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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of:

Proposed Amendments to Rules
Governing Water Quality Standards,
Class 2 and Class 7 Use Designations,
Minnesota Rules Chapter 7050,
Revisor's ID Number R-4561

OAH Docket No. 65-9003-35561

The Public Rulemaking Hearing in the
above-entitled matter came on before Administrative
Law Judge Ann C. O'Reilly, taken before Susan M. Strom,
a Notary Public in and for the County of Dakota,
State of Minnesota, taken on the 11th day of December,
2019, at 520 Lafayette Road, Room 100, St. Paul,
Minnesota, commencing at approximately 3:30 p.m.

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A P P E A R A N C E S

APPEARING FOR THE MINNESOTA POLLUTION CONTROL AGENCY:

- JEAN COLEMAN: MPCA Staff Attorney
- MARY LYNN: MPCA Rule Coordinator
- WILLIAM BOUCHARD: MPCA Scientist
Water Quality Standards Unit

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1 P R O C E E D I N G S

2
3 THE JUDGE: All right. Well,
4 welcome, and thank you for taking your time to be
5 here today. Today is December 11, 2019. It's a
6 little after 3:30 p.m. and we are here for the
7 public hearing in the matter of the Proposed
8 Amendments to the Rules Governing Water Quality
9 Standards Related to Class 2 and Class 7 Use
10 Designations, Minnesota Rules Chapter 7050,
11 OAH Docket Number 65-9003-35561.

12 My name is Ann O'Reilly. I'm an
13 administrative law judge with the Office of
14 Administrative Hearings. The Office of
15 Administrative Hearings is independent from the
16 Minnesota Pollution Control Agency. We are an
17 independent agency that exists to provide hearings
18 like this in a way that is fair and neutral to all
19 parties.

20 I am here at the office of
21 administrative -- I'm sorry, at the MPCA offices in
22 St. Paul, Minnesota, but this rule hearing is also
23 being simulcast in four different locations:
24 Rochester -- let's see, Detroit Lakes, Duluth,
25 Marshall and Rochester. For those of you joining

1 us in those locations, thank you. There are room
2 supervisors there who will let us know if there is
3 any technical difficulties.

4 Why don't we have -- why don't we have
5 each of the locations check in with us now so that
6 we know that you can hear us and that we can hear
7 you. Let's start with Detroit Lakes.

8 MR. OLSON: Hi. Yeah. This is
9 Detroit Lakes.

10 (Unintelligible.)

11 THE JUDGE: All right. Let's
12 start with Detroit Lakes. If we can just have
13 Detroit Lakes. Whoever is there and is the room
14 supervisor for the staff from the MPCA there please
15 identify yourself by stating and spelling your
16 first and last name.

17 MR. OLSON: Yeah. This is Daniel
18 Olson. Daniel, D-a-n-i-e-l. Olson, O-l-s-o-n.

19 MS. BELLEFEUILLE: I'm Diane
20 Bellefeuille. D-i-a-n-e. Bellefeuille,
21 B-e-l-l-e-f-e-u-i-l-l-e.

22 THE JUDGE: Okay. And from
23 Duluth.

24 MS. AMUNDSEN: Hello. This is
25 Lucie, L-u-c-i-e. Last name Amundsen,

1 A-m-u-n-d-s-e-n. And I'm here with a nice large
2 group.

3 THE JUDGE: Wonderful. Let's go
4 then to Marshall.

5 MR. HEGRENES: Yeah. This is
6 Connor Hegrenes with the MPCA. Connor is
7 C-o-n-n-o-r. Last name, Hegrenes, H-e-g-r-e-n-e-s.
8 And there is no one here currently.

9 THE JUDGE: Okay. And how about
10 in Rochester, Minnesota. Rochester can you hear
11 us?

12 MS. WOLF: Can you hear me now?

13 THE JUDGE: I can.

14 MS. WOLF: Hi. This is Jill Wolf,
15 from the Rochester office. And I am here with two
16 ladies. I have Amy Cordry. A-m-y --

17 THE JUDGE: Hold on. Hold on. If
18 they are going to be speaking later -- I'm just
19 having the room supervisors or the MPCA staff
20 identify themselves at this point.

21 MS. WOLF: Okay.

22 THE JUDGE: All right? So in
23 Rochester we have Jill Wolf? Is that correct?

24 MS. WOLF: That is correct.

25 THE JUDGE: All right. Well, here

1 in St. Paul let's have staff introduce yourselves.

2 DR. BOUCHARD: My name is Will
3 Bouchard, W-i-l-l B-o-u-c-h-a-r-d. And I'm a
4 research scientist in the Water Quality Standards
5 Unit at the PCA. And I'm the technical lead for
6 this rule.

7 MS. COLEMAN: Jean Coleman,
8 J-e-a-n C-o-l-e-m-a-n. I am the staff attorney
9 assigned to this rule.

10 MS. LYNN: Mary Lynn, L-y-n-n. I
11 am a rule coordinator at the MPCA. I am the rule
12 coordinator assigned to this rulemaking.

13 THE JUDGE: Very good. Among the
14 other directives from the Legislature, specifically
15 those in Minnesota Statutes Chapter 14, rulemaking
16 hearings are conducted so that members of the
17 public can participate and be heard in the
18 rulemaking process.

19 I'm here to ensure that there is
20 procedural fairness, to ensure that we are all
21 courteous to one another so that all interested
22 parties can be heard, and to draw out knowledge
23 from as many voices as possible.

24 An underlying assumption of this
25 process is that we rely on the wisdom of the group.

1 Thus, we are grateful that you are contributing
2 your thoughts, experiences and expertise to the
3 formation of substantive rules.

4 Now, there's a handout -- well, there
5 are actually several handouts in the back of this
6 room here in St. Paul and in each of the rooms at
7 our satellite offices. And that handout that is
8 from our office is called OAH Rule Hearings
9 Procedures. If you don't have a copy, be sure to
10 grab one at the next break.

11 That's a short summary of what our
12 Office does and how this proceeding -- all of the
13 steps in this proceeding. It also talks about
14 comment procedures and some other things that will
15 be important for you. And I'm going to cover a lot
16 that is in that handout now. But I do think it's
17 important for you to take that with you in case you
18 have questions.

19 This hearing is part of a process by
20 which rules are adopted under the Minnesota
21 Administrative Procedure Act. During this
22 rulemaking proceeding, there are three key issues
23 that I'm going to be looking at and the Department
24 has the burden to establish. And I ask you to look
25 at this slide really carefully, because these are

1 the three things that I have to look at and that
2 the Agency has to pay close attention to in
3 rulemaking.

4 The first one is does the Agency have
5 the legal authority to adopt the rules that they
6 want to adopt. Two, has the Agency fulfilled all
7 the relevant legal and procedural requirements to
8 promulgate the rules. And then, third, has the
9 Agency demonstrated the need and reasonableness of
10 each portion of the proposed rules.

11 And so when you do your -- when you
12 write your comments or when you present your
13 comments, think of them in these three areas. And
14 that would help me to understand where your
15 challenge is to the rules.

16 Now, some of you are here to express
17 your thoughts and views on various rules. And,
18 that's certainly helpful to the MPCA and to me.
19 But my job, however, is not to rewrite the rules
20 based upon the views of participants or to select
21 one set of proposed rules over another set of
22 proposed rules.

23 Rather, my job is to ensure that the
24 statutory requirements are met for rulemaking.
25 Okay? And that's why those three key issues are

1 important.

2 I'm going to go through a roadmap of
3 how we are going to -- to go today. First, I'm
4 going to complete my remarks. And then we've
5 already introduced the panel that is here from the
6 MPCA.

7 Next, the MPCA will submit exhibits it
8 wishes to include in the hearing record. The
9 Agency will summarize the exhibits so that everyone
10 has an idea of what will be going into this record.

11 You can look at the exhibits. I
12 believe -- are they -- where are they where they
13 can look at them?

14 MS. COLEMAN: (Indicating.)

15 THE JUDGE: They are in the back
16 the room. And then in each satellite office do
17 they have copies of the exhibits? Wonderful. I
18 have copies, too. They are in big binders. And so
19 during the next break, take time to look at those
20 documents. Keep them here in the room. But they
21 are here for you to review. I believe
22 electronically they can look at the documents on
23 your website. Is that correct?

24 MS. COLEMAN: (Nodding head in the
25 affirmative.)

1 THE JUDGE: Very good. After the
2 submission of exhibits, the MPCA will make a brief
3 oral presentation of the proposed rules and the
4 reasons and need for them.

5 Finally, most of the hearing time will
6 be allotted for questions and statements from
7 members of the public. And that's the key reason
8 why we are here today.

9 In order to ensure that we have an
10 accurate record of the number of people attending
11 the hearing, I have asked that everyone sign a
12 hearing register. And it's located in the back of
13 the room here. And in our satellite offices there
14 are the registers for you to fill in.

15 You will see that it will have a place
16 for your name and your address. If you could
17 include your e-mail address, that's helpful to us.
18 Then there are two boxes that you can check. One
19 is if you want to speak, check that box. Second,
20 is if you want a copy of my report when this is
21 done, you can check that box.

22 And in the satellite offices they might
23 have an old form. And the last check box says if
24 you want to be advised of when the rules are sent
25 to the Revisor. We've changed that. That box

1 actually is if you want a copy the ALJ's report
2 check that box.

3 I take these registers with me and we
4 send that report -- if you have checked that box,
5 we send it to you at the address you've provided.
6 We ask that, if you can, provide us an e-mail
7 address that we can send you an electronic version
8 of it instead of having to waste the paper and the
9 resources of sending it in the mail. But if you
10 don't have access to e-mail, we will certainly send
11 it to you as a paper copy. Pardon me.

12 All right. Now, here's how we are
13 going to do with speakers. I'm going to take that
14 register and I'm going to call you off in the order
15 that you signed up. And we're going to kind of do
16 a round robin. I'm going to start here in St.
17 Paul, have the first person. And then we are going
18 to go to each satellite office in alphabetical
19 order, Detroit Lakes, Duluth, Marshall, Rochester.
20 One person from each. So that way there'll be
21 times with we've run out of people at each of those
22 locations and they'll just say pass or nobody and
23 then we'll get through everyone and we will have
24 the bulk of the people here in St. Paul. So that's
25 how we'll work. We'll just go one by one.

1 So I'm going to go back on this one.
2 Here are some things that what you will do when you
3 come up to speak. When I call your name, come on
4 up here. State and spell your first and last name,
5 give us your address and let us know what group
6 you're from, if you want to identify yourself with
7 any particular group.

8 Remember to speak loudly, slowly and
9 clearly. We have a court reporter here and she's
10 trying her best to take down everything we say.
11 But it's hard to do if she can't hear you or if you
12 are not speaking clearly.

13 It's really helpful when you give your
14 comments to identify what particular rules or rule
15 parts that you are addressing, because that will
16 help me. Because I have to go through each rule
17 and determine the need and reasonableness on the
18 ones that are challenged. So that is very helpful.

19 What I think is also helpful is
20 sometimes, if you are like me, I like to write out
21 everything I say. So if it's helpful, you can ask
22 me to mark your written comments into the record.
23 I will mark them as an exhibit. They will come
24 into the hearing record and then you don't have to
25 send them in separately. They're already into the

1 record. All right? So you can do that if you
2 wish.

3 I expect to have plenty of time to have
4 everyone to be heard today. But it's always good
5 if you can organize your thoughts by the time you
6 come on up here and, you know, have a path as to
7 where you'd like to go. I promise you that I will
8 be the last person to leave this room and that you
9 will be heard.

10 A rule hearing is similar to a
11 legislative hearing or a meeting at a local city
12 council. You have the opportunity to speak and ask
13 questions of participants. It's fairly informal.
14 And it's important that we all be courteous to each
15 other.

16 I told you about we are having these
17 rule hearings transcribed. So hear's some helpful
18 hints when you have a court reporter taking
19 everything down. We talked about speaking slowly
20 and clearly and loudly. And remember, that only
21 audible statements go into the record. So head
22 nods or gestures, they don't get transcribed.

23 Please, spell out names or technical
24 terms. There are a lot of technical terms in these
25 types of rules that I might not be familiar with or

1 our court reporter might not be familiar with.
2 It's helpful if you spell those out. Also, there's
3 a lot of use of acronyms, like MPCA. So the first
4 time you use an acronym, say, "the Minnesota
5 Pollution Control Agency, MPCA." You don't have to
6 use that one now. But if there is another acronym
7 that you are using, please do it that way so I know
8 what you are talking about.

9 If I interrupt you while you are
10 speaking, I'm not trying to be rude. Sometimes I
11 just have to make sure that I heard you correctly,
12 number one. Number two, if I need something
13 spelled or if I didn't understand what you said or
14 if you are going too fast for me. Because I try to
15 take -- I learn most by writing what I hear. It's
16 my way of processing twice. I hear it, I write it
17 down. And I find that to be helpful to me. So
18 please don't be taken aback. I don't want you to
19 lose track of your point. But I might interrupt
20 you just briefly to help me out.

21 We also have to remember that we all
22 should be courteous with each other, not to
23 interrupt, not to clap or speak when other people
24 are speaking. And I don't expect that to be a
25 problem here today.

1 Well, let's turn to comment period.
2 Under Minnesota Statute section 14.15, subdivision
3 1, it provides that the administrative law judge
4 may by order keep the hearing record open for up to
5 20 days after the end of the public hearing.

6 So I'm ordering that right now. We are
7 going to leave this open for another 20 days. So
8 starting today the comment period is open for 20
9 days. That puts us to New Year's Eve, December 31,
10 2019. An easy date to remember. By 4:30 I need
11 all your comments. And we will talk about how you
12 submit those comments. They need to be here by
13 that date.

14 Now, there are five ways that you can
15 submit comments in this case. You can come here
16 and offer, as many of you have done, come here and
17 you are er going to offer oral comments. You can
18 offer written comments, like we talked about.
19 Submit your written comments as an exhibit. You
20 can provide an eComment. That's really an easy way
21 to do it. And you go onto that website. My
22 handout has the link for that. And you can do your
23 eComment. But a little bit of trick to that. I
24 don't love the eComment system. It's difficult to
25 use for me. I find it difficult sometimes because

1 it says topics and discussions and the words aren't
2 the words that I usually use. And so I found that
3 it would be very difficult for you to sit and type
4 in all your comments. It might be easier if you
5 attach as an attachment to your comments. All
6 right? So have your comments written out in a Word
7 Document or whatever you want and you can attach
8 it. And that way it will say your name, your
9 comment and that will be the attachment. And
10 that's a good way for me to just print them out.

11 Also, if you don't want to do it
12 electronically, you can certainly send it by U.S.
13 Mail to us. And that's the address on my handout,
14 attention to our -- one of our legal assistants,
15 Denise Collins. Or you can fax it. Kind of an
16 old-fashioned way of doing it. So there are all
17 those different ways. But I must have them in my
18 hand by 4:30 on December 31, 2019.

19 So, in addition to comments, we have
20 time for rebuttal. That's an additional 5 business
21 days. Business days, that doesn't include holidays
22 or weekends. So that puts us at January 8, 2020.
23 Now, a rebuttal is really a reply to something
24 somebody said. It's not new material. Don't
25 submit new stuff. That's just to reply to

1 something else somebody said. That's where
2 eComments is really good. Because eComments, when
3 we get our comments, we download them into the
4 eComments so that everybody can see what other
5 people are saying. That way, you might want to
6 submit a rebuttal to somebody, comments, or to
7 present something else in response to somebody
8 else, to somebody's comments. And so you can keep
9 track of what's going on by going to that eComments
10 website.

11 Now, after January 8th, that's when I
12 prepare my report. Usually -- it's usually due
13 within 30 days of the end of the comment period.
14 Here it would be January 8, 2020. So I have 30
15 days to present my report. Sometimes there are
16 extensions that happen. But you can think to have
17 it in early February.

18 My report will talk about the three
19 issues that we mentioned earlier. And you can
20 receive a copy of that report for free by signing
21 up on that sign-up sheet.

22 When you submit -- did I turn this off
23 accidentally? When you submit your comments, it's
24 really helpful in that if you are going to do that
25 attachment document in the Re line where you say,

1 you know, the regarding, you should put the name of
2 this rule. I don't know what I'm hitting here.
3 But -- you should put the name of the rule and you
4 should put the docket number.

5 One more down. The 17 would be great.
6 So at the bottom of my slide here it says include
7 in the subject matter line the words "Water Quality
8 Standards Rules" and the OAH docket number.
9 Because when you have that docket number, that's
10 how my office gets it to me. If for some reason it
11 gets sent in, that's how we know it's this rule.
12 Because we have several rules going on at all
13 times. And that makes sure it gets routed to me.
14 So those are those big dates that you want to
15 remember.

16 All right. So I think I have said
17 everything I need to say. We are going to now turn
18 to -- turn to the Agency.

19 Ms. Lynn, are you going to start with
20 the Agency presentation?

21 MS. COLEMAN: Thank you, Your
22 Honor. I will start.

23 THE JUDGE: Thank you.

24 MS. COLEMAN: My name is Jean
25 Coleman. Which I have spelled previously. I am a

1 staff attorney with the Minnesota Pollution Control
2 Agency, which I will refer to as Your Honor did as
3 MPCA.

4 The MPCA has an address at 520
5 Lafayette Road North, St. Paul, Minnesota 55155.
6 And I am appearing in this rule proceeding on
7 behalf of the MPCA.

8 As you stated, Your Honor, the
9 Minnesota Pollution Control Agency is proposing
10 amendments to rules governing water quality
11 standards, specifically Class 2 and Class 7 use
12 designations.

13 First, I would like to reintroduce the
14 MPCA staff here today who will be making a
15 presentation about the proposed rule amendments and
16 are available to respond to questions if needed.

17 Dr. Will Bouchard is a research
18 scientist in the Water Quality Standards Unit of
19 the MPCA's Environmental Analysis and Outcomes
20 Division. Mr. Bouchard is the lead scientist for
21 the proposed rules. After introduction of the
22 hearing exhibits by me, Mr. Bouchard will make a
23 presentation on the proposed rule amendments.

24 Mary Lynn, to my left, is the MPCA rule
25 coordinator for this rulemaking. Ms. Lynn manages

1 the administrative procedures aspects of the rule
2 and is the point of contact for process related
3 questions.

4 Before the presentation, I would like
5 to submit into the hearing record the hearing
6 exhibits contained in the three-ring binders at
7 your desk. The exhibits are also posted at the
8 Agency's website and are available on the table in
9 the back of this room.

10 The purpose of these documents, as you
11 outlined, is to first document the legal authority
12 of the Minnesota Pollution Control Agency to adopt
13 the proposed rule. Second, to demonstrate that the
14 Agency has fulfilled all relevant legal and
15 procedural requirements for promulgating the rule.
16 And, finally, to demonstrate that each portion of
17 the proposed rule is needed and is reasonable.

18 I will quickly review the exhibits and
19 relate each exhibit to one of the three purposes I
20 just mentioned. There is an index of the exhibits
21 at the front of the first hearing exhibit binder.

22 Exhibit C contains the text of the
23 proposed rule amendments. Exhibit D contains the
24 statement of need and reasonableness, which is also
25 referred to as SONAR, S-O-N-A-R, that was published

1 with the rule. The SONAR documents has statutory
2 authority of the Minnesota Pollution Control Agency
3 to adopt the proposed rule. The MPCA has legal
4 authority to promulgate and revise water quality
5 rules and water quality standards under Minnesota
6 Statutes section 115.03, subdivision 1 and
7 Minnesota Statutes 115.44.

8 The SONAR in Exhibit D also
9 demonstrates that each portion of the proposed rule
10 is needed and is reasonable. The SONAR includes
11 both a general description of why the rule is
12 needed and reasonable as well as detailed
13 descriptions of why each proposed rule part is
14 needed and reasonable.

15 Many of the other exhibits demonstrate
16 that the Agency has fulfilled all relevant legal
17 and procedural requirements. These include Exhibit
18 A, the initial request for comments that started
19 the formal rulemaking process; Exhibit C, the
20 Revisor's approval of the proposed rule; Exhibit E,
21 the certificate verifying submission of the SONAR
22 to the Legislative Reference Library; Exhibit F,
23 the Dual Notice of Hearing as mailed, as posted
24 electronically on the MPCA web page and as
25 published in the State Register; Exhibit G, the

1 certificate of mailing the Dual Notice of Hearing
2 and the certificate of accuracy of the mailing
3 list; Exhibit H, the certificate of additional
4 notice and evidence of implementation of the
5 additional notice plan; Exhibit K, evidence of
6 compliance with requirements to notify legislators,
7 the Department of Agriculture and municipalities.
8 And, finally, also in Exhibit K, the approval by
9 the Commissioner of Management and Budget of the
10 Agency's fiscal analysis of the impact of the rule
11 and the certificate of mailing notice to those
12 persons who requested that a hearing be held.
13 Exhibit I includes copies of comments on the
14 proposed rule that were received by the MPCA during
15 the prehearing comment period.

16 At this time, the MPCA would also like
17 to introduce Exhibits L-1, L-2 and L-3, which have
18 been added to your book and the hearing records in
19 the back.

20 These exhibits include a copy of the
21 slides from the presentation MPCA will be making
22 today at the hearing. It includes a draft
23 modification of the proposed rule amendments that
24 are being considered by the MPCA in response to
25 comments received in the prehearing comment period.

1 And, finally, an amended certificate of mailing a
2 notice of hearing to those who requested a hearing.

3 As an alternative to paper, hearing
4 attendees can access all the hearing documents on
5 the MPCA website. And the website address and
6 wi-fi access code are written on the whiteboard
7 behind me.

