

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules
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

**REPORT OF THE CHIEF
ADMINISTRATIVE LAW JUDGE**

This matter came on for review by the Chief Administrative Law Judge pursuant to Minnesota Statutes, section 14.16 (2014), and the provisions of Minnesota Rules, part 1400.2240, subpart 4 (2015). Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge, dated May 27, 2016, in all respects.

In order to correct the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall either take the action recommended by the Administrative Law Judge, make different changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minnesota Statutes, section 14.15, subdivision 4.

If the agency chooses to take the action recommended by the Administrative Law Judge, or if the agency chooses to make other changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the *State Register*, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated this 6th day of June, 2016



TAMMY L. PUST
Chief Administrative Law Judge

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

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

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Jeffery Oxley conducted hearings in this rulemaking proceeding from the Minnesota Pollution Control Agency's (MPCA or Agency) office at 520 Lafayette Road North, St. Paul, Minnesota. The hearings commenced at 9:00 a.m. and at 6:00 p.m. on March 31, 2016. The hearings were broadcast via interactive video conference to the regional offices of the Agency in Duluth and Mankato. The hearings continued until everyone present at every location had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act (MAPA).¹ The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements Minnesota law specifies for adopting rules. Those requirements include evidence that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons require one or when ordered by the agency. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and consider what changes might be appropriate.

Jean Coleman, Staff Attorney, represented the Agency at the hearing. The members of the MPCA's hearing panel included William Cole, Supervisor, Environmental Assessment and Outcomes Division (EAOD); Shannon Lotthammer, Director, EAOD; Carol Nankivel, Rule Coordinator, Resource Management and Assistance Division (RMAD); Steve Weiss, Supervisor, Effluent Limits Unit of the EAOD; David Bael,

¹ Minn. Stat. §§ 14.131-.20 (2014).

Economist, EAOD; Scott Fox, Hydrologist, Municipal Division. Approximately 25 people attended the hearings. A total of 17 individuals signed the hearing registers.

The Agency received seven written comments from the public on the proposed rules prior to the hearings.² After the hearings, the Administrative Law Judge kept the administrative record open for an additional 20 calendar days, until April 20, 2016, to allow interested persons and organizations as well as the Agency to submit written comments. Eight post-hearing comments were received from members of the public.³ The Agency filed its post-hearing responses to public comments on April 20, 2016.⁴ Thereafter, the record remained open for an additional five business days, until April 27, 2016, to allow interested persons and the Agency to file a written response to any comments received during the initial comment period.⁵ Three rebuttal comments were received from members of the public.⁶ The Agency also filed rebuttal comments.⁷ In all, 18 written pre-hearing, post-hearing, and rebuttal comments from members of the public were received and considered during this rulemaking process. To aid the public in participating in this matter, comments were posted on the Agency's website shortly after they were received. The hearing record closed for all purposes on April 27, 2016.

NOTICE

The Agency must make this Report available for review by anyone who wishes to review it for at least five working days before the Agency takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Agency makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

² The following written comments were received from members of the public before the hearing in this rulemaking: Comment by Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Friends of the Cloquet Valley State Forest, Northeastern Minnesotans for Wilderness, Protect our Manoomin, Sierra Club North Star Chapter, Save Lake Superior Association, Save Our Sky Blue Waters, Voyageurs National Park Association (Mar. 28, 2016) (Conservation Organizations Pre-Hearing Comment); Comment by Grand Portage Band of Chippewa Environmental Department and Fond Du Lac Band of Lake Superior Chippewa Environmental Program (Mar. 28, 2016) (GP and FDL Pre-Hearing Comment); Comment by Bruce and Maureen Johnson (Mar. 25, 2016) (Johnsons Pre-Hearing Comment); Comment by MCEA (Mar. 28, 2016) (MCEA Pre-Hearing Comment); Comment by Chamber (Mar. 29, 2016) (Chamber Pre-Hearing Comment); Comment by WaterLegacy (Mar. 23, 2016) (WaterLegacy Pre-Hearing Comment); Public Hearing Ex. 1-6 (EPA Comment).

³ Comment by Bruce and Maureen Johnson (Apr. 19, 2016) (Johnsons Post-Hearing Comment); Comment by Harvey Johnson (Apr. 1, 2016) (H. Johnson Post-Hearing Comment); Comment by MCEA (Apr. 20, 2016) (MCEA Post-Hearing Comment); Comment by Chamber (Apr. 20, 2016) (Chamber Post-Hearing Comment); Comment by Minnesota Department of Transportation (Apr. 20, 2016) (MDOT Post-Hearing Comment); Comment by Minnesota Environmental Science and Economic Review Board (. 20, 2016) (MESERB Post-Hearing Comment); Comment by WaterLegacy (Apr. 20, 2016) (WaterLegacy Post-Hearing Comment).

⁴ MPCA Post-Hearing Response to Public Comments (Apr. 20, 2016).

⁵ See Minn. Stat. § 14.15, subd. 1.

⁶ Comment by Randy Johnson (Apr. 27, 2016) (R. Johnson Rebuttal Comment); Comment by WaterLegacy (Apr. 27, 2016) (WaterLegacy Rebuttal Comments).

⁷ MPCA Rebuttal Response to Public Comments (Apr. 27, 2016).

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Agency of actions that will correct the defects, and the Agency may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. If the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Agency may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Agency may not adopt the rules until it has received and considered the advice of the Commission. The Agency is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Agency's submission.

If the Agency elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Agency makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the changed rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Agency must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Agency and the Agency will notify those persons who requested to be informed of their filing.

SUMMARY OF CONCLUSIONS

The Agency has established that it has the statutory authority to adopt the proposed rules, and that the rules are necessary and reasonable, with the exceptions of proposed rules part 7050.0260, subp. 1C and part 7050.0265, subp. 3D which are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100 (2015), as explained below.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. This rulemaking concerns the implementation of the antidegradation provisions of the Clean Water Act (CWA).⁸ Under state and federal law, the Agency is charged with the administration and enforcement of the CWA.⁹ The goal of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰ Federal regulations implementing the CWA provide that “[s]tates¹¹ . . . are responsible for reviewing, establishing, and revising water quality standards . . . and may develop water quality standards more stringent than required by this regulation.”¹²

2. Federal law defines “water quality standards” to “consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are intended to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.”¹³

3. Minnesota Rules, chapter 7050 (2015) establishes water quality standards for “all waters of the state, both surface and underground.”¹⁴ This chapter sets out a classification system for the beneficial uses of waters, establishes numeric and narrative water quality standards, and provides “nondegradation provisions, and other provisions to protect the physical, chemical, and biological integrity of waters of the state.”¹⁵

4. Chapter 7050’s nondegradation provisions consist of two rules: Rule 7050.0180 applies to Outstanding Resource Value Waters (ORVW) and Rule 7050.0185 applies to other waters. Both rules are intended to protect the beneficial uses and water quality of Minnesota’s waters from degradation by new or expanded discharges of sewage, industrial waste and other wastes, but more stringent protections apply to ORVWs.

5. In this rulemaking, the Agency intends to replace the existing nondegradation rules, Minn. R. 7050.0180 and 7050.0185, with rules that better comport with current federal rules and guidance. The last major revision to Minnesota’s nondegradation rules was in 1988, and federal water quality regulations and guidance from the United States Environmental Protection Agency (EPA) have changed

⁸ 33 U.S.C. §§ 1251-1387 (2016).

⁹ 40 C.F.R. § 123.25(a) (2015); Minn. Stat. § 115.03, subs. 1, 5 (2014).

¹⁰ 33 U.S.C. § 1251(a) (2016).

¹¹ “States” includes “Indian Tribes that the EPA determines to be eligible for purposes of the water quality standards program.” 40 C.F.R. § 131.3(j) (2015). For brevity, this Report shall use the term “States” to include States and eligible Tribes.

¹² 40 C.F.R. § 131.4(a) (2015).

¹³ 40 C.F.R. § 131.3(i) (2015).

¹⁴ Minn. R. 7050.0110.

¹⁵ *Id.* Although the Agency has previously used the term “nondegradation,” it has decided to adopt “antidegradation” because that is the term used by federal authorities. SONAR at 1, fn. 1.

significantly since then.¹⁶ In addition, the methods for assessing water quality and implementing effective pollution controls have improved substantially since 1988.¹⁷

6. Federal regulations require states to adopt and implement antidegradation policies that are as stringent as what federal policy prescribes.¹⁸ As the SONAR explains:

The policy specifies three levels, or Tiers, of protection.

Tier 1 requires existing uses and the water quality necessary to support those uses to be maintained and protected. Existing uses are those that actually occurred on or after November 28, 1975.

Tier 2 protects high water quality which is the quality that exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water. High water quality may be lowered only when:

it is necessary (Can degradation reasonably be avoided or minimized?);

it is important (Do the economic or social benefits outweigh the lowering of water quality?);

there is assurance that the highest statutory and regulatory requirements for point sources and best management practices (BMPs) for non-point sources are achieved;

there is an opportunity for public participation and intergovernmental cooperation in decisions to lower high water quality.

This Tier provides for the protection of existing water quality, not just the designated beneficial use.

Tier 3 requires the maintenance and protection of water quality necessary to preserve specific water resources of outstanding value.¹⁹

7. The Agency implements antidegradation policies by reviewing and authorizing regulated activities that involve discharges into waters of the state. In many cases, the Agency is the permitting authority, for example the Agency administers permits for wastewater and stormwater discharges as part of the National Pollutant Discharge and Elimination System (NPDES).²⁰ In some circumstances, a permit or license may

¹⁶ SONAR at 1-2.

¹⁷ *Id.* at 2. Whereas federal regulations employ the term “antidegradation,” Minnesota has used “nondegradation.” In this rulemaking, the Agency proposed to adopt “antidegradation” in place of “nondegradation” in conformance with the federal nomenclature.

¹⁸ 40 C.F.R. § 131.12 (2015).

¹⁹ SONAR at 1.

²⁰ The NPDES was created by the CWA in 1972 and addresses water pollution by regulating point sources that discharge pollutants into waters of the United States. 40 C.F.R. § 122 (2015).

issue from federal authorities but the permit or license also requires that the state certify that the conditions of the permit are such that state water quality regulations and standards will be met. For example, section 404 of the CWA, which is administered by the Army Core of Engineers (ACE), authorizes dredge and fill activities to occur in waters of the United States. However, a section 404 permit also requires that a state certify that its water quality standards will not be violated by issuance of the section 404 permit. A state's certification must conform to the requirements of section 401 of the CWA, which is why the certification is called "a section 401 certification."²¹

8. In this rulemaking, the Agency proposes to mandate specific procedures for activities subject to antidegradation requirements, which procedures are tailored to the type of permit involved and whether the quality of the receiving waters can be reasonably quantified. In addition, the Agency proposes standards to protect waters from degradation. The proposed rules are also intended to better guide applicants through the regulatory process and clarify the information required of applicants.²²

9. According to the Agency, the proposed rules do not expand the kinds of activities subject to nondegradation rules, create new regulatory authority where it did not previously exist, or alter the nondegradation provisions in Minn. R. chs. 7052 or 7060 (2015), apart from "housekeeping" changes.²³

10. The Agency's proposed rules include definitions for 46 key terms and two sets of antidegradation standards: standards that apply when changes in existing water quality are reasonably quantifiable; and standards that apply when such changes are not reasonably quantifiable. The former apply to individual NPDES permits for wastewater, industrial stormwater, and construction stormwater as well as to activities requiring a certification by the Agency that activities authorized by individual federal licenses and permits will comply with state water quality standards. The latter standards apply to general²⁴ NPDES permits, Agency certifications for general federal licenses and permits, and to individual NPDES permits for municipal stormwater activities.²⁵

11. The circumstance that determines which of the two sets of antidegradation standards applies to a particular activity is the number of receiving surface waters affected by the proposed activity's discharges. When only a limited number of surface waters will be affected and when the identity of the waters to be affected is known at the time the permit is issued, the Agency considers the related changes to water quality to be reasonably quantifiable. In cases where an activity may affect many surface waters

²¹ 33 U.S.C. § 1344 (2016) (section 404 of the CWA); 33 U.S.C. § 1341 (2016) (section 401 of the CWA).

²² *Id.* at 2.

²³ *Id.*

²⁴ General permits are developed to apply to many activities that are similar in nature. For example, a general construction stormwater permit may cover dozens or hundreds of construction projects where the proposer is willing and able to comply with the terms of the general permit. When the terms of the general permit are developed, the identities of the waters that will be affected by activities covered by the permit are not known. Public Hearing Transcript (Tr.) at 161-62 (Mar. 31, 2016).

²⁵ SONAR at 2.

and/or the identities of affected waters are not known when the permit or license is issued, the Agency considers that changes to water quality are not reasonably quantifiable.²⁶

12. Both sets of antidegradation standards maintain and protect the existing uses of each water body, bar unnecessary degradation of high water quality, maintain and protect ORVWs and protect against water quality impairments from thermal discharges.²⁷

13. The proposed rules depart from existing rules with respect to the baseline date for measuring anticipated impacts from proposed activities. Under current rules, the relevant baseline date for waters other than ORVWs is January 1, 1988. Under the proposed rules the baseline date is the effective date of the most recently issued permit, license, or certification, for all but ORVWs. The baseline date for ORVWs remains the date the water body was designated as an ORVW (although the baseline date can be changed if the qualities of the water for which it was designated improve).²⁸

14. The proposed rules eliminate the significance threshold for discharges that the current rules provide. The current rules do not require that proposed discharges of 200,000 gallons per day or less to water other than Class 7 waters undergo nondegradation review.²⁹ The Agency views this threshold as problematic because multiple discharges less than the identified threshold can impair water quality. The current rules similarly exclude from review discharges that would “increase the concentration of a toxic pollutant to a level greater than 1 percent over that consistently attained by January 1, 1988.”³⁰ The Agency considers this threshold to be problematic for water bodies where a small change in a pollutant may impair water quality.³¹

15. Although the proposed rules eliminate significance thresholds, they provide exemptions for activities affecting Class 7 waters and for activities that will have only temporary and limited impacts on water quality.³²

16. The Agency states that the proposed rule amendments are needed to better align state rules with federal water quality protection requirements; to take into account improvements in water quality monitoring and pollution control methods; and to provide balanced and transparent procedures for regulated activities subject to the antidegradation requirements of water quality standards.³³ The Agency anticipates that the proposed rules “will reduce the risk of project delays and associated costs due to

²⁶ *Id.*

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ Class 7 waters are “limited resource value waters” as defined in Minn. R. 7050.0140, subp. 8. The uses of Class 7 waters have often been significantly and negatively altered by human activity. Waters of Class 1 to 6 afford more valuable uses.

³⁰ SONAR at 3.

³¹ SONAR at 16.

³² *Id.*

³³ SONAR at 4.

permitting delays or legal challenges” and “provide a balanced approach for the protection of water quality and sustainable economic development.”³⁴

17. During this rulemaking proceeding, the Agency has proposed several modifications to its proposed rules. These proposed modifications are discussed in the rule-by-rule analysis below.

II. Rulemaking Legal Standards

18. In a rulemaking proceeding, the agency must establish the need for and reasonableness of the proposed rules by an affirmative presentation of facts.³⁵ In support of a rule, an agency may rely on legislative facts, including general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute or stated policy preferences.³⁶

19. The MPCA prepared a SONAR in support of its proposed rules. At the hearing, the Agency primarily relied upon the SONAR as its affirmative presentation of facts in support of the proposed rules.

20. The SONAR was supplemented by the MPCA’s hearing presentation, written post-hearing submissions, and comments and responses to questions from the public made by members of the Agency Panel during the public hearing.

21. A rule must be “rationally related to the objective sought to be achieved.”³⁷ Thus, any inquiry as to a rule’s reasonableness requires “a searching and careful inquiry of the record to ensure that the agency action has a rational basis.”³⁸ The agency must “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”³⁹

22. Although reasonable minds might disagree about the wisdom of a certain course of action, it is not the role of the Administrative Law Judge to determine which policy alternative presents the “best” approach, since this would invade the policy-making discretion of the agency.⁴⁰ Therefore, “a reviewing court will not substitute its judgment if an agency can demonstrate that it has complied with rulemaking procedures and made a considered and rational decision.”⁴¹

³⁴ *Id.*

³⁵ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

³⁶ See *Mammenga v. Dep’t of Human Servs.*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

³⁷ *Builders Ass’n of Twin Cities v. Minn. Dep’t of Labor and Industry*, 872 N.W.2d 263, 268 (Minn. Ct. App. 2015) (quotation omitted).

³⁸ *Id.*

³⁹ *Pettersen*, 347 N.W.2d at 244.

