciate several provisions where MPCA has proposed rulemaking language that is consistent with federal regulations, but offers greater internal consistency with the Great Lakes Initiative than required under federal law.

However, WaterLegacy has identified several critical areas where MPCA's proposed amendments to variance rules in Chapters 7050 and 7052 conflict with, do not comply with, and are less stringent than the requirements of federal regulations. Provisions where MPCA rules are less stringent than federal statutes or regulations must be substantially revised or the proposed rules must be disapproved.

II. MPCA's proposed variance rules for Chapters 7050 and 7052 contain provisions that are less stringent than federal rules and must be revised or the proposed rules must be disapproved.

A. MPCA's proposed rules for the duration of variances fail to comply with federal requirements effectively limiting variances to 5 years and may result in indefinite failure to review variances.

Comments on the MPCA's proposed rule by the U. S. Environmental Protection Agency (EPA) called attention the incompatibility between the duration of variances in Minnesota's proposed variance rules and the requirements of EPA's recently adopted rules in 40 CFR §131.14(b). EPA Comments on Minnesota's Proposed Variance Rule Revisions, Dec. 28, 2015 ("EPA Rule Comments"), pp. 2-3.

Federal regulations require that "The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition." 40 CFR §131.14(b)(1)(iv). This provision requires states to limit variance duration to the time needed to design, build and test pollution control measures. EPA explained in adopting the federal variance rule, "Explicitly requiring the state or authorized tribe to document the relationship between the pollutant control activities and the WQS variance term ensures that the term is only as long as necessary to achieve the highest attainable condition and that water quality progress is achieved throughout the entire WQS variance term." 80 Fed. Reg. 51038 (August 21, 2015).

Federal variance regulations provide an effective 5-year limit on the duration of an unreviewed variance in 40 CFR §131.14(b)(1), which states that a variance must include:

> (v) For a WQS variance with a term greater than five years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation. Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.

> (vi) A provision that the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by (b)(1)(v) of this section.

As proposed with its November 9, 2015 notice, MPCA's statewide variance rule in Ch. 7050.0190, Subp. 8 allowed a 10-year variance with no required review prior to variance expiration. In addition to the EPA comments described above, dischargers objected to the 10-year limit on duration, since no specific time limit was included in federal regulations.

In the supplemental draft rule proposal provided by MPCA on February 4, 2016, the MPCA proposed to adopt the federal requirement that variances be no longer than necessary to achieve the highest attainable limitation and that variances be reviewed after five years. This is a positive revision moving closer to compliance with federal requirements.

However, the MPCA failed to adopt the language in subparagraphs (v) and (vi) quoted above that provide *consequences* for failure to provide an appropriate 5-year reevaluation. As noted by the EPA, such language is essential. "This provision must be self-implementing so that if any reevaluation yields a more stringent attainable condition, that condition becomes the applicable interim WQS without additional action." 80 Fed. Reg. 51037(August 21, 2015). EPA has specifically explained that state variance rules must include consequences of a state's failure to reevaluate variances:

> ***The rule also requires states and authorized tribes to adopt a provision specifying that the WQS variance will no longer be the applicable WQS for CWA purposes if they do not conduct the required reevaluation or do not submit the results of the reevaluation within 30 days of completion***. If a state or authorized tribe does not evaluate the WQS variance or does not submit the results to EPA within 30 days, the underlying designated use and criterion become the applicable WQS for the permittee(s) or water body specified in the WQS variance without EPA, states or authorized tribes taking an additional WQS action. In such cases, subsequent NPDES WQBELs for the associated permit must be based on the underlying designated use and criterion rather than the highest attainable condition, even if the originally specified variance term has not expired. 80 Fed. Reg. 51038 (August 21, 2015). (emphasis added)

In Minnesota, ensuring effective reevaluation of variances no less frequently than every five years is critical to protect water quality. On July 2, 2016, WaterLegacy filed a Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits asserting MPCA's failure to examine and update expired permits and variances for mining discharges.[2] This Petition is currently under active investigation by the EPA.

As documented in the Supplement to WaterLegacy Petition and additional exhibits provided to the EPA, a permit and variance for the Dunka Mine was issued in 2001, expired in 2005 and

[2] EPA in Minnesota, NPDES Petition for Program Withdrawal in Minnesota, http://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota

continues to this day to allow non-compliance with underlying water quality standards, despite repeated requests by WaterLegacy and concerned citizens for reevaluation of the variance. Dunka Mine discharge continually violates water quality standards and impairs aquatic life uses.[3]

In order to meet the minimum requirements of federal regulations and to ensure that future variances protect Minnesota water quality, the following revisions to the MPCA's current proposal for Chapter 7050[4] are required:

> Revisions to MPCA Proposed Ch. 7050.0190
> Subp. 8. Term and expiration. The terms and conditions of a water quality standards variance are included and incorporated in the permit issued by the agency.
> A. The term of a variance must only be as long as necessary to achieve the highest attainable condition.
> B. For a variance with the term greater than five years, the agency shall reevaluate the highest attainable condition using all existing and readily available information ~~every~~ no later than five years after United States Environmental Protection Agency approval using the public participation process specified in subparts 5 and 6. Results of such reevaluation shall be submitted to EPA within 30 days of completion of the reevaluation.
> C. Any variance issued under this section shall include a provision stating that the variance shall expire and shall no longer be the applicable WQS if the requirements of paragraph B are not met.

In the Great Lakes region, variances are limited to 5 years. "A WQS variance shall not exceed five years or the term of the NPDES permit, whichever is less. A State or Tribe shall review, and modify as necessary, WQS variances as part of each water quality standards review pursuant to section 303(c) of the CWA." 40 CFR, Part 132, Appendix F, Procedure 2.B.

In addition to the special Great Lakes area requirements of Part 132 of Title 40 of the Code of Federal Regulations, requirements of Part 131, including EPA's variance rules, also apply to the Great Lakes. As explained in 40 CFR §131.1, "This part describes the requirements and procedures for developing, reviewing, revising, and approving water quality standards by the States as authorized by section 303(c) of the Clean Water Act. ***Additional*** specific procedures for developing, reviewing, revising, and approving water quality standards for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Clean Water Act and 40 CFR part 132, are provided in 40 CFR part 132." (emphasis added)

Minnesota's proposed rules for Chapter 7052 appropriately continue to include a 5-year limit on Lake Superior Basin variances at 7052.0280, Subp. 2. However, the proposed rules do not include the self-implementing limit on duration now required under federal regulations for *all* variances. As in the Dunka Mine situation, where a variance has evaded review despite the

[3] *Id*., Supplement to WaterLegacy Petition (October 27, 2015).
[4] In order to reduce confusion, throughout these comments, the MPCA's current proposal, incorporating February 4, 2016 changes where applicable, is reflected as existing text without underline or strike-outs. Strike-outs indicate WaterLegacy's proposed deletions and underlining indicates our proposed additions to the most current version of MPCA proposed rules.

passage of 15 years, Minnesota dischargers routinely extend permits and variances by applying for renewal 180 days prior to expiration of the permit. This application, without substantive review, allows the permit holder to continue discharge, irrespective of whether the MPCA conducts any evaluation of the proposed reissuance. See Minn. R. 7001.0040, Subp. 3.

As applied to variances, the unreviewed extension of variances allowed under Minnesota rules is less stringent and fails to comply with the requirements of federal regulations at 40 CFR §131.14(b)(1) described above. The following revisions to proposed Chapter 7052 are required to protect Lake Superior Basin waters:

> Revisions to MPCA Proposed Ch. 7052.0280:
> Subp. 2. Term. A variance must only be as long as necessary to achieve the highest attainable condition, and in addition must not exceed five years or the term of the permit, whichever is less. Any variance issued under this section shall include a provision stating that the variance shall expire and shall no longer be the applicable WQS, irrespective of any application for reissuance, if within five years of after United States Environmental Protection Agency approval of the variance the agency has not made a determination to renew the variance in compliance with this section.

B. MPCA's proposed variance rules fail to adequately specify requirements for highest attainable use and fail to comply fail to comply with federal requirements to avoid backsliding on permits.

In comments on the proposed rules, EPA emphasized the divergence between the MPCA's proposed variance rules and federal regulations requiring that variances must include requirements representing the highest attainable condition of water body or segment throughout the term of the WQS. EPA stated, "To be approved by EPA, variances must address all of the requirements of 40 CFR 131.14." EPA Rule Comments, p. 3.

In adopting its variance rules the EPA stressed the importance of the highest attainable use (HUA) concept:

> The concept of HAU is fundamental to the WQS program. Adopting a use that is less than the HAU could result in the adoption of water quality criteria that inappropriately lower water quality and could adversely affect aquatic ecosystems and the health of the public recreating in and on such waters. 80 Fed. Reg. 51025 (August 21, 2015).

Federal regulations require that for WQS variances "the State must specify the highest attainable conditions of the water body or waterbody segment as a quantifiable expression." 40 CFR §131.14(b)(ii). For discharger-specific variances such as those described in the MPCA's proposed variance rules, this quantified expression must be either the highest attainable interim criterion, the interim effluent condition that reflects the greatest pollution reduction achievable, or, if no additional feasible pollutant control technology can be identified, the greatest pollution reduction achievable using current pollutant control technologies and the requirement for adoption and implementation of a Pollutant Minimization Program. 40 CFR §131.14(b)(ii)(A)(1)-(3).

