

Minnesota Pollution Control Agency Rules Relating to Tiered Aquatic Life Use and Modification of Class 2 Beneficial Use Designations

Closed Mar 17, 2017 · Discussion · 4 Participants · 1 Topics · 5 Answers · 0 Replies · 0 Votes

4

PARTICIPANTS

1

TOPICS

5

ANSWERS

0

REPLIES

0

VOTES

SUMMARY OF TOPICS

SUBMIT A COMMENT

 5 Answers · 0 Replies

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Katie Lin · Admin · (Postal Code: 55101) · Mar 16, 2017 12:33 pm

 0 Votes

Comment from Minnesota Conservation and Civic Groups

Howard Markus · Citizen · (Postal Code: unknown) · Mar 17, 2017 12:35 pm

 0 Votes

Will Bouchard (talurulemaking.pca@state.mn.us)
Minnesota Pollution Control Agency
Environmental Analysis and Outcomes Division
520 Lafayette Road North
Saint Paul, MN 55155-4194

RE: Proposed Amendments to Minnesota Rules, Chapters 7050 and 7052, relating to Tiered Aquatic Life Uses (TALU) and Modification of Class 2 Beneficial Use Designations

Dear Dr. Bouchard,

An important concern that I have is demonstrated by Figure 2-3 on page 30 of the SONAR. The purpose of the figure is to diagram the process of using biological data to make beneficial use decisions. Steps #5 and #6 illustrates my concern that the MPCA is ignoring existing upstream pollution impacts, since those data are not included when the chart decides which direction to take from either Step 5 or Step 6. That difference is very important: is this a potentially biologically healthy waterbody that is may be impaired by upstream excess nutrients or sediment vs a biologically irretrievable ditch whose uses

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should be downgraded? All data must be considered before a decision as important as this is made.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

Howard D. Markus, Ph.D., P.E. [retired]

9175 Pinehurst Road

Woodbury, MN 55125

bluesky11@comcast.net

cc:

Linda Holst, USEPA Region 5

David Pfeifer, USEPA Region 5

Barbara Wester, USEPA Region 5

Kevin Molloy · Citizen · (Postal Code: unknown) · Mar 17, 2017 3:14 pm

👍 0 Votes

MPCA Post Hearing Comments No. 1 of 2

Kevin Molloy · Citizen · (Postal Code: unknown) · Mar 17, 2017 3:15 pm

👍 0 Votes

MPCA Post Hearing Comments No. 2 of 2

Randy Neprash · Citizen · (Postal Code: unknown) · Mar 17, 2017 4:33 pm

👍 0 Votes

comment...

Minnesota Conservation and Civic Groups

March 16, 2017

E-FILED WITH OAH
Administrative Law Judge James R. Mortenson
Minnesota Office of Administrative Hearings
600 North Robert Street
St. Paul, MN 55101

RE: *In the Matter of the Proposed Amendments to Minnesota Rules, Chapters 7050 and 7052, relating to Tiered Aquatic Life Uses (TALU) and Modification of Class 2 Beneficial Use Designations; Revisor's ID Number RD4237*
OAH Docket No. 5-9003-33998

Dear Judge Mortenson,

Thank you for providing an opportunity for continued comments on the Minnesota Pollution Control Agency (MPCA) proposed Tiered Aquatic Life Uses (TALU) rules through March 17, 2017. We appreciate your interest in the views of citizens and stakeholders.

The undersigned conservation and civic organizations appreciate the MPCA's practice of conducting biological assessments in order to protect streams from pollution that is killing fish and macroinvertebrates (such as aquatic insects), especially where Minnesota rules have not caught up with current science to set numeric limits for these pollutants. We also strongly support the classification of Minnesota waters with exceptional aquatic habitat as "Exceptional Use" waters. We believe that this is an important step to protect Minnesota's water resources, health, quality of life and recreation-based economy for generations to come.

However, we have four important concerns about the proposed TALU rules that must be addressed before the MPCA's proposed rule changes are adopted. We have suggested specific recommendations to address our concerns summarized below.

"Modified Use" Waters

First, we believe that the provisions allowing reclassification of waters as "Modified Use" waters will reduce their protection under the Clean Water Act. Under existing law and practice, when Minnesota waters are impaired due to poor fishes or macroinvertebrate assessments, they are listed as impaired waters. A plan is then made to study and restore those waters under Section 303(d) of the Clean Water Act.