⁴⁰ See *Minn. Env’tl. Science and Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 102 (Minn. Ct. App. 2015) (“An agency decision, including rulemaking, enjoys a presumption of correctness and a court should defer to an agency’s expertise and special knowledge.”).

⁴¹ *Id.* at 98.

23. In addition to need and reasonableness, the Administrative Law Judge must also assess whether: the Agency complied with the rule-adoption procedures; the proposed rules grant undue discretion; the Agency has statutory authority to adopt the rules; the rules are unconstitutional or illegal; the rules involve an undue delegation of authority to another entity; or the proposed language is not a rule.⁴²

24. If changes to the proposed rule are made by the Agency or suggested by the Administrative Law Judge after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2014). The statute specifies that a modification does not make a proposed rule substantially different if the differences are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice; the differences are a logical outgrowth of the contents of the notice of hearing and the comments submitted in response to the notice; and the notice of hearing provided fair warning that the outcome of the rulemaking proceeding could be the rule in question.⁴³

25. In determining whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether: persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests; the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of hearing; and the effects of the rule differ from the effects of the proposed rule contained in the notice of hearing.⁴⁴

III. Procedural Requirements of Chapter 14 (2014)

26. The Minnesota Administrative Procedure Act⁴⁵ and the rules of the Office of Administrative Hearings⁴⁶ set forth certain procedural requirements that must be followed during agency rulemaking.

27. On January 29, 2007, the MPCA published a Request for Comments on Planned Amendments to Rules Governing the Non-Degradation of Minnesota Waters in the State Register.⁴⁷ The Request for Comments was published at 31 Minn. Reg. 960.⁴⁸

28. On April 30, 2007, the Minnesota Center for Environmental Advocacy (MCEA) filed a petition for rulemaking with the MPCA.⁴⁹ The petition requested that the

⁴² Minn. R. 1400.2100.

⁴³ Minn. Stat. § 14.05, subd. 2(b) (2014).

⁴⁴ *Id.*, subd. 2(c) (2014).

⁴⁵ The provisions of the Act relating to agency rulemaking are codified in Minnesota Statute section 14.001 through 14.47.

⁴⁶ The rules governing rulemaking proceedings are set forth in Minn. R. 1400.2000-.2240 (2015).

⁴⁷ Public Hearing Ex. A-1.

⁴⁸ *Id.*

⁴⁹ Public Hearing Ex. B.

Agency adopt new rules governing anti-degradation for high-quality waters and for all waters.⁵⁰

29. On May 29, 2007, the MPCA published a second Request for Comments on Planned Amendments to Rules Governing the Non-Degradation of Water Quality in the State Register.⁵¹ This Request for Comments was published at 31 Minn. Reg. 1739.⁵²

30. On February 25, 2013, the MPCA published a third Request for Comments on Planned Amendments to Rules Governing the Non-Degradation of Minnesota Waters in the State Register.⁵³ The Request for Comments was published at 37 Minn. Reg. 1255.⁵⁴

31. On February 5, 2015, the MPCA requested that the Office of Administrative Hearings give prior approval to its Additional Notice Plan.⁵⁵

32. Under the Additional Notice Plan, the MPCA represented that it: (1) had developed an extensive mailing list of interested parties through a very broad outreach effort; (2) engaged in efforts in the early stages of the development of the proposed rules to provide opportunities to interested parties to participate in the rule development process, such as holding a series of stakeholder meetings and developing a webpage dedicated to the rulemaking; and (3) would send the notice to all persons who registered interest in antidegradation or water quality standards rules and would post the notice on its webpage.⁵⁶ The Agency noted that the original invitation to participate in this rulemaking was sent to approximately 700 organizations and individuals. The mailing list was composed of NPDES and SDS permit holders,⁵⁷ persons who were active in past water quality standards rulemakings and persons and organizations known to have an interest in water-related issues.⁵⁸ In 2012, the MPCA transitioned to the “GovDelivery” system, an internet-based communications system for government agencies, for sending future notices. Ultimately, over 1,500 interested parties registered with GovDelivery to receive notifications specifically about antidegradation rulemaking.⁵⁹

33. By Order dated February 11, 2015, Administrative Law Judge Jeanne M. Cochran approved the Agency’s Additional Notice Plan.

⁵⁰ *Id.*

⁵¹ Public Hearing Ex. A-2.

⁵² *Id.*

⁵³ Public Hearing Ex. A-3.

⁵⁴ *Id.*

⁵⁵ See Minn. Rule 1400.2060.

⁵⁶ SONAR at 134-136.

⁵⁷ As mentioned, NPDES permits address water pollution by regulating point sources. SDS refers to Minnesota’s State Disposal System which issues permits required for the construction or operation of large feedlots or manure storage sites. See Minn. R. ch. 7020 (2015) regulating animal feedlots.

⁵⁸ SONAR at 134.

⁵⁹ SONAR at 134-135.

34. On August 5, 2015, the MPCA asked the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.⁶⁰

35. In a memorandum dated August 12, 2015, Michelle Mitchell, Executive Budget Officer for MMB, stated that she had reviewed the proposed rules and SONAR and concluded that the MPCA adequately analyzed the potential costs and benefits of the proposed rule changes.⁶¹

36. On December 30, 2015, the MPCA provided notice of the rulemaking, and a copy of the proposed rules and SONAR, to the Commissioner of Agriculture as required by Minn. Stat. § 14.11.⁶²

37. On January 27, 2016, the MPCA:

- Sent a copy of the SONAR to the Legislative Reference Library as required by Minn. Stat. §§ 14.131 and 14.23;⁶³
- Provided notice of the rulemaking to municipalities as required by Minn. Stat. § 115.44, subd. 7;⁶⁴ and
- Provided notice of the rulemaking to Legislative chairs and minority leaders as required by Minn. Stat. § 14.116.⁶⁵

38. On February 1, 2016, the MPCA published its Notice of Hearing in the State Register at 40 Minn. Reg. 901.⁶⁶

39. The MPCA certified that, on February 1, 2016, it:

- Mailed electronic copies of the Notice of Hearing and proposed rules to all persons and associations who had registered their names with the Agency for purpose of receiving such notice;⁶⁷
- Certified the accuracy of the mailing list;⁶⁸ and
- Provided notice of its proposed rules and rulemaking hearing according to its approved Additional Notice Plan.⁶⁹

⁶⁰ Public Hearing Ex. K-4.

⁶¹ *Id.*

⁶² Public Hearing Ex. K-1.

⁶³ Public Hearing Ex. E.

⁶⁴ Public Hearing Ex. K-2.

⁶⁵ Public Hearing Ex. K-3.

⁶⁶ Public Hearing Exs. F1 and F2.

⁶⁷ Public Hearing Ex. G-1.

⁶⁸ Public Hearing Ex. G-2.

⁶⁹ Public Hearing Ex. H (H-1 through H-4).

40. Public hearings on the proposed rules were held on March 31, 2016, in St. Paul, Minnesota, and broadcast via interactive video conference to the regional offices of the Agency in Duluth and Mankato. During the hearing, the MPCA submitted the following documents, which were received into the hearing record:

- Exhibit A-1: Request for Comments published in the State Register on January 29, 2007 (31 Minn. Reg. 960);
- Exhibit A-2: Request for Comments published in the State Register on May 29, 2007 (31 Minn. Reg. 1739);
- Exhibit A-3: Request for Comments published in the State Register on February 25, 2013 (37 Minn. Reg. 1255);
- Exhibit B: Petition for Rulemaking submitted by the Minnesota Center for Environmental Advocacy on April 30, 2007;
- Exhibit C: Proposed rules with a certificate as to form by the Revisor of Statutes;
- Exhibit D: Statement of Need and Reasonableness (SONAR);
- Exhibit E: Transmittal letter and certificate showing the Agency sent a copy of the SONAR to the Legislative Reference Library on January 27, 2016;
- Exhibit F-1: Notice of Hearing as mailed and posted on the MPCA website;
- Exhibit F-2: Notice of Hearing published in the State Register on February 1, 2016 (40 Minn. Reg. 901);
- Exhibit G-1: Certificate attesting that, on February 1, 2016, the Agency mailed its Notice of Hearing to persons and associations on the Agency's rulemaking mailing list;
- Exhibit G-2: Certificate attesting to the accuracy of the Agency's mailing list;
- Exhibit H-1: Certificate attesting that notice was given in accordance with the Agency's Additional Notice Plan;
- Exhibit H-2: Screenshots of the MPCA's public notice webpage and rulemaking webpage showing Notice of Hearing and other documents posted;
- Exhibit H-3: Plain English version of the Agency's Notice of Hearing and summary of the proposed rule amendments as posted on MPCA's rulemaking webpage;

- Exhibit H-4: Electronic version of the Notice provided by the Agency to all Minnesota municipalities and transmittal letter provided to municipalities without electronic access;
- Exhibit I: Written comments received on the proposed rules during the pre-hearing comment period.
- Exhibit I-1: Letter from Paula Goodman Maccabee, Advocacy Director/Counsel for WaterLegacy, dated March 23, 2016, with exhibits ;
- Exhibit I-2: Letter dated March 25, 2016, from Bruce L. Johnson and Maureen K. Johnson;
- Exhibit I-3: Letter from MCEA dated March 28, 2016, with attachments;
- Exhibit I-4: Letter dated March 28, 2016, from the Grand Portage Band of Chippewa and Fond du Lac Band of Lake Superior Chippewa;
- Exhibit I-5: Letter dated March 28, 2016, from various conservation organizations including Center for Biological Diversity, Friends of the Boundary Waters, Friends of the Cloquet Valley State Forest, Northeastern Minnesotans for Wilderness; Protect Our Manoomin; Save Lake Superior Association; Save Our Sky Blue Waters; Sierra Club North Star Chapter; and Voyageurs National Park Association.
- Exhibit I-6: Letter from Lina Holst, Chief, Water Quality Branch, EPA;
- Exhibit I-7: Letter dated March 29, 2016, from Tony Kwilas, Minnesota Chamber of Commerce;
- Exhibit J: Agency's statement of nonapplicability of approval to omit text of proposed rules from the State Register publication as complete rule text was published;
- Exhibit K-1: Agency's letter providing notice to the Department of Agriculture as required by Minn. Stat. § 14.111;
- Exhibit K-2: Agency's letter providing notice to municipalities as required by Minn. Stat. § 155.44, subd. 7 (2014);
- Exhibit K-3: Agency's letter providing notice to Legislative chairs and minority leaders as required by Minn. Stat. § 14.116 (2014);
- Exhibit K-4: Correspondence between the Agency and the Minnesota Management and Budget Office regarding fiscal impact of proposed rules, as required by Minn. Stat. § 14.131.

41. In addition to the documents the Agency submitted, the following additional exhibits were submitted by members of the public and received into the hearing record:

- Exhibit 1: Written comments of Maureen Johnson, retired biologist, Stacy, Minnesota;
- Exhibit 2: Written comments of Bob Tammen, Soudan, Minnesota.
- Exhibit 3: Written comments of Bruce Johnson, retired biologist and chemist, Stacy, Minnesota;

42. The Administrative Law Judge finds that the Agency has met the procedural requirements imposed by above-referenced laws and rules.

A. Additional Notice

43. Minnesota Statutes sections 14.131 and 14.23 require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules.

44. As noted above, the Agency certified that it had provided notice of the proposed rules to all individuals and organizations included on its rulemaking mailing list as well as to the individuals and entities identified in its Additional Notice Plan that was approved by Administrative Law Judge Cochran on February 11, 2015.

45. The MPCA also stated that it made efforts early on in the development of the proposed rules to provide opportunities to interested parties to participate in the rule development process. For example, the Agency held a series of stakeholder meetings in 2008 and 2009 to discuss fundamental aspects of the anti-degradation policy and implementation. The meetings were held in three locations: St. Paul, Duluth and Rochester. Following these meetings, MPCA staff continued to meet with specific groups and individuals over the years to discuss issues related to the anti-degradation rulemaking.⁷⁰

46. The Agency also posted notices and general information on a webpage it maintained specific to this rulemaking located at <http://www.pca.state.mn.us/oxpg919>.⁷¹ It also provided an informational briefing at the January 2015 meeting of the MPCA Citizens' Board. This meeting was webcast and advance notice of the meeting and agenda were provided to all persons registered to receive notice of Board meetings and also through a Govdelivery notice to all persons registered to receive information about the anti-degradation rules.⁷²

⁷⁰ SONAR at 134-136. See SONAR Attachment (Att.) 1 for MPCA's complete list of meetings with external parties from January 2007 – December 2015.

⁷¹ SONAR at 135.

⁷² *Id.* at 136.

47. The MPCA provided an extended pre-hearing comment period, posted a “plain English” summary of the Notice and proposed rule amendments on its rulemaking webpage, and provided interactive access to the rulemaking hearings through video-links to multiple regional locations.⁷³

48. Prior to the hearing, a commenter asserted that the Agency failed to provide adequate notice of its intent to repeal Minnesota Rule, parts 7050.0180 and 7050.0185, specifically regarding those portions relating to “all waters” and “groundwater.”⁷⁴

49. The Notice of Hearing specifically stated that the MPCA was proposing to repeal Minnesota Rules, parts 7050.0180 and 7050.0185, and replace them with new antidegradation rules. The Agency also discussed its intent to replace the existing nondegradation rules extensively in the SONAR.

50. The Administrative Law Judge finds that the MPCA has met the procedural requirements related to additional notice as imposed by applicable law and rules.

B. Statutory Authority

51. The MPCA relied upon Minn. Stat. § 115.03, subd. 1(e) as the source of its statutory authority to adopt and implement these rules.⁷⁵ This statute, which was enacted prior to January 1, 1996,⁷⁶ authorizes the MPCA to adopt standards and rules “in order to prevent, control or abate water pollution.”⁷⁷

52. The MPCA also relies on Minn. Stat. § 115.44 (2014) as additional authority for adopting the proposed rules.⁷⁸ This statute authorizes the Agency to adopt classifications and standards of purity and quality for waters of the state.⁷⁹

53. The Administrative Law Judge concludes that the MPCA has statutory authority to adopt the proposed rules.

C. Impact of Farming Operations

54. When rules are proposed that affect farming operations, Minn. Stat. § 14.111 requires that notice be given to the Commissioner of Agriculture and Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

⁷³ *Id.*

⁷⁴ Public Hearing Ex. I-2; MPCA Rebuttal Response to Comments at 21 (Apr. 27, 2016).

⁷⁵ SONAR at 12.

⁷⁶ If a law authorizing or requiring an agency to adopt, amend, or repeal rules became effective after January 1, 1996, the agency must publish a notice of intent to adopt the rules or a notice of hearing within eighteen months of the effective date of the authorizing statute or lose its rulemaking authority. Minn. Stat. § 14.125 (2014). Because the MPCA’s authority to adopt rules to prevent, control or abate water pollution existed prior to January 1, 1996, the time limit does not apply here.

⁷⁷ Minn. Stat. § 115.03, subd. 1(e).

⁷⁸ SONAR at 12.

⁷⁹ Minn. Stat. § 115.44, subd. 2.

55. The Agency provided notice to the Commissioner of Agriculture more than thirty days before the proposed rules were published in the State Register,⁸⁰ and the hearings in this matter were broadcast to MPCA regional offices located in agricultural areas. As a result, the Administrative Law Judge concludes that the Agency has complied with Minn. Stat. §§ 14.111 and 14.14, subd. 1b.

IV. Regulatory Analysis in the SONAR

56. Minnesota Statutes section 14.131 requires an agency adopting rules to consider eight factors in its Statement of Need and Reasonableness. The Agency's analyses of each of these factors are discussed below.

A. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

57. The MPCA states that all persons who use, rely on, and have an interest in the quality of Minnesota's surface waters, as well as the biological communities supported by those waters, will be affected by and benefit from the proposed rules. For example, anyone who uses Minnesota waters for drinking water, recreation (swimming, fishing, boating, etc.), commerce, or for scientific, educational, cultural, and aesthetic purposes will be affected by and benefit from the proposed rules.⁸¹

58. The MPCA also asserts that the sustainable maintenance of the state's surface water quality will benefit not only this generation of Minnesotans, but generations to come. In addition, the Agency contends that the regulated community, consultants, concerned citizens, the MPCA and other government agencies will benefit from the proposed rules' clear language regarding scope, standards and procedures.⁸²

59. The MPCA notes that there are costs associated with the implementation of the proposed antidegradation procedures and it acknowledges that regulated parties will bear most of these costs. Specifically, individual permittees will bear the cost of gathering information for their antidegradation assessments; the MPCA will bear the cost of conducting antidegradation reviews for both individual and general authorizations; and concerned citizens and other entities will bear costs associated with participating in the MPCA's antidegradation determinations such as costs associated with time spent reviewing assessments and submitting comments.⁸³

⁸⁰ Public Hearing Ex. K-1.