Although the MPCA's proposed variance rules, use the phrase "highest attainable conditions" in defining applicability of a variance and in requiring an applicant to produce information for the determination of a variance, these proposed rules do not require that the agency's final decision on variances specify highest attainable conditions as part of variance terms and do not require a quantified expression of highest attainable conditions. See MPCA Proposed Ch. 7050.0190, Subp. 1 and 4, compared to Subp. 6; Proposed Ch. 7052.0280, Subp. 3 compared to Subp. 5. Failure to include the federal requirements for highest attainable use would create ambiguity as to what is required of dischargers as well as potentially vague variance requirements less stringent than federal regulations.

In addition, the MPCA's proposed requirements for the terms of a variance are inconsistent with and less stringent than federal prohibitions against backsliding, specifically enacted in Clean Water Act and adopted in federal regulations.

The Clean Water Act prohibits renewal, reissuance or modification of water quality permits "to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. §1342(o)(1). Federal regulations also prohibit backsliding. Unless an error was made or circumstances on which the prior permit is based have materially changed, "when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit." 40 CFR §122.44(l).

MPCA's proposed variance rules only require the agency to include "an effluent limitation representing currently achievable treatment conditions . . . that is no less stringent than that achieved under the previous permit." Proposed Ch. 7050.0190, Subp. 6, item A; Proposed Ch. 7052.0280, Subp. 5, item A. This language would allow the MPCA to grandfather in prior failure to enforce a permit condition and allow continuing pollution in excess of the effluent limitations in the existing permit. Such lack of stringency is in direct conflict with the Clean Water Act.

The following revisions to proposed Chapters 7050 and 7052 are required to ensure that Minnesota variances contain the quantification of "highest attainable conditions" required under recently adopted federal regulations and to prevent backsliding proscribed by the Clean Water Act:

> Revisions to MPCA Proposed Ch. 7050.0190
> Subp. 6 . . . If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and incorporate the following variance terms and conditions:
> A. an effluent limitation representing the highest attainable conditions of the water body or waterbody segment ~~currently achievable treatment conditions based on discharge monitoring or projected effluent quality~~ that is no less stringent than that achieved under the previous permit and no less stringent than the final effluent limitations, standards or conditions in the previous permit. The highest attainable condition shall be quantified as either
> (i) the highest attainable interim criterion;

(ii) the interim effluent condition that reflects the greatest pollution reduction achievable through use of feasible pollutant control technology; or
(iii) if no additional feasible pollutant control technology can be identified, the greatest pollution reduction achievable using current pollutant control technologies and the requirement for adoption and implementation of a Pollutant Minimization Program.

Revisions to MPCA Proposed Ch. 7052.0280
Subp. 5 . . . If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and incorporate the following variance terms and conditions:
A. an effluent limitation representing the highest attainable conditions of the water body or waterbody segment ~~currently achievable treatment conditions based on discharge monitoring or projected effluent quality. If the variance is being considered for renewal, t~~ The effluent limitation must be no less stringent than that achieved under the previous permit and no less stringent than the final effluent limitations, standards or conditions in the previous permit. The highest attainable condition shall be quantified as either
(i) the highest attainable interim criterion;
(ii) the interim effluent condition that reflects the greatest pollution reduction achievable through use of feasible pollutant control technology; or
(iii) if no additional feasible pollutant control technology can be identified, the greatest pollution reduction achievable using current pollutant control technologies and the requirement for adoption and implementation of a Pollutant Minimization Program.

C. MPCA's proposed variance rules fail to comply with Clean Water Act requirements that permits must comply with water quality standards.

The MPCA's proposed variance rules fail to require application of and compliance with underlying water quality standards that protect a beneficial use of the water body. The Clean Water Act requires that the EPA may not approve a water quality program that fails to provide adequate authority to insure that water quality permits "apply and insure compliance with any applicable requirements of" various Clean Water Act provisions, including the section (section 1311) requiring effluent limitations to achieve water quality standards. 33 U.S.C. §1342(b)(1)(A). Federal regulations also require that permit conditions must "Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." 40 CFR §122.44(d)(1).

Failure to require attainment of underlying water quality standards in final permit conditions would effectively serve to remove a designated use of a water body or segment of a water body. Under federal regulations, the only way to remove a designated use of a water body is through a structured scientific assessment known as a "use attainability analysis." 40 CFR §§131.10(g) and (j); 131.3(g).

MPCA's proposed Chapter 7050 variance rules do not require final limits complying with underlying water quality standards unless the variance term is shorter than the underlying permit.

Proposed Ch. 7050.0190, Subp. 6, item C. A simple edit would bring this proposed section in compliance with the Clean Water Act:

> Revision to MPCA Proposed Ch. 7050.0190
> Subp. 6 . . . If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and incorporate the following variance terms and conditions. . .
> C. an effluent limitation sufficient to meet the underlying water quality standard upon the expiration of the variance~~, when the duration of the variance is shorter than the duration of the permit~~; and

D. MPCA's proposed variance rules fail to provide the public participation and public hearing process expressly required by federal law.

EPA emphasized in its comments that variances are changes in water quality standards such that federal public participation requirements for new and revised water quality standards apply both to variances and triennial review. EPA Rule Comments, pp. 1-2.

There may have been ambiguity prior to EPA's recent adoption variance rules in August 2015 as to whether states were required to comply with federal public participation procedures for variances. This question has now been resolved. The lead sentence of the new federal variance rules states, "States may adopt WQS variances, as defined in §131.3(o). Such a WQS variance is subject to the provisions of this section and public participation requirements at §131.20(b)." 40 CFR §131.14. Though states may provide greater public access, they have no discretion to provide a lesser degree of public participation than that in federal regulations. As explained by EPA in adopting the 40 CFR §131.14 rule revisions:

> At a minimum, per § 131.20(b), states and authorized tribes are required to follow the provisions of state or tribal law and EPA's public participation regulations at 40 CFR part 25. EPA's public participation regulation, at 40 CFR 25.5, sets minimum requirements for states and authorized tribes to publicize a hearing at least 45 days prior to the date of the hearing; provide to the public reports, documents, and data relevant to the discussion at the public hearing at least 30 days before the hearing; hold the hearing at times and places that facilitate attendance by the public; schedule witnesses in advance to allow maximum participation and adequate time; and prepare a transcript, recording, or other complete record of the hearing proceedings . . . State and tribal law may include additional requirements for states and authorized tribes to meet when planning for and conducting a hearing. 80 Fed. Reg. 51043 (August 21, 2015).

These public participation requirements are applicable both to variances outside and within the Lake Superior Basin, as explained above in Section IIA of these comments.

MPCA proposed statewide variance rules at Ch. 7050.0190, Subparts 5, 6, and 9, item B and Minnesota's proposed variance rule for the Lake Superior Basin at Ch. 7052.0280, Subparts 4, 5 and 8 apply procedural requirements of Minn. R. 7000.7000 to both the issuance of variance and to triennial review. Minnesota Rule 7000.7000 provides lesser notice than the federal minimum

and *no right to a public hearing*. Minn. R. 7000.7000, Subp. 4. Applying this Minnesota procedural rule to variances and triennial review would fail to meet minimum federal public participation requirements.

In addition, since a variance is considered to be a rule change, WaterLegacy strongly recommends that provisions in Minnesota Rule 1400.2080, Subpart 3, item D allowing a contested case type of hearing upon the request of 25 persons made during the comment period, be incorporated in Minnesota's rules for variances. WaterLegacy also suggests that requirements for public participation be set forth in Chapters 7050 and 7052, rather than providing a reference to federal regulations in order to make the process understandable and transparent to citizens. In the text below, the proposed revisions that are not expressly mandated under federal regulations are italicized. All of the following revisions are strongly recommended:

Revisions to MPCA Proposed Rule 7050.0190

Subp. 5 ~~Submittal and notice~~ Procedural requirements.

A. Variance application submittal, public notice of the agency's preliminary determination to grant the variance, and notice requirements must conform to part 7000.7000 and must provide at least notice 45 days prior to the date of the hearing when there are substantial documents which must be reviewed for effective hearing participation or complex or controversial matters to be addressed by the hearing. *The notice shall state that that if 25 or more persons submit a written request for a contested case hearing during the comment period, the public hearing on the variance request in paragraph B of this subpart must be held pursuant to Minnesota Statutes, sections 14.57 to 14.62.*

B. Public hearing. Prior to making a final decision regarding a variance request, the agency shall hold at least one public hearing at a time and place which, to the maximum extent feasible, facilitates attendance by the public and presentation of both scheduled and unscheduled witnesses and free expression of views. The agency shall inform the attendees of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public. The agency shall prepare a transcript, recording or other complete record of public hearing proceedings and make it available at no more than cost to anyone who requests it, and provide a copy of the record for public review.

Subp. 6. Agency final decision; variance requirements. The agency must make a final decision regarding the variance request. ~~that conforms to the procedural requirements in part 7000.7000.~~ If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and in corporate the following variance terms and conditions:

Subp. 9. Every three years, the agency shall provide public notice of a list of variances currently in effect at the time of public notice and engage public participation consistent with the triennial review of water quality standards required under Code of Federal Regulations, title 40, section 131.20. The public notice shall include a statement that a

person may submit to the agency new information that has become available relevant to the list of variances.