8 Now Mr. Bouchard will make a
9 presentation outlining the proposed rule amendments
10 and summarizing the need for and reasonableness of
11 the proposed rule amendments.

12 The presentation -- because the rules
13 are very scientifically based, the presentation
14 will be somewhat lengthy and take about 45 minutes.
15 When finished, Mr. Bouchard will be happy to answer
16 any clarifying questions on the material presented.

17 I have nothing further for Your Honor
18 at this time.

19 THE JUDGE: Okay. Very good.
20 Let's check in quickly with each of our satellite
21 locations, making sure that they're all -- if you
22 could just -- I can see you. I don't know if you
23 can see me. If you could just -- if the room
24 leader could just raise their hands so I know that
25 you are all hearing me.

1 All right. I think so, except for the
2 far corner. Very good. All right. So now we will
3 turn to Dr. Bouchard.

4 DR. BOUCHARD: Thank you, Judge
5 O'Reilly. So to give you an overview of what I'll
6 cover, and I apologize, I won't exactly be brief,
7 but I think it's worthwhile to have a comprehensive
8 overview of these rule amendments so that we can
9 not just summarize them but get into the details
10 regarding how these rules are -- why these rules
11 need to be changed and why it's reasonable and how
12 that fits into a broader context of water quality
13 standards.

14 So, first, we will start with an
15 overview of the rule amendment process and
16 schedule. And Mary Lynn will cover that. Then I
17 will talk about the MPCA's statutory authority to
18 adopt these rules.

19 I will provide an overview of water
20 quality standards, including how the proposed
21 amendments fit into water quality standards. I
22 will give an overview of these rule amendments and
23 then get into the technical elements, the two main
24 technical elements of this rule, the review and
25 designation of warm and cold water habitats and

1 tiered aquatic life uses. I'll also cover the
2 public participation and stakeholder involvement
3 for this rule and summarize the comments that we
4 have received thus far as well as put forward a
5 modification to the proposed rules.

6 So I will hand this over to Mary Lynn.

7 MS. LYNN: Thank you, Will. I
8 have a quick slide or two here, just to provide
9 some context for the rulemaking process. This is a
10 rather high-level graph, but it does show the
11 Administrative Procedure Act, key notices and steps
12 of the process.

13 I should note that not on this graph is
14 even before that first green box on the very left,
15 the Governor's Office Preliminary Review, even
16 before we start the process, the MPCA will engage
17 in outreach activities and stakeholder meetings to
18 share information and data that we have and discuss
19 possible rulemaking. So internally we kind of
20 think of that as the rule development process. We
21 haven't actually started rulemaking, but we do
22 begin with stakeholder engagement well before we
23 start the formal process.

24 So this graph shows starting at the
25 left there is you see green boxes. These are the

1 four points in the process where we communicate
2 with the Governor's office. The first being the
3 Governor's office preliminary review. This is when
4 we notify the Governor's office that we are
5 considering doing a rulemaking and what we
6 anticipate that rulemaking to be about.

7 The second box is the Governor's office
8 review. That is where we have draft rules
9 proposed. And we send those over to the Governor's
10 office with the SONAR. Again, the statement of
11 need and reasonableness explaining what we are
12 doing.

13 The next point of Governor's office
14 review is after we have completed the hearing and
15 the Office of Administrative hearing review of the
16 rules, at that point we consider the rules to be in
17 final and the Governor's office final review.

18 However, there is on the very far right
19 there the Governor's office veto period. Which is
20 also in the statute.

21 Public comment and participation, those
22 areas are identified in the yellow boxes. The
23 Request for Comments that Jean Coleman had
24 mentioned. The Notice of Intent to Adopt Rules,
25 that is the point in the process for this

1 rulemaking where the dual notice was published and
2 we ask for comment on the proposed rules. And,
3 also, the blue box on top there, Adopt With a
4 Hearing, is another point in the process for public
5 input and participation.

6 Lastly, we have the Office of
7 Administrative Hearing's office where their role,
8 as Judge O'Reilly identified, is to review the
9 rules and the rule record and make a report on the
10 rules.

11 The MPCA will then take action based on
12 the ALJ's report. Ultimately, the rules are filed
13 with the Secretary of State's Office. Once the
14 Governor receives those rules from the Secretary of
15 State's Office, the Governor's office has a 14-day
16 veto period.

17 If that does not happen, and we don't
18 typically see that happen in large part because we
19 have kept the Governor's office informed all the
20 way throughout this rule process, and at the end
21 there we get to the notice of adoption of the
22 rules.

23 So just a real high-level timeline
24 here. This sort of explains where we are at in
25 terms of the graph we just looked at. We did have

1 a public information meeting on these rules on
2 October 29. Our hearing today, Judge O'Reilly will
3 issue her order. We will review that, take action
4 on the order. And we hope to publish notice of
5 adoption of these rules in the State Register
6 spring/summer of 2020. Because these are water
7 rules, these will then go on to U.S. EPA for review
8 and approval.

9 I will hand it back to Will.

10 DR. BOUCHARD: Thank you, Mary.
11 So, the first thing I will talk about is the MPCA's
12 statutory authority to adopt these rules. The
13 Minnesota Procedures Act requires that the agency
14 proposing rules has the authority to adopt those
15 rules. And the MPCA has the statutory authority to
16 adopt these rules. And, in fact, is required by
17 the Clean Water Act to adopt such rules.

18 So as part of the cooperative federal
19 structure of the Clean Water Act, states are
20 required to establish water quality standards.
21 Which is the first bullet there on the top.

22 In terms of Minnesota statutory
23 authority, Minnesota Statute 115.44 gives the MPCA
24 authority to classify waters of the state. Which
25 is very relevant to this current rule. And

1 Minnesota Statute 115.03 gives the MPCA authority
2 to establish or alter standards for any water of
3 the state and perform all acts necessary to
4 participate in delegated Clean Water Act programs.

5 So next I want to talk about water
6 quality standards and in particular how does this
7 rule, these rule amendments fit into this
8 fundamental tool of the Clean Water Act.

9 So we can boil water quality standards
10 down to three main questions: What and who are we
11 protecting? So waters are protected for things
12 like drinking water, aquatic life, recreation,
13 industrial use and so forth. These are the
14 beneficial uses. That's the first part. And
15 that's the part that's most relevant to this rule.
16 But water quality standards also consider what
17 conditions are protective. Those are the
18 standards. So in order for our water quality to be
19 usable for drinking water, what conditions do you
20 need to maintain in that water so that it's usable
21 for that use.

22 For aquatic life, for example, to
23 protect warm water aquatic life there's a 5
24 milligram per liter daily minimum dissolved oxygen.
25 So we need to maintain those conditions in order to

1 have healthy warm water aquatic life.

2 The third part of standards is how do
3 we maintain high water quality. And that's
4 antidegradation. So for waters that are doing
5 better than the minimum that's required in terms of
6 the standards in order to protect that use how do
7 we maintain those higher than minimum standards.

8 Now, the proposed rule amendments today
9 do not amend the narrative or numeric standards or
10 antidegradation rules. So those two elements are
11 not being changed in any part in 7050. Which is
12 the portion of Minnesota rule that covers water
13 quality standards. However, uses are very
14 important because they determine the standards that
15 apply to a water body as well as impacting
16 antidegradation provisions.

17 So the Clean Water Act states that each
18 state must specify appropriate water uses to be
19 achieved and protected. The classification of the
20 waters of the state must take into consideration
21 the use and value of water for public water
22 supplies, protection and propagation of fish,
23 shellfish and wildlife, recreation in and on the
24 water, agricultural, industrial and other purposes,
25 including navigation. And to that end the MPCA --

1 or Minnesota has seven beneficial use classes.

2 Depending on the water body, several of
3 these use classes apply. Most waters are protected
4 for classes 2, 3, 4, 5 and 6. Waters that are
5 protected for drinking water are also protected for
6 classes 2, 3, 4, 5 and 6. And then the next common
7 grouping are limited resource value waters which
8 are protected for classes 3 through 7. So they are
9 not protected for drinking water or aquatic life.

10 I just want to note that these numbers
11 1 through 7, they don't imply a priority ranking.
12 So a Class 1 drinking water is not more important
13 or more valuable than aquatic life and aquatic life
14 is not more important than industrial use. These
15 are just codes that are applied to these waters.

16 Now, this rule amendment deals with
17 aquatic life. And it's one of the most important
18 beneficial uses in Minnesota. It protects fish,
19 insects, mussels, plants, aquatic organisms that
20 live in, on or depend on healthy aquatic ecosystems
21 as well as the ecosystem services these waters
22 provide. And one of the reasons why it's so
23 important is because this use applies to nearly
24 every water in the state. The only waters in the
25 state that aren't protected for Class 2 are the

1 Class 7 waters.

2 In addition, aquatic life is often one
3 of the most protective or sensitive beneficial
4 uses. So a lot of the work that we do is to
5 protect or restore aquatic life beneficial uses.

6 Now, the Clean Water Act allows states
7 to adopt subcategories. And in Minnesota we have
8 subcategories of Class 2 aquatic life. So beyond
9 the class, we have subclasses. And these are
10 dividing the aquatic life use class, more or less,
11 into natural classifications. And these are -- the
12 first three are just the lakes. So Class 2A for
13 cold water lakes and streams, Class 2B for warm
14 water and cool water lakes and streams, Class 2B
15 for warm water lakes and streams. Classes 2Bd and
16 2B are both warm water habitats. The only
17 difference is Class 2Bd is also protected for
18 drinking water. And throughout this presentation I
19 will use the shorthand "warm water" to mean both
20 2Bd and 2B. In addition, the rule language defines
21 2Bd and 2B as warm and cool water. Again, I will
22 just use "warm water" to encompass these. There is
23 also Class 2D which is designated to wetlands.

24 Now, beyond the subclass, streams are
25 further divided into tiered aquatic life uses. So

1 there's exceptional, general and modified uses.
2 And these are based on the biological potential.
3 The highest biological potential streams can meet.

4 I'm not going to go into a lot of
5 detail right now on the subclass and the tiered
6 aquatic life uses. These are the main elements of
7 this rule. So I will go into each of those
8 individually in a moment.

9 So the way that we implement much of
10 the aquatic life use protections is through the
11 intensive watershed monitoring strategy. So there
12 is 80 watersheds in the state. On average, eight
13 of these watersheds are sampled intensively each
14 year so that over a 10-year cycle all 80 watersheds
15 are sampled.

16 For that year, these watersheds are
17 sampled for biology, habitat and chemistry. And
18 that information is used for these steps that
19 follow that monitoring, following the monitoring of
20 these watersheds. So we review the use
21 designations to determine are the uses correct. We
22 perform assessments to determine if the standards
23 are being met to protect those uses. If they
24 aren't or they are, that defines the watershed
25 restoration protection strategies. What do we need

1 to do to restore these waters or what do we need to
2 do to protect these waters. And then from that
3 stems the water quality management activities.
4 What actually is done on the landscape to restore
5 or protect these waters.

6 Now, this rule is focused on use
7 designations. Because it's important that we
8 assign the correct use designation to these waters,
9 because it affects what standards apply to that
10 water. Which, in turn, affects whether or not it's
11 determined to be meeting or not meeting standards
12 protecting that aquatic life beneficial use, which
13 then impacts how we go about protecting or
14 restoring those waters. So everything that follows
15 that use designation is incumbent on whether or not
16 that use designation is correct.

17 So there is a number of terms that I
18 will use throughout. And I want to define these.
19 These are terms that are part of the Clean Water
20 Act and because we are required by the Clean Water
21 Act to follow those requirements when we propose
22 use designations.

23 So, first, "use attainability
24 analysis." This is a structured scientific
25 assessment of the factors affecting the attainment

1 of the use which may include physical, chemical,
2 biological and economic factors. So for some of
3 the use designations we are proposing today, a use
4 attainability analysis was required. But even for
5 those waters where we are not doing a formal use
6 attainability analysis we are doing a similar type
7 of analysis.

8 The second term is "existing use."
9 These are uses that are actually attained in the
10 water body on or after November 28, 1975. So if a
11 stream supported a cold water aquatic life use in
12 1990, that's an existing use. It was there after
13 November 28, 1975. And that establishes that that
14 use cannot be removed even if it's lost through
15 degradation to the point where it's not restorable.

16 The third term is a "101(a)(2) use."
17 And the Clean Water Act defines this as the
18 national goal that wherever attainable, an interim
19 goal of water quality which provides for the
20 protection and propagation of fish, shellfish and
21 wildlife. So this is what we are talking about.
22 Aquatic life is a 101(a)(2) use and it has certain
23 requirements when we review these use designations.

24 So my first of three flowcharts. So
25 the requirements for performing a use attainability

1 analysis or a UAA designating a use one of the
2 first considerations is whether or not the use is a
3 101(a)(2). In other words, is it aquatic life or
4 recreation. If it's not, there is different
5 requirements in terms of that UAA depending on
6 whether or not you are designating a non 101(a)(2)
7 use or removing or revising it. However, again,
8 this rule deals with aquatic life which is a
9 101(a)(2) use, so those -- the top portion of the
10 flowchart are not relevant.

11 So if it is a 101(a)(2) use, aquatic
12 life, then one of the questions is is it a
13 designation of a subcategory with more stringent
14 standards. If the answer is yes, then a use
15 attainability analysis is not required and we would
16 designate the appropriate use subcategories such as
17 a Class 2A cold water or an exceptional use.

18 However, if it is the removal of a use
19 or a use subcategory or the designation of a
20 subcategory with less stringent standards than the
21 currently assigned use, then a UAA is required and
22 that process requires a demonstration that the
23 current use is not an existing use nor a feasibly
24 attainable use.

25 If it is either of these two, then you

1 would retain the current use and, of course, we
2 wouldn't be proposing that as part of the rule
3 because the use is correct.

4 But if it is not either an existing use
5 or a feasibly use, then you could designate the
6 appropriate use subcategory, a Class 2Bd or a
7 modified use, for example.

8 So just to summarize this rule
9 amendment. This rule is focused on assigning
10 aquatic life uses based on biological potential.
11 It assigns accurate and representative aquatic life
12 use designations so that the steps that follow this
13 use designation, the assessments, the water quality
14 management activities on the landscape are correct
15 and effective and by applying the right standards
16 and implementing appropriate water quality
17 management actions, those outcomes are going to be
18 better and water quality will be improved.

19 This rule includes use designations we
20 can group into two types. So going back to those
21 subclasses and tiered aquatic life uses or TALUs.
22 There are cold and warm water designations based on
23 that natural water body type, the subclasses in
24 Class 2, and tiered aquatic life use designations
25 based on the biological potential for those waters.

1 This map shows where these use
2 designation proposals are and what they are. You
3 notice the grayed out areas are watersheds that
4 contain some of these use designation proposals.
5 The reason why it's only some watersheds is because
6 these use designations are structured by that
7 intensive watershed monitoring strategies. So
8 these use designations support that strategy.

9 So now I will get into the first -- the
10 technical portion. And that is the designation of
11 warm and cold water habitat. So coming back to the
12 subcategories in Class 2. We are focusing on
13 subclass here, so we don't have to worry about the
14 tiered aquatic life uses now. We are only talking
15 about streams and lakes. So we can drop out Class
16 2D. So this is just determining in which of these
17 three bins do these lakes and streams belong. Are
18 they cold water habitats, 2A. Are they warm water
19 habitats, either 2B or 2Bd.

20 There is also two stream resources that
21 also -- that are currently classified as Class 7,
22 limited resource value waters and not protective
23 for aquatic life. We've collected data from these
24 streams and it demonstrates that these should be
25 designated as Class 2.

1 So, as I said, most streams and lakes
2 are classified as either warm water, Class 2B or
3 2Bd, or cold water habitats. The only streams that
4 aren't included in that are the Class 7s.

5 So the proposed amendments don't change
6 this dichotomy. The definition at the top that
7 defines what a Class 2A water is; these cold water
8 habitats shall be such as to permit the propagation
9 and maintenance of a healthy community of cold
10 water aquatic biota, that definition does not
11 change, nor do the standards that protect such
12 waters. This rule only changes the designation for
13 some waters based on the biological communities
14 that they support or should support as required by
15 the Clean Water Act.

16 And, again, these designations need to
17 be correct because the biological assessment tools
18 which set expectations for the types and species of
19 fish and invertebrates we find in these waters is
20 defined by the designation. So if we have a
21 naturally warm water system that's incorrectly
22 designated as cold water, we have expectations to
23 find cold water species in that water body. But if
24 it's naturally warm water, they are not going to be
25 present and we are going to make errors in terms of

1 the assessment and management of those waters.

2 So, historically, the MPCA relied
3 directly on DNR's trout waters list. So the DNR
4 maintains a list of trout waters. These are in
5 Minnesota Rules 6264.0050. And, historically,
6 anything the DNR classified as a trout water we
7 automatically designate it as a cold water Class
8 2A. And, for the most part, this is a very good
9 list. This is a good starting point. Most of
10 those trout waters are in fact cold water habitats.
11 But the MPCA and the DNR's goals differ to some
12 degree.

13 So, for example, I mean, the DNR is
14 focused on maintaining these as fisheries for cold
15 water communities. Trout in particular. The MPCA
16 is focused on maintaining these biological
17 communities to their highest attainable potential
18 and to their most natural state.

19 In addition, how we implement those
20 goals is somewhat different. So the DNR designates
21 some waters that they do not manage for trout and
22 do not expect to find trout or other cold water
23 organisms as trout protection waters which are
24 adjacent or upstream or downstream of these trout
25 waters and they are warm water habitats. But those

1 are brought into the MPCA's list as 2A, although
2 they do not support or naturally support cold water
3 communities.

4 In addition, there are some cold water
5 habitats that don't support trout that the DNR does
6 not list on their trout waters list. So they are
7 small streams that don't have the habitat that
8 support trout, but they are cold and they have cold
9 water invertebrates, so it's appropriate based on
10 the MPCA's definition of cold water habitats that
11 we designate those as cold water habitats even
12 though the DNR does not maintain those on the trout
13 waters list.

14 The DNR also considers landowner
15 requests for their designations for trout water.
16 So there are some waters that the DNR does maintain
17 for cold water communities, specifically trout,
18 that are not on their trout waters list. But it's
19 appropriate for the MPCA to classify those as Class
20 2A waters.

21 And then, finally, the DNR does not
22 need to consider existing uses as defined by the
23 Clean Water Act. The MPCA is a Clean Water Act
24 delegated program in the state, and so we do need
25 to consider existing use.

1 So, for example, going back to that
2 example when I defined existing use. If you have a
3 cold water habitat in a stream in 1990 and it
4 becomes degraded to the point where it's not
5 restorable, that's still an existing use and the
6 MPCA needs to retain that on our list. However,
7 the DNR may remove that from their trout waters
8 list if they determine that it's not reasonable or
9 feasible to maintain it or it's not wise to spend
10 money on trying to maintain a water that cannot be
11 restored.

12 So the review process involved is
13 usually triggered by review of MPCA data. Fish and
14 macroinvertebrate data. We also get temperature
15 logger data from most of these sites. So get very
16 detailed temperature data to determine whether or
17 not the temperatures are present during the
18 summertime to support cold water communities. We
19 also review DNR data, biology, temperature,
20 stocking records, creel surveys, management
21 objectives. And the DNR data is often very useful
22 because it usually goes further back into the
23 records. So '50s, '60s, '70s, '80s. So that helps
24 us get a handle on the existing use or the
25 restorability of these waters.

1 Following a preliminary recommendation,
2 we have discussions with the DNR to determine what
3 their management goals are for these waters and if
4 we are interpreting the data correctly in terms of
5 the attainable uses within these systems. If the
6 outcome of this is that the use designation is
7 incorrect, the MPCA will document the use
8 designation recommendation as required for the
9 rulemaking.

10 So flow chart number 2. So this is the
11 process the MPCA goes through with reviewing these
12 thermal habitats and goes through the requirements
13 of the Clean Water Act for designating uses.

14 One of the first things we determine is
15 what is the natural thermal habitat. So are these
16 streams in the absence of human impact would they
17 be warm or cold water.

18 If the answer is these are naturally
19 warm water habitats, then we check to see are they
20 currently designated correctly. Are they warm
21 water. If they are, then there is no use
22 designation revision needed. And so, of course, we
23 don't include those within this rule.

24 But if the answer is no, it is
25 incorrectly designated as a cold water habitat, we

1 perform that use attainability analysis
2 demonstrating that it's not an existing use nor a
3 feasibly attainable use and we would propose it as
4 a warm water habitat through rulemaking.

5 If it is a naturally cold water system,
6 then we start asking, okay, is it an existing use
7 or is it a feasibly attainable use. If either of
8 those is true, again, what is the current
9 designation. If it's currently designated as a
10 cold water habitat, then it's correctly designated.
11 We don't need to do a use designation. And, of
12 course, we don't have any of those in this rule
13 amendment. But if the answer is no, it's currently
14 designated as a warm water and it should be a cold
15 water habitat, we would propose to change that in
16 the rulemaking.

17 If the answer is no, it's not an
18 existing use nor a feasibly attainable use, then it
19 could be designated as a warm water habitat.
20 Again, consistent with the Clean water. Where we
21 don't have any of these either. So the use
22 designations around these warm waters and cold
23 waters are only correcting the designations from
24 what they are naturally.

25 So another way to look at this is

1 through this table. These are different examples.
2 I will just focus on these two, because these are
3 relevant to the current rule. So considering what
4 is the natural stream type, what is the existing
5 use, what is the attainability. If the water is
6 currently designated as a cold water, the review
7 determines that it's naturally a warm water
8 habitat. If it's a naturally a warm water habitat,
9 the existing use would not be cold water. It would
10 be warm water. Because that's it's natural. The
11 cold water wouldn't be feasibly attainable because
12 the natural condition again is warm water. So the
13 correct use designation would be warm water. We
14 would need to go through a rule amendment because
15 this changes it from cold water to warm water. And
16 because the warm water has less stringent standards
17 it requires a use attainability analysis.

