

State of Minnesota
Minnesota Pollution Control Agency
Attachment 2 to MPCA Post-Hearing Response to Public Comments
MPCA Detailed Responses to Public Comments
December 31, 2019

This document supplements information in the Statement of Need and Reasonableness (SONAR; Hearing Exhibit D) in the matter of proposed amendments to Minnesota Rules, chapter 7050, relating to Class 2 and Class 7 beneficial use designations.

This document contains the Minnesota Pollution Control Agency’s (MPCA or Agency) detailed responses to public comments on the proposed amendments submitted during the pre-hearing comment period, September 23 - November 7, 2019, and during the public hearing held on December 11, 2019. The Agency thoroughly reviewed public comments, participated in the hearing, and reviewed the transcript of the hearing. This review resulted in the compilation of comments on multiple topics, which are addressed in detail in this document. All comments received during the pre-hearing comment period and the public hearing transcripts are posted in their entirety on the MPCA webpage for this rulemaking at: <https://www.pca.state.mn.us/water/wqs-designated-uses>.

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Summary of comments received in the matter of proposed amendments to Minnesota Rules, chapter 7050, relating to Class 2 and Class 7 beneficial use designations.

The MPCA heard a number of comments during the pre-hearing comment period (September 23 - November 7, 2019) and during the December 11, 2019 hearing on the proposed amendments to Minn. R. ch. 7050. Some commenters indicated support generally for the need to review use designations and some expressed support only for use designations which carried with them more stringent standards (e.g., Class 2A). Many of the comments can be summarized as expressing concern regarding the protection of water quality in Minnesota and concern that the proposed rule amendments could result in increased amounts of pollutants to Minnesota's waters. These comments were largely focused on the Class 2Bd use designations with few comments specific to the other use designations proposed in these amendments (i.e., Class 2A or tiered aquatic life uses). Many of these comments were specifically concerned that the Class 2Bd designations would allow an increase in sulfate loading to Minnesota's waters and thereby potentially impact methyl mercury levels. However, the proposed rule amendments do not decrease water quality protection, but rather ensure protection appropriate for the water body. The proposed rule amendments do not remove sulfate standards for any waters, nor do the amendments facilitate future changes to sulfate standards. All submitted comments are organized into topics and the MPCA addresses each in the following sections.

A. Comments in support of the proposed rule amendments

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 1.B, Introduction and statement of general need [pp. 1-4];

Section 5, Reasonableness of the amendments [pp. 20-23].

A.1. Support of the proposed amendments

Summary of comments:

Multiple commenters expressed support for the adoption of the proposed amendments or parts of the amendments. Some commenters indicated that there is a general need to review use designations for Minnesota's waters [Beranek (I-10), Suus and Sterle (I.7), Zentner (I.2, L.22)]. Beyond indicating general support for this need, some commenters indicated support specifically for the designation of Class 2A waters [Lenczewski (I.11), Winter (L.16), Koltz-Hale (Hearing transcript December 11, 2019)]. Another commenter [Koltz (I.9)] expressed support for removal of the linkage between the Minnesota Department of Natural Resource's (MDNR) trout waters list (Minn. R. 6264.0050) and the MPCA's Class 2A waters (Minn. R. 7050.0470).

MPCA response:

The MPCA appreciates the statements of support for the primary goal of this rulemaking which is to improve protection of water quality and the aquatic life (e.g., fish, insects, mussels, plants) that depend on healthy streams and lakes (Hearing Exhibit D, SONAR [pp. 1-4]). This goal is consistent with the Clean Water Act's (CWA) objective to "restore and maintain the chemical, physical, and

biological integrity of the Nation's waters" (33 U.S.C. § 1251 (a)). Amending use designations as needed and thereby assigning the correct goals for streams will lead to better outcomes for assessing and ensuring the protection of aquatic life, and better restoration efforts to achieve water quality goals. The proposed amendments reasonably designate beneficial uses for protecting and restoring aquatic life based on attainable biology (Hearing Exhibit D, SONAR [pp. 1-4, 20-23]).

A.2. Question regarding who submitted comments in support of the rule amendments

Summary of comments:

One commenter asked the MPCA to list the people or organizations which expressed support of the proposed rule amendments [Iverson (Hearing transcript December 11, 2019)].

MPCA response:

The commenters expressing support for the rule are described in Section A.1 of this document, immediately above.

B. Comments regarding the MPCA's statutory authority to adopt these rule amendments

Relates to:

Minn. R. 7050.0219 (Human health-based criteria and standards);

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 4, Statutory authority [pp. 18-20].

Other relevant documents:

Hearing Exhibit L.1: Copy of slides from the MPCA presentation at the December 11, 2019, rule hearing.

Summary of comments:

The MPCA received a comment contending that the MPCA does not have the statutory authority to adopt these rules and that these amendments need to go through a contested case hearing [Morrison (L.6, L.7, L.8, L.9, Hearing transcript December 11, 2019)].

MPCA response:

As described in the SONAR (Hearing Exhibit D, SONAR [pp. 18-20]) and hearing presentation (Hearing Exhibit L.1 [p. 3, slide 5]), the MPCA has statutory authority to propose and adopt water quality standards rules through the CWA and Minnesota Statute. The Minnesota Administrative Procedures Act (MAPA) (Minn. Stat. ch. 14, Minn. R. ch. 1400) does not require a contested case hearing process for the adoption of rules.

C. Comments related to the public notice to adopt rules

Relates to:

Minn. R. 7050.0219 (Human health-based criteria and standards);

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Relevant document:

Hearing Exhibit F: The Dual Notice of Intent to Adopt Rules

Hearing Exhibit D (SONAR) discussion at:

Section 4, Statutory authority [pp. 18-20].

Summary of comments:

The MPCA received comments [form letter (I.12), Sadusky (L.4)] that suggested the “Notice of Intent to Adopt Rules” (Hearing Exhibit F) was misleading because contrary to the notice, the proposed amendments change numeric standards or that it was not clear that 31 Class 2A streams were proposed to be designated Class 2Bd.

MPCA response:

The proposed amendments do not change any numeric or narrative water quality standard. Numeric and narrative water quality standards are found in Minn. R. 7050.0220 through 7050.0227. The proposed amendments do not propose any changes to Minn. R. 7050.0220 through 7050.0227. Although it is correct that changing a use designation for a water body affects the standards which apply to these waters, the MPCA is not changing numeric or narrative standards for either the original use designations or the proposed use designations. The use designation decisions in the proposed rule amendments were made independent of any information as to what water quality standard would ultimately apply. The use designation changes in the proposed amendments were made based only on the federal and state law requirements for use designations (see Hearing Exhibit D, SONAR [pp. 18-20]).

The “Notice of Intent to Adopt Rules” (Hearing Exhibit F) was very clear that the proposed amendments altered the list of Class 2A water bodies as shown by the following language from the Notice.

“Described below are the main parts of the rule amendments the MPCA is proposing... 1. The proposed rules update the list of waters designated as cold water streams and lakes, and modernize the process for designating cold and warm/cool water habitats. The current use designation framework adopts the designations in MDNR rules Minn. R. 6264.0050; however, these designations are driven by the goals and objectives of the MDNR, not the MPCA. The proposed revision would remove the link between Minn. R. 7050.0420 and 6264.0050 and allow the MPCA to designate cold water habitats based on evidence supporting the designation. This update will align the waters designated as Class 2A, 2Ae, and 2Ag in Minn. R. 7050.0470 to regulatory goals in Minnesota and federal regulations for the protection of cold water aquatic life and habitat.” (emphases added)

In addition, the notice directed the public to the MPCA’s webpage for this rule which included detailed information regarding the specific proposed use designations, including changes to Class 2A

water bodies (<https://www.pca.state.mn.us/water/amendments-water-quality-standards-use-classifications-2-and-7>).

D. Comments related to the use review process and requirements for evidence supporting use designations

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2.E.3, Review of tiered aquatic life uses for streams [pp. 11-13];

Section 2.E.4, Review of cold and warm/cool water aquatic life uses for lakes and streams [pp. 13-15];

Section 3, Public participation and stakeholder involvement [pp. 15-18].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-32: Amendments to Aquatic Life (Class 2) Use Designations +appendices;

Hearing Exhibit D, SONAR Exhibit S-37: Technical Guidance for Reviewing and Designating Aquatic Life Uses in Minnesota Streams and Rivers;

Hearing Exhibit D, SONAR Exhibit S-31: Tiered Aquatic Life Uses (TALU) rule Statement of Need and Reasonableness (SONAR);

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 [p. 68].

Summary of comments:

Several commenters stated that they did not think the specific use designations and supporting documentation were clearly explained, sufficient, or understandable for the public. One commenter [Sip (I.5)] indicated that the use designation documentation was not clear and that it was difficult to determine which sections of water bodies had proposed use designations. This commenter also requested that the MDNR's public waters inventory be included with the use designation maps provided as part of the technical support document (Hearing Exhibit D, SONAR Exhibit S-32). Other commenters felt that the specific use designations and supporting documentation were not sufficient to demonstrate that waters currently designated as Class 2A should be designated Class 2Bd [Lenczewski (I.11, L.15, Hearing transcript December 11, 2019), Maccabee (I.8, Hearing transcript December 11, 2019), form letter (I.12), Sadusky (L.4), Digby (L.13), Mattison (Hearing transcript December 11, 2019)]. Specifically some of these commenters argued that the documentation did not demonstrate that these water bodies are not existing or attainable cold water habitats (i.e., Class 2A).

