



Minnesota Pollution Control Agency

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March 2, 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: Final 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, the Minnesota Pollution Control Agency's (MPCA) Final Response to Comments (Final Response) for the proposed rule amendments referenced above. The Final Response, prepared for the five working-day rebuttal comment period that ends on March 2, 2016, addresses the comments received during the post-hearing comment period that ended on February 24, 2016. The Final Response is in addition to the MPCA's Preliminary Response to Comments (Response) submitted to you on February 19, 2016 and the revised Response submitted on February 24, 2016.

If you have any questions regarding the enclosed Final Response or the content of the proposed rule amendments, please contact Elise Doucette at 651-757-2316 or 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.

Sincerely,

A handwritten signature in blue ink, reading "Mary H. Lynn", is positioned below the word "Sincerely,".

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

MHL:jl

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 Final
Response to Public Comments
(Rebuttal)

March 2, 2016

MPCA Final Response to Comments Submitted During the Post-Hearing Rebuttal Comment Period.

I. Introduction

The Minnesota Pollution Control Agency (MPCA) public noticed 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 MPCA published a Notice of Hearing on the proposed rules in the *State Register* on December 28, 2015 (40 SR 714). The public hearing on the proposed rules was held on February 4, 2016, as described in the November 9, 2015, Dual Notice.

The MPCA presented information to demonstrate that the proposed rule 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 on February 4, 2016, held at the MPCA St. Paul office and simultaneously at the MPCA Duluth office via interactive videoconferencing, and in its Preliminary Response to Comments (Response) submitted to Administrative Law Judge Barbara J. Case on February 19, 2016 and in its revised Response submitted on February 24, 2016.

This document contains the MPCA's Final Response to Comments (Final Response) and responds to comments received during the post-hearing comment period that ended on February 24, 2016. Where the comments received are repetitive with those previously addressed by the MPCA in its Response, the reader is referred to the appropriate section of the Response. Some comments are summarized and not presented verbatim.

II. Comments Received by the Office of Administrative Hearings from Interested Parties During the Post-Hearing Comment Period and MPCA's Response

The following interested parties submitted comments during the post-hearing comment period.

1. Letter dated February 12, 2016, from Paula Maccabee, WaterLegacy;
2. Letter dated February 19, 2016, from Kris Sigford, Betsy Lawton, and Albert Ettinger, Minnesota Center for Environmental Advocacy;
3. Letter dated February 23, 2016, from Margaret Watkins, Grand Portage Band and Nancy Schuldt, Fond du Lac Band;
4. Letter dated February 23, 2016, from Bradley Sagen;
5. Letter dated February 24, 2016, from Louis H. Knieper, Southern Minnesota Beet Sugar Cooperative; and
6. Letter dated February 24, 2016, from Aaron Klemz, Friends of the Boundary Waters Wilderness and submitted on behalf of the following groups who are members of the Minnesota Environmental Partnership: Friends of the Boundary Waters Wilderness, Friends of the Cloquet Valley State Forest, Northeastern Minnesotans for Wilderness, Protect Our Manoomin, Save Our Sky Blue Waters, Sierra Club North Star Chapter, Voyageurs National

III. Response to Comments

This section provides responses to the general issues and specific comments raised by individual commenters. The MPCA has reviewed the comments and have prepared the following responses.

1. Paula Maccabee, WaterLegacy

Comment 1a: Federal law and Minnesota statutes and rules preclude any aspect of the proposed variance rules from being less stringent than federal statutes or regulations. This first comment lists specific state and federal laws that require conformity. WaterLegacy states that state rules need to be consistent with federal regulations but not necessarily symmetrical noting that state regulations could be more restrictive. To make this point, several state and federal rules are cited including the Minnesota's Administrative Procedures Act (*Minn. R.* 1400.2100, item D), Minn. Stat. §115.03, subd. 5, 40 CFR 131.4(a), and the federal Clean Water Act (33 U.S.C. §1370)

A similar discussion is provided specific to the Lake Superior Basin, in which it is noted that Minnesota Rules in the Great Lakes may be more but not less stringent than federal regulations (40 CFR §131.4(a), 40 CFR §132.4(i)).

Response: The MPCA agrees that state rules may not explicitly allow for conditions to be less restrictive, but may call for more restrictive measures. However, state and federal rules do not need to be identical. The Response, Part III, section A, item 2 provides an extended discussion of differences between federal final WQS Rules and revised state proposed rules. Where differences are cited, in both syntax and content, explanations are provided. A tabular form of this discussion is provided in Attachment 2 of the Response. (See also Response, Part IV, comments 4b and 5f.)