18 So an example of that in this rule is
19 Willow Creek and the Red Eye River -- or Red Eye
20 Watershed. This creek was the DNR thought that it
21 would have potential as a trout water. They
22 stocked it for trout for several years but stopped
23 stocking in the early '70s when they determined
24 that they weren't able to establish a native
25 population or even getting much carryover from year

1 to year in this stream. So based on that
2 information and more current information, this
3 system is determined to be a warm water system and
4 so it should be corrected in the rules so we can
5 manage it appropriately.

6 The second example are streams that are
7 currently designated as warm water. We collect
8 data or the DNR collects data which indicates that
9 the natural stream type is cold water. For many of
10 these they currently meet that cold water use or at
11 least demonstrate that that use is feasibly
12 attainable or could be restored. So they should be
13 designated as a cold water habitat. We also need
14 to go through a rule amendment for this, but there
15 is no use attainability analysis needed. However,
16 we are doing an analysis, regardless, which is
17 similar. So for this one we also have these in the
18 proposed rule amendments.

19 So an example of this would be the
20 Cloquet River or a portion of it where the MPCA
21 sampled fish and macroinvertebrates and temperature
22 from this river. We found brook trout in this
23 river. We found cold water adapted invertebrates.
24 Temperature loggers indicated that it has cold
25 temperatures that would support cold water habitat.

1 So this use needs to be corrected.

2 So that's the first technical element.
3 I guess I would pause for a moment, Judge O'Reilly.
4 I don't know if you have any questions on this
5 before I proceed to the next technical bit?

6 THE JUDGE: No. Does anybody else
7 have a question? Should we save the questions or
8 do we want to --

9 DR. BOUCHARD: Well, why don't we
10 just -- we'll go through --

11 THE JUDGE: Okay. Why don't we do
12 that. Write your questions down --

13 UNIDENTIFIED SPEAKER: I have a
14 question.

15 THE JUDGE: Okay. What I'm going
16 to have everybody do is write your questions down
17 and then when it's your turn to speak ask your
18 questions. Because, otherwise, I will lose control
19 of this process. Okay? So write your question
20 down if you have it now and you can ask it when we
21 call your name.

22 All right. So let's proceed to the
23 next -- because here's how we're going to go.
24 We're going to have Dr. Bouchard finish. We're
25 going to take a short break where people can take

1 some time to look at the exhibits. Okay? Use the
2 restroom. And then we are going to go straight on
3 to questions and comments. All right.

4 Dr. Bouchard.

5 DR. BOUCHARD: Thank you, Your
6 Honor. And, hopefully, maybe I'll have an answer
7 to those questions before I get to the end of this.

8 THE JUDGE: Okay.

9 DR. BOUCHARD: So the second
10 technical element is the tiered aquatic life uses.
11 So these are beneficial uses based on biological
12 potential. So, again, coming back to this slide.
13 Before, we were just talking about the subclasses
14 for lakes and streams. We are going to add back
15 these tiered aquatic life uses. So once we know
16 what the natural classification are of these
17 waters, are they cold water or warm water, then
18 these can be further divided based on biological
19 potential of those waters. What is the highest
20 condition that the biology can meet within these
21 systems.

22 Now, I want to note that in this rule
23 among the use designations we proposed these are
24 largely distinct, the subclasses and the TALU
25 tiers. So, for the most part, the waters that we

1 are proposing, cold water or warm water
2 designations, are separate from the waters that we
3 are proposing TALU designations for. There are two
4 waters that are changing both subclass and TALU.

5 THE JUDGE: Does TALU apply only
6 to streams? It says streams in parentheses.

7 DR. BOUCHARD: Correct.

8 THE JUDGE: Okay.

9 DR. BOUCHARD: Correct. Yes.

10 THE JUDGE: Okay.

11 DR. BOUCHARD: The tiered aquatic
12 life uses was a rule that we adopted in 2017. And,
13 yes, it only divides streams into tiers.

14 THE JUDGE: Okay. So a lake isn't
15 divided into tiers.

16 DR. BOUCHARD: Yes.

17 THE JUDGE: All right. Thank you.

18 DR. BOUCHARD: So before we
19 adopted TALU in 2017, we applied a one-size-fits-
20 all approach to our biological goals. So the Clean
21 Water Act establishes that interim goal. The
22 protection and propagation of fish, shellfish and
23 wildlife. So we applied that goal to all of our
24 waters.

25 So we have waters like the Brule River

1 which is in a largely undisturbed watershed. It
2 has biological communities that are close to the
3 natural undisturbed state. So they are doing much
4 better than that propagation of fish, shellfish and
5 wildlife goal. So they are at risk of being
6 degraded all the way down to that goal before any
7 action would be triggered.

8 The Wild Rice River is in a mixed use
9 watershed and it's doing well. It meets that goal.
10 But it's not greatly exceeding that goal. So the
11 previous goal worked okay for the Wild Rice River.

12 And then we have systems like County
13 Ditch 34 which is legally maintained for drainage.
14 And the activity of maintaining it for drainage
15 creates habitat that limits the biological
16 community. So the biological communities in
17 natural streams like the Brule River and the Wild
18 Rice River depend on, you know, diversity of
19 habitat such as different depths, flows,
20 substrates. And when systems are maintained for
21 drainage they often lack these habitat requirements
22 and so these ditches are often unable to meet that
23 minimum goal.

24 So with the adoption of tiered aquatic
25 life uses we created three tiers. The exceptional

1 use so that we can assign a higher goal to these
2 waters that have demonstrated high water quality so
3 that we can maintain that condition. The general
4 use is equivalent to the previous goal. The
5 interim goal. So these have good aquatic life.
6 And then a modified use goal which sets a lower
7 goal which is consistent with what's attainable
8 within these waters that are legally maintained for
9 drainage.

10 Now we can compare these goals on a
11 grading of biological condition. Where the blue is
12 high, natural undisturbed biological condition.
13 Red is low, highly degraded. Really provides
14 little in terms of ecosystem services and certainly
15 doesn't meet biological goals.

16 So the exceptional use is toward the
17 top here. So, again, these are high quality almost
18 natural streams. The general use is a step down
19 from that. These are still good biological
20 communities, but they are not natural. So there
21 may have been some changes. Some of the more
22 sensitive species may have been lost or some of
23 their numbers may have been reduced. But those
24 sensitive species have been replaced by tolerant
25 species that fulfill similar ecological goals. So

1 functionally it's still a healthy system, but it's
2 not pristine or natural. But it's consistent with
3 that protection and propagation of fish, shellfish
4 and wildlife that's required by the Clean Water
5 Act.

6 Modified use is a step down from that.
7 At this point you are losing more of the structure
8 and function of the community. But this is
9 consistent with what we see in well-managed
10 drainage ditches in terms of the biology that they
11 can support.

12 So the way this is implemented. If a
13 water body is designated as exceptional use, it
14 cannot be degraded below that line. If it does, it
15 becomes impaired. So before that exceptional use
16 goal was added that water could have been degraded
17 all the way down to that general use bar before it
18 would have triggered anything in terms of
19 impairment. So now that becomes impaired and needs
20 to be restored back above that line. And same as
21 the case for general use and modified use waters.
22 If they are degraded below their goal, they become
23 impaired and need to be restored. So this
24 establishes what the highest attainable use is for
25 these biological communities and locks that in. It

1 cannot be degraded below that goal once we've
2 demonstrated that use is attainable.

3 However, they can move up. So if a
4 modified use improves the general use and the
5 general use improves to exceptional, that becomes
6 the new use and that use needs to be maintained.
7 That can't be lost.

8 The way these are implemented are
9 through models called indices of biological
10 integrity. So for different stream types we have
11 different models that set expectations for the fish
12 species and macroinvertebrate species we expect to
13 find in healthy streams and rivers.

14 And this is important. It goes back to
15 the previous topic of Class 2A, Class 2B. Because
16 on those stream types the top seven for the fish
17 are warm water streams. The bottom two are cold
18 water streams. And these are part of where those
19 expectations are set. So if the wrong use
20 designation is assigned to these waters, then the
21 wrong model will be used to determine the condition
22 of that community. Which means, you know, we may
23 determine that the water that's impaired isn't
24 impaired or we may miss an impairment by using the
25 wrong tool.

1 So once the stream type is established,
2 there are three tiered aquatic life uses;
3 exceptional use, general and modified. And there
4 is biological criteria that are assigned to each of
5 those tiers.

6 And just one note. The modified use
7 doesn't have a bio criteria for southern rivers or
8 cold water habitats because those systems tend not
9 to be modified for drainage. And even if they are,
10 they demonstrate an ability to meet that goal.

11 So once we know the stream type, the
12 next question is, well, which of these three tiers
13 does that stream or river belong to. So that
14 process starts with looking at the biology. Does
15 the biology meet the exceptional use biological
16 criteria. If it does, then it would be designated
17 as an exceptional use. If it doesn't, then does it
18 meet at least the general use biological criteria.
19 If the answer is yes, then it would be designated
20 as general use.

21 So going back to these biological
22 criteria. If a southern stream there, the second
23 stream type or fish meets the exceptional use, the
24 goal is 66. If a southern stream for the
25 macroinvertebrates, that fifth line down there,

1 meets a 62, that's an exceptional use. We have
2 demonstrated that that use is attainable because
3 it's currently being met and we have data that
4 demonstrates that it can be met. If it doesn't
5 meet that, then we look at the next tier to see if
6 it meets the biological criteria for those waters.

7 This includes drainage ditches. We
8 have drainage ditches that meet the general use.
9 So this is part of that use determination, you
10 know, establishing that highest general use.
11 There's not an automatic modified use designation
12 applied to ditches. However, if a stream doesn't
13 meet at least that general use, then that triggers
14 that use attainability analysis that's required by
15 the Clean Water Act.

16 So the first question we're asking is
17 are the biological communities limited by the
18 legally altered habitat? Are these legally
19 maintained for drainage? If the answer is no, it's
20 a natural channel or stream, for example, it would
21 be designated as a general use. Or we have, for
22 example, ditches that have good habitat, and so
23 these would also be designated as a general use
24 even if they don't meet that general use goal.

25 However, if the answer is yes, it is

1 legally maintained for drainage and it has poor
2 habitat that's limiting the biology, then we need
3 to determine if it's an existing use or is it
4 feasibly attainable.

5 So part of that existing use
6 determination is is there data demonstrating that
7 it met the general use after November 28, 1975.
8 The other thing we look at is when was the channel
9 created. So if it was a natural channel in 1975
10 but it was ditched in 1980, it wouldn't be eligible
11 for a modified use. It would be designated as a
12 general use. But if it's not an existing use nor
13 feasibly attainable, then it can be designated as a
14 modified use. And this is documented in more
15 detail in the technical guidance when reviewing
16 these use designations which is SONAR Exhibit S-37
17 here in Exhibit D.

18 So just to summarize the tiered aquatic
19 life uses. So these uses are needed to establish
20 the attainable beneficial uses so that the
21 appropriate management actions can be taken to
22 maintain or improve these waters. And then
23 specifically in this rule we propose to a subset of
24 streams in the state to modified uses and general
25 uses.

1 So that is the second technical
2 element. So to summarize the rule changes, there
3 are some housekeeping rules in Minnesota Rule
4 7050.0219 which removes references to the now
5 defunct Class 2C. There are rule amendments to
6 7050.0420 which changes the description of how cold
7 water habitats are reviewed and designated,
8 specifically removing the explicit linkage between
9 the DNR trout water's habitat. And then in
10 7050.0470 these 191 stream reaches will be
11 designated. Lakes will be actually designated
12 within that rule part and then the stream reaches
13 will be designated in documents incorporated by
14 reference.

15 So to summarize what these rule
16 amendments do. They document uses to provide
17 protection from backsliding. We need to establish
18 what the highest attainable uses are from these
19 waters so we can protect them.

20 It provides protections for high
21 quality waters. These are the exceptional use
22 waters.

23 It will set appropriate designated use
24 if the water is affected by legal historical
25 impacts. In particular drainage, maintenance.

1 It modernizes how cold water habitats
2 are designated to ensure that the correct
3 beneficial uses are designated and designates a
4 subset of these to their correct beneficial use.
5 And these four items together will improve outcomes
6 because we will be focusing on the correct goals
7 and subsequently the correct management activities
8 to protect and restore these waters.

9 So some things that these amendments
10 don't do. They do not change numeric or narrative
11 standards or antidegradation rules. These are
12 unchanged.

13 It does not designate any use class
14 other than Class 2. Although, Minnesota Rule 7050
15 links Class 2A with classes 1B and 3B. So when a
16 Class 2A is designated, these other two classes are
17 designated. So really follow that for waters being
18 designated as Class 2A.

19 It does not remove the Class 1 drinking
20 water designation from any waters.

21 It does not automatically remove Class
22 2 designations from any trout waters. So the
23 waters that are currently designated as trout
24 waters that are Class 2A, those remain designated
25 with the exception of the subset of waters that are

1 being proposed for changes in this rule.

2 It does not extend protections to
3 waters not already protected by water quality
4 standards.

5 It does not create prohibitions while
6 maintaining waters for drainage under Minnesota
7 Statute 103E.

8 And it does not remove existing or
9 feasibly attainable uses as required by the Clean
10 Water Act.

11 So I want to talk about some of the
12 outreach and public participation that took place
13 as part of this rule amendment. Some of the early
14 outreach started in 2013. Started talking about
15 some of these 2A, 2B, 2Bd use designations. This
16 was because the MPCA was collecting more biological
17 data and we were starting to see mismatches between
18 that data and the designated uses. So we began to
19 talk with stakeholders about whether or not these
20 were appropriately designated.

21 We also adopted the 2017 TALU rule
22 which was very similar in that it designated a
23 number of tiered aquatic life uses. So the work
24 that was done as part of that rule where
25 stakeholder and public outreach is very similar and

1 relevant.

2 We sent GovDelivery notices for the new
3 rulemaking as well as request for comments and the
4 Notice of Intent to Adopt Rules. Before we
5 requested comments, we developed a new rule page in
6 2019 that provided draft rule language, use
7 designations and documentation supporting those use
8 designations in order to give stakeholders and the
9 public well over a year to review these and to
10 provide feedback to the MPCA.

11 We published an RFC September 24, 2019
12 and received four comments through that. After the
13 RFC, we had the period between that and the actual
14 Notice of Intent to Adopt. So we further sought
15 and encouraged additional public feedback through
16 e-mail, phone call, meetings, GovDelivery on the
17 draft rule amendments and the use designations.

18 We also informed stakeholders about the
19 draft rule amendments during any related meeting,
20 water quality standards meetings, use designations,
21 TALU. We usually included a few slides on this,
22 encouraging stakeholders to contact us if they had
23 any questions.

24 We did have two stakeholder groups
25 indicate interest and we held meetings with them.

1 And as a result we made some changes to the draft
2 use designation rule amendments. We also notified
3 tribes about the rule notices and presented at the
4 Minnesota Tribal Environmental Council meeting on
5 July 10, 2019.

6 The Notice of Intent to Adopt was
7 published on September 23, 2019 in the State
8 Register. This included the rule amendments, the
9 SONAR, the updated technical support document.
10 There was a 45-day comment period which ended on
11 November 7. We held an informational meeting on
12 October 29, 2019 to provide additional information
13 and to provide a forum for the public to ask
14 questions in regard to this rule. PCA staff were
15 also available by phone or e-mail to answer
16 questions during the comment period and we fielded
17 a number of questions to clarify the rule.

18 We received a total of 265 requests for
19 a hearing. And that's why we're here today. And
20 we also received 11 comments.

21 To summarize these comments, we
22 received comments in support of the rule
23 amendments. We also received comments that were
24 concerned with things like technical information
25 not being sufficient, protection of downstream

1 waters and implementing restoration actions,
2 removal of drinking water standards, protecting
3 existing or feasibly attainable uses.

4 So we received some comments that
5 supported the general needs to review use
6 designations to ensure that the correct beneficial
7 uses are assigned to water bodies. We also
8 received some comments that were more narrow in
9 that they broadly supported use designations that
10 carry more stringent standards but not those with
11 less stringent standards.

12 We received comments that there was
13 concern the technical information provided was not
14 sufficient or user friendly. The documentation we
15 provided in the technical support document and in
16 other documents on the web page and through the
17 rule record are extensive and sufficient. They are
18 similar to the documentation we provided in the
19 2017 TALU rule which was approved by the EPA
20 indicating this documentation was sufficient to
21 satisfy the Clean Water Act requirements. But we
22 received some similar comments during that rule.
23 So in response to that, we created an interactive
24 map which is available on the rule page so that the
25 public can view where these use designations are

1 and what they are. We also added some information
2 to the technical documentation beyond what was
3 needed in order to provide that to stakeholders.
4 And we will continue to consider recommendations to
5 make this information more user friendly.

6 There were concerns that the Class 2B
7 designations will remove the Class 1B designations.
8 This rule is focused only on aquatic life or Class
9 2. It does not remove or change any drinking water
10 standards, Class 1B, from any waters.

11 There was also some comments
12 recommending the removal of the automatic
13 association between Class 2A and Class 1B. Again,
14 this rule is focused just on aquatic life, Class 2.
15 Any future designations that would change Class 1
16 to any -- would have to go through a different
17 rulemaking. We didn't do that type of analysis or
18 review any drinking water beneficial uses for any
19 of these waters.

20 There was concern that the proposed use
21 designations would not protect downstream uses or
22 limit protection and restoration strategies. The
23 MPCA is required through state water quality rules
24 and the Clean Water Act to protect downstream
25 waters. And we have -- there's a rule part,

1 7050.0155, all waters must maintain a level of
2 water quality that provides for the attainment and
3 maintenance of the water quality standards of
4 downstream waters, including the waters of another
5 state. So this is a consideration with these
6 designations and with the management of these
7 waters.

8 So it's the MPCA's goal to assign the
9 correct beneficial use to a water body, protect
10 those beneficial uses, but also consider the
11 protection of downstream uses. This may mean that
12 although an upstream water body meets all of its
13 water quality standards, it may need better water
14 quality to protect the downstream water. But that
15 doesn't mean it's appropriate to designate an
16 incorrect beneficial use to an upstream water to
17 protect a downstream water.

18 And some of the differences that we
19 have are due to the differences in the DNR and the
20 MPCA's goals. Although we both are seeking to
21 protect and improve water quality; the DNR is
22 managing these waters for fisheries, we are
23 managing these to the most natural state. The way
24 we implement these protections are different and so
25 it's reasonable that we have different frameworks

1 for those use designations.

2 We received comments that were
3 concerned that some of the use designations that
4 the Agency is proposing will not protect feasibly
5 attainable or existing beneficial uses. These use
6 designations are consistent with the Clean Water
7 Act's use designation requirements. They are
8 supported by a scientific assessment, relevant data
9 that demonstrate the current designated uses are
10 not existing uses nor are they feasibly attainable.

11 Similar to this, we also received
12 comments that expressed concern that the proposed
13 rule language will not protect feasibly attainable
14 uses. And the MPCA agrees with these comments. It
15 was not our intention to exclude protection to
16 feasibly attainable uses. But the language could
17 be more clear to ensure that these are protected.
18 And so the MPCA plans to modify the proposed rule
19 language based on these comments. And these are in
20 hearing Exhibit L-2.

21 So it may be difficult to see this on
22 the screen, but the original language read that
23 cold water habitats must reflect an existing
24 beneficial use. We will add existing or feasibly
25 attainable beneficial use to that statement to

1 ensure that it's clear that both of these types of
2 uses need to be maintained and protected.

3 This language is drawn from the Clean
4 Water Act which state that minimum uses are deemed
5 attainable if they can be achieved by the
6 imposition of effluent limits required under
7 sections 301(b) and 306 of the Act and cost
8 effective and reasonable best management practices
9 for nonpoint source control.

10 In addition, states may designate a
11 use, or remove a use that is not an existing use,
12 if the State conducts a use attainability analysis
13 that demonstrates attaining the use is not feasible
14 because of one of the six factors.

15 So I won't spend a lot of time on this.
16 Judge O'Reilly did a much better job of explaining
17 the next steps following this and so did Mary Lynn.
18 So I will wrap this up in the interest of time to
19 allow plenty of comments. Thank you.

20 THE JUDGE: Okay. Thank you very
21 much. Anything further from the MPCA before we
22 turn to the public?

23 MS. COLEMAN: Not from the MPCA.

24 THE JUDGE: Okay. At this time
25 why don't we take say a five-minute break. Or do

1 we need more? A ten-minute break. Why don't we
2 take a ten-minute break so that everyone can
3 stretch, use the restroom and take a look at
4 documents, if you would like. Okay?

5 (A recess was taken from 4:53 p.m. until 5:03 p.m.)

6 THE JUDGE: We are back on the
7 record. And here's how we are going to do this.
8 We are going to call our first person from
9 St. Paul. Then we are going to go to the first
10 person on the list -- just to be clear, it doesn't
11 look like we have anybody from Detroit Lakes. Is
12 that correct, Detroit? Nobody has appeared? Can
13 Detroit Lakes hear me? I don't think they can hear
14 me. I know the bottom corner, where is that?
15 Rochester?

16 MS. WOLF: Hello, we're Rochester.

17 THE JUDGE: So, Marshall, can you
18 hear us?

19 MR. HEGRENES: Yes, we can hear
20 you. Marshall.

21 THE JUDGE: Okay. Detroit Lakes,
22 can you hear me? Detroit Lakes? Detroit Lakes?
23 Is that the four gentlemen on the bottom there, is
24 that Detroit Lakes?

