Southern Minnesota Beet Sugar Cooperative

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

March 2, 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
Rebuttal Comments 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) has previously commented on the Minnesota Pollution Control Agency's (MPCA) proposed amendments to rules governing water quality variances, and appreciates the opportunity to provide rebuttal comments. SMBSC has considered the MPCA's additional submissions and explanations, dated February 19, 2016. 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.

SMBSC understands that the Chamber of Commerce is providing detailed comments on behalf of its members in Minnesota and we agree with the rebuttal from the Chamber. However, there is one subject that must be further addressed due to its significance.

SMBSC commented that MPCA's proposed rules inappropriately interchange the terms water quality standard or criterion for the word use[1] particularly in the section of the proposed rule that is taken from federal WQS Rule (CFR 131) that addresses designation of uses (CFR 131.10). MPCA's post-hearing response includes a comment that is illustrative in showing the differences and fundamental

1 SMBSC, August 5, 2013. SMBSC; SMBSC, December 29, 2015; SMBSC February 24, 2016.

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misalignment between MPCA's proposed rules and EPA WQS rule. The MPCA comment[2] is as follows:

- *The MPCA does not intend to issue variances to a "use", as variances are specific to WQS.*

The MPCA position and misunderstanding of the connection and relationship between WQS or Criterion and Designated Use is shortsighted and will create significant difficulties where proposed regulations address impacts on lesser use waters.

In my February 24th letter, I used an illustrative example to demonstrate where inserting "water quality standard(s)" for "use" is not appropriate. The following continuation of that illustrative example is intended to demonstrate the fundamental misalignment between the proposed rules and federal WQS rules and the other issues discussed in detail by the Chamber of Commerce. By way of additional background, SMBSC presently holds a variance for certain "salty" components (dissolved solids) in our discharges, and has applied for renewal of that variance. Setting aside any unique issues associated with the renewal of an existing variance, concern about "salty discharges" is an emerging issue throughout the state. This example focuses on a proposed new variance for a municipal discharger.

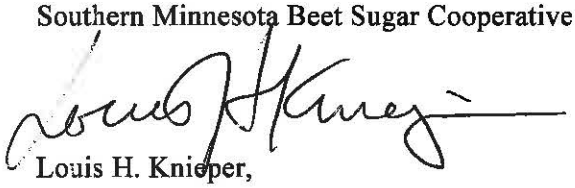
- Assume a municipality discharges effluent to a Class 7, limited resource value water, and new effluent limits are being put in-place to address an emerging issue in Minnesota—"salty discharges". This emerging issue is developing from a growing awareness that municipal effluents have (and have had) the reasonable potential to exceed dissolved mineral water quality criteria associated with industrial and irrigation designated uses—designated uses which are also assigned to Class 7 waters (7050.0410) whether or not those uses are actually attainable. 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 designated uses, irrigation and industrial use, are not attainable due to "natural, ephemeral, intermittent, or low-flow conditions"—i.e., these conditions prevent attainment of the "designated use".
- Under federal WQS rule, 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 effort allows the underlying designated use and water quality criteria to be met.

[2] MPCA, February 19, 2016 Post-hearing Preliminary Response and Proposed Amendments. Response to comment 18b—page 22 of 57.

- Under the proposed WQV Amendments, however, the municipality could not obtain a variance under the proposed rules because:
    - Under 7050.0190 Subpart 4.A.(2) , a variance could not be granted because the "natural, ephemeral, intermittent, or low-flow conditions" DO NOT prevent attainment of the "water quality standard;"
    - MPCA does not intend to issue a variance for "designated uses" alone; and
    - Temporary water quality criteria could not be issued without also temporarily affecting the designated use.
- Under the proposed MPCA rule, the municipality's only option would be to seek a permanent removal of the industrial and irrigation designated uses under CFR 131.10, an outcome the MPCA has itself stated is inferior to a temporary variance in the use.

We hope that this concrete example shows how the MPCA's substitution of the phrase "water quality standards" for "use" can raise significant problems for permittees. 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,
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Cc: Brandon Smith, MPCA
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WaterLegacy
Protecting Minnesota's waters and the communities who rely on them

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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:

The response comments below are submitted on behalf of WaterLegacy. They are based on review of the Minnesota Pollution Control Agency's (MPCA) February 19 and February 24, 2016 Post-Hearing Responses to Comments, including Attachment 1 (enclosed) in which the MPCA's proposes additional revisions to its draft water quality variance rules.