Comment 1b: The MPCA's proposed variance rules for chapters 7050 and 7052 contain provisions that are less stringent than federal rules and must be revised or the proposed rules must be disapproved (see below comments 1c - 1i).

Response: Comment noted. The proposed rules may not be and are not less restrictive than federal regulations.

Comment 1c: The MPCA's proposed rules for the duration of variances fail to comply with federal requirements effectively limiting variances to five years and may result in indefinite failure to review variances. The comment suggests that the revision to require a reevaluation of the variance review after five years is a positive step towards consistency with the federal final rule and offers that. Language similar to 40 CFR 131.14(b)(1)(iv-v) should be used to be more "self-implementing" and to reinforce MPCA's submittal requirements for maintenance of variances. To this end, WaterLegacy proposes specific rule language edits and additions statewide and in the Lake Superior Basin.

Response: The MPCA proposes to revise the rule to be consistent with the federal rule to reevaluate the variance every five years, regardless of variance term. The proposed revision also provides a "self-implementing" mechanism for variance expiration within a specified time frame. The proposed revision conforms with variance review requirements in 40 CFR 131.14(b)(v). (See also Response, Part III, section A, item 3 and Part III, section B, comment 26.)

Comment 1d: The comment expresses the importance of the highest attainable use and asserts that MPCA's proposed variance rules fail to adequately specify requirements for highest attainable use and fail to comply with federal requirements to avoid backsliding on

permits. WaterLegacy is concerned that the proposed rules do not require that the MPCA final decision on variances specify highest attainable use as part of variance terms and do not require a quantified expression of highest attainable conditions. The comment suggests changes to the rule to quantify or define highest attainable use.

Response: No rule change is proposed. The proposed variance language requires variances to reflect the highest attainable condition. The MPCA believes that the proposed rule provides for a case specific determination and quantified expression of the highest attainable condition in permits. The MPCA anticipates using numeric interim effluent limits as the primary method of defining highest attainable condition. However, given the breadth of situations covered in the more than 1000 National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) wastewater permits statewide, situations may arise that would appropriately be managed through a non-numeric highest attainable condition and be included in a permit, for example “maintenance of the aquatic habitat to support a normal fishery and lower aquatic biota”. The MPCA believes that the proposed rule is also flexible enough to allow for alternate expressions of the highest attainable condition in permits where numeric interim limits may not be appropriate. (See Response, Part III, section B, comment 18a.)

Comment 1e: The MPCA’s proposed variance rules fail to comply with Clean Water Act requirements that permits must comply with water quality standards (WQS). WaterLegacy states that the failure to require attainment of underlying WQS in final permit conditions would effectively serve to remove a designated use of a water body or segment of a water body. The comment suggests alternate rule language.

Response: No rule change is proposed. The MPCA disagrees. Existing federal rules (40 CFR 122.44 (d)) require that water quality based effluent limits (WQBELs) be included in permits when the discharge is found to have the reasonable potential to cause or contribute to an excursion of a state WQS. Inclusion of the WQBEL in the permit provides a linkage to protection of the WQS. So long as WQBELs are included in permits, where necessary, the permit will not remove a designated use of a segment or waterbody or function as a use attainability analysis.

Permits with variances from WQS (*Minn. R. 7050.0190* and *Minn. R. 7052.0280*) will contain final WQBEL, designed to meet underlying WQS that will become effective upon expiration of the term of the variance thereby achieving precisely the desired result of the commenter.

In instances when the MPCA determines that term of the variance should be shorter than the permit term the permit would include final WQBEL that would become effective at a specified date prior to permit expiration. (See Response, Part III, section A, comment 6, Part III, section B, comment 17a, and Part V.)

Comment 1f: The MPCA’s proposed variance rules fail to provide the public participation and public hearing process expressly required by federal law. The comment suggests alternate rule language to make submittal and notice requirements more similar to federal WQS rulemaking requirements. The comment suggests removal of the requirement for consistency with *Minn. R. 7000.7000*, the existing administrative rules for variances. The comment also proposes analogous rule language modifications for the Lake Superior Basin.

