



# Minnesota Pollution Control Agency

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February 24, 2016

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

Re: Post-Hearing Preliminary Response and Proposed Amendments to *Minnesota Rules*, Chapters 7050, 7052, and 7053 Governing Water Quality Variances (OAH Docket No. 82-9003-32864; Governor's Office Tracking No. AR2009; Revisor ID No. 4136)

Dear Judge Case:

Please find enclosed, a revised Attachment 1 of the Minnesota Pollution Control Agency's (MPCA) Post-Hearing Response to Comments (Response) for the proposed rule amendments referenced above. The Response, submitted to you on February 19, 2016, was prepared for the post-hearing comment period that ends on February 24, 2016. The MPCA requests that the revised Attachment 1, which contains a revision to the proposed revision at part 7053.0195, subpart 8, be included as part of our Response submitted to you on February 19, 2016.

If you have questions regarding the revised Attachment 1, the Response or the content of the proposed rule amendments, please contact Elise Doucette at 651-757-2316 or [elise.doucette@state.mn.us](mailto:elise.doucette@state.mn.us). If you have questions regarding the rulemaking procedures followed for this rulemaking, please contact me at 651-757-2439 or [mary.lynn@state.mn.us](mailto:mary.lynn@state.mn.us).

Sincerely,

A handwritten signature in blue ink that reads "Mary H. Lynn".

Mary H. Lynn  
Rule Coordinator  
Agency Rules Unit  
Resource Management & Assistance Division

MHL:jlr

Enclosure

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.



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Dear Judge Case:

Please find enclosed, the Minnesota Pollution Control Agency's (MPCA) Post-Hearing Response to Comments (Response) for the proposed rule amendments referenced above. This Response, prepared for the post-hearing comment period that ends on February 24, 2016, addresses: 1) the substantive issues that were raised in the comment letters received by the MPCA during the Dual Notice public comment period, which ended December 29, 2015; 2) the oral testimony and comments that were made during the February 4, 2016, public hearing on the proposed rule amendments; and 3) several questions you asked and specifically requested the MPCA to address in this response.

The MPCA also plans to prepare a Final Response to Comments that will be submitted during the rebuttal comment period, which ends on March 2, 2016. If you have questions regarding the enclosed Response or the content of the proposed rule amendments, please contact Elise Doucette at 651-757-2316 or [elise.doucette@state.mn.us](mailto:elise.doucette@state.mn.us). If you have questions regarding the rulemaking procedures followed for this rulemaking, please contact me at 651-757-2439 or [mary.lynn@state.mn.us](mailto:mary.lynn@state.mn.us).

Sincerely,

A handwritten signature in blue ink that reads "Mary H. Lynn" with a stylized flourish at the end.

Mary H. Lynn  
Rule Coordinator  
Agency Rules Unit  
Resource Management & Assistance Division

MHL:jlr

Enclosure

State of Minnesota  
Minnesota Pollution Control Agency

In the Matter of Proposed Amendments  
to *Minnesota Rules*, Chapters 7050, 7052,  
and 7053 Governing Water Quality Standards Variances  
OAH Docket #82-9003-32864  
Revisor ID 4136

MPCA Post-Hearing Response  
to Public Comments

February 19, 2016

**MPCA Response to Comments Submitted During the Dual Notice Public Comment Period and at the Public Hearing.**

**I. Introduction**

A water quality variance is a temporary change in a state water quality standard (WQS) for a specific pollutant. The Minnesota Pollution Control Agency (MPCA) is amending Minnesota Rules chapters (*Minn. R. chs.*) 7050, 7052, and 7053 to address inconsistencies in the rules governing water quality variances, and to better align state rules with federal requirements for variances.

The final federal Water Quality Standards Regulatory Revisions, Final Rule (WQS Rule) were published in the *Federal Register* dated August 21, 2015, (80 FR 51020). The final WQS Rule includes new variance rules that establish what is required of states and authorized tribes in adopting a variance and submittal of the variance to United States Environmental Protection Agency (USEPA) for approval. Federal rules allow states to adopt WQS variances, but require USEPA to approve variances granted by the states before they can be used in permits.

USEPA's rules are procedural in nature, and establish what is required by states and authorized tribes in granting a variance and submittal to USEPA for approval. Minnesota's rules are also procedural in nature; however, state rules make clear what is required by the regulated party or permittee. The proposed rule amendments govern the processing and consideration of WQS variance requests; establishing the procedures under which a variance may be granted.

For WQS variances submitted to USEPA between 2004 and 2015, 75% came from states covered by the "Water Quality Guidance for the Great Lakes System" at 40 CFR 132. USEPA attributes this success in states granting and submitting WQS variances to the fact that the states and their stakeholders have had more specificity in regulation regarding WQS variances than the rest of the country. (80 FR 51035)

Minnesota adopted language from the "Water Quality Guidance for the Great Lakes System" into *Minn. R. ch. 7052* in 1997-1998 (see Statement of Need and Reasonableness for Proposed Amendments to Rules Governing Water Quality Variances, page 10). Therefore, when Minnesota began considering rule revisions for variance requirements outside the Lake Superior Basin, the requirements in chapter 7052 were used as the framework. This was supported by USEPA.

USEPA's intent was to include the specificity of the variance requirements in 40 CFR 132 to variance procedures for the rest of the nation. Although USEPA did not take verbatim the requirements from 40 CFR 132, the intent is the same. The intent of a variance is to allow a discharger additional time to achieve incremental improvements in water quality leading to eventual attainment of the WQS. Many of the requirements in new the federal final WQS Rules for variances (40 CFR 131.14) remain in place to protect water quality, albeit in different locations on the federal rules.

MPCA's intent is to make clear the information needed from the permittee for the state to assess whether the permittee meets the criteria that would allow for a variance. For example, a permittee may find that controls more stringent than those already required would result in substantial and widespread negative economic and social impacts. In collecting this information, the state must also be sure that federal requirements would not prohibit the approval of a

variance. For example, the state needs to verify that any increased risk to human health and the environment as a result of the variance is consistent with the protection of the public health, safety and welfare. This ensures the variance meets the general requirement of section 303(c)(2) of the CWA (i.e. such standards shall be such as to protect public health and welfare).

In summary, it was MPCA's intent to make clear through these rule amendments what is required of the state to assess a WQS variance. Regulated parties can use Minnesota rules to determine if the variance is a viable option for them to have more time to achieve the effluent limit based on the underlying WQS. The MPCA and permittee must gather appropriate information to determine if a variance should be given preliminary approval. If this is found to be the case, the MPCA submits this information to USEPA for their assessment of final approval.

#### **A. Dual Notice and Notice of Hearing**

The MPCA placed on public notice its Dual Notice of Intent to Adopt Rules (Dual Notice) for proposed amendments to rules governing water quality variances, *Minn. R.*, chapter 7050 Waters of the State, chapter 7052 Lake Superior Basin Water Standards, and chapter 7053 State Waters Discharge Restrictions in the Minnesota *State Register* on November 9, 2015 (40 SR 531). The Dual Notice stated that the MPCA would hold a hearing on the rules if 25 requests were received. In the absence of 25 requests, Minnesota law allows adoption of a rule without a hearing. Although the proposed rules are procedural in nature, there existed a possibility that USEPA would view the rule as "a water quality standard" under the Clean Water Act and that adopting the rule without a hearing could lead to USEPA comments indicating that the proposed rules will not be approvable. Therefore, in order to avoid unnecessary procedural delay, the MPCA published a Notice of Hearing on the proposed rules in the *State Register* on December 28, 2015 (40 SR 714), giving notice that it intended to proceed with a hearing, held following the procedures in *Minn. Stat.* §§ 14.131 to 14.20, to take place on February 4, 2016, as described in the November 9, 2015, Dual Notice.

The MPCA presented information to demonstrate that the proposed amendments are necessary and reasonable in the Statement of Need and Reasonableness (SONAR) for the proposed amendments. The MPCA also presented additional information during the public hearing, which was held on February 4, 2016, at the MPCA St. Paul and simultaneously at the MPCA Duluth office via interactive videoconferencing.

#### **B. Review of comments and organization of this document**

This document contains the MPCA's Post Hearing Response to Comments. This document supplements information provided in the SONAR for the proposed rule amendments.

Within it, the MPCA provides its responses to the following:

- Written comments received during the Dual Notice public notice comment period which ended on December 29, 2015;
- Oral testimony provided at the public hearing on February 4, 2016; and
- Questions asked by Administrative Law Judge (ALJ) Barbara J. Case at the public hearing.

Following the post-hearing comment period, the MPCA intends to review the comments submitted to the Office of Administrative Hearings (OAH), and then provide a Final Response to the ALJ during the rebuttal period, which ends on March 2, 2016.

## **II. Proposed Changes to the Rule Amendments in Response to Comments Received on the Proposed Rules**

After review and careful consideration of comments, MPCA proposes several changes to the rules as published in the Minnesota *State Register* on November 9, 2015. Attachment 1 includes these proposed changes. Each of the proposed changes in Attachment 1 are included and discussed in Part III, item B of this document following comments submitted on the specific rule part.

The need and reasonableness of each proposed rule part is established in the SONAR for the proposed rules. Additional statements of need and reasonableness for the proposed changes in Attachment 1 are included in Part III, item B of this document following comments submitted on the specific rule part where the proposed rule change is discussed.

Proposed rule changes must meet the standard established in *Minn. Stat.* § 14.05, subd. 2 to assess if a change is substantially different than the proposed rule. The changes to the proposed rules (Attachment 1) are not substantially different from the proposed rule based on the criteria set forth in *Minn. Stat.* § 14.05, subd. 2 because:

- The changes are within the scope of the matter announced in the dual notice;
- The changes are a direct and logical outgrowth of comments submitted in response to the dual notice;
- The dual notice provided fair notice to persons interested in and affected by the rule amendments that the additional changes would be part of the rule in question;
- The additional changes do not change in any way the group of persons who will be affected by the rule;
- The subject matter of the additional changes is the same as the subject matter contained in the dual notice; and
- The additional changes do not alter the effects of the rule proposed in the dual notice.

Where no rule change is proposed, an assessment of the difference between the proposed rule and the federal rule is provided in Part III, item B following the comment submitted on the related rule part.

### **III. Response to Comments Received during the Dual Notice Public Notice Comment Period**

This part contains the MPCA's response to comments submitted during the Dual Notice public notice comment period. The response to comments is organized by general comments in item A and comments on specific rule parts in item B. The comments are summarized and not presented verbatim. General comments submitted were about the proposed rule and were not necessarily directly related to a specific rule part.

The comments on specific rule parts are provided sequentially by rule section. Each rule section is followed by a listing of the comments submitted related to the rule section. The MPCA's response to comments on specific rule parts is provided; both where a rule change is proposed as a result of comments submitted and where no rule change is proposed as a result of comments submitted. Where the MPCA agrees with a comment requesting a change to the rule, a proposal for specific changes to the proposed rule language is included. All proposed changes are in Attachment 1.

During the public notice comment period on the rule, the MPCA received fifty two (52) requests for a public hearing including requests from US Steel, Minnesota Chamber of Commerce, Minnesota Center for Environmental Advocacy, and Southern Minnesota Beet Sugar Cooperative. The MPCA received no requests for notice of submission to the Office of Administrative Hearings.

The MPCA received six (6) comment letters on the proposed rules during the public notice comment period. Comments fell into two areas: general comments about the overall rule, and comments about specific rule parts and rule language. The following is a list of interested parties who submitted written comments to the MPCA during the public notice comment period from November 9, 2015, through December 29, 2015.

1. Letter from David L. Smiga, U.S. Steel received via U.S. mail on December 18, 2015;
2. Letter from Tony Kwilas, Minnesota Chamber of Commerce, received via e-mail on December 28, 2015;
3. Letter from Kris Sigford, Betsy Lawton, and Albert Ettinger, Minnesota Center for Environmental Advocacy, received via e-mail on December 29, 2015;

4. Letter from Linda Holst and Dave Pfeifer, US Environmental Protection Agency, Region 5, received via U.S. mail on December 28, 2015, and via e-mail on December 29, 2015;
5. Letter from Andy Bradshaw and Chris Hood, Minnesota Environmental Science and Economic Review Board, received via e-mail on December 29, 2015;
6. Letter from Louis Knieper, Southern Minnesota Beet Sugar Cooperative, received via e-mail on December 29, 2015.

#### A. General Comments

This section contains responses to categories of general comments submitted by multiple commenters and general comments submitted by individual commenters where no rule part is cited relating to the comment.

##### 1. MPCA's proposed rule amendments do not reflect the final USEPA Water Quality Standards Rules.

**Comment 1a:** US Steel supports the use of variances as a tool to achieve water quality standards, and agree with MPCA's goals of 1) clearer variance procedures for regulated parties, 2) consistent application of the state water quality variance rules and applicable federal requirements, and 3) improved efficiencies in the MPCA's processing of variance requests. However, the proposed amendments do not reflect the final USEPA WQS rules. US Steel recommends that MPCA's proposed amendments to the variance rules should reflect USEPA's final WQS rules.

**Response:** The MPCA agrees that WQS variances must meet the new federal variance requirements. Throughout the variance rulemaking, MPCA has strived to be consistent with federal rules. Consistency with federal rules is one of the primary objectives of the rulemaking. The proposed rule, including changes made as a result of comments, help meet that objective. MPCA coordinated with USEPA during the development of the rule and will continue to coordinate with USEPA to ensure consistency between state and federal variance processes through implementation. See also the response to Comment 1b below.

**Comment 1b:** Minnesota Chamber of Commerce (Chamber) and Southern Minnesota Beet Sugar Cooperative (SMBSC) commented that the proposed rule is not based on current federal requirements; the rules do not meet the goal of aligning the state-wide water quality variance requirements with federal requirements. MPCA's proposed amendments to the rules governing water quality variances should reflect USEPA final WQS. Because USEPA final WQS Rules were issued well before MPCA's proposed amendments, it is not clear why MPCA based the amendments on the USEPA draft rule rather than the final rule. MPCA does not explain, and it is not clear why MPCA would proceed to publish the rule revisions prior to completing its review of the final WQS Rules.

**Response:** The MPCA worked with USEPA Region 5 throughout the development of the proposed amendments to the state water quality variance rules. This work included closely following the development of the federal variance rule and conversations with USEPA Region 5 staff about the rule content and projected timelines for the rules. At the time the MPCA received approval in June 2015, to public notice the proposed amendments to the variance rules, USEPA Region 5 gave no indication that publication of the final federal variance rules was imminent and might occur as early as August 2015. To be responsive to calls for clearer, more concise state variance rules, MPCA went ahead with public notice of the proposed rules. Conversations with USEPA Region 5 since publication of the final federal variance rules have continued and MPCA maintains that the proposed rule, along with changes made in response to comments received, meets the objective of consistency between state and federal rules. Further, the rulemaking process allows for changes in the final product, within the scope of *Minn. Stat.* § 14.05,

subd. 2. The newly revised state variance rules better reflect both the new federal rules and comments received by stakeholders.

**Comment 1c:** Minnesota Center for Environmental Advocacy (MCEA) commented that the proposed amendments to 7050 and 7052 require significant changes for clarity, to protect Minnesota waters properly and comply with federal law.

**Response:** The MPCA disagrees. The proposed rule, along with changes made in response to comments received, meets the objectives of providing a clear variance process consistent with federal rules.

**Comment 1d:** Minnesota Environmental Science and Economic Review Board (MESERB) commented that the proposed amendments are more limiting than necessary and inconsistent with federal regulations. The proposed amendments to *Minn. R. chs. 7050, 7052, and 7053*, conflict with the Agency's declared intentions to (1) implement a more flexible approach to variances; and (2) promote consistency with federal variance regulations. The proposed rules are more restrictive than required and are substantively inconsistent with the applicable federal rules.

**Response:** The MPCA disagrees that the proposed rules are more restrictive than federal rules. The proposed rule, along with changes made in response to comments received, meets the objectives of providing a clear variance process consistent with federal rules.

## 2. Statutory requirement for assessment of differences between proposed rule and federal rule and analysis of each difference.

**Comment 2a:** The Chamber and SMBSC commented that the SONAR for the proposed rules does not meet the statutory requirement to provide "...an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference." The Chamber further comments that if the state chooses to implement rules that go beyond federal requirements, the MPCA needs to comply with the statute, revise and reissue for public comment the proposed rule and the SONAR to assess, explain, and justify those differences.

**Comment 2b:** MCEA commented that 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." Information regarding the difference between MPCA's proposed amendments and the new federal water quality variance regulations must be made available for public review and comment for at least 30 days before adoption of those amendments. MPCA's failure to assess its proposed amendments for compliance with federal variance regulations is problematic for two additional reasons: 1) EPA must disapprove any state variance that is inconsistent with these federal requirements and 2) EPA will only approve state variance rules that comply with the new federal regulations. In addition, a revised SONAR that contains "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," must be made available for public comment before amendments to Minnesota's water quality variance rules can be adopted by MPCA.

