EPA's Review of Revisions to Minnesota's Water Quality Standards:
Antidegradation Policy and Implementation Procedures
(Minn. R. 7001, 7050 and 7052)
Under Section 303(c) of the Clean Water Act
WQSTS # MN2016-720

Date: JUN 13 2017

I. Summary

A. Date received by EPA: December 27, 2016

B. Submittal history:

- First Request for Comments, January 29, 2007 (31 SR 960)
- Second Request for Comments, May 29, 2007 (31 SR 1739)
- Third Request for Comments, February 25, 2013 (37 SR 1255)
- Proposed Rules: February 1, 2016
- Notice of Hearing, February 1, 2016 (40 SR 901)
- Date of Public Hearing: March 31, 2016
- Notice of Adoption, November 14, 2016 (41 SR 545)

C. Documents included in the submittal:

- Letter from MPCA Commissioner John Linc Stine to EPA Regional Administrator Robert Kaplan, Request for US Environmental Protection Agency (EPA) Approval of Amendments to Minn. R. 7001, 7050, and 7052 (Water Quality Standards – Antidegradation), dated December 2, 2016;
- Order Adopting Rules: Adoption of Amendments to Water Quality Standards Governing Antidegradation, *Minnesota Rules*, Chapter 7050 and Minor Supporting Changes to Chapters 7001 and 7052; and the Repeal of Rules Governing Nondegradation of Waters, *Minnesota Rules*, parts 7050.0180 and 7050.0185, dated October 12, 2016;
- Legal Certification of Amendments to Minn. R. 7050 governing Antidegradation Water Quality Standards and Minor Supporting Changes to Minn. R. 7001 and 7052, dated November 17, 2016 from Jean Coleman, MPCA Attorney;
- Adopted Permanent Rules Relating to Antidegradation of State Waters, Minnesota State Register Volume 41, Number 20, pp. 545-547;
- Letter from William Cole, MPCA, to David Pfeifer, EPA Region 5, dated October 10, 2016; and
- Rules as Adopted, dated August 10, 2016.

D. Other supporting documents:

- Statement of Need and Reasonableness (SONAR) in the Matter of Proposed Revisions of Minnesota Rules ch. 7050, Relating to Nondegradation and Minor Supporting Changes to

Minnesota Rules chs. 7052 and 7001, dated December 17, 2015 with following attachments:

- Attachment 1 – List of Meetings with External Parties;
- Attachment 2 – Probable Costs to the Minnesota Pollution Control Agency Associated with Adopting the Proposed Antidegradation Rules;
- Attachment 3 – Internal MPCA Memorandum of Estimated Cost of Wastewater Facility Planning and its Relationship to Preparing Antidegradation Assessments Under the Proposed Antidegradation Rules;
- Attachment 4 – Conducting Antidegradation Alternatives Analyses for Individual NPDES Municipal Wastewater Permits – A Suggested Approach;
- Attachment 5 – Comparison of Federal Antidegradation Regulatory Requirements with Standards in the Proposed Antidegradation Rules;
- Attachment 6 – Minnesota Cities, Townships and Unorganized Territories with Fewer than Ten Total Employees and with NPDES Wastewater Permits in 2012;
- Attachment 7 – Assessment of Differences Between the Proposed Antidegradation Rules and Similar Standards in States Bordering Minnesota and EPA Region 5 States;

- Exhibits (154) cited in SONAR;
- Comments on Rules as Proposed;
- MPCA Response to Public Comments Submitted During the Pre-Hearing Public Comment Period and at the Public Hearings, dated April 20, 2016 and attachments;
- MPCA Rebuttal Response to Public Comments Submitted During the Post-Hearing Public Comment Period, dated April 27, 2016 and attachments;
- Notice of Hearing – Proposed Rules Governing Antidegradation of Waters Minnesota Rules, Parts 7001.0050, 7050.0218, 7050.0250 through 7050.0355 and 7052.0300 and the Repeal of Rules Governing Nondegradation of Waters, Minnesota Rules, parts 7050.0180 and 7050.0185; Revisor's ID Number 4030, dated December 17, 2015;
- Notice of Hearing for Antidegradation Rule Amendments, dated January, 2016;
- Minnesota State Register (40 SR 901), dated February 1, 2016;
- Rules as Proposed; and
- Report of the Administrative Law Judge in the Matter of the Proposed Rules of the Pollution Control Agency Governing Antidegradation of Waters Minnesota Rules, parts 7001.0050, 7050.0218, 7050.0250 through 7050.0335 and 7052.0300 and the Repeal of Rules Governing Nondegradation of Waters, Minnesota Rules, parts 7050.0180 and 7050.0185, dated May 27, 2016.

E. Description of action:

Minnesota adopted new rules at Minn. R. 7050.0250 - 7050.0325 that repealed and replaced Minnesota's prior rules in Minn. R. 7050 that had set forth Minnesota's prior, generally-applicable antidegradation[1] policy and antidegradation implementation procedures.

[1]Prior to this rulemaking, the State's rules used the term "nondegradation." As described in the SONAR, the State replaced this term with the term "antidegradation" to better correspond with federal policy and to avoid confusion. Throughout this document, the term "antidegradation" will be used, except where the existing rules are cited.

These new rules shall be referred to collectively as "Minnesota's antidegradation rules." With the exception of minor, nonsubstantive changes noted below, Minnesota's antidegradation rules did not revise Minnesota's antidegradation rules that apply to the Lake Superior Basin in Minn. R. 7052.

Minnesota's new rules also made the following minor, nonsubstantive revisions to Minnesota's prior rules:

- Conforming changes and minor wording revisions to the State's antidegradation policy at Minn. R. 7052.0300 that applies to the discharge of bioaccumulative chemicals of concern (BCCs) to surface waters in the Lake Superior Basin;
- Moving the term "toxic pollutant" from Minn. R. 7050.0185, which is repealed by this rule, to Minn. R. 7050.0218;
- Adding a reference to the new antidegradation implementation methods to National Pollutant Discharge Elimination System (NPDES) permit application requirements at Minn. R. 7001.0050;
- Conforming changes throughout the Minnesota Administrative Code to update cross-references and replace the term "nondegradation" with "antidegradation."

F. Basis of action:

Federal regulations at 40 CFR 131.6 specify the minimum required elements of state or tribal water quality standards (WQS). These include an antidegradation policy consistent with 40 CFR 131.12. Federal regulations at 40 CFR 131.5 state that in reviewing new and revised WQS, the U.S. Environmental Protection Agency will determine whether a state or tribe has adopted an antidegradation policy consistent with 40 CFR 131.12 and whether any implementation procedures adopted by the state or tribe are consistent with 40 CFR 131.12. Federal regulations at 40 CFR 131.12 require that states develop and adopt a statewide antidegradation policy that is, at a minimum, consistent with federal rules. As included at 40 CFR 131.12(a), federal rules specify that state and tribal antidegradation policies provide for three levels of protection (commonly referred to as tiers), as follows:

- Tier 1: "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected" (40 CFR 131.12(a)(1)).
- Tier 2: "where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located" (40 CFR 131.12(a)(2)).
- Tier 3: "where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional

recreations or ecological significance, that water quality shall be maintained and protected" (40 CFR 131.12(a)(3)).

In addition, 40 CFR 131.12(a)(4) requires that "in those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act."

Minnesota's previously adopted antidegradation policies at Minn. R. 7050.0180 and 7050.0185 were last revised in 1988.

II. Area Affected

Minnesota's antidegradation rules apply to all waters of the state, although not all tiers of antidegradation may apply to all surface waters. Tier 1 requirements established by these rules apply to all waters of the state. Tier 2 requirements apply to waters with water quality that exceeds, on a parameter-by-parameter basis, the levels necessary to support aquatic life or recreation uses. Tier 3 requirements apply to those waters designated as outstanding resource value waters (ORVWs) at Minn. R. 7050.0335. Therefore, these rules affect the entire State of Minnesota.

III. Clean Water Act (CWA) Sections 101(a)(2)/303(c)(2)/40 CFR 131 and 132 Review

A. EPA's authority under Section 303(c)(2) of the CWA:

Federal regulations at 40 CFR 131.21 require EPA to review and approve or disapprove state-adopted WQS. In making this determination, EPA must consider the following requirements of 40 CFR 131.5 that are relevant to this submittal:

- whether the State has adopted an antidegradation policy that is consistent with 40 CFR 131.12 and whether any adopted antidegradation implementation procedures are consistent with 40 CFR 131.12;
- whether the State has followed legal procedures for revising its standards;
- whether State standards are based on appropriate technical and scientific data and analyses; and
- whether the State's submission includes certain basic elements as specified in 40 CFR 131.6.

The following EPA actions on a submittal of new/revised WQS are possible:

- **Approval.** Where EPA has concluded that the new or revised WQS are consistent with the CWA and federal regulations and that they will not affect listed species, or are otherwise not subject to ESA consultation.
- **Approval subject to ESA consultation.** Where EPA has concluded that the new or revised WQS are consistent with the CWA and federal regulations and that they may affect listed species (including beneficial effects), but that consultation is not concluded.