MPCA response:

The technical documentation for the use designations in this rule amendment reasonably documents the appropriate designated uses in a manner that is consistent with the CWA. The proposed use designations and the supporting documentation is clearly explained in the technical

support document (Hearing Exhibit D, SONAR Exhibit S-32) and maps (including an interactive map¹) are provided to assist with the description of the materials. Specific to the water bodies proposed to be designated Class 2Bd from Class 2A, the required use attainability analysis (UAA) was performed because the use was proposed to change from a subcategory (2A) with more stringent standards to a subcategory (2Bd) with less stringent standards². The use attainability analysis includes a reasonable demonstration that the current use designation (i.e., cold water habitat) is not an existing use (i.e., not attained after November 28, 1975³) and that the current use is not attainable⁴. The technical documentation provided in this rule is sufficient as has been demonstrated in previous rules. In the Tiered Aquatic Life Uses (TALU) rule adopted in 2017 (Hearing Exhibit D, SONAR Exhibit S-31 [Appendix A]), the MPCA provided similar justification for use designations and these were determined to be adequate and reasonable by the Administrative Law Judge (Attachment 3). Furthermore, the 2017 TALU rule amendments, including similar use designations, were reviewed and approved by the U.S. Environmental Protection Agency (EPA) indicating that this documentation is adequate to fulfill the CWA's requirements for designating beneficial uses.

The technical summaries (Hearing Exhibit D, SONAR Exhibit S-32 [pp. 20-187]) detail the evidence used to support the MPCA's use designation decisions, but necessarily do not include every piece of evidence or data point used in these decisions. Most of these decisions are supported by thousands of temperature measurements, detailed lists of species collected from these and nearby streams, and many pages of reports by the MDNR and MPCA. The MPCA is dedicated to being transparent and encourages the public to review this information and engage with MPCA staff if there are concerns with draft designated use changes. To this end, the MPCA began public engagement on some of the Class 2Bd designations in 2013 and again encouraged public participation from August 2018 through September 2019 (Hearing Exhibit D, SONAR [pp. 15-18]). By making the draft list of use designations and the reasoning behind these decisions available for more than a year before the Notice of Intent to Adopt (Hearing Exhibit F), the MPCA was seeking public partners in these decisions. A more detailed summary of evidence for the Cory Brook use designation was provided to Mr. Lenczewski by the MPCA when he requested such detailed evidence. Mr. Lenczewski entered this MPCA-provided information into the hearing record (L.15), and it is evidence of interactions by the MPCA with persons interested in such information.

¹ Beginning in 2018, the MPCA webpage for the rule (<https://www.pca.state.mn.us/water/amendments-water-quality-standards-use-classifications-2-and-7>), at the upper right-hand location of the page, has connected interested persons to the "Map of draft beneficial use designations" at <https://www.pca.state.mn.us/water/map-draft-beneficial-use-designations>.

² Although Minnesota's designated uses and use subcategories may carry more or less stringent standards, this does not imply that a different priority or value is assigned to designated uses or use subcategories (see discussion in Section F.6, p. 15). The standards applicable to designated uses are based on the conditions needed to protect those beneficial uses. For example, the dissolved oxygen standard is more stringent in cold water streams than in warm water streams. Warm water streams naturally have lower dissolved oxygen because warmer water physically holds less oxygen. As a result, the natural biological communities in these waters are adapted to these conditions and the dissolved oxygen standard does not need to be as stringent to protect these organisms.

³ "Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 CFR § 131.3(e)

⁴ "At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost-effective and reasonable best management practices for nonpoint source control." 40 CFR § 131.10(d)

Beyond what is required by state and federal regulations for use designations, the MPCA constantly strives to improve the information available to the public to assist them in understanding the rule amendments. As a result, several improvements have been made to the rule documentation for the proposed rule amendments based on public comments from the previous 2017 TALU rule amendments. This included adding additional information to the use designation review summaries (i.e., assessment and stressor identification results) and the addition of an interactive map which included requested features (e.g., Public Land Survey layer, street map) on the rule webpage (<https://www.pca.state.mn.us/water/map-draft-beneficial-use-designations>). The MPCA will consider comments and continue to improve our documentation of rule amendments to maximize the accessibility and usefulness of this information for the public. This includes considering the addition of specific information such as including the MDNR public waters and public drainage systems to use designation maps in future products.

E. Comments regarding impacts to indigenous peoples

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 6.F, Environmental justice policy [pp. 31-35];

Section 7, Notice plan [pp. 35-39].

Summary of comments:

The MPCA heard several comments regarding concerns about possible negative impacts of the proposed rule amendments on indigenous peoples [Monson (L.5), DeFoe (Hearing transcript December 11, 2019), Christenson (L.2)]. Specifically these comments included concerns regarding the health impacts of increased pollutants on indigenous peoples and the need to uphold treaties.

MPCA response:

Most importantly, the proposed rules do not create a mechanism for the increase of pollutants into Minnesota's waters. As described in Section K of this document (p. 24), these rule amendments do not impact sulfate or mercury standards for the subset of waters which are being designated through this rule. The result of this rule is improved water quality management of these waters by assigning the correct goals for these waters.

The MPCA also performed an equity analysis to determine if the costs or consequences of the proposed rule would be disproportionately borne by low-income populations and communities of color. This review did not identify any communities that would be disproportionately impacted by this rule (Hearing Exhibit D, SONAR [pp. 31-35]). The MPCA also fulfilled all requirements regarding notifying tribes in Minnesota of this rule (Hearing Exhibit D, SONAR [pp. 35-39]).

F. Comments on the proposed Minn. R. 7050.0420 rule language

Relates to:

Minn. R. 7050.0420 (Trout waters).

Hearing Exhibit D (SONAR) discussion at:

Section 5.A.2., Revising Minn. R. 7050.0420 [p. 21];

Section 5.B., Proposed changes and specific reasonableness [p. 22];

Section 2.E.4, Review of cold and warm/cool water aquatic life uses for lakes and streams [pp. 13-15].

Other relevant documents:

Attachment 4: Minn. R. 7050.0155 Protection of downstream uses;

Hearing Exhibit D, SONAR Exhibit S-16: 40 CFR § 131.10, Designation of uses (2015) (1983, as amended);

Hearing Exhibit D, SONAR Exhibit S-18: 40 CFR § 131.3, Definitions (1983, as amended);

Hearing Exhibit L.1: Copy of slides from the MPCA presentation at the December 11, 2019 rule hearing;

Hearing Exhibit C: The proposed rule, including Revisor's approval;

Hearing Exhibit L.2: Draft Modification to the Proposed Water Quality Standards;

Hearing Exhibit D, SONAR Exhibit S-32: Amendments to Aquatic Life (Class 2) Use Designations +appendices [pp. 20-187];

Hearing Exhibit D, SONAR Exhibit S-37: Technical guidance for designating aquatic life uses in Minnesota streams and rivers.

F.1. Trout water tributaries reference

Summary of comments:

Two comments [Maccabee (I.8), form letter (I.12)] were opposed to the removal of the reference to Minn. R. 6264.0050 and specific reference to trout water tributaries from Minn. R. 7050.0420.

MPCA response:

The current rule requiring all MDNR-defined trout waters and trout protection waters to be designated as Class 2A results in the inappropriate classification of warm water habitats as cold water habitats. These inappropriate classifications result from the differing goals of the CWA (as implemented by MPCA) as compared to the MDNR goals for trout fisheries management. Designation of cold water habitats (Class 2A) has in the past relied almost solely on the MDNR list of designated trout waters in Minn. R. 6264.0050. With the development and use of improved tools to assess the biological condition of Minnesota's waters (e.g., indices of biotic integrity, biological criteria) some differences in management goals between the MPCA and MDNR in designating cold water systems have become apparent and need to be addressed. As evidenced by review of historical and contemporary biological data, a small number of waters in Minn. R. 6264.0050 are not appropriate for the MPCA to manage as cold water habitats and there are some waters not included on the MDNR trout waters list that the MPCA should manage as cold water habitat. The amendment to this rule part will ensure that designations in Minn. R. 7050.0470 comply with the state and federal regulations that govern the MPCA. Because the MPCA's and MDNR's goals and mechanisms

for implementing these goals differ, it is reasonable for the classification systems between the agencies to also be different.

The MPCA is not proposing to remove the Class 2A (cold water habitat) designation from all water bodies designed as trout waters or trout protection waters under Minn. R. 6264.0050. In fact, the MPCA is using the MDNR's trout waters list as a starting point and will make changes as sufficient data are available to determine the appropriate designated use subcategory under state and federal water quality rules. In addition, as the MDNR makes ongoing changes to their trout water list, the MPCA will review these designations and make decisions regarding their designation as Class 2A. All future use designations will go through rulemaking as required.⁵ The result is that the vast majority of Class 2A waters will also be MDNR listed trout waters. There will be some differences between these lists because the MPCA and MDNR administer different rules and our goals may differ for these waters. This means a small subset of waters not on the MDNR's trout waters list will be classified as cold water habitat (Class 2A) and some of the MDNR's trout waters list will be warm water habitat (Class 2B or 2Bd) (Hearing Exhibit D, SONAR [pp. 13-15]).