**Comment 2c:** MESERB commented that the SONAR does not meet the statutory requirement for an assessment of differences between the proposed rule and federal rule, and analysis of each difference. By failing to offer a "specific analysis of the need and reasonableness of each difference" between the proposed rule and the



applicable federal standards, the MPCA failed to meet its statutory burden under *Minn. Stat. § 14.131(7)*.

**Response:** The MPCA's response will first address the comments regarding differences between the proposed rule amendments and the USEPA proposed WQS Rules for variances; and then discuss the differences between the proposed rule and the USEPA final WQS Rules for variances.

**Differences between the proposed rule amendments and the USEPA proposed WQS Rules for variances.**

The MPCA does not agree that the SONAR for the proposed rules does not meet the requirements of Minn. Stat. § 14.131(7) which requires that a SONAR must include "to the extent the agency, through reasonable effort, can ascertain . . . 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 MPCA met its requirement because a reasonable effort was made to assess the differences between the proposed rule and the proposed federal rule at the time the SONAR was prepared and approval was received in June 2015 to public notice the proposed amendments to the water quality variance rules. The MPCA received approval to public notice the proposed rules prior to USEPA finalizing its WQS Rules for variances, and MPCA's knowledge of the content of the forthcoming final federal rules. The proposed rules are based in large part on USEPA's proposed WQS Rules as published on September 4, 2013 (78 FR 54518). The required assessment was made between the MPCA's proposed rule and the existing federal variance procedures and proposed federal rule. The MPCA noted in its fact sheet "Draft Amended Rules for Water Quality Variances" that "a goal of this rulemaking is to have Minnesota's rules conform, where appropriate, to the federal requirements." However, while the MPCA was in the process of taking the necessary administrative procedural steps to publish the proposed rules, USEPA informed MPCA, in late July 2015, that the final WQS Rules were to be published soon. On August 5, 2015, the USEPA Administrator signed the final WQS Rule, which includes the variance rules; and the final WQS Rule was published on August 21, 2015 (80 FR 51019). The MPCA's SONAR was signed June 8, 2015, more than two months before USEPA's final rule was published.

USEPA's final WQS Rules differed from its proposed rules. The MPCA noted in its October 2015 fact sheet "Draft Amended Rules for Water Quality Variances" that the "final federal rules for WQS variances are compatible with the proposed state rules in many areas; however, there are some differences and MPCA is currently working with USEPA to better understand the final federal rules and to determine whether the proposed rules will need to be modified." Based on conversations with USEPA that took place after the August 2015 publication of the federal final WQS Rule and in advance of the November 2015 publication of the MPCA's proposed amendments to the state water quality variance rule indicated that the minor differences between the final federal and proposed state rule could be addressed as necessary following the public notice. Rather than further delay this rulemaking, MPCA decided to proceed with the rules as proposed. In doing so, the MPCA in the Dual Notice for the proposed rules, specifically requested comment on the proposed rules conformance with applicable requirements of the final federal rules, including proposed rule language regarding variance term, expiration, renewal, and review. Further, the MPCA here provides further assessment of differences between the rules and analysis of the need and reasonableness of the existing differences. No person has been deprived of a meaningful opportunity to participate in this rulemaking and all have opportunity to comment on any new differences presented by changes from USEPA's proposed and final rule.

## Differences between the proposed rule amendments and the USEPA final WQS Rules for variances.

The amendments the MPCA is proposing to *Minn. R. chs. 7050, 7052, and 7053* do not propose any new standards for water quality under *Minn. Stat. ch. 115*. The proposed amendments to existing water quality variance rules are necessary to provide clarity and consistency between the rules, and to better align state rules with the most current federal variance requirements. (See SONAR page 42.) *Minn. Stat. § 116.07, subd. 2, item (f)* also requires a specific analysis of the need for and reasonableness of each difference between the proposed state rules and existing federal rule in the SONAR. The specific need for and reasonableness of the proposed rule amendments is described in the SONAR.

To provide further clarity about the proposed rule amendments, the MPCA conducted a detailed assessment of the differences between the state proposed rule amendments for the chapter 7050 WQS variance rules, and the federal final WQS Rules for variances at 40 CFR 131.14 (see Attachment 2). Because the chapter 7052 WQS variance rules are based on 40 CFR 132, the federal Water Quality Guidance for the Great Lakes System and not the final WQS Rules, no assessment of differences between chapter 7052 rules and the final WQS Rules was conducted. Though minor changes are proposed for chapter 7052; the requirements of chapter 7052 align with the federal Part 132 requirements for the Great Lakes System and there are no differences between the two rules that require assessment. Additionally, because chapter 7053 contains the state rules for variances from state discharge restrictions or treatment requirements, and there is no corresponding existing federal rule for these requirements, no assessment of differences needed to be conducted for chapter 7053.

The proposed amendments to the chapter 7050 WQS variance rules have been structured such that they align with both the final federal WQS variance rules at 40 CFR 131.14, and the chapter 7052 WQS variance rules which are based on 40 CFR 132. This is to provide consistency between the two chapters of state WQS variance rules. However, there are some differences between the chapter 7050 proposed rule amendments and the final WQS Rules. In general, parts of the chapter 7050 rules are different because they reflect applicable requirements from other existing federal rules, rather than the final WQS Rules. The state must comply with all applicable Clean Water Act and federal rule requirements whether or not they are cited specifically in the federal final WQS Rules for variances. Additionally, where there are differences, it is important to state that “difference” does not necessarily mean that the state rule is more or less stringent than the federal rules. For example, “difference” can mean the state rule and federal rule use different terms that have substantially the same meaning. Lastly, where a requirement applies, either in the federal final WQS Rules for variances or other applicable federal rules or statutes, the chapter 7050 rule amendments do not impose additional variance procedures or requirements beyond federal final WQS Rules and other applicable federal rules and statutes.

A comparison of the differences between the proposed rule amendments to chapter 7050 and the federal final WQS Rule is provided in tabular form in Attachment 2 which is incorporated by reference. A comprehensive and detailed discussion of all identified differences between the proposed rule and the federal final WQS Rules for variances and of the need for and reasonableness of those differences are provided below.

1. Part 7050.0190, subpart 1

The requirements of subpart 1 align with federal rules at 40 CFR 131.14(a)(1) which state a WQS variance may be adopted for a permittee. The only difference is that

state variances address only individual point source dischargers; these variances are implemented through permits. The federal rules include water body/water body segment variances. The MPCA does not grant such variances. Because state variances are discharger/permittee specific, MPCA chose not to include unnecessary procedure for water body variances in this rulemaking. The proposed rules do not prohibit the MPCA from considering water body/water body segment variances in the future. If a water body variance is pursued, the MPCA must comply with the applicable federal requirements. Because the MPCA has not issued this type of variance and does not anticipate that it will, it is reasonable that the proposed rule applies only to variance requests from individual point source dischargers or permittees. (See also SONAR page 15.)

2. Part 7050.0190, subpart 1.A

Subpart 1, item A establishes that to be eligible for a variance, the permittee must demonstrate that the continued existence of endangered or threatened species would not be jeopardized or the species' critical habitat destroyed or adversely modified. This requirement aligns with federal rules; Section 7 of the Endangered Species Act (ESA). However, subpart 1, item A is different than the federal variance rule because the federal variance rule does not itself include a requirement for demonstration of compliance with the ESA. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules. Though the ESA is not included in the variance rules at 40 CFR 131.14, it still applies and all variances approved by USEPA must not violate the ESA. The requirements in question exist in 40 CFR 132, Water Quality Guidance for the Great Lakes System and in state rule in existing chapter 7052. The MPCA included this language in chapter 7050 to provide consistency in the variance application process statewide, provide for statewide protection of water quality, and to be consistent through the three variance rules chapters. It is necessary and reasonable to inform the permittee that compliance with the ESA will have a bearing on whether or not a variance is approved by USEPA. (See also SONAR page 16, and below Part III, section B, response to comment 15b.)

3. Part 7050.0190, subpart 1.B

Subpart 1, item B establishes that the permittee must implement effluent limitations required under sections 301(b) and 306 of the Clean Water Act, codified in United State Code title 33, sections 1311(b) and 1316. This requirement is consistent with the federal variance rules at 40 CFR 131.14(a)(4). The state rule differs in that it not only specifies that the permittee must demonstrate that the standards will not be attained by implementing technology-based effluent limits but additionally requires demonstration that the standards will not be attained by implementing cost-effective and reasonable best management practices (BMP) for nonpoint sources under the permittees control as established under state authority. The MPCA has authority to regulate activities within the permittee's control and would want to evaluate and confirm the absence of BMPs within the permittees control that could be implemented before granting a variance. It is therefore necessary and reasonable to require the permittee to demonstrate that the requested variance meets this condition. The state rule also differs in that it uses the term best management practices or BMP; the federal variance rule uses the term Pollutant Minimization Program or PMP. BMPs are management practices designed to minimize pollution and serve substantially the same function as PMP. The intent of the state rule is the same as the federal rule though different terms are used. The MPCA recognizes that the state and permittee must meet the requirements of 40 CFR 131.14(b)(2)(A)(3), which requires the adoption of PMP and those requirements will be met in a document having a different name, i.e., BMP. The MPCA and the regulated community have

historically used the term and understood the purpose of BMP. There is no need to introduce a new term into the state's regulatory and permitting scheme when the substantive requirement is already being met. It is necessary and reasonable to inform the permittee that these conditions must be met to be eligible for a WQS variance. (See also SONAR page 16, and below Part III, section B, response to comment 16.)

4. Part 7050.0190, subpart 1.C

Subpart 1, item C establishes that a permittee will not be eligible for a variance if the variance would remove an existing use. Subpart 1, item C is different than the federal variance rule because the federal variance rule does not itself state "variance would not remove an existing use." The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules. The MPCA points to the same requirement (cannot remove an existing use) in the federal rules at 131.10(g), and 131.10(h)(1). The state rule makes it clear variances from state WQS, which ultimately need approval from USEPA, need to be protective of existing uses as in otherwise required by applicable federal rule. The MPCA would not attempt to give preliminary approval to grant a variance and send to USEPA for final approval a variance that would remove an existing use. The intent of the variance is to protect existing water quality. This statement maintains the goal of the variance which is to protect existing water quality. It is reasonable to alert the permittee of this restriction on eligibility for a variance. (See also SONAR page 17, and below Part III, section B, response to comments 17a and 17b.)

5. Part 7050.0190, subpart 2. No difference

6. Part 7050.0190, subpart 3. Repealed

7. Part 7050.0190, subpart 4

Subpart 4 establishes that a variance must be submitted to and approved by USEPA before it can become effective. This requirement for USEPA approval aligns with Section 303(c) of the Clean Water Act and the federal rules at 40 CFR 131.21. Subpart 4 is different than the federal final WQS Rule because the federal variance rule does not itself explicitly call out USEPA authority for approval of WQS variances. This authority lies in Section 303(c) of the Clean Water Act. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules. This requirement is necessary and reasonable because it informs the permittee and the public that the USEPA has a role in the full approval process for variances from WQS. (See also SONAR page 18).

8. Part 7050.0190, subpart 4.A

Subpart 4 establishes that to be eligible for a preliminary determination by the MPCA to grant a WQS variance, the permittee must demonstrate that attaining the WQS and associated water quality-based effluent limit is not feasible according to one of the six conditions listed in subpart 4, item A. This requirement aligns with federal variance rules. However, subpart 4.A is different than the federal variance rule because the federal variance rule uses the term "use" and the state rule uses the term "water quality standard." The intent of the state rule is the same as the federal rule though different terms are used. Sections 101(a) and 303(c) of the Clean Water Act directs delegated states to adopt "standards" to protect "uses". Multiple WQSs protect a given use; for example Minnesota has many WQS like chloride and ammonia that are designed to protect water for use by aquatic life. Granting a variance from one chemical specific WQS does not grant a variance from the protection of the use. Federal regulations are clear that variances cannot remove uses. The MPCA grants variances from WQS and does not grant variances from "uses." For these reasons, use

of the term “WQS” in the state rules is necessary and reasonable. (See also SONAR page 19, and below Part III, section B, response to comments 18a and 18b.)

*(Note – One of the six conditions in subpart 4.A is different than the federal variance rule. The MPCA proposes a rule change at subpart 4.A(5) as suggested by USEPA to align with the federal rule at 131.10(g)(5). Aquatic life protection uses are added.) (See below Part III, section B, response to comment 18c.)*

9. Part 7050.0190, subpart 4.B

Subpart 4.B establishes that the permittee must comply with the State’s antidegradation rules. Existing Minnesota Rules call these provisions nondegradation rules, but will be soon be changed to antidegradation rules. This requirement aligns with federal antidegradation rules at 40 CFR 131.12. However, subpart 4.B is different than the federal variance rule because the federal variance rule does not include demonstration of compliance with antidegradation rules. The state must comply with the Clean Water Act and federal rules whether or not their requirements are cited specifically in the federal variance rules. Though the federal antidegradation rules are not included in the variance rules at 40 CFR 131.14, the requirements of the antidegradation rules still apply. The MPCA must meet federal and state antidegradation regulations when giving preliminary approval to grant a variance. This is not a new obligation or process for a permittee because they have always been subject to the cited state requirements. This requirement is necessary and reasonable because it informs the permittee and the public of the state antidegradation requirements that must be met. (See also SONAR page 19, and below Part III, section B, response to comments 19a and 19b.)

10. Part 7050.0190, subpart 4.C

Subpart 4.C establishes the permittee must characterize risk to human health and the environment such that the MPCA can conclude that the health, safety and welfare of the public will be protected, even if a variance is approved. This requirement aligns with Section 303(c) of the Clean Water Act. However, subpart 4.C is different than the federal variance rule because the federal variance rule does not itself include a requirement for demonstration of compliance with other federal requirements for protection of public health and welfare. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules. Though the federal rules for the protection of public health and welfare are not included in the variance rules at 40 CFR 131.14, the rules still apply. Because variances are from WQS that meet the goals and requirements of the Clean Water Act, this subpart 4.C is intended to ensure that the general requirements of section 303(c)(2)(a) of the Clean Water Act (i.e., standards shall be such as to protect the public health and welfare) are met even though specific protection criteria may be temporarily exceeded. This requirement is necessary and reasonable because it informs the Permittee and the public of these Clean Water Act requirements that must be met. (See also SONAR page 19, and below Part III, section B, response to comment 20.)

11. Part 7050.0190, subpart 4.D. No difference.

12. Part 7050.0190, subpart 5

Subpart 5 establishes that the requirements for variance application submittal and public notice of the MPCA’s preliminary determination to grant the variance must conform to MPCA procedural rules *Minn. R. 7000.7000*. This requirement aligns with the federal variance rules at 40 CFR 131.14(b) and federal rules for public participation at 40 CFR 131.20(b). However, subpart 5 is different than the federal variance rule because the federal variance rule does not expressly state the public notice and public

participation requirements. The intent of the state rule is the same as the federal rule. It is not necessary for every federal requirement a state is bound to follow be mirrored or duplicated in state rule. If we fail to meet our obligation, we will be accountable to USEPA and interested parties. Further, public notice requirements are required to be included in the MPCA's National Pollutant Discharge Elimination System (NPDES) permit program in accordance with 40 CFR 123.25(a)(28). Because water quality permits are part of the federal NPDES permit program, and water quality variances are implemented through NPDES permits, this rule is consistent with state and federal regulations and the same public notice requirements apply to both processes. It is necessary and reasonable to reference the MPCA procedural rules to inform the permittee and the public where the procedures for public process are located in the MPCA's rule. (See also SONAR page 20.)

13. Part 7050.0190, subpart 6. No difference

14. Part 7050.0190, subpart 6.A. No difference

15. Part 7050.0190, subpart 6.B. No difference

16. Part 7050.0190, subpart 6.C. No difference

17. Part 7050.0190, subpart 6.D. No difference

18. Part 7050.0190, subpart 7. No difference

19. Part 7050.0190, subpart 8

Subpart 8 establishes that the terms and conditions of a WQS variance are included and incorporated in the permit issued by the MPCA, and that the term of the variance must be as short as possible but must expire no later than ten years after USEPA approval. The requirements of subpart 8 differ from the federal variance rules at 40 CFR 131.14 because the federal variance rules do not state that the variance must expire no later than ten years.