- **Disapproval.** Where EPA has concluded that the new or revised WQS are not consistent with the CWA or federal regulations.
- **No EPA action.** Where EPA has concluded that certain new or revised state statutory or regulatory provisions are not revisions to the state's or tribe's WQS and, therefore, are not subject to review and approval/disapproval under Section 303(c) of the CWA.

Consistent with federal-regulations at 40 CFR 131.21, new or revised WQS do not become effective for CWA purposes until they are approved by EPA.

B. EPA's review of Minnesota's antidegradation rules:

1. EPA's review for consistency with minimum requirements for WQS submissions at 40 CFR 131.6

a. Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act (40 CFR 131.6(a))

Minnesota's antidegradation rules do not revise Minnesota's existing, effective designated uses.

b. Methods used and analyses conducted to support WQS revisions (40 CFR 131.6(b))

Documents submitted by MPCA in support of these rules include all items listed above under Sections I.C and I.D of this document.

c. Water quality criteria sufficient to protect the designated uses (40 CFR 131.6(c))

Minnesota's antidegradation rules do not revise Minnesota's existing, effective water quality criteria.

d. An antidegradation policy consistent with 40 CFR 131.12 (40 CFR 131.6(d))

As described in Section III.B.2, Minnesota's antidegradation rules are consistent with 40 CFR 131.12.

e. Certification by the State Attorney General or other appropriate legal authority within the State that the WQS were duly adopted pursuant to State law (40 CFR 131.6(e))

MPCA's Legal Services Unit certified that Minnesota's antidegradation rules were duly adopted pursuant to State law in a letter from Jean Coleman to Robert Kaplan, dated November 17, 2016.

f. General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to

State standards which may affect their application and implementation (40 CFR 131.6(f))

Minnesota's antidegradation rules do not revise Minnesota's designated uses. Therefore, they do not include any uses not specified in Section 101(a)(2) of the CWA.

Minnesota's antidegradation rules do include implementation procedures for Minnesota's antidegradation policy as required by the federal regulations at 40 CFR 131.12. See Section III.B.2.f for EPA's review of these implementation procedures for consistency with 40 CFR 131.12(b).

2. EPA's review of Minnesota's antidegradation rules for consistency with 40 CFR 131.12

40 CFR 131.12 provides:

> (a) The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with the following:
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> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
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> (2) Where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.
>
> (i) The State may identify waters for the protections described in paragraph (a)(2) of this section on a parameter-by-parameter basis or on a water body-by-water body basis. Where the State identifies waters for antidegradation protection on a water body-by-water body basis, the State shall provide an opportunity for public involvement in any decisions about whether the protections described in paragraph (a)(2) of this section will be afforded to a water body, and the factors considered when making those decisions. Further, the State shall not exclude a water body from the protections described in paragraph (a)(2) of this section solely because water quality does not exceed levels necessary to support all of the uses specified in section 101(a)(2) of the Act.
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> (ii) Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the

area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

(b) The State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section. The State shall provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public.

As described below, Minnesota's antidegradation rules comply with these requirements.

Review for Consistency with 40 CFR 131.12(a)

a. **Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. (40 CFR 131.12(a)(1))**

Minn. R. 7050.0250, Item A, requires that "existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected." This requirement is reiterated at Minn. R. 7050.0265, subp. 2 and 7050.0270, subp. 2, which prohibit the State from approving an activity or issuing a control document that would not maintain and protect existing uses. Consequently, Minnesota's antidegradation rules satisfy the requirements of 40 CFR 131.12(a)(1).

b. **Where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all**

cost-effective and reasonable best management practices for nonpoint source control. (40 CFR 131.12(a)(2))

40 CFR 131.12(a)(2) includes several requirements applicable with respect to waters where water quality exceeds levels necessary to support the protection and propagation of fish, shellfish and wildlife and recreation in and on the water. Each of those requirements are addressed below.

i. **Where the quality of the water exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds ... [after meeting certain conditions addressed below] that allowing lower water quality is necessary to accommodate important economic or social development. (40 CFR 131.12(a)(2))**

Minn. R. 7050.0250, Item B provides that "degradation of high water quality shall be minimized and allowed only to the extent necessary to accommodate important economic or social development." "Degradation" is defined at Minn. R. 7050.0255, subp. 11, as "a measurable change to existing water quality made or induced by human activity resulting in diminished chemical, physical, biological, or radiological qualities of surface waters. For municipal sewage and industrial waste discharges, degradation is calculated at the edge of the mixing zone upon reasonable allowance for dilution of the discharge according to part 7053.0205, subparts 5 to 7." "High water quality" is defined at Minn. R. 7050.0255, subp. 21 as "water quality that exceeds, on a parameter-by-parameter basis, levels necessary to support the protection and propagation of aquatic life and recreation in and on the water as described in part 7050.0140, subpart 3." Minn. R. 7050.0140, subp. 3 clarifies that "[a]quatic life and recreation includes all waters of the state that support or may support fish, other aquatic life, bathing, boating, or other recreational purposes and for which quality control is or may be necessary to protect aquatic *or terrestrial life or their habitats* or the public health, safety, or welfare" (emphasis added). Consequently, Minnesota's antidegradation rules meet the requirements of 40 CFR 131.12(a)(2) that require maintenance and protection of water quality that exceeds levels "necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water . . . unless the State finds ... [after meeting certain conditions addressed below] that allowing lower water quality is necessary to accommodate important economic or social development."

ii. **Where the quality of the water exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, *after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process*, that allowing lower water quality is necessary to accommodate important economic or social development. (40 CFR 131.12(a)(2))**

Minn. R. 7050.0265, subp. 5, Item D and 7050.0270, subp. 4, Item E require that MPCA "provide an opportunity for intergovernmental coordination and public participation" before either allowing degradation or issuing a control document that would result in net increases in loading or other causes of degradation. Consequently, Minnesota's antidegradation rules satisfy

the intergovernmental coordination and public participation requirements of 40 CFR 131.12(a)(2).

iii. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. (40 CFR 131.12(a)(2))

As noted in Section III.B.2.a, Minn. R. 7050.0250, Item A, requires that "existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected." This requirement is reiterated at Minn. R. 7050.0265, subp. 2 and 7050.0270, subp. 2, which prohibit the State from approving an activity or issuing a control document that would not maintain and protect existing uses. These requirements apply with respect to decisions pertaining to lowering of water quality both in high quality waters as well as waters that are not high quality waters. Consequently, Minnesota's antidegradation rules satisfy the requirements of 40 CFR 131.12(a)(2) that any decision to allow degradation or lowering of water quality in waters where the quality of water exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water ensure protection of existing uses.

iv. The State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control. (40 CFR 131.12(a)(2))

Minn. R. 7050.0265, subp. 5, Item C and 7050.0270, subp. 4, Item D require that MPCA determine that "issuance of the control document will achieve compliance with all applicable state and federal surface water pollution control statutes and rules administered by the commissioner." Minnesota's antidegradation rules, therefore, comply with the first part of 40 CFR 131.12(a)(2). With regard to the second part, EPA explained on page 2 of a February 22, 1994 memorandum entitled "Interpretation of Federal Antidegradation Regulation Requirement" from Tudor T. Davies, Director of the Office of Science and Technology for EPA, that

> Section 131.12(a)(2) does not require that states adopt or implement best management practices for nonpoint sources prior to allowing point source degradation of a high quality water. However, States that have adopted nonpoint source controls must assure that such controls are properly implemented before authorization is granted to allow point source degradation of water quality.

MPCA, however, "does not have regulatory authority over nonpoint sources." May 27, 2016, Report of the Administrative Law Judge, "In the Matter of the Proposed Rules of the Pollution Control Agency Governing Antidegradation of Waters Minnesota Rules, parts 7001.0050, 7050.0218, 7050.0250 through 7050.0335 and 7052.0300 and the Repeal of Rules Governing Nondegradation of Waters, Minnesota Rules, parts 7050.0180 and 7050.0185," at page 68. Consequently, Minnesota's antidegradation rules satisfy the requirements of 40 CFR 131.12(a)(2) that the State assure that there shall be achieved the highest statutory and

regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

v. **The State may identify waters for the protections described in paragraph (a)(2) of this section on a parameter-by-parameter basis or on a water body-by-water body basis. Where the State identifies waters for antidegradation protection on a water body-by-water body basis, the State shall provide an opportunity for public involvement in any decisions about whether the protections described in paragraph (a)(2) of this section will be afforded to a water body, and the factors considered when making those decisions. Further, the State shall not exclude a water body from the protections described in paragraph (a)(2) of this section solely because water quality does not exceed levels necessary to support all of the use specific in section 101(a)(2)(2). (40 CFR 131.12(a)(2)(i))**

Minnesota's antidegradation rules generally reflect a parameter-by-parameter approach for identifying when protections for high quality waters apply. Specifically, as noted above, Minn. R. 7050.0250, Item B provides that "degradation of high water quality shall be minimized and allowed only to the extent necessary to accommodate important economic or social development." "High water quality" is defined at Minn. R. 7050.0255, subp. 21 as "water quality that exceeds, on a parameter-by-parameter basis, levels necessary to support the protection and propagation of aquatic life and recreation in and on the water as described in part 7050.0140, subpart 3." Thus, the protections for high quality waters apply in all situations where the water quality for any particular parameter in any particular water body that could be at issue exceeds the "levels necessary to support the protection and propagation of aquatic life and recreation in and on the water [and, as explained above in Section III.B.2.a, 'terrestrial life or their habitats and public health, safety or welfare']."

