

State of Minnesota

Minnesota Pollution Control Agency

In the Matter of Proposed Amendment to
Minnesota Rules Chapters 7050 and 7053

MPCA Post-Hearing Rebuttal Response to Public
Comments

OAH Docket # 8-9003-37102

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Revisor ID 04335

MPCA Rebuttal Response to Comments Submitted during the Post-hearing Comment Period.

I. Introduction

A. Scope

This document and attachments constitutes the Minnesota Pollution Control Agency's (MPCA or Agency) Post-Hearing Rebuttal Response to Public Comments (Rebuttal) on proposed amendments to Minn. R. chs. 7050 and 7053. Specifically, this Rebuttal responds to public comments received during the post-hearing comment period that were not previously addressed by MPCA in its Post-Hearing Response to Comments filed with the Office of Administrative Hearings (OAH) on February 24, 2021 (Response).

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

In this Rebuttal the MPCA responds to common themes and topic areas that were frequently identified in the comments during the time frame stated below, and describes additional proposed revisions to the rules as proposed.

Attachment 1 to this Rebuttal is a spreadsheet compilation of the comments received through 4:30 p.m. on February 24, 2021, that were not previously addressed in the February 24, 2021, Response.

Attachment 1 includes 87 comments entered into the e-comments system and one comment letter uploaded by OAH. The MPCA is organizing the spreadsheet into three areas:

- Other Comments: Comments not included in the two groupings below.
- Water Legacy: With respect to comments submitted by Waverly Reibel as Attachment A Public Comments Gathered by Water Legacy 765 total comments (first 180 comments are personalized), the agency is summarizing the personalized comments for efficiency. The recurring information is summarized at the beginning of the spreadsheet and responses to those comments apply to all instances where "See form letter" is indicated in the spreadsheet.
- Sierra Club: With respect to comments submitted by Steven Ring on behalf of Sierra Club, which also include the personal comments from 856 Minnesotans supporting the Sierra Club's position, the MPCA is summarizing the personalized comments for efficiency.

Comment letters and oral testimony usually include multiple statements or topics, and the MPCA has generally addressed each topic on a separate line of the spreadsheet.

The "MPCA Response" column provides a short response to the comment or identifies where MPCA has addressed the topic elsewhere, such as a reference to the response in the February 24, 2021, Response Memorandum, the Statement of Need and Reasonableness (SONAR), or the Technical Support Document (TSD). For many of the issues identified by commenters, the MPCA has already provided a

response in the SONAR or TSD in sufficient detail to establish the need and reasonableness of the proposed rule part that is the object of the comment.

II. Response to comments

The MPCA received a substantial amount of comments between 4:30 p.m. on February 22, 2021, through 4:30 p.m. on February 24, 2021. The agency carefully reviewed all comment letters submitted within this period and determined that many topics were already addressed as part of the February 24, 2021, Response. In this Rebuttal, the Agency responds to new topics. All comments were considered.

A. Tribal Consultation

Several tribal representatives provided comments that discussed treaty rights, tribal engagement, and tribal consultation. The comments indicated that the tribal representatives felt that the proposed rule changes are the result of inadequate state consultation with tribes, and that MPCA has misrepresented the process of consultation. The comments also state that “tribal government requests should be accommodated whenever possible to uphold this government-to-government relationship.”

The MPCA values the government-to-government relationship with tribes, as well as our cooperative working relationships with tribal environmental staff. Throughout the process of developing the Class 3 and Class 4 water quality standards (WQS) revisions, the MPCA and tribal environmental staff had several meetings and discussions concerning the content of the proposed rules. Some of those meetings were specifically scheduled to discuss the Class 3 and 4 WQS revisions, while others were more general discussions about water quality and ongoing MPCA work, which included this rulemaking. We characterized these discussions in the SONAR as “engagement.”