⁸¹ SONAR at 137.

⁸² *Id.*

⁸³ *Id.* at 137, 145.

B. The probable costs to the MPCA and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

60. The MPCA states that the proposed rules will increase the number of antidegradation reviews required to be conducted due to the removal of the significance threshold and the inclusion of implementation procedures specific to different types of control documents. The Agency states that the current antidegradation rules do not contain implementation procedures for specific types of control documents and are difficult to apply to regulated activities other than wastewater treatment covered under individual NPDES permits. Because the proposed rules are more clearly applicable and readily able to be implemented to other regulated activities, the MPCA expects to see an increase the number of antidegradation reviews. The MPCA notes, however, that while it expects the number of reviews will increase, the proposed rules do not increase the actual universe of entities subject to antidegradation review.⁸⁴

61. The MPCA conservatively estimates that it will expend \$108,185 annually to conduct antidegradation reviews that were not required to be conducted under the current rules.⁸⁵

62. The MPCA created a table summarizing the estimated number of additional antidegradation reviews and associated costs it will incur as a result of implementing the proposed rules.⁸⁶ Among other costs, the MPCA expects that it will need to conduct 14.3 additional antidegradation reviews on applications for individual NPDES wastewater permits each year as a result of removing the significance threshold from the current rules. The Agency estimates it will incur additional costs associated with these reviews in the amount of \$44,416 annually.⁸⁷ The Agency also predicts it will conduct 2 individual NPDES industrial stormwater permits each year at an estimated cost of \$6,212 annually. The MPCA also estimates that it will conduct 15.5 additional antidegradation reviews on applications for section 401 certifications of individual section 404 permits, at an estimated cost of \$48,143 annually.⁸⁸ And the Agency estimates that it will conduct 2 additional general NPDES wastewater permits, at an estimated cost of \$4,778 annually.⁸⁹

63. The Agency estimates that the total probable increased cost to the MPCA associated with the new additional procedures not related to individual NPDES wastewater permits to be \$63,769 annually.⁹⁰

64. The Agency states that the current antidegradation rules do not contain implementation procedures for specific types of control documents and are difficult to

⁸⁴ *Id.* at 139.

⁸⁵ *Id.* at 138, Table 2 (summary of the estimated number of additional antidegradation reviews and associated costs to the MPCA as a result of implementing the proposed rules).

⁸⁶ *Id.*

⁸⁷ SONAR at 138.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

apply to regulated activities other than wastewater treatment covered under individual NPDES permits. Because the proposed rules are more clearly applicable and readily able to be implemented to other regulated activities, the MPCA expects to experience an increase in the number of antidegradation reviews completed. The MPCA notes that while it expects the number of reviews will increase, the proposed rules do not increase the actual universe of entities subject to antidegradation review.⁹¹

65. The MPCA states that the increase in the number of future antidegradation reviews is the result of “removing the obstacles to the proper implementation of the current rules,” rather than the result of any new requirements in the proposed rules.⁹² According to the Agency, including control document-specific implementation procedures in the proposed rules clarifies which activities are subject to antidegradation procedures.⁹³ The MPCA maintains that the time and effort needed to conduct the additional reviews will be absorbed by the Agency’s regular staff complement and budgets. The Agency also asserts that the long-term costs associated with its surface water programs as a whole may actually decrease as a result of the clearly articulated implementation procedures and improved water quality protection, especially with respect to costs currently expended to restore waters not attaining water quality standards.⁹⁴

66. The Agency notes that the proposed rules provide more opportunity for public comment as a result of the increase in the number of preliminary antidegradation determinations, and acknowledges that there are costs associated with reviewing and responding to comments. However, the Agency contends that the greater transparency and consistency provided by the proposed rules may ultimately result in fewer comments.⁹⁵

67. The MPCA does not believe that any other agency will incur costs associated with the implementation of the proposed rules. Antidegradation and water quality standards are implemented and enforced through MPCA-issued control documents that require compliance with MPCA rule standards. Other agencies do not implement or enforce antidegradation as it relates to the protection of the state’s water quality. While other agencies may wish to provide comment on the MPCA’s antidegradation determinations, the MPCA cannot reasonably estimate the costs other agencies may incur relevant to developing comments.⁹⁶

68. Finally, the MPCA does not anticipate that implementation and enforcement of the proposed rules will directly affect state revenues. However, the Agency notes that there may be indirect effects on state revenues if public funds are allocated to assist public projects. For example, the Public Facilities Authority (PFA) provides financial assistance to wastewater facilities based on a local government or community’s ability to pay for a project. The MPCA states that it is possible that the proposed rules’

⁹¹ *Id.* at 139.

⁹² *Id.*

⁹³ SONAR at 139.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 140.

requirements to implement prudent and feasible alternatives that minimize high water quality degradation may cause local governments to incur costs that will need to be covered by PFA funding. The Agency maintains that it is not possible to predict these potential costs due to the fact-specific nature of each antidegradation situation.⁹⁷

C. A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

69. The Agency maintains that there are no less costly or less intrusive methods for achieving the purpose of the proposed rules as federal water quality rules require that states and authorized tribes adopt antidegradation policy consistent with federal standards of protection.⁹⁸

70. The stated purpose of the proposed rules is to “achieve and maintain the highest possible quality in surface waters of the state.”⁹⁹ The Agency asserts that the stated purpose is consistent with the federal standard of antidegradation.¹⁰⁰

71. The Agency states that to achieve the proposed rules’ stated purpose it must strictly prohibit water quality degradation where the water quality is necessary to maintain outstanding characteristics of ORVWS or to maintain an existing use. For waters that are of high quality, the proposed rules allow for degradation when necessary to accommodate important social or economic development.¹⁰¹

72. The Agency asserts that it cannot achieve the purpose of meeting the federal antidegradation standards without requiring those new elements of the proposed rules that are specifically designed to meet the federal standards. For example, the Agency states that it cannot meet the federal expectation of protecting assimilative capacity of high quality waters without eliminating the current exemptions for significant thresholds.¹⁰²

D. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

73. The MPCA states that it approached this rulemaking by evaluating the current rules in relation to the federal antidegradation standards and reviewing the antidegradation policies and procedures of other states. According to the Agency, its evaluation and review revealed the areas the MPCA needed to address in establishing the scope of the proposed rules.¹⁰³

⁹⁷ *Id.*

⁹⁸ *Id.* at 141. See 40 C.F.R. § 131.12.

⁹⁹ Proposed Minn. R. 7050.0250.

¹⁰⁰ SONAR at 141; see 40 CFR § 131.12 (2015).

¹⁰¹ SONAR at 140.

¹⁰² *Id.*

¹⁰³ *Id.*

74. The Agency considered simply amending the current antidegradation rules, but determined that the current rules were so significantly out-of-date that it would be more efficient to repeal the current rules and propose new rules that meet current standards and needs.¹⁰⁴ The last major revision of the current nondegradation rules occurred in 1988. Since that time, there have been significant changes in the understanding of water quality protection, state and federal regulatory programs, and EPA guidance concerning the implementation of antidegradation policy.¹⁰⁵ The Agency asserts that the inadequacies of the current rules have given rise to a number of legal challenges that resulted in substantial costs to both the MPCA and the regulated community.¹⁰⁶

75. The Agency also considered, as an alternative to the proposed rules, using the ACE's determinations made under CWA section 404 guidelines¹⁰⁷ to satisfy antidegradation requirements for those activities involving physical alterations to water bodies.¹⁰⁸ The determinations made under section 404(b)(1) guidelines are based on a broad range of considerations, only one of which is water quality. The MPCA determined that this option was unacceptable because of the inadequacy of the review factors. The MPCA also rejected this option because the ACE relies on the MPCA to ensure water quality standards are met through CWA section 401 certification processes.¹⁰⁹

76. In the view of the Agency, the proposed rules are the best approach for meeting federal antidegradation standards and achieving the highest possible water quality in the state.

E. The probable costs of complying with the proposed rules including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

77. The MPCA states that costs of complying with the proposed rules will be borne by the regulated community. The costs are associated with: 1) providing the information the MPCA needs to make antidegradation determinations, and 2) minimizing high water quality degradation. The proposed rules increase the probable costs of compliance by increasing the number of reviewable activities due to the removal of the significance threshold, and by including implementation procedures for specific types of control documents. The Agency notes that other costs will also be incurred by entities interested in the MPCA's antidegradation assessments as a result of time spent reviewing assessments and preparing comments.¹¹⁰

¹⁰⁴ *Id.* at 141-42.

¹⁰⁵ SONAR at 141-42.

¹⁰⁶ *Id.*

¹⁰⁷ SONAR, Ex. 84.

¹⁰⁸ SONAR at 142.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 143.

78. The SONAR includes a lengthy and detailed analysis of the probable costs of complying with the proposed rules.¹¹¹ The MPCA drew on studies of three states (Iowa, Indiana, and Missouri) to estimate the costs of antidegradation assessments and compliance costs. Each of these three states conducted detailed analyses of the costs of conducting antidegradation assessments, which the MPCA used to estimate costs for Minnesota. The MPCA notes that none of these states presented compliance cost estimates related to minimizing degradation of high water quality because the numerous potential scenarios were deemed to be too fact-specific to allow for a reasonably accurate estimation.¹¹²

79. The proposed rules require that an applicant seeking coverage under an individual control document (an NPDES or 404 permit) provide an antidegradation assessment consisting of specific information that the MPCA needs to make an antidegradation determination. The MPCA anticipates it will receive an additional 33 applicants per year under the proposed rules, and conservatively estimates the total probable annual costs for preparing the 33 antidegradation assessments at \$2,175,155.¹¹³

80. The MPCA created a table summarizing the anticipated increase in the number of assessments and estimated total annual costs to the regulated community for preparing the antidegradation assessments.¹¹⁴ The Agency assumes that the number of applications for individual NPDES wastewater permits will increase by 14.3 annually, resulting in an additional \$925,939 in total annual costs for preparing these assessments (\$64,751 per assessment). The Agency also anticipates that applications for individual NPDES industrial stormwater permits will increase by two annually, resulting in an additional \$129,502 in total annual costs for preparing these assessments, and that individual NPDES municipal stormwater permits will increase by 0.4 annually, resulting in an additional \$23,470 in total annual costs for preparing these assessments. The MPCA also assumes individual section 404 permits will increase by 15.5 annually, resulting in an additional \$1,003,641 in total annual costs for preparing these assessments. The Agency anticipates that applications for individual federal licenses or permits other than section 404 permits will increase by 0.8 annually, resulting in an additional \$92,603 in total annual costs for preparing these assessments.¹¹⁵

81. The MPCA maintains that it is not able to adequately estimate the probable costs of minimizing high water quality degradation because each situation is unique and fact-specific in nature.¹¹⁶ The proposed rules do not specify which pollution control measures will result in minimizing degradation of high water quality because a variety of factors must be taken into consideration before a determination may be made as to which pollution control measure is the most prudent and feasible. For example, the nature of

¹¹¹ *Id.* at 142-155, Att. 4.

¹¹² SONAR at 148-154; MPCA's Rebuttal Response at 18 (Apr. 27, 2016).

¹¹³ SONAR at 143.

¹¹⁴ *Id.*; Table 3.

¹¹⁵ SONAR at 143, Table 3 (summary of estimated annual costs to the regulated community for preparing antidegradation assessments as a result of implementing the proposed rules).

¹¹⁶ SONAR at 144.

the discharge, the characteristics of the impacted waters, and the cost and availability of pollution control measures must be taken into account. Therefore, the Agency maintains that it cannot reasonably estimate the probable costs of minimizing degradation of high quality water.¹¹⁷

82. The MPCA states that the parties that will bear the probable costs of complying with the proposed rules include owners and operators of proposed new or expanding wastewater facilities covered under individual NPDES permits where the new or expanded discharges will not exceed the *de minimis* discharge or concentration thresholds. Both municipal and industrial facilities have qualified for these exemptions from nondegradation review. The PFA may also incur costs if public facilities request and qualify for financial assistance.¹¹⁸ In addition, applicants for NPDES stormwater permits for MS4s,¹¹⁹ construction and industrial activities, and applicants for federal licenses and permits requiring CWA section 401 certification actions will bear costs associated with the increase in reviewable activities due to the inclusion of viable implementation procedures for specific types of control documents.¹²⁰

83. In public comments at the hearing and written comments, the Minnesota Environmental Science and Economic Review Board (MESERB), a joint powers organization of 42 Minnesota cities, public utilities commissions and sanitary sewer districts, criticized the Agency for failing to adequately analyze the probable costs associated with the proposed rule's requirement that entities implement pollution control alternatives to avoid or minimize degradation.¹²¹ MESERB disagrees with the MPCA's assertion that it cannot reasonably estimate the costs of minimizing degradation given the site-specific nature of each situation. MESERB contends that the Agency too swiftly dismissed its statutory obligation to make a reasonable effort to ascertain the probable costs of implementation of the proposed rule requirements.¹²²

84. MESERB also challenges the MPCA's assertion that it does not anticipate that implementation of the proposed rules will directly affect state revenues. MESERB contends that the Agency failed to adequately analyze whether PFA funding will be available for wastewater treatment infrastructure and failed to perform a cost estimate. MESERB notes that the EPA has performed over 4,500 studies examining environmental compliance costs, and MESERB conducted a cost study in 2005 analyzing probable costs for wastewater treatment facilities for compliance with water quality regulations.¹²³

85. MESERB maintains that the MPCA's failure to adequately analyze the probable costs of implementing pollution control measures to minimize degradation

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 145.

¹¹⁹ Municipal Separate Storm Sewer Systems (MS4s) are publicly-owned conveyances for collecting and conveying stormwater to surface waters and which do not combine stormwater with other discharges <https://www.pca.state.mn.us/water/municipal-stormwater-ms4>.

¹²⁰ *Id.*

¹²¹ MESERB Comments at 14-15 (Apr. 20, 2016).

¹²² *Id.*

¹²³ *Id.* at 15.

defeats the public's ability to participate meaningfully in the rulemaking process as required by statute.¹²⁴

86. In its response to comments, the MPCA maintains that it has made reasonable efforts to ascertain the probable costs of complying with the proposed rules, including the probable costs of implementing pollution control alternatives. The MPCA asserts that, while it is very familiar with the EPA's methods for conducting cost benefit analyses, it cannot feasibly estimate the compliance costs associated with pollution control options given the highly variable and fact-specific nature of individual projects. The Agency explains that it is not the cost analysis methods that are lacking, but the fact-specific information that each wastewater treatment facility would face in implementing the least-degrading, prudent and feasible alternative. Nonetheless, the Agency maintains that it has made a concerted effort to evaluate compliance costs associated with the proposed rules and has provided scenarios that include detailed cost estimates as a means for antidegradation applicants to determine the affordability of all compliance alternatives.¹²⁵

F. The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

87. The MPCA states that the consequence of not adopting the proposed rules would be the continued application of the current rules, which are outdated and fail to comport with current federal antidegradation regulations and associated EPA guidance.¹²⁶ The MPCA maintains that the inadequacies of the current rules have resulted in costly legal challenges over the years and delays in permit issuance. The MPCA contends that litigation and delays would likely continue if the proposed rules are not adopted.¹²⁷

88. The MPCA also notes that if the proposed rules are not adopted, the risk of water quality impairment will increase along with the costs associated with restoring water quality. The MPCA asserts that the proposed rules will reduce the risk of impairment by removing the current significance thresholds and requiring applicants for individual authorizations to provide an assessment of existing water quality and impacts to that quality as a result of the proposed activity.¹²⁸

¹²⁴ *Id.*, citing Minn. Stat. § 14.15, subd. 5.

¹²⁵ MPCA Rebuttal Response to Comments at 18-19 (Apr. 27, 2016); SONAR Att. 4.

¹²⁶ SONAR at 156-157.

¹²⁷ *Id.* at 155-156.

¹²⁸ *Id.* at 157-158.

G. An assessment of any differences between the proposed rule and current federal regulations and a specific analysis of the need for and reasonableness of each difference.