*(Note –the MPCA proposes a rule change at subpart 8 to align with the federal rule at 131.14(b)(iv) and (v). Change variance term to only as long as necessary and reevaluate every five years in accordance with 40 CFR 131.14(b)(1)(v) and (vi).)*  
*(See below Part III, section B, response to comments 26a and 26b)*

20. Part 7050.0190, subpart 9.A

Subpart 9, item A identifies the MPCA's process for public notice of current and approved variances, and that the MPCA will request new information on variances every three years (during the WQS triennial review). This requirement aligns with federal rules for state review of applicable WQS every three years at 40 CFR 131.20(a). However, subpart 9, item A is different than the federal variance rule because the federal variance rule does not expressly state that WQS variances shall be reviewed every three years. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules. Though the federal rules for public notice and review are not included in the variance rules at 40 CFR 131.14, the rules still apply. Subpart 9.A is reasonable because it informs the permittee and the public of the review process for variances. (See also SONAR page 22.)

21. Part 7050.0190, subpart 9.B

Subpart 9, item B establishes that the MPCA will review the variance if the permittee requests a renewal of the variance in accordance with part 7050.0190, subpart 7, as well as information submitted to the MPCA under subpart 9, item A. This requirement aligns with federal rules for state review at 40 CFR 131.20(a), and is consistent with the federal variance rules at 40 CFR 131.14(b)(1)(v). The

intent of the intent of the state rule is the same as the federal rule. However, subpart 9, item B is different than the federal variance rule because the federal variance rule does not expressly state that the state shall consider new information submitted by the public when reviewing a variance. Also, the federal variance rules do not address renewal of a variance. Under the proposed rule amendments, a variance renewal must go through the same assessment as a new variance. MPCA must also review any new information submitted during the triennial review concerning the variance as required in subpart 9, item A. It is reasonable that the permittee be required to request a renewal of the variance, and that the MPCA review the variance because a variance is temporary and the conditions under which the variance was approved may have changed. (See also SONAR page 23.)

### 3. Length of time for the term of the variance.

All commenters, except USEPA, commented on the term of a variance. Some commenters provided general comments; some cited a specific rule part. All comments regarding the term of variance are addressed here. Comments on the specific rule parts regarding term of variance are addressed in Part III, section B.

**Comment 3a:** US Steel commented that variance terms should be determined specific to each application for a variance request. Investigation into alternatives to achieve the WQS will take time and the length of the term should not be limited, but rather determined based off of the criteria at time of the application. The ten year term does not align with final EPA WQS rules. US Steel recommends that MPCA eliminate any time limit on the length of a variance under all variance rule chapters.

**Response:** The MPCA will revise the rule to be consistent with the term of the WQS variance in the final WQS Rules at 40 CFR 131.14.

**Comment 3b:** The Chamber and SMBSC commented that the proposed rules go beyond federal requirements in restricting the maximum duration of a variance. USEPA dropped the ten year maximum duration limit in favor of a re-evaluation every five years, with no maximum duration specified and that MPCA must adopt the final WQS Rule language as to the variance duration. The revised rule should make it clear that variances are subject to renewal after re-evaluation if the MPCA and EPA determine that a variance remains necessary in the context of "long-term WQS challenges."

**Response:** The MPCA will revise the rule to be consistent with the term of the WQS variance in the final WQS Rules at 40 CFR 131.14, and to re-evaluate the variance every five years, regardless of variance term.

**Comment 3c:** MCEA agrees that a Minnesota variance should last no longer than ten years and that the variance must not last longer than is necessary. The rule must also incorporate the requirements of 40 CFR 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 CFR 131.14(b)(vi).

**Response:** The MPCA will revise the rule to be consistent with the federal rule to re-evaluate the variance every five years, regardless of variance term. USEPA cannot approve water quality variances that are not consistent federal rules. To ensure consistency, following the re-evaluation MPCA agrees that it must submit documentation to USEPA within 30 days of completion of the reevaluation demonstrating that the term of the variance is only as long as necessary to achieve the highest attainable condition.

**Comment 3d:** MESERB commented that the proposed amendments unnecessarily place a ten year maximum duration on variances outside the Lake Superior Basin (LSB). This is inconsistent with the federal rule, and contravenes the Agency's desire for flexibility. 40 CFR 131.14(b)(vi). The federal rule does not impose a maximum duration for a variance, but instead requires re-evaluation of a variance every five years. The proposed rule uses limiting qualifying language "term of a variance must be as short as possible." This language is inconsistent with the federal regulation and the MPCA's stated objectives regarding flexibility. Delete and replace with language consistent with 40 CFR 131.14(b)(vi)-(v).

**Response:** The MPCA will revise the rule to be consistent with the term of the WQS variance in the final WQS Rules at 40 CFR 131.14, and to re-evaluate the variance every five years, regardless of variance term.

#### 4. Public notice and review of variances.

**Comment 4a:** US Steel commented that the variance public comment and notice should coincide with the applicable permit renewal or modification. Having the variance coincide with the state's triennial review of WQS does not make sense and is redundant. US Steel recommends that the public notice and review of a variance should coincide with the public comment period and review for the applicable permit renewal or modification and reflect the final WQS Rule.

**Response:** No rule change is proposed. Collecting new information at the triennial review complies with the intent to have periodic reviews of water quality variances that last longer than a permit term. Additionally, the MPCA will revise the rule to be consistent with the term of the WQS variance in the final WQS Rules at 40 CFR 131.14, and to re-evaluate the variance every five years, regardless of variance term.

**Comment 4b:** USEPA commented on the public participation requirements for WQS rulemaking. 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 or revised WQS.

**Response:** Comment noted. The MPCA agrees a hearing is to be held on any WQS adopted or revised.

#### 5. Need definitive MPCA response.

**Comment 5:** US Steel commented that the MPCA should be held accountable for the variance approval process. Lengthy Agency response times create uncertainty and undue hardships for permittees. US Steel recommends adding a timeline for Agency approval of a variance to the amended variance rules.

**Response:** No rule change is proposed. The variance review and approval process includes opportunities for review and comment from the public along with approval by USEPA. Due to circumstances that may be beyond the control of the MPCA, it is not possible to add a timeline for approval. The MPCA is committed to working with permittees and USEPA to facilitate an efficient and transparent variance process.

#### 6. MPCA use of 40 CFR 131.10(g)

**Comment 6a:** The Chamber commented that the proposed variance rules extend federal requirements to uses not covered by the federal rule (uses not associated with fishable, swimmable goals), without a clear rationale. MPCA use of 40 CFR 131.10(g) in draft rules would apply to other uses such as irrigation and industrial use. MPCA expansion of the variance scope is particularly surprising given that the MPCA's stated goal with these rule



revisions is to align with, not go beyond, federal requirements. MPCA should adopt the federal definition and clarify variance requirements for the non-101(a)(2) uses.

**Comment 6b:** MESERB commented that the proposed amendments fail to distinguish between a section 101(a)(2) use and a non-101(a)(2) use. The federal standard distinguishes between variances for uses specified under section 101(a)(2) (fishable, swimmable goals) and non-101(a)(2) uses. 40 CFR 131.14(b)(2)(A); (b)(2)(B). The federal rule only requires the demonstration under 40 CFR 131.10(g) for section 101(a)(2) uses, whereas the MPCA's proposed rule extends this requirement to other non-101(a)(2) uses. By failing to make this distinction the MPCA's proposed rule does not equate with the federal rule and is unjustifiably strict.

**Response:** No rule change is proposed. Both the Chamber and MESERB mischaracterize the scope of the federal rule and its applicability to non-101(a)(2) uses. The federal rule expressly states that the demonstrations under 40 CFR 131.10(g) may be used when considering variances involving non-101(a)(2) uses. This can readily be seen with reference to the follow provisions excerpted from the federal rule:

- Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. If adopting new or revised designated uses other than the uses specified in section 101(a)(2) of the Act, or removing designated uses, States must submit documentation justifying how their consideration of the use and value of water for those uses listed in this paragraph appropriately supports the State's action. A use attainability analysis may be used to satisfy this requirement. In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States. 40 CFR 131.10(a)
- States may designate a use, or remove a use that is not an existing use, if the State conducts a use attainability analysis as specified in paragraph (j) of this section that demonstrates attaining the use is not feasible because of one of the six factors in this paragraph. If a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in section 131.3(m).
  - (1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
  - (2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
  - (3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
  - (4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
  - (5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
  - (6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact. 40 CFR 131.10(g)

- A State must conduct a use attainability analysis as described in §131.3(g), and paragraph (g) of this section, whenever:
  - (1) The State designates for the first time, or has previously designated for a water body, uses that do not include the uses specified in section 101(a)(2) of the Act; 40 CFR 131.10(j)
- A State is not required to conduct a use attainability analysis whenever:
  - (3) The State wishes to remove or revise a designated use that is a non-101(a)(2) use. In this instance, as required by paragraph (a) of this section, the State must submit documentation justifying how its consideration of the use and value of water for those uses listed in paragraph (a) appropriately supports the State's action, which may be satisfied through a use attainability analysis. 40 CFR 131.10(j)

Regarding the documentation States are required to submit to USEPA, the federal rule states:

- (2) The supporting documentation must include:
  - (i) Documentation demonstrating the need for a WQS variance because:
    - (A) For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such use, the State must demonstrate that attaining the designated use and criterion is not feasible throughout the term of the WQS because:
      - (1) **One of the factors listed in 131.10(g) is met**, or
      - (2) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.
    - (B) For a WQS variance to a non-101(1)(2) use, the State must submit documentations justifying how its consideration of the use and value of the water for those uses listed in 131.10(a) appropriately supports the WQS variance and term. **A demonstration consistent with paragraph (b)(2)(i)(A) of this section may be used to satisfy this requirement.** 40 CFR 131.14(b)(2) (emphasis added).

The MPCA's proposed rule is consistent with the new federal rule and provides process clarity for permittees requesting a variance from a standard applicable to non-101(a)(2) uses. The proposed amendments to the variance rules provide a clear and consistent process for permittees when requesting a variance from WQS regardless if the standard is designed to protect aquatic life and recreation or some other use such as agricultural, industrial or irrigation. The process will not vary depending on the WQS in question. Any suggestion that the new federal regulations do not apply to variances from WQS that protect uses other than the "fishable swimmable" uses specified in section 101(a)(2) of the Clean Water Act is contradicted by the above-quoted language from the federal rule. For a variance from a non 101(a)(2) WQS, the new federal regulations require that the State must submit documentation justifying how its consideration of the use and value of the water appropriately supports the variance and term. The new federal regulations specify that a demonstration consistent with 40 CFR 131.14 (b)(2)(i)(A) (which includes consideration of 131.10(g) factors) may be used to satisfy the justification requirement. This is consistent with the way variances are currently processed by the MPCA and USEPA. The MPCA will continue to send variances from *Minn. R. chs. 7050 and 7052* to USEPA for approval, whether they are 101(a)(2) or non-101(a)(2) uses. USEPA will continue to determine which

variances they will review. The MPCA did not receive comments from USEPA that indicated the agency would be treating WQS that protect 101(a)(2) uses and non-101(a)(2) uses differently and that states doing so is prohibited.

**7. Compatibility of proposed rule amendments with USEPA variance regulations.**

**Comment 7:** USEPA provided comment on the compatibility of Minnesota proposed revisions with USEPA variance regulations at 40 CFR 131.14. On August 21, 2015, USEPA published new regulations covering variances at 40 CFR 131.14. There are a number of requirements in the new federal rule that Minnesota was not able to include in its proposed rules because of when the new federal rules were published. Any variance submitted to USEPA by Minnesota must comply with 40 CFR 131.14 to be approved. The following new federal requirements do not appear to be addressed in the proposed rules: 131.14(b) requirements for submission to EPA. This new section includes specific requirements applicable to discharger-specific variances and requirements for documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. To be approved by USEPA, variances submitted by Minnesota to USEPA must address all of the requirements of 40 CFR 131.14.

**Response:** The MPCA understands that variances submitted to USEPA must comply with the requirements of 40 CFR 131.14 and provide documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition.

**8. Proposed amendments to 7052.0280.**

**Comment 8:** MCEA commented that these rules must meet the "more stringent" of the rules provided at 40 CFR 131.14 and those provided under the 1995 Great Lakes Water Quality Guidance (GLWQG).

**Response:** Comment noted. Variances to WQS must be reviewed and approved by USEPA and satisfy the requirements on 40 CFR 131.14. MPCA will continue to comply with the appropriate federal rules.

**9. Proposed amendments to chapter 7053.**

**Comment 9:** MCEA provided general comments on chapter 7053 (i.e. part 7053.0195 Variances from discharge effluent limits or treatment requirements) and states that part 7053.0195 must be completely rewritten to make clear what is intended and properly limited so as to comply with federal law and properly protect Minnesota waters. The proposed rule should be reconsidered and perhaps deleted for the following reasons (see below comments 9a - 9e).

**Comment 9a:** It is unclear how this proposed section fits with the balance of the proposal and the relationship between this proposal and the proposed language at 7050.0190.

**Response:** As stated throughout, the intent of this rule was to make clear the requirements for a variance submittal and to be consistent through the three variance rules chapters. The MPCA references back to *Minn. R. ch. 7050* to avoid repetition.

**Comment 9b:** The SONAR indicates that this provision relates to "minimum performance criteria" and, thus, arguably relates to technology-based requirements required under federal or state law. The rule does not provide for consideration of the types of factors that would possibly justify waiving technology-based requirements.

**Response:** Comment noted. This rule section relates to all discharges of sewage, industrial, and other wastes to all waters of the state, both surface and underground.

Specifically, *Minn. R.* 7053.0115 states, "Other regulations of general or specific application that include any more stringent effluent limits or prohibitions are preserved. Water quality standards applicable to waters of the state are in chapter 7050. Water quality standards applicable to waters in the Lake Superior basin are in chapter 7052."

Any changes to technology-based effluent limits must comply with federal rules 40 CFR 122. Variances to technology-based effluent limits are rare and will be reviewed on a case-by-case basis. *Minn. R.* ch. 7053 includes minimum treatment requirements that are neither federal effluent limit guidelines nor considered technology-based by federal rules. The proposed rules allow MPCA to continue to consider variances to treatment requirements under chapter 7053, State Discharge Restrictions. The proposed rules also align the consideration of variances from chapter 7053 requirements with the WQS variance in chapters 7050 and 7052.

**Comment 9c:** The 7053.0205 effluent rules include compliance with water quality based effluent limits (WQBELs) as one of their conditions. The proposed rule could be read to allow MPCA to grant a variance from WQS so as to allow a discharger to have a less restrictive WQBEL or no WQBEL at all without the variance being approved by USEPA.

**Response:** Proposed part 7053.0195, subpart 1 states that, "This part applies to variance requests from individual point source discharges to surface waters of the state for any provision of this chapter that is included in a permit." (Emphasis added) The MPCA would not grant a chapter 7050 or 7052 WQS variance under chapter 7053 as doing so would violate those rules. See Attachment 1 for the revision to part 7053.0195, subpart 4 to clarify the conditions for approval of a variance under this part. Discharge effluent limits are limits based on State Discharge Restrictions included in this chapter. State discharge restrictions apply to the discharge of sewage, industrial waste and other wastes, and limit the amount of pollutants that can be discharged based on minimum treatment requirements. Water quality-based effluent limits are based on the water body and the type of beneficial use that is being protected.

**Comment 9d:** All National Pollution Discharge Elimination System permits must prevent discharges that cause or contribute to violation of water quality standards. 40 CFR 122.44(d). If it is intended through this provision to allow dischargers to obtain permits that would otherwise violate federal law against allowing discharges that cause or contribute to violations of WQS, a variance obtained under this rule would be a variance from WQS.

**Response:** The MPCA would not grant a chapter 7050 or 7052 WQS variance under chapter 7053 as doing so would violate those rules. The conditions within this variance rule are applicable to all state WQS. In doing so, it provides a clear mechanism for incremental attainment of WQS through permit conditions. As noted in the response to comments 6a and 6b, this rule does not attempt to regulate USEPA's role in review and approval of variances. See Attachment 1 for the revision to part 7053.0195.

**Comment 9e:** Contrary to the proposed rule at subpart 4, such a variance could not be effective without approval from USEPA. The federal regulations make plain that variances from water quality standards are subject to review and approval whether proposed by a permittee for a particular discharge or proposed for a water body.  
40 CFR 131.14(a)

**Response:** The MPCA recognizes that USEPA will review and approve WQS variances. USEPA does not review variances from discharge restrictions or effluent limits developed under chapter 7053. The MPCA would not grant a chapter 7050 or 7052 WQS variance under chapter 7053 as doing so would violate those rules. Proposed part 7053.0195,

subpart 1 specifies that, "This part applies to variance requests from individual point source discharges to surface waters of the state for any provision of **this chapter** that is included in a permit." See Attachment 1 for the revision to part 7053.0195.

#### **10. Submittal of rule to USEPA.**

**Comment 10:** MCEA commented that MPCA must submit any final revisions to its water quality variance rules to USEPA for review and approval. 40 CFR 131.13. It is important for the public to understand that adoption of optional policies that impact application and implementation of water quality standards, such as variance policies, are subject to USEPA review and approval.