Response: No rule change is proposed. The MPCA’s proposed rules align with federal rules. It is not necessary for every federal requirement a state is bound to follow to be mirrored or duplicated in state rule. If we fail to meet our obligation, we will be accountable to the United States Environmental Protection Agency (USEPA) and interested parties. USEPA cannot approve variances that do not meet the requirements for public participation including a hearing. (See also Response, Part IV, comment 4e.)

Comment 1g: The MPCA's proposed rules do not comply with federal regulations precluding variances for new or recommencing Great Lakes dischargers.

Response: No rule change is proposed. The proposed state variance rules do not change the prohibition on variances to new dischargers in the Lake Superior Basin already in existing *Minn. R. 7052.0280*.

Comment 1h: The MPCA's proposed variance rules do not appropriately reflect Great Lakes antidegradation requirements.

Response: No rule change is proposed. See Response, Part III, section B, comments 27 and 30a.

Comment 1i: The MPCA's proposed Lake Superior variance rules do not provide the notice to Great Lakes tribes and states required by federal regulations.

Response: No rule change is proposed. It is not necessary for every federal requirement a state is bound to follow to be mirrored or duplicated in state rule. The state must comply with the Clean Water Act and USEPA's variance procedures for the Great Lakes System (40 CFR 132).

Comment 1j: Sections of MPCA proposed chapter 7050 rules that meet federal requirements provide consistency between variance chapters and serve other state and federal policies are reasonable and desirable.

Response: Comment noted.

Comment 1k: WaterLegacy supports: MPCA's proposed rule amendments regarding protection of human health, compliance with federal endangered species laws, prohibiting variances that remove an existing use, and use of the term "water quality standards" in describing conditions that must be met to allow granting of a variance.

Response: Comment noted.

Comment 1l: Proposed variance rules for both chapter 7050 and 7052 should reference federal definitions to ensure consistency and clarity in application.

Response: The MPCA agrees that for terms not expressly defined in chapters 7050 and 7052 and where there is a federal definition, the federal definition will apply as provided in existing *Minn. R. 7050.0030*, subpart 7 and, existing *Minn. R. 7052.0010*, subpart 1. Therefore no rule change is proposed.

2. Kris Sigford, Betsy Lawton, and Albert Ettinger, Minnesota Center for Environmental Advocacy

Comment 2a: The purpose and effect of the proposed changes to *Minn. R. 7053.0195* remain unclear, and the language is potentially misleading. It is still unclear what MPCA is attempting to do through changes to *Minn. R. 7053.0195*. Minnesota Center for Environmental Advocacy (MCEA) states that MPCA seems to require less as to WQBELs than is required by federal law and to inadequately set forth how to obtain a variance from a technology-based effluent limit and yet remains unclear on whether USEPA approval is required. It appears that current language proposed would allow variances from WQS so as to affect WQBELs. This chapter should be revised to clarify that it is only applicable for seeking relief from WQBELs if an appropriate variance had previously been approved by MPCA and USEPA under *Minn. R. 7050.0195* or *Minn. R. 7052.0280*. This chapter should be rewritten to make clear that it never applies to allow a variance from WQBEL requirements and that discharger seeking a variance from WQS that would allow a less stringent WQBEL must proceed under chapters 7050 or 7052. Changes to chapter 7053 should not go forward without substantial clarification.

Response: See Response, Part III, section A, item 9 which addresses MCEA's pre-hearing comments on chapter 7053, and Part IV, section B, comment 5a where MPCA clarified that all variances to state WQS must be reviewed and approved by USEPA. Proposed variance provisions in chapter 7053 are expressly limited to variances from state discharge restrictions and minimum treatment requirements that are explicitly included in this chapter. The MPCA acknowledges that variances from WQS must proceed under chapter 7050 or 7052. (See also Response, Part V, comment 6 which explains the differences in the three state rule chapters being amended.)

Comment 2b: State rules need not allow variances under all instances that federal law might allow them. MCEA disagrees with suggestions from other commenters that variances are too strict because they include provisions to non-101(a)(2) uses. MCEA states that variances that affect uses other than Clean Water Act, section 101(a)(2) uses should be approved by USEPA under 40 CFR 131.13, and specifically identifies drinking water as a use that must be protected.

Response: Comment noted. The MPCA is not distinguishing the process that must be followed for variances from 101(a)(2) uses and non-101(a)(1) uses. The procedures to grant variances from 101(a)(2) uses and non-101(a)(1) uses will be the same. (See also Response, Part III, section A, item 6b.)

Comment 2c: Wild rice cultivation is both a Clean Water Act section 101(a)(2) use and an agricultural use.

