

State of Minnesota
Minnesota Pollution Control Agency

In the Matter of Proposed Amendment to Proposed Amendments to Minnesota Rules, Chapters 7050 and 7052, relating to Tiered Aquatic Life Uses and Modification of Class 2 Beneficial Use Designations; OAH Docket # 5-9003-33998; Revisor ID RD4237.

MPCA Post-Hearing Response to Public Comments

March 17, 2017

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

I. Introduction

A. Notice and public hearing

The Minnesota Pollution Control Agency (MPCA or Agency) noticed its intent to adopt the above referenced proposed rule amendments in a Dual Notice published in the *State Register* on December 19, 2016 (41 SR 659). The Notice provided for the submission of comments and requests to hold a rule hearing from the date of publication through February 2, 2017.

The MPCA received a sufficient number of requests to hold a rule hearing and a rule hearing was held by Administrative Law Judge James R. Mortenson of the Office of Administrative Hearings on February 16, 2017. The MPCA presented information demonstrating that the proposed amendments are needed and reasonable as required by Minn. Stat. § § 14.131 and 14.14, subd. 2, through an affirmative presentation of facts at the public hearing, and exhibits introduced at the hearing including Hearing Exhibit D, the Statement of Need and Reasonableness (SONAR).

B. MPCA review of comments and organization of MPCA's response to comments

This memorandum and Attachments, hereinafter called the Response, contain the Agency's detailed responses to comments submitted during the dual notice public comment period and at the hearing. This Response is considered a supplement to the information in the SONAR.

All comments received during the pre-hearing comment period, and the public hearing transcripts, are posted in their entirety on the MPCA webpage for this rulemaking at: <https://www.pca.state.mn.us/water/tiered-aquatic-life-uses-talu-framework>.

Attachment 1 is a spreadsheet compilation of the written comments received during the dual notice public comment period and submitted at the public hearing. The Agency participated in the hearing and reviewed the transcripts of the hearing. Comments submitted orally during the hearing were largely reflective of written comments submitted. However, Attachment 1 contains all new, unique comments made orally at the hearing

that were not previously contained in written comments submitted during the dual notice public comment period.

Attachment 1 either directly excerpts or paraphrases written comments received during the dual notice public comment period and at the hearing. A single written comment letter may address multiple issues or multiple parts of the proposed rule. Each distinguishable comment within a letter has been labeled as a separate line in Attachment 1.

Attachment 1 contains information on the rule part or parts each comment relates to, when identifiable.

Attachment 1 also identifies the SONAR pages on which the rule part or topic is addressed. The SONAR references are provided because the SONAR addresses many comments in detail sufficient to establish the need and reasonableness of the proposed rule part on which the comment is made. The MPCA does not repeat information in the SONAR if the comment is adequately addressed in the SONAR.

During its review of comments, the Agency categorized the comments by topic as noted on Attachment 1 in the column titled "Comment topic." Short responses by the Agency to singular comments are included in the "MPCA Response" column of Attachment 1.

More detailed responses to multiple comments on a topic are included in **Attachment 2** and are noted as such in the "MPCA Response" column of Attachment 2.

The comment topics specifically addressed in **Attachment 2** are:

- A. Comments supporting adoption of the proposed amendments, TALU framework, or concepts underlying the TALU framework
- B. Comments related to designated use list and format
- C. Comments related to the documentation of the science supporting the proposed amendments
- D. Comments suggesting clarifications to proposed rule language
- E. Comments related to adoption of documents by reference
- F. Comments related generally to UAA implementation
- G. Comments related to application of IBI models, biological criteria, and UAA tools
- H. Comments related to the proposed Modified Use provisions
- I. Comments related to specific proposed use designations or the beneficial use tables
- J. Comments related to the proposed UAA process for designating Exceptional Uses
- K. Comments related to economic analysis, cost of compliance, and cost of implementation
- L. Comments related to public participation

II. MPCA Proposed Modifications to Rule Amendments as Published in December 19, 2016, State Register

After review and careful consideration of comments, MPCA proposes several changes to the rule as published in the Minnesota *State Register* on December 19, 2016. The need and reasonableness of the each proposed rule section is established in the SONAR. Any additional statements of need and reasonableness for the proposed changes are included below and are considered a supplement to the SONAR.