**Response:** Comment noted. The MPCA agrees and understands that these WQS variance rules will be submitted to USEPA for review and approval.

#### **11. Overarching policy concerns regarding regulation of wastewater treatment facilities.**

**Comment 11:** MESERB members are concerned that regulation of wastewater treatment facilities (WWTFs) is now reaching a point of diminishing return. The current regulatory scheme as applied to WWTFs generally amounts to a fine tuning of present treatment efforts. These "small" adjustments can cost millions of dollars to implement, and sometimes provide insignificant improvements to underlying water quality. The tremendous expense of scarce local resources often results in minimal measurable environmental benefits. WWTFs and the communities that support them are currently faced with an onslaught of actual and potential regulations dealing with WQS for phosphorus, chloride, sulfate, ammonia, nitrates etc. To further complicate matters, this regulatory playing field may change for MESERB members with each five-year permitting cycle.

As these regulations take effect we foresee two problematic situations: 1) standards imposed on WWTFs will be unachievable using current cost-effective treatment technology, 2) a WWTF meets a specific WQBEL related to a TMDL, but the quality of the protected water fails to improve as a result of non-point sources of pollution or otherwise. This is where a flexible approach to variances becomes an essential regulatory tool.

MESERB supports MPCA's intention to use variances more liberally in the short-term. However, variances should not be treated as a long-term solution to fix implementation problems within the current regulatory scheme. The MPCA must develop standards and compliance mechanisms that more accurately account for implementation costs, and emphasize cumulative benefits to water quality. This includes the increased use of trading, creative and effective offsetting measures, and targeted enforcement of non-point sources of pollution.

**Response:** Comment noted. The MPCA may pursue revisions to WQS as peer review data become available that support scientifically justified and reasonable changes that continue to protect beneficial uses like fishing and swimming. Variances are used as a permit tool to help the permittee meet the existing WQS.

#### **12. Variances are potentially cost prohibitive for cities and sanitary districts.**

**Comment 12:** MESERB commented that the costs associated with seeking a variance will prevent cities and sanitary districts from applying. It is unreasonable to expect a WWTF from a community of 2,000 citizens to pay the same application fee as the Metropolitan Council, or a large industrial concern. MPCA should consider a sliding scale in establishing fees to make the process accessible. MESERB further commented that no basis is given in the SONAR for the MPCA's estimated cost to apply for a variance and does not believe it is an accurate estimate. The MPCA should revisit the calculation and also consider ways to

share the technical and professional costs/burden with communities and sanitary districts as a means of providing greater accessibility to the process. MPCA should also include amendments to its fee structure, and address MESERB's concerns over the cost prohibitive nature of the application fee when combined with the professional/technical expenses necessary to apply for a variance.

**Response:** Changes regarding fees are beyond the scope of this rulemaking. Any fee changes, including a sliding fee scale, would need to be considered by the legislature and incorporated in *Minn. R. ch. 7002*. The MPCA staff has forwarded MESERB's comment to the MPCA Commissioner who is considering the overall fee structure for the MPCA. Also, variances are an optional tool to achieve WQS. Costs are specifically taken into account if a permittee requests a variance based on these proposed rules due to "substantial and widespread negative economic and social impacts" [(*Minn. R. 7050.0190*, subp. 4(6), *Minn. R. 7052.0280*, subp. 3(6))].

**13. The Great Lakes System standard for variances should not extend to Minnesota waters outside the Lake Superior Basin.**

**Comment 13:** MESERB commented the proposed *Minn. R. 7050.0190* attempt to apply the federal GLS standard to all of Minnesota's waters in the name of consistency is concerning, because it is inconsistent with federal regulations. Such an approach is unreasonable, unsupported, varies from the federal approach, and is excessively strict and unduly burdensome. The SONAR fails to address the reasonableness of this proposal in light of its inconsistency with the applicable federal rules. To address the unnecessary application of the GLS standard and to promote flexibility and consistency with the federal standard, MESERB states changes should be made to *Minn. R. 7050.0190*.

**Response:** USEPA used the Great Lakes Initiative (see SONAR page 9), as a basis for their variance framework, meaning variances outside the Great Lakes System are very similar. The MPCA's revised rule resembles the full body of federal regulations to be taken into consideration during the review and granting of a variance. The requested exclusion of specific requirements will not eliminate the need to comply with these requirements. Therefore, Minnesota maintains this language to clearly articulate to permittees what the state and the federal government will require when reviewing a variance. See below Part III, section B, Comments on Specific Rule Parts.

**14. MPCA should rewrite or withdraw the proposed rules.**

**Comment 14a:** The Chamber is opposed to the entire proposed amendments. It is the Chamber's opinion that MPCA should withdraw these proposed rules, and revise them to bring them into alignment with final federal requirements.

**Response:** The MPCA disagrees and will not be withdrawing the proposed rules. The MPCA is making revisions to the proposed rules based in part on comments received. In doing so, the revised proposed rules are both consistent with federal rules and take stakeholder comments into consideration. See below Part III, section B, Comments on Specific Rule Parts.

**Comment 14b:** MCEA commented that the proposed changes to 7050 and 7052 should be strengthened, and completely rewrite 7053. MCEA believes it is improper to proceed with the current rule proposal for the reasons identified in their comment letter.

**Response:** Comment noted. See below Part III, section B, Comments on Specific Rule Parts.

**Comment 14c:** MESERB objects to the proposed amendments in their entirety for the reasons identified in their comment letter. The MPCA should withdraw the current

rulemaking and revise the proposed rules and the SONAR, and re-issue them for public comment. In so doing, the MPCA should incorporate the above comments, and better align the proposed rules with the applicable federal rules.

**Response:** The MPCA disagrees and will not be withdrawing the proposed rules. The MPCA is making revisions to the proposed rules based in part on comments received.

## **B. Comments on Specific Rule Parts**

This section provides responses to each individual comment on a specific rule part.

### **7050.0190 VARIANCE FROM STANDARDS.**

#### **15. Part 7050.0190, Subpart 1.A**

**Comment 15a:** MCEA agrees with the condition to protect endangered species.

**Response:** Comment noted.

**Comment 15b:** MESERB commented that the rule language requiring an applicant to show that a “variance would not jeopardize endangered . . . or threatened species . . . or ‘critical habitat’” should be deleted. This language is inconsistent with the applicable federal rule and is unnecessarily limiting when applied to waters outside of the LSB. 40 CFR 131.14.

**Response:** USEPA and states must comply with Section 7 of the Endangered Species Act. Section 7 of the Endangered Species Act requires federal agencies to use their authority to carry out conservation programs to benefit endangered and threatened species. There is also an explicit requirement for federal agencies to ensure, in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service, that any action they authorize, fund, or carry out will not be likely to jeopardize the continued existence of a listed species, or destroy or adversely modify designated critical habitat. Therefore, this section makes clear that any jeopardy to endangered species from a variance would not be approvable. Although the Endangered Species Act is not included in the variance rules 40 CFR 131.14, it still applies and all variances approved by USEPA must not violate the Endangered Species Act. The specific language in question exists in 40 CFR 132, Water Quality Guidance for the Great Lakes System. The MPCA included this language in chapter 7050 to be consistent in the variance application process statewide, provide for statewide protection of water quality, and to be consistent through the three variance rules chapters.

#### **16. Part 7050.0190, Subpart 1.B**

**Comment 16:** MCEA agrees that this condition is necessary and that a variance may not be granted if the standard can be achieved through technology-based requirements or reasonable BMPs. MCEA does not agree that a variance may be granted in the case in which WQS could be met through implementation of BMPs that are not within the permittee’s control. MPCA may not grant a variance, or subsequent variance, that applies to a water body or waterbody segment without providing documentation to USEPA. 40 CFR 131.14(b)(2)(A) and (B). Under federal antidegradation regulation, new or increased pollution cannot be allowed unless the State meets the requirements of 40 CFR 131.12(a)(2). MPCA needs to define what is within the permittee’s control.

**Response:** No rule change is proposed. MPCA has authority to regulate activities within the permittee’s control. The MPCA has other authorities to use tools, aside from permits, to address nonpoint sources outside of the control of the permittee (i.e. restoration plans that call for mercury reduction from nonpoint sources and minimization of deicing chemicals). If MPCA were to attempt to grant a variance predicated on actions that are

not within the permittee's control, it is unclear how this would be enforceable under existing permitting authorities and it is possible USEPA would not approve it. The MPCA recognizes that the state and permittee must meet the requirements of 40 CFR 131.14(b)(2)(A)(3), which requires the adoption of Pollutant Minimization Program. Finally, the term "practices within the permittee's control" is unambiguous and requires no further definition.

#### 17. Part 7050.0190, Subpart 1.C

**Comment 17a:** MCEA commented that the rule language "The variance would not remove an existing use" should be altered to make clear that no variance should be allowed that would not "maintain and protect existing uses." MCEA understands that the term "remove" originates with 40 CFR 131.10(g) which addresses removal of use designations. However, the term is not entirely appropriate as to variances, which assume maintenance of use designations and are focused on reaching the highest attainable use during the period until all designated uses can be achieved. MCEA proposes that the language should specify that the variance "maintain and protect all existing uses." The "maintain and protect" language appears at 40 CFR 131.12(a)(1) and is appropriate here.

**Response:** No rule change is proposed. Permittees and the state must comply with all federal antidegradation provisions in 40 CFR 131.12 including the part referenced in the comment.

The new federal variance regulations state [40 CFR 131.14(b)(1)(ii)] that a variance "shall not result in any lowering of currently attained ambient water quality..." States and permittees must comply with this, as well as antidegradation requirements.

**Comment 17b:** MESERB commented that the rule language requiring the applicant to show the variance "would not remove an existing use" should be deleted. This requirement lacks consistency with the applicable federal rule on variances and is duplicative as the bar against removing existing uses exists elsewhere in both state and federal statutes, *Minn. R. 7050.0180* and 40 CFR 131.11.

**Response:** The language in question in the proposed variance rule makes it clear variances from state WQS, which ultimately need approval from USEPA, need to be protective of existing uses. The MPCA would not attempt to give preliminary approval of a variance and send to USEPA for final approval a variance that would remove an existing use. The intent of the variance is to not further degrade water quality. This statement maintains the goal of the variance which is not to make the water quality worse.

#### 18. Part 7050.0190, Subpart 4

**Comment 18a:** The Chamber and SMBSC commented that MPCA substituted the term "water quality standard(s)" rather than using the WQS Rule term "use." This substituted language needlessly causes confusion and the precise federal language must be employed. MPCA use of term "highest attainable condition" is not defined clearly. The "highest attainable use" or condition that must be attained during the variance period is not adequately defined.

**Response:** No rule change is proposed. USEPA directs delegated states to adopt "standards" to protect "uses". The proposed rules align with state language and maintain consistency with state rules. Also, the MPCA believes the term "water quality standards" is more specific. Multiple WQSs protect a given use; for example Minnesota has many WQS like chloride and ammonia that are designed to protect water for use by aquatic life. Granting a variance from one chemical specific WQS does not grant a variance from the protection of the use. Federal regulations are clear that variances cannot remove uses. The MPCA grants variances from WQS and does not grant variances from "uses."



Each variance evaluation will include a determination of the “highest attainable condition”. The determination of the highest attainable condition will be a case specific determination considering the chemical and biologic quality of the receiving water along with data and information unique to the permitted facility applying for the variance. Ascribing a definition to this term in the proposed rule would unduly limit the implementation of the rule particularly because the highest attainable condition may be different for each variance request. USEPA did not define “highest attainable condition”. Instead, the supplementary information section II.E of USEPA’s “Water Quality Standards Regulatory Revision” (FRL-9921-21-OW) provides examples of what could be used to define the “highest attainable condition”. (Numeric effluent limits, including an enforceable sequence of actions that the State determines are necessary to achieve the final effluent limit). The MPCA will follow these suggestions when reviewing each variance request.

**Comment 18b:** MESERB commented that when incorporating 40 CFR 131.10(g)(1)-(6) into the proposed rule, the MPCA substituted the phrase “use” from the federal language, to “water quality standard(s).” See proposed *Minn. R. 7050.0190*, subp. 4. A. (1)-(6). This change should be reversed because it creates potential internal inconsistencies within the proposed rule, and fails to align with the federal standard. Change “water quality standard(s)” to align with federal language “use.”

**Response:** See response to comment 18a. The MPCA does not intend to issue variances to a “use”, as variances are specific to WQS.

**Comment 18c:** USEPA in their comments identified disagreement between Minnesota proposed revisions and 40 CFR 131.10(g)(5) and recommends the MPCA revise 7050.0190, subp. 4 to be consistent with 40 CFR 131.10(g)(5). If Minnesota declines to make the recommended change and submit a variance based on natural features precluding attainment of the use for a use other than aquatic life, USEPA would be unable to approve such a variance.

**Response:** The MPCA proposes to revise part 7050.0190, subp. 4.A(5) to clarify that a variance based on natural features does not preclude attainment of the use for a use other than aquatic life. It is reasonable to make this change to be consistent with federal rule at 40 CFR 131.10(g)(5).

**PART 7050.0190, SUBP. 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

**Comment 18d:** MESERB commented that 40 CFR 131.10(g) should be adopted “as is” to promote consistency and clarity within the proposed rules. MPCA’s proposed rule requires meeting one of the six-factors found at 40 CFR 131.10(g)(1)-(6) in order to qualify for any WQS variance. The federal rule clearly places the disjunctive word “or” after every factor. In contrast, the proposed rule only uses the disjunctive between factors (5) and (6). This omission should be corrected to align with the federal rule, and improve clarity regarding the rule’s application.

**Response:** The intent of the proposed variances rules is to allow a variance if any one of the six factors can be met. USEPA’s intent is the same. The new federal variance rules reference 40 CFR 131.10(g). In this location, there is a distinctive “or” after each factor. However, existing variance language in 40 CFR 132 is not written this way. Instead, semicolons are used and only one “or” is used between the fifth and sixth

factors. In these proposed rules, the intent was to be consistent through the three variance rules chapters. Therefore, MPCA will retain the language as written in chapter 7052. This is reasonable because it conforms to one of the two ways the federal rules are written. It is also reasonable because it maintains the intent of the proposed rules and existing federal language, which is to meet one of the six factors to be eligible for a preliminary determination by the MPCA to grant the variance, and obtain final approval of the variance from USEPA.

#### 19. Part 7050.0190, Subpart 4.B

**Comment 19a:** MCEA agrees that any variance must conform to state and federal antidegradation standards. Because MPCA has not yet finalized revisions to its antidegradation rules, it is important that MPCA include compliance with federal antidegradation regulations in this variance rule. Subpart 4.B. should state “show that the variance fully complies with parts 7050.0180, 7050.0185 and 40 CFR 131.12.” It should be a very rare case in which a permittee that proposes a new or increased discharge would qualify for a variance.

**Response:** No rule change is proposed. The MPCA must meet federal and state antidegradation regulations when giving preliminary approval to grant a variance. Adding the federal citation as requested by MCEA does not add value or clarity to the proposed rule. The MPCA is in the process of amending the antidegradation rules and published public notice of proposed amendments to the antidegradation rules in the *State Register* on February 1, 2016 (40 SR 901).

**Comment 19b:** MESERB commented that the rule language requiring an applicant to demonstrate that a variance conforms to Minnesota’s non-degradation rules should be deleted because it fails to comport with the applicable federal rule for non LSB waters. 40 CFR 131.14.

**Response:** The MPCA must meet federal and state antidegradation regulations when giving preliminary approval to grant a variance. This is not a new obligation or process for a permittee. The proposed rule at part 7050.0190, subp. 4.B that the variance conform with state antidegradation rules informs the permittee and the public on the state antidegradation requirements that must be met. See response to 19a above.

#### 20. Part 7050.0190, Subpart 4.C

**Comment 20:** MESERB commented that the rule language requiring the applicant to “characterize the extent of any increased risk to human health and the environment associated with granting the variance” should be deleted. This language is inconsistent with the applicable federal rule for non LSB waters, and is unduly restrictive. 40 CFR 131.14

**Response:** No rule change is proposed. Permittees are currently required to demonstrate the extent of any increased risk to human health and the environment associated with compliance with the variance compared to the original WQS. This is expressly required under existing chapter 7052 for waters in the Lake Superior Basin at part 7052.0280, subp. 3.C. While similar language is not currently in chapters 7050 and 7053, USEPA (as part of its review and approval process for all state variances) has required the state to characterize any increased health risk and to find that any increased risk is consistent with the protection of the public health, safety and welfare before giving preliminary approval to variances under those rule provisions. This has been required by USEPA pursuant to that agency’s guidance and is not a new condition for approval by USEPA. However, the requirement has not historically been incorporated into these state rules. This proposed rule is consistent with applicable federal requirements and practices and is needed to add

clarity to the variance process. The MPCA's express inclusion of this requirement is consistent with what USEPA historically has requested from the state. It is therefore reasonable to expressly incorporate the requirement in the other variance rules. Because variances are from WQS that meet the goals and requirements of the Clean Water Act, this language is intended to ensure that the general requirements of section 303(c)(2)(a) of the Clean Water Act (i.e., standards shall be such as to protect the public health and welfare) is met even though specific protection criteria may be temporarily exceeded. This is reasonable because having the language these variance rules ensures that permittees understand what is required before pursuing a variance.