The proposed rule language does not result in automatic inclusion of trout protection waters, including tributaries within a Public Land Survey (PLS) section containing trout waters, because such language is not needed nor is it reasonable. Any given reach of a stream may be different in character from tributaries within the same PLS section or adjacent reaches of the same stream. These differences may arise from factors (e.g., groundwater, shading, water velocity) that differ from one reach to another. For example, a cold water stream reach may have greater groundwater flow compared to the adjacent, upstream reach. As a result, the upstream reach may have warm water temperatures and support a warm water biological community in contrast to the cold water habitat in the downstream reach. It is unreasonable to automatically assign a downstream beneficial use to an upstream reach. The unreasonableness arises when the downstream designated use does not reflect the actual, assessed beneficial use in the upstream reach. The MDNR does not manage all trout protection waters for trout, but by automatically designating them as Class 2A (i.e., coldwater) the MPCA would be obligated to manage these waters as cold water habitats through the application of cold water standards. The result is a mismatch between the designated use and the potential use. However, applying the correct warm water designated use to a stream reach upstream of a coldwater stream reach does not mean that the downstream coldwater stream reach is not protected. The downstream coldwater stream reach is protected through the implementation of protections required by the CWA⁶ which require the MPCA to protect downstream water bodies. The protection of downstream waters is also required by Minn. R. 7050.0155 (Attachment 4). When implementing permits, the MPCA considers impacts to downstream waters as required.

⁵ The CWA requires states to adopt water quality standards (33 USC § 1313(a); 40 CFR § 131.4). Pursuant to the CWA, Minnesota first adopted water quality standards in 1973, which are codified in Minn. R. ch. 7050. The EPA approved those standards in 1977. Because water quality standards are codified in rule, any change must also be accomplished through rulemaking.

⁶ Under the CWA, the MPCA creates total maximum daily load (TMDL) studies (33 USC § 1313(d)) and issues national pollutant discharge elimination system (NPDES) permits (33 USC § 1342). Implementation of each of these programs require consideration of, and protection of, downstream water quality prior to issuance of a permit to discharge pollutants.

F.2. Proposed rule language too broad

Summary of comments:

Two commenters [Maccabee (I.8), Lenczewski (I.11)] argued that the proposed rule language is too broad and could result in other changes to the list of waters designated as Class 2A. Related to these comments, one commenter [Iverson (Hearing transcript December 11, 2019)] asked if the MPCA plans to make categorical changes to use designations in future rule amendments.

MPCA response:

The proposed rule amendments are needed for future aquatic life designated use reviews and for the implementation of protection and restoration of Minnesota's waters, but they do not create a mechanism for categorical changes to use designations. The proposed rule language changes may result in additional modifications to the list of Class 2A waters through future rulemakings. However, MPCA does not anticipate large numbers of additional changes because the majority of waters designated as trout waters in Minn. R. 6264.0050 are correctly designated as Class 2A waters. In addition, any future changes to use designations would not be automatic and will continue to require a rulemaking documenting why use designations are needed and reasonable.⁷ The proposed rule amendments do not change the burden of evidence needed to make these use designation changes. They clarify how the MPCA makes these decisions and establish a framework that will ensure state and federal regulations are followed.

F.3. Existing uses

Summary of comments:

Some commenters [Maccabee (I.8), Watkins (I-6), form letter (I.12)] indicated concern that cold water habitats could be designated as warm water even if cold water is an existing use.

MPCA response:

One commenter indicated that through these rule amendments, cold water habitats (Class 2A) could be designated as warm water habitats (Class 2B or 2Bg) if the water body was not already designated as an Exceptional Use [Maccabee (I.8)]. This statement is inaccurate and appears to be a misunderstanding of water quality standards and the TALU framework. If a stream is a cold water habitat, either as an existing use or an attainable use, it would retain the cold water habitat designation (i.e., Class 2Ag or 2Ae). The TALU designations (i.e., Exceptional, General and Modified Uses) are separate and do not have any bearing on the natural, thermal classification.

The same commenter [Maccabee (I.8)] suggested that the proposed rule language would limit protections to waters where current conditions support a healthy community and habitat and that the proposed rule language does not protect "existing uses" as required by the CWA. The commenter is correct regarding the requirements in state and federal regulations; however, the commenter's interpretation of the rule amendments to Minn. R. 7050.0420 are inaccurate. The proposed amendments (Hearing Exhibit C) and the MPCA's revisions to those amendments (Hearing Exhibit L.2) provide exactly the protections for which the commenter is arguing.

A similar comment stated that correcting a use designation from a Class 2A to a Class 2Bd requires a use attainability analysis (UAA) regardless of the presence of a naturally reproducing population of

⁷ Ibid, see footnote 5.

trout at the time the MPCA performed biological monitoring [Watkins (I.6)]. The MPCA agrees that a UAA is needed for a use designation where the use subcategory carries with it less stringent standards as described in 40 CFR § 131.10(j)(2)⁸, even when that use designation is incorrect. However, the proposed amendments do not remove existing or attainable cold water habitat beneficial uses. Furthermore, the designated use reviews were not based only on MPCA biological data or a demonstration of natural trout reproduction (Hearing Exhibit D, SONAR [pp. 13-15], Hearing Exhibit D, SONAR Exhibit S-32 [pp. 20-187], Hearing Exhibit D, SONAR Exhibit S-37 [pp. 18-21]). All available data including temperature and invertebrate data were considered; and in the case of Class 2Bd designations, the determination using these data was that these systems are naturally warm water habitats. Through this review, the MPCA has demonstrated that the cold water habitat designated use is not an existing use (i.e., not attained on or after November 28, 1975, 40 CFR § 131.3 (e); Hearing Exhibit D, SONAR Exhibit S-18) nor an attainable cold water habitat (40 CFR § 131.10(d); Hearing Exhibit D, SONAR Exhibit S-16). This is because these waters are naturally warm water habitats. If a determination was made that a stream was naturally a cold water habitat, but that designated use was lost before November 28, 1975, then a UAA would also be needed to support removal of that use. Such a UAA would need to demonstrate that the cold water habitat is not an existing use (i.e., not attained on or after November 28, 1975) nor an attainable use (see 40 CFR § 131.10; Hearing Exhibit D, SONAR Exhibit S-16). However, if a natural cold water habitat was attained on or after November 28, 1975, even if that use is currently not attained, that designated use could not be removed.

F.4. Attainable uses

Summary of comments:

Three commenters [Markus (I-1, L-11), Maccabee (I.8), Johnson (I-4)] indicated that the proposed rule language is not clear in regards to the protection of waters where the use is not an existing use, but the beneficial use is attainable.

MPCA response:

As described above, when considering a use designation, both the existing use⁹ and the potential to attain a beneficial use¹⁰ are considered during the use designation review. If the natural, minimally disturbed condition of a water body was a cold water habitat, and the habitat has the potential to be restored through required effluent limits or through cost-effective and reasonable best

⁸ "(j) A State must conduct a use attainability analysis as described in § 131.3(g), and paragraph (g) of this section, whenever:

(1) The State designates for the first time, or has previously designated for a water body, uses that do not include the uses specified in section 101(a)(2) of the Act; or

(2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act, to remove a sub-category of such a use, or to designate a sub-category of such a use that requires criteria less stringent than previously applicable." 40 CFR § 131.10(j)

⁹ "Ibid, see footnote 3.

¹⁰ "States may not remove designated uses if:

(1) They are existing uses, as defined in § 131.3, unless a use requiring more stringent criteria is added; or

(2) Such uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control." 40 CFR § 131.10(h)

management practices¹¹, then the potential to be restored is considered as part of the use review. In such a case, the water body should be designated as a cold water habitat (i.e. Class 2A) because the designated use is attainable. However, if the natural, minimally disturbed condition of a water body was a cold water habitat, and the habitat does not have the potential to be restored as described above and cold water habitat is not an existing use, then the designated use may be removed¹².

One commenter [Markus (I-1, L-11)] suggested that the use of “potential” in Minn. R. 7050.0140 and 7050.0222 was dispositive as to the requirement that restoration potential be considered in every designated use review. It is not. While Minn. R. 7050.0140, subp. 3, relates to use classifications in the proposed rule amendments, the phrase “is or may be necessary” (which the commenter equates to “potential”) is a modifier in the phrase “for which quality control is or may be necessary to protect the public health, safety, or welfare.” In its entirety, this phrase establishes that there is or may be a need to establish water quality standards to protect the beneficial uses described earlier in the provision (i.e., to protect the beneficial uses of “Aquatic life and recreation [which] include[es] all waters of the state that support or may support aquatic biota, bathing, or other recreational purposes”). The establishment of water quality standards that “[are] or may be necessary” to protect the aquatic life beneficial uses are not themselves the beneficial uses. Likewise, the use of “potential” in Minn. R. 7050.0222 is in reference to determining a polluted condition relative to established water quality standards; it is not related to the determination of designated uses. This language protects against pollution that could harm beneficial uses, but does not refer to the establishment of those uses.