The parameter-by-parameter approach is further reflected in the provisions of Minnesota's antidegradation rules governing determining existing water quality. Specifically, Minn. R. 7050.0260 provides:

> Subpart 1. **Methods**. Existing water quality shall be determined using methods described in items A to D. The methods are listed in descending order of priority. Lower priority methods shall be used only if higher priority methods are not reasonably available. More than one method shall be used when a single method does not adequately describe existing water quality.
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> A. Using commissioner-approved monitoring data that exist at the time the determination of existing water quality is undertaken.
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> B. Monitoring surface waters, provided that samples are collected in a manner and place and of such type, number, and frequency as may be considered necessary by the commissioner to adequately reflect the condition of the surface waters. Samples must be collected, preserved, and analyzed following accepted quality control and quality assurance methods and according to the procedures in part 7050.0150, subpart 8.

C. Identifying reference surface waters that have similar physical, chemical, and biological characteristics and similar impacts from regulated and unregulated activities.

D. Use of a water quality model to characterize existing conditions in the surface water, provided that the model uses data from the same watershed as the surface water under review for existing conditions.

Subp. 2. **Consideration of existing regulated activities**. For surface waters impacted by activities that are regulated by existing control documents, existing water quality includes surface water conditions that are anticipated at loadings or other causes of degradation authorized in the applicable control document.

In addition, for general NPDES permits and general federal licenses and permits (*i.e.*, NPDES and federal permits and licenses of general applicability) and other "control documents that authorize net increases in loading or other causes of degradation and where changes in existing water quality of individual surface waters cannot reasonably be quantified," Minn. R. 7050.0270, subp. 2 specifies that, "on a parameter-by-parameter basis, class 2 surface waters not identified as impaired pursuant to section 303(d) of the Clean Water Act are considered of high quality."

The only possible exception to Minnesota's generally-applicable parameter-by-parameter approach is that, under Minn. R. 7050.0275, subp. 1, the high quality water protections do not

apply to proposed activities resulting in a net increase in loading or other causes of degradation to a class 7 surface water except when, in the commissioner's judgment, there is reasonable risk that the proposed activity would result in:

A. the loss of existing uses and the level of water quality necessary to protect existing uses in the class 7 surface water and downstream surface waters;

B. permanently precluding attainment of water quality standards;

C. degradation of downstream existing high water quality; or

D. degradation of downstream existing water quality essential to preserve the exceptional characteristics of outstanding resource value waters.

Class 7 is a very limited use designation "to protect aesthetic qualities, secondary body contact use, and groundwater for use as a potable water supply." Minn. R. 7050.0227, subp. 2; reflecting uses less than necessary "to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on water:" *i.e.*, less than the uses specified in Section 101(a)(2) of the CWA. *See* SONAR, pp. 77-78. The limited nature of Class 7 waters, is further spelled out in Minn. R. 7050.0140, subp. 8:

Class 7 waters, limited resource value waters. Limited resource value waters include surface waters of the state that have been subject to a use attainability analysis and have been found to have limited value as a water resource. Water quantities in these waters are

intermittent or less than one cubic foot per second at the 7Q10 flow as defined in part 7050.0130, subpart 3. These waters shall be protected so as to allow secondary body contact use, to preserve the groundwater for use as a potable water supply, and to protect aesthetic qualities of the water. It is the intent of the agency that very few waters be classified as limited resource value waters. The use attainability analysis must take into consideration those factors listed in Minnesota Statutes, section 115.44, subdivisions 2 and 3. The agency, in cooperation and agreement with the Department of Natural Resources with respect to determination of fisheries values and potential, shall use this information to determine the extent to which the waters of the state demonstrate that:

A. the existing and potential faunal and floral communities are severely limited by natural conditions as exhibited by poor water quality characteristics, lack of habitat, or lack of water;

B. the quality of the resource has been significantly altered by human activity and the effect is essentially irreversible; or

C. there are limited recreational opportunities, such as fishing, swimming, wading, or boating, in and on the water resource.

The conditions in items A and C or B and C must be established by the use attainability analysis before the waters can be classified as limited resource value waters.

The federal regulations at 40 CFR 131.(a)(2)(i) allow states to identify "high quality waters" on either a parameter-by-parameter or waterbody-by-waterbody basis:

> (i) The State may identify waters for the protections described in paragraph (a)(2) of this section on a parameter-by-parameter basis or on a water body-by-water body basis.

The federal regulations go on to state that:

> Where the State identifies waters for antidegradation protection on a water body-by-water body basis, the State shall provide an opportunity for public involvement in any decisions about whether the protections described in paragraph (a)(2) of this section will be afforded to a water body, and the factors considered when making those decisions. Further, the State shall not exclude a water body from the protections described in paragraph (a)(2) of this section solely because water quality does not exceed levels necessary to support all of the uses specified in section 101(a)(2) of the Act.

Thus, the federal regulations establish a two-step test for acceptability of a waterbody-by-waterbody basis for identifying high quality waters: first, that there be public involvement in the decision regarding which waters are identified as "high quality" and which are excluded, and second, that the basis for excluding a water from being considered "high quality" should not be solely observed poor water quality for individual water quality parameters. Minnesota's decision to not consider Class 7 waters to be "high quality" for purposes of antidegradation satisfies both of these criteria.

The requirement for public involvement was satisfied by Minnesota's rulemaking process. Minnesota public noticed its proposed revisions to its antidegradation rules, which included the decision to not consider Class 7 waters to be "high quality" for purposes of antidegradation. Minnesota's existing water quality standards are readily available and specifically identify waters assigned to Class 7 (see 7050.0470). In this way, Minnesota provided an opportunity for public involvement in the decision to not consider Class 7 waters to be "high quality" for purposes of implementing Minnesota's antidegradation policy. In fact, the public did comment on this provision during the public notice of the proposed antidegradation rules. Minnesota received public comments on its proposed approach of not considering Class 7 waters to be "high quality" for purposes of implementation of Minnesota's antidegradation policy. Minnesota considered the comments received, made some modifications of the rule to ensure protection of waters downstream of Class 7 waters and decided to retain the Class 7 provision.

Any future MPCA decision to designate a specific waterbody as Class 7, which would constitute a decision regarding whether that waterbody is "high quality", would constitute a revision to water quality standards that would have to be submitted to and approved by EPA, based upon a use attainability analysis demonstration that attaining the Section 101(a)(2) uses is not feasible. *See* 40 CFR 131.10 and 131.20. MPCA would also need to satisfy state procedural requirements in Minn. Stat. 14 and Minn. R. 1400, which require the agency to solicit comments from the public before and after publishing a notice of intent to adopt rules or a notice of hearing. Thus, all future decisions regarding which waters are identified as "high quality" would also require public involvement.

As described above, Minnesota's rules specify the basis for assigning waters to Class 7. The rules require a use attainability analysis be performed. Federal regulations at 40 CFR 131.3(g) define a use attainability analysis as:

> a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in §131.10(g).

The definition of "use attainability analysis" demonstrates that a decision to identify a particular surface water as Class 7 will be based on more than just observed excursions above individual water quality criteria as the focus of the use attainability analysis is on the feasibility of attaining a use; observed excursions of water quality to levels that do not attain water quality criteria is not, by itself, adequate to demonstrate a use is not attainable. Similarly, As described above, Minnesota's rules require a comprehensive evaluation of the overall condition of a waterbody and the feasibility of attaining uses beyond Class 7 in coordination with the Minnesota Department of Natural resources. These requirements ensure that waters are not identified as Class 7, "solely because water quality does not exceed levels necessary to support all of the uses specified in section 101(a)(2) of the Act."

In sum, Minnesota's antidegradation rules satisfy the requirements of 40 CFR 131.12(a)(2)(i).

vi. Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a

lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation. (40 CFR 131.12(a)(2)(ii))

For individual NPDES permits and individual federal licenses and permits and "other control documents that authorize net increases in loadings or other causes of degradation and where changes in existing water quality of individual surface waters can reasonably be quantified through antidegradation procedures," Minn. R. 7050, subp. 1, Item E, Minnesota's antidegradation rules at Minn. R. 7050.0265, subp. 5, provide, among other things:

A. The commissioner shall not approve a proposed activity when the commissioner makes a finding that prudent and feasible prevention, treatment, or loading offset alternatives exist that would avoid degradation of existing high water quality. When the commissioner finds that prudent and feasible prevention, treatment, or loading offset alternatives are not available to avoid degradation, a proposed activity shall be approved only when the commissioner makes a finding that degradation will be prudently and feasibly minimized.