Revisions to MPCA Proposed Rule 7052.0280
Subp. 4 ~~Submittal and notice~~ Procedural requirements.
A. Variance application submittal, public notice of the agency's preliminary determination to grant the variance, and notice requirements must conform to part 7000.7000 and must provide at least notice 45 days prior to the date of the hearing when there are substantial documents which must be reviewed for effective hearing participation or complex or controversial matters to be addressed by the hearing. *The notice shall state that that if 25 or more persons submit a written request for a contested case hearing during the comment period, the public hearing on the variance request in paragraph B of this subpart must be held pursuant to Minnesota Statutes, sections 14.57 to 14.62.*

B. Public hearing. Prior to making a final decision regarding a variance request, the agency shall hold at least one public hearing at a time and place which, to the maximum extent feasible, facilitates attendance by the public and presentation of both scheduled and unscheduled witnesses and free expression of views. The agency shall inform the attendees of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public. The agency shall prepare a transcript, recording or other complete record of public hearing proceedings and make it available at no more than cost to anyone who requests it, and provide a copy of the record for public review.

Subp. 5. Agency final decision; variance requirements. The agency must make a final decision regarding the variance request. ~~that conforms to the procedural requirements in part 7000.7000.~~ If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and in corporate the following variance terms and conditions

E. MPCA's proposed rules do not comply with federal regulations precluding variances for new or recommencing Great Lakes dischargers.

EPA has emphasized that variances for new or recommencing Great Lakes dischargers are *prohibited*. To prevent the situation where a Minnesota variance would be disapproved by EPA, "EPA recommends that Minnesota revise the applicability requirements in 7052.0280 to be consistent with the requirements of 40 CFR 132 with regards to variances for new Great Lakes dischargers." EPA Rule Comments, p. 1.

Federal regulations for Great Lakes variances clearly state: "*This provision shall not apply to new Great Lakes dischargers or recommencing dischargers*." 40 CFR, Part 132, Appendix F, Procedure 2. A.1.

MPCA proposed variance rules for Chapter 7052 only contain part of the applicability limitation for variances under the Great Lakes regulations and would, thus, be less stringent than federal requirements. This deficiency in the MPCA's proposed variance rules is easily corrected as follows:

> Revision to MPCA Proposed Rule 7052.0280
> 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 or recommencing dischargers, ~~unless the proposed discharge is necessary to alleviate an imminent and substantial danger to public health and welfare~~.

F. MPCA's proposed variance rules do not appropriately reflect Great Lakes antidegradation requirements.

WaterLegacy recognizes that Minnesota's antidegradation rules are in the process of rule revision. It is likely that citations to existing Chapter 7050 nondegradation rules (parts 7050.0180 and 7050.0185) in MPCA's proposed Chapter 7050 and 7052 variance rules will be amended as part of the antidegradation rulemaking.

However, in addition to updating the Chapter 7050 antidegradation citations after new rules have been adopted, WaterLegacy believes that the MPCA's proposed Chapter 7052 must cite antidegradation rules for the Great Lakes region.

Under the Code of Federal Regulations Title 40, Part 132, Appendix E, antidegradation regulations for the Great Lakes area are more stringent than those for other waters. State Chapter 7052 implementing Great Lakes antidegradation requirements contain numerous requirements not applicable to other waters, such as protection of Outstanding International Resource Waters and controls on bioaccumulative substances of immediate concern. Proposed variance rules for the Lake Superior Basin must demonstrate that Great Lakes antidegradation requirements have been met in addition to the requirements generally applicable to Minnesota waters. This is a simple amendment:

> Revision to MPCA Proposed Rule 7052.0280
> Subp. 3, To be eligible for a preliminary determination by the agency to grant the variance, the permittee must. . .
> B. show that the variance conforms with parts 7050.0180 and 7050.0185; and parts 7052.0300 to 7052.0330.

G. MPCA's proposed Lake Superior variance rules do not provide the notice to Great Lakes tribes and states required by federal regulations.

Federal regulations also require that notice of *any* preliminary decision on a Great Lakes variance be provided to *the other Great Lakes States and Tribes.* 40 CFR, Part 132, Appendix F, Procedure 2 E. This notice requirement is not included in the MPCA's proposed Chapter 7052 rules.

Again, a simple amendment would address this deficiency. The proposed revision below should be incorporated with the public participation changes proposed in Section IID of these comments.

> Revisions to MPCA Proposed Rule 7052.0280
> Subp. 4 ~~Submittal and notice~~ Procedural requirements.
> A. Variance application submittal, public notice of the agency's preliminary determination to grant the variance, and notice requirements must conform to part 7000.7000, must provide notice of any preliminary decision to other Great Lakes States and Tribes . . . [see additional proposed revisions in Section IID of these comments]

III. Sections of MPCA proposed Chapter 7050 rules that meet federal requirements, provide consistency between variance chapters and serve other state and federal policies are reasonable and desirable.

In its proposed variance rules for Chapter 7050, the MPCA included several provisions not explicitly required by federal minimum requirements, but well-supported both by federal and state policies. WaterLegacy specifically supports the following provisions of Chapter 7050 as proposed by the MPCA.

A. WaterLegacy supports MPCA's proposal regarding protection of human health.

MPCA's proposed conditions for approval of a Chapter 7050 WQS variance include a requirement that the permit applicant "characterize 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." Proposed Ch. 7050.0190, Subp. 4, item C.

The proposed analysis and protection of human health is reasonable, desirable and consistent with both federal and state policy. As explained in discussing recent federal variance amendments, EPA considers protection of human health when consuming fish to be a critical part of the protection of aquatic life. 80 Fed. Reg. 51024 (August 21, 2015). As cited above in Section IIB of these comments, one of the driving reasons for EPA's amendments to variance rules was to protect the health of the public. *Id*., at 51025.

B. WaterLegacy supports MPCA's proposal regarding compliance with federal endangered species laws.

MPCA's proposed Chapter 7050 text states that to be eligible for a WQS variance a permit applicant must demonstrate that the variance "would not 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." Proposed Ch. 7050.0190, Subp. 1, item A. WaterLegacy agrees with the MPCA that stating the requirement for compliance with the federal Endangered Species Act in Chapter 7050 is reasonable to advise applicants and other interested

parties that compliance with this federal law will have a bearing on whether or not a proposed variance will be approved by EPA. MPCA SONAR, p. 16. This text does not increase requirements placed on permit applicants; it merely informs them of requirements under existing federal law and provides greater transparency for the public.

C. WaterLegacy supports MPCA's proposal prohibiting variances that remove an existing use.

MPCA's proposed Chapter 7050 text states that to be eligible for a WQS variance a permit applicant must demonstrate that "the variance would not remove an existing use." Proposed Ch. 7050.0190, Subp. 1, item C. WaterLegacy agrees with the MPCA that adding item C is reasonable because it provides consistency between Chapters 7050 and 7052, aligns state and federal regulations and "also allows for a case-by-case analysis to be conducted for all discharges, whether in the Great Lakes or other waters of the State." MPCA SONAR, p. 24.

Based on WaterLegacy's experience working with scientific experts on specific permits and variances, we believe that the resulting case-by-case analysis of proposed variances is essential to protect aquatic life, wildlife and recreation uses that must be restored and maintained under section 101(a)(2) of the Clean Water Act (33 U.S.C. §1251(a)(2)). For many potential pollutants that affect aquatic life and wildlife as well as human health, a discharger may request a variance that on its face, would only result in a violation of numeric water quality standards for an industrial or agricultural use. However, on case-by-case review, scientific evidence may demonstrate that an increase in hardness or specific conductance in a specific water body would result in impairment of benthic macroinvertebrates (e.g. insects in the aquatic food chain) necessary to support fish populations or an increase in invasive species, such as zebra mussels, that impair aquatic ecosystems.

The MPCA's proposed inclusion of Subpart 1, item C in the Chapter 7050.0190 variance rules would allow the scientific analysis needed to protect Clean Water Act aquatic life and wildlife uses as well as human health and should be included in the adopted rule, consistent with the Clean Water Act, state policies and the MPCA's reasonable goals.

D. WaterLegacy supports MPCA's proposed use of the term "water quality standards" in describing conditions that must be met to allow granting of a variance.

MPCA's proposed conditions for approval of a WQS variance in Proposed Chapter 7050.0190, Subpart 4, item A, paragraphs (1) through (4) use the phrase "water quality standard," which is contained in comparable federal regulations pertaining to the Great Lakes, rather than the word "use" contained in federal regulations for variances in general. MPCA explains that this proposal is reasonable "because doing so aligns Minnesota rules and approval procedures with USEPA's procedures, streamlining the process by having the same conditions in the three water quality rule chapters under which a Permittee may be eligible for a variance." MPCA SONAR, p. 19.

WaterLegacy has had the opportunity to consult both with water quality experts and with EPA staff. We've been informed that the Great Lakes language that MPCA proposes to use is a more recent phrasing and that, according to the federal definition of "water quality standards," the

language proposed by MPCA is neither problematic nor inconsistent with federal regulations. We believe that using the same language in Minnesota's three water quality rules would reduce confusion and allow development of more consistent practice. To assist in this consistency, WaterLegacy would also recommend, as provided in Section IV of these comments, that Minnesota variance rules explicitly reference federal definitions of terms where no state definition has been provided.

IV. Proposed variance rules for Chapter 7050 and 7052 should reference federal definitions to ensure consistency and clarity in application.

WaterLegacy appreciates that MPCA's proposed statewide and Lake Superior Basin proposed variance rules adopt language contained in corresponding federal regulations. However, several of these terms are not defined in Minnesota statutes or rules.