25 MS. AMUNDSEN: Your Honor, I think

1 Detroit Lakes signed off if they did not have
2 anyone attend.

3 THE JUDGE: Well, I'm confused.

4 MR. SCHAFER: Your Honor, this is
5 Craig in Marshall. And we still show Diane and
6 Detroit Lakes on. We just show them as being
7 muted. I believe, yeah, we still show Diane up in
8 Detroit Lakes on ours.

9 THE JUDGE: Okay. So Marshall is
10 in the right-hand corner. The lady in the blue or
11 white turtleneck in the left-hand corner, who is
12 that? Rochester, raise your hand. Okay. So
13 that's Rochester. Duluth, raise your hand. And
14 then so that's Detroit Lakes. And Detroit Lakes
15 looks like they have left the conference at this
16 point. Okay. Just for the record, nobody showed
17 up at Detroit Lakes, so I'm not going to be calling
18 on Detroit Lakes to respond and they are on mute.
19 We can see them, they don't realize that, but we
20 cannot hear them.

21 So let me ask for Marshall -- oh, here,
22 we have -- I'm sorry. So we have two speakers in
23 Duluth, two speakers in Roch -- oh, no. I don't
24 know how this got sent to me like this. How did
25 this -- who prepared these, so you can answer my

1 question? So these people are Duluth people, these
2 two up here?

3 MS. LYNN: Yes.

4 MS. AMUNDSEN: Your Honor, Duluth
5 has four. We did have at one point 11, but we
6 dwindled to four.

7 THE JUDGE: Okay. Four people who
8 want to speak. So we have Janet Drapper, Dave
9 Zentner, Dorie Reisenweber and Laura Gauger still
10 there, correct?

11 MS. AMUNDSEN: Some of those have
12 left. There has been a lot of back and forth. I
13 have Dorie Reisenweber, Dave Zentner. I have Ricky
14 W. DeFoe and Janet Keough.

15 THE JUDGE: All right. So we have
16 two people in Rochester who want to speak. Four
17 people in Duluth who still want to speak. Nobody
18 in Marshall who wants to speak. Correct, Marshall?

19 MR. SCHAFER: Yeah, we don't have
20 anybody.

21 THE JUDGE: Okay. So, Marshall,
22 you can just go on mute. And we will go forward.
23 We are going to have our first speaker from
24 St. Paul.

25 If we could have the first speaker

1 please state and spell your first and last name.

2 MR. MORRISON: My name is Eric
3 Morrison.

4 THE JUDGE: You are going to have
5 a speak much louder.

6 MR. MORRISON: My name is Eric
7 Morrison, E-r-i-c M-o-r-r-i-s-o-n. And my address
8 is 1202 Cherokee Avenue in West St. Paul.

9 THE JUDGE: Okay. Before we went
10 back on the record, we marked as L-6 the documents
11 that Mr. Morrison is entering into the record. He
12 has them marked as Exhibit A through O. But they
13 are all going to come under the Exhibit L-6 number.
14 Okay. Mr. Morrison.

15 MR. MORRISON: I'm Eric Morrison.
16 I'm a lifelong resident of Minnesota and a chemist
17 with a bachelor's from the U of M and a Ph.D. from
18 Penn State. I volunteer for Minnesota's Northern
19 Lakes Scientific Advisory Panel, NLSAP.

20 THE JUDGE: Hold on. Northern
21 Lakes Advisory Panel.

22 MR. MORRISON: Scientific Advisory
23 Panel. Which is NLSAP. Where I'm on a steering
24 committee. And I brought exhibits today to explain
25 why MPCA work like this requires contested case

1 hearings. And I will be speaking specifically
2 about Minnesota Rules 7050.0420, section B.

3 Exhibit A is from the Minnesota
4 Pollution Control Agency website. It shows that
5 mercury gets into fish when it is converted to the
6 bioavailable form called methylmercury by sulfate
7 producing bacteria. Methylmercury is a potent
8 neurotoxin that bioaccumulates in fish.

9 Exhibit B is from the US Geological
10 Survey that shows that the first bit of sulfate
11 pollution right here rapidly raises methylmercury
12 to a plateau giving a frowning plot shape that's
13 called the Goldilocks curve.

14 Exhibit C shows US Geological Survey,
15 USGS data from northern Minnesota lakes
16 superimposed on the Goldilocks curve. By the time
17 the sulfate in northern Minnesota lakes reaches
18 5 parts per million, mercury levels in fish have
19 quadrupled.

20 And this D shows the USGS data again
21 with lake names. And up here at the top is Crane
22 Lake. And Crane Lake is closest to the source of
23 pollution here which is the Minntac tailings basin
24 in Virginia. While the other lakes, Rainy and
25 Namakan and Sand Point they're further down stream

1 so the sulfate was diluted so there's less mercury
2 in the fish.

3 Exhibit C shows -- oops, I'm sorry. I
4 went backwards. Mining companies want you to
5 believe something different. They allege that
6 mercury in fish is not related to sulfate
7 pollution. This exhibit is from Wenck
8 Engineering's web page. It says, "Link between
9 mining and mercury in fish less of a factor than
10 previously thought." Which completely contradicts
11 the USGS work.

12 Exhibit F is the journal publication of
13 Wenck's research. And this is how they did it,
14 Exhibit G. What they did is they took water with
15 no sulfate -- well, they had .5 parts per million
16 sulfate in it and they added sulfate in the lab up
17 to 5 parts per million to get to the top of this
18 Goldilocks curve. Then they compared it to other
19 water that they added sulfate up to 15 parts per
20 million. It's also at the top of this Goldilocks
21 curve. And then that way they could conclude that,
22 gee, that mercury in fish doesn't have anything to
23 do with sulfate. This is something that this
24 research and the conclusion from it has to be tried
25 in court.

1 PolyMet also alleges that mine polluted
2 water doesn't produce methylmercury any more than
3 other water. And this is their mercury fact sheet.
4 And this is the publication cited in their fact
5 sheet. It purports to compare mine polluted water
6 with unimpacted wetlands. But as my next exhibit
7 shows this is a USGS topographical map showing that
8 unimpacted water. And it's right down here in the
9 corner with the big arrow to it. This is downhill
10 from all these mine dumps. And they called it
11 unimpacted water. And we tested this water. NLSAP
12 tested this water and it was 6 parts per million
13 sulfate, putting it right at the top of that
14 Goldilocks curve maximum methylmercury production.
15 And whether or not these researchers were
16 committing fraud when they misrepresent this site
17 as unimpacted is a matter for the courts.

18 Exhibit K. This is water sampling
19 locations and sulfate measures measured by NLSAP in
20 northern Minnesota. Sulfate is never above 2 parts
21 per million unless the water came from downstream
22 of mining.

23 This is an excerpt from the Minnesota
24 Department of Health report that shows that 1 in 10
25 babies is born with unsafe levels of mercury in

1 their blood and that 5 of those babies in the study
2 had mercury 25 times that safe limit. So they were
3 born with severe brain damage. It's permanent
4 brain damage. This is a compelling reason to
5 regulate mining waste in Minnesota and just water
6 in general. But regulation won't happen if the
7 MPCA works on mining without contested case
8 hearings.

9 And this is PolyMet's water discharge
10 permit. You might have heard about it. It's 479
11 pages. But of the 479 pages, 320 of those pages
12 are a single table called Limits and Monitoring.
13 And it has 2335 rows. But of the 2335, 2319 of
14 those say "monitor only." There's only 17 rows
15 with any limits of any kind on any pollutants and
16 for only two locations. And sulfate is only
17 regulated in one place.

18 So Exhibit N here is a compilation of
19 all the limits in the PolyMet water discharge
20 permit. There's only 17 rows that have limits. It
21 barely fills one page out of this 479 page permit.
22 This level of non-regulation allows PolyMet, if it
23 were to go into existence, to pollute mercury and
24 sulfate freely.

25 So my final exhibit is from 2014. It's

1 an article that appeared in Outdoor News Magazine
2 about Trout Lake. The last trout was caught here
3 in 1956. The trout were killed by mining and
4 wastewater treatment. You know, the water is
5 improving, but, yeah, I guess it can't be an
6 attainable use because it's still not possible to
7 put trout back into Trout Lake right now.

8 I don't think we should allow the MPCA
9 to let this water get polluted like this so that it
10 will be, like, centuries maybe before they could
11 ever have trout in them again. So I would ask that
12 don't let MPCA make these changes without oversight
13 from permitting, you know, with a contested case
14 hearing. And so I've got for you --

15 THE JUDGE: I'm confused, though.
16 What are you talking about a contested case
17 hearing? We are here for a rule hearing; right?

18 MR. MORRISON: Yeah, I don't think
19 they should be able to make this rule change
20 without this being held out in court. Because they
21 are making rule changes, so this is about their
22 authority to make these rule changes for that 2A
23 water and the 7050.0420, section B. It's about the
24 attainable uses. And I think an attainable use is
25 that these trout streams can have trout in them and

1 those trout should be protected from having mercury
2 in them. And I don't think they should be able to
3 make these changes. I don't think they are
4 authorized to make these changes like this without
5 this going to a court proceeding where people can
6 call into question the work that I showed you from
7 Wenck Engineering, for example. Because they would
8 have you believe that there is sulfate in all this
9 water up north and that, furthermore, sulfate
10 doesn't have anything to do with mercury in fish.
11 So I don't think that the MPCA is allowed to make
12 these changes arbitrarily and without hearings.

13 THE JUDGE: So you are saying that
14 the MPCA doesn't have legal authority to pass -- to
15 promulgate these rules?

16 MR. MORRISON: Absolutely. They
17 should be contested cases. They should have
18 contested case hearings. And so should the PolyMet
19 permit, for example.

20 THE JUDGE: Well, I guess that's a
21 different issue here. But we're here for rules.

22 MR. MORRISON: Exactly.

23 THE JUDGE: There aren't contested
24 case hearings for rules, though.

25 MR. MORRISON: I don't think they

1 have the authority to make these changes.

2 THE JUDGE: Okay. I get that. So
3 you are saying -- so I wrote that you don't believe
4 the MPCA has legal authority to promulgate these
5 rules --

6 MR. MORRISON: Exactly.

7 THE JUDGE: -- altogether.

8 MR. MORRISON: Absolutely.

9 THE JUDGE: Okay. So that's a
10 fair summary of what you're --

11 MR. MORRISON: Exactly.

12 THE JUDGE: Kind of tying the
13 whole thing together?

14 MR. MORRISON: Absolutely.

15 THE JUDGE: Okay. Good. All
16 right. I understand that. Thank you. I'm
17 accepting these into the hearing record as Exhibit
18 L-6. Thank you.

19 MR. MORRISON: What I have here is
20 I have the actual exhibits. This is that -- the
21 PolyMet permit (indicating). And this is --

22 THE JUDGE: Okay. This is the
23 permit itself?

24 MR. MORRISON: Yep, that's the
25 permit itself.

1 THE JUDGE: Do you want to put
2 this into the hearing record?

3 MR. MORRISON: Yeah.

4 THE JUDGE: Okay.

5 MR. MORRISON: And that is that
6 article --

7 THE JUDGE: Give me one more
8 minute. I thought you already brought this one in.
9 You brought this one already as Exhibit F.

10 MR. MORRISON: I made a copy of
11 the cover for you. That's the actual article.

12 THE JUDGE: Okay.

13 MR. MORRISON: That's the article.
14 This is the one where they added the sulfate to
15 bring it up to the top of the Goldilocks curve.

16 THE JUDGE: Okay. Let me do a
17 couple things here. So I'm going to mark the
18 PolyMet permit. You actually want to submit this
19 into the hearing record?

20 MR. MORRISON: Absolutely. Yeah.

21 THE JUDGE: We're going to have to
22 probably take it out of this.

23 MR. MORRISON: That's fine.

24 THE JUDGE: Okay.

25 MR. MORRISON: It's yours now.

1 THE JUDGE: Oh. Great. Okay. So
2 I'm going to mark this as L-7, but we are going to
3 end up having to take it out of its -- of its
4 binder. And then L-8 will be that full article.
5 Okay. And any other documents?

6 MR. MORRISON: Yea. Well, so this
7 is the article from the UMD where they took that
8 polluted water.

9 THE JUDGE: Okay.

10 MR. MORRISON: And they called it
11 unimpacted water and it had 6 parts per million
12 sulfate in it. That's this one is Exhibit I.

13 THE JUDGE: Okay.

14 MR. MORRISON: So I just had a
15 copy of the first page for you.

16 THE JUDGE: Okay. Okay. L-9. I
17 am marking that as an exhibit.

18 MR. MORRISON: And this one is
19 Exhibit H is the mercury fact sheet from PolyMet.

20 THE JUDGE: Okay.

21 MR. MORRISON: And then all the
22 rest of these you have copies of.

23 THE JUDGE: L-10. And the rest of
24 them are in here?

25 MR. MORRISON: That's right.

1 THE JUDGE: Okay. So here are the
2 exhibits that Mr. Morrison --

3 MR. MORRISON: I don't know if I
4 mentioned at the beginning --

5 THE JUDGE: -- has offered.

6 MR. MORRISON: -- I'm a chemist.
7 Did I say that?

8 THE JUDGE: I got that. That's
9 what I wrote here, chemist with a Ph.D.

10 MR. MORRISON: Okay.

11 THE JUDGE: L-6, L-7, L-8, L-9 and
12 L-10 are all from Mr. Morrison. Okay.

13 Just also to be clear, prior to while
14 we were on break, we had a couple documents. John
15 Sadusky, S-a-d-u-s-k-y, offered Exhibit L-4. And
16 Margot Monson, M-a-r-g-o-t M-o-n-s-o-n, offered
17 Exhibit L-5. Okay. All right. Is that it,
18 Doctor?

19 MR. MORRISON: Yeah. There's that
20 (indicating).

21 THE JUDGE: Okay. Thank you.

22 MR. MORRISON: Thank you.

23 THE JUDGE: Thank you so much for
24 your time today, sir. So now we are going to go to
25 -- Marshall, are they still on mute?

1 MS. HOTZ: Yeah, the upper
2 right-hand corner.

3 MR. HEGRENES: Yeah, we're here.

4 THE JUDGE: You have asked to be
5 excused and you can be excused.

6 MR. HEGRENES: Okay.

7 MR. SCHAFER: Thank you, ma'am.

8 MR. HEGRENES: Thank you.

9 THE JUDGE: Thank you. Nobody has
10 shown up at Marshall, so we are excusing Marshall.
11 No one has shown up at -- well, it looks like two
12 people recently showed up at Detroit Lakes.
13 Correct? Detroit Lakes --

14 MR. OLSON: We have two people in
15 Detroit Lakes and they would both like to speak at
16 some point.

17 THE JUDGE: Okay. Very good. I
18 know one of you from a different case.
19 Mr. Mattison, are you there? Hello.

20 MR. MATTISON: (Indicating).

21 THE JUDGE: Okay. So because you
22 guys showed up a little later, we're going to skip
23 over Detroit Lakes here for a second. We'll come
24 back to you. We're doing a round robin as we go.
25 So we are now going to go to Duluth. The first

1 person I see on the Duluth signup was Dave Zentner.

2 Dave, would you like to speak?

3 MR. ZENTNER: Yeah.

4 THE JUDGE: Okay. Dave.

5 MR. ZENTNER: I would.

6 THE JUDGE: Okay. Mr. Zentner if
7 you could please state and spell --

8 MS. AMUNDSEN: He's coming right
9 up.

10 THE JUDGE: Very good.

11 MR. ZENTNER: Thank you. My name
12 is David Zentner, Z-e-n-t-n-e-r. I live at 2116
13 Columbus Avenue, Duluth, Minnesota. I'm here
14 tonight this evening on behalf of the Duluth
15 chapter of the Izaak Walton League of America and
16 the Minnesota division of the Izaak Walton League
17 of America. We have 16 chapters. We have been a
18 conservation presence in our state since the 1920s.
19 And water quality and the protection of our water
20 resources is one of our highest priorities.

21 My comments this evening on the MPCA
22 amendments proposed to the standards as described
23 will be general and I will be brief. We've mailed
24 a more formal comment to the office of the hearing
25 administrative law judge as well as to the

1 appropriate personnel at MPCA.

2 As we examine, the first point relates
3 to the general subject of coordination in this
4 context referring to the coordination between the
5 two major state agencies designated to be on point,
6 MPCA for water quality and the Department of
7 Natural Resources for habitat. And as we examined
8 the proposed summary and the exhibit material, some
9 of which is before us here in Duluth tonight, we
10 found little evidence to support coordination
11 between the two major agencies instructed to work
12 on water quality and on habitat.

13 So we reached out to our regional
14 fishery specialist. In northeast Minnesota, we are
15 blessed with a good deal of the cold water
16 fisheries habitat represented in the entire state.

17 In our less than complete but
18 significant effort to find out coordination, we
19 were not able to find a single DNR person who was
20 aware of this process when we contacted them,
21 including the fishery's manager for the French
22 River facility in Duluth.

23 It is very concerning, because one of
24 the problems in our existence with the
25 institutional arrangements that we have constructed

1 in our state and at the federal level is the
2 tendency to have silos inside individual agencies
3 as well as among and between agencies within the
4 state. Enough said on that issue.

5 The second issue is to reflect on
6 comments on what we call upsidedown watersheds. In
7 and near Duluth, we have examples of fisheries that
8 in their original reaches exhibit warm water/ cool
9 water properties. As they travel towards the
10 finish or entering a larger body of water,
11 underground upwellings dramatically change the
12 resource and create cold water fisheries that
13 exhibit abundant wild populations of brook trout
14 and/or brook and brown trout.

15 The concern of the Izaak Walton League
16 is that the upwater designation by MPCA can
17 encourage development in the upper portions of the
18 system that inhibit or destroy the resource I have
19 just described. I noticed in the Agency response a
20 bit ago some comments that touched on recognition
21 of that. But given the problem that we have with
22 the Minntac facility and the Dark River system as
23 part of the release from its tailing facility and
24 the fact that condition or problem of not needing
25 adequate water quality standards under an existing

1 permit has existed from 1994 to a present and
2 recent court action.

3 Now, that means to me that a child born
4 in 1994 who is now, he or she, 25 years old and has
5 lived a third, roughly, of his or her life has not
6 had the agency that is committed to this mission or
7 a combination of agencies resolve that threat to
8 the resource. In 25 years, an awful lot of wrong
9 things can happen to the Dark River and other
10 similar situations.

11 The third issue is resiliency. And
12 that's touched on also in some of the comments that
13 we heard. But we are concerned that we are going
14 to end up with a process that makes it easier to
15 delist cold water fisheries without appropriately
16 providing an efficient means for relisting.

17 One of the things the Izaak Walton
18 League has found in its work, including work with
19 other groups, other DNRs, Wisconsin and the
20 Driftless country, is an example and working with
21 Trout Unlimited is the resiliency, the recovery and
22 resiliency of watersheds where there are
23 significant positive improvements. Invertebrate
24 populations accompanied by cold water fisheries
25 thriving and warm water species moving down the

1 watershed allowing a restoration of wild trout
2 resources. We are concerned that this may possibly
3 impede in Minnesota being able to advance resource
4 recovery that encourages relisting and
5 appropriately protecting those resources.

6 I have already touched on the last item
7 which I commented a moment or two ago about the
8 Dark River Minntac situation.

9 I noted a bit ago a listing on our
10 screen in Duluth of what this will do and what this
11 will not do. In the lifetime of the Izaak Walton
12 League, what "will do," honorably stated and
13 intended, often -- what will happen honorably
14 stated and often intended by the great team of
15 public servants that we have in our state agencies
16 often does not happen because of the power of
17 political intervention, because of the power of
18 corporate intervention as compared to the strength
19 of citizen organizations and nonprofit efforts.
20 And I think that the agencies involved here need to
21 be a little bit more realistic or at least restate
22 in the documents the relative connected tissue
23 between the intent to enforce and the restatement
24 exhibited in these amendments. Thank you very
25 much.

1 THE JUDGE: Thank you, sir. All
2 right. Let's now turn to Rochester. Is Amy Cordry
3 still there? Rochester?

4 MS. CORDRY: Hello, Your Honor.
5 This is Amy Cordry in Rochester.

6 THE JUDGE: Okay. Could you
7 please state and spell your first and last name.

8 MS. CORDRY: My name is Amy
9 Cordry. A-m-y C-o-r-d-r-y. I live at 26006 County
10 Road 9, Winona, Minnesota.

11 THE JUDGE: Very good.

12 MS. CORDRY: Thank you, Your
13 Honor, for allowing me to speak today. I
14 appreciate your time. My husband and I have been
15 the owners of a small farm in the Driftless and
16 karst area of southeast Minnesota for over 45
17 years. Cedar Valley Creek runs through the entire
18 property.

19 My attention and interest in Minnesota
20 waters began naturally. I am a citizen scientist
21 stream monitor for the MPCA and recently received
22 my physical, biological and chemical monitoring
23 training from the Izaak Walton League. I am a
24 member also. Hello, fellow members.

25 Certification allows me to enter stream

1 data into the federal water data base which must be
2 used when creating regulation. I am enormously
3 concerned about Minnesota water, which is our most
4 precious natural resource, and the changes those
5 waters are experiencing. I see these personally on
6 a small basis, and my interest in Minnesota water
7 leads me to pay attention to the overall situation
8 in the state of Minnesota.