Minnesota Stat. § 14.05, subd. 2, establishes the standard to assess if a change is substantially different than the proposed rule. The changes proposed below are not substantially different than the rule as published because:

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

The MPCA proposes to modify the rule amendments as published in the *State Register* as shown in the table below. The black text, including black underlines and black strikethrough font, shows the applicable rule provisions as published. The red text, including red underlines and red strikethrough font, shows the MPCA’s proposed modifications to those provisions. Red text with no underlined font is text that the MPCA, in the rule amendments as published, initially proposed to remove from existing rule provisions but has since decided to retain. Red underlined font shows new text the MPCA is proposing to adopt that was not in the rule amendments as published. Red strikethrough font shows newly-proposed text in the rule amendments as published that the MPCA now proposes to remove.

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0150, Subp. 3a. Subp. 3a. Assessment criteria. The criteria by which water bodies are assessed to determine if beneficial uses are supported, and definitions of the data and information required for that assessment, is in 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), which is incorporated by reference. The guidance manual is not subject to frequent change and is available at http://www.pca.state.mn.us/lupg1125</p>	<p>The MPCA’s intent for adding this reference into rule was to improve clarity and convenience in regards to how beneficial uses are assessed. However, the MPCA’s intent was not to adopt these methods into rule or to change the process by which the documents are modified. Several comments received indicated that the reference was confusing. As a result, based on several comments received, the Agency will modify the proposed rule to eliminate this reference.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0150, Subp. 4. <u>S. “Lotic water” means a flowing or moving water body such as a stream, river, or ditch.</u></p>	<p>Several comments identified the need to define whether or not ephemeral or non-flowing streams were intended to be assessed under the proposed TALU framework. This definition is added to support other modifications which clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters. See modifications to: 7050.0222, Subp. 2c (HEADING); 7050.0222, Subp. 2c., Item A; 7050.0222, Subp. 2c., Item, Subitem (2); 7050.0222, Subp. 2c., Item A, Subitem (4); 7050.0222, Subp. 2d (HEADING); 7050.0222, Subp. 2d; 7050.0222, Subp. 3c (HEADING); 7050.0222, Subp. 3c., Item A; 7050.0222, Subp. 3c., Item, Subitem (2); 7050.0222, Subp. 3c., Item A, Subitem (4); 7050.0222, Subp. 3d (HEADING); 7050.0222, Subp. 3d; 7050.0222, Subp. 4c (HEADING); 7050.0222, Subp. 4c., Item A; 7050.0222, Subp. 4c., Item, Subitem (2); 7050.0222, Subp. 4c., Item A, Subitem (4); 7050.0222, Subp. 4d (HEADING); 7050.0222, Subp. 4d; 7050.0430 UNLISTED WATERS.</p>
<p>7050.0155 PROTECTION OF DOWNSTREAM USES. <u>All waters must maintain a level of water quality that provides for the attainment and maintenance of the water quality standards of downstream waters, including the waters of another state.</u></p>	<p>Several comments raised concerns about the protection of downstream waters as required by the CWA. The MPCA’s intent is to comply with federal requirements to protect downstream waters. It is reasonable to comply with federal requirements to protect downstream waters as part of the use designation process. To clarify this, the Agency will propose modifications to the TALU amendments in a new part to explicitly include downstream use protection language that follows federal regulations.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0220, Subpart 1. A. cold water sport fish (trout waters) <u>aquatic life and habitat</u>, also protected for drinking water: Classes 1B;; 2A; <u>2Ae or 2Ag</u>; 3A or 3B_z; 4A and 4B_z; and 5 (subpart 3a); B. cool and warm water sport fish <u>aquatic life and habitat</u>, also protected for drinking water: Classes 1B or 1C_z; 2Bd; <u>2Bde, 2Bdg, or 2Bdm</u>; 3A or 3B_z; 4A and 4B_z; and 5 (subpart 4a); C. cool and warm water sport fish, indigenous aquatic life, and wetlands <u>aquatic life and habitat and wetlands</u>: Classes 2B, 2C, <u>2Be, 2Bg, 2Bm</u>, or 2D; 3A, 3B, 3C, or 3D; 4A and 4B or 4C; and 5 (subpart 5a); and</p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity.</p>
<p>7050.0220, Subp. 3a. Subp.3a. Cold water sport fish <u>aquatic life and habitat, drinking water, and associated use classes.</u> Water quality standards applicable to use Classes 1B, 2A; <u>2Ae or 2Ag</u>; 3A or 3B_z; 4A and 4B_z; and 5 surface waters. <u>The water quality standards in 7050.0222, subpart 2, that apply to Class 2A also apply to Classes 2Ae and 2Ag. In addition to the water quality standards in 7050.0222, subpart 2, the biological criteria defined in 7050.0222, subpart 2d, apply to Classes 2Ae and 2Ag.</u></p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity.</p>