WaterLegacy has noted that neither the term "existing use" nor "water quality standard" contain a clear definition in either Chapter 7050 or 7052, although they are defined in 40 CFR §131.3(e) and (i). The terms "new" and "existing" discharger, required to qualify the application of Chapter 7052 to Lake Superior Basin variance are not explained in Minnesota Rules, but have a specific definition in 40 CFR §132.2.

Some of the terms used by regulators have definitions in the context of water quality protection that are quite different from their meanings in ordinary conversation. For example, under federal regulations an "existing use" doesn't mean only the uses actually attained when an application is made for a variance, but "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 CFR §131.3(e). These meanings may not be obvious to permit applicants or members of the public.

WaterLegacy proposes that both Chapter 7050 and Chapter 7052 contain a brief subpart stating that terms used in the preceding section shall be construed according to their federal definitions, unless otherwise specified.

> Revision to MPCA Proposed Rule 7050.0190
> Subp. 10. Unless otherwise defined herein, terms used in this section shall have the meaning provided in federal rules in Part 131 of Title 40 of the Code of Federal Regulations.
>
> Revision to MPCA Proposed Rule 7052.0280
> Subp. 9 Unless otherwise defined herein, terms used in this section shall have the meaning provided in federal rules in Parts 131 and 132 of Title 40 of the Code of Federal Regulations.

CONCLUSION

WaterLegacy and the MPCA agree that compliance with Minnesota water quality standards must be the norm and variances from rules should be a limited exception. As stated in the MPCA

SONAR, "In practice, a WQS variance is the exception, not the norm; the decision on whether or not to grant a variance is not taken lightly by the Agency." MPCA SONAR, p. 25.

In several critical respects, as explained in Section II of these comments, MPCA's proposed rules for Chapter 7050 and 7052 are less stringent than applicable federal regulations, a result that is prohibited under MPCA's enabling statute as well as under federal law. For each portion of the proposed variance rules that fails to meet minimum federal requirements WaterLegacy has proposed specific revisions to the MPCA's draft rule to ensure compliance with federal and state law. We respectfully request that the MPCA's proposed rules for Chapter 7050 and 7052 be substantially revised as we have proposed so that they need not be disapproved in order to comply with the Minnesota APA and its implementing rules.

Where MPCA has proposed amendments to Chapter 7050 to foster consistency between variance chapters and serve other federal and state policies related to water quality, WaterLegacy has expressed support for these provisions in Section III of our comments. Both federal and state law specifically allow MPCA to enact rules that differ from federal regulations if those rules are at least as stringent as federal law. In order to ensure consistency with federal law and prevent confusion, WaterLegacy has also proposed in Section IV of our comments that Minnesota's variance rules state that federal definitions of terms shall apply where no state definition has been provided.

Minnesotans care about the quality of their water for drinking, fishing, swimming, canoeing and as a legacy we will leave for the next generation. WaterLegacy believes that revisions of the MPCA's variance rules as proposed in these comments will meet minimum federal requirements, increase public participation and transparency, and ensure that variances are rigorously analyzed and reviewed so that Minnesota's precious water resources are not polluted and degraded.

Thank you for the opportunity to provide post-hearing comments in these proceedings.

Sincerely yours,

Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy

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February 19, 2016

Office of Administrative Hearings
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VIA ELECTRONIC MAIL AND U.S. MAIL

The Honorable Barbara J. Case
Administrative Law Judge
Office of Administrative Hearings
P.O. Box 64620
St Paul, MN 55164

Re: Proposed Permanent Rules Relating to Existing Water Quality Variance Procedures - Post-Hearing Comments of Minnesota Center for Environmental Advocacy
OAH Rulemaking Docket 82-9003-32864

Dear Judge Case,

These Post-Hearing Comments of the Minnesota Center for Environmental Advocacy (MCEA) supplement the comments filed December 29, 2015 and the testimony given at the hearing held in this matter on February 4, 2016.

The new proposed amendments by the Minnesota Pollution Control Agency (MPCA) to its proposal that MCEA obtained on the day of the hearing and the testimony at the hearing require that the five following points be emphasized at this time:

- The proposed changes to Minn. R. 7053.0195 should not go forward without substantial clarification by MPCA;
- While the Minnesota rules need not include all the language of the federal requirements, they should not confuse or misinform the public about the federal requirements;
- Minnesota regulations are not required to provide only the minimum protections afforded by federal law;
- Wild rice cultivation must be afforded all the protections against water pollution given to other aquatic life and wildlife uses; and
- The minimum requirements for reconsideration of variances should be set forth in the Minnesota rules as well as the consequences of any failure to reevaluate variances after five years.

I. The Purpose And Effect Of The Proposed Changes to Minn. R. 7053.0195 Remain Unclear, And The Language Is Potentially Misleading.

The February 4, 2016 proposed changes to MPCA's proposal and the testimony given at the hearing on February 4, 2016 served to heighten the confusion regarding the purpose and effect of MPCA's proposed changes to 7053.0195.

To make clear the scope and context of the confusion, review of certain basic concepts regarding water quality standards and NPDES permitting under the Clean Water Act is necessary. The new amendment, proposed by MPCA on February 4, 2016, serves only to heighten the confusion, rather than to clarify anything, and we are left to speculate as to its meaning.

A. Regulatory background.

Under the Clean Water Act, limits in NPDES permits must be set as the more stringent of the applicable technology based effluent limits (TBELs) or water quality standard based limits. 33 USC § 1311(b)(1)(C); 40 C.F.R. § 122.44(a) and (d). Technology based effluent guidelines are developed by the U.S. Environmental Protection Agency (U.S. EPA) by considering what certain types of dischargers (e.g. oil refineries) can generally be expected to achieve. Permit writers use these effluent guidelines to write TBELs for permits. 40 C.F.R. § 125.3. The TBEL for publicly owned sewage treatment works (POTWs) is "secondary treatment." See, 40 C.F.R. § 133.102, Minn. R. 7052.0215, subp. 1 ("minimum secondary treatment").

In addition, some states, including Minnesota, have their own effluent rules established on a categorical basis without direct calculation of the effect of the discharge on water quality. In some circumstances, these state effluent standards may go beyond the minimum federal TBEL requirements. See Minn. R. 7053.0215, 7053.0225 and 7053.0255.

Where there is dilution of the wastewater discharge, TBELs (and any additional state effluent rules) may be more stringent than is necessary to prevent violation of water quality standards. Still, all dischargers generally must meet at least the minimum technological requirements—the solution to pollution is not generally dilution. Congress has directed the EPA and states to work toward zero discharge of pollutants. 33 U.S.C. § 1251(a)(1).

Water Quality Based Permit Limits (WQBELs) that are more stringent than the TBELs are required whenever a discharge may cause or contribute to a water quality standards violation. 40 C.F.R. § 122.4(i) and 40 C.F.R. § 122.44(d); See also, *American Paper Institute v. U.S. Environmental Protection Agency*, 996 F.2d 346, 350 (D.C. Cir. 1993). This law is recognized by the Minnesota Rules. Minn. R. 7053.205, subp. 8.

Turning now to variances, regulatory relief is allowed from both TBELs and WQBELs under limited circumstances. The existing 7053.0195 states that variances are available in "exceptional circumstances," in subpart 1, and hints that there are differences between some variances and "variances from water quality standards." Subp. 3.

Under federal law, variances from water quality standards that would allow a discharger to have a less stringent WQBEL than it would otherwise receive must be approved by U.S. EPA. 40 C.F.R. § 131.14(a). Obviously, a variance from a water quality standard is a change in water quality standards, and changes in water quality standards must be approved by U.S. EPA under 33 U.S.C. §1313(c).

On the other hand, variances from TBEL requirements, whether federally required or added state effluent requirements, are not subject to direct approval by U.S. EPA. Of course, U.S. EPA can choose to take over a state NPDES permit, 40 C.F.R. § 123.44, or, under some circumstances, may withdraw state authority to write NPDES permits. 40 C.F.R. § 123.64.

Finally, the new federal variance regulation, 40 C.F.R. § 131.14, addresses variances from water quality standards. This is the necessary first step in allowing a less stringent WQBEL than would otherwise be required. The federal rule contemplates "discharger specific" variances, 40 C.F.R. § 131.14(b)(ii)(A), and variances that would apply to a water body or water body segment, 40 C.F.R. § 131.14(b)(ii)(B), which might allow less stringent WQBELs for a number of dischargers. As mentioned, both of these types of variances from water quality standards and WQBELs require U.S. EPA approval.

B. It is still unclear what MPCA is attempting to do through changes to Minn. R. 7053.0195.

MPCA's initial rule proposal for 7053.0195 contained language that "the requirement to submit the variance to the United States Environmental Protection Agency for approval does not apply to variances granted by the agency under this part." As pointed out in MCEA's initial comment letter, this statement would be wrong and misleading to the public insofar as variances granted under the rule would allow variances from water quality standards and a less stringent WQBEL (or no WQBEL at all). Further, the language of proposed 7053.0195 contains provisions that are not appropriate if it is a variance from TBEL requirements that is sought.

The MPCA's proposed February 4, 2016 amendment to the 7053.0195 proposal struck the language that the variance need not be submitted to U.S. EPA. This change, along with the language in proposed 7050.0190, which does require submission and approval to U.S. EPA, would lead to the natural conclusion that variances sought under 7053.0195 **do** have to be submitted to U.S. EPA. The testimony of MPCA representatives at the hearing, however, indicated that they do not believe that variances obtained through the new 7053.0195 must be approved by U.S. EPA. Moreover, no changes have been made to proposed 7053.0195 that

would allow it to serve as a vehicle for obtaining variances from TBEL requirements when no potential WQBEL would be affected.

