

State of Minnesota
Minnesota Pollution Control Agency

In the matter of proposed revisions of
Minnesota Rules, chapter 7050, relating to Class
2 and Class 7 beneficial use designations;
OAH Docket # 65-9003-35561;
Revisor ID No. R-4561.

MPCA Post-Hearing Response to Public
Comments

December 31, 2019

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

I. Introduction

A. Notice and public hearing

The Minnesota Pollution Control Agency (MPCA or Agency) noticed its intent to adopt the above referenced proposed rule amendments in a Dual Notice published in the *State Register* on September 23, 2019 (44 SR 405). The Notice provided for the submission of comments and requests to hold a rule hearing from the date of publication through November 7, 2019.

The MPCA received a sufficient number of requests to hold a rule hearing and a rule hearing was held by Administrative Law Judge Ann C. O'Reilly of the Office of Administrative Hearings on December 11, 2019. The MPCA presented information demonstrating that the proposed amendments are needed and reasonable as required by Minn. Stat. § § 14.131 and 14.14, subd. 2, through an affirmative presentation of facts at the public hearing, and exhibits introduced at the hearing including Hearing Exhibit D, the Statement of Need and Reasonableness (SONAR).

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

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

All comments received during the pre-hearing comment period, and the public hearing transcript, are posted in their entirety on the MPCA webpage for this rulemaking at: <https://www.pca.state.mn.us/water/amendments-water-quality-standards-use-classifications-2-and-7>.

Attachment 1 is a spreadsheet compilation of the written comments received during the dual notice public comment period and submitted at the public hearing. The Agency participated in the hearing and reviewed the transcript of the hearing. Comments submitted orally during the hearing were largely reflective of written

comments submitted. However, Attachment 1 also contains all new, unique comments made orally at the hearing that were not previously contained in written comments submitted during the dual notice public comment period.

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

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

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

During its review of comments, the Agency categorized the comments by topic as noted on Attachment 1 in the column titled "Comment topic." Some of the comment topics are subdivided into subtopics to facilitate review of the response to comments. In the "MPCA Response" column of Attachment 1, the MPCA references the location of the detailed response in **Attachment 2**. The comment topics specifically addressed in Attachment 2 are:

- A. Comments in support of the proposed rule amendments
- B. Comments regarding the MPCA's statutory authority to adopt these rule amendments
- C. Comments related to the public notice to adopt rules
- D. Comments related to the use review process and requirements for evidence supporting use designations
- E. Comments regarding impacts to indigenous peoples
- F. Comments on the proposed Minn. R. 7050.0420 rule language
- G. Comments related to the protection and restoration of water quality and aquatic life habitat
- H. Comments related to 7050.0470 use classification tables
- I. Comments related to biomonitoring tools for "put-in-take" fisheries
- J. Comments related to coordination with other agencies
- K. Comments related to sulfate standards and drinking water use designations
- L. Comments related to economic analysis
- M. Comments related to specific proposed use designations
- N. Comments related to the determination of impairment based on habitat
- O. Comments questioning the impetus for the rule amendments
- P. Comments related to the need for rulemaking when designating uses with more stringent standards
- Q. Comments related to trout biology
- R. Comments expressing concern that the proposed rule amendments will make it easier to change use designations in future rules

II. MPCA's modifications to rule amendments as published in response to comments received

After review and careful consideration of all comments, MPCA proposes changes to the rule as published in the Minnesota *State Register* on September 23, 2019. The need and reasonableness of the each proposed rule section is established in the SONAR. Any additional statements of need and reasonableness for the proposed changes are included below and are considered a supplement to the SONAR.

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

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

The MPCA proposes to modify the rule amendments as published in the State Register on September 23, 2019 as shown in the table below. The black text, including black underlines and black strikethrough font, shows the applicable rule provisions as published. Red underlined font shows new text the MPCA is proposing to adopt that was not in the rule amendments as published.