<p>7050.0220, Subp. 4a. Subp. 4a. Cool and warm water sport fish <u>aquatic life and habitat, drinking water, and associated use classes.</u> Water quality standards applicable to use Classes 1B or 1C_z; 2Bd; <u>2Bde, 2Bdg, or 2Bdm</u>; 3A or 3B_z; 4A and 4B_z; and 5 surface waters. <u>The water quality standards in 7050.0222, subpart 3, that apply to Class 2Bd also apply to Classes 2Bde, 2Bdg, and 2Bdm. In addition to the water quality standards in 7050.0222, subpart 3, the biological criteria defined in 7050.0222, subpart 3d, apply to Classes 2Bde, 2Bdg, and 2Bdm.</u></p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0220, Subp. 5a. Subp. 5a. Cool and warm water sport fish aquatic life and habitat and associated use classes. Water quality standards applicable to use Classes <u>2B, 2Be, 2Bg, 2Bm, 2C,</u> or 2D; 3A, 3B, or 3C; 4A and 4B; and 5 surface waters. See parts 7050.0223, subpart 5; 7050.0224, subpart 4; and 7050.0225, subpart 2, for Class 3D, 4C, and 5 standards applicable to wetlands, respectively. <u>The water quality standards in 7050.0222, subpart 4, that apply to Class 2B also apply to Classes 2Be, 2Bg, and 2Bm. In addition to the water quality standards in 7050.0222, subpart 4, the biological criteria defined in 7050.0222, subpart 4d, apply to Classes 2Be, 2Bg, and 2Bm.</u></p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity.</p>
<p>7050.0222, Subp. 2c (HEADING) Subp. 2c. Beneficial use definitions for lotic cold water aquatic life and stream and river habitats (Class 2A).</p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>
<p>7050.0222, Subp. 2c., Item A A. Subitems (1) to (4)(5) apply to the beneficial uses in items B and C: <u>(5) The beneficial use subclass designators “e” and “g” are added to the Class 2A designator as specific additional designators. The additional subclass designators do not replace the Class 2A designator. All requirements for Class 2A cold water stream and river habitats in 7050.0222 and 7052.0100 continue to apply in addition to requirements for Class 2Ae or Class 2Ag cold water stream and river habitats in 7050.0222. These subclass designators are only applied to lotic waters.</u></p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity. These modifications also clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 2c., Item A, Subitem (2) <u>(2) The attributes of species composition, diversity, and functional organization are measured using:</u> (a) the fish based IBI as defined in Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Fish data collection protocols for lotic waters in Minnesota (2017); or (b) the macroinvertebrate IBI as defined in Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Macroinvertebrate data collection protocols for lotic waters in Minnesota (2017).</p>	<p>One commenter requested a more accessible version of the documents proposed to be included by reference in this subitem. In response to this comment, the MPCA created such documents and the modification references these documents. These documents describe the requirements for collecting data that can be used in UAAs and assessments of lotic waters in Minnesota. The information in the new documents is not substantially different from the original.</p>
<p>7050.0222, Subp. 2c., Item A, Subitem (4) <u>(4) The following documents are incorporated by reference and are not subject to frequent change:</u> (a) Calibration of the Biological Condition Gradient for Streams of Minnesota, Gerritsen et al. (2012). The document is available on the agency's Web site at www.pca.state.mn.us; (b) Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Fish data collection protocols for lotic waters in Minnesota (2017). The document is available on the agency's Web site at www.pca.state.mn.us; (c) Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Macroinvertebrate data collection protocols for lotic waters in Minnesota (2017). The document is available on the agency's Web site at www.pca.state.mn.us; and (d) Development of Biological Criteria for Tiered Aquatic Life Uses, Minnesota Pollution Control Agency (2016). The document is available on the agency's Web site at www.pca.state.mn.us.</p>	<p>One commenter requested a more accessible version of the documents proposed to be included by reference in this subitem. In response to this comment, the MPCA created such documents and the modification references these documents. These documents describe the requirements for collecting data that can be used in UAAs and assessments of lotic waters in Minnesota. The information in the new documents is not substantially different from the original.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 2d (HEADING) Subp. 2d. Biological criteria for lotic cold water aquatic life and stream and river habitats (Class 2A).</p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>
<p>7050.0222, Subp. 2d. <u>A. The biological criteria for lotic cold water aquatic life and habitats (Class 2A) are applicable to perennial and intermittent waters that allow for colonization of fish or macroinvertebrates.</u></p>	<p>The MPCA does not routinely sample ephemeral, lotic waters for fish and macroinvertebrates because the IBIs and biological criteria are not developed for use in this type of habitat. Therefore it is reasonable to make these modifications to rule to clarify the intent of the Agency regarding the applicability of the IBIs.</p>