B. The commissioner shall approve a proposed activity only when the commissioner makes a finding that lower water quality resulting from the proposed activity is necessary to accommodate important economic or social changes in the geographic area in which degradation of existing high water quality is anticipated. The commissioner shall consider the following factors in determining the importance of economic or social changes:

(1) economic gains or losses attributable to the proposed activity, such as changes in the number and types of jobs, median household income, productivity, property values, and recreational, tourism, and other commercial opportunities;

(2) contribution to social services;

(3) prevention or remediation of environmental or public health threats;

(4) trade-offs between environmental media; and

(5) the value of the water resource, including:

(a) the extent to which the resources adversely impacted by the proposed activity are unique or rare within the locality, state, or nation;

(b) benefits associated with high water quality for uses such as ecosystem services and high water quality preservation for future generations to meet their own needs; and

(c) factors, such as aesthetics, that cannot be reasonably quantified; and

(6) other relevant environmental, social, and economic impacts of the proposed activity.

Minn. R. 7050.0280, subp. 2; Minn. R. 7050.0285, subp. 2; and Minn. R. 7050.0290, subp. 2 require applicants for individual NPDES permits and individual federal licenses or permits to submit "an analysis of alternatives that avoid net increases in loading or other causes of degradation through prudent and feasible prevention, treatment, or loading offsets" or, when there are no such alternatives, "an analysis of prudent and feasible alternatives that minimize degradation through prudent and feasible prevention, treatment, or loading offsets that identifies the least degrading prudent and feasible alternatives." Minn. R. 7050.0280, subp. 3; Minn. R. 7050.0285, subp. 3; and Minn. R. 7050.0290, subp. 3 provide that "[t]he commissioner [of MPCA] shall conduct an antidegradation review based on the information provided under subpart 2 and other reliable information available to the commissioner concerning the proposed activity and other activities that cause cumulative changes in existing water quality in the surface waters."

Minnesota's antidegradation rules pertaining to actions on individual NPDES permits and individual federal licenses and permits, therefore, require an analysis of alternatives and a finding that a lowering of water quality is necessary to accommodate important economic or social development in the geographic area in which degradation will occur before any lowering of water quality can be allowed. Minnesota's antidegradation rules' requirement that "a proposed activity shall be approved only when the commissioner makes a finding that degradation will be prudently and feasibly minimized" is consistent with the federal requirement that, "[w]hen the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation." Consequently, Minnesota's antidegradation rules for individual NPDES permits and individual federal license and permits are consistent with federal requirements at 40 CFR 131.12(a)(2)(ii)).

For control documents "WHEN CHANGES IN EXISTING WATER QUALITY ARE NOT REASONABLY QUANTIFIABLE," which includes individual storm water permits for municipal separate storm sewer systems, general NPDES permits, and general federal licenses and permits (Minn. R. 7050.0270, subp. 1), Minnesota's antidegradation rules at Minn. R. 7050.0270, subp. 4, provide:

B. The commissioner shall not issue a control document [allowing for lowering of high water quality] when the commissioner makes a finding that prudent and feasible prevention, treatment, or loading offset alternatives exist that would avoid net increases in loading or other causes of degradation. When the commissioner finds that prudent and feasible alternatives are not available to avoid net increases in loading or other causes of degradation, a control document shall only be issued when the commissioner makes a finding that the issuance of the control document will prudently and feasibly minimize net increases in loading or other causes of degradation.

C. The commissioner shall issue a control document that authorizes a net increase in loading or other causes of degradation only when the commissioner makes a finding

that issuance of the control document is necessary to accommodate important economic or social change.

For individual storm water permits for municipal separate storm sewer systems, Minn. R. 7050.0290 provides:

Subpart 1. **Antidegradation procedures required.** The antidegradation procedures in this part apply to new, reissued, or modified individual NPDES permits for municipal separate storm sewer systems, as defined under part 7090.0080, subpart 8, that the commissioner anticipates will result in net increases in loading or other causes of degradation to surface waters.

Subp. 2. **Applicant's antidegradation assessment.** The applicant must include the following information with the written permit application specified in part 7001.0050:

A. a list of class 2 surface waters identified as impaired pursuant to section 303(d) of the Clean Water Act within the applicant's jurisdiction;

B. a list of surface waters listed in part 7050.0335 within the applicant's jurisdiction;

C. an analysis of prudent and feasible prevention, treatment, or loading offset alternatives that avoid or minimize net increases in loading or other causes of degradation to high water quality;

D. identification of prudent and feasible prevention, treatment, or loading offset alternatives that result in the least net increase in loading or other causes of degradation to high water quality; and

E. an evaluation of whether net increases in loading or other causes of degradation to high water quality accommodates important economic or social change in the geographic area in which high water quality degradation is reasonably anticipated.

Subp. 3. **Antidegradation review.** The commissioner shall conduct an antidegradation review based on the information provided under subpart 2 and other reliable information available to the commissioner concerning the proposed activity and other activities that cause cumulative changes in existing water quality in the surface waters. The purpose of the antidegradation review is to evaluate whether the proposed activity will satisfy the antidegradation standards in part 7050.0270. If, in the commissioner's judgment, the antidegradation standards described in part 7050.0270 will not be satisfied, the commissioner shall provide written notification to the applicant of the deficiencies and provide recommendations necessary to satisfy the antidegradation standards in part 7050.0270.

Subp. 4. **Preliminary antidegradation determination.** Based upon the review described in subpart 3, the commissioner shall prepare a written preliminary antidegradation determination as to whether the antidegradation standards described in

part 7050.0270 are satisfied. The preliminary antidegradation determination must be included with the commissioner's preliminary determination to issue or deny the permit according to part 7001.0100. If, in the commissioner's judgment, the antidegradation standards are not satisfied, reasons why they are not satisfied must be included in the preliminary antidegradation determination.

Subp. 5. **Opportunity for comment.** The commissioner shall:

A. include the preliminary antidegradation determination with the public notice to issue or deny the permit according to part 7001.0100, subpart 4;

B. distribute the public notice according to part 7001.0100, subpart 5; and

C. provide opportunity for comment on the preliminary antidegradation determination according to part 7001.0110.

Subp. 6. **Final antidegradation determination.** The commissioner shall consider comments received under subpart 5 before preparing a written final antidegradation determination. The final antidegradation determination must include a statement of whether the proposed activity achieves or fails to achieve the antidegradation standards specified in part 7050.0270. The final antidegradation determination must be included with the commissioner's final determination to authorize or not authorize the proposed activity according to part 7001.0140.

For individual stormwater permits for municipal separate stormwater systems, therefore, Minnesota's antidegradation rules require the permit application to identify a list of the surface waters potentially impacted by the permittee's stormwater discharges, Minn. R. 7050.0290, subp. 2, Items A and B; MPCA to make a preliminary antidegradation determination as to whether the antidegradation standards in Minn. R. 7050.0270 are met, including whether prudent and feasible alternatives exist to avoid or minimize net increases in loadings and whether issuance of the permit is necessary to accommodate important economic or social change, Minn. R. 7050.0270, subp. 4, Items B and C; and the public has the right to comment on the preliminary determination before MPCA makes its final antidegradation determination, Minn. R. 7050.0290, subps 5 and 6. Consequently, Minnesota's antidegradation rules for municipal separate stormwater systems are consistent with federal requirements at 40 CFR 131.12(a)(2)(ii)).

For general permits, Minn. R. 7050.0295 provides:

Subpart 1. **Antidegradation procedures required.** The antidegradation procedures in this part apply to new, reissued, or modified general NPDES permits that the commissioner anticipates will result in net increases in loading or other causes of degradation to surface waters.

Subp. 2. **Antidegradation review.** The commissioner shall conduct an antidegradation review during the development of general NPDES permits. The purpose

of the antidegradation review is to develop permit conditions that will ensure that the antidegradation standards in part 7050.0270 are satisfied.

Subp. 3. **Preliminary antidegradation determination.** Based upon the review described in subpart 2, the commissioner shall prepare a written preliminary antidegradation determination as to whether the permit conditions will satisfy the antidegradation standards described in part 7050.0270. The preliminary antidegradation determination must be included with the commissioner's fact sheet according to part 7001.0100, subpart 3.

Subp. 4. **Opportunity for comment.** The commissioner shall:

A. include the preliminary antidegradation determination with the public notice of intent to issue a general permit according to part 7001.0210, subpart 4;

B. distribute the public notice according to part 7001.0100, subpart 5; and

C. provide opportunity for comment on the preliminary antidegradation determination according to part 7001.0110.

Subp. 5. **Final antidegradation determination.** The commissioner shall consider comments received under subpart 4 before preparing a written final antidegradation determination. The final antidegradation determination must include a statement that issuing the general NPDES permit achieves or fails to achieve the antidegradation standards specified in part 7050.0270. The final antidegradation determination must be included with the commissioner's final determination according to part 7001.0140.