If the "Modified Use" classification were used, even if pollution as well as channeling of streams contributed to low biological assessment, degradation would be locked in forever, rather than remediated. This is an especially big problem in both agricultural and mining areas where many of the pollutants contributing to the impairment of waters (such as salts, hardness, and specific conductivity) have no specific numerical standards to protect aquatic life. A finding of impairment and a plan for cleanup now depends on the biological assessment.

The proposed rules would classify a stream as “Modified Use” rather than “impaired” if channeling or other hydrological change resulted in poor quality habitat, even if pollution had also diminished aquatic life. Especially since 53% of Minnesota’s stream miles are impacted by channeling or impoundments, the “Modified Use” classification could result in downgrading the protection of a staggering proportion of Minnesota waters.

Recommendation: To reduce the threat from wide-spread downgrading of Minnesota streams to “Modified Use,” we request that all of the sections of the rule that allow for “Modified Use” designations be changed as follows¹:

(1) To meet the definition in this item, waters must have been the subject of a use attainability analysis, and an individualized determination must have been made with public notice in the affected area and an opportunity for comment found to be that the water is incapable of supporting and maintaining the Class 2Bdg [or Class 2Bg] beneficial use because of human-induced modifications of the physical habitat that preclude the potential for recovery of the fauna, and that the failure to support such general use does not result in whole or in part from a point source or nonpoint source pollutant. Waters where nonattainment of beneficial uses is attributable in part to a pollutant shall remain classified for general use and shall be listed as impaired under the Clean Water Act Section 303(d) (Category 5) whether or not that pollutant has been identified. Human-induced ~~These~~ modifications must be the result of direct alteration to the channel, such as drainageway maintenance, bank stabilization, and impoundments and both long-term natural recovery of beneficial uses and restoration best practices must be considered to evaluate the potential for recovery of general beneficial use.

Waters in the Boundary Waters Canoe Area Wilderness and Voyageurs National Park

Second, we believe, as explained by a former MPCA staff scientist at the contested case hearing on February 16, 2017, that there is something very wrong about the MPCA’s proposal to use a default “General Use” classification rather than a default “Exceptional Use” classification for waters in the Boundary Waters Canoe Area Wilderness and Voyageurs National Park. This default “General Use” classification, in effect, assumes that, no streams in the Boundary Waters or Voyageurs National Park have hosted exceptional aquatic life communities at any time since November 28, 1975, when Clean Water Act existing uses began to apply.

The Boundary Waters Canoe Area Wilderness and Voyageurs National Park were designated as a national wilderness and a national park precisely because of the exceptional characteristics of their pristine waters. The TALU rules should use an “Exceptional Use” designation for these waters, unless it is demonstrated that a particular body of water was only of “General Use” quality at all times since November 28, 1975.

Recommendation: To ensure that streams in Minnesota’s pristine wilderness and national park are protected for the exceptional aquatic use, we request that the section of the MPCA’s proposed rules pertaining to unlisted waters, Minn. R. 7050.0430, be amended as follows²:

¹ Changes apply to the MPCA’s proposed language for Minn. R. 7050.0222, Subp. 3c (Class 2Bd) Item D (1) and Subp. 4c (Class 2B), Item D (1), pp. 57.3 to 57.8, 75.22 to 76.2.

² Changes are suggested based on the text in MPCA’s proposed rule text, pp. 78.26 to 79.12.

Subpart 1. **Statewide surface waters.** Except as provided in subparts 2 and 3, all surface waters of the state that are not listed in part 7050.0470 and that are not wetlands as defined in part 7050.0186, subpart 1a, are hereby classified as Class 2Bg, 3C, 4A, 4B, 5, and 6 waters.

Subp. 2. **Boundary Waters Canoe Area Wilderness.**

A. All streams in the Boundary Waters Canoe Area Wilderness [11/5/84P] not listed in part 7050.0470 are classified as Class 1B, 2Bdg e, 3B. . .