In conversations with tribes about MPCA’s ongoing water quality work, MPCA staff asked that tribes let the agency know if they were specifically interested in discussions on the Class 3 and 4 WQS. The tribes and entities that identified specific interest were Fond du Lac, Grand Portage, Leech Lake, and the 1854 Treaty Authority. Focused engagement discussions occurred with water quality staff from these Tribes and the Treaty Authority, although MPCA worked to also ensure that staff from other tribes remained informed, and certainly welcomed their engagement.

Staff-to-staff discussions are critical, and particularly helpful for discussing detailed technical aspects of water quality standards and implementation. MPCA recognizes that staff-to-staff discussions are not formal government-to-government consultation; rather they are a place to share information, start discussions on what issues, concerns, or opportunities there are for ongoing coordination or, depending on the matter and level of interest, for either the state or Tribal staff to bring to the matter to their respective leadership and recommend consultation.

To date, the MPCA’s approach to Tribal Consultation on water quality standards generally has been to provide early and sufficient information to ensure Tribes are aware of what MPCA is working on so that they may participate in staff-level engagement or formally request higher-level consultation, according to their own choices and priorities. (An exception is the wild rice sulfate rulemaking, where MPCA requested consultation.) The MPCA is currently working under its September 2013 Tribal Consultation policy,¹ which states that after MPCA informs tribes of an agency action “a Tribal Chair or Designated

¹ Available at <https://www.pca.state.mn.us/sites/default/files/p-gen5-06.pdf>

Consultation Official...may provide a written request to the MPCA Designated Consultation Official...or Tribal Chair requesting that formal consultation occur at that higher level for a specific topic.” This policy was developed with tribal review and input. The MPCA is working on revising this policy, and is discussing it with tribes at various levels. Until the policy is revised, our understanding is that consultation requests are directed from the Tribal chair or designated official to the Governor or Commissioner; and MPCA staff invited such requests for this rulemaking.

At the engagement meeting in November 2019, staff from Grand Portage requested consultation on the Class 3 and 4 WQS changes. The MPCA Commissioner had a Consultation meeting with Grand Portage in December 2019 on a broad range of topics, and staff working on the Class 3 and 4 rule revisions were informed that the water quality standards did not come up. MPCA’s tribal liaison followed up with Grand Portage staff, and they indicated consultation was requested “because they feel their comments and feedback have not been incorporated or taken into consideration.” In response, MPCA prepared more detailed information about how tribal staff feedback had been considered; which was included as part of the SONAR, Section 9, beginning on page 182.

In early August 2020, the MPCA offered further discussion to the staff from the tribal entities that had previously been engaged. Section 9 of the SONAR and Exhibit S5 were shared on August 24, but ultimately a meeting was not held. Some comments were received that mentioned consultation, and described the components of consultation.

On October 2, 2020, the MPCA was copied on a letter to Governor Walz from ten tribal nations (Fond du Lac, Grand Portage, Leech Lake, Lower Sioux, Mille Lacs, Prairie Island, Red Lake, Upper Sioux, White Earth, and the Minnesota Chippewa Tribe.) The letter included the following statement:

“In addition to MPCA’s steadfast refusal to apply the state’s 10 milligram per liter wild rice sulfate standard through enforceable permit limits in any NPDES permit for mining facilities that are known to discharge into wild rice waters, and despite tribal requests dating back over 15 years, MPCA is now proposing to weaken salty discharge criteria statewide for Beneficial Use Classes 3 and 4 (industrial, agricultural, and wildlife) water quality standards—at the request of U.S. Steel, owner of Minntac. Wild rice is a Class 4 Beneficial Use, yet MPCA has not considered the effect that these changes may have on wild rice. We ask for state-tribal consultation on this matter before any final decision.”

Based on MPCA’s review of our records, this was the only formal request for consultation made. Much of the request discusses wild rice, and MPCA had been engaged in conversations with Tribes throughout the second half of 2019 to discuss the path forward on wild rice, including ideas for a wild rice stewardship council.