Subp. 6. **Further antidegradation procedures not required.** Except as provided in part 7050.0325, if the commissioner's final antidegradation determination states that issuing a general NPDES permit will achieve the antidegradation standards specified in part 7050.0270, further antidegradation procedures are not required when a person seeking coverage under the general NPDES permit certifies that the permit conditions can and will be met.

For general NPDES permits, therefore, Minnesota's antidegradation rules require MPCA to make a preliminary antidegradation determination as to whether the antidegradation standards in Minn. R. 7050.0270 are met, including whether prudent and feasible alternatives exist to avoid or minimize net increases in loadings and whether issuance of the permit is necessary to accommodate important economic or social change, Minn. R. 7050.0270, subp. 4, Items B and C. Minnesota's general permit rules at Minn. R. 7001.0210, which are referenced in Minn. R. 7050.0295, require that any general permit must specify the geographic area covered by the permit, Minn. R. 7001.0210, subp. 5; which therefore would also be the geographic area considered in the antidegradation review for the general permit under Minn. R. 7050.0270 and Minn. R. 7050.0290 to which the commissioner's consideration of alternatives and whether issuance of the general permit is necessary to accommodate important economic or social change

would apply. The public has the opportunity to comment on the preliminary determination before MPCA makes its final antidegradation determination, Minn. R. 7050.0295, subps 4 and 5, and an applicant will be required to seek coverage under an individual permit if it cannot comply with the permit conditions, Minn. R. 7050.0270, subp. 6, or does not fit within the category covered by the general permit, Minn. R. 7001.0210, subp. 6.

In approving other states' antidegradation policies and procedures, EPA has accepted the premise that conducting a tier II antidegradation review at issuance of the general permit permissible for states (and EPA) to conduct a Tier II antidegradation review at the general permit issuance stage. *See* EPA's approval of Washington's 2003 Water Quality Standards for Antidegradation and EPA's approval of Iowa's February 17, 2010 rule revisions. As recommended by EPA in its July 7, 1998 Advanced Notice of Proposed Rulemaking (ANPRM), the essence of finding that the limited lowering (still meeting water quality criteria and protecting applicable designated uses) is "necessary" is to "develop an analysis of pollution control/pollution prevention alternatives. By doing this, the State ensures that all feasible alternatives have been adequately evaluated, and that the least degrading reasonable alternative is implemented." 63 Fed. Reg. 36784. Further, in the ANPRM EPA stated that "EPA's current thinking is that determining the social and economic importance of a proposed activity is a public question best addressed by State, Tribal or local interests, perhaps as part of the development of a basin plan." Id.

Whereas an individual permit is written for a specific discharge, a general permit is crafted to address a class of similar activities, such that the least degrading alternative(s) for the permitted activity can be determined and applied to the class of activities covered by the general permit. In a similar way, the antidegradation analysis for the general permit would evaluate the social or economic importance of the class of activity being permitted within the geographic area covered by the general permit, up to and including an entire state. All of these analyses would be required to be subjected to public notice and comment and response by the permit authority. The reasonableness of this decision-making, along with any other aspect of the general permit, would be subject to judicial review under applicable state permit procedures.

Consequently, Minnesota's antidegradation rules for general NPDES permits are consistent with federal requirements at 40 CFR 131.12(a)(2)(ii)).

For general federal licenses and permits, Minn. R. 7050.0305, subp. 2 and Minn. R. 7050.0315, subp. 2 provide that the commissioner shall conduct an antidegradation review, the purpose of which "is to evaluate whether issuing the section 401 certification for the [general federal license or permit] will satisfy the antidegradation standards in part 7050.0270." Minn. R. 7050.0305, subp. 3 and Minn. R. 7050.0315, subp. 3 provide that, "[b]ased upon the review described in subpart 2, the commissioner shall prepare a written preliminary antidegradation determination as to whether the antidegradation standards described in part 7050.0270 are satisfied or can be satisfied by issuing a section 401 certification with conditions." Minn. R. 7050.0305, subp. 6, and Minn. R. 7050.0315, subp. 6 provide that:

> [e]xcept as provided in part 7050.0325, if the commissioner's final antidegradation determination states that issuing a [general NPDES permit or general federal license or

> permit] will achieve the antidegradation standards specified in part 7050.0270, further antidegradation procedures are not required when a person seeking coverage under the [general federal license or permit] certifies that the permit conditions can and will be met.

For general federal licenses and permits, therefore, Minnesota's antidegradation rules require MPCA to make a preliminary antidegradation determination as to whether the antidegradation standards in Minn. R. 7050.0270 are met, including whether prudent and feasible alternatives exist to avoid or minimize net increases in loadings and whether issuance of the permit is necessary to accommodate important economic or social change, Minn. R. 7050.0270, subp. 4, Items B and C.

As with general NPDES permits, Minnesota's antidegradation rules for general federal licenses and permits require MPCA to conduct the antidegradation review at the time of permit issuance and further antidegradation procedures would not be required if an applicant seeking coverage under the general federal license or permit certifies that the permit conditions can and will be met. General federal licenses and permits are similar to general NPDES permits; they must include (or the State may impose) conditions to ensure that environmental impacts will be minimized and must contain eligibility requirements to ensure that the activities covered are appropriately similar such that the alternatives based on certain technologies or pollution prevention measures would be the same set of alternatives for all of the dischargers to be authorized under the general federal license or permit. General federal licenses or permits must specify the geographic area covered by the permit (e.g. *see* 33 CFR 330.1), which therefore would also be the geographic area considered in the antidegradation review by the MPCA commissioner for the federal general license or permit under Minn. R. 7050.0270 and Minn. R. 7050.0305 or Minn. R. 7050.0315 to which the commissioner's consideration of alternatives and whether issuance of the general permit is necessary to accommodate important economic or social change would apply. For nationwide permits and other general federal licenses and permits that cover a geographic area outside the State of Minnesota, the geographic area for the purposes of the antidegradation review would be that part of the area that occurs within the State of Minnesota. Minnesota's rules at 7050.0305 subp. 4 specify that the commissioner shall:

> ...prepare and distribute a public notice of the preliminary antidegradation determination with the preliminary determination to issue or deny the section 401 certification through the procedures described in part 7001.1440, except that part 7001.1440, subpart 2, does not apply.

Minnesota's rules at 7050.0305 subp. 5 require the commissioner to consider information received as a result of the public notice in formulating a final determination on whether or not a given general 404 permit complies with Minnesota's antidegradation standard. This process creates an opportunity for the public to provide input on whether or not the activities covered by the general permit comply with Minnesota's antidegradation policy. An applicant will be required to seek coverage under an individual permit if it cannot comply with the permit conditions, Minn. R. 7050.0270, subp. 6, or does not fit within the category covered by the general permit, Minn. R. 7001.0210, subp. 6.

Consequently, Minnesota's antidegradation rules for Section 401 certifications of general Section 404 permits and federal general licenses and permits are consistent with federal requirements at 40 CFR 131.12(a)(2)(ii)).

c. **Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected. (40 CFR 131.12(a)(3))**

Minn. R. 7050.0250, Item C, requires that "water quality necessary to preserve the exceptional characteristics of outstanding resource value waters (ORVWs) shall be maintained and protected." Minnesota's rules include two categories of ORVWs: prohibited ORVWs and restricted ORVWs. Minnesota's antidegradation rules provide that the State must prohibit any net increase in loading or other causes of degradation to a prohibited ORVW, consistent with 40 CFR 131.12(a)(3). Minn. R. 7050.0265, subp. 7; Minn. R. 7050.0270, subp. 6. Restricted ORVWs are a Minnesota-specific classification intermediate between high quality waters and Outstanding National Resource Waters. For those exceptional characteristics for which the restricted ORVW was designated, no degradation may be allowed. For characteristics other than those for which the water body was designated, degradation may be allowed if the proposed activity would satisfy Tier 1 and 2 requirements.

MPCA made no changes to the existing lists of ORVWs but transferred the lists from Minn. R. 7050.0180 to Minn. R. 7050.0335. The State also added provisions that provide protection as restricted ORVWs to water bodies designated by the state or federal government as scenic or recreational river segments or calcareous fens and protection as prohibited ORVWs to water bodies designated by the state or federal government as wild river segments or water necessary to maintain state-designated scientific and natural areas.

