

STATE OF MINNESOTA  
MINNESOTA POLLUTION CONTROL AGENCY

Adoption of Amendments to Minnesota Rules,  
Chapters 7050, 7052, and 7053 Governing  
Water Quality Standards Variances

AMENDED ORDER ADOPTING RULES

Office of Administrative Hearings No. 2-9003-32864  
Governor's Office Tracking No. AR2009  
Revisor's No. 4136

WHEREAS:

1. The Report of the Administrative Law Judge (ALJ) was issued on April 18, 2016.
2. The ALJ found that the Minnesota Pollution Control Agency (MPCA) complied with all notice and procedural requirements in *Minnesota Statutes*, chapter 14, *Minnesota Rules*, chapter 1400, and all other applicable procedural laws and rules.
3. In response to comments received during the public comment period and the public hearing, the MPCA made four revisions to the rule amendments proposed in the November 9, 2015, *State Register* (40 SR 531). These revisions are discussed in the MPCA Post-Hearing Response to Public Comments, dated February 19, 2016, the revised Attachment 1 of the Post-Hearing Response to Public Comments dated February 24, 2016, and the MPCA Post-Hearing Final Response to Public Comments (Rebuttal) dated March 2, 2016. Comments received that did not result in the MPCA making additional revisions to the proposed rule amendments are also discussed in these documents.
4. As detailed in the Report of the ALJ, the ALJ found that the proposed rule amendments, including the four revisions to the rule amendments made by the MPCA in response to comments received, are necessary and reasonable, and recommended the proposed rules, as modified by the MPCA, be adopted. The ALJ also provided a recommendation for additional revisions to the proposed rules, as modified, and the MPCA proposes to revise the rule based on the ALJ's recommendation.
5. The MPCA adopts the Report of the ALJ dated April 18, 2016, subject to the exception discussed below, and incorporates the Report into this Amended Order Adopting Rules, with the below revisions to the proposed rule amendments as recommended in the Report at Findings 188 and 226.

**7050.0190 VARIANCE FROM STANDARDS.**

6. The proposed rules at 7050.0190, subpart 6 contain the requirement that the MPCA must make a final decision on the variance request, as long as the request meets the procedural requirements established in *Minn. R. 7000.7000*. These procedural rules are used as the basis for decisions on variance applications (see SONAR page 20). *Minn. R. 7007.7000*, subpart 4 establishes the public notice requirements for the variance application and the Commissioner's

preliminary determination whether or not the variance should be granted. The public notice must identify how the public may submit comments, and how to request a contested case hearing or public informational meeting on the variance application. *Minn. R. 7007.7000*, subpart 8 establishes that the MPCA Citizens' Board is to make all final decisions on variance applications pursuant to Minn. Stat. § 116.02, and approve or deny each application.

7. Historically, all variances were brought to the MPCA Citizens' Board for final decision on variance applications. The Citizens' Board meetings provided a public forum and opportunity for persons to submit an oral or written comment on a variance application. Though the MPCA Citizens' Board was disbanded by the legislature in 2015 (see Addendum to Water Quality Variance SONAR, 7/20/2015), these meetings before the Citizens' Board regarding variances met the public hearing requirements in 40 CFR 25.5(a). The MPCA submitted variances approved by the Citizens' Board to the United States Environmental Protection Agency (USEPA) for approval.
8. The August 21, 2015, federal final Water Quality Standards Rules (80 FR 51049) establish that the public participation requirements in 40 CFR 131.20(b), which include public hearings, must meet the public participation requirements in 40 CFR 25. The term public hearing used in 40 CFR 25.5(a) has a different meaning than how the State interprets the term public hearing. The requirement for a public hearing in 40 CFR 25.5 (a) states "Any non-adjudicatory public hearing, whether mandatory or discretionary under the three Acts shall meet the following minimum requirements." In other words, a judge is not required for a public hearing. In contrast, Minnesota Rules chapter 1400 governing the Administrative Procedure Act requires that a judge be assigned to a public hearing for a rule proceeding (*Minn. R. 1400.2020*). The MPCA believes it is this difference in the federal and State use of the term "public hearing," that can cause confusion on whether a public hearing is required for a water quality variance application and whether the requirements for the State to hold a public hearing are met.
9. When considering water quality variance requests, the MPCA must comply with all applicable Clean Water Act and federal rule requirements whether or not they are cited specifically in the federal final Water Quality Standard Rules for variances or any other applicable federal and State rules.
10. **ALJ Report, Findings 180 - 188. Agency Final Decisions, Variance Requirements.** The ALJ stated that the proposed rule's reference to *Minn. R. 7000.7000* may give potential applicants and the public the impression that the variance request must conform with only part 7000.7000 when the USEPA makes clear that the public hearing requirements of 40 CFR 25 apply to variances from water quality standards. The ALJ concluded that this omission of a significant federal requirement for public notice and hearing does not inform the applicant or public of all of the requirements needed for USEPA approval, and that changing the rule so that it contains the complete list of requirements for an application, including the federal requirement for public hearings, may help avoid potential future litigation on this issue.
11. The ALJ recommended that the MPCA revise the proposed rule in the manner suggested by the Minnesota Center for Environmental Advocacy or in another manner to indicate to potential applicants and the public that federal public hearing requirements must be followed by the MPCA before a variance application be approved by the MPCA.
12. The ALJ found that making this revision would not result in a rule that is substantially different from the rule as originally proposed (see Finding 188).