#### 21. Part 7050.0190, Subpart 6

**Comment 21:** MCEA notes that *Minn. R. 7000.7000* does not require a public hearing, while the federal regulations do. Rules at 7000.7000 also specify a decision by the MPCA Board, which was abolished by the legislature in 2015. MCEA commented that this section of the variance rule should state "final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000 and 40 CFR 131.20(b)."

**Response:** No rule change is proposed. Similar to the comment from USEPA (above in Part II, Section A, comment 4b), the state must comply with federal rule and will therefore be compliant with 40 CFR 131.20(b). It is not necessary for every federal requirement a state is bound to follow, be mirrored or duplicated in state rule. If we fail to meet our obligation, we will be accountable to USEPA and interested parties. Adding the federal citation to rule as requested by MCEA does not add value or clarity to the proposed rule.

#### 22. Part 7050.0190, Subpart 6.A

**Comment 22:** MCEA agrees with this provision insofar as it requires that the effluent limitation should certainly be no less stringent than that achieved under the previous permit. However, the term "currently achievable treatment" is vague and could be interpreted to mean currently achievable using only the current pollutant control technology. The rule should provide that the effluent limitation should reflect the greatest "pollutant reduction achievable" using any "feasible pollutant control technology" that can be identified. The rule should also make clear that the MPCA in its ruling will document the relationship between pollutant control activities and the highest attainable use.

**Response:** No rule change is proposed. The MPCA believes the terms used have the same meaning, and the term "currently achievable treatment" is broader and clearer. The MPCA must be as stringent as federal rules. If MPCA gives preliminary approval to grant a variance and wants to obtain USEPA approval of the variance, it must comply with new federal language.

#### 23. Part 7050.0190, Subpart 6.B

**Comment 23a:** MCEA comments that a Pollutant Minimization Program should also be required under certain circumstances.

**Response:** Comment noted. Because MPCA must be as stringent as federal rules, MPCA will comply with federal language, and include a Pollutant Minimization Program when applicable.

**Comment 23b:** MESERB commented that proposed *Minn. R. 7050.0190, subp. 6. A-B* dealing with terms and conditions incorporated into permits that receive variances should be deleted and replaced with the applicable language from 40 C.F.R. § 131.14(b)(1).

**Response:** Comment noted. Because MPCA must be as stringent as federal rules, MPCA will comply with federal regulations.

#### 24. Part 7050.0190, Subpart 6.D

**Comment 24:** MCEA agrees that such a reopener should be included in the permit. The permit should also contain a reopener provision allowing for tighter effluent limits if feasible pollutant control technology becomes available that would allow the receiving water body to attain a higher water quality condition.

**Response:** Comment noted. Because MPCA must comply with 40 CFR 131.14(b), the variance may only be as long as necessary to achieve the highest attainable condition, and MPCA must reevaluate the need for and terms of the variance every five years. Given the time and costs necessary to plan, build, and initiate new advanced technologies, a five-year review duration is reasonable. As well, current rules at *Minn. R. 7001.0170* already provide the authority to reopen or modify permits. Additional language would be redundant and unnecessary.

#### 25. Part 7050.0190, Subpart 7

**Comment 25a:** MCEA agrees that a renewal should only be granted for a variance under circumstances in which a new variance could be granted.

**Response:** Comment noted.

**Comment 25b:** MESERB commented proposed *Minn. R. 7050.0190*, subp. 7, dealing with renewal of a variance should be deleted, and replaced with language consistent with 40 C.F.R. § 131.14(b)(iii)-(vi). Likewise, proposed *Minn. R. 7053.0195*, subp. 7 should also be amended for internal consistency.

**Response:** The MPCA proposes to revise subpart 8 in order to incorporate the new federal regulation. No rule change is proposed for subpart 7.

#### 26. Part 7050.0190, Subpart 8

**Comment 26a:** MCEA agrees that a Minnesota variance should last no longer than ten years and that the variance must not last longer than is necessary. The rule must also incorporate the requirements of 40 CFR 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.

**Response:** The MPCA proposes to revise subpart 8 in order to incorporate the new federal rule for variance term and the applicability of a variance if reevaluation of the variance is not conducted by the state and submitted to USEPA. The MPCA understands that it must comply with the federal requirements for reevaluation of a variance. It is reasonable to make this change because it makes clear what the permittee must submit in order for MPCA to give preliminary approval to grant a variance, and it makes clear that the variance term is limited.

The MPCA also proposes to change the rule by adding the requirement for the permittee to request in writing a reevaluation of a variance greater than five years. If the permittee does not make such a request, the MPCA would not have to conduct the reevaluation and the variance will expire. There will be instances when a permittee reaches compliance with the underlying effluent limit and no longer needs the variance. By MPCAs asking the permittee to confirm its desire to maintain the variance, this change conforms to the intent of the final WQS Rule which states that if the variance is not reevaluated, the variance is no longer applicable. If the permittee does not submit the written request, the variance terminates, and the underlying effluent limit in the permit automatically becomes applicable. The MPCA would not have to expend time and resources to reevaluate a variance that the permittee no longer needs or wants. While no specific form

of writing is required, the permittee would typically express its desire to maintain the variance in its application for permit reissuance. Therefore, it is necessary and reasonable to require the permittee to request the reevaluation.

#### **PART 7050.0190, SUBP. 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.~~

**Comment 26b:** MESERB commented that the proposed amendments unnecessarily place a ten year maximum duration on variances outside the LSB. This is inconsistent with the federal rule, and contravenes the Agency's desire for flexibility. 40 CFR 131.14(b)(vi). The federal rule does not impose a maximum duration for a variance, but instead requires re-evaluation of a variance every five years.

The proposed rule uses limiting qualifying language "term of a variance must be as short as possible." This language is inconsistent with the federal regulation and the MPCA's stated objectives regarding flexibility. Delete and replace with language consistent with 40 CFR 131.14(b)(vi)-(v).

**Response:** See response to comment 26a.

#### **27. Part 7052.0280, Subpart 1**

**Comment 27:** MCEA agrees that a variance should not be available to new dischargers for GLWQG covered pollutants, unless the proposed discharge is necessary to alleviate an imminent and substantial danger to public health and welfare. This restriction should also apply to recommencing discharges. 40 CFR 132 Appendix F, Procedure 2.A.1.

**Response:** No rule change is proposed. First, new federal regulations do not reference recommencing discharges. Because this section of Minnesota rule involves 40 CFR 132, the MPCA must ensure that variances meet these federal requirements. As stated in the comment, recommencing discharges are already restricted under 40 CFR 132, Appendix F. It is possible, in a rare case, that a new discharger could make the water quality better (new technology), and still need a variance; however, would create a better overall use. If a facility is upgrading the wastewater treatment system, conventional, and even advanced wastewater treatment, may have the capacity to better remove a wide range of pollutants, but these technologies may not be readily available to reduce others. Use of a variance may provide a way to build new advanced treatment and create an overall benefit to the receiving water quality with the exception of a single constituent.

#### **28. Part 7052.0280, Subpart 1.A**

**Comment 28:** MCEA agrees with the condition to protect endangered species.

**Response:** Comment noted.

#### **29. Part 7052.0280, Subpart 1.B**

**Comment 29:** As with variances from statewide water quality standards discussed above, MCEA agrees that this condition is necessary and that a variance may not be granted if the standard can be achieved through technology based requirements or reasonable BMPs.

See also, 40 CFR 131.14(a)(4). MCEA does not agree that a variance may be granted in the case in which water quality standards could be met through implementation of BMPs that are not within the permittee's control. MPCA may not grant a variance, or subsequent variance, that applies to a water body or waterbody segment without providing documentation to USEPA. 40 CFR 131.14(b)(2)(A) and (B). Under federal antidegradation regulation, new or increased pollution cannot be allowed unless the State meets the requirements of 40 CFR 131.12(a)(2). The MPCA needs to define what is within the permittee's control.

**Response:** See MPCA response to comment 16.

### 30. Part 7052.0280, Subpart 1.C

**Comment 30a:** USEPA commented that variances for new Great Lakes dischargers are prohibited by 40 CFR, Appendix F, Procedure 2. Proposed rule prohibits variances where granting a variance would result in removal of an existing use. Though likely to lead to variance decisions compatible with 40 CFR 132 in most cases, possible proposed rule could lead to a decision to grant a variance prohibited under 40 CFR 132. If this occurs, USEPA would be unable to approve such a variance. USEPA recommends MPCA revise 7052.0280 applicability requirements to be consistent with 40 CFR 132.

**Response:** Comment noted. If this situation occurred, the MPCA agrees and understands USEPA would not be able to approve such a variance.

**Comment 30b:** MCEA commented that the rule language "The variance would not remove an existing use" should be altered to make clear that no variance should be allowed that would not "maintain and protect existing uses." See comment above.

**Response:** See above Part III, section B, response to comment 17a.

### 31. Part 7052.0280, Subpart 2

**Comment 31:** MCEA agrees that the term of variances under the GLWQG cannot be longer than five years.

**Response:** Comment noted.

### 32. Part 7052.0280, Subpart 3.B

**Comment 32:** MCEA agrees that any variance must conform to state and federal antidegradation standards. Because MPCA has not yet finalized revisions to its antidegradation rules, it is important that MPCA include compliance with federal antidegradation regulations in this variance rule. Subpart 4.B. should state "show that the variance fully complies with parts 7050.0180, 7050.0185 and 40 CFR 131.12." It should be a very rare case in which a permittee that proposes a new or increased discharge would qualify for a variance. See comment 19a above.

**Response:** See MPCA response to comment 19a.

### 33. Part 7052.0280, Subpart 5

**Comment 33:** MCEA notes that *Minn. R. 7000.7000* does not require a public hearing, while the federal regulations do. Rules at 7000.7000 also specify a decision by the MPCA Board, which was abolished by the legislature in 2015. MCEA comments that this section of the variance rule should state "final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000 and 40 CFR 131.20(b)." See comment 21 above.

**Response:** See MPCA response to comment 21.

**34. Part 7052.0280, Subpart 5.A**

**Comment 34:** MCEA agrees with this provision insofar as it requires that the effluent limitation should certainly be no less stringent than that achieved under the previous permit. However, the term “currently achievable treatment” is vague and could be interpreted to mean currently achievable using only the current pollutant control technology. The rule should provide that the effluent limitation should reflect the greatest “pollutant reduction achievable” using any “feasible pollutant control technology” that can be identified. The rule should also make clear that the MPCA in its ruling will document the relationship between pollutant control activities and the highest attainable use.

**Response:** See MPCA response to comment 22.

**35. Part 7052.0280, Subpart 5.D**

**Comment 35:** MCEA agrees that such a reopener should be included in the permit. The permit should also contain a reopener provision allowing for tighter effluent limits if feasible pollutant control technology becomes available that would allow the receiving water body to attain a higher water quality condition. See comment 24 above.

**Response:** See MPCA response to comment 24.

**36. Part 7052.0280, Subpart 5.E**

**Comment 36:** MCEA agrees that for BCCs, a pollutant minimization program should be required.

**Response:** Comment noted.

**7053.0195 VARIANCES FROM DISCHARGE EFFLUENT LIMITS OR TREATMENT REQUIREMENTS.**

**37. Part 7053.0195, Subpart 1**

**Comment 37:** MESERB commented that in light of the above deletions to proposed *Minn. R. 7050.0190*, subp. 1. A and C, the last sentence of proposed *Minn. R. 7053.0195*, subp.1, referring to the aforementioned subparts should be stricken for internal consistency.

**Response:** No rule change is proposed. The MPCA does not propose to change part 7050.0190, subp.1.A and C; therefore, no rule change is proposed for part 7053.0195, subp. 1. See MPCA response to comment 15b.

**38. Part 7053.0195, Subpart 4**

**Comment 38:** MCEA commented in their general comments (see Comment 8 above) that contrary to the proposed rule at subpart 4, such a variance could not be effective without approval from USEPA. The federal regulations make it plain that variances from water quality standards are subject to review and approval whether proposed by a permittee for a particular discharge or proposed for a water body, 40 CFR 131.14(a).

**Response:** The MPCA proposes to revise subpart 4 to delete the language that USEPA approval does not apply to variances granted by the agency under this part. The MPCA may submit a variance granted under this part to USEPA for review; however, USEPA does not approve variances from discharge effluent limits or treatment requirements. The WQS variance provisions are found in chapters 7050 and 7052. As USEPA states in their December 28, 2015, comment letter submitted on these proposed rule amendments, “These comments are limited to variances affecting Minnesota’s water quality standards program under section 303(c) of the Clean Water Act and do not address revisions to

7053.0195 as those fall outside the scope of section 303(c)". It is reasonable to make this change to provide clarification regarding USEPA approval of variances.

#### 7053.0195, Subp. 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.~~

#### 39. Part 7053.0195, Subpart 7

**Comment 39:** MESERB commented proposed *Minn. R.* 7050.0190, subp. 7, dealing with renewal of a variance should be deleted, and replaced with language consistent with 40 C.F.R. § 131.14(b)(iii)-(vi). Likewise, proposed *Minn. R.* 7053.0195, subp. 7 should also be amended for internal consistency.

**Response:** See response to comment 25b.

#### 40. Part 7053.0195, Subpart 8

**Comment 40:** MESERB commented that the proposed amendments unnecessarily place a ten year maximum duration on variances. This is inconsistent with the federal rule, and contravenes the Agency's desire for flexibility. 40 CFR 131.14(b)(vi). The federal rule does not impose a maximum duration for a variance, but instead requires re-evaluation of a variance every five years.

Furthermore, the proposed rule uses limiting qualifying language when addressing the duration of the variance, stating that the "term of a variance must be as short as possible." This language is inconstant with the federal regulation and the Agency's stated objectives regarding flexibility. The applicable federal rule states that "[t]he term of the WQS variance must only be as long as necessary." 40 C.F.R. § 131.14(b)(vi). Subpart 8 should be deleted and replaced with language consistent with 40 CFR 131.14(b)(vi)-(v).

**Response:** The MPCA proposes to revise subpart 8 in order to incorporate the new federal rule for variance term. It is reasonable to make this change because it makes clear what the permittee must submit in order for MPCA to grant preliminary approval, and it makes clear that the variance term is limited.

The MPCA also proposes to change the rule by adding the requirement for the permittee to request in writing a reevaluation of a variance greater than five years. If the permittee does not make such a request, the MPCA would not have to conduct the reevaluation and the variance will expire. There will be instances when a permittee reaches compliance with the underlying effluent limit and no longer needs the variance. By MPCAs asking the permittee to confirm its desire to maintain the variance, this change conforms to the intent of the final WQS Rule which states that if the variance is not reevaluated, the variance is no longer applicable. If the permittee does not submit the written request, the variance terminates, and the underlying effluent limit in the permit automatically becomes applicable. The MPCA would not have to expend time and resources to reevaluate a variance that the permittee no longer needs or wants. While no specific form of writing is required, the permittee would typically express its desire to maintain the variance in its application for permit reissuance. Therefore, it is necessary and reasonable to require the permittee to request the reevaluation.



## Part 7050.0190, Subp. 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.~~

### IV. Oral Testimony Provided During the Hearing

#### A. List of Parties Testifying

1. Debra Topping, Interested Party
2. Korey Northrup, Interested Party
3. Bob Tammen, Interested Party
4. Paula Maccabee, Clean Water Legacy
5. Albert Ettinger, Minnesota Center for Environmental Advocacy
6. Louis Knieper, Southern Minnesota Beet Sugar Cooperative
7. Daniel Marx, Minnesota Environmental Science and Economic Review Board

#### B. Comments and Response

Many of the comments provided during the February 4, 2016, hearing were similar to those submitted in writing during the Dual Notice public notice comment period for the proposed rule amendments. The following is a summary of comments that were made during the hearing. The same format for identifying the comments and responses identified above in Part III is used here.

**Comment 1a:** Ms. Topping asks; what pollutant is the MPCA trying to change?

**Response:** The MPCA is not changing any pollutant or WQS with this rulemaking. The proposed rules are only concerned with the procedural requirements for obtaining a variance and will not result in more or less restrictive water quality standards or change to a water quality standard of any kind. The rules establish the procedures that must be followed for a permittee to request a variance. The proposed rules do not include any specific water quality variances; they merely establish a process by which individual permit holders can apply for a variance from a discharge limit based on a water quality standard.