89. In addition to the requirement of Minn. Stat. § 14.131(7) that the Agency assess any difference between the proposed rule and current federal regulation, the MPCA is also required to include an analysis of any proposed standards that are more stringent than federal standards.¹²⁹

90. The Clean Water Act requires that state water quality standards be at least as stringent as mandated by federal law. While states may elect to implement greater protections for its waters, they must, at a minimum, satisfy federal standards.¹³⁰

91. The MPCA states that the proposed rules are not more stringent than federal regulatory requirements, but instead provide detail on how the requirements will be implemented. The MPCA also notes that federal antidegradation regulations are broad and provide states and tribal authorities a great deal of discretion in implementing the requirements.¹³¹

92. In an attachment to the SONAR, the MPCA provided a detailed comparison of federal antidegradation regulatory requirements with standards in the proposed antidegradation rules.¹³² Among the differences noted, federal regulations require an analysis of “practicable alternatives” that would “prevent or lessen” degradation, while the proposed rules require an analysis of “prudent and feasible” alternatives. The MPCA states that it chose to require the “prudent and feasible” standard because it is a standard already established in the current nondegradation rules and it is broader standard while still encompassing all of the elements found in the definition of “practicable.”¹³³

93. The MPCA also notes that the EPA chose not to mandate implementation of the least degrading practicable alternative in order to allow states and authorized tribes the flexibility to balance multiple considerations.¹³⁴ The MPCA contends that its decision to require implementation of the least degrading prudent and feasible alternative in its proposed rules is a difference, but aligns with the EPA’s desire for flexibility in determining how high water quality degradation may reasonably be minimized.¹³⁵

94. Another difference between the proposed rules and federal regulations identified by the MPCA is the higher level of protection it assigns to water bodies specifically designated as ORVWs. According to the MPCA, it, like a number of other states has assigned a level of protection that is more stringent than the federal Tier 2 level of protection, but less stringent than the federal Tier 3 level. The MPCA contends that

¹²⁹ SONAR, Ex. 135.

¹³⁰ 33 U.S.C. § 1370 (2016).

¹³¹ SONAR at 158.

¹³² SONAR at 158 and Att. 5. See also, MPCA Response to Comments, Att. 1 at 60-61.

¹³³ SONAR Att. 5 at 7.

¹³⁴ *Id.*, Attachment 5 at 8.

¹³⁵ *Id.*

the proposed rules do not fundamentally change how ORVWs are currently protected, but provide clarification and reasonable protection of waters that may not have been designated simply because of excellent water quality.¹³⁶

95. The Agency received several comments asserting that the proposed rules conflict with the Clean Water Act by failing to meet minimum federal antidegradation requirements.¹³⁷ These comments and the Agency's proposed modifications to rule language in response to the comments, will be addressed in the Rule by Rule Analysis section of this report.

96. MESERB submitted comments expressing concern that the proposed rules are more restrictive than necessary and thereby conflict with federal regulations.¹³⁸ MESERB argues that requiring implementation of the least degrading alternative renders the proposed rules more restrictive than the federal rule which permits implementation of alternatives that either prevent or lessen the degradation.¹³⁹ MESERB contends that the categorical application of the least degrading alternative will require entities to implement the most expensive alternative without balancing economic and development interests.¹⁴⁰

97. In addition, MESERB maintains that the MPCA failed to adequately analyze the need for and reasonableness of the different standard. MESERB contends that, contrary to the Agency's claim that it is aligning its proposed rules with EPA guidelines, the EPA explicitly rejected the Agency's mandatory least degrading alternative approach in recent amendments to the federal antidegradation rule.¹⁴¹

98. The MPCA responded by noting that the proposed rule requires implementation of the least degrading *prudent and feasible* alternative and not simply the least degrading or most expensive alternative, as MESERB suggests. The MPCA asserts that the proposed rule reasonably balances the protection of high water quality and economic affordability.¹⁴²

H. An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

99. The MPCA states that the goal of the proposed rules aligns with the goals of the CWA and federal water quality regulations. The MPCA maintains that it made every effort to ensure that the proposed rules do not add duplicative or cumulative requirements.¹⁴³

100. The Administrative Law Judge finds that the Agency has adequately considered the potential alternatives and probable costs associated with the proposed

¹³⁶ *Id.* at 158-159.

¹³⁷ See Public Hearing Exs. I-1, I-3, I-4.

¹³⁸ Test. of Daniel Marx at 82-92; MESRB Comments (April 20, 2016) at 13.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, citing 80 Fed. Reg. 51020 (2015) at 51033.

¹⁴² MPCA Rebuttal Response to Comments at 16 (Apr. 27, 2016).

¹⁴³ SONAR at 159; MPCA's Response to Comments, Att. 1 at 59-60.

rules and has otherwise complied with the eight-factor analysis required by Minn. Stat. § 14.131.

V. Performance-Based Regulation

101. The Minnesota Administrative Procedure Act also requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.¹⁴⁴ A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and provides maximum flexibility for the regulated party and the agency in meeting those goals.¹⁴⁵

102. In its SONAR, the MPCA states that the proposed rules provide a publically-informed decision-making process for the protection and sustainable use of the state's water quality. The MPCA maintains that the proposed rules represent a reasonable balance between prescriptive detail and flexibility, while also taking into account the fact-specific nature of individual situations.¹⁴⁶

103. The Agency asserts that the proposed rules provide flexibility for both the regulated community and the MPCA in the following ways:

- The proposed rules contain two sets of antidegradation standards. One set of standards applies to activities where impacts to existing water quality can reasonably be quantified and the other applies to activities where such assessments are not reasonable;
- The proposed rules exempt activities that impact Class 7 waters (provided that uses are maintained and downstream high water quality and ORVWs are protected) and activities that are temporary and limited in nature;
- Applicants seeking individual authorizations are provided the opportunity to evaluate and identify prudent and feasible pollution control measures that minimize degradation. The same flexibility is also provided for general authorization;
- Applicants seeking an individual authorization are provided the opportunity to demonstrate that degradation of high water quality is important for economic or social development. Likewise, in conducting an antidegradation review for a general authorization, the MPCA is provided the flexibility to demonstrate the need to increase

¹⁴⁴ Minn. Stat. § 14.131.

¹⁴⁵ Minn. Stat. § 14.002.

¹⁴⁶ SONAR at 160.

loading to high quality waters for reasons of economic or social development.¹⁴⁷

104. The MPCA contends that its proposed rules meet the legislative requirement that rules achieve the regulatory objective with the maximum flexibility feasible for the regulated parties.¹⁴⁸

105. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. § 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

VI. Consultation with the Commissioner of Management and Budget

106. Under Minn. Stat. § 14.131, the Agency is required to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

107. On August 5, 2015, the MPCA asked MMB to evaluate the fiscal impact and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.

108. In a memorandum dated August 12, 2015, Michelle Mitchell, Executive Budget Officer for MMB, stated that she had reviewed the proposed rules and SONAR and concluded that the proposed rules will have fiscal impacts on local units of government with NPDES wastewater and stormwater permits, Clean Water Act section 404 permits for dredging and filling, and federal licenses and permits other than section 404 permits.¹⁴⁹

109. Ms. Mitchell noted that when an entity applies for a new permit or seeks to renew a permit, the proposed rules require a more detailed review of alternatives to degrading water quality through pollution discharge. The entity pays for the review and, if alternatives to degradation are found, the entity will be required to implement the least damaging action, which may cost more or less than what is required under the current rules. MPCA provided cost estimates based on economic analyses from other states that have implemented similar rules.

110. Based on her review of the proposed rules, SONAR, and the MPCA’s cost estimates based on economic analyses from other states with similar rules,¹⁵⁰ Ms. Mitchell concluded that the MPCA adequately analyzed and presented the potential costs and benefits of its proposed rule changes.¹⁵¹

¹⁴⁷ *Id.* at 160-161.

¹⁴⁸ *Id.* at 160.

¹⁴⁹ Public Hearing Ex. K-4.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

111. The Administrative Law Judge finds that the MPCA has met the evaluation requirements set forth in Minn. Stat. § 14.131.

VII. Compliance Costs for Small Businesses and Cities

112. Under Minn. Stat. § 14.127, the Agency must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

113. The MPCA anticipates that an additional 33 permit applicants per year will be required to submit antidegradation assessments.¹⁵² The MPCA expects that at least one small business or one small city will be among these applicants.¹⁵³

114. The type of small business or city that may be effected by the proposed rules are those applying for NPDES permits, as well as those that require section 401 actions on federal licenses and permits.¹⁵⁴ The costs to these businesses and cities will be associated with: 1) the preparation of antidegradation assessments for individual authorizations; 2) the implementation of pollution control measures that minimize high water quality degradation; and 3) the preparation of comments on the MPCA’s preliminary antidegradation determinations.¹⁵⁵

115. With respect to small cities, the MPCA notes that in 2012 there were 263 cities, townships, and unorganized territories that had less than 10 employees and had NPDES permit coverage for wastewater discharges.¹⁵⁶ If a city chooses to build a new facility or upgrade an existing facility resulting in an expanded loading, antidegradation procedures will be required.¹⁵⁷

116. The MPCA is unable to identify with any accuracy the number of small businesses that are likely to have wastewater discharges and likely to trigger antidegradation procedures.¹⁵⁸

117. The probable costs to the regulated community of complying with the proposed rules are addressed in the regulatory analysis above in item 5.¹⁵⁹

118. The MPCA estimates the average cost of a typical antidegradation assessment to be \$64,751.¹⁶⁰ The MPCA believes this estimate is likely high for

¹⁵² SONAR at 143, 162.

¹⁵³ *Id.* at 162.

¹⁵⁴ SONAR at 162-163.

¹⁵⁵ *Id.* at 163.

¹⁵⁶ SONAR, Att. 6.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See* SONAR at 143.

¹⁶⁰ *See id.* at 163.

wastewater facilities because it includes costs that are intrinsic to facility planning, which will be conducted regardless of the antidegradation review. In addition, the estimate may be high because new or expanding facilities for small cities will be less complex, and therefore the antidegradation assessment will be less costly.¹⁶¹

119. Costs may also be incurred by small businesses and cities as a result of implementing pollution control measures that minimize high water quality degradation. The MPCA states that these costs cannot be reasonably estimated because decisions on how to minimize impacts are situation-specific and may only be determined through the antidegradation review process.¹⁶² However, because of the lengthy planning and review process, the MPCA believes that very few actual costs will be incurred during the first year after adoption of the proposed rules.¹⁶³

120. In summary, the MPCA believes that the cost of complying with the proposed rules in the first year after the rules take effect may exceed \$25,000 for a small business or small city. However, the MPCA is unable to determine with any greater specificity how many small entities may be effected or the costs associated with preparing assessments and implementing pollution controls measures given the site-specific nature of each situation.¹⁶⁴

121. The Administrative Law Judge finds that the MPCA has made the determination required by Minn. Stat. § 14.127 and approves that determination.

VIII. Adoption or Amendment of Local Ordinances

122. Under Minn. Stat. § 14.128, the Agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.¹⁶⁵

123. The MPCA determined that local governments will not be required to adopt or amend ordinances in order to comply with the proposed rules.¹⁶⁶ The Agency stated that because antidegradation is not administered by local governments, it is not necessary for local governments to incorporate the antidegradation requirements into local ordinances.¹⁶⁷ However, the Agency noted that there could be a scenario where a community would make changes to an ordinance in order to be able to meet the conditions for a general NPDES stormwater permit, such as prohibiting raking leaves into

¹⁶¹ *Id.*

¹⁶² *Id.* at 163.

¹⁶³ *Id.*

¹⁶⁴ SONAR at 163.

¹⁶⁵ Minn. Stat. § 14.128, subd. 1.

¹⁶⁶ SONAR at 161.

¹⁶⁷ *Id.*

the street.¹⁶⁸ In that scenario, the ordinance change would be due to permit requirements and not a direct consequence of the proposed rules.¹⁶⁹

124. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128, and approves that determination.

IX. Impact on Farming Operations

125. Minnesota Statutes, section 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rule in the State Register.¹⁷⁰ In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

126. The Agency states that the proposed rules do not change the applicability of antidegradation requirements related to farming practices under current regulatory or statutory authority.¹⁷¹ However, the MPCA did provide notice to the Commissioner of Agriculture more than 30 days before the proposed rules were published in the State Register.¹⁷² In addition, MPCA staff met with Minnesota Department of Agriculture (MDA) staff to discuss the proposed rules, and MDA staff participated in general stakeholder meetings over the course of the rulemaking process.¹⁷³ The rulemaking hearings were also broadcast to MPCA regional offices located in agricultural areas (Duluth and Mankato).

127. The Administrative Law Judge concludes that the MPCA has complied with Minn. Stat. §§ 14.111 and 14.14, subd. 1b.

X. Assessment of Proposed Rule with Other State and Federal Standards

128. For rulemakings that propose changes to standards for water quality under Minn. Stat. ch. 115, the SONAR must also include:

- (1) an assessment of any differences between the proposed rule and:
 - (i) existing federal standards adopted under the Clean Air Act, United States Code, title 42, section 7412(b)(2); the Clean Water Act, United States Code, title 33, sections 1312(a) and 1313(c)(4); and the Resource Conservation and Recovery Act, United States Code, title 42, section 6921(b)(1);
 - (ii) similar standards in states bordering Minnesota; and

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Minn. Stat. § 14.111.

¹⁷¹ SONAR at 133-134.

¹⁷² Public Hearing Ex. K-1.

¹⁷³ SONAR at 134.

- (iii) similar standards in states within the Environmental Protection Agency Region 5; and
- (2) a specific analysis of the need and reasonableness of each difference.¹⁷⁴

129. In its SONAR, the MPCA states the process of comparing the proposed antidegradation standards and requirement to those of border and EPA Region 5 states is complicated because of the wide range of policies and intricacies of each state's water quality standards program, as well as the values, priorities and regulatory structure that are unique to each state.¹⁷⁵

130. The MPCA states that although there are some differences between the proposed rules and other states' rules in how federal requirements are implemented, the proposed rules do not represent a significant departure from requirements in other states.¹⁷⁶ The MPCA provided a detailed comparison of its proposed rules to those found in border and EPA Region 5 states in Attachment 7 to the SONAR.¹⁷⁷

131. In general, the MPCA found many aspects in common among its proposed rules and those of most of the other states. For example, antidegradation standards are applied through control documents regulating activities subject to the CWA; antidegradation standards apply to surface waters of the state; antidegradation procedures are triggered by net increases in loading; antidegradation procedures allow for exemptions; high water quality is determined on a parameter-by-parameter basis; and the determination of whether a proposed activity is necessary is made by an analysis of reasonable alternatives that avoid or minimize degradation.¹⁷⁸

132. The MPCA notes that two aspects vary considerably among states' rules: 1) exemptions for *de minimis* impacts to high water quality; and 2) the application of antidegradation requirements through the issuance of general permits.¹⁷⁹ The MPCA's proposed rules do not provide a *de minimis* exemption because of the difficulty in accounting for cumulative impacts and the fact that not all parameters that may degrade high water quality have numeric water quality standards.¹⁸⁰ Illinois, Iowa and South Dakota also do not provide a *de minimis* exemption, but other states do provide some *de minimis* exemptions.¹⁸¹ In addition, the MPCA's proposed rules include specific antidegradation procedures for general permits, similar to Iowa's rules.¹⁸² North Dakota, South Dakota and Wisconsin do not provide specifics on how antidegradation is applied

¹⁷⁴ Minn. Stat. § 116.07, subd. (2)(f) (2014).

¹⁷⁵ SONAR at 164.

¹⁷⁶ *Id.*

¹⁷⁷ SONAR at 164; Attachment 7.

¹⁷⁸ SONAR at 165.

¹⁷⁹ *Id.* at 165-167.

¹⁸⁰ *Id.* at 85 and 165-166.

¹⁸¹ *Id.* at 165-166 and Attachment 7.

¹⁸² *Id.* at 167; Attachment 7.

to general permits. And in Ohio, activities covered under general permits are not required to undergo review.¹⁸³

133. The Administrative Law Judge finds that the MPCA has made the determination required by Minn. Stat. § 116.07, subd. 2(f).

XI. Analysis of the Proposed Rules

134. The remainder of this Report focuses its discussion on the portions of the proposed rules that received significant critical comment or otherwise require examination. The Report will not discuss each proposed rule and rule subpart in equal depth. Subparts providing definitions of terms that provoked no controversy have been reviewed by the Administrative Law Judge and found to be needed and reasonable. These subparts are not further discussed in this Report. Nor will this Report address every comment made either in writing or orally at the hearing. Some comments apply to multiple rules and rule parts, and in such cases the discussion and analysis of the concern will be limited to the first part or subpart where it arises. The Administrative Law Judge has read and considered every comment made by a member of the public. After addressing general comments about the rulemaking, the Report turns to a part-by-part analysis of the proposed rules.

A. Adequacy of Notice, Adequacy of Public and Tribal Participation in Rule Development Process, and Adequacy of Intergovernmental Coordination

135. The Grand Portage and Fond du Lac Bands charged that the Agency did not seek input from Minnesota tribes with federally approved Water Quality Standards nor from tribes with treaty-protected aquatic resources in developing the rules, noting that these tribes would clearly have an interest in this rulemaking.¹⁸⁴

136. The Agency reports that it did make “extensive efforts to inform and engage tribes throughout the rule drafting process” but that “[n]o tribe requested a consultation on the topic of the proposed antidegradation rules.”¹⁸⁵ The Agency sent notifications to at least 23 tribal contacts via GovDelivery and lists the pre-proposal notices to tribal contacts in the MPCA Response to Comments.¹⁸⁶ On this record, the Administrative Law Judge cannot conclude that notice to Minnesota tribes was inadequate.