In sum, proposed 7053.0195 as interpreted by MPCA officials seems to require less as to WQBELs than is required by federal law and to inadequately set forth how to obtain a variance from a TBEL, and yet remains unclear on whether EPA approval is required.

It was stated at the hearing that U.S. EPA had repeatedly stated that it did not have to approve variances adopted through 7053.0195. That may be true and U.S. EPA may have been correct if the only variances that have been adopted under 7053.0195 in the past were variances *from TBEL requirements*. It appears, however, that the current language of proposed 7053.0195 would also allow variances from water quality standards so as to affect WQBELS. This fact appears to have been missed by U.S. EPA in its comment of December 28, 2015.

At a minimum, 7053.0195 should be revised to clarify that approval by U.S. EPA is necessary if a variance is sought that would allow a less stringent WQBEL limit to be applied than would otherwise be required under 40 C.F.R. § 122.44(d) and Minn. R. 7053.205, subp. 8. Further, MPCA and U.S. EPA should consider whether the new 7053.0195 is an appropriate substitute for existing 7053.0195 where a variance is sought only from a technology based requirement that would not normally be subject to the requirements of 40 C.F.R. § 131.14 and the requirement of U.S. EPA approval.

There are a number of options for revising 7053.0195 to avoid misinforming the public and creating confusion and conflict with federal law. For example, 7053.0195 could be revised to clarify that it is only applicable for seeking relief from WQBELs if an appropriate variance had previously been approved by MPCA and U.S. EPA under 7050.0190 or 7052.0280. Alternatively, 7053.0195 could be rewritten to make clear that it never applies to allow a

variance from WQBEL requirements and that dischargers seeking a variance from water quality standards that would allow a less stringent WQBEL must proceed under 7050.0190 or 7052.0280.

In any event, it must be made clear that dischargers must fulfill all the requirements of 40 C.F.R. § 131.14, including U.S. EPA approval, if they seek a variance from water quality standards and less stringent WQBELs.

II. State Rules Need Not Allow Variances Under All Instances That Federal Law Might Allow Them.

There has been some suggestion by the Minnesota Chamber of Commerce and others that the proposed rules are too stringent regarding variances because they place restrictions on variances from water quality standards protecting uses in addition to the Clean Water Act Section 101(a)(2) uses. MCEA strongly disagrees with this suggestion. No variance should be allowed from Minnesota water quality standards unless it satisfies at least all the requirements of proposed 7050.0190 or 7052.0280.

First, the law is clear that Minnesota rules may be more stringent than the minimum federal requirements. Minn. Stat. §115.03, subd. 1; *In Re Alexandria Lake Area Sanitary District, NPDES Permit No. MN 0040738*, 763 N.W. 2d 303, 308 (Minn. 2009) ("The MPCA implements the NPDES program in Minnesota by issuing permits that comply with or are more stringent than federal permit conditions").

Further, it appears that variances that affect uses other than Clean Water Act Section 101(a)(2) uses should be approved by U.S. EPA under 40 C.F.R. § 131.13.

Most importantly, the obvious use that could be adversely affected by a decision by MPCA to allow variances to be granted more leniently as to non-101(a)(2) uses is drinking

water. Certainly given recent experiences in Flint, Michigan, Toledo, Ohio, and other communities, MCEA would strongly object to any shortcuts being allowed that would make it easier to pollute potential sources of drinking water.

III. Wild Rice Cultivation Is Both A Clean Water Act Section 101(a)(2) Use And An Agricultural Use.

Some concern was expressed at the hearing that variances would be more easily obtained as to wild rice water bodies because it has been suggested that wild rice is not one of the Clean Water Act Section 101(a)(2) uses for "protection of fish, shellfish, and wildlife and provides for recreation in and on the water." MCEA believes that it should not and cannot be easier to obtain a variance that would allow pollution that would potentially affect wild rice.

First, as discussed above, Minnesota law may be stronger than the federal minimum. Thus, even if federal law allowed less protection of non-101(a)(2) uses and wild rice were not a Clean Water Act Section 101(a)(2) use, Minnesota should not afford wild rice a lower level of protection.

Moreover, while Minnesota has considered wild rice harvesting to be a form of agriculture (Minn. R. 7052.0224), U.S. EPA has interpreted the Clean Water Act Section 101(a)(2) uses broadly to include consumption of fish and other "aquatic life." 80 Fed. Reg. 51020, 51024 (August 21, 2015). Wild rice is a form of aquatic life and its consumption is vitally important to many Minnesota communities. Wild rice, then, is properly seen under federal law as a Clean Water Act Section 101(a)(2) use.

Further, protection of wild rice is integral to protection of other wildlife, such as migratory birds. See Great Lakes Indian Fish and Wildlife Commission brochure, available at

http://www.glifwc.org/publications/pdf/Wildrice_Brochure.pdf; Minnesota DNR, http://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html.

IV. The Variance Period For Variances Outside The Great Lakes Basin Should Be Limited To 10 Years And The Provision Requiring Reevaluation After Five Years Contained In 40 C.F.R. § 131.14(b)(vi) Should Be Set Forth In The Rules.

The term of variances under the Great Lakes Water Quality Guidance (GLWQG) cannot be longer than five years. 40 C.F.R. § 132 App. F Procedure 2 B; 80 Fed. Reg. at 51040. Thus, MPCA has properly limited variances for waters in the Great Lakes basin to five years in proposed Rule 7050.0280. However, MCEA continues to believe that no Minnesota variances should last longer than ten years. Accordingly, the February 4, 2016 amendment to proposed 7050.0190, subp. 8 should not be adopted. Ten years should be long enough for implementation of plans to restore water quality in all but the rarest cases.

Moreover, the rule should incorporate the requirements of 40 C.F.R. § 131.14(b)(v) to reevaluate the "highest attainable use" at least every five years. Further, the rules must contain a provision that the variance will no longer be applicable if the State fails to conduct the necessary evaluation. 40 C.F.R. § 131.14(b)(vi); 80 Fed. Reg. at 51036.

There was some discussion during the hearing whether the Minnesota rules need to incorporate all of the federal language. MCEA agrees that they need not. However, MCEA hopes and assumes that MPCA agrees that the rules should not include language that confuses the public or fails to inform the public of requirements that must be met for a variance to be effective. Without explicitly including the federal language on the length of variances and the fact that they must automatically end if not re-evaluated, there is a serious danger that dischargers and the general public will not fully understand the need for reevaluation of variances and the consequences of a failure to reevaluate a variance.

Finally, in view of the serious drafting and purpose questions remaining as to several provisions, MCEA believes that specified sections of the draft rule should be clarified and amended to comport with federal law, or, in the alternative, should be disapproved.

Sincerely,

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Water Quality Director

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February 23, 2016

Office Administrative Hearings ' e-Comments
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SENT ELECTRONICALLY
Administrative Law Judge Barbara J. Case (barbara.case@state.mn.us)
Office of Administrative Hearings
600 Robert Street North
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Re: OAH Rulemaking Docket 82-9003-32864
Minnesota's 2016 Proposed Amendments to Rules Governing Water Quality Variances, Minnesota Rules Chapter 7050, 7052 and 7053

Honorable Administrative Law Judge Barbara J. Case:

The Grand Portage Band of Lake Superior Chippewa and the Fond du Lac Band of Lake Superior Chippewa (the "Bands") hereby submit these post-hearing comments in connection with the Minnesota's 2016 Proposed Amendments to Rules Governing Water Quality Variances Minnesota Rules Chapters 7050 and 7052. The Bands are federally recognized Indian tribes that retained hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe[1] (the "Ceded Territory"). In the Ceded Territory, all the Bands have a legal interest in protecting natural resources.

Additionally, both the Grand Portage and Fond du Lac Bands have delegated water quality regulatory authority under §303(c) and §401of the Clean Water Act (CWA), and have comprehensive water quality standards (WQS) approved by the US Environmental Protection

[1] Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available on-line at http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm (last visited Feb. 1, 2010).

Agency (EPA) applicable to the waters of our respective reservations.The Bands implement our water quality standards to be as protective as possible of the designated beneficial uses for our surface water resources, including aquatic life, cultural, recreational, ceremonial and subsistence uses.

The Bands were unable to participate in the public hearing on February 4, 2016, but appreciate this opportunity to provide our perspectives and suggested language for these rule amendments to the State. We are concerned that the Minnesota Pollution Control Agency (MPCA) is proposing variance rule amendments that may not be as stringent as federal regulations, as required by law, and may not be consistent with Minnesota policies for protecting clean water. Because we share jurisdiction with the state for implementing the CWA, we feel compelled to identify language in the proposed rules that may not ensure either adequate protectiveness for water resources, or sufficient and timely progress towards full attainment of applicable standards and criteria, especially in the high quality aquatic resources we co-manage in northeastern Minnesota.

Variances provide a process to make incremental progress towards meeting the applicable WQS when the appropriate criteria are not attainable in the near-term but may be attainable in the future. Applicable narrative, chemical, physical, and biological WQS serve a critical role of protecting usufructuary rights by ensuring that waters of the state are healthy enough to provide harvestable quantities of fish, wild rice, and other naturally occurring flora and fauna that are safe to eat.

We note instances where the proposed new variance rules do not seem to meet the requirements of federal statutes and regulations, specifically the need to be at least as stringent as the federal rules. Per the federal Clean Water Act:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) *any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter*; or (2) *be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters*) of such States. 33 U.S.C. §1370 (emphasis added).