Proposed change to the rule amendments as published	Statement of need and reasonableness
<p>7050.0420 TROUT COLD WATER HABITAT WATERS. <u>A. Trout lakes identified in part 6264.0050, subpart 2, as amended through June 14, 2004, are classified as trout waters and Cold water habitat waters are listed under part 7050.0470. Trout streams and their tributaries within the sections specified that are identified in part 6264.0050, subpart 4, as amended through June 14, 2004, are classified as trout waters. Trout streams are listed in part 7050.0470. Other lakes that are classified as trout waters are listed in part 7050.0470.</u> <u>B. Cold water habitat waters identified as class 2A, 2Ae, or 2Ag in part 7050.0470 must reflect an existing <u>or feasibly attainable</u> beneficial use that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats.</u> <u>C. The commissioner must propose changes to part 7050.0470 when reliable scientific evidence supports adding or removing a water listed as class 2A, 2Ae, or 2Ag. Changes must be supported by data relevant to the</u></p>	<p>Several comments raised concerns that the proposed rule language was not clear regarding the Clean Water Act (CWA) requirements to retain designated uses if the use is attainable. To address the comments submitted, the MPCA proposes the modifications to the rule amendments as published in order to more clearly convey that cold water habitats which require designation and protection are those where the beneficial use is attainable even if it is not an existing use. The addition of “feasibly attainable” inserts clarifying language that is consistent with language in the CWA’s use designation requirements (40 CFR § 131.10(d) and (g); Hearing Exhibit D, SONAR Exhibit S-16). The additional language clarifies the Agency’s intent to protect attainable beneficial uses.</p>

Proposed change to the rule amendments as published	Statement of need and reasonableness
<p><u>biological community, habitat, thermal regime, or other features of a class 2A, 2Ae, or 2Ag habitat.</u> <u>D. All waters</u> Unless otherwise listed in part 7050.0470 as, all class 1B, 2A, and 3B 2Ae, or 2Ag waters listed in part 7050.0470 are also classified as class 1B, 3B, 4A, 4B, 5, and 6 waters.</p>	
<p>7050.0470, Subp. 1 Documents incorporated by reference. (“Beneficial Use Designations for Stream Reaches: Nemadji River Watershed (04010301)”); https://www.pca.state.mn.us/sites/default/files/wq-s6-46e.pdf).</p>	<p>Several comments emphasized the need for sufficient evidence to propose a use designation. Based on this consideration, the Agency once again reviewed the proposed use designations and is withdrawing the use designation for a section of the Blackhoof River (Waterbody ID: 04010301-761; Hearing Exhibit D, SONAR Exhibit S-32 [p. 38]). Compared to sections of the Blackhoof River upstream (04010301-519) and downstream (04010301-762) of 04010301-761, there is less biological community information (i.e., surveys of fish and invertebrates). Since 04010301-761 is between warm and cold water river sections, the MPCA is withdrawing this use designation in order to collect additional data to determine the natural stream type of this reach, and to ensure that the requirements to demonstrate that the current use designation (i.e., Class 2A) is not an existing or attainable use are met. If these new data indicate that this section of Blackhoof is incorrectly classified, the MPCA will propose a classification change in a future rulemaking.</p>

III. Conclusion

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

List of attachments supporting the MPCA's Response to Comments

Attachment 1 - Spreadsheet of Comments.

Attachment 2 - MPCA Detailed Responses to Comments.

Attachment 3 - Report of the administrative law judge in the matter of the proposed amendments to MPCA water quality standards relating to Tiered Aquatic Life Uses and modification of Class 2 beneficial uses, Minnesota Office of Administrative Hearings, 2017.

Attachment 4 - Minn. R. 7050.0155 Protection of downstream uses, State of Minnesota, 2017.

Attachment 5 - A Discrete-Count Model of Recreational Demand, Feather, P., et al., Journal of Environmental Economics and Management, 29:214-227, 1995.

Attachment 6 - Economic benefits of improved water quality in the Delaware River (USA), Kauffman, G. J., River Research and Applications, 35(10): 1652-1665, 2019.

Attachment 7 - Measuring the economic benefits of water quality improvement with benefit transfer: an introduction for noneconomists, Dumas, C.F., et al., In: Effects of Urbanization on Stream Ecosystems. (eds. Brown, L.R., Gray, R.H., Hughes, R.M., Meador, M.R.) American Fisheries Society, Bethesda, MD, pp. 53-68, 2005.

Attachment 8 - The Economic Benefits of Protecting Healthy Watersheds, EPA 841-N-12-004, US Environmental Protection Agency, 2012.

Attachment 9 - Smithee letter, US Environmental Protection Agency, 2008.

Attachment 10 - Statement of Need and Reasonableness (SONAR) in the matter of the proposed revisions to the rule governing classification and standards for waters of the state, Minnesota Pollution Control Agency, 1993.

Attachment 11 - Letter from the City of Elgin petitioning use designation review, 2013.

Attachment 12 - Minn. R. 7050.0405 Petition by outside party to consider attainability of use, State of Minnesota, 2008.

Attachment 13 - Minnesota drainage law and analysis, Smith, L.N. and C.B. Holtman, 2011.

Attachment 14 - Comparison of Class 2A and 2Bd standards, Minnesota Pollution Control Agency, 2019.