137. WaterLegacy charged that the Agency’s proposed rules “make no provision for intergovernmental coordination on a permit or Section 401 Certification.”¹⁸⁷ The Agency responded that its proposed rules did not explicitly separate “intergovernmental coordination” and “public participation” but they did provide an opportunity for comment by any interested entity. The Agency includes local governments, federal and state agencies,

¹⁸³ *Id.*

¹⁸⁴ Comments by GP and FDL at 3 (Mar. 28, 2016).

¹⁸⁵ MPCA Responses to Comments, Att. 1 at 63 (Apr. 20, 2016).

¹⁸⁶ MPCA Responses to Comments at 4 (Apr. 20, 2016).

¹⁸⁷ Comments by WaterLegacy at 21 (March 23, 2016).

and tribal governments in its mailing lists for notices. The proposed rules do not change the public and intergovernmental review opportunities that currently exist for section 401 and other certifications.¹⁸⁸ The Agency further explains that:

[a]ll of the procedures contain opportunities for public comment, including those for general authorizations (proposed rules 7050.0295, subp. 4; 7050.0305, subp. 4; and 7050.0315, subp. 4) and compensatory mitigation (proposed rule 7050.0285, subp. 5. Regarding exemptions from review (proposed rule 7050.0275), the opportunity for public comment is provided through public participation procedures in Minn. R. ch. 7001 for the issuance of the permit itself.¹⁸⁹

The Administrative Law Judge concludes that the proposed rules do allow for intergovernmental coordination.

138. WaterLegacy also expressed concern that persons and groups concerned with conservation and public health were not consulted by the Agency in developing the rules while mining interests and other interests that would be regulated under the rules were consulted numerous times.¹⁹⁰ Along with its pre-hearing comments on the rules, WaterLegacy submitted a number of documents detailing its concerns with the impacts of mining operations on Minnesota's waters.¹⁹¹ Attachment 3 is a letter from the EPA to WaterLegacy communicating a protocol for how EPA staff will proceed to investigate the MPCA concerning allegations that it has failed to adequately regulate mining facilities for water quality impacts.¹⁹²

139. Exclusionary and preferential bias is a relevant concern for any rulemaking proceeding. The record on participation in the rulemaking process, however, supports the Agency's claim to have "conducted extensive public participation work from 2007 through the development of the proposed rule"¹⁹³ Attachment 1 to the SONAR is a list of meetings the Agency held with external parties. The list demonstrates that extensive public meetings were held. Out of approximately 60 meetings in the period from 2007 to the present, one was held with PolyMet Mining in November 2015 and one with "Mining Companies" in March 2015.¹⁹⁴ The Agency notes that after 2012, "the number of meetings

¹⁸⁸ MPCA Responses to Comments, Att. 1 at 55 (Apr. 20, 2016).

¹⁸⁹ *Id.* at 54.

¹⁹⁰ *Id.* at 22, Att. 1 at 1 (Mar. 23, 2016); SONAR, Att. 1.

¹⁹¹ Attachment 1 is *PolyMet NorthMet Proposal and MPCA proposed Antidegradation Rulemaking* (supporting criticisms of the proposed rule via a discussion of adverse water quality impacts from mining); Attachment 2 is *Re: Northshore Mining Expansion, MPCA 2014-01685-DWW Draft Clean Water Act Section 401 Certification*, WaterLegacy (November 2015) (opposing certification of section 401 permit for a mine because of water quality impacts).

¹⁹² Letter from Kevin M. Pierard, Chief NPDES Programs Branch to Paula Goodman Maccabee, Esq, (undated) transmitting a document entitled *Protocol for Responding to Issues Related to Permitting and Enforcement* (outlining what the EPA will do to investigate WaterLegacy's *Petition for Withdrawal of Program Delegation from the State of Minnesota for National Pollutant Discharge Elimination System Permits Related to Mining Facilities*).

¹⁹³ MPCA Responses to Comments, Att.1 at 63 (Apr. 20, 2016).

¹⁹⁴ SONAR, Att. 1.

declined and those that were held were at the invitation of groups seeking information about specific aspects of antidegradation.”¹⁹⁵ No other exclusive meetings with mining interests are listed. Based on this record of meetings, the Administrative Law Judge cannot conclude that the Agency discouraged or limited participation by conservation interests in the rulemaking process or that it provided mining interests with superior access to the rulemaking process.

140. One commenter complained that the last draft of the proposed rules before the version published prior to the public hearing on March 31, 2016 was made available to the public in 2012, and since then the draft rules had become convoluted and unclear and did not deal with municipal storm sewer separation.¹⁹⁶

141. The Agency responds that it did circulate draft rules in June 2014. It acknowledged that its draft rules continued to change even since 2014 in response to stakeholder input, and agreed with the commenter that the proposed rules do not address storm sewer separation.¹⁹⁷

142. The Administrative Law Judge concludes that all interested parties had notice of the proposed rules and an opportunity to participate in the rule development process.

143. Two commenters severely criticized the public notice of the hearing and the 180-page SONAR as inadequate because a layperson “would not understand that the basic principles in the current rules were not being retained unless they actually reviewed the current rules against the proposed rules.”¹⁹⁸

144. The proposed rules do make many changes from the current rules. The Notice of Hearing provides in its title notice that the Agency seeks to promulgate newly proposed rules that will govern antidegradation of waters and repeal the current rules governing the nondegradation of waters.¹⁹⁹ The Notice of Hearing further provides a high-level overview of the goals of the proposed rules. Because there are numerous new rules proposed, many of which have numerous subparts, the Notice of Hearing could not reasonably discuss the many changes the Agency is seeking to make. As the part-by-part review of the proposed rules will demonstrate, commenters in this proceeding have arrived

¹⁹⁵ MPCA Responses to Comments, Att. 1 at 63 (Apr. 20, 2016).

¹⁹⁶ Comment by WaterLegacy at 17 (Mar. 23, 2016), Comment by WaterLegacy at 7 (Apr. 20, 2016), Comment by WaterLegacy at 2 (Apr. 27, 2016); Comment by MCEA at 14-17 (Mar. 28, 2016); Comment by GP and FDL at 5 (Mar. 28, 2016); Comment by Conservation Organizations at 1-2 (Mar. 28, 2016); Comment by Bruce and Maureen Johnson at 2 (Mar. 25, 2016).

¹⁹⁷ MPCA Response to Comments, Att. 2 at 15 (Apr. 20, 2016).

¹⁹⁸ Comment by Bruce and Maureen Johnson at 2 (Mar. 25, 2016). The Johnsons participated extensively in providing comments and testimony in this rulemaking and both have expertise in water pollution matters. Bruce Johnson has over 30 years of experience in environmental work as a biologist/chemist. He has done eutrophication research with the EPA, mining impact research for the MDNR, and was the technical lead for enforcing all industrial water quality NPDES permits for the MPCA, in addition to other environment-related work. Maureen Johnson has over twenty five years of experience as a biologist with the EPA, the U.S. Forest Service and as project manager for the superfund program at the MPCA.

¹⁹⁹ NOTICE OF HEARING (December 17, 2015).

at different conclusions as to the extent to which the principles of the current rules are retained in the proposed rules.

145. Regardless of the conclusions drawn as to the merits of the new rules compared to the current rules, a person who read the Notice of Hearing would know that the rules pertaining to the degradation of the State's waters were being changed. Notices of the hearing, draft rules provided for public review, and informational documents supporting the rulemaking explicitly state that current rule Parts 7050.0180 and 7050.0185 would be repealed.²⁰⁰ The full text of the proposed rules was published in the State Register, allowing an interested person to assess the proposed changes.²⁰¹

146. The Administrative Law Judge concludes that the Agency's Notice of Hearing in this proceeding was adequate to give the public notice of the proposed rulemaking.

B. Overview of the Rules

147. Because the rule parts are substantially interrelated, before beginning a part-by-part review of the rules, it is useful to have an overview of how the Agency has structured its proposed rule parts. As is frequently the case with proposed rules, the antidegradation rules begin with a part stating the proposed rules' purpose (7050.0250) and this is followed by a part devoted to definitions, 46 in all (7050.0255).

148. Next follows a part prescribing how existing water quality is to be determined when a regulated activity affecting surface waters is proposed (7050.0260). To implement an antidegradation policy, it is necessary to define existing water quality conditions in some way. And of course, it is necessary to determine how a proposed regulated activity could adversely affect water quality.

149. Many of the proposed rules that follow are premised on the proposition that determining existing water quality for Minnesota's waters is either relatively easy or extremely difficult: some projects will cause discharges of pollutants where existing water quality and the anticipated effects of the project on water quality are reasonably quantifiable and other projects will cause discharges of pollutants where the anticipated effects on water quality are not reasonably quantifiable. The Agency has developed antidegradation standards for each situation (reasonably quantifiable/not reasonably quantifiable) (7050.0265 and 7050.0270).

150. The next step in implementing the two antidegradation standards is to develop antidegradation procedures for the various kinds of permits and certifications the Agency issues, renews, or modifies. Before proposing implementation procedures, the Agency first sets out several specific exemptions (7050.0275).

²⁰⁰ MPCA Response to Comments at 63 (Apr. 20, 2016); MPCA Rebuttal Response to Comments at 21 (Apr. 27, 2016).

²⁰¹ NOTICE OF HEARING at 2 (December 17, 2015).

151. Regulated activities in this rule chapter are authorized under either an individual permit or a general permit. As the name suggests, a single general permit may cover many similar activities. The common types of activities that require permits regulated by this part are individual and general permits for stormwater discharges for municipalities, construction projects, and industry; wastewater discharges; and permits for dredge and fill activities.²⁰² The Agency has proposed rules for implementing antidegradation procedures for several categories of permit types.

- Procedures for individual stormwater permits for construction and industry and for individual wastewater permits (7050.0280).
- Procedures for certifying individual federal licenses and permits (7050.0285).
- Procedures for individual permits for municipal separate storm sewer systems (7050.0290).
- Procedures for general stormwater permits for construction and industry and general wastewater permits (7050.0295).
- Procedures for certifications of general permits for dredge and fill activities (7050.0305)
- Procedures for certifying general federal licenses and permits other than dredge and fill permits (7050.0315).

152. With so many different kinds of permits available, one activity may be regulated under several permits and the permits may be of different types such that different antidegradation procedures may apply to a single activity. The Agency accordingly has proposed a rule that specifies which procedures apply in such an event (7050.0325).

153. Certain waters have been determined by state or federal authorities to have exceptional characteristics and these waters are specifically designated by rule (7050.03335). These waters receive the greatest level protection from antidegradation procedures.

154. Finally, several other rules are changed to be consistent with or to properly reference the newly proposed rules (7050.0050 – Written Application) (7050.0218 - Methods for Determination of Criteria for Toxic Pollutants, for which Numeric Standards not Promulgated).

²⁰² Permits for dredge and fill activities are issued by the Army Core of Engineers under section 404 of the CWA. The Agency is authorized by federal and state law to certify that the issuance of the federal permit will not cause violations of state water quality regulations. 33 U.S.C. § 1341 (2016); Minn. Stat. § 115.03, subd. 5.

C. Part-by-Part Analysis of the Rules

7050.0250 Antidegradation Purpose

155. The Agency states that setting out the purpose of its proposed antidegradation rules is “needed to articulate the goal of the proposed rules.”²⁰³ The language proposed is very similar to the language in 40 C.F.R. § 131.12. The proposed language improves upon current rule Part 7050.0185, Subpart 1 (which is proposed to be repealed) by employing the term “existing uses” whereas the current rule confusingly refers to “beneficial uses,” “existing water uses,” “existing beneficial uses,” and “existing uses.”²⁰⁴ Proposed rule Part 7050.0255 provides definitions for both “existing uses” and “beneficial uses.”

156. As proposed prior to the post-hearing comment period, Subpart A of rule 7050.0250 stated that to accomplish the purpose of achieving and maintaining “the highest possible quality in **surface waters** of the state,” “**existing uses shall be maintained and protected.**” (Emphasis added.) Several commenters found this statement of purpose objectionable because in limiting the purpose to “surface waters” the provision fails to protect groundwater and wetlands.²⁰⁵ The Grand Portage Band of Chippewa and the Fond Du Lac Band of Lake Superior Chippewa shared this concern, noting that “approximately 79 percent of all Minnesotans obtained their domestic water supplies from groundwater” and that contaminated groundwater can contribute to surface water pollution.²⁰⁶

157. The Agency responded that where a term was not included among the terms defined in Part 7050.0255, the definitions found in state or federal law applied.²⁰⁷ As “surface waters” is not defined in Part 7050.0255, the definition in Minn. R. 7050.0130 applies, which defines “surface waters” as “waters of the state excluding groundwater as defined in Minnesota Statutes, section 115.01, subdivision 6.” Subdivision 22 of section 115.01 (2014) defines “waters of the state” as “all streams, lakes, ponds, marshes, watercourses, waterways, wells springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.” By including “marshes and “all other bodies or accumulations of water,” surface waters include wetlands.

158. While wetlands are thus included within the scope of the proposed antidegradation rules, groundwater is not. Commenters objected to the exclusion of groundwater for two reasons: First, the current nondegradation rule Part 7050.0185,

²⁰³ SONAR at 20.

²⁰⁴ *Id.*

²⁰⁵ Comment by Bruce and Maureen Johnson at 2 (Mar. 25, 2016); Public Hearing Tr. at 61-62 (March 31, 2016) (M. Johnson); Comment by WaterLegacy at 5 (Mar. 23, 2016); Comment by Conservation Organizations at 1 (Mar. 28, 2016).

²⁰⁶ Comment by GP and FDL at 6-7 (Mar. 28, 2016) (citing Minn. Dept. of Health and U.S. Geological Survey at <http://www.health.state.mn.us/divs/eh/groundwater/background.html#protecting>).

²⁰⁷ MPCA Response to Comments, Att. 1 at 4 (Apr. 20, 2016).

Subpart 1 states that “[i]t is the policy of the state to protect **all waters** from significant degradation” (Emphasis added.) Commenters oppose the exclusion of groundwater from nondegradation protection which such waters currently enjoy.²⁰⁸ Second, commenters point out that polluted waters from surface bodies may flow into groundwater and vice versa.²⁰⁹

159. The Agency notes that antidegradation protection for groundwater is provided elsewhere in statute and rule. Minnesota Statutes, section 103H.001 (2014) sets out the state goal “that groundwater be maintained in its natural condition, free from any degradation caused by human activities.” Minnesota R. 7060.0500 sets out the Agency’s nondegradation policy for the underground waters of the state:

the disposal of sewage, industrial waste, and other wastes shall be controlled as may be necessary to ensure that to the maximum practicable extent the underground waters of the state are maintained at their natural quality unless a determination is made by the agency that a change is justifiable by reason of necessary economic or social development and will not preclude appropriate beneficial present and future uses of the waters.

160. In addition, the Clean Water Act does not require that antidegradation procedures apply to groundwater.²¹⁰ A major purpose of the rulemaking is to comply with federal law, which is what the petition initiating this rulemaking demanded.²¹¹ The EPA’s recently promulgated final rule clarifies that the “waters of the United States’ that are protected under the Clean Water Act,” do not include “shallow subsurface connections nor any type of groundwater”²¹²

161. WaterLegacy contends that by proposing to repeal rule Part 7050.0185 and by excluding groundwater from antidegradation protections, the Agency will contravene the CWA. WaterLegacy also insists that without providing any “technical or scientific justification and with no discernable rationale” for removing groundwater from protection, the Agency also runs afoul of Minnesota’s rulemaking requirements.²¹³ A recent journal article reports 20 judicial opinions finding that the CWA applies to groundwater that is hydrologically connected to “waters of the United States” while only six have categorically excluded groundwater.²¹⁴ WaterLegacy also points to findings the EPA has made that “pollutants conveyed to surface waters via groundwater can constitute a discharge subject to the Clean Water Act.”²¹⁵

²⁰⁸ Comment by WaterLegacy at 4 (Apr. 20, 2016); Comment by Conservation Organizations at 2 (Mar. 28, 2016).

²⁰⁹ Comment by GP and FDL at 7 (Mar. 28, 2016) (quoting *Groundwater Protection Recommendations Report* MPCA (January 2013)).

²¹⁰ MPCA Responses to Comments at 5 (Apr. 20, 2016).

²¹¹ SONAR, Ex. 1.

²¹² MPCA Responses to Comments, Att. 1 at 5 (Apr. 20, 2016) (quoting from *Clean Water Rule: Definition of “Waters of the United States*, 80 Fed. Reg. 124 (June 29, 2015)).