9 I'm addressing Rule 7050.0420. The
10 MPCA, the Minnesota Pollution Control Agency,
11 wishes to rename the Class 2 trout waters
12 designation which also includes aquatic life to the
13 designation cold water habitat. Aquatic life,
14 macro, microinvertebrates, fish, et cetera, are
15 canaries in the mine for water quality. Which is
16 why this change is unnecessary. Because the
17 current protection states, and I quote from that
18 rule, "Aquatic life and recreation includes all
19 waters of the state that support or may support
20 aquatic biota, bathing, boating, or other
21 recreational purposes and for which quality control
22 is or may be necessary to protect aquatic or
23 terrestrial life or their habitats or the public
24 health, safety, or welfare."

25 We can't get more clear than that as to

1 a goal, protect the water life and protect the
2 human life. This is an adequate regulation. It
3 also allows for ongoing improvement of our waters,
4 which should be the aim of the MPCA. Especially
5 since the latest findings regarding impaired waters
6 of Minnesota create levels in private wells and are
7 to be pumping of aquifers, all of which are
8 affecting Minnesota waters and trout streams.

9 When I look at the marvelous
10 presentation by Mr. Bouchard, or Dr. Bouchard, I'm
11 sorry I'm not clear, what stands out to a retired
12 English teacher is the term "feasibly attainable
13 beneficial use" that they want to replace what I've
14 read with. Now, I am not a fan of adverbs in
15 statute. I don't know what in heaven's name
16 feasibly attainable is going to look like. And
17 that is a huge flaw.

18 The citizens of Minnesota have long
19 recognized the term "trout stream." Our relatives,
20 personally speaking, from Chicago and their friends
21 and families come to our area to fly fish in the
22 trout streams. They rent lodging, they buy meals,
23 they buy entertainment and they purchase gear. At
24 a time when rural communities are losing their
25 schools, their hospitals and their small

1 businesses, trout fishing is on the upswing. We
2 have more young people come to our farm to use our
3 stream to fish than any folks asking to hunt these
4 days. Our nephew has recently opened a fly fishing
5 shop in the Midwest and guiding business. Hunting
6 nowadays is too expensive and chronic wasting is
7 taking its toll. Fishing can help replace those
8 dollars. But cold water habitat isn't what those
9 fisher folk are going to look for.

10 MPCA has many fine scientists striving
11 to do the right thing. But in my experience they
12 often lose touch with the common citizen. The
13 common citizen knows trout streams not cold water
14 habitat. Please consider this when making your
15 decision. These changes are not needed nor are
16 they reasonable.

17 Also, the MPCA and the DNR should be
18 able to work together. The previous respondent
19 indicated, they aren't the republicans and the
20 democrats. They are two agencies working for the
21 betterment of Minnesota and they should be able to
22 work together. I thank you for your time and hope
23 you consider this when making your decision.

24 THE JUDGE: Thank you, Ms. Cordry.
25 Ms. Cordry, are you going to be submitting your

1 written documents then into the hearing record?

2 MS. CORDRY: I will be doing that.

3 Given the great vast amount of information I
4 received upon arriving here, there would be some
5 additions that I made ad-libbing. I also have some
6 questions, Your Honor, if this is the time for
7 those.

8 THE JUDGE: Okay. Who are your
9 questions to?

10 MS. CORDRY: Probably Mr. Bouchard
11 or Dr. Bouchard.

12 THE JUDGE: Okay. Why don't you
13 do that.

14 MS. CORDRY: I would ask what
15 feasibly attainable means specifically? Then I
16 would also ask Winona county map in southeast
17 Minnesota shows a general cold water designation,
18 but the data that we are gathering from our stream
19 monitoring shows a higher quality stream in that
20 area. Why is there a difference?

21 THE JUDGE: Well, let's start --
22 let's just do one question at a time. Dr.
23 Bouchard, do you want to answer the feasibly
24 attainable question?

25 MS. COLEMAN: If I could, Your

1 Honor, first?

2 THE JUDGE: Yes.

3 MS. COLEMAN: I just want to the
4 manage expectations --

5 THE JUDGE: Right.

6 MS. COLEMAN: -- about MPCA
7 responding to questions. There are certainly
8 clarification questions related to materials that
9 we presented that we are happy to answer. There
10 are questions that I feel may arise that will
11 debate some of the concepts that we would prefer to
12 respond to in written comment, written response to
13 comments. So I ask that we be allowed to determine
14 how we might prefer to respond.

15 THE JUDGE: Okay.

16 MS. COLEMAN: Thank you. And I
17 think on this one (indicating).

18 DR. BOUCHARD: Yes. Thank you,
19 Your Honor. We can provide some definitions from
20 the Clean Water Act. So if -- attainable, for
21 example, is defined as the imposition of effluent
22 limits as required by the Clean Water Act or
23 through the implementation of cost effective and
24 reasonable best management practices --

25 MS. CORDRY: Excuse me. I'm

1 sorry, you are going to have to speak more clearly.

2 You are being cut out.

3 DR. BOUCHARD: Sorry. So -- can
4 you hear me now?

5 MS. CORDRY: Yes.

6 DR. BOUCHARD: So the Clean Water
7 Act defines "attainable." And attainable is
8 defined -- a use is defined as being attainable if
9 it can be achieved through the imposition of
10 effluent limits as required by the Clean Water Act.
11 There are certain sections that define that. And
12 then "or through the implementation of cost
13 effective and reasonable best management practices
14 for nonpoint source control."

15 The term "feasible" is also linked to a
16 number of factors that may cause that use to be
17 attainable or not attainable. And that is in
18 40 CFR 131.10(g), I believe. So that's the
19 language that the Clean Water Act provides in terms
20 of what feasibly attainable means.

21 In regards to your second question, the
22 discrepancy between the MPCA's designation and the
23 information that you are collecting, I can't
24 comment on that without having more details. But
25 we appreciate the comment and we will consider that

1 in our response in the posthearing comment period.

2 MS. CORDRY: Thank you.

3 THE JUDGE: Anything else, Ms.
4 Cordry?

5 MS. CORDRY: Just one last
6 question. We recently had a fish kill in Garvin
7 Brook which decimated that stream. So how would
8 that stream now be classified under this new
9 ruling?

10 DR. BOUCHARD: Your Honor, if it's
11 designated a cold water and that cold water habitat
12 I would assume is an existing use, not knowing the
13 details of this reach, it would continue to be
14 classified as a cold water habitat because that use
15 was attained on or after November 28, 1975. And I
16 assume since that fish kill was a result of a
17 temporary impact that it's also feasibly
18 attainable.

19 MS. CORDRY: Well, those fish
20 kills are not really temporary in nature, as we
21 well know. They have long-term effects. But thank
22 you very much. And I have your e-mail, so I can
23 always send you any other questions. I thank you
24 very much.

25 THE JUDGE: Thank you for your

1 time, Ms. Cordry.

2 MR. MORRISON: I have a question.

3 THE JUDGE: We will get to second
4 time around, once we get through the first time
5 around. Because we have a limited amount of time,
6 so we are going to move a little faster to be fair
7 to everybody here.

8 MR. MORRISON: A question on
9 feasibly attainable.

10 THE JUDGE: No, there won't be
11 questions, Mr. Morrison, right now. We will see if
12 we get through everybody. I think what we are
13 going to have to do is we are going to have to
14 institute some time limits here of about five
15 minutes per person and then come back around. I
16 thought we could do it otherwise. But I'm going to
17 impose that, just so that we can get as many people
18 heard as possible today with the time that we have
19 this evening.

20 So now we are going back to St. Paul.
21 Emma -- I cannot read the handwriting. Schurink?

22 MS. SCHURINK: I didn't check the
23 speaking.

24 THE JUDGE: Oh, you didn't. Very
25 good. The next person in line would be Dan

1 Iverson. Is Mr. Iverson here?

2 MR. IVERSON: Yeah, I guess I am.

3 THE JUDGE: Okay. Mr. Iverson, do
4 you want to speak?

5 MR. IVERSON: Yeah.

6 THE JUDGE: Please come up here.

7 Please state and spell your first and last name.

8 Have a seat there, sir.

9 MR. IVERSON: All right. It's
10 Daniel Iverson, I-v-e-r-s-o-n. 4640 North Arm
11 Drive, Mound, Minnesota.

12 THE JUDGE: Very good.

13 MR. IVERSON: That's my
14 background. Do I ask MPCA a couple questions now
15 or after I maybe --

16 THE JUDGE: It depends on how you
17 want to use your five minutes initially.

18 MR. IVERSON: Oh, boy. And so his
19 time counts against me?

20 THE JUDGE: Well, no. But in
21 terms of if you'd like to make a comment or --

22 MR. IVERSON: Okay. Just a couple
23 quick questions to the MPCA that occurred to me
24 while I was listening.

25 THE JUDGE: Okay.

1 MR. IVERSON: I was questioning in
2 my mind what was the origin or what was the impetus
3 of this change? What drove it? Where did it come
4 from? Was there an individual, a corporation or
5 organization? Where did the impetus come from for
6 this change at this point in time now in Minnesota
7 history?

8 DR. BOUCHARD: Your Honor, there
9 are three different origins for these rule changes.
10 The most common one is the collection of MPCA data.
11 So we collect data, we examine that data. In some
12 cases it doesn't match the designated use and that
13 triggers a further review.

14 Other use designations are triggered by
15 changes by the DNR. So some of these are just
16 following along with the changes the DNR made last
17 year to their list of trout waters. And there is
18 also one water -- there was a city in southeast
19 Minnesota that requested a Class 7 water be
20 redesignated as a Class 2 water. So removing that
21 use designation to a 2A.

22 MR. IVERSON: Okay. I was
23 wondering in my mind what existing waters do you
24 see as possibly subject to change based -- if this
25 new mandate goes through, what existing waters

1 specifically in northern Minnesota do you see as
2 subject to reclassification?

3 DR. BOUCHARD: Your Honor, can I
4 ask a clarifying question. Are you asking what
5 future rule changes might be proposed in the
6 future?

7 MR. IVERSON: No. You must have
8 in mind I would think specifically the existing
9 waters or streams that would be possibly subject to
10 change, categorical change based on the new regs.

11 DR. BOUCHARD: Oh. I see. Your
12 Honor, we don't have any expectation for
13 categorical change. We take these as they come --

14 MR. IVERSON: No expectations.
15 Okay. Third question. Stakeholders. I'm just
16 wondering, you mentioned two stakeholders in
17 support, that came forth in support of these
18 changes.

19 DR. BOUCHARD: Uh-huh.

20 MR. IVERSON: Do you know those
21 two stakeholders?

22 MS. COLEMAN: Your Honor, if I
23 could just start while Dr. Bouchard is thinking.

24 THE JUDGE: Uh-huh.

25 MS. COLEMAN: There are -- all of

1 the written comments are included as part of the
2 administrative record that are posted on our rule
3 web page. And so any of those comments are
4 available to anyone and you can review those.

5 MR. IVERSON: Okay. Were any of
6 them private citizens or were they just
7 corporations?

8 MS. COLEMAN: Your Honor, I think
9 the list is in the rule exhibit hearing list and
10 the individual can make -- Mr. Iverson can make his
11 own assessment as to whether they were individuals
12 or corporations.

13 MR. IVERSON: Okay. I guess I
14 will proceed, since I have a time limit and you
15 have a time limit. I jotted down some notes. I'm
16 no Clarence Darrow. I'm not Perry Mason. Okay?
17 Even with my limited layman's grasp of these
18 changes and revised definitions as proposed by our
19 own MPCA and apparent cooperation with the
20 Minnesota Department of No Resources, I see a
21 potentially significant and troubling further loss
22 of protection for our water quality in Minnesota.
23 And one must wonder, considering previous court
24 actions concerning the MPCA and their serious
25 failure by the public trust -- in the public trust

1 to truly preserve and protect our most valuable
2 resource of water. And so these proposed and
3 circumspect modifications to the designated
4 standards concerning trout streams should be
5 denied.

6 We certainly have come a long way since
7 those days when Governor Wendell Anderson was on
8 the cover of Time Magazine proudly hoisting up a
9 nice healthy northern pike with the caption of
10 "The Good Life." I never lived in fear of telling
11 the truth and following my conscious. And I think
12 the MPCA, the Department of Natural Resources and
13 our own legislators should follow my example.

14 THE JUDGE: Very good.

15 MR. IVERSON: Thanks.

16 THE JUDGE: Thank you very much
17 for your comments. Are you going to be submitting
18 written comments, sir, then?

19 MR. IVERSON: No. These people
20 are so much better at it.

21 THE JUDGE: Well, I thought you
22 did a wonderful job. And you are certainly welcome
23 to submit written comments as well.

24 MR. IVERSON: Thank you, lawyer.
25 Or judge.

1 THE JUDGE: Okay. Let's go to --
2 back to Duluth then. Dorie Reisenweber.

3 MS. REISENWEBER: Correct.

4 THE JUDGE: Very good.

5 MS. REISENWEBER: Hello. My name
6 is Dorie Reisenweber. My formal name is Doretta,
7 D-o-r-e-t-t-a, Reisenweber, R-e-i-s-e-n-w-e-b-e-r.
8 I live at 101 West Kent, K-e-n-t, Road in Duluth,
9 Minnesota 55812.

10 As a former teacher, I'm very concerned
11 for our --

12 THE JUDGE: One moment, please.

13 (Discussion held off the record.)

14 THE JUDGE: Ms. Reisenweber, if
15 you could slow down for us, that would be helpful.

16 MS. REISENWEBER: Right.

17 THE JUDGE: Thank you.

18 MS. REISENWEBER: As a former
19 teacher, I am very concerned for our children.
20 Clean, safe water is vital to their future and to
21 us all. I appreciate the chance to express my
22 opposition to the Minnesota Pollution Control
23 Agency's, MPCA's proposed changes in trout waters.
24 These changes would weaken Minnesota's sulfate
25 standards and let more sulfate into the waters

1 which would increase harm to the fish, wild rice
2 and human health.

3 I hope this quote from yesterday's
4 Duluth News Tribune will be followed by actions
5 true to the statements. "The Minnesota Pollution
6 Control Agency is dedicated to protecting
7 Minnesota's most valuable resource, its water. The
8 MPCA will continue to engage with stakeholders to
9 ensure the state's groundwater and surface water
10 are protected." This article reports on Minntac's
11 8000 acre tailings basin which is leaking into
12 ground and surface water. The high sulfate content
13 of the leaking water may be one reason for mining
14 companies, including copper-nickel mining companies
15 such as PolyMet as well as taconite mining
16 companies, to pressure the MPCA to create the
17 proposed lax sulfate standards. Don't more lax
18 sulfate standards contradict the MPCA's dedication
19 to protecting the waters?

20 Water is part of the commons, belonging
21 to all, and thus requiring protection. The climate
22 crisis exacerbates the need for clean, safe water
23 throughout the world, including in the U.S.
24 Minnesota's precious waters must be protected for
25 all. Who would benefit from sulfate polluted

1 waters if current standards were eliminated by
2 these proposed changes? Not the fish, not the wild
3 rice, not the children, or any people, all of whose
4 well-being depends on the MPCA to maintain and
5 enforce current protective water standards.

6 I urge that all agencies and parties
7 who may affect the decision on the proposed
8 weakening of the water quality standards consider
9 the future. Are northeastern Minnesota's clean
10 waters no longer a precious resource?

11 I urge that the MPCA be mandated to
12 follow through on its statement and that it indeed
13 would protect the waters and other natural
14 resources. I urge all responsible parties to not
15 allow the proposed changes which would contribute
16 to further resource exploitation by developers and
17 other wealthy stakeholders and hasten the demise of
18 the people's precious waters. After all, aren't
19 the people the primary stakeholders.

20 To me, the proposed trout water rule
21 changes would present a threat to the public
22 health. They are not merely risky. They are just
23 plain wrong. Thank you for your consideration.

24 THE JUDGE: Thank you.

25 Ms. Reisenweber, I assume you will be sending in

1 your written comments that you just read, or no?

2 MS. REISENWEBER: Yes, I will.

3 THE JUDGE: Thank you so much. I
4 look forward to receiving those. Let's now turn to
5 -- give me a moment. I'm running a timer on my
6 phone so I can stay fair and even here and I have
7 to turn it off in between.

8 So let's then go to Rochester. Cecilia
9 Dingbody, would you like to talk?

10 MS. DINGLEDY: It's Dingledy.
11 Dingledy.

12 THE JUDGE: Dingledy. Okay. They
13 have you -- it's spelled wrong here. So I
14 apologize for that, what they wrote. If you could
15 please state and spell your first and last name,
16 that would be helpful.

17 MS. DINGLEDY: My name is Cecilia,
18 C-e-c-i-l-i-a. Dingledy, D-i-n-g-l-e-d-y. I live
19 at 3443 Jasper Court Northeast, Rochester,
20 Minnesota 55906. I'm a member of Water Legacy.

21 THE JUDGE: Very good.

22 MS. DINGLEDY: I appreciate the
23 comments from members from St. Paul, Duluth, who
24 else, other areas who have been talking about the
25 lack of coordination between the MPCA and the DNR.

1 Dr. Bouchard had his very organized
2 slide show, but some things were gone over very
3 quickly. I have a question for Dr. Bouchard. The
4 last slide had something about effluent limits.
5 Are you talking about the removal of the 250 parts
6 per million sulfate limit for trout waters?

7 DR. BOUCHARD: Your Honor, no,
8 this proposed rule doesn't change sulfate
9 standards. There is no sulfate standards in the
10 aquatic life use standards.

11 MS. DINGLEDY: So that is not part
12 of it. So the other question I have: Are trout
13 waters Class 2A downgraded to Class 2B waters?

14 DR. BOUCHARD: Your Honor, could
15 you clarify the question, please?

16 MS. DINGLEDY: If streams and
17 lakes that are now trout waters 2A are downgraded
18 to Class 2B waters, there is a concern that water
19 quality standards intended to protect trout and
20 drinking water would no longer apply. Will that be
21 true?

22 DR. BOUCHARD: Your Honor, for any
23 waters that the designation is moving from a Class
24 2A to a 2B, it's actually a 2Bd which retains the
25 Class 1B drinking water standards. So the drinking

1 water standard would be retained on those waters.
2 These are waters that do not naturally support cold
3 water communities and so the warm water designation
4 is correct. So it's not removing a protection for
5 a trout water because that water is not actually --
6 it's loosely defined as a trout water and not --
7 you know, so it's not a cold water habitat that
8 supports trout, and so moving it from a from a 2A
9 to a 2B doesn't downgrade the protections.

10 MS. DINGLEDY: My other question
11 is with all the scientists at MPCA, we know that
12 trout stops growing at 73 degrees Fahrenheit. They
13 can survive up to 77 degrees Fahrenheit. Why are
14 we just using cold and warm for these designations
15 for streams and nothing more specific as far as
16 temperature?

17 DR. BOUCHARD: Your Honor --

18 MS. DINGLEDY: For Dr. Bouchard.

19 DR. BOUCHARD: Your Honor, I think
20 this one is getting technical and so -- I
21 appreciate the comment. I think we would like to
22 respond to this in the posthearing comment period.

23 THE JUDGE: Okay. So they are
24 choosing to respond in writing to your answer. To
25 your question.

1 MS. DINGLEDY: I am very concerned
2 about the lack of organization and the coordination
3 with MPCA and the DNR. And the MPCA's recent 10
4 year assessment found that over half of Minnesota's
5 waters are impaired. 580 bodies of water added to
6 the polluted list. Northeast Minnesota having
7 significantly higher concentrations of mercury and
8 fish. Southern Minnesota waters contaminated by
9 excess soil and nutrients from farm field. I would
10 say this is a water crisis for Minnesota.

11 The report will go to the EPA, where
12 EPA could stand for Environmental Polluting instead
13 of Environmental Protection Agency headed by a
14 wheeler-dealer, a former co-lobbyist with an anti-
15 environment agenda weakening clean water rules.
16 Minnesota voters and taxpayers expect MPCA rules to
17 safeguard Minnesota's trout habitat, clean
18 drinking, wilderness and animal habitats and water
19 for tribal communities and others who rely on
20 fishing. Don't water down the standards. Follow
21 MPCA's mission, quote, "To protect and improve the
22 environment and human health," unquote. Make
23 "pollution control" mean something.

24 THE JUDGE: Thank you very much
25 for your comments. Very good. So we will turn

1 back now to St. Paul. And the next individual is
2 Howard Marcus. Howard, would you still like to
3 speak?

4 MR. MARKUS: Yes.

5 THE JUDGE: Okay. If you could
6 state and spell your first and last name, sir. And
7 I will mark into the record your written comments.
8 Thank you. They will be L-11. They are marked and
9 received. Please state and spell your first and
10 last name.

11 MR. MARKUS: Yes. My name is
12 Howard Markus, H-o-w-a-r-d M-a-r-k-u-s. I live at
13 9175 Pinehurst Road, Woodbury, Minnesota 55125. I
14 want to thank Judge O'Reilly and Mary, Jean and
15 Dr. Bouchard for offering this opportunity to
16 present my comments.

17 I'm going to modify my comments a
18 little bit from what I submitted for a couple of
19 reasons. One, I continue to have more brainstorms
20 as things evolve. And also this Exhibit L-2 which
21 I think affected a little bit of what I was going
22 to say. And I think it was developed at least in
23 part in response to what I had originally
24 submitted. So I will have to incorporate that into
25 what I say.

1 I have a lengthy record in rulemaking
2 and in Class 2. And I have attached that at the
3 end of my handout. I was employed for 10 plus
4 years with the Missouri State Water Agency and
5 almost 23 years with the MPCA, including
6 appointment as a wastewater treatment plant review
7 engineer, a water quality planner, a water quality
8 modeler and a research scientist here at the MPCA.
9 I have a Ph.D. from Iowa State and I'm a retired
10 professional engineer.