Response: Comment noted. The MPCA is not distinguishing the process that must be followed for variances from 101(a)(2) uses and non-101(a)(1) uses. The procedures to grant variances from 101(a)(2) uses and non-101(a)(1) uses will be the same. (See also Response, Part III, section A, item 6.)

Comment 2d: The variance period for variances outside the Great Lakes Basin should be limited to 10 years; MCEA continues to believe no Minnesota variances should last longer than 10 years. Accordingly, the new amendments proposed at the hearing should not be adopted. Ten years should be long enough for implementation of plans to restore water quality in all but the rarest cases.

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. The MPCA will reevaluate the variance every five years if requested by the permittee. (See also Response, Part III, section A, item 3.)

Comment 2e: The provision requiring reevaluation after five years contained in 40 CFR 131.14(b)(vi) should be set forth in the rules.

Response: The MPCA proposes to revise the rule to be consistent with the federal final WQS Rule for variances to reevaluate the variance every five years, regardless of variance term. (See also Response, Part III, section A, item 3 and Part III, section B, comment 26.)

3. Margaret Watkins, Grand Portage Band and Nancy Schuldt, Fond du Lac Band

Comment 3a: The commenters are concerned that the MPCA is proposing variance rule amendments that may not be as stringent as federal regulations, as required by law, and may not be consistent with Minnesota policies for protecting clean water. The commenters note instances where the proposed new variance rules do not seem to meet the requirements of federal statutes and regulations, specifically the need to be at least as stringent as the federal rules. Although the Minnesota rules in place to protect water quality across the state and within the Lake Superior Basin may not be *less* stringent than federal law, they may be *more* protective than federal law and may include additional state concerns. States and authorized

tribes may develop WQS more stringent than required by regulations under the Clean Water Act, 40 CFR 131.4(a), and both Bands have exercised that discretion in favor of protecting critical subsistence and cultural resources. The commenters state there are specific components of the proposed MPCA variance rules where it appears that some federally required provisions are lacking (see comments 3b - 3n below).

Response: Comment noted. The proposed rule amendments are consistent with the federal final WQS Rules for variances at 40 CFR 131.14, and other applicable federal rules. It is not necessary for every federal requirement a state is bound to follow to be mirrored or duplicated in state rule.

Comment 3b: The term of a variance must be no longer than necessary to achieve the highest attainable condition.

Response: Comment noted. 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. 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. (See also Response, Part III, section A, item 3.)

Comment 3c: Interim limits must be reevaluated at least once every five years if a variance exceeds one five year term.

Response: See response to comment 3b above.

Comment 3d: Rules must include a provision that the WQS variance will no longer be applicable if the reevaluation is not conducted or the results not submitted to USEPA within 30 days.

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 the applicability of a variance if reevaluation of the variance is not conducted by the state and submitted to USEPA. (See also Response, Part III, section A, item 3 and Part III, section B, comment 26a.)

Comment 3e: Variances include the highest attainable condition expressed as interim permit limits until WQS criterion is met.

Response: No rule change is proposed. The proposed variance language requires variances to reflect the highest attainable condition. The MPCA believes that the proposed rule provides for a case specific determination and quantified expression of the highest attainable condition in permits. The MPCA anticipates using numeric interim effluent limits as the primary method of defining highest attainable condition. However, given the breadth of situations covered in the more than 1000 NPDES/SDS wastewater permits statewide, situations may arise that would appropriately be managed through a non-numeric highest attainable condition and be included in a permit, for example "maintenance of the aquatic habitat to support a normal fishery and lower aquatic biota". The MPCA believes that the proposed rule is also flexible enough to allow for alternate expressions of the highest attainable condition in permits where numeric interim limits may not be appropriate. (See also Response, Part III, section B, comment 18a.)

Comment 3f: Variances must include legally binding provisions to ensure attainment of the principal WQS for which the variance was written. As provided for in 40 CFR 122.44, variances must include legally binding provisions to ensure attainment of the principal WQS for which

the variance was written. The requirement to 'ensure attainment of the principal WQS' does not appear to be included in either the chapter 7050 or 7052 revised variance provisions.

Response: Variances are implemented in state and federal NPDES/SDS permits. An NPDES/SDS permit is a legally binding document. 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 final limit to protect the underlying WQS.

Comment 3g: A 45-day public notice must be given before a public hearing is held. The submittal and notice requirements as specified in *Minn. R. 7000.7000* do not comply with 40 CFR 25.5(b) which requires at least 45 days for public comment prior to a public hearing.