WaterLegacy appreciates that the MPCA's proposed revisions are beginning to address the issues we raised in our hearing testimony. The MPCA's requirement that variances be reevaluated after five years is a step in the right direction. We also appreciate that MPCA is not proposing to revise sections of the proposed variance rules that protect human health, endangered species and provide consistency between chapters, which rule sections were discussed in Section III of our February 12, 2016 post-hearing written comments.

However, there are several important revisions that still must be made in MPCA's proposed variance rules to comply with federal requirements. These remaining concerns, explained in more depth in WaterLegacy's February 12 post-hearing comments, are summarized below.

1. **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.**

MPCA's proposed variance rules and revisions still fail to appropriately specify requirements for highest attainable use, allow backsliding on permits and fail to specify requirements for a Pollution Minimization Program if there is no currently available technology to reduce pollution. Federal regulations requiring changes in MPCA's proposed rules are detailed in our February 12 comments.

Highest attainable use (HAU) is the heart of federal requirements for variances. WaterLegacy strongly recommends that the explanation of HAU be stated clearly in the rules, so that both dischargers and citizens will understand the applicable limits on permissible variances. We

repeat our request that the requirements of 40 CFR §131.14(b)(ii) be incorporated in Minnesota rules to ensure that Minnesota variances contain the quantification of "highest attainable conditions" required under recently adopted federal regulations and to prevent backsliding prohibited 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.

2. 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 for Chapter 7050 fail to comply with the Clean Water Act requirement that permits must comply with water quality standards upon the expiration of a variance.

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

3. 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 and that federal public participation requirements in 40 CFR §131.20(b) must apply both to variances and triennial review.

In the February 19, 2016 MPCA Response to Comments Submitted During the Dual Notice Public Comment Period and at the Public Hearing (hereinafter "MPCA Response"), the Agency seemed to suggest that MPCA will comply with federal hearing requirements even if state rules continue to provide a lesser and inconsistent level of public participation. MPCA Response, pp. 24 (¶21), 27 (¶33).

MPCA might claim for *any* provision of Minnesota variance rules that is less stringent than federal law that the Agency will ignore Minnesota's written rules and will, instead, apply federal requirements.

This approach is particularly galling for citizen participation rights. It assumes that stakeholders will know that federal procedural rules differ from Minnesota rules and that the MPCA is obligated to apply the federal process. It assumes that citizens would know that they have a right to a variance hearing even if Minnesota rules exclude that right. It then assumes that, if MPCA fails to hold a hearing, citizens would know what rights were denied and how to appeal to EPA to prevent approval of a variance.

MPCA's proposal to retain Minnesota public participation rules below federal standards is unsatisfactory under federal law. It is also a recipe for uncertainty and confusion.

Federal requirements for public participation must be incorporated into Minnesota Rules for Chapters 7050 and 7052. WaterLegacy also recommends that, since a variance is a change in water quality standards, 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 included in Minnesota's rules for variances. In our proposed text below, revisions that would allow a contested case petition in addition to minimum federal regulations are italicized:

> 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

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

EPA has emphasized that variances for new or recommencing Great Lakes dischargers are *prohibited*. See 40 CFR, Part 132, Appendix F, Procedure 2. A.1. The MPCA's response to this comment from EPA, MCEA and WaterLegacy provides no substantive grounds for failure to comply with federal Great Lakes Initiative requirements. MPCA Response, p. 26 (¶27), p. 33 (Comment 4f).

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~~.

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

It is critical that any analysis of antidegradation for Lake Superior Basin waters comply with antidegradation requirements for the Great Lakes region. Under federal law (40 CFR, Part 132, Appendix E), antidegradation regulations for the Great Lakes area are *much 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.

MPCA provides no justification in its responses to comments for failure to require a permittee to show that a proposed variance in the Lake Superior Basin meets applicable Great Lakes antidegradation standards. MPCA Response, p. 33 (Comment 4g). As with prior areas of concern, the assertion that the Agency will meet standards but won't allow those standards to be reflected in rules is contrary to law and unintelligible as policy. The revision to cure this deficit is simple and necessary:

> 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.

Conclusion

WaterLegacy appreciates that MPCA has continued to revise its proposed variance rules for Chapters 7050, 7052 and 7053 to increase compliance with federal minimum requirements. We also agree with the MPCA's goal of increasing consistency between Minnesota's rule chapters to avoid confusion.