<p>7050.0222, Subp. 3c (HEADING) Subp. 3c. Beneficial use definitions for lotic warm or cool water aquatic life and stream and river habitats (Class 2Bd).</p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>
<p>7050.0222, Subp. 3c., Item A A. Subitems (1) to (4)(5) apply to the beneficial uses in items B to D: <u>(5) The beneficial use subclass designators “e,” “g,” and “m” are added to the Class 2Bd designator as specific additional designators. The additional subclass designators do not replace the Class 2Bd designator. All requirements for Class 2Bd warm or cool water stream and river habitats in 7050.0222 and 7052.0100 continue to apply in addition to requirements for Class 2Bde, Class 2Bdg, or Class 2Bdm warm or cool water stream and river habitats in 7050.0222. These subclass designators are only applied to lotic waters.</u></p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity. These modifications also clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 3c., Item A, Subitem (2) <u>(2) The attributes of species composition, diversity, and functional organization are measured using:</u> (a) the fish-based IBI as defined in <u>Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Fish data collection protocols for lotic waters in Minnesota (2017)</u>; or (b) the macroinvertebrate IBI as defined in <u>Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Macroinvertebrate data collection protocols for lotic waters in Minnesota (2017)</u>.</p>	<p>One commenter requested a more accessible version of the documents proposed to be included by reference in this subitem. In response to this comment, the MPCA created such documents and the modification references these documents. These documents describe the requirements for collecting data that can be used in UAAs and assessments of lotic waters in Minnesota. The information in the new documents is not substantially different from the original.</p>
<p>7050.0222, Subp. 3c., Item A, Subitem (4) <u>(4) The following documents are incorporated by reference and are not subject to frequent change:</u> (a) Calibration of the Biological Condition Gradient for Streams of Minnesota, Gerritsen et al. (2012). The document is available on the agency's Web site at www.pca.state.mn.us; (b) <u>Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Fish data collection protocols for lotic waters in Minnesota (2017)</u>. The document is available on the agency's Web site at www.pca.state.mn.us; (c) <u>Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Macroinvertebrate data collection protocols for lotic waters in Minnesota (2017)</u>. The document is available on the agency's Web site at www.pca.state.mn.us; and (d) <u>Development of Biological Criteria for Tiered Aquatic Life Uses, Minnesota Pollution Control Agency (2016)</u>. The document is available on the agency's Web site at www.pca.state.mn.us.</p>	<p>One commenter requested a more accessible version of the documents proposed to be included by reference in this subitem. In response to this comment, the MPCA created such documents and the modification references these documents. These documents describe the requirements for collecting data that can be used in UAAs and assessments of lotic waters in Minnesota. The information in the new documents is not substantially different from the original.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 3c., Item D (1) To meet the definition in this item, waters must have been the subject of a use attainability analysis <u>where it is determined that attainment of and must have been found to be incapable of supporting and maintaining</u> the Class 2Bdg beneficial use <u>is not feasible</u> because of human-induced modifications of the physical habitat <u>that preclude the potential for recovery of the fauna</u>. These modifications must be <u>the result of direct alteration to the channel, such as drainageway maintenance, bank stabilization, and impoundments</u>.</p>	<p>Several commenters suggested changes to this language. The MPCA proposes the following modifications to the rule amendments as published in order to more clearly convey the purpose of the provision. The modifications are reasonable because they more closely follow phrases in the CWA (40 CFR § 131.10 (g)¹; S-2) and clarify the original intent of the provision to remove ambiguity.</p>
<p>7050.0222, Subp. 3d (HEADING) Subp. 3d. Biological criteria for lotic warm or cool water aquatic life and stream and river habitats (Class 2Bd).</p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>
<p>7050.0222, Subp. 3d. <u>A. The biological criteria for lotic warm or cool water aquatic life and habitats (Class 2Bd) are applicable to perennial and intermittent waters that allow for colonization of fish or macroinvertebrates.</u></p>	<p>The MPCA does not routinely sample ephemeral, lotic waters for fish and macroinvertebrates because the IBIs and biological criteria are not developed for use in this type of habitat. Therefore it is reasonable to make these modifications to rule to clarify the intent of the Agency regarding the applicability of the IBIs.</p>
<p>7050.0222, Subp. 4c (HEADING) Subp. 4c. Beneficial use definitions for lotic warm or cool water aquatic life and stream and river habitats (Class 2B).</p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>