On October 9, 2020, the MPCA responded to the October 2 letter, officially acknowledging the request for consultation. See Attachment 3. The letter included the following statement:

“The Minnesota Pollution Control Agency (MPCA) has been working on the proposed amendments to the Class 3 and 4 water quality standards for nearly a decade. During that time, tribal environmental staff have provided thoughtful input that has informed the current proposal. For this particular matter, we would appreciate the opportunity to share what we have heard, how we have incorporated Tribal input related to protection of aquatic life from the impacts of salty parameters, and to listen and understand your remaining concerns prior to the release of draft rule language.

*The MPCA is planning to make draft rule language available on our website the last week in October with a goal to publish the rule for formal comment in late November 2020. We would like to meet with you before these milestones. We recognize that the letter submitted is on behalf of all Minnesota Tribes, therefore we **will be setting up a meeting on Wednesday, October 14th at 4PM** during the time usually allotted to the regular occurring Tribal Leaders call with the Governor's Office...The purpose of the meeting is to walk through what we have heard from tribal environmental staff on the Class 3 and 4 rulemaking and how we have considered and incorporated their input. In advance of the meeting on the 14th, we would like to share the most recent drafts of two documents – the approach to protection of aquatic life and a portion of the draft State of Need and Reasonableness (SONAR) for the rule that describes how we have considered and incorporated the comments received during tribal engagement (attached).” (Emphasis in the original.)*

A more formal phone call between the Commissioner and Tribal leaders, and including staff from the Governor's Office, was held on October 14, 2020. In advance of the meeting the MPCA provided the version of Section 9 of the SONAR that had been provided to staff in late August, with notes as to portions that had received additional comments and where MPCA was working on revisions. The MPCA also provided a copy of Exhibit S5. During the call the MPCA provided a brief presentation on the contents of the rules, and listened to tribal comments. A written version of the comments and statements from the call was provided by Grand Portage Secretary/Treasurer April McCormick via email after the meeting, and many of the comments were echoed by others. Attachment 4 – email from April.

On November 10, 2020, Secretary/Treasurer McCormick asked that MPCA provide, in writing, information on how the MPCA sees these rule changes as complying with the Clean Water Act. On November 30, 2020, MPCA provided a letter to the Minnesota Indian Affairs Council with a response. The information provided there mirrors what MPCA provided in the SONAR and in these responses. See Attachment 2.

Executive Order 19-24 states “Meaningful and timely consultation between the State of Minnesota and the Minnesota Tribal Nations will facilitate better understanding and informed decision making by allowing for collaboration on matters of mutual interest and help to establish mutually respectful and beneficial relationships between the State and Minnesota Tribal Nations.” The MPCA considered tribal comments gained through multiple in-person discussions and written comments submitted by Tribes; particularly those comments directed at managing natural resources.

However, as also noted in the joint Tribal letter, consideration does not always result in the MPCA agreeing with comments whether those comments are from Tribal Nations or interested persons. The MPCA's choices, which may differ from Tribal comments, remain based in science and are reasonable. The rule as proposed is a reasonable path to achieving the goal of protecting water quality for industrial and agricultural/wildlife uses.

B. When narrative criteria are allowed under federal regulations

A few commenters referenced federal regulations that state that narrative criteria can only be developed “where numerical criteria cannot be established” or “to supplement numerical criteria” (40 CFR 131.11(a)). MPCA understands and agrees with this. In the SONAR (Section 2.B.), MPCA demonstrates that the numeric values currently in place are based on unsubstantiated data for Class 3

and outdated and inapplicable data from California for Class 4A. MPCA understands how, on a superficial level, it might appear that replacing numeric standards with narrative standards is not allowed. However, this rulemaking is based on a deep dive into the science underpinning the current numeric standards. Upon MPCA's review of the science, it is clear the criteria currently in rule are not appropriate for the protection of the Class 3 and 4 designated uses. Industrial and agricultural appropriators have a wide range of water quality needs that a single numeric criterion for specific parameters simply does not reasonably protect as we now understand the science behind the current rule. For example, a comparison of water quality necessary for gravel washing versus a computer chip manufacturer illustrates an expansive range, one that is best addressed through a tailored narrative standard approach. The same idea holds true for irrigation appropriators where the impact of certain parameters is highly variable depending on crop type and soil salinity, among other specific factors as outlined in the translator.