13. The MPCA accepts the ALJ's recommendation to revise the "Agency final decision, variance requirements" in part 7050.0190, subpart 6.
14. The MPCA, in its Post-Hearing Response to Public Comments, comment 4b, stated its agreement that a hearing is to be held on any water quality standard adopted or revised.
15. The MPCA has revised part 7050.0190, subpart 6 to cite specifically 40 CFR 25.5, the public hearing requirements, rather than 40 CFR 131.20(b), the public participation requirements, for several reasons. First, 40 CFR 131.20(b) requires that "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 MPCA believes that citing specifically to 40 CFR 25.5 in the revised rule provides a clearer path for the reader to the applicable federal requirements, rather than directing the reader to 40 CFR 131.20(b), which then directs the reader to the specifically applicable requirement 40 CFR 25.5.
16. Next, the proposed rule at part 7050.0190, subpart 4 "Conditions for approval" already cites specifically the federal requirements for public participation. Subpart 4 requires that "Before a variance can become effective, the variance must be submitted to and approved by the United States Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act and Code of Federal Regulations, title 40, sections 131.20 and 131.21." The MPCA believes it is not necessary to cite 40 CFR 131.20 again in subpart 6.
17. Subpart 6 is revised, as shown below, by adding language to specify that the MPCA must hold at least one meeting that meets the public participation requirements in 40 CFR 25.5 before the MPCA makes a final decision on the variance request. The term "meeting" is used to avoid any confusion in the difference in the federal and State use the term "public hearing" (see above item 8). The MPCA finds that this revision is reasonable because adding the federal cite provides clarity and informs the applicant for a water quality variance and the public of all the requirements needed for USEPA approval of a variance.

#### **Change to Part 7050.0190, subpart 6**

*Subp. 6. **Agency final decision; variance requirements.** The agency must make a final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000. The agency must hold at least one meeting that meets the minimum public participation requirements in Code of Federal Regulations, title 40, section 25.5 before the agency makes a final decision on the variance request. If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and incorporate the following variance terms and conditions:*

18. The MPCA finds that the revision to part 7050.0190, subpart 6 does not make the rule substantially different because the revision is a clarification that the ALJ recommended and several commenters requested. The ALJ also found that the revision did not make the rule substantially different. The Dual Notice of Intent to Adopt Rules (Dual Notice) in the Minnesota *State Register* (40 SR 531) provided fair warning that this rule revision could result because it notified readers of the subject matter of the rule such that they could understand that their

interests could be affected, the subject matter and issues in the Dual Notice are the same as the subject matter and issues addressed in the revision and the effects of the revision are not greatly different from the rules as originally proposed. The revision is within the scope of "Subject of Rules, final decision" which was announced in the Dual Notice.