Response: Consistent with 40 CFR 131.20(b), States and Tribes must hold a public hearing consistent with the requirements of 40 CFR 25 as part of each triennial standards review and prior to adopting any or revised WQS. 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. (See also Response, Part III, section A, comment 4b, and Part III, section B, comment 21.)

Comment 3h: Variances must contain a reopener clause allowing the MPCA to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable WQS.

Response: Variances are implemented through NPDES/SDS permits. Existing *Minn. R. 7001.0170* already provide the authority to reopen or modify permits. (See also Response, Part III, section B, comment 24.)

Comment 3i: Great Lakes WQS do not allow variances for new dischargers.

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*. (See also Response, Part III, section B, comment 27, and Part IV, comment 4f.)

Comment 3j: Currently attained water quality must not be lowered.

Response: Comment noted. States and permittees must comply with the federal final WQS Rules for variances at 40 CFR 131.14(b)(1)(ii) that require 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 shall not result in a lowering of the currently attained ambient water quality, unless the variance is necessary for restorative activities. (See also Response, Part III, section B, comment 17a.)

Comment 3k: *Minn. R. 7053.0195* must comply with the final WQS Rules for variances at 40 CFR 131.14. *Minn. R. 7053.0195*, subpart 3 has been repealed, but it must be reinstated to conform with federal NPDES requirements. MPCA has been delegated the authority to issue NPDES permits by the USEPA. In order to maintain that authority, MPCA rules must be at least as stringent as federal NPDES requirements. Therefore, MPCA must reinstate *Minn. R. 7053.0195*, subpart 3 which states "Variances from discharge effluent limits or treatment requirements granted by the agency under this part are subject to agency and public review at least every five years. Variances from water quality standards are granted by the agency under parts 7000.7000 and 7050.0190. Variances may be modified or suspended under the procedures in part 7000.7000."

Response: The MPCA proposes to repeal subpart 3 and move the subpart 3 requirements for review of a variance to a new subpart 9 and combine them with the requirements for public

notice. Part 7053.0195, subpart 9 requires the MPCA provide public notice of all variances in effect as required in part 7050.0190, subpart 9 (see SONAR pages 29 and 31).

The MPCA will revise the rule to be consistent with the federal final WQS Rules at 40 CFR 131.14 to reevaluate the variance every five years, regardless of variance term. (See also Response, Part III, section A, item 3.)

Comment 3l: *Minn. R. 7053.0195*, subpart 4, appears to attempt to evade USEPA variance approval by stating "[t]o be eligible for a preliminary determination by the agency to grant the variance, the permittee must meet the conditions specified in part 7050.0190, subpart 4 "except the requirement to submit the variance to the United States Environmental Protection Agency for approval does not apply to variances granted by the agency under tit is part." This must be changed to ensure that every NPDES variance request is sent to USEPA for approval as required by 40 CFR 131.5. Variances are, by definition, a change in a WQS and as such, require USEPA approval.

Response: The MPCA proposes to revise *Minn. R. 7053.0195*, subpart 4 (see Response, Part III, section B, comment 38). The MPCA may submit a variance granted under chapter 7053 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)".

Comment 3m: The MPCA should explicitly state in their variance rules that no variances shall be issued for non-conventional pollutants. The federal deadline for those types of variances expired in 1982, with the expectation that at this point in time, after decades of regulatory enforcement, technological advances, and general progress under the Clean Water Act, no discharger should have difficulties in achieving basic WQS.

Response: The commenters' reference to "non-conventional pollutants" and 1982 are not clear. However, the MPCA believes this reference relates to 40 CFR 125.3 (Technology Based Treatment Requirements in Permits); and more specifically, to best practicable control technology currently available. These are considered technology-based effluent limits, and not within the scope of this rulemaking. The MPCA's proposed rule amendments do not change the procedures and criteria that must be followed for technology-based effluent limits. This rulemaking relates to variances to water quality-based effluent limits, which are based on WQS (see 40 CFR 122.44 (d)).

Comment 3n: The Bands also urge MPCA to specifically link the proposed new variance rules with the concept of highest attainable use, and clearly relate the variance rules to their draft antidegradation rule amendments.