The proposed rule amendments are not like those in *Northwest Environmental Advocates*, cited by the commenters, because here the existing numeric criteria are not based on current nor applicable science and the current science leads to the conclusion that a single numeric criterion is not appropriate to apply statewide such that a narrative criteria with a translator is a reasonable and rational choice. In *Northwest Environmental Advocates* the numeric criteria remained and the narrative criteria were proposed to supplement the numeric criteria. The court held that the narrative effectively replaced (supplanted) the numeric criteria without removing the original numeric criteria – a slight-of-hand. See 855 F. Supp. 2d at 1217-18. In this rulemaking the unsupported numeric criteria is proposed to be removed, so there is no slight-of-hand. In addition, the Agency has shown that the removal of the current numeric criteria is needed and reasonable because of the outdated and inapplicable science underpinning the criteria, and because a single numeric standard would not reasonably protect the wide spectrum of water quality needs of the various users. In *Northwest Environmental Advocates*, the court observed that there was current applicable science supporting a numeric criteria and that the proposed narrative criteria ("NCC") did not protect the entire range of conditions for the beneficial use throughout the state. *Id* at 1218. ("The NCC is based on the assumption that if historical water temperatures protected salmonids then, the same water temperatures would protect salmonids now. This reasoning ignores or otherwise discounts the historical changes to salmonid populations and river conditions. The record clearly demonstrates that many of Oregon's modern waterbodies have undergone dramatic changes and are no longer the rivers they once were... The NCC attempts to restore one aspect of Oregon's historical water conditions (higher temperatures in some waterbodies) without restoring the other conditions that allowed salmonids to thrive.") The court also observed that "The NCC attempts to restore one aspect of Oregon's historical water conditions (higher temperatures in some waterbodies) without restoring the other conditions that allowed salmonids to thrive." *Ibid*. The proposed narrative standard in this rulemaking is designed to do exactly what the Oregon narrative criteria failed to do – use current science to protect the entire range of conditions necessary to protect the entire range of Class 3 or 4 beneficial uses. Commenters further assert that MPCA's proposed Class 2 specific conductance narrative translator (S-5) (which through the translator process results in numeric limits by ecoregion) is MPCA's admission that numeric criteria can be developed for Class 3 and 4. To clarify, the S-5 process and document was developed to respond to previous public comments, is for illustration only, relates only to Class 2, and is not intended to support the proposed Class 3 and 4 rule amendments. As MPCA articulated in the previous Response (Section B.2.), gathering the public's input

to establish additional water quality criteria to protect Class 2 aquatic life beneficial uses from ionic pollution is a top priority of our Triennial Standards Review. The primacy of single numeric criteria

Many of the comments throughout the process appear to take issue not just with the MPCA's move to narrative standards for the Class 3 and Class 4 WQS, but also demonstrate a general presumption against water quality standards that are tailored to specific locations or specific environmental conditions. Some commenters responded to MPCA's statement that we want to implement WQS as location-specific protective values, with the following slippery-slope argument: "If this is true, then why is the agency not proposing to dispense with all numeric criteria for all uses, and undertake solely site-specific analyses?" The commenters go on to state that such an approach would be contrary to the CWA and take extensive time and effort. The MPCA has demonstrated the need and reasonableness of the choices made in developing the Class 3 and Class 4 WQS. However, it is important to the future of water quality standards development in Minnesota to speak to this general concept more broadly.

MPCA is not proposing to dispense with numeric criteria. More to the point, the MPCA does not believe that approaches using more site-specific analyses are inherently not "numeric criteria," or not as valuable as such criteria, or are otherwise not in compliance with the Clean Water Act. Nationwide, it is clear that the general approach to water quality standards is moving towards more tailored approaches when those are appropriate for the pollutants being considered. As data gathering improves and scientific information evolves, water quality standards are increasingly taking into account how varying environmental (particularly water quality) conditions affect the manner in which a specific pollutant impacts the targeted beneficial use, including the aquatic life beneficial use.