Furthermore, this commenter [Markus (I-1, L-11)] states that “it is wrong to grandfather in past pollution practices” and that habitats that have the “potential” to be restored should not be assigned a use designation subcategory with less stringent standards or have a use or subcategory removed. Based on the requirements of the CWA, the MPCA retains designated uses for uses and use subcategories if these uses are existing uses or these uses are attainable¹³. This means that under some circumstances, legacy impacts, and their restorability, can be considered when designating beneficial uses or removing beneficial uses and use subcategories. As defined in 40 CFR § 131.10(h)¹⁴, if legacy impacts are the result of an action that cannot be reversed “by implementing effluent limits required under sections 301(b) and 306 of the [Clean Water] Act and by implementing cost-effective and reasonable best management practices for nonpoint source control”, then a designated use or use subcategory may be removed.

Although, some of the points raised by commenters regarding the protection of existing and attainable use are incorrect, the MPCA agrees that the proposed language in Minn. R. 7050.0420 could be revised to be more clear by specifically including waters where a use is attainable and not just an existing use. Based on these comments, the MPCA intends to revise its proposed language to further clarify the intent of this rule part. This new proposed language inserts “feasibly attainable” to make it consistent with state regulations and the CWA for situations where current conditions do not support a healthy cold water habitat and it is not an existing use, but for which this condition is restorable.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

The proposed modifications to the rule amendments provide consistency between state and federal water quality regulations and in doing so provide additional context regarding the implementation of these rules. Specifically the CWA rules in 40 CFR § 131.10(d) provides context for the term “attainable” by describing the conditions under which designated uses are deemed attainable. The inclusion of “feasible” as used in 40 CFR § 131.10(g) (Hearing Exhibit D, SONAR Exhibit S-16) to describe the reasons for designating a use or removing a designated use and its inclusion in Minn. R. 7050.0420 provides context to the term “attainable.” In addition, the term “feasible” is also used throughout Minn. R. ch. 7050 including in Minn. R. 7050.0222 subps. 3c and 4c to describe the requirements for designating Modified Use streams. The inclusion of “feasible” makes clear that under the CWA, and therefore in Minnesota rules, the attainability of a designated use has additional conditions that need to be considered. The term “feasible” does not reduce the obligations to protect existing or attainable uses, but rather maintains consistency between Minnesota rule and the CWA.

As a result of the comments submitted, the MPCA proposes the following 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 feasibly attainable even if it is not an existing use. The modifications are reasonable because the revised language aligns better with language in the Clean Water Act (CWA) (40 CFR § 131.3(f)) and are needed to clarify the original intent of the provision to remove ambiguity.

Proposed modifications based on public comments:

Guide to tracking modifications to the proposed rule language as published in the State Register on September 23, 2019: 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.

7050.0420 ~~TROUT~~ COLD WATER HABITAT WATERS.

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.~~

B. Cold water habitat waters identified as class 2A, 2Ae, or 2Ag in part 7050.0470 must reflect an existing or feasibly attainable beneficial use that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats.

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 biological community, habitat, thermal regime, or other features of a class 2A, 2Ae, or 2Ag habitat.

D. All waters ~~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.

F.5. Modifications to proposed rule language

Summary of comments:

To address the previous comments (See Section F.4 in this document, immediately above), the MPCA added additional language to the proposed language for Minn. R. 7050.0420 and submitted this modification at the hearing as Hearing Exhibit L.2. However, several commenters expressed opposition or requested clarification for the term “feasibly attainable” due to concerns that this language is not sufficiently specific [Maccabee (Hearing transcript December 11, 2019), Cordry (Hearing transcript December 11, 2019), Mattison (Hearing transcript December 11, 2019)].

MPCA response:

The term “feasibly attainable” was added to address comments which indicated that the proposed language did not adequately address the protection of beneficial uses which can be restored. The language was specifically selected to parallel similar language in the CWA. Although on its own, this term may lack the specificity sought by several commenters, this term, along with language in the CWA provides consistency between state and federal water quality rules and provides more details regarding its meaning and how it is to be used in practice. See discussion in Section F.4 of this document, immediately above.

F.6. Trout waters and Exceptional Uses

Summary of comments:

One commenter [Watkins (I-6)] suggested that trout waters and Exceptional Use waters are equivalent and that all trout waters should also be designated Exceptional Use.

MPCA response:

The “trout water” designation is not equivalent to Exceptional cold water habitat (i.e., Class 2Ae). The ability of a stream to support trout or other cold water adapted organisms, is primarily determined by natural features (e.g., groundwater discharge). So the distinction between a cold or warm water stream carries with it no automatic tiering of the potential of the biological community in terms of condition or health. In other words, under natural conditions, a cold water stream is not better nor does it have greater value than a warm water stream. They are simply naturally different; as a wetland is different from a stream. Different members of the public may ascribe different values to these waters based on their preferences, but such valuation is not codified in federal or state rules¹⁵. Some may argue that cold water habitat is a “higher” use or use of greater value because some chemical standards are more stringent for cold water habitats compared to warm water habitats. However, these standards are not more stringent because cold water habitats have greater value. Instead, the more stringent standards for some chemical standards in cold water habitat is the result of a need to protect natural conditions. For example, the dissolved oxygen standard is more stringent in cold water streams than in warm water streams. Warm water streams naturally have lower dissolved oxygen because warmer water holds less oxygen. As a result, the natural biological communities in these waters are adapted to these conditions and the dissolved oxygen standard does not need to be as stringent to protect these organisms.

¹⁵ “The classifications should not be construed to be in order of priority, nor considered to be exclusive or prohibitory of other beneficial uses.” Minn. R. 7050.0140, subp. 1.

Unlike the Class 2 thermal designations, the TALU designations do consider biological quality or condition. Once the natural thermal classification is established (i.e., cold water or warm water habitat), the TALU framework determines and establishes biological goals based on the attainable biological quality. Under this framework, a cold water habitat can be designated General Use or Exceptional Use (the General Use is the default use¹⁶). The cold water General Use (i.e., Class 2Ag) identifies cold water streams that have good biological condition that is consistent with the CWA interim goal (Hearing Exhibit D, SONAR Exhibit S-31 [p. 42]). The Exceptional Use (i.e., Class 2Ae) identifies cold water streams as having excellent biological condition that is close to being natural or undisturbed. For both cold water General and Exceptional Use designations, the biological expectations and tools for measuring those expectations are in Minn. R. 7050.0222, subp. 2c¹⁷. In the case of the example raised by the commenter [Watkins (I-6); Pete's Creek], the MPCA is only confirming the first step of the use review (i.e., is it a cold or warm water habitat?). This confirmation is based on an MDNR review and MDNR data which the MPCA has determined to be sufficient to support cold water habitat use proposal. However, the data needed to confirm a TALU designation¹⁸ was not collected for this stream section. With the collection of additional data, a future review of the biological condition could be made to determine if it is an Exceptional or General Use cold water habitat.

F.7. Use of the term “must”

Summary of comments:

One commenter [Maccabee (Hearing transcript December 11, 2019)] expressed concern that the term “must” in the proposed language for Minn. R. 7050.0420, Item C could force the MPCA to implement use designations that are not consistent with CWA requirements.

MPCA response:

The term “must” is standard terminology in rule language because it avoids confusion. However, the term does not change the level of evidence needed to support use designation requirements through the CWA (Hearing Exhibit D, SONAR Exhibit S-16). It is reasonable that the MPCA be required to propose use designations when sufficient evidence exists to support that use change.

F.8. “Trout waters” versus “Cold water habitat waters”

Summary of comments:

Some commenters expressed opposition to changing the title of Minn. R. 7050.0420 from “TROUT WATERS” to “COLD WATER HABITAT WATERS” [form letter (I.12), Christenson (L.12), Winter (L.16), Cordry (Hearing transcript December 11, 2019), DeFoe (Hearing transcript December 11, 2019)].

MPCA response:

Although some commenters indicated that they may not have the same emotional connection to “cold water habitat waters” as they might with “trout waters,” the change to the title for Minn. R. 7050.0420 is needed to provide a more precise and accurate term. The term “cold water habitat waters” is scientifically more accurate and provides a better description of the protection goals for these waters in rule. The term also helps to reduce confusion regarding the list of Class 2A

¹⁶ Minn. R. 7050.0430 Unlisted waters.

¹⁷ Similar documentation is codified in rule for Classes 2Bd and 2B in Minn. R. 7050.0222, subps. 3c and 4c.