²¹³ Comment by WaterLegacy at 6 (Apr. 27, 2016).

²¹⁴ *Id.* at 7.

²¹⁵ *Id.* at 7-8.

162. The Agency's decision to implement new antidegradation rules for surface waters and its repeal of rule 7050.0185 does support the conclusion that whatever protection Part 7050.0185 provided groundwater that Minn. Stat. § 103H.001 and Minn. R. 7060.0500 do not is lost, at least until such time as the Agency pursues revision of its rules in chapter 7060. However, the Agency explained that devising adequate procedures to establish a similar antidegradation review for groundwater would require significant additional effort as well as the involvement of other state agencies.²¹⁶

163. It is also important to note that the proposed rules do allow for consideration of the impacts of regulated activities on environmental conditions apart from impacts to surface waters. Where changes in water quality may be reasonably quantified, part 7050.0265, subp. 5B(3)-(5) requires that before issuing, renewing, or modifying a permit, the Commissioner must consider a broad range of impacts from the activity, including environmental impacts such as impacts to groundwater.²¹⁷ Proposed rule part 7050.0270 which concerns regulated activities where changes to water quality cannot be reasonably quantified lacks similar provisions because the Agency does not know where the activity will occur. However, the Commissioner, as is required in both parts 7050.0265 and 7050.0270 situations, must consider what the prudent and feasible, least degrading alternatives are and "feasible would include things such as alternatives that have sound environmental practices."²¹⁸ The proposed definition in Part 7050.0255, Subpart 17 of "feasible alternative" for pollution control requires that it be consistent with sound environmental practices.

164. There are protections against groundwater degradation in current statutes and rules apart from Part 7050.0185. The subject of this rulemaking is antidegradation rules for surface waters. Establishing antidegradation rules for groundwaters involve different chapters and is not part of this rulemaking. Because rulemaking requires substantial time and effort, hobbling this rulemaking by imposing an "everything or nothing" requirement is not reasonable.

165. An additional concern with this part was that the proposed rule language did not conform to federal policy because it did not explicitly state that the goal of antidegradation is the protection of all existing uses. The MCEA proposed revising Subpart A of Part 7050.0250 to read "existing uses and the quality of water necessary to protect those uses shall be attained and maintained." (Underline indicates MCEA's proposed revision.)²¹⁹

²¹⁶ Public Hearing Tr. at 156-57 (Mar. 31, 2016) (J. Coleman).

²¹⁷ Proposed Part 7050.0265, Subp. 5B(3)-(5) requires the Commissioner to consider: (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"

²¹⁸ William Cole, Public Hearing Tr. at 174 (referring to Part 7050.0270, Subp. 4B as well as Part 7050.0265, Subp. 5A).

²¹⁹ Comment by MCEA at 6 (Mar. 28, 2016).

166. The Agency agreed to MCEA's suggested revision and has proposed modifying subpart A to read: "existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected."²²⁰

167. The statement of purpose is needed to communicate the overarching goal of the antidegradation rules so as to inform the interpretation of the other proposed rules. The modification is reasonable as it responds to concerns that the purpose did not explicitly identify the necessity of maintaining the level of water quality necessary to protect existing uses. This modification of the initially proposed rule does not make it substantially different and is within the scope of the subject matter announced in the Notice of Intent to Adopt Rule and Notice of Hearing.²²¹

7050.0255 Definitions

168. This part of the proposed rules defines the rule's scope and provides definitions of 46 terms. One criticism broadly applicable to all of the proposed definitions is that they "must be rewritten to include terms more commonly used by EPA, and these definitions must be clear and concise with no ambiguities and [be] directly tied to the intent of the Federal Regulation."²²²

169. The Agency responded to this criticism by noting that many of the 46 defined terms in this part have the same definitions as used in federal and state law. The majority of the definitions generated no comments and are needed and reasonable and will not be further discussed in this Report. Those subparts which commenters found defective are discussed below.

Subpart 1. Applicability

170. In this subpart, the Agency proposes that terms in Parts 7050.0250-.0335 that "are not specifically defined in applicable federal or state law shall be construed in conformance with the context, in relation to the applicable section of the statutes pertaining to the matter and current professional usage." One commenter objected that this language violated Minn. Stat. § 14.07, subd. 3(3) which requires that the Revisor "to the extent practicable, use plain language in rules and avoid technical language"²²³

171. The Agency explained that having a broad directive regarding undefined terms is sensible because defining every term within the proposed rules would be overly burdensome. This position is reasonable given the scope and nature of the proposed rules.²²⁴ Minnesota Statutes, section 14.07, subdivision 3 assigns the duty to use plain language in rules to the Revisor, and limits the duty to avoid technical language "to the

²²⁰ MPCA Response to Comments at 3 (Apr. 20, 2016). This Report adopts the convention of using strike-throughs to indicate stricken language and underlining to indicate new language.

²²¹ Minn. Stat. § 14.05, subd. 2(1).

²²² Comment by Bruce and Maureen Johnson at 2 (Mar. 25, 2016).

²²³ *Id.* at 3.

²²⁴ SONAR at 21.

extent practicable.” The Administrative Law Judge finds that the Agency may reasonably rely on the Revisor to carry out this duty.

172. At hearing, the Administrative Law Judge noted that if professional usage changes over time, the meaning of “current professional usage” could become problematic.²²⁵ The Agency responded that its intent was to refer to present professional usage and indicated it would clarify the language.²²⁶ However, the Agency proposed no change to the language and did not further address this minor point. If the Agency deems it extremely unlikely that the current professional usage will ever differ from future professional usage in a problematic way, changing the wording would not be helpful. But if the Agency considers it probable that a problem could arise, the Agency could modify its proposed rule by replacing “current professional usage” with “professional usage as of the effective date of this rule.” This change would not result in the rule being substantially different from the rule proposed.

Subpart 9. Compensatory Mitigation

173. In certain circumstances, the CWA allows physical modifications to water bodies. Section 404 of the CWA regulates the discharge of dredged or fill material into waters of the United States. Some examples of permitted activities include the construction or maintenance of dams, levees, and bridges.²²⁷ EPA guidance describes the types of compensatory mitigation as restoration, establishment, enhancement, and preservation.²²⁸

174. The Agency’s proposed pre-hearing definition for “compensatory mitigation” was:

the restoration, establishment, or enhancement of surface waters to replace the loss of an existing use resulting from a physical alteration of a surface water after all prudent and feasible alternatives have been implemented to avoid and minimize degradation.

175. This proposed definition raised the concern that the phrase “to replace the loss of an existing use” indicated that the definition would permit existing uses to be lost, in contravention of CWA’s directive that states develop antidegradation policies that

²²⁵ Public Hearing Tr. at 164 (Mar. 31, 2016).

²²⁶ *Id.*

²²⁷ The Johnsons observe that many types of physical alterations can degrade surface waters such as mine and gravel pits, farm field drain tiles, and waste rock piles. Comment by Bruce and Maureen Johnson at 5 (Mar. 25, 2016). “Compensatory mitigation” is only permitted for the loss of aquatic resources resulting from the dredge and fill activities in waters of the United States that are allowed by the CWA. SONAR at 24.

²²⁸ SONAR, Ex. 70; “Wetland Compensatory Mitigation” EPA at https://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf.

protect existing uses.²²⁹ This interpretation of “compensatory mitigation” prompted calls for the removal of the concept from the proposed rules.²³⁰

176. In its post-hearing response, the Agency proposed amending the definition to read:

Compensatory mitigation” means the restoration, establishment, or enhancement of surface waters to ~~replace the loss of~~ preserve an existing use ~~resulting from~~ when there is a physical alteration of a surface water after all prudent and feasible alternatives have been implemented to avoid and minimize degradation.²³¹

177. The amendment makes clear that compensatory mitigation does not contemplate the loss of an existing use. A definition of “compensatory mitigation” is needed because federal regulations permit discharges in circumstances that result in unavoidable impacts. The Agency’s proposed definition as revised is reasonable as it is largely derived from section 33 C.F.R. § 332.2 but makes clear that existing uses must always be preserved. This amendment is within the scope of this rulemaking and the proposed modification is not substantially different from the rule proposed.²³²

Subpart 10. Control Document

178. The Agency proposes to define “control document” as:

an authorization issued by the Commissioner that specifies water pollution control conditions under which a regulated activity is allowed to operate. Control document includes Clean Water Act authorizations used to administer NPDES permits and section 401 certifications. For purposes of parts 7050.0250 to 7050.0334, total maximum daily loads are not control documents.

179. One commenter objected that the definition should name the exact permit types which are considered “control documents” and clarify whether the EPA’s CWA authorization for the Agency to administer NPDES permits is a “control document.”²³³ Another commenter stated that a section 401²³⁴ certification is not a “control document,”

²²⁹ Comment by Bruce and Maureen Johnson at 7 (Mar. 25, 2016) (citing 40 C.F.R. § 131.12(a)(1)).

²³⁰ Comment by Bruce and Maureen Johnson at 7 (Mar. 25, 2016); Comment by WaterLegacy at 9 (Mar. 23, 2016); Comment by MCEA at 7 (Mar. 28, 2016).

²³¹ MPCA Response to Comments at 4 (Apr. 20, 2016).

²³² As contemplated in Minn. Stat. § 14.05, subd. 2 (b)(1), (2) (the modification “is within the scope of the matter announced and did not deprive the public of air warning that this rule could be the result of this rulemaking” and “the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice”).

²³³ Comment by Bruce and Maureen Johnson at 3 (Mar. 25, 2016).

²³⁴ Section 401 of the CWA requires persons seeking to perform “any activity that may result in a discharge to waters of the United States to obtain a section 401 certification to ensure proposed projects comply with the state’s water quality standards.” SONAR at 46. The MPCA is responsible for issuing section 401 permits in Minnesota.

in that the underlying federal permit is the control document.²³⁵ This commenter further asserted that section 401 certifications do not always address all discharges from a facility and generally rely on NPDES permits for compliance with water pollution statutes. The commenter is concerned that section 401 certifications will not require compliance with antidegradation requirements.²³⁶

180. The Agency responded to the concern that this subpart list all permit types by stating that it had anticipated it could be delegated additional regulatory authority in the future which might involve additional types of control documents. Accordingly, the definition focuses on the functions of a control document and does not provide an exhaustive list of control documents.²³⁷

181. With respect to the criticism that a section 401 certification is not a control document, the Agency disagrees. Proposed rule Part 7050.0255, Subpart 39 defines a “section 401 certification” as “an authorization issued by the commissioner under section 401 of the Clean Water Act, United States Code, title 33, section 1341.” Minnesota Rules Part 7001.1470, Subp. 2 provides that:

A section 401 certification shall contain the special conditions described in part 7001.1080, subparts 2 to 9, which conditions shall be established in the same manner as special conditions are established under part 7001.1080 for national pollutant discharge elimination system permits.

The special conditions are described in Part 7001.1080 as “conditions necessary for the permittee to achieve compliance with all Minnesota or federal statutes or rules.” Further, “[f]ederal permits cannot proceed without a section 401 certification action – either a waiver or issuance.”²³⁸ Accordingly, the Agency contends, a section 401 certification is a control document.²³⁹

182. A definition of control document is necessary because these documents govern how antidegradation policy is implemented. The proposed definition is reasonable because it explains what control documents do and gives examples of what are and are not control documents.

Subpart 11. Degradation or Degrade

183. The task of drafting antidegradation rules demands that the term “degradation” be defined. The MPCA originally proposed defining “degradation or degrade” to mean as follows:

²³⁵ Comment by WaterLegacy at 11 (Mar. 23, 2016).

²³⁶ *Id.*

²³⁷ SONAR at 25-26, 51.

²³⁸ MPCA Rebuttal Response to Comments, Att. 1 (Apr. 27, 2016).

²³⁹ MPCA Responses to Comments, Att. 1 at 58 (Apr. 20, 2016).

a measurable change to existing water quality made or induced by human activity resulting in diminished chemical, physical, biological, or radiological conditions 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, subpart 5.

184. The Agency used much of the language from Minn. Stat. § 115.01, subd. 13(b), but substituted “measureable change” for the statutory language of “alterations” because of its intent that degradation be quantifiable to the extent reasonably possible.²⁴⁰ Rule part 7053.0205 allows for the dilution of effluents in mixing zones and this is recognized in the proposed definition.

185. The EPA took exception to the Agency’s initially proposed definition and advised that the term “conditions” and be changed to “quality” to better correspond with federal regulation.²⁴¹ The Agency accepted this suggestion and modified its proposed rule accordingly.

186. A commenter complained that with respect to the proposed language recognizing mixing zones, the reference to Part 7053.0205, Subpart 5 should be expanded to include Subparts 6 and 7.²⁴² Subpart 6 of Part 7053.0205 preserves the applicability of requirements in other rules and Subpart 7 concerns the minimum stream flow at which discharges must meet water quality protection requirements. Further, this commenter proposed that the term “measurable” should be removed and the phrase “reduction in assimilative capacity” should be added.²⁴³

187. The Agency responds that its proposed definition of “measurable change” in Part 7050.0255, Subpart 24 “clearly articulates that adverse changes to water quality are to be quantifiable.”²⁴⁴ The proposed definition of “measurable change” is “the practical ability to detect a variation in water quality, taking into account limitations in analytical technique and sampling variability.”²⁴⁵ This “reasonably limits the analysis of water quality changes to standard procedures that are commonly available” and takes into account sampling variability. Adding the term “reduction in assimilative capacity” also implies the ability to measure assimilative capacity and changes to it.²⁴⁶ Further, reductions in water quality directly imply the diminishment of assimilative capacity. The EPA defines the “available assimilative capacity of a waterbody” as “the difference

²⁴⁰ SONAR at 26.

²⁴¹ Public Hearing Ex. I-6.

²⁴² Comment by WaterLegacy at 6 (Apr. 27, 2016).

²⁴³ *Id.* The EPA defines the “available assimilative capacity of a waterbody” as “the difference between the applicable water quality criterion for a pollutant parameter and the ambient water quality for that pollutant parameter where it is better than the criterion.”²⁴³ SONAR at 15.

²⁴⁴ MPCA Rebuttal Response to Comments, Att. 1 at 25 (Apr. 27, 2016).

²⁴⁵ Proposed rule Part 7050.0255, Subp. 24.

²⁴⁶ *Id.*

between the applicable water quality criterion for a pollutant parameter and the ambient water quality for that pollutant parameter where it is better than the criterion.”²⁴⁷

188. The Agency proposed to modify the definition of “degradation” and “degrade” in response to comments as follows:

a measurable change to existing water quality made or induced by human activity resulting in diminished chemical, physical, biological, or radiological ~~conditions~~ 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 ~~subpart~~ subparts 7053.0205, subpart 5, 6 and 7.²⁴⁸

189. It is clearly necessary to have a definition of “degrade” and “degradation” in the antidegradation rules. The Agency’s proposed definition is reasonable as it derives from Minn. Stat. § 115.01, subd. 13(b) (2014) which defines “pollution of water” and “water pollution” as: “the alteration made or induced by human activity of the chemical, physical, biological, or radiological integrity of waters of the state.” The modifications the Agency proposed are within the scope of the rulemaking and do not substantially change the proposed rule.²⁴⁹ Although “assimilative capacity” is a well-defined term and could be reasonably used in this definition, the Agency’s decision not to include it does not make the Agency’s proposed definition unreasonable.

Subpart 13. Effective Date

190. To determine whether a proposed activity will degrade water quality, it is clearly necessary to assess the anticipated impacts the project will have on water quality. This assessment requires a “before” and “after” comparison of water quality. The purpose of the concept of “effective date” is to establish the “before” baselines for the pollutants in the receiving water body or bodies. Or as the Agency explains “[t]he effective date sets the baseline from which loading or other causes of degradation are measured.”²⁵⁰ This subpart establishes effective dates for the protection of high quality water and for the protection of ORVWs.²⁵¹

191. For high quality waters this definition proposes that the effective date differ depending upon whether the activity was previously regulated. If the activity was not previously regulated, the effective date is the date of issuance of the control document. If the activity was previously regulated, the effective date is the date of the most recently issued control document.

²⁴⁷ SONAR, Ex. 55 at 1.

²⁴⁸ MPCA Response to Comments at 4 (Apr. 2016).

²⁴⁹ Minn. Stat. § 14.05, subd. 2 (b)(2).

²⁵⁰ SONAR at 27.

²⁵¹ Proposed Rule Part 7050.0255, Subp. 21, which is discussed below, defines “high water quality or of high quality” 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.” SONAR at 33.