Subp. 3. **Voyageurs National Park.**

A. All streams in Voyageurs National Park [11/5/84P] not listed in part 7050.0470 are classified as Class 2Bg e, 3B. . .

Indeterminate Standards for Sampling and Biological Assessment

It has been very difficult for conservation and civic groups to participate in this rulemaking process, due to the vague and indeterminate nature of the rules themselves. We are not sure whether we would support or raise concerns about the way in which the MPCA proposes to conduct sampling and evaluate biological assessments because the rules are not specific about what MPCA proposes to do.

This problem would become even more significant if we or citizens who live near a water sought to understand or challenge a classification. We wouldn't be able to determine whether the sampling was done according to the rules or whether the numerical rating for a biological assessment was the correct one for that type of water in that part of the state.

There are at least four places in the proposed rules where the MPCA refers to a collection of research, policy and justification documents rather than specifying what precisely in those documents is being enacted as part of a rule.³ These referenced documents, found through a general Internet search, include at least five papers, with a total of 318 pages of various types of material, most of which is not prescriptive.⁴ Conservation groups and citizens who live near and use Minnesota's waters, as well as regulated parties, need to know *how* the

³ See MPCA proposed TALU rules, Minn. R. 7050.0150, Subp. 3a, p. 1.24 to 2.3; Minn. R. 7050.0222, Subp.2c (Class 2A), p. 40.12 to 41.14; Subp. 3c (Class 2Bd), p. 55.2 to 56.6; Subp. 4c (Class 2B), p. 73.25 to 75.3 for incorporations by reference.

⁴ Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List (2014 and as subsequently amended)(77 pages), currently available at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-04i.pdf> ; Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, MPCA (2014)(63 pages), currently available at <https://www.pca.state.mn.us/sites/default/files/wq-bsm2-03.pdf>; Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, MPCA (2014)(57 pages), currently available at <https://www.pca.state.mn.us/sites/default/files/wq-bsm4-01.pdf>; Calibration of the Biological Condition Gradient for Streams of Minnesota, Gerritsen et al. (2012)(57 pages), currently available at <https://www.pca.state.mn.us/sites/default/files/wq-s6-32.pdf>; Development of Biological Criteria for Tiered Aquatic Life Uses, Minnesota Pollution Control Agency (2016)(64 pages), currently available at <https://www.pca.state.mn.us/sites/default/files/wq-bsm4-02.pdf>.

regulatory agency will implement TALU rules -- not just what staff may tell us today, but what the rule will require of them over time.

Recommendation: The most transparent way to address our concerns would be to revise the proposed TALU rules to specify methodology for sampling and assessment in the rule itself, as is customarily done in Minnesota rules. If the MPCA would like to reference methods documents in the proposed TALU rules, these methods documents need to be brief, explicit, prescriptive, intelligible and linked by a specific url to the rule text, explaining what the MPCA will do to sample and evaluate waters. The methods language should include at least the following:

- 1) number, location, season and specificity of fish and macroinvertebrate sampling, requiring fish sampling to a species level in all cases and macroinvertebrate sampling to a genus level in all cases and to a species level wherever feasible, and identification of pollution-tolerant and pollution-sensitive genera/species;
- 2) explanation of how the determination of biologic criterion numbers/ IBI scores shall be counted and determined for a specific type of water and watershed;
- 3) explanation of how habitat metrics will be determined and used for designation/ reclassification of uses.

Downgrading of 109 Streams to “Modified Use” Waters

Finally, we believe that the MPCA’s proposed downgrading of 109 streams to “Modified Use” waters should be rejected by the Administrative Law Judge, pending more thorough public notice and appropriate documentation that a use attainability analysis has been done on individual waters in compliance with Clean Water Act requirements.

It is not clear to us whether the MPCA’s notice meets legal standards. But the notice does not meet common sense standards.

The only disclosure in the notice is on page 5, which says, “the MPCA is proposing to reclassify 141 stream reaches from the existing General Use to either Exceptional or Modified Use.” The MPCA did not say that the vast majority of these reclassifications, 109 out of the 141, would be downgraded from “General Use” to “Modified Use.” The MPCA did not list the waters proposed to be downgraded or inform people in communities near these waters. The MPCA did not even inform the public that if they wanted to know which streams were being downgraded, they could find this information buried in Appendix A of the MPCA’s Statement of Need and Reasonableness (SONAR).