¹⁸ Data collection protocols are documented in Minn. R. 7050.0222, subp. 2c.

waters and the MDNR's list of trout waters. The proposed rule language also makes Minn. R. 7050.0420 more consistent with other parts of Minn. R. ch. 7050. Cold water habitats (i.e., Class 2A) are defined in Minn. R. 7050.0222 as "*surface waters shall be such as to permit the propagation and maintenance of a healthy community of cold water aquatic biota, and their habitats.*" This definition does not include the term "trout" because this use is not specific to only waters that support trout. However, it is incorrect to assume that "cold water habitat waters" exclude "trout waters," because most waters classified as "trout waters" are correctly classified as Class 2A (Hearing Exhibit D, SONAR [p.14]). The more accurate and protective term "*cold water aquatic biota*" includes trout as well as other cold water-adapted species such as sculpin, the amphipod *Gammarus*, and the small minnow mayfly *Baetis tricaudatus*. This means that cold water habitats include those that support or should support trout as well as those that do not support trout, but support another subset of Minnesota's cold water-adapted species. Therefore, the term "cold water habitat waters" is more accurate and more inclusive as these rule amendments reasonably add waters not listed as trout waters on MDNR's list (Minn. R. 6264.0050) to MPCA's list of cold waters (Class 2A). The result is that the MPCA has proposed to list some water bodies as cold water habitat that are not on the MDNR's trout waters list.

F.9. Anthropogenically warmed habitats

Summary of comments:

One commenter asked how waters which have been warmed anthropogenically are designated [Cordry (Hearing transcript December 11, 2019)].

MPCA response:

There are a several possible use designation outcomes for cold water habitats which have been warmed through anthropogenic activity. These are described in Hearing Exhibit L.1 [p.11, slides 21-22]. If a water body is naturally a cold water habitat that has been warmed through human activity, the designation is dependent on whether or not the cold water habitat is an existing use (Hearing Exhibit D, SONAR Exhibit S-16; 40 CFR § 131.3(e)) or an attainable use (Hearing Exhibit D, SONAR Exhibit S-18; 40 CFR § 131.10(d) and (g)). If the cold water habitat is either an existing use or attainable, then it should be designated as a cold water habitat regardless of whether or not it currently attains a cold water habitat use. However, if cold water habitat is neither an existing use nor attainable use, then the CWA allows the removal of that use through a use attainability analysis (Hearing Exhibit D, SONAR Exhibit S-18; 40 CFR § 131.10(g)). As described in the hearing presentation (Hearing Exhibit L.1), the later use designation scenario is not part of these rule amendments.

G. Comments related to the protection and restoration of water quality and aquatic life habitat

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 1.A., Summary of proposed amendments [p. 1];

Section 1.B, Introduction and statement of general need [pp. 1-4].

Other relevant documents:

Attachment 4: Minn. R. 7050.0155 Protection of downstream uses;

Hearing Exhibit D, SONAR Exhibit S-16: 40 CFR § 131.10, Designation of uses (2015) (1983, as amended);

Attachment 13: Minnesota drainage law and analysis;

Hearing Exhibit D, SONAR Exhibit S-29: The use of the Tiered Aquatic Life Use (TALU) framework to designate beneficial uses for drainage ditches and altered watercourses;

Attachment 14: Comparison of Class 2A and 2Bd standards.

G.1. Protecting and restoring water quality

Summary of comments:

Several commenters expressed a general concern that the proposed use designations would lessen protections and make it harder to protect and restore water quality in Minnesota's waters [Barton (I.3), Hayner (I.12), Suus and Sterle (I.7), Zentner (I.2, Hearing transcript December 11, 2019, L.22), Poisson (I.12), form letter (I.12), Sadusky (L.4), Monson (L.5), Christenson (L.12), Winter (L.16), Iverson (Hearing transcript December 11, 2019), Dingley (Hearing transcript December 11, 2019), Koltz-Hale (Hearing transcript December 11, 2019), Lenczewski (Hearing transcript December 11, 2019)]. Some of these comments were concerned the proposed rules would result in higher concentrations of pollutants such as sulfate (see Section K in this document, p. 24) or diminish the protection of habitat for trout. Although not always explicit in the comment, most commenters appeared to be concerned with water bodies moving from Class 2A to Class 2Bd. Some of these commenters specifically expressed concerns that the implications of these amendments is that fewer waters would be listed as impaired and that it will be more difficult to implement protection and restoration strategies. One comment [form letter (I.12)] expressed concern that approximately 70% of the proposed use designations have some less stringent applicable standards.

MPCA response:

The MPCA agrees that protective, accurate designated uses should be applied to Minnesota's waters. However, the rule amendments are not a lessening of standards, but rather they assign correct beneficial uses to water bodies which carry with them standards that are more, less, or similar in terms of stringency depending on the natural water body type and potential for these waters¹⁹. None of the proposed uses are "downgrades", they are corrections. Most of the water bodies in this rule never had a use review until now because a default designated use (see Minn. R.

¹⁹ Ibid, see footnote 2.

7050.0430) was applied when Minnesota's waters were originally classified in the 1970s²⁰. For some other water bodies, the designations were made many decades ago and new data and assessment tools demonstrate that the use was not correct. In addition, the claim that since 70% of the stream miles will have less stringent standards means the amendments are incorrect, is a false conclusion. These designations are data driven and not predetermined by a quota of waters that need to have more or less stringent standards.

The MPCA agrees that cold water habitats, including trout waters, need to be protected. These rule amendments assign the correct use designation to water bodies so that appropriate management can be implemented which supports protection of aquatic habitats. For the Class 2A or 2Bd designations in these rule amendments, the main consideration was determining the water body's natural habitat type (i.e., cold or warm water). The natural habitat type reflects what habitat and biological community a water body supports under natural or undisturbed conditions. This is the focus for the thermal habitat designations in the current rule amendment. In cases where a stream or lake is changing from Class 2A to 2Bd, this is based on a review that indicates these waters do not and did not naturally support a cold water habitat.

The use designations will not make the mechanisms for listing waters as impaired more difficult. The mechanism for listing waters as impaired is not changed through this rulemaking. The proposed use designations assign beneficial uses based on the natural water body type and potential for these waters. The goal of listing waters as impaired is not to simply add more waters to the impaired waters list, but rather, it is to add waters to the list based on sound science and sufficient data so that Minnesota's water quality management efforts can be focused on restoration and protection efforts which improve water quality. The proposed amendments do not stem from a goal of allowing permittees to avoid water quality obligations. All use designations are based on sound science and will result in better water quality management outcomes.

G.2. Protecting downstream beneficial uses

Summary of comments:

Some comments expressed concern about the protection of downstream waters (e.g., cold water habitats which are downstream of warm water habitats) [Suus and Sterle (I.7), Zentner (I.2, Hearing transcript December 11, 2019, L.22), Meyer (Hearing transcript December 11, 2019)].

MPCA response:

The MPCA is also concerned with the protection of downstream waters and that is an important element of water quality protection under the CWA.²¹ The MPCA needs to ensure that upstream waters do not cause the non-attainment of water quality standards in downstream waters (Attachment 4; Minn. R. 7050.0155). However, this does not mean that upstream waters should have artificial designated uses as a means to protect downstream waters. Protection of downstream waters occurs through: the issuance of permits to point sources that include limits on the quantity of pollutants discharged; Total Maximum Daily Loads (TMDL) studies; and Watershed Restoration

²⁰ Ibid, see footnote 5.

²¹ Pursuant to sections 303 and 101(a) of the Clean Water Act, 40 CFR 131.10(b) requires that "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."

and Protection Strategies (WRAPS) that promote reduction of pollutant discharges by non-point sources. The proposed rule amendments do not alter the MPCA's requirements or strategies for the protection of downstream uses.

G.3. Impacts on drainage maintenance

Summary of comments:

One commenter [Sip (I.5)] requested that the impact of this rule on drainage maintenance be explained.

MPCA response:

The aquatic life use designations do not impact drainage law. There is no legal mechanism to control or prohibit drainage maintenance through water quality standards (Attachment 13, Hearing Exhibit D, SONAR Exhibit S-29) other than Section 404 of the CWA.²² However, these amendments do not change or alter in any way the implementation of Section 404.

G.4. Changes to applicable standards

Summary of comments:

One commenter [Koltz-Hale (Hearing transcript December 11, 2019)] requested that the MPCA explain the differences between standards for Class 2A and Class 2Bd waters.

MPCA response:

The MPCA has provided a table with a comparison of the standards in Minn. R. 7050.0222 for Class 2A and 2Bd waters (Attachment 14)²³. For a subset of the pollutants, the values are more stringent for Class 2A compared to Class 2Bd. The different standards are due to the methods used to derive the standards and different protection endpoints (i.e., protections for aquatic life versus protections for human health). For example, aquatic life toxicity standards may differ because the calculation for the standard included cold water species (e.g., trout). Standards to protect human health (i.e., exposure from consumption of fish) may differ due to differences in lipid content between salmonids (e.g., trout) and other fish species. As explained in previous responses, in both instances, if a water body is not a cold water habitat, then the more stringent standards are not necessary to protect aquatic biota or human health. Furthermore, changing the use designation does not mean the level of any given pollutant will be increased. Other elements of water quality standards, such as antidegradation (see Minn. R. 7050.0250 through 7050.0335), protect waters from increases in pollutants even when the applicable standards are met.