We believe that the additional rule revisions summarized in the above response comments are needed to comply with minimum federal requirements. There is no justification for proposing or retaining Minnesota rule language that is in conflict with and less protective than federal requirements for highest attainable use, compliance with water quality standards on variance expiration, public hearing process, and protection of Lake Superior Basin waters consistent with the federal Great Lakes Initiative regulations. WaterLegacy has proposed clear and simple text revisions to resolve each of these conflicts and increase the transparency to the public of Minnesota variance proceedings.

WaterLegacy respectfully requests that the proposed revisions contained in our February 12 post-hearing comments and these response comments be adopted in the final rule to protect Minnesota's precious water resources in compliance with State enabling legislation and federal Clean Water Act statutes and regulations. Thank you for the opportunity to provide post-hearing comments in these proceedings.

Sincerely yours,

Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy

Enclosure

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)

Revised 2/24/2016 **Attachment 1**

Proposed Revisions to Proposed Amendments to Rules Governing Water Quality Variances, *Minnesota Rules*, Chapter 7050 Waters of the State, Chapter 7052 Lake Superior Basin Water Standards, and Chapter 7053 State Waters Discharge Restrictions.

7050.0190 VARIANCE FROM STANDARDS.

Proposed revision part 7050.0190, subpart 4.A(5):

(5) physical conditions related to the natural features of the water body, such as the lack of a proper substrate cover, flow, depth, pools, riffles, and the like, unrelated to chemical water quality, preclude attainment of ~~water quality standards~~ aquatic life protection uses; or

Proposed revision part 7050.0190, subpart 8:

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. The term of a variance must ~~be as short as possible but must expire no later than ten years after the United States Environmental Protection Agency approval date of the variance~~ only be as long as necessary to achieve the highest attainable condition. For a variance with the term greater than five years, only if requested in writing by the permittee, the agency shall reevaluate the variance every five years in accordance with Code of Federal Regulations, title 40, section 131.14(b)(1)(v) and (vi). If the permittee does not request a reevaluation, the variance shall expire at the end of the five year period.

7053.0195 VARIANCE FROM DISCHARGE EFFLUENT LIMITS OR TREATMENT REQUIREMENTS.

Proposed revision part 7053.0195, subpart 4:

Subp. 4. **Conditions for approval.** To be eligible for a preliminary determination by the agency to grant the variance, the permittee must meet the conditions specified in part 7050.0190, subpart 4, items A to D~~, except the requirement to submit the variance to the United States Environmental Protection Agency for approval does not apply to variances granted by the agency under this part~~.

Proposed revision part 7053.0195, subpart 8:

Subp. 8. **Term and expiration.** The terms and conditions of a variance from a discharge effluent limit or treatment requirement are included and incorporated in the permit issued by the agency. The term of a variance must ~~be as short as possible but must expire no later than ten years after the date the agency grants the variance~~ only be as long as necessary to achieve the highest attainable condition. For a variance with the term greater than five years, only if requested in writing by the permittee, the agency shall reevaluate the variance every five years in accordance with Code of Federal Regulations, title 40, section 131.14(b)(1)(v) and (vi). If the permittee does not request a reevaluation, the variance shall expire at the end of the five year period.

MINNESOTA CHAMBER of COMMERCE

March 2, 2016

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Administrative Law Judge Barbara J. Case (barbara.case@state.mn.us)
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Re: OAH Rulemaking Docket 82-9003-32864
Rebuttal Comments on Proposed Amendments to Rules Governing Water Quality Variances (Minnesota Rules Chapters 7050, 7052, and 7053)

Dear Judge Case:

The Minnesota Chamber of Commerce (Chamber) appreciates the opportunity to provide rebuttal comments on the Minnesota Pollution Control Agency's (MPCA) proposed amendments to rules governing water quality variances (WQV Amendments). The Chamber has reviewed and considered MPCA's Post Hearing Preliminary Response and Proposed Amendments to Minnesota Rules, Chapters 7050, 7052, and 7053 Governing Water Quality Variances, dated February 19, 2016 (MPCA Response). Although MPCA's further revisions and explanations address some of the Chamber's concerns, the rules still contain many procedural irregularities and legal errors to a degree that warrants the Office of Administrative Hearings (OAH) to reject the entire rulemaking and requiring the MPCA to start over. This rebuttal submission

incorporates and references the Chamber's prior comments and provides further analysis based upon MPCA's Response.