Although the Minnesota rules in place to protect water quality across the state and within the Lake Superior Basin may not be *less* stringent than federal law, they may be *more* protective than federal law and may include additional state concerns. States and authorized tribes may develop water quality standards more stringent than required by regulations under the Clean Water Act. 40 CFR §131.4(a), and both Bands have exercised that discretion in favor of

protecting critical subsistence and cultural resources. Great Lakes States and authorized tribes may adopt numeric or narrative water quality or values more stringent than those specified in federal regulations and may adopt implementation procedures more stringent than those set forth in appendix F, which includes the specific requirements for variances in Great Lakes States. 40 CFR §132.4(i).

Additional specific components of the proposed MPCA variance rules where it appears that some federally required provisions are lacking:

I. The term of a variance must be no longer than necessary to achieve the highest attainable condition.

Federal regulations require that "The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition." 40 CFR §131.14(b)(1)(iv). This provision makes is clear that states and authorized tribes must limit the duration of a variance to the time needed to design, build and test pollution control measures. As the EPA explained in adopting their new federal variance rule, "Explicitly requiring the state or authorized tribe to document the relationship between the pollutant control activities and the WQS variance term ensures that the term is only as long as necessary to achieve the highest attainable condition and that water quality progress is achieved throughout the entire WQS variance term." 80 Fed. Reg. 51038 (August 21, 2015).

II. Interim limits must be reevaluated at least once every five years if a variance exceeds one 5 year term.

Federal variance rules effectively provide a 5-year limit on the duration of an unreviewed variance in 40 CFR §131.14(b)(1), which states that a variance must include:

> (v) For a WQS variance with a term greater than five years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation. Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.

MPCA proposed in their November 9, 2015 notice that the statewide variance rule in Ch. 7050.0190, Subp. 8 allowed a 10-year variance with no required review prior to variance expiration. EPA comments on the November draft rule specifically noted the incompatibility between the duration of variances in Minnesota's proposed variance rules and the requirements of recently adopted federal rules published in 40 CFR §131.14(b).[2] Additionally, MPCA received comments from dischargers objecting to the 10 year limit on duration, since no specific time limit was included in federal regulations.

[2] EPA cmts., Dec. 28, 2015, re Minnesota's Proposed Variance Rule Revisions, pp. 2-3.

III. Rules must include a provision that the WQS variance will no longer be applicable if the reevaluation is not conducted or the results not submitted to EPA within 30 days

> 40 CFR §131.14(b)(1) (vi) A provision that the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by (b)(1)(v) of this section.

However, the MPCA omitted the language in subparagraphs (v) and (vi) quoted above that provide consequences for failure to provide an appropriate 5-year reevaluation. EPA notes in their comments that such language is essential: "This provision must be self-implementing so that if any reevaluation yields a more stringent attainable condition, that condition becomes the applicable interim WQS without additional action." 80 Fed. Reg. 51037 (August 21, 2015). EPA has specifically explained that state variance rules must include consequences of a state's failure to reevaluate variances:

> The rule also requires states and authorized tribes to adopt a provision specifying that the WQS variance will no longer be the applicable WQS for CWA purposes if they do not conduct the required reevaluation or do not submit the results of the reevaluation within 30 days of completion. If a state or authorized tribe does not evaluate the WQS variance or does not submit the results to EPA within 30 days, the underlying designated use and criterion become the applicable WQS for the permittee(s) or water body specified in the WQS variance without EPA, states or authorized tribes taking an additional WQS action. In such cases, subsequent NPDES WQBELs for the associated permit must be based on the underlying designated use and criterion rather than the highest attainable condition, even if the originally specified variance term has not expired. 80 Fed. Reg. 51038 (August 21, 2015).

Both the revised 7050 and 7052 rules must include a clear provision that the WQS variance will no longer be applicable if a reevaluation with public input is not conducted at least once every five years or the results not submitted to EPA within 30 days of the reevaluation as required by 40 CFR § 131.14(b)(1)(v).

IV. Variances include the highest attainable condition expressed as interim permit limits until WQS criterion is met.

In the supplemental draft rule proposal provided by MPCA on February 4, 2016, the MPCA proposed to adopt the federal requirement that variances be no longer than necessary to achieve the highest attainable limitation and that variances be reviewed after five years. The Bands note that this is a positive step moving state regulations closer to compliance with federal requirements.

However, when adopting its new federal variance rules, the EPA emphasized the significance of the highest attainable use (HUA) concept:

> The concept of HAU is fundamental to the WQS program. Adopting a use that is less than the HAU could result in the adoption of water quality criteria that inappropriately lower water quality and could adversely affect aquatic ecosystems and the health of the public recreating in and on such waters. 80 Fed. Reg. 51025 (August 21, 2015).

Under federal regulations, for WQS variances "the State must specify the highest attainable conditions of the water body or waterbody segment as a quantifiable expression." 40 CFR §131.14(b)(ii). In the case of discharger-specific variances, such as those described in the MPCA's proposed variance rules, this quantified expression must be either the highest attainable interim criterion, the interim effluent condition that reflects the greatest pollution reduction achievable, or, if no additional feasible pollutant control technology can be identified, the greatest pollution reduction achievable using current pollutant control technologies and the requirement for adoption and implementation of a Pollutant Minimization Program. 40 CFR §131.14(b)(ii)(A)(1)-(3). The HAU concept also corresponds to fundamental CWA goals and the requirements on antidegradation, generally prohibiting the lowering of water quality.

V. Variances must include legally binding provisions to ensure attainment of the principal WQS for which the variance was written.

As provided for in 40 CFR §122.44, variances must include legally binding provisions to ensure attainment of the principal WQS for which the variance was written. The requirement to 'ensure attainment of the principal WQS' does not appear to be included in either the 7050 or 7052 revised variance provisions.

VI. A 45-day public notice must be given before a public hearing is held.

The submittal and notice requirements as specified in MN Rules 7000.7000 do not comply with 40 CFR § 25.5 (b). MN Rule 7000.7000 subpart 4 requires 30 days in which the public may submit comments prior to a public hearing. 40 CFR § 25.5 (b) requires at least 45 days for public comment prior to a public hearing. This inconsistency must be addressed.

VII. Variances must contain a reopener clause allowing the MPCA to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

40 CFR §122.44 (*4*) (d) requires that "[t]he permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards." Chapter 7052 Subp. 5 D. includes "a provision allowing the agency to reopen and modify the permit based on agency triennial water quality standards revisions applicable to the variance" thus it appears to limit the reopener clause only to triennial reviews. In order to fully comply with federal rules, a reopener clause must be added to the 7050 rule, and the reopener clause in the 7052 rule must be revised.

VIII. Great Lakes Water Quality Standards do not allow variances for new dischargers.

Variances for new Great Lakes dischargers are prohibited by 40 CFR 132, Appendix F, Procedure 2. However, in the 7052 variance rules, it is not clear that new discharges are not eligible for a variance. Instead, 7052 Subpart 1. states "[t]his 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." Chapter 7052 must clarify that only existing discharges may receive a variance within the Lake Superior Basin.

IX. Currently attained water quality must not be lowered.

A variance shall not result in any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities. 40 C.F.R. § 131.14(b)(1)(ii). Thus, except in the rare case of a variance needed for restoration activities, a variance should not be allowed that would degrade water quality or adversely affect an existing use. MCEA would propose that the language should specify that the variance "maintain and protect all existing uses." The "maintain and protect" language appears at 40 C.F.R. § 131.12(a)(1) and is appropriate here. Again, variance conditions should not be in conflict with antidgradation constraints, and MPCA's rule should be clear on this.

X. 7053.0195 Variance from Treatment Requirements must comply with federal rule 40 C.F.R. § 131.14

Chapter 7053.0195§ Subp. 3. has been repealed, but it must be reinstated to conform with federal NPDES requirements. MPCA has been delegated the authority to issue NPDES permits by the US EPA. In order to maintain that authority, MPCA rules must be at least as stringent as federal NPDES requirements. Therefore, MPCA must reinstate Ch. 7053.0195§ Subp. 3. which states "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."

In addition to reinstating 7053.0195§ Subp. 3., MPCA must revise part 7000.7000 to require a 45-day public notice for variances. Also, a reopener clause must be included in 7053.0195§ Subp. 3, allowing the MPCA to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

Chapter 7053.0195§ Subp. 4, Conditions for approval, appears to attempt to evade EPA variance approval by stating"[t]o be eligible for a preliminary determination by the agency to grant the variance, the permittee must meet the conditions specified in part 7050.0190, subpart 4 "***except the requirement to submit the variance to the United States Environmental Protection***

Agency for approval does not apply to variances granted by the agency under this part. " This must be changed to ensure that every NPDES variance request is sent to EPA for approval as required by 40 CFR § 131.5. Variances are, by definition, a change in a water quality standard and as such, require EPA approval.

In conclusion, the Bands also caution that the MPCA should explicitly state in their variance rules that no variances shall be issued for non-conventional pollutants. The federal deadline for those types of variances expired in 1982, with the expectation that at this point in time, after decades of regulatory enforcement, technological advances, and general progress under the CWA, no discharger should have difficulties in achieving basic water quality standards. The Bands also urge MPCA to specifically link the proposed new variance rules with the concept of HAU, and clearly relate the variance rules to their draft antidegradation rule amendments.