11 While working at the MPCA, I was
12 involved with at least five rulemaking efforts
13 here. Most of them involving biology where I was
14 either a lead or I assisted between 1993 and 2013
15 when I retired.

16 The specific topic I'm going to discuss
17 is the requirement that the MPCA use both actual
18 and potential field conditions to determine both
19 designated use determinations and pollution
20 determinations and my concern that the Agency is
21 ignoring that requirement. And I will go into that
22 in some detail.

23 The specific rules I'm going to talk
24 about are 7050.0150 and 7050.0420. I'm going to
25 give examples of the following statute and rules,

1 describing the need to use both actual and
2 potential conditions. Minnesota Statute 115.01,
3 subpart 13; Minnesota Rule 7050.0140, sub parts 2
4 and 3; 7050.0220 through 7050.0227, subparts 1 and
5 7050.0150, subparts 1 and 4(b). And those are just
6 ones I found. There's probably more.

7 I believe subsequent to my written
8 comment requesting the rulemaking, that the Agency
9 added the phrase feasible -- "feasibly attainable."
10 But I do not believe that covers potential. And I
11 will go into that in quite a bit of detail.

12 At least 10 times the statute and rules
13 make clear that both actual and potential
14 conditions must be met. I won't read all the
15 important language from all these different things,
16 but I will read a portion of the first one,
17 Minnesota Statute 115.01, subdivision 13. I'm not
18 a lawyer. I'm just an engineer and a biologist,
19 but I think it's sort of what I consider enabling
20 language.

21 Pollution of water, water pollution or
22 pollute the water means, A, the discharge of any
23 pollutant in any waters of the state or the
24 contamination of any waters of the state so as to
25 create a nuisance or render such water as unclear

1 or noxious or impure so as to be actually or
2 potentially harmful or detrimental or injurious to
3 public health. And it goes on from there. It's
4 very clear that it's a coequal requirement to
5 consider the potential impacts of assessments.

6 The actions proposed by the current
7 MPCA's rulemaking makes it -- specifically ignores
8 the potential habitat or a history of potential
9 habitat. And I think the concepts of actual and
10 potential require some kind of explanation. I will
11 try to be quick.

12 As an example, an undisturbed river may
13 have had an abundant wild rice bed as noted in
14 local history or biological assessment. If a
15 mining operation then begins discharging pollutants
16 that cause that wild rice bed to become greatly
17 diminished or gone, the current or actual
18 assessment would recommend removing a wild rice
19 designation from that river because it's not there
20 when they go to assess it. And that would happen
21 in this proposed rule change. The potential or
22 history of potential would be ignored. And that is
23 wrong. It's not reasonable. If the polluting
24 impacts of that mine are controlled, there would be
25 enough of a wild rice seedbed to restore the wild

1 rice community.

2 I'm not sure everybody -- being a
3 biologist, I'm not sure everybody understands the
4 concepts of seed banks. If anybody gardens. I'm a
5 master gardener in Washington County. If anybody
6 is a gardener, they understand that tons of seeds
7 are dropped off by weeds, but they don't all
8 regerminate at once. A lot of times there will be
9 decades and decades of decades of seeds that are
10 viable for long periods of time. There is whole
11 studies of lake sediment beds that have decades and
12 centuries of seeds that are still viable. And so
13 that's what's called a seed bank. And that seed
14 bank is there and that can help feed the potential
15 for restoration if allowed if the pollution goes
16 away.

17 THE JUDGE: You reached your five
18 minutes, so if you can kind of tie it all together.

19 MR. MARKUS: I will try to be
20 quick, because I'm about an eighth of the way
21 through.

22 It is wrong to grandfather in past
23 pollution practices and ignore the water resource's
24 ability to recover. And that's what these proposed
25 amendments do. This is exemplified by the PCA

1 recommendation to lessen the designated use of
2 Cedar Lake from a trout stream 2A to a non-trout
3 stream 2Bd based on actual use lakes. Anyway, it's
4 a small lake and the DNR decided to stop stocking
5 it. But that doesn't mean the use isn't
6 potentially there. That doesn't mean the DNR
7 couldn't at some future time decide to restock.
8 But if this use change is -- if this use is
9 changed, they may be inhibited from doing that.
10 And that's not reasonable either. Because we're
11 not DNR. We are PCA here. And we need to protect
12 and maintain uses that are potentially achievable.

13 THE JUDGE: Here's what I'm going
14 to do. The reason being is it's 6:10. I think we
15 are only scheduled to be here until 7:00. We can
16 stay later or no?

17 MS. LYNN: (Indicating.)

18 THE JUDGE: Okay. We can stay
19 later. My worry, though, is it would be
20 disrespectful to everybody if I don't keep
21 everybody to a five-minute and then have you back.
22 Okay?

23 MR. MARKUS: Okay. Thank you.

24 THE JUDGE: So why don't I do
25 this. Stick around. I'm going to put a note. I'm

1 going to highlight you as somebody who will come
2 back after we've given everybody five minutes. I
3 just want to be fair to everybody here who has
4 taken their time to come.

5 MR. MARKUS: Okay.

6 THE JUDGE: And I'm grateful that
7 you submitted in writing, too.

8 MR. MARKUS: Yes.

9 THE JUDGE: That's very helpful.

10 MR. MARKUS: Thank you.

11 THE JUDGE: So let's keep moving.

12 We are going to go back to Duluth. I think there
13 are two people left there. Janet Keough, are you
14 still there? Janet had to leave.

15 MS. AMUNDSEN: However, we have
16 Ricky here.

17 THE JUDGE: DeFoe?

18 MS. AMUNDSEN: Yes.

19 THE JUDGE: Is Ricky the last
20 person in Duluth?

21 MS. AMUNDSEN: Yes, ma'am.

22 THE JUDGE: Why don't we have
23 Ricky come on up. So then after Ricky, here's how
24 we're going to do it. We're going to go St. Paul,
25 Detroit Lakes, St. Paul, Detroit Lake and then

1 finish with St. Paul.

2 Okay. Mr. DeFoe, if you could please
3 state and spell your first and last name, sir.

4 MR. DEFOE: My name is Ricky
5 DeFoe, R-i-c-k-y D-e-F-o-e. And I live at 704
6 Ishpeming Road. And that's spelled
7 I-s-h-p-e-m-i-n-g Road. And that's in Cloquet,
8 Minnesota 55720.

9 THE JUDGE: Thank you, sir.

10 MR. DEFOE: Okay. I want to talk
11 about -- a little bit about how I feel about I
12 would like to see a denial of this proposal to
13 change the wording from "trout water" to "cold
14 water habitat."

15 From what I remember, this institution
16 was called the Minnesota Pollution Control Agency
17 and as I was growing up in school I would hear
18 about control. But now it seems it's the Minnesota
19 Pollution Allow Agency. And the reason I say that
20 is because the bottom line is when these
21 protections be lessened to allow further pollution
22 to occur incrementally, this process of methylation
23 leads to mercury contamination in fish consumed by
24 tribal members.

25 I'm a member of the Minnesota Chippewa

1 tribe. I belong to the Band of Fond du Lac. And
2 much of the St. Louis River and Cloquet River and
3 other ones come through our homelands. So the
4 impact is felt big time by us tribal members. And
5 this mercury contamination leads to future health
6 concerns.

7 I want to talk a little bit also about
8 70 percent of the planet is water. 97 percent of
9 that is saltwater. And that leaves 3 percent of
10 freshwater. 1 percent in atmosphere and 1 percent
11 in subsurface and 1 percent surface. And of that
12 1 percent surface Lake Superior and its watershed
13 is 10 percent.

14 So we talk a lot in indigenous world
15 views about natural law which leads to healthiness
16 and spiritual law which leads to happiness and the
17 oppressive nature of manmade laws.

18 Now, what we're talking about here from
19 the Minnesota Pollution Control Agency as far as
20 I'm concerned it obfuscates. It really does a good
21 job of obfuscation rather than clarification of
22 some things. Particularly, the -- what is morally
23 right. What is morally just. It does a poor job
24 of clarifying that for us as a people.

25 So we have a cosmology and a philosophy

1 that stems from that which entails all values and
2 our actions to those values and that leads to our
3 institutions. This institution of the Minnesota
4 Pollution Control Agency is lending to this
5 confusion of this proposed change from a trout
6 waters, which we all know is historic, to this cold
7 water habitat, which would lead to a lessening of
8 protections. So they have actually become a tool
9 of corporate America to be used in the same way
10 that a civilian review board is used by a tool of
11 law enforcement. As a metaphor, I use that. But
12 it's used to help them, rather than anybody else.

13 Our indigenous world view is that the
14 mountains and the rocks are here first. The seeds,
15 the grass and the trees were here next. The
16 animals, which includes the flyers, the crawlers,
17 the swimmers, the walkers were here next. And man
18 was here last. And what we have now is this root
19 paradigm we're all socialized into is that dominion
20 over all things, a hierarchy of life, and this male
21 transcendent god. And particularly this number 2
22 part of the root paradigm is hierarchy of life.
23 Which is we can see the chain of being where man is
24 at the top and even the rocks and mountains are
25 inanimate. So we have a challenge in indigenous

1 communities to right side that world view in these
2 institutions such as the Minnesota Pollution
3 Control Agency is making things really difficult to
4 do those things. So I think it's procedural, which
5 is obfuscate -- obfuscating which is what is
6 morally right and what is morally just.

7 So we talk a lot about treaties. And
8 it requires -- and the requirement in those
9 treaties is access to hunt, fish and gather, free
10 from contamination. And if these treaties are
11 abnegated, it becomes null and void, entitled to
12 land and resort back to their original titleholder,
13 the tribes. So we see the connection there.

14 We know that 94 percent of the meat
15 consumed on our planet today is from domesticated
16 animals. That means only about 6 percent wild.
17 Which includes the deer, the moose the bison,
18 et cetera.

19 THE JUDGE: Sir, I don't mean to
20 interrupt you, but you have reached your five
21 minutes. Are you close to wrapping it up?

22 MR. DEFOE: Yeah.

23 THE JUDGE: Okay. Fabulous.
24 Because you can also submit these in writing. I do
25 welcome you to submit your written comments that

1 your are reading from, too.

2 MR. DEFOE: I just want to say
3 that much of the indigenous world view and because
4 of demographics and population numbers is never
5 heard, this world view. So I, as a citizen of the
6 Minnesota Chippewa tribe, want to say I want to
7 deny this change, this proposed change from trout
8 waters to cold water habitat.

9 THE JUDGE: Thank you very much,
10 sir. Thank you so much for your comments.

11 MR. DEFOE: Thank you for hearing
12 me.

13 THE JUDGE: Thank you. All right.
14 We now turn to St. Paul again. And we -- is it
15 Jaci or Jaci?

16 MS. CHRISTENSON: Jaci.

17 THE JUDGE: Jaci Christenson.
18 Okay. If you can please state and spell your first
19 and last name. Another familiar face I think. All
20 right.

21 MS. CHRISTENSON: Concern for
22 water brings me to this space again.

23 THE JUDGE: Very good.

24 MS. CHRISTENSON: It's Jaci
25 Christenson, J-a-c-i C-h-r-i-s-t-e-n-s-o-n.

1 THE JUDGE: Very good.

2 MS. CHRISTENSON: Address: 12309
3 Fiona Avenue North, White Bear Lake, Minnesota
4 55110. I'm here as a concerned citizen. I
5 volunteer for a number of different organizations
6 throughout the state.

7 So, Honorable Judge O'Reilly, thank you
8 for this opportunity. I'm opposed to the MPCA's
9 rule change for trout water because it is based on
10 stakeholder requests, it violates Minnesota
11 statutes and the Clean Water Act and will further
12 degrade our water.

13 First off, as a concerned citizen, I'm
14 curious about the timing of this rule change. On
15 the MPCA amendments to water quality standards use
16 classification 2 and 7 proposed rule amendments it
17 reads: As a result of routine monitoring and
18 stakeholder requests, the MPCA has identified
19 waters where the currently designated beneficial
20 use does not accurately reflect an attainable use.

21 So I ask you: Who are the
22 stakeholders? After reading the comments submitted
23 to the MPCA on this rule change, I'm lead to
24 believe they are US Steel, Hibbing Taconite and
25 Cliffs, for starters. Industries where we have

1 allowed operations without taconite tailings basin
2 permits for decades. Environmental organizations
3 and the public do not believe that changing this
4 rule would be beneficial to Minnesota's water and
5 people.

6 This degrading -- and a number of
7 those, they are the organizations that I volunteer
8 with. This degrading rule change aligns nicely
9 with the timing of Minnesota's copper sulfide mine
10 projects expanding the list of stakeholders. I'm
11 extremely troubled that the MPCA is making rules to
12 protect corporate stakeholders over people.

13 Secondly, the very act of changing
14 trout waters to cold water habitat waters violates
15 Minnesota Statute 115.44 and seems an admission
16 that our iconic trout are no longer a priority for
17 the MPCA.

18 In the Clean Water Act, it states if a
19 designated use is an existing use for a particular
20 water body the existing use cannot be removed
21 unless a use requiring more stringent criteria is
22 added. The MPCA is clearly proposing less and not
23 more stringent criteria in changing from trout
24 waters to cold water habitat. In changing this
25 rule, the MPCA is accepting a new normal for our

1 waters based on waters that currently support trout
2 rather than additionally striving to restore those
3 waters that previously supported trout.

4 I would like to know what are the
5 consequences of this rule change? The MPCA has
6 either not studied it or is not disclosing the
7 information. With 56 percent of Minnesota's water
8 impaired to the point where we can no longer swim,
9 eat fish from or drink, the MPCA's rule change for
10 trout waters takes us in the opposite direction
11 that we need to be going to ensure clean water for
12 future generations. So who among us, who among us
13 is going to answer to the children who as a result
14 of this rule change experience adverse effects from
15 sulfates in their drinking water?

16 I would also like to just mention,
17 thank Ricky for his words and also say that as
18 non-natives we also have a responsibility to uphold
19 treaties. Our native allies do that beautifully
20 and brilliantly. But we as non-natives have the
21 responsibility to uphold the treaties. And it's
22 impacting the treaty lands. This rule change is
23 impacting the treaty lands of our tribal friends to
24 the north. So I just want to also mention that
25 it's on all of us to uphold treaties. Thank you

1 very much.

2 THE JUDGE: Very good. Thank you.
3 Do you want to mark your written comments into the
4 record?

5 MS. CHRISTENSON: Sure.

6 THE JUDGE: I will mark your
7 exhibit as L-12.

8 MS. CHRISTENSON: Thank you.

9 THE JUDGE: Thank you so much. We
10 are going to turn now -- it looks like Rochester
11 and Duluth can be excused if you would like. Or
12 you can stay. It's up to you. It looks like
13 Rochester has left. Or maybe not.

14 UNIDENTIFIED SPEAKER: We're still
15 here. We just don't have any commenters.

16 THE JUDGE: Okay. No more
17 commenters in Rochester. And, Duluth, it looks
18 like your last is leaving.

19 MS. AMUNDSEN: Yes.

20 THE JUDGE: Okay. Thank you. You
21 are excused if you'd like to be. We are going to
22 turn now to Detroit Lakes. Bernie Meyer. Bernie.

23 MR. MEYER: Okay. Um --

24 THE JUDGE: Hold on. Bernie,
25 would you like to speak? There we've got you,

1 Bernie. Would you like to make oral comments
2 today?

3 MR. MEYER: Yes. There has been
4 many others that have --

5 THE JUDGE: Hold on. I need you
6 to state and spell your first and last name for the
7 record.

8 MR. MEYER: Bernie Meyer,
9 B-e-r-n-i-e M-e-y-e-r.

10 THE JUDGE: Very good.

11 MR. MEYER: There has been many
12 others previously that have stated my concerns, so
13 I will just be short and simplistic.

14 My concern is is if headwaters or feed
15 ditches are reclassified and not maintain the
16 current standards, then are we not contributing to
17 long-term degradation of the downstreams that are
18 currently at the higher standard? That's all I
19 have.

20 THE JUDGE: Okay. Very good.

21 And, Mr. Meyer, you are encouraged to submit your
22 written comments as well. Thank you.

23 Give me a moment here. Sorry, that was
24 a different alarm I had, just to set a time for a
25 break if we wanted to. But I don't feel the need

1 for a break. But I should ask our court reporter.
2 Would you like a ten-minute break?

3 THE COURT REPORTER: I'm fine.

4 THE JUDGE: Okay. I'm going to
5 set another alarm for myself, though, for breaks
6 because sometimes I get going and I forget about
7 her hands getting tired. And I try not to do. So
8 give me one minute here to set an alarm.

9 Let's turn now to our next -- I think
10 it's Digly.

11 MS. DIGBY: Digby.

12 THE JUDGE: Digby. I have trouble
13 reading the first name. But come on up. And I'm
14 going to have you state and spell your first and
15 last name for me.

16 MS. DIGBY: Thank you, Judge
17 O'Reilly. My name is Stephanie Digby.
18 S-t-e-p-h-a-n-i-e. Digby, D, as in David, i-g-b-y.
19 I live at 1682 Taylor Avenue in St. Paul 55104.

20 THE JUDGE: Thank you.

21 MS. DIGBY: As I said, my name is
22 Stephanie Digby. I am Dr. Stephanie Digby. My
23 doctorate is in botany from the University of
24 California, Davis. I tend to speak quickly. I'll
25 slow down.

1 THE JUDGE: Thank you.

2 MS. DIGBY: My dissertation is in
3 fungal genetics. My master's from the University
4 of Rhode Island specialized in aquatic mycology.
5 Which is the study of aquatic fungi. And they are
6 important in the food chain. The food chain
7 doesn't start with the macroorganisms such as
8 invertebrates like daphnia, which is one of the
9 things that MPCA quoted. Rather, it begins with
10 single-celled photosynthetic organisms and aquatic
11 fungi. The aquatic fungi degrade leaves that fall
12 into the water. They make the nutrients available
13 to the microorganisms to the daphnia that's going
14 to eat the little algae and so on up through the
15 food chain. And these fungi are extremely
16 sensitive to sulfites.

17 MPCA wants to increase sulfite levels.
18 And they are also sensitive to other heavy metal
19 pollutants. These pollutants will kill many of the
20 more important aquatic fungi. I have referred to
21 them as hyphomycetes, h-y-p-h-o-m-y-c-e-t-e-s,
22 because that is the correct designation. Nutrition
23 for trout and all other fish begin at the invisible
24 level of these single-celled organisms. When you
25 pollute these organisms, you are impeding the

1 entire food chain.

2 MPCA's page for this proposal shows
3 greenery and a sparkling stream that it seems they
4 are proposing to destroy by permitting sulfites to
5 enter our waters. I cannot comprehend that the
6 MPCA is willing to increase sulfite levels in
7 aquatic systems in Minnesota unless trout have been
8 seen in those waters. To claim the lack of their
9 presence means they cannot live there is scientific
10 nonsense. Maybe I should say non-science. The
11 lack of fish does not mean that the waters are
12 there for damage and further pollution is
13 reasonable. And yet this is what MPCA is
14 promulgating.

15 What is also ignored is the increase in
16 sulfites increases mercury methylation. A toxin
17 that MPCA can't argue about. The MPCA is ignoring
18 the potential brain damage to neonates, infants and
19 children of the tribes who inhabit this region. Do
20 we want our own Minamata for the tribes who fished
21 here long before the mining companies tried to take
22 our waterways?

23 The aim of the Clean Water Act is to
24 protect. My understanding is that it does not mean
25 water can be downgraded because a single species of

1 vertebrate is not seen. And they certainly will
2 never be seen if the water is polluted.

3 I have to ask the MPCA which is more
4 important to Minnesotans, protecting the waters of
5 Minnesota for current and future generations or
6 catering to the insistent demands of the mining
7 companies that our water standards be downgraded?
8 Thank you.

9 THE JUDGE: Thank you. Would you
10 like to offer that?

11 MS. DIGBY: Yes. A little bit in
12 my awful writing that explains about aquatic
13 hyphomycetes. If you want me to send a revised
14 copy, I can.

15 THE JUDGE: I can read your
16 writing.

17 MS. DIGBY: You can?

18 THE JUDGE: So thank you. Yes.

19 MS. DIGBY: Thank you.

20 THE JUDGE: I receive this as
21 Exhibit L-13.

22 MS. DIGBY: Thank you.

23 THE JUDGE: Thank you so much.

24 Now we are going to go back to Mr. Mattison in
25 Detroit Lakes.

1 MR. MATTISON: Thank you, Your
2 Honor. My name is Willis Mattison, W-i-l-l-i-s
3 M-a-t-t-i-s-o-n. And I want to thank you, Your
4 Honor, and the MPCA for allowing us the opportunity
5 to comment on the proposed rule changes. Just my
6 comments particularly to 7050.0420. The topic that
7 many people have addressed, the trout waters or
8 habitat waters.

9 I'm particularly troubled with the
10 provision that the proposed rule would rely on the
11 phrase "feasible attainability." I compliment
12 Dr. Bouchard on his nimbleness to find the
13 definition for the separate words "feasibility" and
14 "attainability." But he did not find a definition
15 of the phrase "feasible attainability" as used in
16 this rule. So I suggest the Clean Water Act
17 definitions are inappropriate to define this
18 function.

19 Secondly, I'm an ecologist and a career
20 employee of the Minnesota Pollution Control Agency
21 who was intimately involved in developing many of
22 the stream standards and doing infield assessments
23 for determining attainability of certain water
24 quality uses. So I'm intimately familiar with the
25 practice of what's known as professional judgment.