Response: The proposed rules at *Minn. R. 7050.0190*, subpart 4.B, *Minn. R. 7052.0280*, subpart 3.B, and *Minn. R. 7053.0195*, subpart 4 establish that the permittee must comply with the State's antidegradation rules. This requirement aligns with federal antidegradation rules at 40 CFR 131.12. 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. (See also Response, Part III, section A, item 2 (#9), and Part III, section B, comment 19a.)

Comment 3o: We respectfully request that these proposed rules be withdrawn and substantially revised to be consistent with federal regulations or that they be disapproved.

Response: The MPCA disagrees and will not be withdrawing the proposed rules. The MPCA is proposing revisions to the proposed rule amendments 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. (See also Response, Part V, comment 1.)

4. Bradley Sagen

Comment 4a: Mr. Sagen comments that MPCA has failed to meet its obligations to the Clean Water Act. USEPA should reject the proposed MPCA water quality variance amendments. The MPCA should withdraw the current draft amendments and rework them to meet federal USEPA requirements.

Response: The MPCA disagrees and will not be withdrawing the proposed rules. The MPCA is proposing revisions to the proposed rule amendments 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. (See also Response, Part V, comment 1.)

Comment 4b: Failure to address compatibility of Minnesota's proposed revisions with USEPA's variance regulations at 40 CFR 131.14, published August 21, 2015. Failure will deprive public of required opportunity to comment on proposed changes at draft amendment stage. USEPA acknowledges in its comments of December 28, 2015, "There are a number of requirements in these regulations that Minnesota was not able to include in its proposed rules because of when the new federal regulations were published." (However,) "Any variance submitted to USEPA by Minnesota must comply with the requirements of 40 CFR 131.14 to be approved." Mr. Sagen comments that there are several provisions in the new federal variance rules at 40 CFR 131.14 that the MPCA rules have yet to address, and that he supports the federal variance rules regarding documentation requirements for submission to USEPA, public participation requirements for WQS rulemaking, and the part 7050.0190 provisions at subpart 4, conditions for approval, subpart 7, renewal, and subpart 8, term and expiration.

Response: Comment noted. The MPCA understands that variances submitted to USEPA must comply with the requirements of 40 CFR 131.14. (See also Response, Part III, section A, item 4 and item 7.)

Comment 4c: Variances for New Great Lakes dischargers are prohibited by 40 CFR 132, Appendix F, Procedure 2. Mr. Sagen comments that he supports USEPA's recommendation that Minnesota revise the applicability requirements in *Minn. R. 7052.0280* to be consistent with the requirements of 40 CFR 132.

Response: Comment noted. See Response, Part III, section B, comment 30a.

Comment 4d: Failure to follow state law regarding content of SONAR. Mr. Sagen comments that the MPCA has failed to comply with state law because the SONAR does not contain "an assessment of any differences between the proposed rule and existing federal regulations and

a specific analysis of the need for and reasonableness of each difference.” Minn. Stat. §§ 14.131(7), 14.23.

Response: Comment noted. See Response, Part III, section A, item 2, and Part V, comment 2.

Comment 4e: Failure to provide for tribal consultation. Mr. Sagen states that “I can find no evidence of any action by MPCA (or USEPA) to initiate consultation with tribal interests. Consultation with tribes by USEPA is required and would be in the best interest of the state to pursue as well. “Consultation by EPA will only be provided on state actions in which EPA has an oversight role.” (USEPA Region 5 Implementation Procedures for USEPA Policy on Consultation and Coordination with Indian Tribes 7/26/2011, 2.1.2) MPCA should consult with relevant tribal interests immediately concerning the proposed amendments.

Response: The MPCA initiated communication with the Tribal representatives via e-mail on October 27, 2015, to let them know of the upcoming public notice for the proposed amendments to the water quality variance rules (see Attachment 1, e-mail from Katrina Kessler, MPCA, Manager, Water Assessment Section). When the MPCA published public notice of the proposed rules and the notice of hearing, notification was also sent via e-mail to the Tribes; specifically the air and water representatives of the 11 Tribes in Minnesota informing them of the public notices in the *State Register* (November 9, and December 28, 2016, respectively), and the availability of the public notices on the MPCAs public notice webpage. (See MPCA Hearing Record Exhibit, Exhibits H.1 and H.2, available on the MPCA Water Quality Variance Rule webpage at <https://www.pca.state.mn.us/water/amended-rules-water-quality-variances>. (See also Response, Part IV, comment 1c.)