We respectfully request that these proposed rules be withdrawn and substantially revised to be consistent with federal regulations or that they be disapproved.

Sincerely,

Margaret Watkins

Nancy Schuldt

Margaret Watkins, Water Quality Specialist
Grand Portage Band

Nancy Schuldt, Water Projects Coordinator
Fond du Lac Band

Bradley Sagen
13667 Deer RD, Ely, MN 55731

February 23, 2016

The Honorable Judge Barbara J. Case
Office of Administrative Hearings
600 North Robert Street, P.O. Box 64620
St. Paul, MN 55164-0620

Submitted via electronic mail to,
barbara.case@state.mn.us

RE: OAH Rulemaking Docket 82-9003-32864
Proposed Amendments of MPCA Variance Rules, Chapters 7050, 7052 and 7053

Thank you for providing this opportunity to comment on the Proposed Amendments to Rules Governing Water Quality Variances.

Introduction

EPA, as the agency responsible for implementation of the Clean Water Act (CWA), has authority provided in federal rule at *Code of Federal Regulations*, 40 CFR 131 for Water Quality Variance Rule Amendments. These federal rules require states to designate uses of a water body and the appropriate criteria for those uses, to consider the WQS of downstream waters, and to ensure the attainment and maintenance of downstream waters.

Federal regulations allow states to assume responsibility for CWA actions subject to federal EPA oversight. Regarding variances, As the MPCA SONAR describes it:

> *"Code of Federal Regulations*, title 40, part 131.13 (40 CFR 131.13) allows states, at their discretion, to include in their WQS, a process to allow for variances from WQS. This part of the *Code of Federal Regulations* requires that provisions that allow for variances from WQS are subject to USEPA review and approval. That is, USEPA must approve the MPCA's variance rules and requests for variances from WQS." (SONAR, p.6)

My basic position elaborated in the following comments is that MPCA has failed to meet its obligations to CWA. EPA should reject the proposed MPCA Water Quality Variance Amendments. *MPCA should withdraw the current draft amendments and rework them to meet federal EPA requirements.* The following comments address primarily the discrepancies between the Draft Water Quality Amendments and federal requirements. The major discrepancies were called to the attention of MPCA in comments by EPA submitted December 28, 2015.

Failure to Address Compatibility of Minnesota's proposed revisions with EPA's variance regulations at 40 CFR 131.14, published August 21, 2015. Failure Will Deprive Public of Required Opportunity to Comment on Proposed Changes at Draft Amendment Stage.

On August 21, 2015, EPA published new regulations covering variances at40 CFR 131.14. EPA acknowledges in its comments of December 28, 2015, "There are a number of requirements in these regulations that Minnesota was not able to include in its proposed rules because of when

the new federal regulations were published." (However,) "Any variance submitted to EPA by Minnesota must comply with the requirements of 40 CFR 131.14 to be approved."
Among the 40 CFR changes of August 21, 2015 are several noted by EPA that Minnesota's proposed revisions have yet to address. These include,

Documentation Requirements for Submission to EPA. New 40 CFR 131.14(b)(2)(h) requires: (ii) Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the highest attainable condition. *I support this requirement.*

Public participation requirements for WQS rulemaking. New and revised WQS include variances from WQS. Consistent with 40 CFR 131.20(b), States and Tribes must hold a public hearing consistent with the requirements of 40 CFR Part 25 as part of each triennial standards review and prior to adopting any new or revised WQS. *I support this requirement.*

Proposed Amendments to 7050.0190

Subpart 4. Conditions for Approval. 40 CFR 131.10(g)(5) states, "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 water quality, preclude attainment of *aquatic life protection uses."* [emphasis added] The proposed Minnesota rule instead says, "…preclude attainment of water quality standards." *I join EPA in recommending that Minnesota revise 7050.0190, subpart 4 to be consistent with 40 CFR 131.10(g)(5).*

Subpart 7. Renewal. The proposal is a renewal should only be granted for a variance under circumstances in which a new variance could be granted. *I agree.*

Subpart 8. Term and expiration. *I agree that a Minnesota variance should last no longer than ten years and that the variance must not last longer than is necessary. However, the rule must also incorporate the requirements of 40 C.F.R. § 131.14(b)(v) requiring a reevaluation of the "highest attainable use" at least every five years. Further, the rules must contain a provision that the variance will no longer be applicable if the State fails to conduct the necessary evaluation. 40 C.F.R. § 131.14(b)(vi)*

Proposed Amendments to 7052.0280

Variances for New Great Lakes Dischargers Are Prohibited by 40 CFR 132, Appendix F, Procedure 2. EPA recommends that Minnesota revise the applicability requirements in 7052.0280 to be consistent with the requirements of 40 CFR 132 with regards to variances for new Great Lakes dischargers. New Great Lakes dischargers are prohibited by 40 CFR 132, Appendix F, Procedure 2. *I support this recommendation.*

In addition to failures specific to state CWA obligations, MPCA has failed to meet two other obligations, one state - Failure to Follow State Law Regarding Content of Statement of Need and Reasonableness (SONAR; one federal (but assumed by state agencies in actions conducted under federal oversight) - Failure to Provide for Tribal Consultation.

Failure to Follow State Law Regarding Content of Statement of Need and Reasonableness (SONAR)

MPCA has failed to comply with state law because the SONAR does not contain "an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference." Minn. Stat. §§ 14.131(7), 14.23.

Failure to Provide for Tribal Consultation

I can find no evidence of any action by MPCA (or EPA) to initiate consultation with tribal interests. Consultation with tribes by EPA is required and would be in the best interest of the state to pursue as well.

> "Consultation by EPA will only be provided on state actions in which EPA has an oversight role." (EPA Region 5 Implementation Procedures for EPA Policy on Consultation and Coordination with Indian Tribes 7/26/2011, 2.1.2)

MPCA should consult with relevant tribal interests immediately concerning the proposed amendments.

Conclusion

MPCA has failed to develop Water Quality Variance Rules that meet federal requirements. *EPA should reject the Amendments when submitted. Draft Amendments should be revised by MPCA to meet federal requirements.*

Sincerely,

Bradley Sagen hbsagen@frontiernet.net
13667 Deer RD, Ely, MN 55731

Southern Minnesota Beet Sugar Cooperative

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

February 24, 2016

SENT ELECTRONICALLY
Administrative Law Judge Barbara J. Case (barbara.case@state.mn.us)
Office of Administrative Hearings
600 Robert Street North
St Paul, MN 55101

Re: OAH Rulemaking Docket 82-9003-32864
Comment on Proposed Amendments to Rules Governing Water Quality Variances (Minnesota Rules Chapters 7050, 7052, and 7053)

Dear Judge Case:

Southern Minnesota Beet Sugar Cooperative (SMBSC) appreciates opportunity to provide comments on Minnesota Pollution Control Agency's (MPCA) proposed amendments to rules governing water quality variances. SMBSC attended the February 4, 2016 hearing, listened to and considered MPCA's presentation on that day, has studied and reconsidered the proposed rules and SONAR, and has considered MPCA's proposed changes to the proposed rules (dated February 4), however, SMBSC's overall conclusion about the adequacy of the proposed rules remains unchanged:

> It is SMBSC's opinion that MPCA should withdraw these proposed rules, and revise them to bring them into alignment with final federal requirements, or if the state chooses to implement rules that go beyond federal requirements, then MPCA needs to comply with statute and revise and reissue (for public comment) the SONAR to assess, explain, and justify those differences.

MPCA's proposed amendments to the rules governing water quality variances should reflect U.S. Environmental Protection Agency's (EPA) final Water Quality Standard Rules (40 CFR 131—WQS Rules). As stated in the fact sheet and statement of need and reasonableness (SONAR) that accompany the proposed rule, MPCA's proposed rule revisions are based upon EPA's 2013 draft WQS Rules, and are not based on the final WQS Rules published on August 21, 2015. Within the WQS Rules, EPA's final variance requirements differ greatly from the 2013 draft requirements. Therefore, MPCA's proposed variance rules are not in good alignment with federal requirements.

Variance Term

On February 4, 2016, MPCA proposed changes to the proposed amendments to rules governing variances. With regard to the variance term, the MPCA proposed changes aligned the proposed rules with final WQS Rules—those changes are acceptable to SMBSC.

Proposed rules that are designed to incorporate the concepts within 40 CFR 131.10(g) must use the precise federal language and the word "use" must be used where it is used in the federal rules

In proposing to adopt the language of 40 CFR 131.10(g) into MN Rules 7050.0190 Subp. 4, MPCA has substituted the phrase "water quality standard(s)" for the word "use". In December, SMBSC commented that this substituted language needlessly causes confusion and the precise federal language must be employed and included an example for illustration. Even though SMBSC provided this comment in 2013 when commenting on pre-proposal draft rules, the SONAR does not address MPCA's rationale other to say that it is aligning Chapter 7050 with Chapter 7052 (MPCA, SONAR, page 19). However, consistency is not valuable without being correct.

On February 4th, MPCA proposed to correct one of the clauses in question. The clause that I used as an example in my December letter has been addressed with MPCA's proposed February change. While, we applaud the change proposed for the proposed rule in 7050.0190 Subpart 4.A.(5), our concern remains for the additional and preceding four clauses (7050.0190 Subpart 4.A.(1) – (4)).

As illustrated by MPCA's proposed change, the question of whether a use is being attained, or could be attained, cannot always be judged by whether the current statewide criteria are being met. The second clause is another case where inserting "water quality standard(s)" for "use" is not appropriate in all cases—the following illustrative example is used to demonstrate that our concern has not yet been adequately addressed.