**Comment 1b:** Should we allow any poison or pollutant into our water? Should be looking for what we can do to prevent this?

**Response:** Comments are not within the scope of this rulemaking.

**Comment 1c:** Was there input from the reservation on this matter, were they involved in this decision making?

**Response:** When the MPCA provided notification of this rulemaking, as well as when we published public notice of the proposed rules and the notice of hearing, notification was sent to the tribes; specifically, the air and water representatives of the 11 tribes in Minnesota. The MPCA also contacted the tribal representatives via e-mail in October 2015, prior to when the rules were proposed to let them know that the proposed rules were forthcoming. The MPCA did not receive comment on the proposed rules from any of the tribal representatives. (Judge Case noted at the hearing that the hearing is not the only opportunity for input, there is a 20-day comment period during which written comments may also be received.)

**Comment 1d:** No one here is talking for the deer, water, need to look at balance of it all. Five years for anything, to be able to continue this is five years too much. As a first nation persons, I can't comprehend how this is acceptable anywhere. There's no room for variances, the cost is \$10,000. I say no for my children and grandchildren; there is no room for a variance.

**Response:** Comment noted.

**Comment 2a:** Ms. Northrup asks if the MPCA is not changing a specific pollutant, why is the MPCA trying to change the variance policy; a process in which people can put chemicals in our waters?

**Response:** The variance procedures in the three rule chapters are inconsistent. There are also differences between the existing state variance procedures and the prior federal procedures. These differences have historically made review and approval of variances difficult. The amended rules will provide clearer variance procedures for regulated parties, and consistency in the state's variance rules and with applicable federal requirements for approving variances, resulting in improved efficiency in processing variance requests.

**Comment 2b:** How many meetings are scheduled during the comment period? (Comment is in reference to the MPCAs hearing presentation, slide 5, public involvement, meetings, and conversations with commenters.)

**Response:** There are no meetings scheduled during the public comment period on the proposed rules. Slide number five (5) of the MPCAs hearing presentation provides information about public involvement during this rulemaking, up to the hearing. The slide indicates that there were opportunities for public comment and input before the hearing. The public may also provide additional input in writing during the 20-day post-hearing comment period. After that, there will be a five-day rebuttal period.

**Comment 2c:** Explain the use of Great Lakes conditions outside of the Lake Superior Basin.

**Response:** Prior to the publication of the federal final WQS Rule, USEPA used the variance provisions developed as part of the federal "Water Quality Guidance for the Great Lakes System" (i.e. Great Lakes Initiative) rulemaking at 40 CFR 132, and adopted in Minnesota in chapter 7052, as a guide to be used for developing and reviewing variance applications. USEPA based much of its proposed and final WQS Rule on the Great Lakes Initiative variance language and MPCA initially modeled its proposed rule on USEPA's proposal; therefore, the existing variance provisions in 7052 served as a starting point for the proposed rule. (See above Part III, section A, comment 13.)

**Comment 3:** Mr. Tammen expressed concern about the effects of mining and wetland mitigation; and specifically objects to mitigating outside of our watershed. He comments that mitigating outside of the watershed sends dollars out of the watershed, and degrades waters. There is a lot of pressures on our public surface waters, and mining operations are degrading our public waters. The commenter stated that he hopes there is some way to tie in proposals to mitigate our waters; tie in mitigation in the watershed the variance is for.

**Response:** Minnesota has a statewide goal of no net loss of wetlands. Responsibilities for protecting wetlands at the state level are shared between three agencies – the Minnesota Pollution Control Agency, the Board of Water and Soil Resources, and the Minnesota Department of Natural Resources. In 2015, the Minnesota Legislature made changes to Minnesota's wetland conservation act. (Laws of Minnesota 2015, Chapter 4, Article 4.) A summary of these changes can be found at:  
[http://www.bwsr.state.mn.us/wetlands/wca/Summary\\_of\\_2015\\_WCA\\_Statute\\_Changes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Summary_of_2015_WCA_Statute_Changes.pdf).

Mr. Tammen seems to be referring to two specific changes. The first, a change to *Minn. Stat.* § 103B.3355, requires the identification of high priority areas for wetland

replacement. This will likely allow projects in certain areas of the state to provide wetland mitigation in high priority areas if they cannot find wetland mitigation within their watershed. The second appears to be the change in *Minn. Stat.* § 103G.222, subd. 1, which now allows wetlands that are drained or filled to be replaced by actions that provide at least equal public value (by improving water quality) rather than requiring restoration or creation of a wetland.

The Board of Water and Soil Resources is currently working to follow up on these legislative changes in several ways, including by designating high priority wetland areas and by proposing changes to the Wetland Conservation Act implementation rules.

MPCA rules at *Minn. R.* 7050.0186 set forth wetlands standards and mitigation requirements. *Minn. R.* 7050.0186 requires wetlands that are drained or filled to be mitigated through restoration or creation of a wetland and requires that the restoration or creation take place in the same watershed as the impacted wetland to the extent prudent and feasible. This rulemaking does not propose any changes to *Minn. R.* 7050.0186. Furthermore, wetland mitigation requirements are not related to effluent limits and therefore are not subject to variances. Therefore, the MPCA believes these comments are outside the scope of this rulemaking.

**Comment 4a:** Ms. Maccabee notes in her comments that the MPCA said in their presentation that the people affected by variance rules are dischargers. Ms. Maccabee states that it's communities that are affected.

**Response:** Comment noted.

**Comment 4b:** Do the rules fit with the enabling legislation? Requirement is not symmetrical, cannot be more lax, and it can be stronger. The ten year timeframe for variances; USEPA did not ask MPCA to change this. MPCA can choose to have a limit. Don't make changes until you've had a chance to hear from stakeholders.

**Response:** The proposed revision to the state variance rules does not automatically mean that variances longer than ten years will be approved. The proposed change, consistent with the federal final WQS Rules requires the term of the variance be only as long as necessary. The appropriate term of a variance will be determined on a case by case basis and will may or may not exceed five or ten years.

**Comment 4c:** The MPCA did not require highest attainable interim limits and used currently achievable. This seems to endorse backsliding, variance limits are weaker than permits, and allows status quo be maintained.

**Response:** By law, all permits limits, including those based on variances, may not violate antibacksliding requirements established under section 402(o) of the Clean Water Act.

**Comment 4d:** The commenter states that the length of a variance should be five years and cites an example of a variance left outstanding with continued violations. At the very least, keep the variance term ten years.

**Response:** The MPCA proposes to revise the rule to be consistent with the federal rule to re-evaluate the variance every five years, regardless of variance term. To ensure consistency, following the re-evaluation MPCA agrees that it must submit documentation to USEPA within 30 days of completion of the reevaluation demonstrating that the term of the variance is only as long as necessary to achieve the highest attainable condition. (See above Part III, section B, comments 26a and 26b.).

**Comment 4e:** USEPA emphasized 40 CFR 131.14 and the requirement for a public hearing (40 CFR 25). Part 7000.7000 was never in conformity with federal regulations; and USEPA never raised that issue before. USEPA is now much clearer about what procedures are required.

**Response:** No rule change is proposed. Similar to the comment from USEPA in Part III, section B, comment 4b above, the state must comply with federal rule and will therefore be compliant with 40 CFR 131.20(b). Adding the federal citation to the rule does not add value or clarity to the proposed rule. (See above Part III, section B, comment 21.) MPCA must comply with 40 CFR 131.14 requirements related to public hearings for all changes to water quality standards, including variances.

**Comment 4f:** In the chapter 7052 Great Lakes Initiative rules this provision, variances shall not apply to new discharger or recommencing dischargers (cites Mesabi Nugget), needs to be in our rules.

**Response:** Comment noted. The proposed state variance rules do not change the prohibition on variances to new dischargers already in existing *Minn. R. 7052.0280*.

**Comment 4g:** The chapter 7052 nondegradation requirements, specific to the Great Lakes, should apply to rest of state; the MPCA should use the chapter 7052 requirements.

**Response:** The MPCA must meet federal and state antidegradation regulations when giving preliminary approval to grant a variance. This is not a new obligation or process for a permittee. The proposed rule at part 7050.0190, subp. 4.B that the variance conform with state antidegradation rules guides the permittee and communities on the state antidegradation requirements that must be met. (See above Part III, section B, comments 19a and 19b.)

**Comment 4h:** Variances should be rare, tell dischargers variances are a last resort.

**Response:** Comment noted.

**Comment 5a:** Mr. Ettinger commented that he is very confused by the part 7053.0195 rules and where they fit in the overall scheme. The old rules seem to address technology based standards and variances from technology based standards because these requirements went beyond what was required by USEPA. The proposed language is confusing; variances under this chapter don't have to be approved by USEPA. Read USEPA comment letter, USEPA thinks variances under this chapter are not WQS variances. Chapter 7053 is designed to get around a water quality based effluent limit (WQBEL) based on a WQS. It would be a mistake for one to think they can get a 7053 variance to avoid USEPA approval of a WQS variance.

**Response:** MPCA agrees that all variances to WQS must be reviewed and approved by USEPA. Proposed variance provisions in *Minn. R. 7053.0195* are expressly limited to variances from State Discharge Restrictions explicitly included in chapter 7053.

**Comment 5b:** Notes reaction to the Chamber – we want to limit these rules and protections for fishable/swimmable uses; don't cover drinking water and certain industrial uses. Mr. Ettinger states that he doesn't think the state wants to provide less protection of drinking water. Don't dumb down the rules to limit protection of drinking water supplies; I don't think your rules do that but should be clear in the final rules.

**Response:** Comment noted.

**Comment 5c:** This is a practical problem to be addressed, currently achievable treatment. Concerned a variance not be given if treatment not currently achievable. The answer is not to give the discharger a variance; give the discharger the equipment, require equipment that is feasible. The federal rule requires - feasible pollutant control technology.

**Response:** See above Part III, section B, comment 22.

**Comment 5d:** The MPCA needs to look at nonpoint sources for compliance. The rule requires nonpoint controls that are under the permittee's control. Are there any existing rules or basis that we would know what is under a permittee's control?

**Response:** The MPCA issues permits to regulated parties for activities that are within the jurisdictional control of the permittee. Activities that the entity has control over and the MPCA has the delegated authority to issue a permit for are considered enforceable in a permit. (See above Part III, section B, comment 16.)

**Comment 5e:** If MPCA adopts the federal variance duration and the variance is reconsidered every five years, then you must include the provision that the variance will no longer be applicable if the reevaluation is not conducted. I do not see this federal requirement in state rule. Do you think it would be useful to state this in the MPCA rules? It would be beneficial to have the reevaluation provision in rule. (The commenter also states that they do not blame the MPCA for the timing of the rule, and adds there is a lot of confusion because your rule is targeted towards an earlier draft, and how to mesh the rules now will be difficult.)

**Response:** The MPCA proposes to revise the rule to be consistent with the federal rule to re-evaluate the variance every five years, regardless of variance term. To ensure consistency, following the re-evaluation MPCA agrees that it must submit documentation to USEPA within 30 days of completion of the reevaluation demonstrating that the term of the variance is only as long as necessary to achieve the highest attainable condition. (See above Part III, section B, comments 26a and 26b.)

**Comment 5f:** Ms. Maccabee's notes her comment relates to Mr. Ettinger's previous comment and asks if MPCA staff is saying that if they know a certain procedure is required under federal rule, the state will simply follow procedure without putting requirement into state rule? For example, there needs to be a reevaluation process, and if you don't do it, then the variance can't be continued or there has to be a public hearing process. Is the state considering something other than putting the requirement in state rule? If there is nothing in the rules saying that one is entitled to a hearing or nothing in the rules saying that at the time of triennial review you get hearing; as a person who represents and is an attorney, I would not have had a clue that was a requirement. What isn't in the rules, you're not in compliance with federal rules. From the perspective of citizens, not having it in rules does not appear to be a satisfactory way of resolving.

**Response:** It is not necessary for every federal requirement a state is bound to follow be mirrored or duplicated in state rule. If we fail to meet our obligation, we will be accountable to USEPA and interested parties. The MPCA agrees a hearing is to be held on any WQS adopted or revised. (See above Part III, section A, comment 4b.)

**Comment 6:** Mr. Kneiper states that SMBSC is an industry regulated by federal and state rules, and that SMBSC has a variance from the salinity standard. Because of the variance, they are able to stay in business. The commenter states that they feel the first rule draft did not reflect fully the efforts of MPCA to parallel USEPA requirements. The new draft shows we are getting closer to USEPA (i.e. variance duration, with review). Do not believe the term "water quality standard" should be used in state regulation instead of the federal term "use." "Use" is a driver of standards. Request that the MPCA return to using the term "use" and not "WQS" in its regulation. Definition of highest attainable use – needs more clarity, guidelines, understanding; as we spend money to achieve attainable use. The document does not adequately explain how that will be determined.

**Response:** See above Part III, section B, comment 18a.

**Comment 7a:** Mr. Marx expressed concerns about consistency with the federal rule, in particular chapter 7052. Agree in a regulatory scheme for variances, variances should be limited. However, variance process should be user friendly, understandable, and reasonable for regulated parties with some level of flexibility. More variances will be needed in the future; chloride, sulfide.

**Response:** The intent of the rule is to provide a clear and consistent process for permittees to consider when preparing a variance application.

**Comment 7b:** Application of Great Lakes Initiative (GLI) standard, procedure 2, Appendix F, in chapter 7052 for waters in Great Lakes region. The MPCA is taking the GLI standard and applying it across the state where it does not apply. The federal rule eliminates certain elements; endangered or threatened species, critical habitat, increased risk to human health not in federal rule in 131.10, specific to Great Lakes Region. Not that MESERB does see importance of these elements; we are concerned about a variance that we can't meet. Some of our entities don't have the technical expertise to apply for a variance (e.g. a small city without significant technical capacity); the MPCA should consider how to assist cities. One way is cost. The SONAR does not address this issue in a substantive way. We are concerned with how small cities are going to be able to afford a variance. Consider a sliding fee scale. Look at the inconsistencies in the GLI standard; make sure it is aligned with federal rule. We are concerned cities won't be able to apply for a variance (cost, GLI standard).

**Response:** The proposed rule does not require any regulated party (business, small city) to incur cost or to incur any additional costs. Permittees are not required to apply for a variance. If a permittee voluntarily chooses to apply for a variance there are costs associated with the application. As stated on page 41 of the SONAR the rule does not affect everyone nor any one individual facility; unless they choose to make an application, the MPCA determined that the cost of complying with the proposed rule will not exceed \$25,000 in the first year for any one particular entity. This is because the variance request is voluntary and, the updating of procedural requirements do not present any meaningful increase in costs. Only if a variance is considered necessary could the cost exceed \$25,000. Because the pollutant under which the variances requested is unknown, the only definitive cost to be considered is the fee submitted with the variance application (at \$310 per point and 35 points, the variance application is \$10,850 at this time).

## V. Questions Asked by the ALJ During the Hearing

**Comment 1:** Several commenters provided written comment requesting that the MPCA withdraw the rules. Please address this comment.

**Response:** As noted above in Part III, section A, item 14 "MPCA should rewrite or withdraw the proposed rules" several commenters requested that the MPCA withdraw the proposed rule in part because of differences between the proposed rule and the federal final WQS rule and for explanation of the need for and reasonableness of those differences. The MPCA did not (prior to the hearing) and does not (as a result of the hearing) agree that the rules should be withdrawn and has proceeded with the rulemaking. However, the MPCA is making revisions to the proposed rules based in part on comments received where deemed appropriate. Further, the MPCA provides explanation of the need and reasonableness of remaining differences for consideration by the public in its Preliminary Response to Comment. (See above Part III, section A, item 2 "Statutory requirement for assessment of differences between proposed rule and federal rule and analysis of each difference.") The MPCA submits that the revised proposed rules are both consistent with federal rules and take stakeholder comments into consideration. (See above Part III, section B, Comments on Specific Rule Parts.) The MPCA complied with state rulemaking requirements when it prepared the SONAR based on the proposed rule amendments and did address the differences from the then proposed federal rule. Differences from unchanged provisions in the federal rule are addressed in the SONAR and any additional difference as a result of changes in the final version of the federal rule of the proposed rules are addressed in the MPCA's Preliminary Response to Comment. Both support and provide the necessary justification for the rule amendments. Though *some* of the proposed rule amendments differ from the proposed federal rules (which the state's proposed rule amendments were largely based on), and

some of the proposed rule amendments also differ from the federal final WQS Rules, the MPCA believes that the differences are not inconsistent with or less stringent than the federal rule, that the differences therefore are not prohibited, and that the intent of the state rules is the same as the federal rules (see above Part III, section A, item 2, and Attachment 2). As previously mentioned, the MPCA is proposing changes to the proposed rule amendments (Attachment 1) based in part on comments received during the Dual Notice public notice comment period, and oral testimony given at the February 4, 2016, hearing on the rules. In doing so, the MPCA seeks to make the revised proposed rules parallel to the federal final WQS Rule where appropriate, and to assure consistency with the final WQS Rules for variances, to provide internal consistency within the state rules, and to take public comment into consideration.