1 This term would allow the uncontrollable level of
2 professional judgment to be used and it would have
3 consequences for these streams long term. I
4 believe that the term is far too vague and that
5 Your Honor should recommend that this rule range be
6 stricken because of its vagary, and then the
7 unsupportability of a designation based on this
8 rather undefinable level of proof or evidence.

9 I'm particularly concerned as well that
10 as Mr. Marcus pointed out that many of these
11 streams, while they do not presently demonstrate or
12 have present in them aquatic life assemblages,
13 including trout, that their future potential for
14 having them remains.

15 Many of the reasons these organisms
16 have disappeared have been as a result of land use
17 changes in the watershed. DNR may or may not have
18 had resources to do in-stream habitat restoration
19 and, therefore, no longer giving their limited
20 resources to placing trout or managing trout. It
21 should not then be stricken, that particular stream
22 be stricken from future potential restoration to a
23 level that would support these fisheries and
24 aquatic life uses.

25 So I would really strongly recommend

1 that we rely on the definition and purpose of the
2 Clean Water Act on which these rules are based.
3 That is, to protect and to restore the physical,
4 chemical and biological integrity of the nations
5 waters. We must not remove the potential for
6 restoration by slight of hand or a flippant phrase
7 of "feasible attainability." This, in fact,
8 constitutes what the rule itself was supposed to
9 prohibit. And that is backsliding of these water
10 quality standards.

11 So that would conclude my remarks. I
12 do not intend to make these in writing. I'm sorry
13 that my time would not allow it. I hope I have
14 been clear in my oral comments sufficient to make
15 the point. Thank you, Your Honor.

16 THE JUDGE: Thank you very much
17 for your time today. Okay. We are coming back now
18 to St. Paul. John Sadusky, he left. But I did
19 enter his written comments in. Next is Steven
20 Ring. Mr. Ring.

21 MR. RING: Thank you, Your Honor.
22 This is a copy of --

23 THE JUDGE: Fabulous. I'm going
24 to mark Mr. Ring's comments as Exhibit L-14 and
25 they are received into the hearing record.

1 Could you state and the spell your
2 first and last name, sir.

3 MR. RING: My name is Steven Ring.
4 S-t-e-v-e-n R-i-n-g.

5 THE JUDGE: Very good. Please
6 proceed.

7 MR. RING: Yes. Thank you for the
8 opportunity. I'm making an assumption here that
9 may not be exactly correct. I may be confused with
10 what Dr. Bouchard responded to one of the
11 questions. But my assumption is that in
12 reclassifying some waters that are currently
13 classified as 2A when they are reclassified to 2B
14 that those waters will lose their 250 parts per
15 million sulfate water quality standard.

16 DR. BOUCHARD: Your Honor, they
17 would not.

18 MR. RING: They would not?

19 DR. BOUCHARD: There is no sulfate
20 standard being impacted by these use designation
21 changes.

22 MR. RING: So it doesn't matter if
23 something is currently 2A and it goes to 2B they
24 don't lose a standard?

25 DR. BOUCHARD: Your Honor, the use

1 designations from 2A to 2B or 2Bd which include
2 with it the Class 1B which carries with it the
3 sulfate standard, so it retains the 1B designation
4 and therefore the sulfate standards.

5 MR. RING: So no changes that you
6 have proposed will actually drop the sulfate
7 standard?

8 DR. BOUCHARD: Your Honor, yes,
9 that is correct.

10 THE JUDGE: Okay. Just to be
11 clear. So no changes proposed will affect sulfate
12 standards applied to these waters, yes or no,
13 Dr. Bouchard?

14 DR. BOUCHARD: Your Honor, no,
15 they will not be. Sorry.

16 THE JUDGE: Okay.

17 MS. MACCABEE: Can you say where
18 in the rule that is indicated? Where is that
19 indicated in --

20 THE JUDGE: Hold one --
21 Ms. Maccabee -- is that correct? So just to be
22 clear, Doctor, you are saying that none of the
23 changes proposed in these rules will affect the
24 sulfate standards applied to these waters? Is that
25 correct?

1 DR. BOUCHARD: Your Honor, yes,
2 that is correct.

3 THE JUDGE: Okay.

4 MR. RING: Your Honor, then I
5 believe most of my testimony is probably moot.
6 Because I am focusing on the increase in sulfate
7 which, as other people have testified, has an
8 impact on aquatic organisms. And, particularly, I
9 was focusing on the increase in mercury. That --
10 that sulfate bioactivity can convert inorganic
11 mercury to organic mercury.

12 So I guess I would like if the MPCA
13 could formally state in a response to comments or
14 something that that is the case. Because I believe
15 that many people feel or are misinformed about
16 what's happening.

17 THE JUDGE: It would be helpful to
18 me if the MPCA could clarify that in writing and
19 make it extremely clear. Because a lot of these
20 comments are, as our first speaker, you know, we
21 have a lot of pages here that talk about sulfates
22 and mercury. But if these rules are not going to
23 affect -- if these classification changes are not
24 going to impact sulfate standards for any of the
25 waters, then I think that needs to be made clear.

1 MS. COLEMAN: And, Your Honor,
2 many of the comments that we received during the
3 public comment period also made those types of
4 statements. And we do fully intend to respond in
5 writing in our response to comments to that effect.

6 THE JUDGE: Okay. All right. So
7 everybody here, you want to keep following this
8 rule. Right? Because you are going to want to see
9 what they say. Hold them to their word. Right?
10 So you will have an opportunity to provide written
11 comment for 20 days after today and then rebuttal
12 for five days after that. And that's rebutting
13 something that they say during that 20-day comment
14 period.

15 Okay. Anything further, sir?

16 MR. RING: No, I believe that my
17 written comments are addressed. If there is any
18 increase in sulfate, I think it's a terrible
19 problem and that it would be contrary to overall
20 goals of the PCA and to the state.

21 THE JUDGE: Sure. Thank you very
22 much. I appreciate your time today.

23 MS. HOTZ: Pardon me. Your Honor?

24 THE JUDGE: Yes.

25 MS. HOTZ: It appears that Detroit

1 Lakes is trying to wrap up. I think they may like
2 to be excused.

3 THE JUDGE: Okay. I will. Hold
4 one second. All right. Detroit Lakes -- I don't
5 know if they can hear me.

6 MS. HOTZ: I can send it to them
7 directly as well.

8 THE JUDGE: Okay. Detroit Lakes,
9 you are excused. Well, they are excused. You can
10 let them know by e-mail.

11 MS. HOTZ: Will do.

12 THE JUDGE: All right. We are
13 going to go to Dylan Koltz-Hase.

14 MR. KOLTZ-HALE: Hale.

15 THE JUDGE: Hale. Thank you. If
16 you can please state and spell your first and last
17 name.

18 MR. KOLTZ-HALE: Yes. Dylan
19 Koltz-Hale. D-y-l-a-n K-o-l-t-z hypen H-a-l-e.

20 THE JUDGE: Very good.

21 MR. KOLTZ-HALE: Do you want me to
22 begin testimony then?

23 THE JUDGE: Yes. Start your time.
24 Thank you.

25 MR. KOLTZ-HALE: So, like everyone

1 else, I had to throw out a lot of my notes, because
2 that was a really informative and helpful
3 presentation. So thank you to the MPCA for that.

4 However, I do have one last note. I
5 understand the proposed rule change has merit with
6 regards to the intention to reclassify waters that
7 currently meet 2A standards, but are not classified
8 as such to gain the protections they are entitled
9 to under MPCA classification for 2A. And I
10 understand in the document they provided that the
11 vast majority of waters will be receiving that
12 reclassification. Which is awesome.

13 However, I do not believe the MPCA has
14 demonstrated a reasonable or -- a reason or need to
15 reclassify waters in a way that raise the limit of
16 acceptable contaminants, if that is the case. And
17 I would like to ask Dr. Bouchard if there are
18 changes in those 153 or so miles out of the 837.9 I
19 think in that document that will be receiving a
20 lower classification than is currently applied?
21 Will contaminant levels -- will raised allowed
22 level of contaminants be applied to those? And if
23 so, can we have a clear explanation in writing of
24 what those contaminants would be for each
25 classification? Because it's very unclear.

1 DR. BOUCHARD: Your Honor, we
2 appreciate the comment and we will respond in
3 writing to that comment in our post-comment hearing
4 or post-comment --

5 THE JUDGE: Would you address his
6 name in particular then maybe or at least comments
7 by? Because it helps if you relate to the comments
8 which ones you are responding to.

9 MS. COLEMAN: So, Your Honor, we
10 have a practice at the MPCA of completely
11 identifying or particularly identifying commenters
12 in our response to comments.

13 THE JUDGE: Thank you. That is
14 helpful.

15 MR. KOLTZ-HALE: And I have one
16 last piece as well. So I'm assuming that there
17 will be raised levels of contaminants allowed in
18 this reclassification. If so, I would like to see
19 reason and need for the benefit of raising the
20 allowed levels of contaminants. Because currently
21 I see no reasonable need or public benefit by
22 raising allowed levels of contaminants in those
23 reclassified waters, in addition to the unclarity
24 of what those contaminants would be. And that is
25 it for me.

1 THE JUDGE: Okay. Thank you so
2 much.

3 MR. WINTER: Can I ask him where
4 you find this classification of the numbers of 837
5 and --

6 MR. KOLTZ-HALE: Yeah. That is
7 in --

8 THE JUDGE: Why don't you guys
9 talk privately off -- if you have questions for
10 this in commenter, please talk to him privately.
11 It's just that we don't your name in our transcript
12 yet, et cetera.

13 Okay. Let's move on then. Margot
14 Monson. Margot, we did get to you still.

15 MR. MONSON: I hung in there.

16 THE JUDGE: You hung in there.
17 Very good. Margot, I've already received your
18 written comments as Exhibit L-5, but if you could
19 please state and spell your first and last name.

20 MS. MONSON: My name is Margot
21 Monson. M-a-r-g-o-t M-o-n-s-o-n. I live at 22
22 Ludlow Avenue in St. Paul 55108.

23 THE JUDGE: Slow down.

24 MS. MONSON: I'm an aquatic
25 biologist with a master's degree in entomology.

1 And my research background is studying the aquatic
2 insects that are bioindicators of water quality.

3 THE COURT REPORTER: You are
4 really going to have to slow down for me. I'm
5 writing every single word you are saying.

6 THE JUDGE: Don't rush. It's
7 okay. We're getting -- I think our list is
8 dwindling here. So just relax.

9 MS. MONSON: I'm an aquatic
10 biologist with a master's degree in entomology. My
11 research background is studying the aquatic insects
12 that are bioindicators of water quality in rivers,
13 streams and lakes primarily in northern Minnesota.

14 For any habitat to be healthy, it must
15 have a diversity of plants, animals, fungi,
16 bacteria, et cetera that exist in balance as they
17 evolve in that particular ecosystem. In aquatic
18 habitats, the health of the water depends on the
19 surrounding soil, the vegetation, the sunlight, the
20 diversity of invertebrates, that is the species
21 richness and relative abundance of those insects
22 and water temperature. Depending on the
23 temperature in the waters, different insects and
24 other invertebrate species exist there and play a
25 significant role in keeping these waters healthy

1 for everything living there, be they other insects,
2 plants, birds, reptiles or fish. Many small
3 insects are detritivore. That is they consume
4 decaying organic matter in the water and --

5 THE JUDGE: Slow down, one more
6 time. And are you reading verbatim? Here's why it
7 would be helpful --

8
9 MS. MONSON: Well, somewhat. I
10 really felt like I should --

11 THE JUDGE: Okay. I'm going to
12 have the court reporter look to your L-5, just so
13 that if she has questions --

14 MS. MONSON: I'll try to slow
15 down.

16 THE JUDGE: Okay. Thank you.

17 MS. MONSON: So the insects are
18 playing valuable roles in the health of any aquatic
19 habitat, from those that eat decaying organic
20 matter like detritivores to those that eat aquatic
21 plants. And without them the water is not healthy
22 for any living thing. Others, insects, are food
23 for larger insects. Some larger insects even eat
24 fish, believe it or not. Small fish are eaten by
25 larger fish. Some birds eat larger fish. But many

1 humans eat those fish. If waters are not able to
2 sustain the invertebrate populations, they will not
3 be able to sustain fish.

4 Many waters are already facing
5 impairment, fifty, sixty percent someplace, in
6 Minnesota due to factors such as chemical runoff
7 from ag fields, air pollution, mining, which makes
8 them uninhabitable for insects and fish. For a
9 state with all the miles of waterways that we have,
10 to have them be classified as unhealthy for
11 recreation and fishing, I think its unconscionable
12 that the EPA and then the PCA will change
13 regulations to prevent -- which will prevent
14 Minnesota from protecting our drinking water and
15 fishing habitats.

16 For waters to be classified as
17 Minnesota trout waters and be able to support
18 healthy populations of trout, they are classified
19 as cold water streams, ideally between 7 and 18
20 Centigrade or approximately 45 to 60 degrees
21 Farenheit. But some trout species are somewhat
22 more sensitive than others, such as brook trout
23 that are common in southeastern places. They need
24 very -- they are common in smaller, colder streams.

25 Whenever there are changes to the

1 landscape adjacent to or within an aquatic
2 ecosystem be it due to development, logging, new
3 roadways, mining, it will impact the waters. The
4 organisms that live there potentially raise the
5 water temperatures. Which is one reason studies
6 are done to monitor and document water quality
7 using insects rather than chemistry, which is
8 simply a measurement at a certain time, not
9 biological activity.

10 I was disappointment, and maybe I
11 missed it, but I didn't hear specific reference to
12 our native populations when you gave your report.
13 They depend on fishing and harvesting wild rice.
14 And this alone should be recognized as critical
15 importance in protecting the health of our
16 waterways.

17 In addition, trout fishermen,
18 especially fly fishermen, take their sport very
19 seriously, and businesses selling fishing equipment
20 depend on the health of trout. Much tourism and
21 recreational activity is centered around our lakes
22 and rivers. So there is significant economic value
23 to protecting all the cold water habitats as much
24 as humanly possible.

25 I question -- you mentioned three

1 issues that we had to look at at the beginning. I
2 question the issue of need for this rule change.
3 The last thing Minnesota needs are rules that will
4 make it easier to remove protections for trout
5 waters. And if pollution, logging, mining,
6 et cetera, or new roadways come in, they are going
7 to change the trout habitat.

8 Waters that are now or have the
9 potential to be trout waters need to be protected
10 for thermal or chemical pollution and from
11 conditions that cause turbidity that destroy
12 habitats. Waters that were once healthy trout
13 waters but have been degraded or impaired due to
14 development and lax regulatory enforcement need to
15 be restored to their vitality. I'm almost done.
16 That is what is required under the Clean Water Act
17 and under state law. And that is also what we all
18 need to protect our aquatic habitats and biota for
19 generations to come.

20 I also have been concerned, as some of
21 the other speakers, as why the different
22 designations that are used between the PCA and the
23 DNR. And that causes confusion. I think this is a
24 slippery slope. Who will be monitoring if the rule
25 changes go into effect? Who is going to go around

1 monitoring all these changes? Thank you for your
2 consideration.

3 THE JUDGE: Thank you. Thank you
4 for hanging in there. All right. Next up, John
5 Lenczewski. I couldn't tell if you have a
6 checkmark yes or no. Yes, you want to speak?

7 MR. LENCZEWSKI: Yes. It's
8 Lenczewski.

9 THE JUDGE: Lenczewski. Very
10 good. Would you have something you'd like to mark?

11 MR. LENCZEWSKI: I do have
12 something I'd like an exhibit.

13 THE JUDGE: Okay. I'm going to
14 mark this as Exhibit L-15. Sir, if you could state
15 and spell your first and last name.

16 MR. LENCZEWSKI: Sure. It's John
17 Lenczewski. It's J-o-h-n L-e-n-c, as in cat, z, as
18 in zebra, e-w-s-k-i. Thank you for this
19 opportunity. I'm a member of Trout Unlimited. I'm
20 a longtime trout angler.

21 These changes cause myself, our members
22 concern. Even these little small, somewhat
23 overlooked streams around the state actually are
24 used by people. There is actually recreation
25 taking place, and these are important waters,

1 especially in those parts of the state where we
2 don't have a lot of trout streams. So we are very
3 concerned with any changes in the use designation
4 which we view as a downgrading of those waters.

5 So we did submit some initial written
6 comments. I will just mention that we oppose both
7 the change in the statutory language in Rule
8 7050.0420 as well as a number of the proposed
9 changes to 20 -- 7050.0470. In particular, all
10 those changes which propose to move currently 2A
11 waters to a 2B designation. I will address that
12 second part first.

13 But first I just want to mention that
14 we believe the Agency has good intentions here. We
15 really do. We think you are working hard. We
16 certainly applaud the additions of a number of cold
17 water segments of stream, those moving from 2B to
18 2A. So we support those. However, sometimes even
19 your friends are mistaken, and we are here to sort
20 of express our concern and opposition and really to
21 ask that the Agency demonstrate that there are good
22 grounds to remove 2A designation from these 31 some
23 segments of stream as well as all their tributaries
24 that enter them.

25 So it's been 43 years. For 43 years,

1 the state has declared that these are the
2 beneficial use for these waters as a cold water
3 fishery. Now it's saying, well, maybe we were
4 wrong. It does acknowledge that it needs to
5 demonstrate that it was wrong from the beginning.
6 Unfortunately, at least in the documents we have
7 seen so far, we do not believe meet the burden.

8 We are, essentially, asked to trust the
9 PCA in this regard with a series of one paragraph
10 blurbs in the technical document. We think those
11 largely contain conclusions and very few facts.
12 And we don't think that that is sufficient to
13 demonstrate that in 1975 and at all times since
14 then no trout fishery ever existed in those
15 segments. And I think that's the burden they have.
16 We don't feel the technical documents meet that
17 burden.

18 So I want to give you -- I included an
19 exhibit of Cory Brook. This is one of the few
20 streams for which we actually had some other
21 information. In 2014, it just so happens we had
22 asked the Pollution Control Agency staff about this
23 stream. They shared with us the actual Use Review
24 packet that they developed in the process of
25 arriving at this use designation change. And I

1 will draw your attention to the last page, which is
2 a map showing the various segments of stream.

3 What the PCA is proposing here is to
4 keep the designation of what is section 9. It's at
5 the very top of the page on the left-hand side.
6 They are retaining the 2A designation there. The
7 remaining segments of stream they propose to
8 downgrade to 2B.

9 Now, it's interesting in the packet,
10 and you can look at it at your leisure, but there
11 is clear evidence of an existing use in 1975, in
12 1987 in not just section 9, but section 16, section
13 21. And it's clearly recorded. We have an
14 existing use, naturally producing trout in all
15 these segments. My understanding, the Clean Water
16 Act, they can't change this. They can't change
17 this designation. They have documented actually an
18 existing use in these other sections. So the
19 packet contains no contrary evidence.

20 There is a tributary in section 15 that
21 comes in in section 16 or 21. That one was
22 separately designated by the DNR as a separate
23 unnamed tributary. It's not merely a tributary,
24 you know, covered in one of the segments of the
25 mainstream. They separately designated this. They

1 must have had a reason for that. And I will point
2 out that the DNR does not support this use
3 designation change for any of these -- Cory Brook
4 or any of these tributaries.

5 So very concerning. It's the one
6 packet we have some information on and it sort of
7 begs the question this makes us feel more strongly
8 that what we need to see is actually some better
9 documentation in each of these cases where they
10 intend to downgrade from 2A to 2B. Again, we don't
11 feel the record contains it.

12 These summary blurbs in there -- if you
13 look at the one at Cory Brook, there is no mention
14 of this other information. And so it calls into
15 question, you know, the accuracy of the
16 one-paragraph entries for each stream. We think
17 that it's more appropriate that they include the
18 larger packet of information for each one of these
19 changes.

20 I have little time, but I just want to
21 point out a couple of fundamental errors we think
22 that are at work here. And the first one is it
23 seems that the Agency is basically it's ignoring
24 fish biology. Trout move. Actually, move a lot.
25 And so -- and they move seasonally. It's very

1 common. So, typically, these surveys are done in
2 the summer. What trout typically do in these
3 streams that aren't maybe as, you know, blue ribbon
4 is they move seasonally. They will move out of the
5 warmer water reaches up into the headwaters into
6 tributaries which are cooler. They will spend a
7 month or two there until water temperatures drop
8 and then they drop back into these sections. That
9 is why I suspect with the DNR disagrees with many
10 of these changes, because they are trying to
11 protect the entirety of the trout habitat. It's
12 not just the core area, but those what might be
13 viewed as peripheral areas. But they are just as
14 important to the trout as those core areas.

15 For example, if you block off a
16 spawning tributary, brook trout have about a
17 typically three to four-year lifecycle. If they
18 can't spawn for three years, you lose the
19 population from that system. So, similarly, they
20 typically will winter in lower areas. They may
21 stay in the core area, they drop into these
22 marginal, transitional warm water areas as the PCA
23 thinks. Those are areas where there is actually
24 more forward species. The fish winter there, they
25 feed there, they put on the bulk that keeps them

1 through the winter. So the entirety of their
2 lifecycle has to be considered.

3 What's evident in a lot of these
4 proposed changes is they are not protecting all of
5 the cold water habitat. They are doing too much
6 artificially carving up of a connected aquatic
7 system into little pieces. It's great
8 administratively, but it doesn't work for fish. I
9 know my time is up. I could say more, but I will
10 respect the time. I will submit some written
11 comments later.

12 THE JUDGE: Thank you. In
13 addition, I have L-15 entered. And it is 7:00
14 o'clock, so would you like a few minute break?