The MPCA has used approaches that set standards, such as those for eutrophication, at different levels based on the state's different ecoregions and the different ways in which waterbodies in those ecoregions respond to specific pollutants. Minn. R. 7050.0150 subp. 4 CC. Minnesota's Class 2 water quality standard rules already include standards for some pollutants, such as cadmium, that vary depending on the levels of another component of water quality, hardness. Minn. R. 7050.0220 subp. 3a. B. (7). These relationships are fairly simple and are long-standing in Minnesota's rules.

EPA's newer draft and recommended aquatic life criteria - such as those for metals (copper, cadmium, aluminum) and nutrients in lakes - are equation-based approaches that represent that the impact of the targeted pollutant may vary based on multiple other parameters (such as pH, hardness, dissolved organic carbon, etc.) These examples demonstrate that EPA is increasingly recognizing the need for standards that vary based on specific water quality characteristics. As a specific example, EPA derived a recommended copper criteria in 2007, based on a biotic ligand model (BLM). As EPA states in their *Aquatic Life Freshwater Quality Criteria – Copper 2007 Revision Fact Sheet*, "The BLM requires ten input parameters to calculate a freshwater copper criterion: temperature, pH, dissolved organic carbon (DOC), calcium, magnesium, sodium, potassium, sulfate, chloride, and alkalinity...This allows the BLM-based criteria to be customized to the particular water under consideration."²

These equation-based criteria are considered numeric criteria, with undoubtedly site-specific results. It is inappropriate to say that approaches that aim to be more site-specific or tailored are contrary to the Clean Water Act. Further, an acceptance of such a perspective is likely to prove detrimental to the future

² Available at: <https://www.epa.gov/wqc/aquatic-life-ambient-freshwater-quality-criteria-copper-2007-revision>

of MPCA's water quality standards program and the ability to adopt the best scientifically supported standards to protect all important beneficial uses. If MPCA cannot adopt such criteria, Minnesota's water quality rules will increasingly diverge from the national guidance and practices in other states, as well as failing to reflect the latest water quality science.

C. Previous administrative law judge (ALJ) reports are not precedential

Some commenters argue that an administrative law judges' report should be binding precedent on this proceeding, particularly the ALJ report from the MPCA's previous wild rice rulemaking. Prior opinions issued by administrative law judges do not have precedential value for subsequent opinions by administrative law judges. First, judicial opinions at the same level of authority do not bind each other. For example, a trial court cannot issue an opinion that is binding on other trial courts. The opinion is the law of the case and binding on that specific case only. Likewise, ALJ opinions cannot be binding on other ALJ opinions, as these opinions come from the same level of authority. Second, the ALJ's opinion is characterized as a report, which does not possess precedential value. The report is sent to the agency and the agency reviews the report and makes the final decision, such decision is then appealable to the Court of Appeals. See Minn. Stat. 14.08; 14.15; 14.63. The opinion issued by an ALJ during the rulemaking process is not binding on an agency and does not have the finality of an adjudication. Cf. *Breimhorst v. Beckman*, 35 N.W. 719 (Minn. 1949).

IV. Additional Rule Changes

Part 7053.0260, Subpart 3. Developing effluent limits to protect industrial consumption. The MPCA is planning to add the following language to the table defining the variables in equation one of the Class 3 translator (see new underlined language). This language adds clarity to the variables used in Equation 1.

Abbreviation	Description
Qr	Applicable River Flow <u>at the Industrial Appropriator</u>
Cr	Existing River Calcium Concentration
Qww	WWTP Flow at Expanded Flow Rate
Cww	WWTP Calcium Concentration for Expanded Discharge

III. Conclusion

The MPCA has demonstrated through the SONAR, the hearing presentation and oral testimony, and its Response and Rebuttal to comments that the proposed amendments are needed and reasonable.

V. Attachments

- Attachment 1: Spreadsheet of Rebuttal Comments
- Attachment 2: MPCA Letter to MIAC, November 30, 2020
- Attachment 3: MPCA Letter to Tribes, October 9, 2020
- Attachment 4: Talking points provided by April McCormick, October 14, 2020