**Comment 2:** Address why the SONAR was written to USEPA's proposed rules. (Note – explain if SONAR is still responsive - SONAR should address rule now, not the process).

**Response:** As discussed in the Preliminary Response to Comment, Part III, section A, item 2, and in the MPCA's presentation "Amended Rules for Water Quality Variance Procedures" at the February 4, 2016, hearing (Attachment 3, Hearing Exhibit 1), at the time the SONAR was prepared and the MPCA received approval to place the proposed rules on public notice, USEPA variance rules had not yet been finalized. The MPCA began the rulemaking in October 2012 with a Request for Comment. After requesting comment on federal variance procedures in 1998 and again in 2010, USEPA published their proposed variance rules in September 2013 (see SONAR page 8). The MPCA modelled its draft variance rule language on the existing federal variance procedures and proposed federal rule; and after conversations with USEPA Region 5, the agencies came to the mutual conclusion that the state and federal proposed rules were consistent and that MPCA should continue with its rulemaking process.

The MPCA had further conversations with USEPA after the August 2015 publication of the final WQS Rules for variances and in advance of the MPCA's November 2015 public notice of the proposed rule amendments. While the minor differences between the final federal and proposed state rule were identified, it was agreed that differences that presented inconsistency could be rectified following the public notice. The MPCA and USEPA mutually determined that the state rules and final federal rules were similar enough for the MPCA to move ahead. With that understanding, the MPCA decided to proceed with the rules as proposed rather than further delay this rulemaking.

The MPCA believes that the SONAR prepared for the proposed rule amendments is responsive, and that the SONAR and the MPCA's Preliminary Response to Comment, which addresses current differences between the proposed rule amendments as revised and the final WQS Rules for variances, both support and provide the necessary justification for the rule amendments. (See above Part III, section A, comments 2a, 2b, and 2c.)

**Comment 3:** In the SONAR at page 34 "What is anticipated effect on State revenue?" What is the MPCAs intent?

**Response:** During the hearing, Judge Case referenced language in the SONAR (Exhibit D.1.) found at page 34 and asked MPCA staff whether the MPCA meant "one of the intents" of the rule was to reduce staff time. Ms. Kessler, MPCA, responded in the affirmative to the questions. That response would be correct with respect to the MPCAs intent for the rule as a whole. However, MPCA staff should clarify its response. The reference to intent was in the following sentence, "As identified in item (2) above, the intent of the proposed rules is to reduce staff time to process a variance by aligning state and federal requirements, thus reducing duplication of effort to process the variance under two different sets of regulatory requirements." The quoted language references back to item (2) which specifically addresses probable costs of implementation and enforcement an anticipate effects upon state revenue (see SONAR page 32). In context, the MPCAs statement about intent was limited in scope and was not directed to the rule as a whole.

**Comment 4:** Federal law does not require a variance process in law? Are state variance rules required?

**Response:** Previously there was no federal rule for WQS variances. The federal rules at 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 federal rule requires that provisions that allow for variances from WQS are subject to USEPA review and approval. The federal rule at 40 CFR 131.14 sets out procedural requirements applicable to a state's submittal of a variance for USEPA review and approval or disapproval. That is, USEPA must approve the MPCA's variance rules and requests for variances from WQS (see SONAR page 6). USEPA's expectation is that states will have WQS variance provisions in their rules if they are going to use variances in their permits. At 40 CFR 131.14, USEPA's final WQS Rules for variances, adopted August 21, 2015, lays out the procedural requirements applicable to states and authorized tribes for submittal of a WQS variance to USEPA for review and approval or disapproval. However, the focus of the MPCA's proposed rules is on the process and procedural requirements before the MPCA. While the federal rules requires states that grant variances to have set out state processes for approval of variances in rule, states are not required to duplicate and include 40 CFR 131.14 requirements in state rule. The applicability of those requirements will not be enhanced by inclusion nor made any less applicable by exclusion.

**Comment 5:** At part 7050.0190, subpart 4 D, what does interim mean; is interim a particular period of time?

**Response:** The term "interim" is not a specific period of time. It relates to NPDES permits and means that the limit applied (whether a state discharge restriction or a WQBEL depending on the chapter under which the restriction applies) is not the final limit. The final limit would apply after the variance term is over, or before (if the discharger is making progress at a more rapid pace). "Interim" means the limit is not final, and can be viewed as a ratchet down approach to achieving a final limit.

**Comment 6:** Broadly explain, the best to your ability, in plain language for people who are not participants in the process, the three rule chapters, and if the term of variance is different in each chapter, explain why.

**Response:** The MPCA is delegated to implement the Clean Water Act and has authorities provided in federal rule at 40 CFR 131. These federal rules require states to designate uses of a water body and the appropriate criteria to protect those uses; and to consider the WQS developed to protect the designated uses in downstream waters. Minnesota has delegation from USEPA under section 303 of the Clean Water Act to designate uses and adopt WQS to protect those uses. To implement the Clean Water Act in Minnesota, the MPCA develops and adopts WQS in Minnesota rules. These WQS are the primary tool used to protect the quality of water in Minnesota's lakes and streams. The standards serve as the foundation for MPCA's annual determination of whether waters across the state are meeting WQS or are "impaired." The standards also serve as basis for the development of water quality based effluent limits (or WQBEL), which are discharge limits designed to limit discharges of contaminants such that WQS are met and designated uses are protected. Water quality based effluent limits are implemented into discharge permits issued to wastewater treatment facilities around the state.

### **Chapters 7050, 7052, and 7053**

Minnesota's WQS designed to protect designated uses such as domestic consumption or aquatic life and recreation are found in Minnesota Rules in chapter 7050 for all waters outside of the Lake Superior Basin, and in chapter 7052 for waters in the Lake Superior Basin. The WQS in these chapters establish the conditions necessary to protect, maintain, and restore uses such as fishing and swimming around the state. Chapter 7053, State Waters Discharge Restrictions, includes



requirements for wastewater discharges that are based not on water quality considerations, but on treatment technologies that are feasible for wastewater discharges in Minnesota. For example, chapter 7053 establishes minimum secondary treatment requirements for the discharge of sewage from mechanical plants and stabilization ponds.

#### **Chapter 7050**

Chapter 7050 includes the designated use classifications, numeric and narrative water quality standards, antidegradation, methods for determination of site-specific criteria and other provisions related to ambient WQS. Variances granted under *Minn. R. 7050.0190* are expressly restricted to variances from "individual point source discharges to surface waters from any water-quality based effluent limit based on a water quality standard of this chapter that is included in a permit" from WQS and associated effluent limits that protect the designated uses of receiving waters. As proposed in these rules, the proposed term of a variance must only be as long as necessary to achieve the highest attainable condition.

#### **Chapter 7052**

Chapter 7052 contains provisions similar to chapter 7050 but they are specific to waters in the Lake Superior Basin. This rule, known as the Great Lakes Initiative (GLI), focuses on reducing the influx of persistent and bioaccumulative chemicals into the Great Lakes ecosystems from point sources. The chapter 7052 rules were adopted in the late 1990s under a federal mandate (section 118(c)(2) of the Clean Water Act). The water quality variance procedures in *Minn. R. 7052.0280* are based on USEPA's variance procedures for the Great Lakes System (40 CFR 132), and are specific to variance requests from WQS in the Lake Superior Basin. The state WQS rules for the Lake Superior Basin must contain provisions that are consistent with (i.e. as protective as) the requirements of 40 CFR 132. This includes variance term, which must not exceed five years or the term of the permit.

#### **Chapter 7053**

Chapter 7053 contains treatment requirements for discharges of sewage, industrial wastes and other wastes, effluent limits, and related provisions. Variances granted under *Minn. R. 7053.0195* are for variances from effluent limits that establish minimum performance requirements for specific sectors or facility types. Secondary treatment limits are a type of technology-based effluent limit and are found in chapter 7053. To be consistent with the chapter 7050 variance rules, for variances granted under chapter 7053, the proposed term of a variance must only be as long as necessary to achieve the highest attainable condition.

To summarize, chapter 7050 applies to variances related to WQS for all waters outside of the Lake Superior Basin. Chapter 7052 applies to variances related to WQS for those portions of the Lake Superior Basin within the boundaries of the State of Minnesota. Chapter 7053 applies to variances related to state discharge restrictions and minimum treatment requirements established under chapter 7053.

## **VI. Conclusion**

After diligent consideration of comments made on the proposed rule amendments, MPCA continues to assert that, as required by *Minn. Stat. §§ 14.131, 14.14, subd. 2, and 14.15, subd. 4, and Minn. R. 1400.2100*, the MPCA has shown the rule as proposed with the additional changes in Attachment 1 is needed and is reasonable as demonstrated by and affirmatively shown by facts presented by the MPCA on the hearing record.

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, 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).

**Assessment of Differences Between the proposed Rule Amendments and Federal Final WQS Rules**

This attachment contains an assessment of the differences between the MPCA’s proposed variance rules and the federal Final WQS Rule. Where the state rule differs from the federal rule, the need and reasonableness of the difference is discussed in the Statement of Need and Reasonableness for the proposed rule amendments and/or the MPCA’s Preliminary Response to Comments, Part III, section A, item 2.

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
1	Yes. The subpart 1 requirements align with federal rules which state a WQS variance may be adopted for a permittee.	<b>7050.0190, Subp. 1. Applicability</b> A variance under this part is a temporary change to a water quality standard for a specified pollutant reflects the highest attainable condition for permittee during the term of the variance. This applies to variance requests from individual point source dischargers to surface waters of the state for any water quality-based effluent limit based on a water quality standard in this chapter that is included in a permit. To be eligible, the permittee must demonstrate that it has met the conditions in subp.1. A-C.	<b>131.14(a)(1)</b> Establishes that a WQS variance may be adopted for a permittee or water body/water body segment, but only applies to the permittee or water body/water body segment specified in the WQS variance.  <b>and 131.14(b)(1)(i)</b> Variances must include identification of the pollutant or water quality parameter, and the water body/waterbody segment to which the WQS variance applies. Discharger specific WQS variances must also identify the permittee subject to the WQS variance.	Page 6	Part III.A, item 2
2	Yes. The subpart 1.A requirements align with federal rules. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.	<b>7050.0190, Subp. 1.A</b> The permittee must demonstrate that: the variance would not jeopardize the continued existence of an endangered or threatened species that will result in destruction or adverse modifications to the species critical habitat.	<b>131.14 does not express demonstration of compliance with the Endangered Species Act (ESA)</b> Section 7 of the ESA of 1973, as amended, requires federal agencies to ensure that any action they authorize, fund, or carry out will not be likely to jeopardize the continued existence of a listed species, or destroy or adversely modify designated critical habitat. This is applicable to any WQS and any WQS variance.	Page 16	Part III.A, item 2, and comments 15a and 15b

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
3	Yes. The subpart 1.B requirements align with federal rules. The intent of the state rule is the same as the federal rule though different terms are used.	<b>7050.0190, Subp. 1.B</b> The permittee must demonstrate that: standards will not be obtained by implementing technology-based effluent limits and by implementing cost-effective and reasonable best management practices for nonpoint sources under the permittees control as established under state authority.	<b>131.14(a)(4)</b> Establishes that a state may not adopt WQS variances if the designated use and criterion addressed by the WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Clean Water Act. (i.e. no variance is allowed if the limits can be met through technology based effluent limits.)  <b>and 131.14(b)(1)(ii)(A)(3)</b> ... and the adoption and implementation of Pollutant Minimization Plan. EPA defines PMP at 131.3(p) "Pollutant Minimization Plan" in the context of 131.14 is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings..." Pollutant control technologies represent a broad set of pollutant reduction options,...or best management practices for restoration and mitigation of the water body."	Pages 16-17	Part III.A, item 2
4	Yes. The subpart 1.C requirements align with federal rules. Subpart 1.C means you cannot remove an existing use. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.	<b>7050.0190, Subp. 1.C</b> The permittee must demonstrate that: The variance would not remove an existing use.	<b>131.14(b)(1)(ii) does not state "variance would not remove an existing use"</b>  <b>131.3(e)</b> USEPA defines existing use as "Existing uses are 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. (In other words, what is currently attained.)"	Page 17	Part III.A, item 2, and comment 17

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
			<p><b>and 131.14(b)(1)(ii)</b> A WQS variance must include the requirements that apply through the term of the variance. These requirements represent the highest attainable condition of the water body. The requirement <i>shall not result in a lowering of the currently attained ambient water quality</i>, unless the variance is necessary for restorative activities.</p> <p><b>and 131.10(g)</b> States may designate a use, or remove a use that is <i>not</i> an existing use, if the State conducts a use attainability analysis as specified in paragraph (j) of this section that demonstrates attaining the use is not feasible because of one of the six factors in this paragraph. If a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in 131.3(m).</p> <p><b>and 131.10(g)(6)(h)(1)</b> States may not remove designated uses if: (1) They are existing uses, as defined in §131.3, unless a use requiring more stringent criteria is added; or</p>		

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
5	No.	<b>7050.0190, Subp. 2. Listing</b> MPCA must notify EPA annually by Oct. 1 of variances granted and the need for the variance, the person that received the variance, the rule under which the variance is granted, water body affected, year approved by EPA, the date of expiration, and any restrictions that apply.	<b>131.14(b)(1)(i)</b> Variances must include identification of the pollutant, the water body to which it applies, and the permittee subject to it.  <b>and 131.14(b)(1)(v)</b> For a 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 variance and the results must be submitted to EPA within 30 days of completion.	Page 18	
6		<b>7050.0190, Subp. 3 (Repealed)</b>			
7	Yes. The subpart 4 requirements align with federal rules. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.	<b>7050.0190, Subp. 4. Conditions for approval</b> Before a variance can become effective, the variance must be submitted to and approved by the USEPA in accordance with section 303c of the CWA and 40 CFR 131.20 and 131.21. To be eligible for a preliminary determination by the agency to grant the variance, the permittee must demonstrate it has met the conditions in subp. 4. A-D	<b>131.14 does not contain USEPA authority for approval of WQS variances</b>  <b>Section 303(c)(2) Clean Water Act</b> 303(c)(2) is implemented through federal regulations contained in 40 CFR 131.  <b>and 131.21</b> Requires USEPA to review and approve or disapprove state-adopted WQS.	Page 18	Part III.A, item 2, and comment 20

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
8	<p>Yes. The subpart 4A requirements align with federal rules. The intent of the state rule is the same as the federal rule though different terms are used.</p> <p><i>(Note – MPCA rule change proposed. At subpart 4.A(5) as suggested by USEPA, a change is proposed to the proposed rule amendments to align with the federal rule at 131.10(g)(5). Aquatic life protection uses added.)</i></p>	<p><b>7050.0190, Subp. 4.A</b> The permittee must: Demonstrate to the agency that attaining the water quality standard is not feasible because: [full language listing taken from 40 CFR Part 132 (GLI Guidance, Appendix F, Procedure 2) and 131.10(g)]</p>	<p><b>131.14(b)(2)(i)(A)(1) &amp; (2)</b> Supporting documentation demonstrating the need for a variance. For 101(a)(2) uses - Demonstrate that attaining the designated use or criterion is not feasible because of one of the factors listed in 131.10(g).</p> <p><b>and 131.14(b)(2)(i)(B)</b> For a WQS variance to a non-101(a)(2) use, the state must submit documentation justifying how its consideration of the use and value of the water for those listed in 131.10(a) appropriately supports the variance and term. A demonstration consistent with (b)(2)(i)(A) of this section may be used to justify this requirement.</p>		Comment 6
9	<p>Yes. The subpart 4.B requirements align with federal rules. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.</p>	<p><b>7050.0190, Subp. 4.B</b> The permittee must: show that the variance conforms to part 7050.0180 and 7050.0185 (the state anti-degradation rules).</p>	<p><b>131.14 does not express demonstration of compliance with federal antidegradation rules</b></p> <p><b>131.12</b> Antidegradation policy and implementation methods. The federal antidegradation regulations require states to adopt antidegradation policy and identify implementation procedures that maintain and protect existing uses, prevent unnecessary degradation of existing high water quality, and maintain and protect the quality of waters identified for their outstanding value.</p>	Page 25	Part III.A, item 2, and comment 19