The MPCA’s 109 reclassifications to “Modified Use” don’t meet the requirements to downgrade waters. The only information provided in Appendix A of the SONAR to show that the streams had not supported general aquatic life at any time since 1975 was an aerial photo showing a drainage channel before November 28, 1975. The MPCA’s proposed downgrading also provides no individual review of whether streams could be individually improved through best practices or through natural restoration over time.

Recommendation: Deny the proposed reclassifications for “Modified Use” in this proceeding, without preventing the MPCA from proposing them again after a more transparent and individual review and notice to the public and communities affected by stream reclassification.

We support the application of biological assessments to Minnesota waters and strongly endorse the classification of waters as “Exceptional Use” to protect Minnesota’s high quality water resources.

We greatly appreciate the Office of Administrative Hearings’ role in this process and respectfully request that the recommended changes in our letter be required before the MPCA’s Tiered Aquatic Life Uses rules are allowed to move forward.

Sincerely yours,

Center for Biological Diversity
Friends of the Boundary Waters Wilderness
Friends of the Cloquet Valley State Forest
League of Women Voters, Duluth
Minnesota Center for Environmental Advocacy
Minnesota Environmental Partnership
Northeastern Minnesotans for Wilderness
Protect Our Manoomin
Save Our Sky Blue Waters
Sierra Club North Star Chapter
WaterLegacy



Minnesota Cities Stormwater Coalition

Municipal stormwater professionals
working together for clean water

Comments on TALU Rulemaking
from Minnesota Cities Stormwater Coalition (MCSC)
March 17, 2017

Thank you for the opportunity to comment on this rulemaking. The following are the comments from MCSC.

1. The Rule SONAR includes this text on page 85:

“MS4 cities: There are six MS4 NPDES/SDS Permittees located within one mile of a potential Exceptional Use stream. Collectively, these permittees have a total of 10 stormwater discharge stations to surface waters (of which seven are not expected to discharge under normal circumstances). Because these facilities are required to meet current permit conditions that already protect these streams, and since the stream already qualifies for Exceptional Use designation, no permit changes will be required of these permittees. Therefore, no MS4 NPDES/SDS city discharger is expected to incur additional costs as a result of the receiving water being designated as Exceptional Use.”

After discussion with the MPCA, it has become apparent that the six MS4 permittees referenced above were never contacted in the process of developing this rule. These MS4 permittees should be identified and contacted and given ample opportunity to learn about this proposed rule, understand it’s impacts, and comment directly to the MPCA staff.

2. The text from page 85 includes:

“no MS4 NPDES/SDS city discharger is expected to incur additional costs as a result of the receiving water being designated as Exceptional Use”

Page 73 of the SONAR includes this text:

“The MPCA has determined that the proposed amendments will not have any effect on local ordinances or regulations.”

Page 84 of the SONAR includes this text:

“the MPCA anticipates that the Exceptional Use designation will rarely, if at all, affect existing MPCA NPDES/SDS Permittees point source dischargers to streams. This is because: 1) most Exceptional Use waters are in areas of the state where there are fewer permitted facilities discharging to waters of the state; and 2) the existing pollution controls required by the MPCA NPDES/SDS Permits are already sufficient to protect the

Exceptional Use designation as demonstrated by the attainment of the stream as Exceptional Use.”

These statements are inaccurate, probably significantly so.

Please consider the following scenario:

- There is a stream in the Metro area that is at or close to the IBI score appropriate for Exceptional Use status. This stream is within the boundaries of an MS4 city or township. It is in the relatively undeveloped area of such a city or township (called “city” from this point forward), but there are long-term plans to develop this area sometime in the future.
- Because the city is in the Metro, the land is also in the jurisdiction of a watershed district. The watershed district decides that having the stream designated as Exceptional Use is a high priority goal for their organization. They like the idea of having such a designated stream in their jurisdiction and they value the additional protection from the State that is provided with the designation. The district monitors the stream to provide sufficient data for the designation. If a small amount of improvement is needed, the district does the work to help move the IBI upward. It is reasonable to expect that multiple watershed districts will work to have streams in their jurisdictions designated as Exceptional Use.
- The stream is designated as Exceptional Use.
- The city continues to develop and eventually makes it to this area. The city is then left with very limited options:
 - 2.a. In order to protect the IBI score of the stream, the city decides to leave all the land uses in the drainage area unchanged. This may leave large areas of land undeveloped or developed only as large-lot residential.
 - 2.b. The city decides to proceed with development in the stream drainage area, but with extraordinary local design standards for the new development that protect the IBI score of the stream.
 - 2.c. The city decides to proceed with development of the stream drainage area with the same local design standards that have been adopted and are compliant with their MS4 stormwater permit and antidegradation. These standards prove to be insufficient to maintain the high IBI score that is appropriate for Exceptional Use. This is not determined until the diminished IBI scores are found in the course of monitoring done years later. Based on the diminished IBI scores, the stream is found to no longer meet its designated use. It goes on to the Impaired Waters list and a TMDL is done. The TMDL finds that extensive work must be done in the drainage area to restore the IBI scores and meet the designated use. This work would be extraordinarily expensive because all the development and construction will have been done. Stormwater BMP retrofit is 5-10 times more expensive than installing the BMPs during construction. Also, the