192. With respect to ORVWs, the effective date is the date the ORVW was designated by rule, with two proposed exceptions, both of which are triggered by the Agency's determination that the water quality necessary to protect and maintain the exceptional characteristics of an ORVW has improved. The first exception is when the improvement is a result of changes to the water pollution control conditions specified in a reissued control document. In this event, the effective date is the date when the control document was reissued.²⁵² The second exception arises when the improvement results from "a regulated activity ceasing to discharge to or otherwise adversely impact an outstanding resource value water. . . ."²⁵³ In this circumstance, the effective date "is the expiration date of the associated control document."²⁵⁴

193. The current nondegradation rule for high quality waters is Minn. R. 7050.0185. This rule defines the baseline for assessing proposed activities as "the quality consistently attained by January 1, 1988."²⁵⁵ "New discharges" and "expanded discharges" are discharges that did not exist before January 1, 1988, or discharges that resulted in increased loadings of pollutants after January 1, 1988.²⁵⁶

194. The current nondegradation rule for ORVWs is Minn. R. 7050.0180. It sets the date for determining baseline water quality as the date the water body was designated as an ORVW. "New discharges" and "expanded discharges" are discharges that either first occurred after the water body was designated as an ORVW or that resulted in increased loadings of one or more pollutants after designation.²⁵⁷

195. The principal change the Agency proposes with respect to the function of "effective date" as establishing a baseline from which to assess the impact of proposed activities on water quality is with regard to high quality waters rather than ORVWs. For the former, the Agency proposes to change the baseline date from January 1, 1988 to the date of the most recently issued control document, or if the proposed activity was previously unregulated so that there is no previous control document, the effective date is the date on which a control document is first issued.

196. Several commenters found the definition of "effective date" highly troubling.²⁵⁸ Minnesota Rules Part 7050.0185, Subpart 6C, which rule is proposed to be repealed, defined January 1, 1988 as the date for establishing baseline water quality. According to commenters, for high quality water, changing the effective date to the issuance of a control document for an unregulated activity or to the date of the last issued control document will:

²⁵² Proposed Rule Part 7050.0255, Subp. 13B(1).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Minn. R. 7050.0185, subp. 2C.

²⁵⁶ Minn. R. 7050.0185, subps. 2A, B.

²⁵⁷ Minn. R. 7050.0185, subps. 2B, C.

²⁵⁸ Comment by GP and FDL at 8 (Mar. 28, 2016); Comment by WaterLegacy at 6 (Apr. 20, 2016); Comment by MCEA at 7 (Mar. 28, 2016); Comment by MCEA at 2, 6 (Apr. 20, 2016).

grandfather degradation of high quality waters that the MPCA has allowed since January 1, 1988 due to failure to require effluent limits in permits, inappropriate use of variances and schedules of compliance, failure to timely update permits, and failure to enforce compliance with permits.²⁵⁹

197. This comment raises the question of how the water quality of water bodies affected by permitted activities has changed since January 1, 1988 and the issuance of the most recent control document? If water quality has not changed in the interval between the two, using the date of the most recent control document to assess the impacts from a proposed activity instead of using January 1, 1988 makes no difference. If, however, conditions have changed significantly between those dates, using the date of the control document will make a difference for the antidegradation analysis.

198. The use of the issuance date of existing control documents as the effective date for determining the baseline from which new or expanded discharges are assessed is reasonable assuming that the control documents contain appropriate pollutant limits or that appropriate limits can be determined subsequently. It is the Agency's position that the assumption is accurate. As discussed below in the definition of "net increases in loading," while controversial, the Agency's position is supported in the record.

199. With respect to activities that have not been previously regulated, it is not clear that the use of January 1, 1988, as an effective date is practicable. The record does not establish that there are accurate measurements of water quality for that date for all the surface waters in Minnesota. Consequently, this part of the definition is also reasonable.

200. To appreciate the full significance of the definition of "effective date," one must understand how the term is used in conjunction with the terms "existing water quality" and "net increases in loading or other causes of degradation." The Report discusses the relationships of these definitions and the related concerns raised by commenters below beginning at Finding 223.

Subpart 15. Existing Uses

201. Federal regulations require that existing uses be maintained and protected, which in turn requires that the water quality necessary to protect existing uses be maintained. 40 C.F.R. § 131.3 (e) defines "existing uses" as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."²⁶⁰ The Agency's proposed definition of existing uses is the same but for the omission of the last phrase: "Existing uses' means those uses actually attained in the surface water on or after November 28, 1975."

202. One commenter objected to the definition because it does not include the language from the federal definition of "whether or not they are included in the water

²⁵⁹ Comment by WaterLegacy at 15 (Mar. 23, 2016).

²⁶⁰ SONAR, Ex. 68.

quality standards.”²⁶¹ However, Minn. R. 7050.0140 designates uses for Minnesota’s surface waters and includes all of the uses mentioned in the two sections of the CWA that specify uses - sections 101(a)(2) and 303.²⁶² Rule Part 7050.0140 includes within Class 6 waters “any other beneficial uses not listed in this part . . . including without limitation any such uses in this or any other state, province, or nation of any waters flowing through or originating in this state, and for which quality control is or may be necessary.”²⁶³

203. The definition of “existing uses” as proposed is needed and reasonable because it substantially corresponds to the federal definition and because existing rules provide for the recognition of uses other than those currently designated and the promulgation of water quality standards necessary to protect those other uses.

Subpart 15. Existing Water Quality

204. The definition of “existing water quality” is not controversial in and of itself, but it is important to understand its relationships with two other terms: “effective date” and “increased loading or other causes of degradation.” The discussion of the concerns raised by these three terms follows below in the review of the definition of the latter term.

205. “Existing water quality” is defined as:

the physical, chemical, biological, and radiological conditions of a surface water, taking into account natural variability, on the effective date. Existing water quality is expressed either as a concentration of a water quality parameter or by other means to describe the condition of a surface water.

206. A definition of “existing water quality” is necessary because when the Agency considers permitting a new or expanded discharge, it must consider what changes to water quality the proposed activities will cause. It is reasonable to take natural variability into account as otherwise water quality measures could reflect abnormal conditions in the receiving water body.²⁶⁴ As conditions of a water body are subject to change over time, it is necessary to assess existing water quality at some point in time. Whether using the “effective date” for this purpose is reasonable requires consideration of the definition of “net increase in loadings or other causes of degradation” which is addressed below starting in Finding 237. Expressing water quality as a concentration is reasonable for many pollutants, but not for all. Hence, it is reasonable to permit “other means” to describe water quality.²⁶⁵

²⁶¹ Comment by Bruce and Maureen Johnson at 3 (Mar. 25, 2016).

²⁶² SONAR at 29-30 Exs. 12-13.

²⁶³ Minn. R. 7050.0226 provides for water quality standards to be imposed to protect not otherwise listed beneficial uses. See *also* MPCA Post-Hearing Response to Public Comments at 23 (Apr. 20, 2016).

²⁶⁴ SONAR at 30.

²⁶⁵ *Id.*

Subpart 17. Feasible Alternative

207. An important consideration in antidegradation reviews is whether there is or are feasible alternatives to a proposed regulated activity. The Agency proposes to define “feasible alternative” as:

a pollution control alternative that is consistent with sound engineering and environmental practices, affordable, legal, and that has supportive governance that can be successfully put into practice to accomplish the task.

208. That feasible alternatives must be consistent with sound engineering practices is based on judicial interpretations of “feasible” and is consistent with the definition of “feasible” in Minn. R. 9215.0510, subp. 8b (2015).²⁶⁶ The requirement that alternatives also be consistent with sound environmental practices is intended to ensure “that environmental impacts other than to surface water quality are considered.”²⁶⁷

209. “Affordable” is included to recognize the “unique economic conditions of each applicant” because what is feasible for one applicant may not be for another. It may be argued that “affordable” is too vague a standard, but it allows consideration of the absolute magnitude of the cost of mitigation as well as consideration of the economic circumstances of the entity that must pay for the alternative. Several commenters object to the definition’s incorporation of “affordable” because it excludes practical alternatives and recommend replacing “affordable” with “practicable.”²⁶⁸ To the contrary, MESERB objects that the term “affordable” is not defined in the rules or in the SONAR and argues that it should be defined “to include consideration of operation and maintenance expense, debt service cost on upgrades, the percentage increase of cost to ratepayers, and the total debt of a local government entity.”²⁶⁹ Failing to do so “creates tremendous uncertainty for the regulated community and grants the Agency immense discretion.”²⁷⁰

210. The use of the terms “legal” and “supportive governance” are related but different in an important way. “Legal” is included so that an alternative is not blocked from implementation by a law or regulation that prohibits the alternative.²⁷¹ “Supportive governance” refers to laws or regulations and authoritative policies that do not prohibit the alternative, but which significantly complicate and substantially hinder its implementation.²⁷²

²⁶⁶ *Id.* at 31.

²⁶⁷ *Id.*

²⁶⁸ Comment by WaterLegacy at 10 (Mar. 23, 2016); Comment by Bruce and Maureen Johnson at 4 (Mar. 25, 2016); Comment by MCEA at 10 (Mar. 28, 2016).

²⁶⁹ Comment by MESERB at 4 (Apr. 20, 2016).

²⁷⁰ *Id.*

²⁷¹ SONAR at 31.

²⁷² *Id.* at 32. The Agency gives an example of local community planning guidance that discourages stormwater infiltration around private wellheads to protect drinking water. In such a case, an alternative that relied on infiltration of stormwater would not have supportive governance although it would not be illegal.

211. By including the phrase “consistent with sound . . . environmental practices” the definition requires consideration of how an activity could affect environmental conditions apart from the impact on receiving water(s), such as impacts to groundwater, a recommendation advanced by the EPA.²⁷³

212. The Agency explains that its proposed definition provides necessary flexibility because what is feasible for one project may not be feasible for another.²⁷⁴ Given the wide range of circumstances that arise with respect to proposed activities and the waters that may be affected, the range of treatment alternatives that may be available, and the very disparate entities proposing the activities, it is reasonable that the proposed definition provides as much flexibility as it does.

Subpart 21. High Water Quality

213. Proposed rule Part 7050.0255, Subpart 21 defines “high water quality” or “of high quality” to mean:

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.

214. Under federal law, states may identify “high quality” water either on a water body-by-water body approach or on a parameter-by-parameter basis.²⁷⁵ Although both methods are permissible, the Agency opted to identify and protect high quality waters on a water body-by-water body basis for the following reasons.

- First, using individual parameters eliminates the need for an overall assessment which may include qualitative criteria. Qualitative criteria are problematic for combining with other qualitative or numeric parameters in an overall assessment.
- Second, individual, objective data points may be subject to fewer disputes than overall assessments that must collectively weigh the significance of the values of various disparate parameters.
- Third, the parameter by parameter approach will likely result in the identification of more waters of high quality because a water body may be of high quality for one parameter or several, but not for others which would prohibit its identification as a water body of high quality.
- Fourth, using a water body-by-water body approach would in practice mean either the Agency would designate water bodies of high quality in advance of proposed activities that could harm water quality or at the same time as

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 40 C.F.R. § 131.12(a)(2)(i).

the Agency is considering a proposed activity. Pre-designating water bodies “would be a daunting task given the amount of Minnesota’s surface waters.”²⁷⁶ Assessing the water quality of a water body contemporaneously with consideration of a proposed activity would complicate the evaluation of the activity by inviting simultaneous litigation on the water body assessment.

- Fifth, the Agency explained that with limited resources for water quality protection, devoting significant resources to water body assessments could come at the expense of analysis of proposed activities to find ways to avoid or minimize degradation.²⁷⁷

215. Although the Agency currently uses the parameter-by-parameter approach when conducting nondegradation reviews, it is not explicit in the current rules.²⁷⁸ Making the approach explicit is needed for clarity and is reasonable as is the decision to employ a parameter-by-parameter approach.

216. In its comments, WaterLegacy observes that the Clean Water Act states that its goal is the protection of “fish, shellfish and wildlife” and “recreation in and on the water” citing 33 U.S.C. § 1251(a)(2).²⁷⁹ The commenter objected to the Agency’s reference to “aquatic life,” noting that the term does not have the same meaning as “fish, shellfish and wildlife” in that it does not include “wildlife.” As WaterLegacy points out, the EPA has explained that “Clean Water Act Section 101(a)(2) uses of water for ‘fish’ includes human health [in] consuming fish as well as the propagation of aquatic life.”²⁸⁰

217. The Agency explained that its use of the term “aquatic life” instead of “fish, shellfish and wildlife” is reasonable because the former term “is used throughout Minnesota Statutes and Rules.”²⁸¹ For example, the Agency cites Minn. Stat. § 115.01, subd. 13(a)’s (2014) definition of “pollution of water” or “water pollution.” “Water pollution” means:

the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurious to public health, safety or welfare, to domestic, agricultural, commercial, industrial, recreational or other legitimate uses, or to livestock, animals, birds, fish or other aquatic life”

218. This reference does not clearly support the Agency’s use of the term “aquatic life” to include human health effects from the consumption of fish or the effects on all wildlife. “Aquatic life” plainly includes fish, but not animals or birds. “Wildlife” is

²⁷⁶ SONAR at 35.

²⁷⁷ SONAR at 34-35.

²⁷⁸ *Id.*

²⁷⁹ Comment by WaterLegacy at 2 (Mar. 23, 2016).

²⁸⁰ *Id.* (citing 80 Fed. Reg. 51027 (Aug. 21, 2015)).

²⁸¹ SONAR at 34.

defined as “[w]ild animals and vegetation”²⁸² which includes living things such as animals, birds, and plants. “Aquatic life” as used in Minn. Stat. § 115.01 (2014) does not include land based animals or birds. Nor is it clear that harm to “aquatic life” includes harms to human health through the consumption of “aquatic life.”

219. The Agency also supports its use of the term “aquatic life” by referencing Minn. R. 7050.0140, subp. 3 which defines the uses of Class 2 waters as “aquatic life and recreation” and elaborates on the definition as follows:

Aquatic life and recreation includes all waters of the state that support or may support fish, other aquatic 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.

220. This definition is more encompassing and includes categories of living things not suggested by section 115.01, subdivision 13. In its comments on the proposed rules, the EPA noted that “States must adopt uses consistent with section 101(a)(2) of the Clean Water Act (CWA).”²⁸³ The EPA found that “the criteria and criteria methods in Minnesota’s water quality standards make clear the uses encompassed under Class 2 include fish, other aquatic organisms, recreation, and the protection of humans and wildlife from adverse impacts to consumption of contaminated fish tissue.”²⁸⁴ The EPA concluded that from “the definition of high quality waters in Minnesota’s proposed rules, it is clear that the definition of high quality waters in Minnesota’s proposed rules is consistent with the applicable federal requirements.”²⁸⁵

221. At the hearing, WaterLegacy suggested that rather than use the term “aquatic life,” it would be preferable to use a definition that makes clear that the effects of water quality on human health from consuming fish and on wildlife be considered in defining “high quality” waters. WaterLegacy proposed that the appropriate meaning could be achieved by defining high quality waters as waters meeting the criteria for Class 2 waters defined at Minn. R. 7050.0140, subp. 3.²⁸⁶

222. The Agency agreed with WaterLegacy’s suggestion and revised its proposed definition of “high quality” to conclude with the phrase “as described in part 7050.0140, subp. 3.” Although simply repeating the language from the federal regulation of “fish, shellfish and wildlife” might have been simpler, that phrasing too does not obviously include the effects on human health from the consumption of fish, although the EPA has interpreted the term “fish” to include the effects of fish consumption on human

²⁸² The American Heritage College Dictionary (3rd ed. Boston 1993).

²⁸³ Public Hearing Ex. I-6.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Public Hearing Tr. at 149 (Mar. 31, 2016). See Finding 219.

health.²⁸⁷ Consequently, the proposed definition as revised is needed and reasonable. The Agency's proposed modification is within the scope of this rulemaking and does not substantially change the proposed rule.²⁸⁸

Subpart 22. Loading

Subpart 23. Loading Offset

223. The proposed definition of "loading" is "the quantity of pollutants, expressed as a mass, resulting from a discharge or proposed discharge to a surface water."

224. The Agency initially proposed defining "loading offset" as:

reductions in loading from regulated or unregulated activities, which reductions create additional capacity for proposed net increases in loading. A loading offset must occur concurrent with or prior to the proposed net increase in loading and must be secured with binding legal instruments between any involved persons for the life of the project that is being offset.