Because Minnesota's antidegradation rules at Minn. R. 7050.0250, Item C, Minn. R. 7050.0265, subp. 7; and Minn. R. 7050.0270, subp. 6, prohibit any net increase in loading or other causes of degradation to a prohibited ORVW, EPA concludes that Minnesota's antidegradation rules satisfy federal requirements at 40 CFR 131.12(a)(3) requirement that, "[w]here high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

d. **In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act. (40 CFR 131.12(a)(4))**

Minnesota's antidegradation rules at Minn. R. 7050.0250, Item D and Minn. R. 7050.0265, subp. 8 and 7050.0270, subp. 7 require activities with a potential for water quality impairments associated with thermal discharges to be consistent with Section 316 of the CWA. Consequently, EPA concludes that the adopted rules satisfy the thermal discharge requirements of 40 CFR 131.12(a)(4).

e. Miscellaneous components of Minnesota's antidegradation rules relevant to whether they are consistent with 40 CFR 131.12(a)

i. Compensatory Mitigation

Minn. R. 7050.0265, subp. 3, entitled "Compensatory Mitigation," provides:

> A. The commissioner shall allow compensatory mitigation as a means to preserve an existing use when there is a physical alteration to a surface water only when all of the following conditions are met:
>
> (1) prudent and feasible alternatives are not available to avoid or minimize adverse impacts to the surface water;
>
> (2) the mitigation is sufficient in quality and quantity to ensure replacement of the lost surface water;
>
> (3) the mitigation is accomplished by:
>
> (a) restoring a previously impacted surface water of the same type, or other type if required by statute; or
>
> (b) when restoring is not a prudent or feasible alternative, establishing or enhancing a surface water of the same type, or other type if required by statute;
>
> (4) the mitigation occurs within the same watershed, to the extent prudent and feasible; and
>
> (5) the mitigation is completed before or concurrent with the actual physical alteration, to the extent prudent and feasible.
>
> B. For the purposes of subpart 2 and part 7050.0250, item A, existing uses are maintained and protected when regulated activities involving the physical alterations of surface waters are in compliance with item A.
>
> C. When the physically altered surface water is of high quality, the commissioner shall ensure the requirements specified in subpart 5 are satisfied.

While federal antidegradation rules at 40 CFR 131.12 do not specifically address physical alterations, EPA has stated that Tier 1 rules are not intended to prevent physical alteration activities "that are clearly allowable by the CWA, such as wetland fill operations permitted under Section 404 of the CWA. EPA interprets Section 131.12(a)(1) of the antidegradation policy to be satisfied with regard to fills in wetlands if the discharge did not result in 'significant degradation' to the aquatic ecosystem as defined under Section 230.10(c) of the Section 404(b)(1) Guidelines." WQS Handbook, p. 6. The State's conditions for the use of compensatory mitigation are generally consistent with federal regulations regarding compensatory mitigation for Section 404 permits found at 40 CFR 230 and 33 CFR 332.3, except that the State's rules do not allow the use of preservation as compensatory mitigation (see Appendix A for a more detailed comparison of the State's conditions with federal compensatory

mitigation requirements). The State's rules in this regard, therefore, may actually be more stringent than federal 404 requirements

MPCA stated in the SONAR (p. 53) that it anticipates that this provision will only be used for those physical alteration activities allowable under Section 404 of the CWA, though the rule does not include that limitation to retain flexibility. EPA is not aware of any other permitting actions that would authorize a physical alteration of a surface water outside of a Section 404 permit. MPCA stated in its Rebuttal Response to Comments document (p. 4) that the only control document MPCA is authorized to issue for a physical alteration to a surface water is a Section 401 certification of a CWA Section 404 dredge and fill permit.

If this provision was used to allow any physical alteration not covered by a Section 404 permit, that physical alteration would be required to meet many of the same requirements as a Section 404 permit, which are considered sufficient to insure that a Section 404 permit would not be causing "significant degradation." This indicates that such an activity would also be required to meet the standard of not causing "significant degradation."

In summary, under Minn. R. 7050.0265, subp. 3, all federal rules and guidance regarding Section 404 permitting and compensatory mitigation before that mitigation may be considered as preserving existing uses. Consequently, EPA concludes that Minnesota's allowance for the use of compensatory mitigation to preserve existing uses is consistent with 40 CFR 131.12(a)(1).

ii. Exemption from Antidegradation for Temporary and Limited Degradation

Minn. R. 7050.0275, subp. 2 provides an exemption from antidegradation procedures for proposed activities that would have only temporary and limited effects. To be eligible for the exemption:

- water quality must be returned to pre-activity conditions within 12 months,
- existing uses must be maintained and protected,
- the activity will not cause an exceedance of WQS, and
- a prudent and feasible alternative does not exist that would avoid or minimize the degradation.

The exemption only applies to individual NPDES permits and Section 401 certifications of individual federal licenses and permits.

EPA has explained that it is consistent with federal antidegradation requirements pertaining to Outstanding National Resource Waters (40 CFR 131.12(a)(3)) for states to allow "some limited activities that result in temporary and short-term changes in the water quality of ONRWs." 48 Fed. Reg. 51400, 51403 (Nov. 8, 1983); *see also* EPA's Water Quality Standards Handbook (1994) at p. 12. In addition to Outstanding National Resource Waters (Tier 3), Minnesota's antidegradation rules also apply this exemption with respect to high quality waters (Tier 2). The most stringent protections against lowering of water quality under the federal antidegradation regulations at 40 CFR 131.12 are for ONRWs, in that those regulations effectively prohibit any lowering by providing that "water quality shall be maintained and

protected" in ONRWs. 40 CFR 131.12(a)(3). Because, as described above, state antidegradation provisions can allow temporary and short-term lowering of water quality with regard to waters that are the subject of the most stringent protections specified in EPA's antidegradation regulation (ONRWs or Tier 3), states similarly can allow temporary and short-term lowering of water quality with regard to high quality waters (Tier 2), given that the protections specified in EPA's regulation pertaining to high quality waters at 40 CFR 131.12(a)(2) are less stringent than for ONRWs.

Consequently, EPA concludes that Minnesota's exemption at Minn. R. 7050.0275, subp. 2 from antidegradation procedures for proposed activities that would have only temporary and limited effects allowance is consistent with 40 CFR 131.12(a).

Conclusion Regarding Consistency with 40 CFR 131.12(a)

For the reasons explained above, the following aspects of Minnesota's antidegradation rules establish an antidegradation policy that is consistent with the requirements of 40 CFR 131.12(a):

> Minn. R. 7050.0250; 7050.0260; 7050.0265, subps. 1, 2, 5, 7 and 8; 7050.0270, subps. 1, 2, 4, 6 and 7; 7050.0275; 7050.0280; 7050.0285; 7050.0290; 7050.0295; 7050.0305; and 7050.0315.

The remaining aspects of Minnesota's antidegradation rules at Minn. R. 7050.0250 – 7050.0325 that are not addressed above are addressed below for consistency with 40 CFR 131.12(b).

Review for Consistency with 40 CFR 131.12(b)

In addition to the provisions summarized above that Minnesota has adopted in accordance with the requirements of 40 CFR 131.12(a) of an antidegradation policy, Minnesota also adopted provisions that go beyond the requirements specified in 40 CFR 131.12(a), provisions that implement the required elements specified at 40 CFR 131.12(a), and provisions that implement both required elements specified at 40 CFR 131.12(a) and Minnesota's provisions that go beyond the requirements specified at 40 CFR 131.12(a). EPA is reviewing these additional provisions for consistency with 40 CFR 131.12(b), which provides that "[t]he State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section." 40 CFR 131.12(b) also provides that "[t]he State shall provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public."

f. Whether Minnesota's methods for implementing the antidegradation policy are consistent with the State's policy and 131.12(a)

i. Minn. R. 7050.0255 (Definitions)

This section includes definitions for 46 terms used throughout the antidegradation rules. Some of the definitions are directly relevant to interpreting and implementing the requirements of 40 CFR 131.12(a). Others pertain to provisions that Minnesota adopted that go beyond the

requirements specified in 40 CFR 131.12(a). In any event, EPA reviewed the definitions and determined that they are consistent with the requirements of 40 CFR 131.12(a).

There were public comments in the State's administrative proceedings on the definition of "[n]et increase in loading or other causes of degradation" at Minn. R. 7050.0255, subp.6:

> **Net increase in loading or other causes of degradation.** "Net increase in loading or other causes of degradation" means:
>
> A. when applied to a proposed activity that is not regulated by an existing control document, any loading or other causes of degradation resulting from the proposed activity; or
>
> B. when applied to a proposed activity that is regulated by an existing control document, an increase in loading or other causes of degradation exceeding the maximum loading or other causes of degradation authorized through water pollution control conditions specified in the existing control document as of the effective date. Application of new effluent limitations based on improved monitoring data or new water quality standards that are not a result of changes in loading or other causes of degradation within the existing capacity and processes authorized by an applicable control document is not considered a net increase in loading or other causes of degradation.

Commenters were concerned that, by using a permittee's maximum authorized loading rate instead of its actual loading rate to determine antidegradation applicability, Item B of the definition could be used to improperly exempt some dischargers from antidegradation procedures. The commenters argued that many existing permittees currently discharge at levels less than the maximum loading rate authorized by its existing control document and that those permittees could be allowed to increase their actual loading rate to any level up to the authorized loading rate without triggering an antidegradation review.

In its Preliminary Response to Comments, MPCA responded that facilities routinely receive a higher effluent limit than their actual loading rate to account for variability in effluent conditions. "Wastewater treatment facilities must operate under a wide variety of conditions which results in effluent pollutant load and concentration variability. Any well operated facility is always going to be discharging at some margin below their listed effluent limits to remain in compliance with permit conditions." Preliminary response, p. 46.