5. Louis H. Knieper, Southern Minnesota Beet Sugar Cooperative

Comment 5a: The MPCA should withdraw these proposed rules, and revise them to bring them into alignment with final federal requirements, or if the state chooses to implement rules that go beyond federal requirements, then MPCA needs to comply with statute and revise and reissue (for public comment) the SONAR to assess, explain, and justify those differences. The MPCA's proposed state revisions are based on USEPA's 2013 draft rule and not on the 2015 final rules. The proposed state rules are not in good alignment with federal requirements.

Response: See Response, Part III, section A, item 2.

Comment 5b: With regard to the variance term, the MPCA proposed changes aligned the proposed rules with federal final WQS Rules - those changes are acceptable to Southern Minnesota Beet Sugar Cooperative.

Response: Comment noted.

Comment 5c: Proposed rules that are designed to incorporate the concepts within 40 CFR 131.10(g) must use the precise federal language and the word “use” must be used where it is used in the federal rules. The commenter stated the language needlessly causes confusion and the precise federal language must be employed. The MPCA's rationale is only that it aligns chapter 7050 with chapter 7052. However consistency is not valuable without being correct. Concern remains for the additional and proceeding clauses (7050.0190, subpart 4A(1)-(4)). The question of whether a use is being attained, or could be attained, cannot always be judged by whether the current statewide criteria are being met. Inserting “water quality standards” for “use” is not appropriate in all cases. An illustration is provided to demonstrate the commenters concern that has not yet been adequately addressed.

Response: USEPA directs delegated states to adopt “standards” to protect “uses”. The MPCA believes the term “water quality standards” is more specific. Multiple WQs protect a given

use. 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. (See also Response, Part III, section B, comment 18a.)

Comment 5d: The MPCA's proposed variance rules extend the federal requirements to uses not covered by the federal rule (uses not associated with fishable, swimmable goals), without a clear rationale. The MPCA provides no acknowledgement that it is expanding upon the federal requirements, let alone a non-arbitrary reason for doing so. Therefore, MPCA should adopt the federal definition and clarify variance requirements for the non-101(a)(2) uses.

Response: See Response, Part III, section A, item 6.

Comment 5e: Highest attainable use or condition is not adequately defined.

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

Comment 5f: MPCA's goal of aligning state rule with federal guidance has not been met.

Response: See Response, Part III, section A, item 2.

6. Aaron Klemz, Friends of the Boundary Waters Wilderness, submitted on behalf of the groups who are members of the Minnesota Environmental Partnership

Comment 6a: Our groups specifically request that the following changes (see below comments 6b - 6h) be made in the variance rules proposed by the MPCA for statewide waters (chapter 7050) and waters of the Lake Superior Basin (chapter 7052).

Response: See below response to comments 6b-6h.

Comment 6b: The MPCA's proposed rules for both chapter 7050 and 7052 should only allow variances for as long as necessary to achieve specific pollution reduction goals, like designing and building treatment facilities.

Response: No rule change is proposed. The MPCA's proposed rules limit the term of the variance to only as long as necessary to achieve the highest attainable condition. (See also Response, Part III, section A, comment 3.)

Comment 6c: The MPCA's proposed rules for the duration of variances in both chapter 7050 and 7052 should be changed to include provisions that a variance expires and the underlying WQS applies if the MPCA doesn't complete a review and decision on the variance within five years, as required under federal regulations.

Response: Comment noted. See Response, Part III, section A, comment 3.

Comment 6d: The MPCA's proposed rules for variances in both chapter 7050 and 7052 should be changed so they would not allow grandfathering of the MPCA's failure to require compliance with a discharger's prior permit.

Response: No rule change is proposed. The MPCA's proposed rules do not allow grandfathering of any permit conditions. The existing permit requirements in any unique permit, including discharge limitations, are reevaluated by the MPCA prior to permit reissuance, and outside of the scope of this rulemaking. The proposed variance rules do not change the five year term of an NPDES/SDS permit or any of the compliance and enforcement tools the MPCA has authority to use to assess compliance.

Comment 6e: The MPCA's proposed rules for variances in both chapter 7050 and 7052 should be very specific about the discharger attaining the highest attainable conditions, as in the federal variance rules, so that the MPCA isn't pressured to accept lax variance requirements.

Response: No rule change is proposed. The MPCA's proposed variance rules require a determination of the "highest attainable condition" as a part of each variance evaluation. 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 6f: The MPCA's proposed rules for statewide variances should clearly state that at the end of the variance period the discharger must comply with WQS, as intended by the Clean Water Act.