Procedural Irregularities

The Chamber and numerous other commenters observed that the WQV Amendments were based on a proposed federal rule. The WQV Amendments were based on MPCA's review of EPA 2013 *draft* Water Quality Standard rules (40 CFR 131—WQS rules), not the *final* EPA WQS rules promulgated on August 21, 2015, during the pendency of this rulemaking and before release of MPCA's WQV Amendments.

MPCA admits as much but urges OAH to allow the WQV Amendments to take effect, based on three justifications. First, MPCA explains it cannot be faulted for proceeding on the basis of the draft EPA WQS rules, because MPCA viewed the need to proceed as urgent and EPA did not advise MPCA regarding the speed at which EPA would promulgate the final WQS rules. Although the Chamber agrees that the WQV Amendments are important, urgency alone does not excuse a deficient rulemaking process, particularly where, as here, material discrepancies between the proposed state and final federal rules could hinder permitting actions for years to come. Moreover, OAH should not credit MPCA's claim that the agency was "surprised" by the swiftness of the federal rulemaking. The Chamber and numerous other commenters urged MPCA to wait until the federal rulemaking was complete, given the need for harmony between state and federal law. And regardless of its state of mind, MPCA knew that the federal WQS rules had been finalized *before* MPCA released the *draft*

WQV Amendments. MPCA could have paused and updated both the WQV Amendments and the supporting Statement of Need and Reasonableness (SONAR) without significantly compromising its timetable.

Second, MPCA contends OAH should allow the WQV Amendments to take effect because after EPA finalized the WQS rules, MPCA and EPA informally consulted, and both agencies agreed the differences between the two sets of rules were "minor." Focusing just on the procedural issues associated with this rationale, the nature and scope of these "consultations" is undocumented in the record. Were they conducted by correspondence, electronic mail, or telephone? Did the agency staffs walk together through the two sets of rules line-by-line, or did they simply share their impressions on their mutual impressions of the "big" issues? These are the kinds of questions a SONAR and a formal administrative record are intended to answer and supply. MPCA's attempt to fill the gap with vague hearsay is insufficient.

MPCA's account of the consultation is also directly contradicted by subsequent events. Despite MPCA's contention that there was mutual agreement and that the differences between the rules were minor, EPA filed formal comments requesting significant revisions to the WQV Amendments, prompting MPCA to hastily patch together material revisions to the WQV Amendment and submit them on the *day of the contested case hearing.*

Third, MPCA claims that even if there were material differences between the draft WQV Amendments and the WQS rules, these differences have been corrected by the MPCA's eleventh hour revisions, submitted on February 4, 2016. Although the

Chamber respectfully disagrees that MPCA's revisions are adequate, even if they were substantively sufficient they do not cure the procedural problems. The official SONAR no longer tracks the proposed rules. In addition, the supplemental materials provided by MPCA on February 4, 2016 and February 19, 2016, do not substitute for an adequate SONAR. MPCA does not substantiate many of its claimed consultations with EPA. Moreover, MPCA has introduced wholly new rule language and reasoning as late as February 19, 2016, affording the interested public a mere five days to evaluate and respond to the new information in rebuttal comments. There is simply no alternative other than requiring MPCA to prepare a new, adequate SONAR that properly documents the WQV Amendments and their rationale, especially given the persistent legal errors discussed below.

Legal Errors

A. Improper Substitution of the Phrase "Water Quality Standards" for "Use"

The MPCA Response reveals a misunderstanding of several key terms employed in water quality rulemaking. Specifically, the Chamber and other commenters highlighted what appeared to be loose and problematic substitution of the phrase "Water Quality Standards" (employed in the WQV Amendments) for the word "use" (employed in the federal WQS rules). Commenters observed these terms have different meanings, and MPCA's text implied inconsistent federal and state provisions without any clear justification.

MPCA explains it employed the phrase "water quality standards" rather than the word "use" intentionally and to be more precise. According to MPCA, the agency

grants variances to Water Quality Standards, not uses," and "does not intend to issue variances to a 'use', as variances are specific to WQS." (MPCA Response at pg. 22.)

These explanations do not track federal law. "Water Quality Standards" and "Water Quality Standards Variance" are defined terms in Clean Water Act regulations. As explained in 40 CFR § 131:3(i) and (o):

- "(i) Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States **and** water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act," and

- "(o) *A water quality standards variance* (WQS variance) is a time-limited designated use **and** criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance."