The question of whether to trigger antidegradation reviews based on actual loading rates of proposed activities was raised during EPA development of the Water Quality Guidance for the Great Lakes System at 40 CFR 132. After considering alternatives and public comments, EPA selected an activity-based approach similar to that adopted by Minnesota because this approach brings antidegradation to bear on proposed activities "before the lowering of water quality occurs and while the project is still in the planning stages." Supplementary Information Document, p. 216. In addition, EPA determined that imposing a limit based on the existing effluent quality to implement antidegradation of a discharge raises difficult technical issues related to accounting

for normal effluent variability. This could create a perverse disincentive for dischargers to reduce loadings because doing so would result in a more stringent effluent limit.

In sum, Minnesota's definitions at Minn. R. 7050.0255 are consistent with 40 CFR 131.12(a) and Minnesota's antidegradation policy. Therefore, Minnesota's definitions are consistent with 40 CFR 131.12(b).

ii. Minn. R. 7050.0260 (Determining existing water quality)

Minn. R. 7050.0260 provides:

> Subpart 1. **Methods.** Existing water quality shall be determined using methods described in items A to D. The methods are listed in descending order of priority. Lower priority methods shall be used only if higher priority methods are not reasonably available. More than one method shall be used when a single method does not adequately describe existing water quality.
>
> A. Using commissioner-approved monitoring data that exist at the time the determination of existing water quality is undertaken.
>
> B. Monitoring surface waters, provided that samples are collected in a manner and place and of such type, number, and frequency as may be considered necessary by the commissioner to adequately reflect the condition of the surface waters. Samples must be collected, preserved, and analyzed following accepted quality control and quality assurance methods and according to the procedures in part 7050.0150, subpart 8.
>
> C. Identifying reference surface waters that have similar physical, chemical, and biological characteristics and similar impacts from regulated and unregulated activities.
>
> D. Use of a water quality model to characterize existing conditions in the surface water, provided that the model uses data from the same watershed as the surface water under review for existing conditions.
>
> Subp. 2. **Consideration of existing regulated activities.** For surface waters impacted by activities that are regulated by existing control documents, existing water quality includes surface water conditions that are anticipated at loadings or other causes of degradation authorized in the applicable control document.

Knowledge of the existing water quality is necessary for determining whether a water body is of high quality or not, whether a proposed activity would affect an existing use by violating a water quality criterion, and the capacity of a waterbody to assimilate additional pollutant load. Federal antidegradation regulations and guidance do not specify the methods by which states shall determine existing water quality. The federal regulations at 40 CFR 131.12(b) state that state and tribal antidegradation implementation policies are acceptable if they are consistent with the state's or tribe's antidegradation policy and 40 CFR 131.12(a). 40 CFR 131.12(a) states that an

antidegradation review is required when an activity or action is proposed that would lower water quality, but is silent on the specifics of how that lowering of water quality is to be quantified for purposes of triggering antidegradation review. Minnesota's antidegradation rules include an array of options for determining the existing quality of a waterbody beginning from options that rely on data from the waterbody through reliance on data from similar waters to modeling. All of these are used routinely in water quality management to evaluate water quality. EPA also notes that, for any antidegradation determination, the State will provide an opportunity for public participation as part of the permit process that would allow for public input on whether the method used to determine existing water quality was appropriate given the available data or to offer data of which the State may have been unaware.

For activities that have an existing control document, Minn. R. 7050.0260, subp. 2 specifies that the loading rates or other causes of degradation included in the existing control document shall be considered and included in the determination of existing water quality. Under this subpart, permittees seeking reissuance of a control document would only be required to complete antidegradation procedures if their loading rate increased above the level authorized in its existing control document. Establishing a benchmark for existing loadings for the purpose of determining available assimilative capacity is essential to determining the degree to which water quality may be lowered without impacting existing and designated uses. For example, monitoring data may indicate that a water body has assimilative capacity for a given parameter but some or all of that assimilative capacity may already be allocated through the existing control document. Not considering that allocation would result in an overestimate of available assimilative capacity and, consequently, an exceedance of WQS.

For the reasons described above, the State's method of determining existing water quality as set forth at Minn. R. 7050.0260 is consistent with the State's antidegradation policy and 40 CFR 131.12(a). Therefore, Minn. R. 7050.0260 is consistent with 40 CFR 131.12(b).

iii. Minn. R. 7050.0265, subps. 4 and 6; and Minn. R. 7050.0270, subps. 3 and 5 (Protection of beneficial uses, and restricted outstanding resource waters)

As described above, Minnesota's antidegradation rules include requirements consistent with all of the requirements in 40 CFR 131.12(a): *i.e.*, protection of existing uses, protection of high quality waters, and protection of Outstanding National Resource Waters. Minnesota's antidegradation rules also include additional protections that have no parallel in 40 CFR 131.12(a). Specifically, Minnesota's antidegradation rules include the following additional protections:

> **Protection of beneficial uses.** The commissioner shall not approve a proposed activity that would permanently preclude attainment of water quality standards.
>
> **Protection of restricted outstanding resource value waters.** The commissioner shall restrict a proposed activity in order to preserve the existing water quality as necessary to maintain and protect the exceptional characteristics for which the restricted outstanding resource value waters identified under part 7050.0335, subparts 1 and 2, were designated.

Minn. R. 7050.0265, subps. 4 and 6; and Minn. R. 7050.0270, subps. 3 and 5. These additional protections do not detract from Minnesota's antidegradation rules' other protections discussed above which include the protections required by 40 CFR 131.12(a). Consequently, these provisions are consistent with the State's antidegradation policy and 40 CFR 131.12(a). Therefore, Minn. R. 7050.0265, subps. 4 and 6 and Minn. R. 7050.0270, subps. 3 and 5 are consistent with 40 CFR 131.12(b).

iv. Minn. R. 7050.0325 (Procedures for multiple control documents)

Minn. R. 7050.0325 provides:

> Items A and B apply to proposed activities requiring more than one control document:
>
> A. when the proposed activity requires compliance with standards in both parts 7050.0265 and 7050.0270, the commissioner shall require procedures for which standards in part 7050.0265 apply; and
>
> B. when the proposed activity requires compliance with standards in part 7050.0265 and is subject to more than one procedure, only the procedure that is most protective of existing water quality, as specified by the commissioner, is required.

These provisions do not exempt any activities from Minnesota's antidegradation rules' procedures but only clarify which procedures would be required when multiple procedures apply. Thus, all of the Minnesota's antidegradation rules' protections, which as discussed above include the protections required by 40 CFR 131.12(a), would still apply. Consequently, this provision is consistent with the State's antidegradation policy and 40 CFR 131.12(a). Therefore, Minn. R. 7050.0325 is consistent with 40 CFR 131.12(b).

g. Whether Minnesota provided an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public. (40 CFR 131.12(b))

Minnesota satisfied the public involvement and public availability requirements of 40 CFR 131.12(b) in adopting its antidegradation rules. Specifically, during development of the rules, MPCA published Requests for Comments in the State Register on January 29, 2007, May 29, 2007 and February 25, 2013. On February 1, 2016, a Notice of Hearing and a copy of the draft rules were published in the State Register, notifying the public that written comments would be accepted through March 31, 2016. MPCA also mailed electronic copies of the Notice of Hearing and the draft rules to all interested parties. The agency held public hearings on March 31, 2016 in St. Paul with video conference access provided in Duluth and Mankato. The Administrative Law Judge extended the public comment period until April 20, 2016. MPCA received 15 written comments during this comment period. After MPCA published its response to comments on April 20, 2016, a post-hearing public comment period was provided until April 27, 2016 to allow commenters to rebut the agency's response. Three written comments were received during this period. MPCA publicized the public hearing more than 45 days prior to the date of the hearing, recorded the hearing and met other requirements for public hearings

specified at 40 CFR 25.5. Consequently, EPA concludes that the State has satisfied the public involvement requirements at 40 CFR 131.12(b).

3. EPA's review for consistency with 40 CFR 132

State antidegradation rules applicable to the discharge of bioaccumulative chemicals of concern (BCCs) within the Great Lakes basin must also be consistent with 40 CFR 132, Appendix E. Minnesota made minor changes to its antidegradation policy at Minn. R. 7052.0300 applicable to waters in the Lake Superior Basin. These changes were all nonsubstantive changes to conform with the repeal of Minn. R. 7050.0180 and 7050.0185 and replacement with Minn. R. 7050.0250 to 7050.0335. All of the changes are consistent with 40 CFR 131.12 and 40 CFR 132, Appendix E.

While the State's antidegradation rules at Minn. R. 7050 apply to waters in the Lake Superior Basin, Minnesota's rules Minn. R. 7052 include a separate antidegradation policy and implementation methods that apply to discharges of BCCs within the Lake Superior basin, consistent with the federal regulations at 40 CFR 132, Appendix E, which contain requirements applicable to BCCs. States are required to adopt provisions as protective as those at 40 CFR 132 and EPA previously approved Minnesota's provisions at Minn. R. 7052 as consistent with 40 CFR 132. These antidegradation rules include Tier 2 and 3 protections, but cite antidegradation rules at Minn. R. 7050.0250 to 7050.0335 for Tier 1 protections. Therefore, EPA's review for consistency with 40 CFR 132 focused only on the Tier 1 requirements found in Appendix E.