> Illustrative example: A municipality discharges effluent to a Class 7, limited resource value water, and new effluent limits are being put in-place to address an emerging issue in

Minnesota—"salty discharges". This emerging issue is developing from a growing awareness that municipal effluents have (and have had) the reasonable potential to exceed dissolved mineral WQS associated with industrial and irrigation use--uses which are also assigned to Class 7 waters (7050.0410). In this illustrative example, there is limited natural flow and the stream is "effluent dominated" (which is very typical of Class 7 waters). However, the effluent-dominated stream flow is small enough to convince stakeholders that the uses, irrigation and industrial use, are not attainable due to "natural, ephemeral, intermittent, or low-flow conditions"—i.e., these condition prevent attainment of the "use". In this illustrative example, the municipality might seek a variance to allow the highest attainable use or criterion to be met until a cost effective technology or pollutant reduction efforts allow the underlying WQS to be met. However, if MPCA's proposed rule is adopted as-is and it uses "water quality standard(s)" where "use" should be inserted in 7050.0190 Subpart 4.A.(2) , then that variance could not be granted because the "natural, ephemeral, intermittent, or low-flow conditions" DO NOT prevent attainment of the "water quality standard".

Again, we have illustrated that the term "water quality" is not always synonymous with "use", in ways that are significant for implementation of this rule. Therefore, 7050.0190 Subpart 4.A.(1) – (5) should be brought in alignment with language used in EPA WQS 131.10(g), even if it means that the agency needs to change previously approved rule and guidance.

Non-101(a)(2) Uses

MPCA's proposed variance rules extend the federal requirements to uses not covered by the federal rule (uses not associated with fishable, swimmable goals), without a clear rationale. 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 apply these federal requirements to other uses such as irrigation and industrial use (i.e., uses added by the states under Section 303(c)(2) of the CWA). EPA's final rule clarifies the different variance requirements for use other than CWA Section 101(a)(2) uses. The WQS Rule defines "non-101(a)(2) use as "any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water." The MPCA expansion of the scope of variance requirements is particularly surprising given that MPCA's stated goal with these rule revisions is to align with, not go beyond, federal requirements. The MPCA provides no acknowledgement that it is

expanding upon the federal requirements, let alone a non-arbitrary reason for doing so. Therefore MPCA should adopt the federal definition and clarify variance requirements for the non-101(a)(2) uses.

Highest attainable use or condition are not adequately defined

The highest attainable use or condition that must be maintained during the variance period is defined effectively in the final WQS Rule. While MPCA's proposed rule uses the term "highest attainable condition", the term is not defined clearly. In SMBSC's opinion, the proposed rules need to be improved and clarified through a more complete alignment with the WQS Rules.

MPCA's goal of aligning state rule with federal guidance has not been met

MPCA began this rule-making with the stated goal of aligning the state-wide water quality variance requirements with federal requirements. When considering the final WQS Rule, MPCA's proposed rules do not meet this goal. Critically, MPCA is bound by statute[1] to provide "...an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference". The Statement of Need and Reasonableness (SONAR) for the proposed rule does not meet this statutory requirement for the issues outlined in this letter. For both of these reasons, both arising from the fact that the proposed rule is not based upon current federal requirements, SMBSC is opposed to the entirety of the proposed amendments.

In summary:

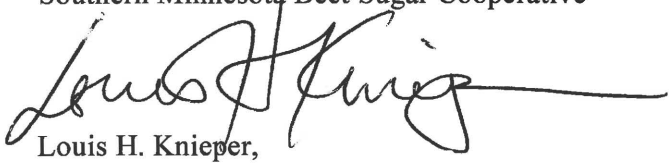
- MPCA's proposed amendments to the rules governing water quality variances substitute the term "water quality standard(s)" rather than using the WQS Rule term "use".
- MPCA's proposed amendments to the rules governing water quality variances go beyond federal requirements in regard to the variance requirements for non-101(a)(2) uses.
- MPCA's proposed amendments to the rules governing water quality variances do not adequately define the highest attainable use or condition that must be attained during the variance period.
- MPCA's proposed amendments to the rules governing water quality variances should reflect U.S. EPA's final WQS Rules.

[1] Minnesota Statute 14.131 Statement of Need and Reasonableness, Item (7).

It is SMBSC's opinion that MPCA should withdraw these proposed rules, and revise them to bring them into alignment with final federal requirements, or if the state chooses to implement rules that go beyond federal requirements, then MPCA needs to comply with statute and revise and reissue (for public comment) the SONAR to assess, explain, and justify those differences.

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

Respectfully submitted,
Southern Minnesota Beet Sugar Cooperative



Louis H. Knieper,
Manager of Environmental Affairs

Cc: Katrina Kessler, MPCA
Brandon Smith, MPCA
Mike Drysdale, Dorsey
Dale Finnesgaard, Barr

February 24, 2016

Administrative Law Judge Barbara J. Case (barbara.case@state.mn.us)
Office of Administrative Hearings
600 Robert Street North
St Paul, MN 55101

RE: OAH Rulemaking Docket 82-9003-32864
Proposed Amendments of MPCA Variance Rules, Chapters 7050, 7052 and 7053

Dear Judge Case:

These comments are submitted on behalf of the undersigned groups who are members of the Minnesota Environmental Partnership. Our groups represent tens of thousands of Minnesotans care about the quality of their water for drinking, fishing, swimming and canoeing and who believe that the health of Minnesota communities and the vitality of Minnesota's economy depend on fresh, clean and abundant water.

Compliance with Minnesota water quality standards is necessary to protect Minnesota's vital water resources. Variances for dischargers should be the very last resort, not the path of least resistance when polluters would prefer not to expend money for wastewater treatment and pollution control.

Standards for variances must not only be at least as stringent as federal requirements under the law. In addition, Minnesota's public health, the value of our Great Outdoors and Minnesota's policies supporting open and transparent citizen input into environmental decisionmaking require that the rules proposed for variances by the Minnesota Pollution Control Agency (MPCA) must be amended or they should not be approved.

Our groups specifically request that the following changes be made in the variance rules proposed by the MPCA for statewide waters (Chapter 7050) and waters of the Lake Superior Basin (Chapter 7050):

1. MPCA's proposed rules for Chapters 7050 and 7052 should only allow variances for as long as necessary to achieve specific pollution reduction goals, like designing and building treatment facilities.

2. MPCA's proposed rules for the duration of variances in both Chapter 7050 and 7052 should be changed to include provisions that a variance expires and the underlying water quality standard applies if the MPCA doesn't complete a review and decision on the variance within 5 years, as required under federal regulations.

3. MPCA's proposed rules for variances in both Chapter 7050 and 7052 should be changed so they would not allow grandfathering of the Agency's failure to require compliance with a discharger's prior permit.

4. MPCA's proposed rules for variances in both Chapter 7050 and 7052 should be very specific about the discharger attaining the highest attainable conditions, as in the federal variance rules, so that the Agency isn't pressured to accept lax variance requirements.

5. MPCA's proposed rules for statewide variances should clearly state that at the end of the variance period the discharger must comply with water quality standards, as intended by the Clean Water Act.

6. MPCA's proposed rules for variances in both Chapter 7050 and 7052 must include public participation with notice and a hearing as required in federal rules. Since variances are like a rule change for a discharger and body of water, citizens who submit 25 signatures should be able to have a contested case hearing with an objective hearing judge.

7. MPCA's proposed rules for variances should protect Lake Superior Basin waters by prohibiting variances for new or restarting dischargers, preventing variances that don't meet Lake Superior Basin antidegradation rules, and giving tribes and other Great Lakes states notice if a variance is proposed for Lake Superior Basin watersheds.

Dischargers have opposed some of MPCA's efforts to increase consistency between the various chapters of variance rules and to make it clearer that federal and state policies will apply to variance decisions. We support MPCA's proposals to require applicants for a variance to analyze potential health risks, to explain that variances can't harm federal endangered species, to prevent variances from changing a body of water that has complied with water quality standards (an existing use) to one that doesn't, and to make conditions for a variance as consistent as possible between the various parts of Minnesota rules, so that citizens can understand how the rules will be applied.

Our undersigned groups greatly appreciate the Administrative Law Judge's decision to give members of the public the maximum 20 days after the hearing on February 4, 2016 to provide our comments on the MPCA's proposed variance rules.

Protection of Minnesota water quality is a high priority for us and for our members. We urge you to recommend variance rules that comply with federal requirements and support protection of Minnesota's precious fresh waters.

Sincerely yours,

Friends of the Boundary Waters Wilderness
Friends of the Cloquet Valley State Forest
Northeastern Minnesotans for Wilderness
Protect Our Manoomin
Save Our Sky Blue Waters
Sierra Club North Star Chapter
Voyageurs National Park Association
Lutheran Advocacy - Minnesota
Austin Coalition for Environmental Sustainability

These comments are submitted on behalf of these groups by Aaron Klemz, Advocacy Director, Friends of the Boundary Waters Wilderness, 401 North 3rd St. #290, Minneapolis, MN 55401. Please contact me if you have any questions or if there are additional opportunities for comment on these proposed rules.

cc: Katrina Kessler, MPCA Water Assessment Manager (Katrina.Kessler@state.mn.us)
Linda Holst, Chief, EPA Region 5 Water Quality Branch (Holst.Linda@epa.gov)
Denise Collins, Minnesota OAH (Denise.Collins@state.mn.us)