#### **7052.0280 VARIANCES FROM WATER QUALITY STANDARDS.**

19. The proposed rules at 7052.0280, subpart 5 contains the requirement that the MPCA must make a final decision on the variance request, as long as the request meets the procedural requirements established in *Minn. R. 7000.7000*.
20. **ALJ Report, Findings 221 - 226. Agency Final Decisions, Variance Requirements.** The ALJ stated that the proposed rule's reference to *Minn. R. 7000.7000* may give potential applicants and the public the impression that the variance request must conform with only part 7000.7000 when the USEPA makes clear that the public hearing requirements of 40 CFR 25 apply to variances from water quality standards. The ALJ concluded that this omission of a significant federal requirement for public notice and hearing does not inform the applicant or public of all of the requirements needed for USEPA approval, and that changing the rule so that the complete list of requirements for an application, including the federal requirement for public hearings, may help avoid potential future litigation on this issue.
21. The ALJ recommended that the MPCA revise the proposed rule in the manner suggested by the Minnesota Center for Environmental Advocacy or in another manner to indicate to potential applicants and the public that federal public hearing requirements must be followed by the MPCA before a variance application be approved by the MPCA.
22. The ALJ found that making this revision would not result in a rule that is substantially different from the rule as originally proposed (see Finding 226).
23. The MPCA accepts the ALJ's recommendation to revise the "Agency final decision, variance requirements" in part 7052.0280, subpart 5.
24. The MPCA, in its Post-Hearing Response to Public Comments, comment 4b, stated its agreement that a hearing is to be held on any water quality standard adopted or revised.
25. The MPCA has revised part 7052.0280, subpart 5 to cite specifically 40 CFR 25.5, the public hearing requirements, rather than 40 CFR 131.20(b), the public participation requirements, for several reasons. First, 40 CFR 131.20(b) requires that "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 MPCA believes that citing specifically to 40 CFR 25.5 in the revised rule provides a clearer path for the reader to the applicable federal requirements, rather than directing the reader to 40 CFR 131.20(b), which then directs the reader to the specifically applicable requirement 40 CFR 25.5.

26. Next, the proposed rule at part 7052.0280, subpart 3 “Conditions for approval” already cites specifically the federal requirements for public participation. Subpart 3 requires that “Before a variance can become effective, the variance must be submitted to and approved by the United States Environmental Protection Agency in accordance with section 303(c) of the Clean Water Act and Code of Federal Regulations, title 40, sections 131.20 and 131.21.” The MPCA believes it is not necessary to cite 40 CFR 131.20 again in subpart 5.
27. Subpart 5 is revised, as shown below, by adding language to specify that the MPCA must hold at least one meeting that meets the public participation requirements in 40 CFR 25.5 before the MPCA makes a final decision on the variance request. The term “meeting” is used to avoid any confusion in the difference in the federal and State use the term “public hearing” (see above item 8). The MPCA finds that this revision is reasonable because adding the federal cite provides clarity and informs the applicant for a water quality variance and the public of all the requirements needed for USEPA approval of a variance.

#### **Change to Part 7052.0280, subpart 5**

*Subp. 5. **Agency final decision; variance requirements.** The agency must make a final decision regarding the variance request that conforms to the procedural requirements in part 7000.7000. The agency must hold at least one meeting that meets the minimum public participation requirements in Code of Federal Regulations, title 40, section 25.5 before the agency makes a final decision on the variance request. If the agency grants the variance and the variance is approved by the United States Environmental Protection Agency, the permit issued by the agency must include and incorporate the following variance terms and conditions:*

28. The MPCA finds that the revision to part 7052.0280, subpart 5 does not make the rule substantially different because the revision is a clarification that the ALJ recommended and several commenters requested. The ALJ also found that the revision did not make the rule substantially different. The Dual Notice of Intent to Adopt Rules (Dual Notice) in the Minnesota *State Register* (40 SR 531) provided fair warning that this rule revision could result because it notified readers of the subject matter of the rule such that they could understand that their interests could be affected, the subject matter and issues in the Dual Notice are the same as the subject matter and issues addressed in the revision and the effects of the revision are not greatly different from the rules as originally proposed. The revision is within the scope of “Subject of Rules, final decision” which was announced in the Dual Notice.

#### **ADOPTION OF THE REPORT OF THE ALJ SUBJECT TO EXCEPTION.**

29. The MPCA adopts the Report of the ALJ dated April 18, 2016, from Judge Barbara J. Case except as described below. The MPCA has made two rule revisions consistent with Judge Case’s recommendations in Findings 188 and 226 in Part XII of the Report of the ALJ, “Part-by-Part Analysis of the Rules.”
30. The MPCA notified the Office of Administrative Hearings on June 28, 2016, that the MPCA received approval from the Governor’s Office on June 23, 2016, to proceed with the Filing of the Order Adopting the Water Quality Variance Rules.