developers' work would have been done years ago and now the work must be done at the city's expense.

Under scenarios 2.a. and 2.c. above, the cost impacts to the city would be immense. Under scenario 2.b., the cost impacts would be significant.

During the public hearing, MCSC (Randy Neprash) asked a question that is relevant. "Is it known whether any local stormwater design standards are sufficiently protective to allow urban or suburban development and still maintain the IBI scores sufficient for Exceptional Use?" The response from the MPCA staff, at the hearing, was that this is not known. Please see the Hearing record for this exchange. This has been confirmed in additional subsequent conversations between MCSC and MPCA staff. In the 6-page document titled "Overview of Tiered Aquatic Life Uses", the MPCA states that "most Exceptional Use streams are in areas with little human activity". This could leave an MS4 city in an untenable position because scenario 2.b. may be impossible to achieve. There is a very good chance that we simply do not know how to develop land and maintain the IBI scores appropriate for Exceptional Use status.

Under scenario 2.a. above, the city could end up in a very difficult position related to the Metropolitan Council. Not being able to develop a drainage area of meaningful size could leave the city unable to meet the minimum densities under the Met Council's requirements for future land use planning.

Under scenario 2.b., the city would have to develop and implement significant new local ordinances and/or regulations (see text from SONAR page 73).

Scenario 2.c. would leave a city in a completely untenable position.

3. MS4 permittees are in an odd position related to their status as sources of non-point or point pollution. The permit regulates urban stormwater runoff, which is, in reality, a non-point source of pollution. In order to support regulation, though, permitted urban stormwater runoff has been defined as a point source. None of the documents related to this rulemaking explain this distinction or address the unique problems related to these facts that may be relevant to this rulemaking.

In the entire 200-page SONAR, the term "MS4" appears only on pages 8, 85, and 90. The only paragraph covering MS4 issues is on page 85. It is short, simplistic, and inaccurate.

Almost every example of the possible impacts of the rulemaking on permitted dischargers in the rulemaking documents addresses wastewater sources. There is one example based on permitted construction site dischargers. There are no detailed examples that discuss the impacts on MS4-permitted dischargers.

Requested Actions and Resolutions

- A. Please identify and contact, at a minimum, the six MS4 permittees referenced on page 85 of the SONAR. Please discuss this rulemaking with them in detail and give them ample opportunity to learn about this proposed Rule, understand its impacts, and comment directly to the MPCA staff.
- B. Please address and correct all the inaccuracies in the text quoted above from pages 73, 84, and 85 of the SONAR. Please address and correct all similar statements in all the other rulemaking documents.
- C. Please prepare and present realistic cost estimates of the possible impacts of this proposed Rule on MS4 permittees. Please consider the scenarios provided in the comments above, and other possible scenarios. Please work closely with the MS4 permittees to prepare these cost estimates and arrive at possible or probable scenarios that should be considered.
- D. Please provide as many examples of the possible impacts on MS4 dischargers as there for other types of permitted dischargers. Please work closely with MS4 permittees in the course of developing these examples.
- E. Please do not finalize or issue this proposed Rule until the tasks above are complete and MS4 permittees have an opportunity to review and respond to the related products. It is not appropriate or prudent to issue this Rule with information and supporting documents that are inaccurate, insufficient, and incomplete.

Thank you for the opportunity to comment on this proposed Rule. Please contact Randy Neprash (651-604-4703, randy.neprash@stantec.com) if you have any questions related to these comments.