¹ “States may remove a designated use which is not an existing use, as defined in § 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible...” (40 CFR § 131.10 (g))

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 4c., Item A. <u>A. Subitems (1) to (4)(5) apply to the beneficial uses in items B to D:</u> <u>(5) The beneficial use subclass designators “e,” “g,” and “m” are added to the Class 2B designator as specific additional designators. The additional subclass designators do not replace the Class 2B designator. All requirements for Class 2B warm or cool water stream and river habitats in 7050.0222 and 7052.0100 continue to apply in addition to requirements for Class 2Be, Class 2Bg, or Class 2Bm warm or cool water stream and river habitats in 7050.0222. These subclass designators are only applied to lotic waters.</u></p>	<p>Several comments indicated people were confused about the need and intent to continue to apply Class 2A water quality standards to waters with TALU classifications. All water quality standards that apply to Classes 2A, 2Bd, and 2B would also apply to Classes 2Ae, 2Ag, 2Bde, 2Bdg, 2Bdm, 2Be, 2Bg, and 2Bm with the only addition being an indication that the biological criteria for different TALUs also apply. The MPCA proposes the following modifications to the rule amendments as published. The modifications are reasonable because they more clearly convey this concept and remove ambiguity. These modifications also clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>
<p>7050.0222, Subp. 4c., Item A, Subitem (2) <u>(2) The attributes of species composition, diversity, and functional organization are measured using:</u> <u>(a) the fish-based IBI as defined in Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Fish data collection protocols for lotic waters in Minnesota (2017); or</u> <u>(b) the macroinvertebrate IBI as defined in Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Macroinvertebrate data collection protocols for lotic waters in Minnesota (2017).</u></p>	<p>One commenter requested a more accessible version of the documents proposed to be included by reference in this subitem. In response to this comment, the MPCA created such documents and the modification references these documents. These documents describe the requirements for collecting data that can be used in UAAs and assessments of lotic waters in Minnesota. The information in the new documents is not substantially different from the original.</p>