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
10	Yes. The subpart 4.C requirements align with federal rules. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.	<b>7050.0190, Subp. 4.C</b> The permittee must: 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;	<b>131.14 does not express demonstration of compliance with federal rules for protection of public health and welfare.</b>  <b>Section 303(c)(2)(a) Clean Water Act</b> Standards shall be such as to protect the public health and welfare.	Pages 19-20	Part III.A, item 2, and comment 20
11	No.	<b>7050.0190, Subp. 4.D</b> Show sufficient information to allow the agency to determine the water quality currently attained and the interim numeric effluent conditions that reflect the highest attainable conditions for the permittee during the term of the variance.	<b>131.14(b)(2)(ii)</b> Documentation demonstrating that the term of the variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the variance by describing the control activities to achieve that highest attainable condition, including those activities identified through the Pollutant Minimization Plan, which served as milestones of the variance.	20	
12	Yes. The subpart 5 requirements align with federal rules. The intent of the state rule is the same as the federal rule.	<b>7050.0190, Subp. 5. Submittal and notice requirements</b> Variance application submittal, public notice of the agency's preliminary determination to grant the variance, and notice requirements must conform to part 7000.7000.	<b>131.14 does not expressly state the public notice and public participation requirements.</b>  <b>131.14(b)</b> <i>Requirements for Submission to EPA.</i> MPCA must comply with 131.14(b) and can do so in accordance with part 7050.0190, subpart 5, and 131.20(b).	Page 20	Part III.A, item 2, and comment 21



	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
			<b>and 131.20(b)</b> <i>Public participation.</i> The State shall hold one or more public hearings for the purpose of reviewing water quality standards as well as when revising water quality standards, in accordance with provisions of State law and EPA's public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.		
13	No.	<b>7050.0190, Subp. 6. Agency final decision; variance requirements</b> The agency must make a final decision regarding the variance request that conforms to the procedural requirements of part 7000.7000. If the Agency grants the variance and the variance is approved by EPA, the permit issued by the agency must include and incorporate the following variance terms and conditions in subp. 6.A-D	<b>131.14(c) Implementing WQS variances in NPDES permits</b> A WQS variance serves as the applicable water quality standard for implementing NPDES permitting requirements pursuant to 122.44(d) of this chapter for the term of the WQS variance. Any limitations and requirements necessary to implement the WQS variance shall be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance.	Page 20	
14	No.	<b>7050.0190, Subp 6.A</b> The permit issued by the Agency must include: an effluent limitation representing currently achievable treatment conditions based on discharge monitoring or projected effluent quality that is no less stringent than that achieved under the previous permit.	<b>131.14(b)(1)(ii)(A) (1)-(3)</b> The state must specify the highest attainable condition as a quantifiable expression, either 1) highest attainable interim criterion, or 2) Interim effluent condition that reflects the greatest pollution reduction achievable, or 3) If no feasible pollutant control technology can be identified, an interim criterion or	Pages 20-21	

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
			interim effluent condition that reflects the greatest pollution reduction achievable with pollutant control technology installed at the time the variance was adopted and implementation of a Pollutant Minimization Program.		
15	No.	<b>7050.0190, Subp. 6.B</b> The permit issued by the Agency must include: a schedule of compliance activities to improve water quality and move toward attainment of the underlying water quality standard.	<b>131.14(c)</b> Implementing WQS Variances in NPDES permits. The variance serves as the applicable WQS for implementing permit requirements pursuant to 122.44 (d) for the term of the variance. Any limitations and requirements necessary to implement the variance shall be included as enforceable conditions of the permit.	Page 21	
16	No.	<b>7050.0190, Subp. 6.C</b> The permit issued by the Agency must include: an effluent limit sufficient to meet the underlying water quality standard, upon expiration of variance, the duration of the variance is shorter than the duration of the permit	<b>131.14(c)</b> , see text above	Page 21	
17	No.	<b>7050.0190, Subp. 6.D A</b> The permit issued by the Agency must include: a provision allowing the agency to reopen and modify the permit based on the agency triennial water quality standards revisions applicable to the variance.	<b>131.14(c)</b> , see text above	Page 21	

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
18	No.	<b>7050.0190, Subp. 7. Renewal</b> To be eligible for renewal of the variance, the permittee is subject to the requirements of subparts 1 to 6	<b>131.14(b)(iv)</b> The term of the WQS variance, expressed as an interval of time from the date of EPA approval or a specific date. The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition and consistent with the demonstration provided in paragraph (b)(2) of this section. The State may adopt a subsequent WQS variance consistent with this section.	Pages 21-22	
19	Yes. <i>(Note – MPCA rule change proposed. At subpart 8 a change is proposed to the proposed rule amendments to align with the federal rule at 131.14(b)(iv) and (v). Change variance term to only as long as necessary and reevaluate every 5 years in accordance with 40 CFR 131.14(b)(1)(v) and (vi).)</i>	<b>7050.0190, Subp.8. Term and expiration</b> The terms and conditions of the water quality standard variance are included and incorporated in a permit issued by the agency. The term of the variance must be as short as possible but must expire no later than ten years after the USEPA approval date of the variance.	<b>131.14 does not state that the variance must expire no later than 10 years.</b> <b>131.14(b)(1)(v)</b> 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 reevaluation 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.  <b>and 131.14(b)(1)(vi)</b> 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.		Part III.A, item 3, and comments 26a and 26b

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
20	Yes. The subpart 9 requirements align with federal rules. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.	<b>7050.0190, Subp. 9.A. Public notice and review</b> Every three years, the agency shall provide public notice of a list of the variances currently in effect at the time of the public notice, consistent with the triennial review of water quality standards required by 40 CFR 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.	<b>131.14 does not expressly state that WQS variances shall be reviewed every three years.</b> <b>131.20(a)</b> <i>State review.</i> The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§131.10 through 131.15 and federally promulgated water quality standards and, as appropriate, modifying and adopting standards. The State shall also re-examine any waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly.	Page 22	Part III.A, item 2
21	Yes. The subpart 9.b requirements align with federal rules. The state must comply with the Clean Water Act and federal rules whether or not they are cited specifically in the federal variance rules.	<b>7050.0190, Subp. 9.B</b> If the permittee requests a renewal in accordance with subpart 7, the agency shall consider information submitted under item A in its review for renewal of the variance. Variances from discharge effluent limits and treatment requirements are granted by the agency under 7000.7000 and 7053.0195.	<b>131.14 does not expressly state that the state shall consider new information submitted by the public when reviewing a variance.</b> <b>131.14(b)(1)(v)</b> 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.	Page 22	Part III.A, item 2

	State Rule Different than Federal Rule?	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7050	Federal Final Rules for WQS Variances 40 CFR 131.14 (80 FR 51019) 8/21/2015	Where Addressed in SONAR	Where Addressed in Response to Comments
			<p><b>and 131.14(b)(1)(vi)</b> 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.</p> <p><b>and 131.20(a)</b>, see text above</p>		

	State Rule Different than Federal Rule	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7052	Final Water Quality Guidance for the Great Lakes System 40 CFR 132 (60 FR 15366) 3/23/1995	Where Addressed in SONAR	Where Addressed in Response to Comments
22	No. Requirements of chapter 7052 align with federal rules.	Part 7052.0280	Part 132 – Water Quality Guidance for the Great Lakes System	Page 9, and pages 23-27	
	State Rule Different than Federal Rule	MPCA Proposed Variance Rules Chapters 7050, 7052, 7053 (11/9/2015)  Chapter 7053	Minnesota Rules Chapter 7053 Adopted Permanent Rules Relating to Water Quality (32 SR 1699)	Where Addressed in SONAR	Where Addressed in Response to Comments
23	No. The requirements of chapter 7053 are state rules. No federal rule exists for variances from discharge effluent limits or treatment requirements. The MPCA does rely on USEPA Effluent Limit Guidelines to include technology-based effluent limits in permits.  <i>(Note –MPCA rule change proposed. At subpart 4 a change is proposed to the proposed rule amendments to clarify USEPA approval does not apply to variances under chapter 7053.)</i>	Part 7053.0195	USEPA Effluent Limit Guidelines and Standards are national wastewater discharge standards that are developed by USEPA on an industry-by-industry basis. These are technology-based regulations, and are intended to represent the greatest pollutant reductions that are economically achievable for an industry. The standards for direct dischargers are incorporated into NPDES permits issued by States and USEPA regional offices, and permits or other control mechanisms for indirect dischargers. <i>(It should be noted that there are state discharge restrictions, or minimum treatment requirements, contained in chapter 7053 that are not mentioned in USEPA's list of effluent limit guidelines which are often used to denote technology-based effluent limits.)</i>	Page 10, and pages 21-31	Part III.A, item 9

**Amended Rules for Water Quality Variance Procedures**

**February 4, 2016, Rule Hearing**

**Slide 1 – cover slide**

Hello, my name is Elise Doucette (spell name). I'm a policy analyst and have been working on these rules since 2012. It is important to note here that the proposed rules amend the procedural rules for water quality variances. These rules establish the procedures that must be followed for a Permittee to request a variance. The proposed rules do not include any specific water quality variances, they merely establish a process by which individual permit holders can apply for a variance from a discharge limit based on a water quality standard.

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**Slide 2 – list of questions, overview**

Our presentation today will give an overview of answers to the following questions, such as, what is a water quality variance? Why is MPCA is amending the water quality variance procedures? Who is affected by these rules? And how were these rules developed?

What we hope to convey at this hearing are the steps the MPCA took to bring these rule amendments forward, interactions with regulated parties, stakeholders and EPA, comments we received on the proposed rules during the comment period, and rule changes we are proposing based on those comments.

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**Slide 3 - definition**

A variance is a temporary or time-limited change to a water quality standard for a specific pollutant. The key term here is "temporary". The intent is for the discharger to work towards attainment of the effluent limit based on the water quality standard.

Variances are an existing tool that can be implemented in state and federal National Pollutant Discharge Elimination System/State Disposal System Permits, also known as NPDES/SDS permits. Permittees may apply for a variance if meeting the water quality-based effluent limit would cause substantial and widespread economic and social impacts. Variances provide

dischargers time to determine what, if any, treatment technologies are viable for their facility and time to procure the financial resources needed to meet the final WQBEL. The permit is the implementation tool for a variance and may include specific schedules and compliance activities to ensure that the discharger is making progress toward ultimately meeting the limit based on the water quality standard. Because water quality standard variances issued to a specific discharger represent a temporary modification to a water quality standard, EPA must approve water quality standard variances.

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#### **Slide 4 – why amend?**

The existing procedural rules for variances reside in three chapters of Minn. Rules, chapters 7050, 7052, and 7053. The chapter 7052 variance rules were updated in 1998 to comply with the Great Lakes initiative (GLI). The chapter 7050 and 7053 variance rules have not been changed since their adoption in 1964.

The variance procedures in the three rule chapters are inconsistent.

There are also differences between the existing state variance procedures and the prior federal procedures. These differences have historically made review and approval of variances difficult. Currently, dischargers and MPCA have to meet different requirements under state and federal rules. This led to inefficiencies and loss of time, which in turn, led to loss of money on the behalf of the permittees. For example, a separate engineering report may be required for EPA that was not required by MPCA. Or questions that needed answering by EPA were not asked early in the process, again leading to a loss of time.

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#### **Slide 5 – timeline of MPCA and EPA rules**

As indicated on the slide, EPA first requested comments on federal variance procedures and other federal water quality standard regulations in July 1998. EPA again requested comments in July 2010. At neither time did EPA provide draft language.

MPCA began its evaluation of state variance procedural rules in 2012. As part of that work, MPCA conducted a process improvement project in an attempt to address the delays and inefficiencies I mentioned in the previous slide. The MPCA and stakeholders concluded that



state variance procedural rules needed to be amended to be more consistent with federal requirements. The resulting state rulemaking began in October 2012 with the initial Request for Comments.

In September 2013, EPA made their proposed variance procedures available. The MPCA modelled our draft variance rule language on the proposed federal variance procedures.

As noted on the slide and highlighted in yellow, MPCA spoke with EPA after their draft rule language was proposed with the intent of understanding if the proposed state rule amendments aligned with proposed federal rules. During those conversations, MPCA and EPA came the conclusions that the state and federal proposed rules were consistent and that MPCA should continue the rulemaking process.

MPCA received executive approval in June 2015 to publish the proposed amendments to the state variance rule procedures. Despite continued regular conversations with EPA Region 5, we were not aware until a late July 2015 conversation that EPA's variance rules were to be final in August. Between August and November, we continued discussions with EPA Region 5 as is noted on this slide. Both agencies compared proposed state and final federal variance rules. We mutually determined the rules were similar enough for the state to move ahead.

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#### **Slide 6 – who is affected? Who can receive?**

The terms of the variance and other details are controlled by the NPDES/SDS permit. Therefore, dischargers of wastewater, whether domestic or industrial, are the entities that may be affected by this change. As stated earlier, a discharger that is struggling to comply with a limit based on a water quality standard needs flexibility. In these instances the MPCA works with dischargers to understand their economic and treatment technology challenges. Ultimately the state may make a preliminary determination to grant a variance. EPA is responsible for final approval.

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#### **Slide 7 – How were the rules developed?**

As stated previously, this rulemaking process began after MPCA and stakeholders concluded that state variance procedural rules needed to be amended to be more consistent with federal

requirements, and to make clear what MPCA would address when considering a variance. The MPCA has engaged the public and worked with EPA during this rulemaking.

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### **Slide 8 – What is the cost?**

As you've heard, variances are a permit implementation tool that currently exists. There is a fee associated with applying for a variance. This fee is not under MPCA authority, and is not addressed in this rulemaking. The proposed rule does not add any additional cost to regulated parties. If a permittee finds that controls to meet a water quality-based effluent limit are so burdensome as to result in substantial and widespread negative economic and social impacts, the permittee may apply for a variance. At that point the permittee would pay an application fee to the MPCA.

As part of the state and federal evaluation of a variance application, the financial burden to install treatment technology and meet discharge limits are considered.

Just to be clear, we are not changing the variance application fee. The economic burden to permittees is and will continued to be considered as part of individual variance application.

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### **Slide 9 – What is in the proposed rules?**

Previously, the variance procedures in chapters 7050 and 7053 did not include the criteria under which the EPA would approve a variance. The proposed rules do include those criteria and are now organized in a similar way to chapter 7052.

First, Applicability – which establishes what the discharger may do to demonstrate that they are eligible for a variance. Conditions for approval – this includes the criteria that must be met before a variance can be allowed. Next – what is required to be submitted. Final decision – this includes conditions that would be included in a permit to ensure progress toward the final limit, such as compliance activities and interim limits. Renewal requirements – should a permittee need a renewal of the variance. The term, or length, of the variance. And finally – the public notice that MPCA must conduct to receive any new information about a variance.

## **Slide 10 – What comments were received?**

This slide summarizes general comments that were received during the public notice comment period for the proposed rule amendments. They include comments about the differences between new federal variance rules and the state's proposed rules. They also include comments about the term of the variance, as well as the approval process for variances from Class 2 water quality standards designed to protect fishing and swimming. Definitions were requested for "highest attainable condition", and the use of the term "water quality standard" as opposed to the word "use".

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## **Slide 11 – Response to Comments**

MPCA's response to the comments will be available for review, and the public will have post-hearing opportunity to comment on the MPCA's response including our assessment of differences between state and federal rules and changes proposed.

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## **Slide 12 – Will the proposed rules be changed?**

The MPCA is proposing changes in response to comments submitted. The proposed changes are posted on the Water Quality Variance rule webpage and copies are available at this meeting. The proposed changes are summarized on the next slide.

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## **Slide 13 – Proposed rule changes**

The MPCA will change the term of a variance, to be consistent with the final federal variance rules. The proposed state rules include a variance term of as short as possible but no longer than 10 years. This is consistent with the draft variance procedures proposed by EPA in September 2013. All commenters made reference to the term of a variance in their comment letters. For that reason, MPCA proposes to change the term of the variance to only as long as needed to achieve the highest attainable condition. The MPCA also proposes to change the rules to specify that variances lasting longer than five year will be reevaluated every five years.

The MPCA will add aquatic life protection uses as suggested by EPA to the 5<sup>th</sup> of the 6 criteria in chapter 7050. In their comment letter EPA indicated that it would be difficult for them to approve a variance using that criteria for a water quality standard designed to protect something other than aquatic life. The criteria in question relates to impacts to aquatic life from the physical conditions of a water body such as flow and depth. The MPCA proposes this change to be clear and consistent with EPA.

Finally, EPA has indicated multiple times that variances to discharge restrictions under chapter 7053 do not need EPA approval. Therefore, the MPCA proposes to change the rule language in chapter 7053 to make this clear.

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#### **Slide 14 – What happens after the hearing?**

The public has the opportunity to submit oral and written comments today and during the post-hearing comment period. The post-hearing administrative process is summarized on the slide. Judge Case, this ends our presentation on the Amended Rules for Water Quality Variance Procedures.