(Emphasis added.) Thus, a "Water Quality Standard" contains *two* components: a "use," and a "criterion" applicable to that use. A "Water Quality Standards Variance" provides a temporary exception to the use and criterion that would otherwise apply. In the preamble to the WQS rules, EPA also makes this clear, explaining that a Water Quality Standards Variance is "a designated use **and** criterion reflecting the highest attainable condition applicable throughout the term of the WQS variance, *instead of* pursuing a *permanent* revision to the designated use and associated criteria." 80 Fed. Reg. 51020, 51035 (Aug. 21, 2015) (Emphasis added).

Importantly, the definition of a water quality standards variance was first introduced in the final WQS rule. It was not in the proposed WQS rule and the proposed WQS rule is the basis for MPCA's proposed variance rule. In the final

WQS rule, EPA has inextricably linked "designated use" and "water quality criteria" in the definition of water quality standard and water quality standards variance. EPA in its WQS rules envisions that variances would address the designated use as well as criteria, which is why the variance rule in 40 CFR §131.14 refers back to the designation of uses addressed in 40 CFR §131.10—a variance is a time-limited change to the designated use *and* to a water quality criterion. MPCA's proposed rules and its SONAR appear to use "WQS" as the equivalent of EPA's WQS definition (i.e., addressing both designated use and water quality criteria not just "water quality criteria"). So when it writes that "MPCA does not intend to issue variance to a 'use'…", MPCA expresses a fundamental misalignment between its WQV Amendments and the final federal WQS rules. MPCA appears to be equating the phrase "Water Quality Standard" with the "criterion" prong of standard, without acknowledging that a Water Quality Standard is a function of *both* a use and a criterion.

Notably, there are separate procedures for changing either "uses" or "criteria" independently of each other. A change in a criterion without a change in the use is a "site specific standard." 40 CFR §131.11(b)(1). Conversely, a change in a use may also occur through a "use attainability analysis" pursuant to 40 CFR §131.10. However, both of these processes result in a *permanent* change to the standard. Under federal law, the only means to achieve a *temporary* change in standards is to promulgate a water quality standards variance, which requires modification of *both* the use and the relevant criteria. Consequently, when MPCA explains that it is "not

intending to issue variances to a use" it is materially deviating from federal law. The net effect is to either *never* grant variances, because federal law requires the variance to encompass the use as well as the criteria, or at a minimum put applicants at risk of lengthy proceedings during which MPCA and EPA attempt to work out their differing terminology.

Ironically, it is quite clear that MPCA is in favor of temporary changes to both uses and criteria, and does not want to be confined to the permanent avenues afforded by 40 CFR 131.10 and 131.11(b)(1). In the context of permanent changes to uses, MPCA explained:

> A variance should be used instead of removal of a designated use where the State believes the WQS can ultimately be attained. By allowing a temporary change to the standard rather than removing the use and the associated standard, the State will assure that further progress is made in improving water quality and attaining the standard. ... The principal difference between a variance and a downgrade of a designated use (a change in use to one with a less stringent standard) is that a variance is temporary. The USEPA found this approach acceptable as it would lead to only a temporary change in a WQS rather than a permanent downgrade. ... The USEPA is proposing numeric interim requirements be required in a permit as a component of any variance, reflecting the highest attainable use.[1]

MPCA apparently does not realize that this laudable statement of policy is hindered, not advanced, when the agency substitutes its preferred shorthand for the specific federal language.

EPA picked up on this problem, at least in part. In its comments, EPA demanded that MPCA revise the draft WQV Amendments so as to conform to federal terminology in the context of aquatic life protection uses, and made clear that it could

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1 MPCA SONAR (pgs. 7-9).

not approve variance applications on that subject unless the language was changed. On that specific topic, MPCA complied and brought the state rule (Minn. R.7050.0190, subp. 4.A(5)), into harmony with the federal rule (40 CFR §131.10(g)(5). Unfortunately, there are numerous additional instances of the substitution of "Water Quality Standards" for "uses" throughout the WQV Amendments. These include Minn. R. 7050.0190, subps. 4.A(1),4.A(2), 4.A(3), and 4.A(4). In addition to these specific instances, MPCA's erroneous understanding that the term "Water Quality Standards" excludes "uses" now raises concerns every time MPCA employs the "Water Quality Standards" term in the WQV Amendments.