As discussed above, the adopted antidegradation policy at Minn. R. 7050.0250, Item A and implementation methods at Minn. R. 7050.0265, subp. 2 and 7050.0270, subp. 2 include Tier 1 protections that require existing uses and the level of water quality necessary to protect existing uses to be maintained and protected. Tier 1 protection under 40 CFR 132, Appendix E differs slightly from that under 40 CFR 131.12(a)(1) in that it also prohibits a lowering of water quality with respect to a pollutant or pollutants causing an impairment of a designated use. The adopted rules do not specifically include this requirement. However, the State's antidegradation policy at Minn. R. 7052.0300, subp. 2 applicable within the Lake Superior Basin adds this provision. Consequently, EPA concludes that the State has satisfied the Tier 1 requirements of 40 CFR 132, Appendix E.

4. Other new and revised items that EPA is approving

a. Minn. R. 7050.0218 (Methods for determination of criteria for toxic pollutants, for which numeric standards not promulgated)

MPCA moved the definition of a "toxic pollutant" from the existing antidegradation rule chapter (Minn. R. 7050.0185) repealed by this rulemaking to Minn. R. 7050.0218, which contains rules for the development of criteria for toxic pollutants. This move maintains the EPA-approved definition for the purposes of criteria development since the revised antidegradation rules do not use this term. No changes were made to the definition previously approved by EPA and effective for CWA purposes other than changing its location in the Minnesota WQS. Since EPA

previously approved the definition in its previous location, EPA also approves the definition in its new location in Minnesota's WQS.

b. Repeal of Minn. R. 7050.0180 and 7050.0185

Minnesota repealed the State's existing antidegradation rules at Minn. R. 7050.0180 and 7050.0185. Because these rules are replaced by Minn. R. 7050.0250 through 7050.0335, which as discussed above satisfy the federal requirements of 40 CFR 131.12, EPA concludes that repeal of these rule chapters is consistent with 40 CFR 131.12 and approves the repeal.

c. Change of term "nondegradation" to "antidegradation" throughout Minn. R. 7050, 7052 and 7053

Prior to this rulemaking, the State's rules used the term "nondegradation." As described in the SONAR, the State replaced this term with the term "antidegradation" to better correspond with federal policy and to avoid confusion. Minnesota replace the term "nondegradation" with "antidegradation" wherever it appears in Minn. R. 7050, 7052 and 7053. This is a nonsubstantive change that is consistent with 40 CFR 131.12 and 40 CFR 132, Appendix E. Consequently, EPA approves these revisions.

5. Public participation, comments and issues raised regarding the draft rules (40 CFR 131.20(b)):

During development of the rules, MPCA published Requests for Comments in the State Register on January 29, 2007, May 29, 2007 and February 25, 2013. On February 1, 2016, a Notice of Hearing and a copy of the draft rules were published in the State Register, notifying the public that written comments would be accepted through March 31, 2016. MPCA also mailed electronic copies of the Notice of Hearing and the draft rules to all interested parties. The agency held public hearings on March 31, 2016 in St. Paul with video conference access provided in Duluth and Mankato. The Administrative Law Judge extended the public comment period until April 20, 2016. MPCA received 15 written comments during this comment period. After MPCA published its response to comments on April 20, 2016, a post-hearing public comment period was provided until April 27, 2016 to allow commenters to rebut the agency's response. Three written comments were received during this period. MPCA publicized the public hearing more than 45 days prior to the date of the hearing, recorded the hearing and met other requirements for public hearings specified at 40 CFR 25.5. Consequently, EPA concludes that the State satisfied the public participation requirements at 40 CFR 131.20(b).

MPCA considered and responded to the public comments before adopting the rules. MPCA proposed amendments to the rules in response to some of the comments. EPA reviewed and considered all of the public comments and MPCA's responses in deciding whether Minnesota's antidegradation rules are consistent with the CWA and adequately protect and maintain water quality. EPA agrees with MPCA's responses to the public comments and nothing in MPCA's responses to the public comments lead EPA to conclude that Minnesota's antidegradation rules

are not consistent with CWA and federal regulations or do not adequately protect and maintain water quality consistent with 40 CFR 131.12.

6. Conclusion

For the reasons described above, EPA approves Minnesota's antidegradation rules in accordance with Section 303(c) of the Clean Water Act and 40 CFR 131.21.

IV. Documents Considered by EPA

In addition to the documents submitted by Minnesota, EPA consulted the following documents:

- 33 CFR 332.3
- 40 CFR 131.12
- 40 CFR 132, Appendix E
- 40 CFR 230 – Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material
- Advanced Notice of Public Rulemaking. 63 Fed. Reg. 36742 (July 7, 1998).
- EPA's Water Quality Standards Handbook, Second Edition, EPA-823-B-12-002; March 2012.
- EPA's Interim Economic Guidance for Water Quality Standards, Chapter 5, EPA-823-B-95-002; March 1995.
- EPA policy memorandum: "Interpretation of federal antidegradation regulatory requirement." Tudor T. Davies, Director, Office of Science and Technology, February 22, 1994.
- EPA policy memorandum: "Antidegradation policy approvals and Endangered Species Act consultations." Geoffrey H. Grubbs, Director, Office of Science and Technology, January 27, 2005.
- EPA policy memorandum: "Tier 2 antidegradation reviews and significance thresholds," Ephraim King, Director, Office of Science and Technology, August 8, 2005.
- EPA's Questions & Answers on: Antidegradation, EPA/811/1985.5, August 1985.
- EPA's Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001, March 1991.

V. Endangered Species Act (ESA) Requirements

Minnesota's antidegradation rules are consistent with the requirements of the federal regulations at 40 CFR 131.12. Upon review of EPA's regulatory authority, EPA has determined that it lacks relevant discretion to implement measures that would benefit listed species in connection with antidegradation policy approvals. Thus, EPA is not required to consult on the approval of antidegradation policies with the U.S. Fish and Wildlife Service. If a state or authorized tribe submits to EPA for review an antidegradation policy that meets the requirements of 40 CFR 131.12 and 132, Appendix E, then EPA is required by the CWA to approve the policy. Because EPA lacks authority to require the state or tribe to provide more than the minimum elements required by federal regulations, EPA lacks discretion to require inclusion of measures

that would benefit listed species. Therefore, consultation is not required, consistent with the ESA and the Services' implementing regulations at 50 CFR 402.03.

VI. Tribal Consultation

On May 4, 2011, EPA issued the "EPA Policy on Consultation and Coordination with Indian Tribes" to address Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." The EPA Tribal Consultation Policy states that "EPA's policy is to consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions may affect tribal interests."

Eleven tribes have resources in the State of Minnesota. In a letter dated December 15, 2016, EPA Region 5 extended an invitation to these 11 tribes to consult on Minnesota's revisions to its antidegradation rules. A conference call to present the Minnesota rule revisions and take comments was held on January 12, 2017. Two tribes attended the call and one responded that they were only attending for information purposes and not to initiate formal consultation. A tribal representative from Fond du Lac Band of Chippewa Indians indicated that she was officially designated to represent the Tribe and wished to initiate formal consultation. During the consultation conference call, the tribal representatives raised a number of issues, some of which are addressed in this decision document. Consultation was concluded with a letter sent from Christopher Korleski to the chairperson of Fond du Lac Band of Chippewa that was dated on the same date that EPA signed the letter approving Minnesota's antidegradation rules. In this letter, EPA summarized the issues identified by the Tribe during consultation related to EPA's review of the antidegradation rules and provided EPA's responses to the Tribe's comments.

Appendix A: Comparison of state compensatory mitigation requirements to satisfy the Tier 1 policy with federal compensatory mitigation rules.

Federal Regulation(s)	State Requirements at Minn. R. 7050.0265, subp. 3, Item A
40 CFR 230.91(c)(2) – "the district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States." 40 CFR 230.10(a) – "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem…"	(1) Prudent and feasible alternatives are not available to avoid or minimize adverse impacts to the surface water;
33 CFR 332.3(a) – "Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit." 33 CFR 332.3(f) – "the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions."	(2) The mitigation is sufficient in quality and quantity to ensure replacement of the lost surface water;
33 CFR 332.3(a)(2) – "Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered…"	(3) The mitigation is accomplished by: a) Restoring a previously impacted surface water of the same type, or other type if required by statute; or b) When restoring is not a prudent or feasible alternative, establishing or enhancing a surface water of the same type, or other type if required by statute;
33 CFR 332.3(b)(1) – "In general, the required compensatory mitigation should be located within the same watershed as the impact site…"	(4) the mitigation occurs within the same watershed, to the extent prudent and feasible; and

Federal Regulation(s)	State Requirements at Minn. R. 7050.0265, subp. 3, Item A
33 CFR 332.3(m) – "Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts."	(5) the mitigation is completed before or concurrent with the actual physical alteration, to the extent prudent and feasible.