²² Section 404 of the CWA requires permits for the discharge of pollutants from point sources. Routine maintenance of drainage ditches under Minn. Stat. ch. 103E is regulated as a point source if the maintenance results in a disturbance to the land of more than five acres for the purpose of routine maintenance performed to maintain the original line and grade, hydraulic capacity, and original purpose of the facility. Routine maintenance does not include activities such as repairs, replacement and other types of non-routine maintenance. See Minnesota Construction Stormwater General Permit NPDES/SDS #MNR100001, item 25.6.

²³ As requested by Administrative Law Judge Ann C. O'Reilly during the Hearing on December 11, 2019, the MPCA is specifically responding to a question from Dylan Koltz-Hale (Hearing transcript December 11, 2019).

H. Comments related to 7050.0470 use classification tables

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2.E.3., Review of tiered aquatic life uses for streams [p. 12].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-32: Amendments to aquatic life (Class 2) use designations +appendices;

Hearing Exhibit D, SONAR Exhibit S-31: Tiered Aquatic Life Uses (TALU) rule Statement of Need and Reasonableness (SONAR) [p. 50].

Summary of comments:

Two comments [Sip (I.5), form letter (I.12)] indicated that it was too difficult to determine which waters are designated as trout waters or that it would be helpful to have a table that indicated the differences between the Class 2A waters and MDNR's trout waters list.

MPCA response:

As authorized by Minn. R. 7050.0470, the MPCA maintains tables of use classifications for stream reaches by water basin in Minnesota. These use classification tables are found at:

<https://www.pca.state.mn.us/regulations/incorporations-reference>. An example of one of these tables (Lake Superior North Watershed) that includes TALU designations is at:

<https://www.pca.state.mn.us/sites/default/files/wq-s6-46a.pdf>.

The MPCA is always seeking to improve delivery of this information to the public. Having two lists that satisfy the legal requirement of Minn. R. 7050.0470, each with different content (i.e., one as currently exists on the webpage, and another that indicates the differences between Class 2A waters and MDNR's trout waters list) would potentially lead to confusion. However, the MPCA is committed to delivering information in informal ways beyond the manner proscribed in rule. This is why the MPCA created an interactive map and individual maps in the appendix of the technical support document (Hearing Exhibit D, SONAR Exhibit S-32) that describes the locations of the proposed use designations. The MPCA agrees that it would be helpful to make available a table or some other product that identifies the differences between the MDNR's trout waters list and the list of Class 2A waters. The MPCA will consider how to best develop and deliver such a product in an informal manner.

I. Comments related to biomonitoring tools for “put-in-take”²⁴ fisheries

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2.E.4, Review of cold and warm/cool water aquatic life uses for lakes and streams [pp. 13-15].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-37 Technical Guidance for Reviewing and Designating Aquatic Life Uses in Minnesota Streams and Rivers.

Summary of comments:

One commenter [Johnson (I-4)] asked the MPCA which biological criteria (warm or cold water) it intends to apply to put-in-take trout waters which are naturally warm water habitats.

MPCA response:

“Put-and-take” trout waters do not create a conflict between the MPCA’s use designation framework and biological monitoring tools with the current rule amendments. It is possible that future use designation reviews of water bodies could identify conflicts and the MPCA will need to consider the appropriate goals for such waters. The MDNR’s management goals for these waters is part of the use review process and informs MPCA’s use designation decisions (Hearing Exhibit D, SONAR Exhibit S-37). As with the current rule amendments, the MPCA will assign beneficial uses and goals that are consistent with the CWA and state water quality rules, while seeking to coordinate management of these waters with the MDNR and other agencies responsible for water quality.

²⁴ “Put-in-take” refers to MDNR’s practice of releasing hatchery-raised fish into a water body to support recreational fishing; and where the fish will not naturally reproduce in the water body, thus requiring periodic release of hatchery-raised fish.

J. Comments related to coordination with other agencies

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2.E.4, Review of cold and warm/cool water aquatic life uses for lakes and streams [pp. 13-15].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-32: Amendments to Aquatic Life (Class 2) Use Designations +appendices [pp. 3-10, 20-187];

Hearing Exhibit D, SONAR Exhibit S-37 Technical Guidance for Reviewing and Designating Aquatic Life Uses in Minnesota Streams and Rivers.

Summary of comments:

Several comments indicated that it is important for the MPCA to coordinate management of cold water habitats with the MDNR [Zentner (I.2, Hearing transcript December 11, 2019, L.22), Suus and Sterle (I.7), Cordry (Hearing transcript December 11, 2019), Dingley (Hearing transcript December 11, 2019)]. Two commenters [Zentner (I.2, Hearing transcript December 11, 2019, L.22), Suus and Sterle (I.7)] further contended that they could find no evidence, based on conversations with regional MDNR fisheries biologists, that the MPCA discussed or coordinated use designation changes with MDNR staff.

MPCA response:

The MPCA agrees that it is important to coordinate water quality protection and restoration efforts with the MDNR. It is important to note that although some commenters have expressed concern regarding a lack of coordination between the MPCA and MDNR, 31 of the use designations in these rule amendments are based on MDNR rule changes (Hearing Exhibit D, SONAR Exhibit S-32 [pp. 3-10, 16]). However, in cases where the use designation review is initiated by the MPCA, the MPCA discussed the possible use designations with MDNR staff (including staff from central and regional offices). For the use designations proposed as part of these rule amendments, the MPCA had multiple meetings and communications between MPCA staff and MDNR staff from their headquarters and regional offices for each cold water review. The MPCA provides a list of MDNR staff which were consulted regarding the cold water habitat reviews (see Table below). This list is the minimum list of MDNR staff which were consulted as many additional conversations with MDNR staff may not have been recorded. The MPCA cannot respond to why the MDNR staff the commenter spoke to are not aware of these rule changes unless the commenter spoke to different staff or staff have changed positions since the MPCA held these discussions with MDNR staff in the regional offices.

Partial list of Minnesota DNR staff consulted regarding thermal habitat designations.		
MDNR Contact	MDNR Contact	MDNR Contact
Owen Baird (Brainerd)	T.J. DeBates (East Metro)	David Weitzel (Grand Rapids)
Deserae Hendrickson (Duluth)	Kevin Stauffer (Lake City)	Melissa Konsti (Lanesboro)
Steve Persons (Grand Marais)	Dan Spence (Lake City)	Randy Binder (Lake City)
Arlen Schalekamp (Fergus Falls)	Matt Ward (Grand Rapids)	Vaughn Snook (Lanesboro)
Jeff Tillma (Grand Rapids)	Brent Flatten (Tower)	Dean Beck (Glenwood)
Dean Paron (Finland)	Roger Hugill (Hinckley)	Brian Nerbonne (East Metro)
Joe Stewig (Montrose)	Steve Klotz (Lanesboro)	

K. Comments related to sulfate standards and drinking water use designations

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 1.B, Introduction and statement of general need [footnote 6, p. 2];

Section 2.D., Assessment of aquatic life beneficial uses [p. 8].

K.1. Sulfate standards

Summary of comments:

Several comments expressed concern that correcting Class 2A designations as a Class 2Bd would remove or reduce protections in water quality standards for sulfate and thereby increase sulfate loading to Minnesota’s waters [Maccabee (I.8), form letter (I.12), Morrison (L.6, L.7, L.8, L.9), Christenson (L.12), Digby (L.13), Ring (L.14), McCarthy (L.18), Fitzpatrick (L.19), Reisenweber (L.20), Gauger (L.21), Dingley (Hearing transcript December 11, 2019), DeFoe (Hearing transcript December 11, 2019)]. Some of these commenters also noted the connection between sulfate levels and methyl mercury. Some commenters [Maccabee (I.8), form letter (I.12), Ring (L.14)] specifically cited concern that the rule amendments would result in a loss of domestic consumption standards because the domestic consumption use (Class 1B) is automatically applied to Class 2A water bodies, but not Class 2B waters. One of these letters [Maccabee (I.8)] further requests that the MPCA describe the impacts of removing the Class 1B designation from Class 2A water and describe possible future effects on water quality.

MPCA response:

The proposed rule amendments do not remove sulfate standards from any water bodies²⁵. Also, the proposed rule does not change the linkage between Class 1B (i.e., domestic consumption [drinking water]) and Class 2A use designations (Hearing Exhibit D, SONAR [footnote 6, p. 2]). Class 2A waters remain protected as a source of drinking water, meaning that the EPA’s drinking water standards (including sulfate) will continue to apply. Sulfate standards are not mentioned in these rule amendments because these rule amendments do not impact the sulfate standard. Sulfate standards

²⁵ As requested by Administrative Law Judge Ann C. O'Reilly during the Hearing on December 11, 2019, the MPCA is specifically responding to a question from Steven Ring (L.14).

are only tangentially impacted because Class 1B, and therefore the sulfate drinking water standard, is automatically applied (Minn. R. 7050.0420) to water bodies designated as Class 2A. The result of the proposed rule is that 33 water bodies will have the Class 1B use added (because they receiving Class 2A designations) and no water bodies currently designated Class 1B will have that use designation removed.

K.2. Linkage of Classes 2A and 1B

Summary of comments:

Two comment letters [Beranek (I.10), Koltz (I.9)] stated that the Class 1B (Domestic consumption) designation should not be automatically applied to Class 2A waters.