It is not clear to the Chamber why EPA did not similarly object to these other errors, because the language problem is identical. It may be an artifact of the ad hoc and informal quality of the "consultations" between MPCA and EPA that followed promulgation of the federal WQS rules, or there may be some as yet unstated rationale distinguishing the aquatic life protection provisions from the other sections of the WQV Amendments that employ the same terminology. Whether the result is an oversight or a deliberate choice, MPCA should correct the problem throughout the WQV Amendments, or at a minimum provide a clear rationale for the differences. To date, MPCA has seemingly ignored the comments of the Chamber and other parties on this subject. This oversight should render the rulemaking defective.

B. No Definition of "Highest Attainable Condition"

The Chamber also requested that MPCA's rules more clearly define the term "highest attainable condition," which EPA uses in the federal WQS rules. The MPCA Response

declined to provide a clear definition of the term "highest attainable condition." According to MPCA, providing a definition would "unduly limit" implementation of the rule because determination of the highest attainable condition "will be a case specific determination" and "may be different for each variance request." (MPCA Response at pg. 22). MPCA also noted that EPA's rules did not define the term "highest attainable condition," but in the preamble to the federal WQS rules provided examples of information States could submit to establish the condition, such as "[n]umeric effluent limits, including an enforceable sequence of actions that the State determines are necessary to achieve the final effluent limit." *Id.*

MPCA's unwillingness to define the term "highest attainable condition" overemphasizes the case-specific nature of variance requests. EPA opted not to define the term "highest attainable condition" in the federal WQS rules. But EPA's failure to specifically define the term does not mean, as MPCA suggests, every "highest attainable condition" will be based exclusively on case-specific information and will differ in every variance request. Water quality standard variances contain some case-specific information because they are modified water quality standards designed to meet the "highest attainable use" for a water body and "identify the highest attainable condition applicable throughout the WQS variance term." 80 Fed. Reg. 51020, 51035 (Aug. 21, 2015). *See also* 40 CFR § 131.3(o) (defining "water quality standards variance"). But the federal WQS rule definition of "highest attainable use" makes clear that to modify the use, States must submit information based upon the factors in 40 CFR § 131.10(g) that preclude certain uses, not all of which will differ for every variance. A "highest attainable

use" under the federal WQS rules is a "modified . . . use" that is "both the closest to the uses specified in section 101(a)(2) of the [Clean Water] Act and attainable." 40 CFR § 131.3(m). To determine highest attainable use, States must evaluate the factors in 40 CFR § 131.10(g) that "preclude(s) attainment of the section 101(a)(2) use and any other information or analyses that were used to evaluate attainability." *Id.* The "highest attainable condition" is a "quantifiable expression" of the modified water quality criterion necessary to achieve "highest attainable use." 80 Fed. Reg. at 51035.

Nothing in the federal WQS rules prohibits MPCA from including in its WQV Amendments a clearer definition of the type of information it will rely upon in determining the "highest attainable condition." MPCA asserts that EPA's preamble to the final WQS rules includes "suggestions" of what States may use to establish the "highest attainable condition" and claims Minnesota will follow those suggestions. But MPCA mischaracterizes the examples in EPA's preamble, asserting they are limited to "[n]umeric effluent limits" and compliance schedules. (MPCA Response at pg. 22). In reality, EPA's preamble states the federal WQS rules allows States "the flexibility to express the highest attainable condition as numeric pollutant concentrations in ambient water, numeric effluent concentrations, or other quantitative expressions of pollutant reduction." 80 Fed. Reg. at 51037. And where a State cannot identify a feasible pollutant control technology, the federal WQS rules allow "options for articulating the highest attainable condition using the greatest pollutant reduction achievable with optimization of currently installed pollutant control technologies" and adoption of a pollutant minimization plan. *Id.* In asserting the "highest attainable condition" is exclusively a

case-by-case determination focusing on effluent limits, MPCA has mischaracterized EPA's position. MPCA should more clearly define the term "highest attainable condition" to reflect the flexibility inherent in the federal WQS rules.

Conclusion

The Chamber believes MPCA must withdraw the proposed rules because of the noted procedural errors discussed above. If MPCA chooses to proceed with the rules, it should revise the rules to correct the legal errors discussed above.

Respectfully,

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