15 THE COURT REPORTER: Sure.

16 THE JUDGE: Why don't we take a
17 ten-minute break.

18 (A recess was taken from 7:00 p.m. until 7:13 p.m.)

19 THE JUDGE: We are back on the
20 record. Barton Winter is next. Is Barton here?

21 MR. WINTER: Here.

22 THE JUDGE: Okay. Very good.
23 Come on up. State and spell your first and last
24 name, if you would, for me, please.

25 MR. WINTER: Barton, B-a-r-t-o-n,

1 is my first name. And then Winter, W-i-n-t-e-r.

2 THE JUDGE: Very good. Thank you.

3 MR. WINTER: I live in White Bear
4 Lake, Minnesota, essentially.

5 THE JUDGE: Perfect.

6 MR. WINTER: So I am a Trout
7 Unlimited member. I'm also a citizen water monitor
8 for the MPCA down near Spring Valley. I've been
9 monitoring Spring Valley Creek, Deer Creek and Bear
10 Creek. So I'm interested in that area. And I've
11 also done a lot of kayaking and trout fishing down
12 in the southeast primarily. So I'm pretty familiar
13 with those waters down there.

14 My impression is that maybe this rule
15 change isn't very much targeted at that area, which
16 seems to have increasing trout populations rather
17 than warming water. There's more stretches of
18 colder water which trout can live in. So they may
19 be expanding their range down there.

20 And what strikes me is, one, that this
21 rule doesn't seem to have any apparent loopholes.
22 It seems to cover trout streams that were
23 pre-existing in 1975, and so, therefore, why are we
24 concerned that they are going to downgrade existing
25 trout streams into something if they had potential

1 at one time and have been impaired or degraded.

2 But I'm against, basically, having
3 something that sounds as austere as cold water
4 aquatic management or cold water aquatic habitat
5 versus trout streams. I like the term trout
6 streams. That's the way I think about these places
7 that I like, places like this. And they are known
8 as trout streams or trout lakes. And so I don't
9 like the term cold water aquatic management or
10 habitat areas.

11 I would certainly like to see as much
12 transparency about why this rule came about and is
13 there any proponent of this rule change that we
14 would like to know about, as a previous commentator
15 asked. And so we would like to know if any special
16 interests are promoting this.

17 And I'm interested in certainly
18 positive things that would designate new cold water
19 areas or cold water areas that -- especially in the
20 southeast I understand that there are reasons why
21 certain landowners don't want a trout stream
22 designation and they may be against that because
23 they feel it restricts them in some way. And so I
24 would like to see as, you know, a complete a
25 designation as possible. And I'm definitely

1 interested in preserving trout streams. And I know
2 we need as much preservation in the agricultural
3 areas as possible and we would like to improve.
4 And I've been doing investigation on that and
5 hopefully we can get more cooperation from the ag
6 community. And that's all I have.

7 THE JUDGE: Thank you very much.
8 Would you like to mark anything?

9 MR. WINTER: Yes, I will give
10 you a --

11 THE JUDGE: Thank you. I will
12 mark your -- Mr. Winter, I will mark your exhibit
13 as L-16. Thank you for your comments today. All
14 right. Next up we have Paula Maccabee. Ma'am, if
15 you could please state and spell your first and
16 last name.

17 MS. MACCABEE: My name is Paula
18 Maccabee. And Paula is P-a-u-l-a. And Maccabee is
19 M-a-c-c-a-b, as in boy, e-e.

20 THE JUDGE: Very good.

21 MS. MACCABEE: And I'm the
22 advocacy director and legal counsel for Water
23 Legacy. Water Legacy was formed by citizens in
24 northern Minnesota 10 years ago to protect
25 Minnesota waters and communities, plant, fish,

1 wildlife and human beings that rely on an abundance
2 of clean water to live and to thrive.

3 And I live at 1961 Selby Avenue,
4 S-e-l-b-y, in St. Paul, Minnesota 55104. And I
5 have spent much of the past 10 years working on
6 rulemaking and working on mining permits. And so
7 I'm a little -- I'm going to focus -- I had a lot
8 of stuff I had written down and I want to focus
9 more on what has actually come up today. And since
10 I have been doing this full-time and more for the
11 last 10 years, I can answer some of the questions
12 in a slightly different way. And then I also want
13 to make a distinction between what I think are a
14 lot of good intentions and what the rule language
15 actually says. Because we are here about the rule
16 language, not to judge what scientists really want
17 to do to try and help the water.

18 First, where this came from.
19 US Steel sued the Minnesota Pollution Control
20 Agency I believe it was in 2017. And they were
21 trying to get the courts to force the Pollution
22 Control Agency to reclassify polluted waters
23 downstream of the Minntac tailings basin. And that
24 included removing the trout waters designation of
25 the Dark River and also removing other

1 classifications that limit salts and sulfate
2 pollution.

3 And as a resolution -- part of that
4 resolution of that lawsuit, US Steel was going to
5 proceed with trying to reclassify Dark River. But
6 what they were trying to do is get a law that would
7 require a commissioner to declassify waters. So
8 where is the stakeholder interest? That was the
9 first stakeholder interest.

10 And in the comments, there is another
11 important stakeholder, Cliffs Erie, which is one of
12 the largest taconite mining concerns in Minnesota.
13 And they have made in their comments a request to
14 declassify Wyman Creek, W-y-m-a-n, which is now a
15 trout water. And that's a water that again is
16 downstream of mining pollution, of sulfate.

17 So I don't disagree that there are
18 positive stakeholders, including this small town
19 that wants to improve their waters and go from
20 Class 7 to Class 2. But the driving force, and you
21 can see it in the comments from Hibb Tac, Cliffs
22 Erie and Barr Engineering, who sort of is the
23 scientific expertise for all the mining industry,
24 this is where the impetus is coming from.

25 And there is some really important

1 things I want to also talk about. Dr. Bouchard is
2 correct, the 31 miles I think it is of streams that
3 are being reclassified in this packet from 2A to 2B
4 are classified as 2Bd. Which does retain the
5 protection of drinking water.

6 But if you look at the rules, there is
7 nothing that says that when trout waters are
8 reclassified out of 2A they have to go into 2Bd
9 rather than into a regular Class 2B classification
10 which has no protections for sulfates, no
11 protections for drinking water. And so as far as
12 the expertise on why these trout waters should or
13 should not be classified, I'm going to turn to Dr.
14 Markus or Mr. Lenczewski. They are much more
15 expert about the waters. But I want to look at the
16 text of the law.

17 First, I think the fix of adding
18 feasibly attainable doesn't do anything. Not only
19 because where it's feasibly attainable is not
20 specified anywhere in law, but because the words
21 beneficial use that "permits." "Permits" is a word
22 that is a present tense. So this law -- this rule
23 would be incoherent. Existing has a layperson's
24 concept which is different from the one that
25 applies under the Clean Water Act. A layperson's

1 concept of existing is present tense and words like
2 "permits propagating" are just fine. But if we are
3 actually going to follow the Clean Water Act in
4 order to declassify downgraded trout water, there
5 would have to be proof that all the way back until
6 1975, November 28 there never was a cold water or
7 trout water use. This language does not do that.

8 And so I have suggested language that I
9 think does do the protection. I think the intent
10 that Dr. Bouchard expressed is not problematic.
11 But the -- and so I think that the language as it's
12 written now does not conform to the Clean Water Act
13 regulations in 40 CFR 131.10 or .12 or .3 and it
14 does not conform with Minnesota statutes either.
15 Because Minnesota statutes require that
16 classification take into account the uses which
17 have been made, are being made or may be made of
18 said waters. And that's in Minnesota Statutes
19 Chapter 115.44. So just on that alone, this rule
20 is not authorized under either state or federal
21 law.

22 Second, I think we need to take a much
23 closer look at the next paragraph of 7050.0420,
24 item C. And that requires that the commissioner
25 must propose changes when there is evidence to

1 remove waters. That is a very peculiar
2 requirement. It basically would allow a mining
3 company to file a writ of mandamus requiring the
4 commissioner to propose downgrading a trout water,
5 whether it's the Dark River or Wyman Creek, if Barr
6 Engineering came in with a bunch of evidence saying
7 this is a problem.

8 Now, that would be an enormous waste of
9 resources for the state of Minnesota. And from a
10 policy perspective it's inconsistent with the Clean
11 Water Act. There is nothing that should be
12 mandating a commissioner to downgrade waters. That
13 is simply not consistent with the Clean Water Act.

14 I usually don't focus too much on need
15 and reasonableness, because I don't think I have as
16 much expertise as I do on law. But I'm at a loss
17 to understand why this rule is needed, other than
18 to improperly downgrade trout waters. And most of
19 the work that Dr. Bouchard has done is not
20 downgrading trout waters. It's improving waters.
21 But none of that requires a rule change. I mean,
22 none of that requires any change to 7050. It
23 requires the kind of analysis to say yes, there is
24 no trout water potential, yes, water quality has
25 improved or whatever. But the idea that this rule

1 is needed in order to protect waters doesn't make
2 sense to me. Because the actual language reduces
3 protection.

4 And I'm also troubled by the whole idea
5 that -- and this is the language in the SONAR, that
6 we need this law to target MPCA water management
7 resources. Having watched this Agency for the past
8 10 years and huge pressure that this Agency is
9 under from political actors and from the
10 legislature, I think the MPCA has sort of lost its
11 way. The Minnesota Pollution Control Agency is not
12 a water management agency. It is a pollution
13 control agency. And the way in which the Pollution
14 Control Agency is designed to improve waters is by
15 enacting rules that strengthen protections
16 consistent with science.

17 For example, we know that excessive
18 sulfate not only bothers drinking water and creates
19 diarrhea in wildlife. But sulfate kills the
20 macroinvertebrates that support healthy populations
21 of fish. So there should be an effort right now
22 not to remove sulfate standards through the
23 backdoor, but to actually set a sulfate standard to
24 protect fish and macroinvertebrates. To set a
25 specific conductivity standard to protect fish and

1 macroinvertebrates. To set a sulfate standard that
2 would prevent increased methylation of mercury.

3 These are the standards that
4 environmental groups and citizens have been calling
5 for -- I know I've called for them for the past 10
6 years. But instead, rule after rule comes to our
7 tables and we spend, in my case wholly
8 uncompensated hours, to try and beat back yet one
9 more rollback to make it easier for large
10 industries to pollute.

11 So from that perspective I think we
12 need to say, Minnesota Pollution Control Agency,
13 your mission is not targeting management resources.
14 Your mission is preventing and controlling
15 pollution. And the way to restore waters is not to
16 put beautiful presentations on red and yellow and
17 green potential. But by doing total maximum daily
18 load studies, TMDL studies and reducing the amount
19 of pollution allocated to a water body.

20 In summary, I believe this rule is not
21 needed. It is not reasonable. And perhaps most
22 important it is not authorized under state and
23 federal law. And I would like also to say that my
24 experience shows that this is -- they aren't taking
25 the whole hand. They are getting nibble by nibble

1 by nibble. So maybe today we change it and make it
2 easier to remove to 2A classifications. But we
3 don't immediately take away the clean water
4 protection from 2Bd waters. But it's right in the
5 SONAR and it's right and Cliffs Erie's comment that
6 that this is the next step. And some of -- most of
7 us are volunteers. Some of us are getting on in
8 years. We might not be here two years from now or
9 five years from now when the next step, one after
10 another after another comes by. We might not be
11 here when the next reclassification of waters is to
12 2B waters and not 2Bd. We might not be here when
13 Dark River comes back or Wyman Creek comes back.
14 So we need to make changes today or completely deny
15 this rulemaking so that we are not setting up the
16 slow rollback of the very few water protections we
17 have.

18 And I'm just calling the PCA, we have
19 been begging year after year it's time to actually
20 use science to improve standards and enforce
21 standards. You have got great scientists here at
22 the Minnesota Pollution Control Agency, and I
23 certainly hope the politicians will let you do the
24 job of protecting waters. Happy to answer any
25 questions.

1 THE JUDGE: Very good. Do you
2 have --

3 MS. MACCABEE: No. This is
4 random. I apologize. I'm sorry. I will get a
5 comment in of some kind with a more -- some of this
6 down by the end of December.

7 THE JUDGE: Perfect. Thank you
8 very much. Okay. We have gone through everybody
9 on our list who asked to speak. So now we can go
10 to the second-timers. I think Eric Morrison has
11 left the building. He was the first gentleman who
12 spoke and wanted to talk again.

13 Howard Markus, I know I promised you
14 that you would have an opportunity to come back.

15 MR. MARKUS: Well, thank you.

16 THE JUDGE: Okay. Anybody else
17 here who is wanting a second opportunity? No?
18 Okay. Mr. Markus.

19 MR. MARKUS: Well, thank you. I
20 guess my -- I'm in L-11 where I was. I wish Paula
21 hadn't talked about not being here, at the age I
22 am. I'm not sure what kind of mood I'm in at this
23 point.

24 When I had to stop, I was finishing up
25 the discussion on Cedar Lake. I just wanted to

1 finish that before I start somewhere else.

2 While it's true that Cedar Lake's
3 actual trout status is poor, it had potential as
4 recently as 2006 and still has that potential.
5 Nothing has changed in terms of habitat or
6 temperature or things that I'm aware of that would
7 preclude DNR coming back and deciding to start
8 restocking trout again. The potential for that
9 trout use is still there and we should not be
10 degrading this lake because we can. I don't
11 believe that's reasonable.

12 Now, I want to get at the basis for
13 what the problem is that -- the justification for
14 this. It's in another part of subpart 7050.0150.
15 This happens to be subpart 6.

16 THE JUDGE: Hold on. 7050 --

17 MR. MARKUS: 0150, subpart 6.

18 THE JUDGE: Okay.

19 MR. MARKUS: It describes the --
20 it determines the impairment of the biological
21 community and the aquatic habitat. Sections A
22 through C, A, B and C, describe fish invertebrates
23 and aquatic plants and how to assess them for their
24 health status. The subpart D describes habitat.
25 Subpart E talks about other. But at the very end

1 of that section it limits the assessment
2 determination to only parts A, B and C: Fish,
3 invertebrates and plant communities. It ignores D,
4 which is the habitat. The habitat is about the
5 only way to determine potential or history of
6 potential for that resource. And that's not used.
7 It's specifically ignored. It's specifically
8 omitted. And, to me, that is a violation of
9 7050.0150, subpart 1 and all the other references I
10 made that talked about actual and potential.

11 So I know there is very good science in
12 assessing fish, invertebrates and plant
13 communities. But it's insufficient alone to
14 determine the use determinations, because it
15 ignores D. For example, habitat could include seed
16 bank determinations, again, to see if there was
17 ever the potential for the protection of that use.
18 You might look for fish scales or who knows what in
19 sediments. That habitat and the potential for use
20 of the habitat is not included in their
21 assessments. And I believe that's not reasonable
22 or fair to the resource. So that's the main
23 problem, is the ignoring of the habitat to study
24 potential.

25 THE JUDGE: Okay.

1 MR. MARKUS: So ignoring habitat
2 potential and history grandfathers in past
3 pollution impacts. If they are not there now and
4 you are out there now and you don't look at what
5 used to be or what could be, you are accepting past
6 impacts. That's not reasonable and it's not the
7 intent of chapter 7050 I don't believe and the
8 enabling statutes.

9 I believe you need to ignore the
10 proposed rule change in 7050.0420 because it limits
11 to attainable or feasibly attainable, but it does
12 not specifically include the potential to be
13 attainable. And that's required throughout Chapter
14 7050 and Statute 115.

15 It's not reasonable to downgrade Cedar
16 Lake, for example, or other trout streams that have
17 that use or had that use since 1975. That use
18 needs to be maintained because the potential for
19 trout streams and lakes is there. And it may be a
20 question of people don't want to spend the money or
21 people don't want to do this or that should not
22 matter in terms of use protection.

23 So I guess that's about it. If people
24 have questions. I appreciate everybody staying
25 late. As a retired state worker, I appreciate the

1 extra time you all are putting in and I thank you
2 very much.

3 THE JUDGE: Okay. Thank you.
4 Anybody else who would like to speak here today?
5 No? Ms. Maccabee.

6 MS. MACCABEE: This is not
7 substantive. I'm Paula Maccabee with Water Legacy.
8 I did the get several e-mails and texts during this
9 hearing from citizens who were letting me know or
10 letting somebody else in the group who knew me know
11 that the way the hearing was organized today was
12 not good for citizens and we lost at least 10
13 people who came here to testify. And so I was
14 going to suggest --

15 THE JUDGE: Why was it not
16 organized?

17 MS. MACCABEE: What I mean is that
18 allowing the administration to sort of give the
19 first hour and a half is not helpful to people.
20 You know, especially if people come right from work
21 and need to get home. Either if it's necessary for
22 the administrative law judge to hear from the
23 Agency first, then you say in a notice that
24 citizens will start at 5:00 and let the Agency
25 speak first or say that the Agency will speak for

1 15 minutes and then at the end. So that way
2 citizens can go home and take care of the baby or
3 make dinner or water and come and testify or that
4 they know we can be on by 4:00 and then we will get
5 our time to speak before going home for dinner.

6 Because I think it's really a shame,
7 especially people up in Duluth, and we had a
8 handful of people here that had to leave because
9 they couldn't stay. And I don't think it was
10 intentional. But in terms of a process, either one
11 of those alternatives. If we let people know that
12 the Agency will speak first and then citizens will
13 start at this time, people may just choose to go
14 home and quickly take care of their stuff and back
15 to here.

16 THE JUDGE: Okay. I think in
17 every rule hearing that we've had we've always had
18 an agency they do their presentation. Part of it
19 is for education of those here. A lot of people
20 want to actually see that part. And so, you know,
21 we did notice this from 3:30 to 7:00, I believe.
22 Like I said at the beginning, I will stay as late
23 as we need to get everybody heard. I understand,
24 though, there aren't people who can't block out
25 from 3:30 to 7:00. That's why we keep 20 days

1 after the hearing open for additional comments.

2 I will take back to our Office your
3 recommendation that if -- I had no idea how long,
4 by the way, the Agency's comments were going to
5 take. I've had agencies who take very little time,
6 take a little longer time. So I guess we will
7 relook at the process of how these hearings are
8 held in the future.

9 It's never -- because if we say, well,
10 the agency doesn't give their presentation until
11 the very end, then you are going to have people who
12 will say, but I came because I want to see the
13 presentation. I want to hear and be educated about
14 it before I give my comments. Because the agency
15 they do have the burden here and so they are trying
16 to do their presentation first and then we go from
17 there.

18 MS. MACCABEE: Your Honor, that
19 may be the most reasonable thing. And maybe to
20 talk with the agency, if they need time because
21 it's technical. But then just let people and the
22 public know how long it's going to take so if they
23 only have an hour they won't come for the first
24 hour. And that's not to say this was too long or
25 something is wrong with that. But I feel like when

1 I was getting e-mails and texts, oh, my three
2 friends I brought are leaving, there should be a
3 way to do it. Not necessarily put the agency on a
4 time limit. But if you know it's a detailed,
5 complicated thing, then let people know.

6 THE JUDGE: I had no idea. I
7 actually hadn't seen the Agency's presentation
8 prior to today. But I will take that back. It's
9 something that we try to improve. Every time we
10 have a hearing, we try to improve it. Every
11 hearing is a little different. But for anybody,
12 please tell the people who contacted you --

13 MS. MACCABEE: Send them in
14 writing.

15 THE JUDGE: Send it in writing. I
16 think that sometimes the written comments are more
17 effective for me in many ways. The reason being is
18 I can go back and read it four or five times.
19 Whereas, when I listen to you, I write it down, I
20 process it once. But when I can read it, I can
21 read it over and over if it's not connecting for
22 me.

23 So I do encourage them. I am holding
24 this open for 20 more days. Please have them send
25 in their comments. Every comment is read. Every

1 comment is seriously considered. And so I
2 encourage it.

3 MS. MACCABEE: Yes. I know that,
4 you know, I got the e-mails and I felt like I was
5 letting people down because we just didn't -- they
6 didn't have an opportunity to be heard.

7 THE JUDGE: Well, they will have
8 an opportunity to be heard by sending in their --

9 MS. MACCABEE: To be read.

10 THE JUDGE: To be read. We will
11 relook at our process here and think if there is
12 for future rule hearings if we can -- if the agency
13 knows how long they will speak, maybe our notice
14 can say that the first 20 minutes or the first 45
15 minutes will be the agency and then we go from
16 there.

17 MS. MACCABEE: Thank you.

18 THE JUDGE: I did not think we
19 would have to put time limits on people here
20 because I thought there aren't that many people.
21 But I think it does help to have time limits
22 because it keeps people on task, too.

23 All right. Well, thank you. I
24 appreciate all of your time. And that concludes
25 today's hearing.

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(Discussion held off the record.)

THE JUDGE: L-17 will be the
sign-in sheets for all five locations.

(The Public Hearing adjourned at 7:43 p.m.)

1 REPORTER'S CERTIFICATE

2
3 I, SUSAN M. STROM, do hereby certify that
4 I recorded in stenotype the Public Hearing on the
5 foregoing matter on the 11th day of December, 2019,
6 at St. Paul, Minnesota;

7
8 That I was then and there a Notary Public in
9 and for the County of Dakota, State of Minnesota;

10
11 I further certify that thereafter and on that
12 same date I transcribed into typewriting under my
13 direction the foregoing transcript of said recorded
14 hearing, which transcript consists of the typewritten
15 pages 1 through 174.

16
17 I further certify that said hearing
18 transcript is true and correct to the best of my
19 ability.

20
21 WITNESS MY HAND AND SEAL THIS 16th DAY OF
22 DECEMBER, 2019.

23 _____
SUSAN M. STROM
24 Court Reporter
25

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