MPCA response:

This rule is focused on aquatic life uses and not drinking water uses (e.g., Class 1B). As stated by one commenter [Beranek (I-10)], this rule does not include sufficient information to demonstrate removal of Class 1B designations. This is correct because these rule amendments are focused on aquatic life use (Class 2) designations and it is not appropriate to remove Class 1 designations without review. Without a review of the Class 1 uses for individual waters, the MPCA opts to retain the Class 1B for waters currently designated as such. Similarly, without a review of the linkage between Class 2A and Class 1B, the MPCA has followed existing rule (Minn. R. 7050.0420) and assigned Class 1B to waters being designated as Class 2A.

K.3. Aquatic life sulfate standard

Summary of comments:

One commenter [Maccabee (Hearing transcript December 11, 2019)] indicated that a sulfate standard to protect aquatic life is needed.

MPCA response:

The current rule amendments are narrowly focused on assigning the correct use designation from the existing use designation framework for a subset of water bodies. The development of new numeric sulfate standard is beyond the scope of this rule.

L. Comments related to economic analysis

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 8, Consideration of economic factors [pp. 39-48].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-51: Fletcher A. & Z. Christin (2015) The value of nature's benefits in the St. Louis River watershed. Earth Economics, Tacoma, WA;

Hearing Exhibit D, SONAR Exhibit S-52: Anderson, D. (2016) Economic impact of recreational trout angling in the Driftless Area. Trout Unlimited Driftless Area Restoration Effort;

Attachment 5: Feather, P., D. Hellerstein, and T. Tomasi (1995) A Discrete-Count Model of Recreational Demand. *Journal of Environmental Economics and Management*, 29:214-227;

Attachment 6: Kauffman, G. J. 2019. Economic benefits of improved water quality in the Delaware River (USA). *River Research and Applications*;

Attachment 7: Dumas, C.F., P.W. Schuhmann, and J.C. Whitehead (2005) Measuring the economic benefits of water quality improvement with benefit transfer: an introduction for noneconomists. 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;

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

L.1. Economic benefits of improving water quality

Summary of comments:

One comment [Sip (I.5)] requested that the MPCA provide information supporting the claim that improved water quality can have certain economic benefits.

MPCA response:

The SONAR (Hearing Exhibit D [pp. 39-48]) generally stated that there are a number of economic benefits associated with improved water quality and costs to water quality degradation. Economic benefits of improved water quality come from added jobs, mainly from tourism and support activities for tourism, which includes retail sales and therefore sales tax revenues to cities and counties from retail sales. It includes benefits from increases in property values for property owners and for local government through higher property taxes. Although it can be difficult to quantify the exact value of water quality improvements, these benefits are estimated in many studies. In the SONAR (Hearing Exhibit D, SONAR [p. 40]), the MPCA cited two studies that documented the value of aquatic resources in Minnesota (Hearing Exhibit D, SONAR Exhibits S-51 and S-52). The MPCA can also cite a number of additional studies documenting the economic benefits of improved water quality. For example, Feather et al. (1995) (Attachment 5) found a positive relationship between recreation demand for fishing in lakes in Minnesota and water clarity. In another study, Kauffman

(2019; Attachment 6) estimates dollar values²⁶ for increases in tourism, water supply, recreational and commercial fishing, and property values, as benefits of improved water quality. Furthermore, poor water quality can increase the costs of water treatment (Kauffman 2019; Attachment 6) so it can be concluded from this research that improved water quality ‘avoids’ that cost. The need to buy water filters or bottled water because of contaminated drinking water is also an avoided cost of better water quality. Dumas et al. (2005; Attachment 7) includes a case study showing how a decrease in water quality would decrease land value. An EPA factsheet (EPA 841-N-12-004; Attachment 8) also describes how “[p]reventing impairments in healthy watersheds protects valuable ecosystem services that provide economic benefits to society and prevent expensive replacement and restoration costs.”

L.2: Efforts by stakeholders to improve water quality

Summary of comments:

Sip (I.5) requested that the MPCA acknowledge the efforts to improve water quality by watershed districts, soil and water conservation districts, cities, townships, agricultural stakeholder groups, farmers, and landowners in the SONAR.

MPCA response:

The MPCA agrees that the “watershed districts, soil and water conservation districts, cities, townships, agricultural stakeholder groups, farmers, and landowners that also work to protect and restore Minnesota’s waters” should be given credit for their efforts to improve water quality. These organizations were not intentionally omitted from the economic analysis.

L.3. Significance of the proposed use designations

Summary of comments:

Another comment [Maccabee (I.8)] expressed the opinion that the significance of the proposed use designations is not described in the SONAR (Hearing Exhibit D, SONAR) or Technical Support Document (Hearing Exhibit D, SONAR Exhibit S-32).

MPCA response:

The economic significance of the proposed use designations is provided in the economic analysis (Hearing Exhibit D, SONAR [pp. 39-48]).

²⁶ “Additional economic valuation of this water quality improvement shows direct use benefits in the Delaware River to range from \$371 million to \$1.1 billion per year. Other economic sectors benefiting from improved water quality include recreational boating (\$46–\$334 million), recreational fishing (\$129–\$202 million), agriculture (\$8–\$188 million), nonuse value (\$76–\$115 million), viewing/boating/fishing (\$55–\$68 million), bird watching (\$15–\$33 million), property value (\$13–27 million), water supply (\$12–\$24 million), commercial fishing (up to \$17 million), and navigation (\$7–\$16 million).”

M. Comments related to specific proposed use designations

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2.E.4, Review of cold and warm/cool water aquatic life uses for lakes and streams [pp. 13-15].

Other relevant documents:

Attachment 9: Smithee letter [p. 2];

Hearing Exhibit D, SONAR Exhibit S-32: Amendments to Aquatic Life (Class 2) Use Designations +appendices;

Hearing Exhibit D, SONAR Exhibit S-31: Tiered Aquatic Life Uses (TALU) rule Statement of Need and Reasonableness (SONAR).

M.1. Proposed use designation for Cedar Lake

Summary of comments:

A commenter [Markus (I-1, L-11)] used Cedar Lake as an example of a water where the proposed use designation does not protect an attainable use.

MPCA response:

In the proposed rule amendments, Cedar Lake is proposed as a Class 2Bd use designation because the MDNR removed this water from its trout waters list (Hearing Exhibit D, SONAR Exhibit S-32 [p.29]), and because the Class 2Bd designation reflects the natural state of this water body as it is a warm water fishery. The natural state was apparent because the native warm water taxa were limiting the success of the stocked trout population. In order to maintain the stocked “put-in-take” fishery, the MDNR had to regularly extirpate the native fish community. When it was apparent that the native fish community could not be eliminated, the MDNR removed this water from the trout waters list. Because the warm water condition is closer to the natural, minimally disturbed status, existing use provisions or attainability considerations when reviewing the use designation do not require that the trout fishery be maintained (Attachment 9; p. 2).

M.2. Proposed use designation for Wyman Creek

Summary of comments:

Another commenter [Beranek (I.10)] requested that Wyman Creek be designated a Class 2B.

MPCA response:

The designated beneficial use for Wyman Creek was not reviewed as part of this rulemaking, but will be reviewed in the future. Because Wyman Creek was not reviewed, this rulemaking cannot designate it as a Class 2B water. Based on the schedule for use reviews, the MPCA anticipates Wyman Creek will be reviewed in 2020 and will be part of a rulemaking after that date if needed. The MPCA will consider the commenter’s request at the time of the review.

M.3. Southeastern Minnesota stream Tiered Aquatic Life Use designations

Summary of comments:

One commenter questioned why much of southeast Minnesota is designated General Use when data collected by the commenter indicates higher quality [Cordry (Hearing transcript December 11, 2019)]

MPCA response:

The Tiered Aquatic Life Use (TALU) determination for a stream is based on a rigorous scientific process which was described in the Tiered Aquatic Life Use Rule SONAR (Hearing Exhibit D, SONAR Exhibit S-31 [pp. 28-31]). These requirements are codified in Minn. R. 7050.0222, subps. 2c, 3c, and 4c. To designate a stream as an Exceptional Use requires collection of sufficient data to demonstrate that the Exceptional Use was met on or after November 28, 1975. There are some reasons why the commenter may be observing discrepancies between the aquatic life use designations and the commenter's expectation for these streams. It is possible that the MPCA has not yet collected data or reviewed available data from these streams to determine the appropriate TALU designation. The current rule amendments and the previous TALU rule represents designations for 40% of the watersheds within the state so it is possible that the MPCA has not reviewed aquatic life uses in the watersheds to which the commenter is referring. Without knowing the streams or the data to which the commenter is referring, further speculation is not useful, but the MPCA is willing to discuss specific stream reaches further to clarify the commenter's question.

M.4. Proposed use designation for Cory Brook

Summary of comments:

One commenter raised specific reasons for opposing the Class 2Bd designation for part of Cory Brook [Lenczewski (L.15, Hearing transcript December 11, 2019)]. Specific reasons for opposition were evidence of an existing cold water habitat use and that one of the tributaries of Cory Brook was designated as a trout water and not a trout protection water.