31. On July 13, 2016, the MPCA submitted to the Office of Administrative Hearings the Order Adopting the Water Quality Variance Rules signed by Deputy Commissioner Michelle Beeman for Commissioner John Linc Stine on July 12, 2016. The signed ORDER stated "IT IS ORDERED that the above-named rules, in the form published in the *State Register* on November 9, 2015, with the modifications as indicated in the Revisor of Statutes draft, file number RD 4136, dated May 3, 2016, are hereby adopted."
32. The Office of Administrative Hearings notified the MPCA on July 19, 2016, that it filed the Adopted Water Quality Variance Rules with the Secretary of State on July 19, 2016.
33. The MPCA received an email from Elizabeth Dressel, Policy Coordinator, Office of the Governor, on July 25, 2016, stating that Governor Dayton will not veto the Water Quality Variance Rules RD 4136, and that the MPCA may proceed with the Notice of Adoption.
34. The MPCA received the Notice of Adoption from the Office of the Revisor of Statutes on July 26, 2016, with the adopted modifications to the rules as proposed and published in the *State Register* on November 9, 2015 (40 SR 531).
35. The MPCA E-filed its Post-Hearing Response to Public Comments, which included the original Attachment 1, with the Office of Administrative Hearings on February 19, 2016. Attachment 1 contains the MPCA's four proposed revisions to the proposed amendments to rules governing water quality variances. The proposed revision to part 7053.0195, subpart 8 in the original Attachment 1 was incorrect. The revised proposed revision to part 7053.0195, subpart 8 was identified in the MPCA's letter to Judge Case, dated February 24, 2016, in a revised Attachment 1 of the MPCA's Post-Hearing Response to Public Comments. In its review of the Notice of Adoption, the MPCA found that the revised proposed revision to part 7053.0195, subpart 8, as identified in revised Attachment 1, was not included in the adopted modifications to the rules, RD 4136, dated May 3, 2016.
36. The MPCA's Post-Hearing Response to Public Comments of February 19, 2016, with original Attachment 1, and the letter to Judge Case, dated February 24, 2016, with the revised Attachment 1 were posted on the Office of Administrative Hearings Rulemaking e-Comment website and on the MPCA's Water Quality Variance Rulemaking website during the post-hearing rebuttal period. Therefore, the public had opportunity to review and comment on all the proposed revisions identified in revised Attachment 1, including the revised proposed revision to part 7053.0195, subpart 8. The revised proposed revision to part 7053.0195, subpart 8 (in revised Attachment 1) is parallel to the proposed revision to part 7050.0190, subpart 8 (which was correctly presented in the original and revised Attachment 1).
37. The MPCA finds that items 251 through 255 of the Report of the ALJ are not directed to the revised proposed revision to part 7053.0195, subpart 8 proposed by the MPCA as identified in the revised Attachment 1. The part 7053.0195, subpart 8 rule language in revised Attachment 1 reads as follows:

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.

38. The MPCA finds that the correction to part 7053.0195, subpart 8 is necessary and reasonable and does not make the rule substantially different because the correct rule language was identified in revised Attachment 1 of the MPCA's Post-Hearing Response to Public Comments submitted to Judge Case on February 24, 2016. The proposed revised rule language in subpart 7053.0195, subpart 8, is parallel to the proposed revision to part 7050.0190, subpart 8 which is discussed and approved by Judge Case in items 206 through 208 of the Report of the ALJ.
39. The MPCA finds the correction to part 7053.0195, subpart 8 to be a minor clerical correction to the Water Quality Variance Rules, and submits this Amended Order Adopting Rules to the Office of Administrative Hearings, with the corrected rule, file number RD 4136, dated July 28, 2016.

ORDER

IT IS ORDERED that the above-named rules, in the form published in the *State Register* on November 9, 2015, with the modifications as indicated in the Revisor of Statutes draft, file number RD 4136, dated July 28, 2016, are hereby adopted.

8/24/16  
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Date

  
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John Linc Stine  
Commissioner  
Minnesota Pollution Control Agency