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 4c., Item A, Subitem (4) (4) <u>The following documents are incorporated by reference and are not subject to frequent change:</u> (a) <u>Calibration of the Biological Condition Gradient for Streams of Minnesota, Gerritsen et al. (2012). The document is available on the agency's Web site at www.pca.state.mn.us;</u> (b) Development of a Fish-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Fish data collection protocols for lotic waters in Minnesota (2017). <u>The document is available on the agency's Web site at www.pca.state.mn.us;</u> (c) Development of a Macroinvertebrate-based Index of Biological Integrity for Minnesota's Rivers and Streams, Minnesota Pollution Control Agency (2014) Macroinvertebrate data collection protocols for lotic waters in Minnesota (2017). <u>The document is available on the agency's Web site at www.pca.state.mn.us; and</u> (d) <u>Development of Biological Criteria for Tiered Aquatic Life Uses, Minnesota Pollution Control Agency (2016). The document is available on the agency's Web site at www.pca.state.mn.us.</u></p>	<p>One commenter requested a more accessible version of the documents proposed to be included by reference in this subitem. In response to this comment, the MPCA created such documents and the modification references these documents. These documents describe the requirements for collecting data that can be used in UAAs and assessments of lotic waters in Minnesota. The information in the new documents is not substantially different from the original.</p>
<p>7050.0222, Subp. 4c., Item D (1) <u>To meet the definition in this item, waters must have been the subject of a use attainability analysis where it is determined that attainment of and must have been found to be incapable of supporting and maintaining the Class 2Bg beneficial use is not feasible because of human-induced modifications of the physical habitat that preclude the potential for recovery of the fauna. These modifications must be <u>the result of direct alteration to the channel, such as drainageway maintenance, bank stabilization, and impoundments.</u></u></p>	<p>Several commenters suggested changes to this language. The MPCA proposes the following modifications to the rule amendments as published in order to more clearly convey the purpose of the provision. The modifications are reasonable because they more closely follow phrases in the CWA (40 CFR § 131.10 (g)²; S-2) and clarify the original intent of the provision to remove ambiguity.</p>

² “States may remove a designated use which is not an existing use, as defined in § 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible...” (40 CFR § 131.10 (g))

Proposed Change to Rule Amendments as Published	Specific Reasonableness
<p>7050.0222, Subp. 4d. (HEADING) Subp. 4d. Biological criteria for lotic warm or cool water aquatic life and stream and river habitats (Class 2B).</p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>
<p>7050.0222, Subp. 4d. <u>A. The biological criteria for lotic warm or cool water aquatic life and habitats (Class 2B) are applicable to perennial and intermittent waters that allow for colonization of fish or macroinvertebrates.</u></p>	<p>The MPCA does not routinely sample ephemeral, lotic waters for fish and macroinvertebrates because the IBIs and biological criteria are not developed for use in this type of habitat. Therefore it is reasonable to make these modifications to rule to clarify the intent of the Agency regarding the applicability of the IBIs.</p>
<p>7050.0430 UNLISTED WATERS. <u>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 2B2Bg, 3C, 4A, 4B, 5, and 6 waters. Unlisted lotic waters are also assigned the beneficial use subclass designator "g" to the Class 2B designator.</u></p>	<p>These modifications clarify the original intent of the rule that the TALU framework is applicable only to lotic/flowing waters.</p>

III. Conclusion

After thorough consideration of comments made on the proposed rule, and as required by Minn. Stat § § 14.131, 14.14, subd. 2, and 14.15, subd.4, and Minn. Rules § 1400.2100, the Agency has shown the rules as proposed with the additional modifications detailed in Section II. of this document are needed and are reasonable as demonstrated by and affirmatively shown by facts presented by the Agency in the hearing record.

List of exhibits supporting the MPCA's Response to Comments

Attachment 1 – Spreadsheet of Comments.

Attachment 2 – MPCA Detailed Responses to Comments.

Attachment 3 – Fish data collection protocols for lotic waters in Minnesota: Sample collection, sample processing, and calculation of indices of biotic integrity, MPCA, 2017.

Attachment 4 – Macroinvertebrate data collection protocols for lotic waters in Minnesota: Sample collection, sample processing, and calculation of indices of biotic integrity, MPCA, 2017.

Attachment 5 – Gerritsen, et al, Calibration of the biological condition gradient in Minnesota streams: a quantitative expert-based decision system, Freshwater Science, February 6, 2017 (pre-publication version).

Attachment 6 – Reconnaissance Procedures for Initial Visit to Stream Monitoring Sites, MPCA, 2014.

Attachment 7 – Yoder, C.O. and E.T. Rankin. A Framework for Conducting Use Attainability Analyses (UAA) for Aquatic Life Uses. Midwest Biodiversity Institute, 2016.

Attachment 8 – 40 CFR Part 131 Water Quality Standards Regulatory Revisions; Final Rule, Environmental Protection Agency, 2015.

Attachment 9 – Sandusky river drainage basin, State of Ohio, 2017.

Attachment 10 – Minor corrections to SONAR.

Attachment 11 – Proposed Rules – Beneficial Use Designations, Ohio Environmental Protection Agency, 2016.