MPCA response:

The MPCA reviewed information from this stream reach and discussed management of this water body with MDNR. Review demonstrated that the upper portion of this stream does support brook trout and the MDNR manages this section for trout. The lower sections which are proposed to be designated Class 2Bd, do not support cold water species. Historically brook trout have been collected from this lower section, including after November 28, 1975, but there has been no indication of trout reproduction in this section or that it supports a community of other cold water species. As noted during the hearing (Lenczewski [Hearing transcript December 11, 2019]), some trout are mobile and may utilize warm water habitats seasonally. As a result, the capture of trout from stream reaches adjacent to cold water habitats does not necessarily demonstrate the presence of a cold water habitat. It is useful to have demonstration that trout are reproducing in the reach, that temperatures are cold, or that other less mobile cold water-adapted species (e.g., invertebrates) are present to document cold water habitat.

N. Comments related to the determination of impairment based on habitat

Relates to:

Minn. R. 7050.0150 (Determination of water quality, biological and physical conditions, and compliance with standards).

Relevant documents:

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, 1993.

Summary of comments:

The MPCA received a comment letter and heard in the hearing [Markus (I.1, L.11, Hearing transcript December 11, 2019)] concerns regarding rule language in Minn. R. 7050.0150, subp. 6, Item E. This language does not include “habitat quality” as a factor for a finding of an impaired condition and the commenter indicated that this is not appropriate because habitat potential is important for determining if a use is attainable.

MPCA response:

When Minn. R. 7050.0150 language was written in 1993, “habitat quality” was included because it is an important consideration for biological (e.g., fish, invertebrates, or plants) impairments (Attachment 10 [pp. 20-21]). Specifically the 1993 SONAR states that “Habitat structure will also be assessed because interpretation of biological data has to be considered in the context of habitat quality.” When the 1993 rule was written, the focus was on developing rules to support the use of biological standards for protecting and restoring water bodies. The intent was not to create a mechanism to list waters as impaired based solely on habitat measures; rather, the intent was to establish rules for the collection of habitat quality data (the “context”) to support the interpretation of biological data.

O. Comments questioning the impetus for the rule amendments

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 1.A., Summary of proposed amendments [p. 1].

Other relevant documents:

Attachment 11: Letter from the City of Elgin petitioning use designation review;

Attachment 12: Minn. R. 7050.0405 Petition by outside party to consider attainability of use.

Summary of comments:

The MPCA received several comments questioning the origin and intent of the proposed rule amendments [Maccabee (Hearing transcript December 11, 2019), Christenson (L.12), Winter (L.16), DeFoe (Hearing transcript December 11, 2019), Iverson (Hearing transcript December 11, 2019)]. Some of these commenters indicated concern that the MPCA was proposing amendments to

Minn. R. ch. 7050 in order to support or facilitate permit issuance, specifically permits related to mining activities. These comments appear to be linked to concerns that the proposed rules would result in less-strict sulfate standards (see Section K in this document, p. 24) due to the designation of Class 2B waters.

MPCA response:

The impetus for the rule amendments to Minn. R. 7050.0420 and the Class 2A and 2Bd use designations in general come from three sources: routine biological monitoring, rulemaking by the MDNR, and a request from an external party (Hearing Exhibit D, SONAR [p. 1]). This work is rooted in the MPCA's biological monitoring program and the implementation of the Intensive Watershed Monitoring strategy which began more than a decade ago. As part of the collection of better biological monitoring data, it became clear that for some waterbodies, the data collected by the MPCA and the use designation did not align. For example, the collection of fish and invertebrates from some water bodies designated as warm water (i.e., Class 2B/2Bd) streams revealed that these waters supported communities of cold water-adapted fish and invertebrates. As a result, MPCA began reviewing these data and developing requirements for performing these reviews. During this work the MPCA received a request from a city in southeast Minnesota to reclassify a Class 7 water to Class 2 (Attachment 11). Using the tools and framework for reviewing these use designations, the MPCA reviewed this water and determined that a Class 2 designation is appropriate. The MDNR also makes periodic changes to its list of trout waters and 31 of these are included in this rule. The proposed rules are not based on an objective to remove permitting hurdles for certain regulated entities, but rather is consistent with the Continuing Planning Process requirements of the CWA that direct the state to collect and use water quality data to inform its water quality protection responsibilities.²⁷ Furthermore, this rule does not change how external parties request use designation reviews. Minn. R. 7050.0405 (Attachment 12) describes how external parties may petition the review of a use designation.

P. Comments related to the need for rulemaking when designating uses with more stringent standards

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Summary of comments:

The MPCA received a comment [Maccabee (Hearing transcript December 11, 2019)] stating that the MPCA is not required to designate uses or use subcategories with more stringent standards through rulemaking.

MPCA response:

Any changes to rules, including the designation of uses in Minn. R. 7050.0470, requires rulemaking.²⁸ Perhaps the commenter's confusion on this requirement is related to that fact that a use attainability analysis is not needed when designating uses or subcategories with more stringent

²⁷ 33 USC § 1313. See also 33 USC § 1254(a)(5).

²⁸ Ibid, see footnote 5.

standards. The change in designation of the use always requires rulemaking, regardless of whether a use attainability analysis is required to support the change.

Q. Comments related to trout biology

Relates to:

Minn. R. 7050.0420 (Trout waters);

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2.C, Water quality standards [pp. 6-7].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-16: 40 CFR § 131.10, Designation of uses (2015) (1983, as amended).

Summary of comments:

The MPCA received comments expressing concern that the proposed use designations do not consider fish biology [Lenczewski (Hearing transcript December 11, 2019), Sadusky (L.4), Dingley (Hearing transcript December 11, 2019)]. Specifically, these comments indicated that trout are mobile and may move into waters that are not considered cold water habitat for part of the year. Some of these comments also indicated that there need to be additional or more refined thermal classifications for protecting trout. One commenter [Lenczewski (L.15, Hearing transcript December 11, 2019)] also noted that the MDNR “disagrees” with many of the Class 2A designations because the use designations fail to protect the entire trout habitat.

MPCA response:

Minnesota’s current use designation framework for streams and lakes is binary in terms of thermal habitat types. Streams and lakes are either assigned to warm water (Class 2B/2Bd) or cold water (Class 2A) habitat. It is possible that some trout may use warm water habitats seasonally and that the current use designation framework is not sufficiently refined to address seasonal uses for these species. If trout are using warm water habitats waters seasonally, the CWA provides the option of creating seasonal uses (40 CFR § 131.10(f); Hearing Exhibit D, SONAR Exhibit S-16). Such modifications to the designated use framework could be considered in future rulemaking to revise Minnesota’s use designation framework. However, this would require technical analysis and the development of new water quality standards which is beyond the scope of this rule. The current rule amendments are narrowly focused on assigning the correct use designation from the existing use designation framework for a subset of water bodies.

Although a comment characterized the differences in use designations between the MPCA and MDNR as disagreements, this is not necessarily the case because MDNR and MPCA goals and regulations are different. Although each agency may set different water quality protection goals and implement those goals differently, it does not mean that these efforts are in conflict. Overall, both the MPCA and MDNR work to protect and improve water quality and as such, the efforts of these agencies are usually in alignment.

R. Comments expressing concern that the proposed rule amendments will make it easier to change use designations in future rules

Relates to:

Minn. R. 7050.0420 (Trout waters).

Relevant documents:

Hearing Exhibit D, SONAR Exhibit S-16: 40 CFR § 131.10, Designation of uses (2015) (1983, as amended);

Hearing Exhibit L.2: Draft Modification to the Proposed Water Quality Standards.

Summary of comments:

The MPCA received comments [Maccabee (Hearing transcript December 11, 2019), Monson (L.5)] expressing concern that the proposed use designations will make it easier in future rules to remove designated uses or use subcategories (e.g., Classes 2A and 1B). One commenter [Maccabee (Hearing transcript December 11, 2019)] specifically expressed concern that the Class 2Bd designation would make it easier in future rule amendments to remove the Class 1B designation compared to water bodies designated as Class 2A.

MPCA response:

The proposed rule amendments do not change the requirements for adding or removing designated uses or use subcategories. The Class 2A or Class 2Bd designation also has no bearing on the ease or difficulty of removing a Class 1B designation. The Class 1B designation could be removed from either a Class 2A or 2Bd water body based on a use and value demonstration (40 CFR § 131.10; Hearing Exhibit D, SONAR Exhibit S-16). As stated in Section K of this document, page 24, this rule did not review Class 1B designations and any additions or removals would need to part of future rule amendments. The proposed rule language in Minn. R. 7050.0420 (Hearing Exhibit L.2) will facilitate corrections to Class 2A and 2B/2Bd designations and more clearly describes the use review process and requirements to ensure that the MPCA's use designations are consistent with CWA requirements and state water quality standards. As with other use designations, any future Class 2 use designations will need to go through rulemaking following Minnesota Administrative Procedures Act (MAPA; Minn. Stat. 14). The proposed rule amendments do not change the MAPA requirements for the MPCA to designate beneficial uses. Furthermore, CWA requirements will also continue to apply to use designations.