Response: No rule change is proposed. The MPCA's proposed rules align with federal final WQS Rules that require the term of a variance be only as long as necessary to achieve the highest attainable condition. Additionally both MPCA's proposed rules and federal final WQS Rules require variance reevaluation every five years to determine if the highest attainable conditions is being met. Upon expiration of the variance the discharger must meet the final limit to protect the underlying WQS. (See also Response, Part III, section A, item 3.)

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

Response: Nothing in the proposed rule amendments prohibits citizens from requesting a contested case hearing. (See also Response, Part IV, comment 4e.)

Comment 6h: The MPCA's proposed rules for variances should protect Lake Superior Basin waters by prohibiting variances for new or restarting dischargers, preventing variances that don't meet Lake Superior Basin antidegradation rules, and giving tribes and other Great Lakes states notice if a variance is proposed for Lake Superior Basin watersheds.

Response: No rule change is proposed. The proposed state variance rules do not change the prohibition on variances to new dischargers in the Lake Superior Basin already in existing *Minn. R. 7052.0280*.

Comment 6i: We support MPCA's proposals to require applicants for a variance to analyze potential health risks, to explain that variances can't harm federal endangered species, to prevent variances from changing a body of water that has complied with WQS (an existing use) to one that doesn't, and to make conditions for a variance as consistent as possible between the various parts of Minnesota rules, so that citizens can understand how the rules will be applied.

Response: Comment noted.

IV. Conclusion

The MPCA has demonstrated through the SONAR, the hearing presentation and oral testimony, the Preliminary Response to Comments, and this Final Response to Comments, that the proposed rule amendments are needed and reasonable.

From: Kessler, Katrina (MPCA)
Sent: Tuesday, October 27, 2015 9:47 AM
To: Andrea Junker; Brad Frazier; Brandy Toft; Charlie Lippert; Chris Holm; Cody Charwood; Corey Strong; Curtis Gagnon; Daniel Cozza; Dave Conner; Deb Dirlam; Ed Fairbanks; harmon.darrel@epa.gov; Heather Westra; Jesse Anderson; Joy Wiecks; Kayla Bowe; Kenneth Westlake; Kevin Koski; Levi Brown; lisa johnson; Margaret Watkins; Megan Ulrich; MICHAEL B WHITT; Mike Swan; Monica Hedstrom; Nancy Schuldt; Sam Malloy; Scott Doig; Scott Walz; Scott Wold (scottw@upperprouxcommunity-nsn.gov); Seth Moore; Shane Bowe; Stan Ellison; Steve Mortensen; Susan Kedzie; Tara Geshick; 'Tara Loomis'; Thornton, J. David (MPCA); Wayne Dupuis; Yvette Chenaux
Cc: Neuschler, Catherine (MPCA); Doucette, Elise (MPCA); Lynn, Mary (MPCA)
Subject: MPCA's proposed Variance Rule Making
Attachments: WQVarianceRuleFactsheetWeb_10-7-2015.pdf

Greetings:

As you may recall from the September 2, 2015 Tribal/MNTEC meeting, the MPCA is planning to soon propose amended Water Quality Variance Rules. The MPCA expects that public notice of the Proposed Amendments to Water Quality Variance Rules will be published in the November 9, 2015, State Register, with a 45 day public comment period. I am writing to you to give you advance notice of that announcement.

The MPCA is proposing amendments to its rules governing processing and consideration of water quality standard variance requests. 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. The 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.

To further explain the proposed Water Quality Variance Rules changes please see the attached fact sheet, "Draft Amended Rules for Water Quality Variances." As noted in the fact sheet, the U.S. Environmental Protection Agency (USEPA) finalized their Water Quality Standards rules in August 2015. We are still working with USEPA to better understand the final federal rules and to determine whether our proposed Water Quality Variance rules will need to be modified.

On the date the proposed rules are published, the public notice will be available by visiting the MPCA Public Notice Webpage and the related rule documents can be viewed at <http://www.pca.state.mn.us/zihy1479>.

If you have any questions or would like to discuss the proposed rules, please contact me at 651-757-2490 or by email at katrina.kessler@state.mn.us.

Many thanks,
Katrina

Katrina Kessler, P.E.

Water Assessment Section Manager ▪ Minnesota Pollution Control Agency ▪ 651 757-2490

Follow me on Twitter @katrinaMPCA

Our mission is to protect and improve the environment and enhance human health