225. A definition for "loading" is needed because it is the anticipated increase in loading that triggers antidegradation review. "Loading" is defined as a mass because it provides "a practical and tangible means to quantify the amount of pollutants . . . entering a surface water."²⁸⁹ A definition of "loading offset" is needed to describe how net increases in loading to high quality water due to a proposed activity may be reduced or eliminated.²⁹⁰

226. Commenters object that the definition of loading offset does not require the offset to be for the same parameter and in the same water body as the proposed discharge.²⁹¹ They also found it troubling that the rule does not require a demonstration of sufficient assimilative capacity especially in circumstances where the offset occurs in another water body or is for another parameter. Another criticisms made of allowing "loading offsets" were that they did not account for pollutants defined as concentrations.²⁹²

227. The EPA commented that "loading offsets" must occur either adjacent to or upstream of where the proposed increase in loading will occur.²⁹³ WaterLegacy shared this concern and noted that the EPA has not guided states to adopt loading offsets.²⁹⁴ WaterLegacy also found problematic the definition of "loading" in terms of mass because water quality standards and discharge monitoring reports are expressed as

²⁸⁷ Comment by WaterLegacy at 2 (Mar. 23, 2016).

²⁸⁸ Minn. Stat. § 14.05, subd. 2(b)(2) (2014).

²⁸⁹ SONAR at 35-36.

²⁹⁰ *Id.* at 36.

²⁹¹ Comment by WaterLegacy at 16 (Mar. 23, 2016).

²⁹² *Id.*

²⁹³ Public Hearing Ex. I-6.

²⁹⁴ Comment by WaterLegacy at 15-16 (Mar. 23, 2016).

concentrations and thermal and radiation pollution do not have mass.²⁹⁵ WaterLegacy also contends that the party responsible for anticipated increases in loading should be legally responsible for guaranteeing the loading offset.

228. WaterLegacy argues that while the “loading offset” concept was allowed by the Minnesota Supreme Court in *In re City of Annandale*, 731 N.W.2d 502 (Minn.2007), no federal court has followed in allowing such offsets.²⁹⁶ In this latter regard, WaterLegacy cites to *Friends of Pinto Creek v. United States EPS*, 504 F.3d 1007 (9th Cir. 2007), *cert denied by Carlota Copper Vo. V. Friends of Pinto Creek*, 555 U.S. 1097 (2009).

229. The Administrative Law Judge finds that it is not unreasonable for the Agency to rely on an opinion from the Minnesota Supreme Court rather than an opinion from a court with no jurisdiction in Minnesota.

230. The Agency responded to the concerns about where the loading offset must occur by revising its proposed rule as follows:

“Loading offset” means reductions in loading from regulated or unregulated activities, which reductions create additional capacity for proposed net increase in loading. A loading offset must:

- A. occur concurrent with or prior to the proposed net increase in loading;
- B. ~~and must~~ be secured with binding legal instruments between any involved persons for the life of the project that is being offset; and
- C. occur either adjacent to or upstream of the proposed activity.²⁹⁷

231. The Administrative Law Judge suggests that “concurrent” be changed to “concurrently” as it is functioning as an adverb modifying “occur.”

232. The Agency also explained that a party proposing to use a loading offset would be required “to demonstrate that the proposed offset is equivalent to the proposed discharge of a specific pollutant.”²⁹⁸ The Agency clarified that loading offsets may not be appropriate in all cases, agreeing with the commenter’s point that not all pollutants are measured in concentrations, including thermal or radiological pollutants.²⁹⁹

233. Loading offsets are also provided for by state statute. Minnesota Statutes section 115.03, subdivision 10, authorizes the MPCA to “issue or amend permits to authorize pollutant discharges to a receiving water and may authorize reductions in loading from other sources to the same receiving water, if together the changes achieve a net decrease in the pollutant loading to the receiving water.” This subdivision further provides that the “agency must require significant offset ratios for offsets between

²⁹⁵ Comment by WaterLegacy at 16 (Mar. 23, 2016).

²⁹⁶ *Id.*

²⁹⁷ MPCA Response to Comments at 5-6 (Apr. 20, 2016).

²⁹⁸ MPCA Responses to Comments, Att. 1 at 12-13 (Apr. 20, 2016).

²⁹⁹ *Id.* at 13.

permitted sources and nonpermitted sources and must demonstrate how nonpermitted source offset credits make progress toward ensuring attainment of water quality standards.”

234. The Agency notes that its “loading offset” concept is “entirely consistent with the statute’s antidegradation goal as well as EPA’s trading policy that recommends that state or tribal antidegradation policies include provisions for trading to occur.”³⁰⁰ The fact that the EPA reviewed the proposed definition and sought to change rather than eliminate the rule language indicates that “loading offsets” are not, in the EPA’s view, prohibited by the CWA. The Agency acknowledges that loading offsets may be inapplicable in certain situations, for example, with respect to thermal or radiological pollutants.³⁰¹ The rule requires binding legal instruments between “any involved persons” and the applicant proposing to utilize the offset would be an “involved person.”

235. While the Chamber supports the use of loading offsets, it argues that the offset should be defined to protect the receiving water. The Chamber explains that additional capacity could also be created through loading offsets in high quality water that is downstream of the discharge, but upstream or adjacent to the targeted water body.³⁰² By requiring loading offsets to occur upstream or adjacent to the proposed activity, the Chamber describes the EPA as “slightly mixed up around the concept of ‘creating additional capacity.’”³⁰³

236. The Agency did not specifically respond to the Chamber’s argument that offsets could occur downstream of the discharging activity. In so far as the EPA and the Minnesota Supreme Court both interpret the CWA to permit loading offsets, the definitions of “loading” and “loading offsets” are reasonable. The Administrative Law Judge is hesitant to endorse the Chamber’s judgment that the EPA is “slightly mixed up” because allowing loading offsets downstream of a proposed activity but upstream or adjacent to the targeted water body will result in the degradation of the water between the project and the offset. While the Chamber’s proposed correction is not unreasonable, it is also reasonable for the Agency to protect all water from degradation and not only the target water body.

237. The definition of “loading” is necessary to describe the quantity or mass of a pollutant with mass in a water body. A definition of “loading offset” is necessary to implement compensatory mitigation. The Agency’s proposed definitions are reasonable and its modifications are within the scope of the rulemaking and do not substantially change the originally proposed rule.³⁰⁴

³⁰⁰ *Id.* at 12.

³⁰¹ *Id.*

³⁰² Comment by Chamber at 8 (Apr. 20, 2016).

³⁰³ *Id.*

³⁰⁴ Minn. Stat. § 14.05, subd. 2(b)(2).

Subpart 26. Net Increases in Loading or Other Causes of Degradation

238. “Net increases in loading or other causes of degradation” is defined in two contexts: under Item A the term is defined as it applies to proposed activities that are not regulated by an existing control document; and under Item B the term is defined as applied to activities that are regulated by an existing control document. In the first case, the phrase means “any loading or other causes of degradation resulting from the proposed activity”³⁰⁵ and in the second case it means “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.”³⁰⁶

239. The rule is needed to define the circumstances that trigger an antidegradation review. As “increased loading” is not applicable to all types of pollutants (e.g. thermal pollution or physical alteration of a water body) adding the phrase “other causes of degradation” is necessary. A proposed activity of a type which is regulated but for which there is no control document should undergo antidegradation review to determine if the activity will cause or contribute to the degradation of water quality. If the proposed activity is currently operating under a control document and seeks to expand its discharges beyond what is allowed in its control document, antidegradation review is also triggered.

240. Commenters are of two minds on the appropriateness of these definitions. With regard to Item A, the existing water quality is measured as of the effective date of the control document. For non-ORVW waters, the effective date is the date of issuance of the control document and is the date on which the baseline level of water quality is established from which to measure whether there is a “net increase in loading or other causes of degradation.”³⁰⁷ This is a change from the current rule that sets the baseline date as January 1, 1988. According to one commenter, this will “grandfather in” the degradation that has occurred since that date. The commenter pointed out that in its Nondegradation Rulemaking Issue Paper 7 (September, 2008), the MPCA noted “This approach and others that do not establish firm baseline conditions can result in slowly deteriorating water quality, because incremental *de minimis* discharges slowly cause a lowering of water quality without an antidegradation review.”³⁰⁸

241. With respect to activities that have not been previously regulated, it is not clear that the use of January 1, 1988 as an effective date is practicable. The record does not establish that there are measurements of water quality for that date for all or even most Minnesota waters. To the extent such measures exist, the improvement of monitoring techniques over the last 25 plus years suggests past measurements may not be as reliable as measurements made in 2016 or thereafter. The improvement in pollution control technologies over that same span of time creates the possibility that water quality

³⁰⁵ SONAR at 37.

³⁰⁶ *Id.*

³⁰⁷ SONAR at 37.

³⁰⁸ Comment by WaterLegacy at 14 (Mar. 23, 2016) (emphasis in original).

in some water bodies may have improved rather than degraded.³⁰⁹ Last, over time society's growing knowledge about the effects of various effluents on the environment and human health indicates that pollutants of concern can change over time: – pollutants that are highly concerning today may not have been of concern in 1988 and so may not have been monitored. Given these practical difficulties and on the record in this proceeding, the Administrative Law Judge does not find the Agency's proposal for Item A unreasonable.

242. Commenters have sharply different views on Item B. These comments raise three issues: the relationship between permit limits and actual loads; whether large numbers of permits have been issued without load limits; and how the Agency determines existing water quality if the current control document does not have one or more effluent limits for parameters of concern. These are important issues for assessing the Agency's proposed rules as the baseline measures of water quality provide the benchmark for determining whether a proposed activity will require antidegradation review.

243. WaterLegacy, the MCEA, and the Bands contend that use of permit limits thwarts the purpose of antidegradation by allowing degradation to occur in situations where existing permits are inadequate or if adequate, the actual levels of pollutant discharges are well below the permitted level. These commenters allege that substantial numbers of control documents allow pollutant discharges well in excess of the facilities' current discharges. In such cases, using the permitted level of a pollutant as a baseline could allow significant degradation of water quality from actual, current levels of quality, and effectively grandfather in the ability of these facilities to increase their pollutant discharges without undergoing antidegradation review. These commenters argue that to avoid degrading waters, the baseline for assessing existing water quality must be set by the actual conditions in the receiving waters at the time of the proposed new or expanded discharge.³¹⁰

244. One necessary implication of this position is that to the extent that any wastewater treatment facilities increase their actual discharges in future years, they would face an antidegradation review. The commenters who support this definition of "effective date" believe that many of the permits currently in effect were granted without an antidegradation review. They contend that requiring the holders of such permits to undergo an antidegradation review to renew their permits in the future is not excessive regulatory oversight but rather is necessary to protect water quality and ameliorate, to some extent, the past failures of the Agency to implement the CWA and state antidegradation policies.

245. To illustrate the extent of the degradation made possible by using permit levels instead of current actual pollutant discharges as the benchmark for measuring the

³⁰⁹ The improvement in water quality monitoring techniques and pollution control techniques are two factors the Agency cited as motivating this rulemaking. SONAR at 2.

³¹⁰ Comment by WaterLegacy at 15 (Mar. 23, 2016); Comment by WaterLegacy at 2 (Apr. 20, 2016); Comment by GP and FDL at 8 (Mar. 28, 2016); Comment by MCEA at 3 (Mar. 28, 2016); Comment by MCEA at 1 (Apr. 20, 2016).

impacts of a proposed activity on water quality, one opponent of the Agency's proposal pointed to a situation involving a wastewater treatment facility in Brainerd, Minnesota:

In 2007, the MPCA issued a NPDES permit for an expansion to the Brainerd wastewater treatment facility authorizing an increased discharge of total phosphorus over actual loads to a reach of the Mississippi that is designated as a restricted discharge ORVW. This authorized capacity amounted to a 65% increase over the facility's actual phosphorus load in 1988, the earliest year for which there appear to be reliable data, and a nearly 37% increase over the 2007 actual discharged load. The agency argued that the new permit reduced the *authorized* phosphorus discharge. Thus, the agency permitted an increased loading of a pollutant that would degrade the high water quality of an ORVW without evaluating the necessity of the proposed discharge.³¹¹

246. This opponent of the Agency's approach explained that because actual discharges of pollutants are lower than permit limits (or calculated limits when the permit does not have a limit for a particular pollutant) for many facilities, the total authorized discharge of a pollutant in a particular watershed may greatly exceed current actual discharges. Thus, large increases in pollutant discharges in a watershed may occur without triggering antidegradation review.³¹² For example, the MPCA has authorized phosphorus discharges in the Lake Pepin watershed several times greater than actual phosphorus discharges.³¹³ In support of its position, the opponent cited the EPA's *Water Quality Standards Handbook* (2nd Ed. 1994) at 4-8, which states that:

no permit may be issued, without an antidegradation review, to a discharger to high-quality waters with effluent limits greater than *actual current loadings* if such loadings will cause a lowering of water quality.³¹⁴

247. MESERB and the Chamber agree with the Agency that permit limits, not actual levels of pollutants, are the appropriate baseline measure for assessing net increases in loadings or other causes of degradation.³¹⁵ The Chamber explains that using actual rather than permitted loading would be inconsistent with Minn. Rule 7052.0310, subp. 5 (2015) (activities that do not trigger a nondegradation demonstration – Lake Superior Water Basin) and 40 C.F.R. § 132 (2015), Appendix E Great Lakes Water Quality Initiative Antidegradation Policy (actions and activities that do not trigger an

³¹¹ Comment by MCEA at 4 (Mar. 28, 2016) (emphasis in original). The MCEA further notes that the permit in this instance did not have a limit for phosphorus. The MPCA calculated "the maximum authorized capacity by multiplying the facility's maximum design flow (treatment capacity by volume) by a proxy pollutant concentration based on facility technology in place in the 1980's (when its nondegradation policy was first applied.) *Id.*

³¹² *Id.* at 3; Comment by MCEA at 4 (Apr. 20, 2016).

³¹³ Comment by MCEA at 3 (Mar. 28, 2016).

³¹⁴ *Id.* (emphasis supplied by MCEA).

³¹⁵ Comment by MCEA at 8-9 (Apr. 20, 2016); Comment by MESERB at 10-12 (Apr. 20, 2016).

antidegradation demonstration).³¹⁶ The Chamber asserts that the use of actual loading to:

trigger antidegradation requirements for permitted activities is unrealistic due to operational issues that are covered by and anticipated within the existing applicable control document, such as normal operational variability, changes in intake water pollutants, production rate changes, and anticipated wastewater treatment plant capacity.³¹⁷

248. Pollutant limits in permits are established through the "waste load allocation process as part of a total maximum daily load (TMDL) evaluation."³¹⁸ "Waste load allocation" is the process of determining allowable levels of pollutant discharges that will maintain acceptable receiving water quality. The TMDL for a pollutant is calculated to allow a margin of safety and a reserve capacity for growth of existing and future loads. It also takes into account waste load from the future growth of permitted point sources and nonpoint sources.³¹⁹ Pollutant limits in granted permits thus reflect the wasteload allocation process and so protect water quality.

249. In responding to the critics of its proposed definition, the Agency explains that most wastewater permit limits are necessarily higher than actual loads. Wastewater treatment facilities are designed to accommodate population and economic growth. The permit limit is set in relationship to a facility's design capacity which may not be utilized for many years and it is set in light of other current and future anticipated discharges. When a facility's treatment capacity is reached, the limit set in the permit will protect receiving waters.³²⁰ The Agency's position is that it is unreasonable to require antidegradation review for increases in loading that the Agency has already determined will not degrade receiving water quality through its permitting process.

250. The Agency also explains that these comments presuppose that permitted facilities that are currently discharging well below their permit limits could increase their pollutant discharges up to their limits. The Agency states that as a general matter, "it may not be accurate to associate the margin of difference between discharge quality and limit as a legitimate environmental threat or margin of potential degradation" because a "well operated wastewater treatment facility is always going to be discharging at some margin below their listed effluent limits to remain in compliance with permit conditions."³²¹ Further, "most effluent limits are set, by design, at a level less restrictive than the intended discharge quality knowing the facility will need to operate at a more stringent level to consistently remain in compliance."³²² This is done because of the wide range of conditions under which treatment facilities operate. Effluent pollution loads and

³¹⁶ Comment by MCEA at 8 (Apr. 20, 2016).

³¹⁷ Comment by MCEA at 9 (Apr. 20, 2016).

³¹⁸ Comment by MESERB at 11 (Apr. 20, 2016) (citing EPA Water Quality Standards Handbook (2nd ed. 1994)).

³¹⁹ MPCA Response to Comments, Att. 8 at 15 (Apr. 20, 2016).

³²⁰ SONAR at 50.

³²¹ MPCA Response to Comments, Att. 1 at 46 (Apr. 20, 2016).

³²² *Id.*

concentrations will vary considerably over time such that to be compliant with permit limits, a facility must often operate at a more stringent level than the permit limit.³²³

251. The Agency further explains that “evaluating the authorized load for a large group of facilities is not a simple task of picking a number out of a limits and monitoring table”³²⁴ and points out that total phosphorus limits at facilities throughout the state will be revised over the next five year review cycle. Last, the Agency states that using actual discharge levels could incent facilities to discharge at the maximum level rather than seeking to achieve the best results, which could reverse the trend the Agency has observed of wastewater treatment plants voluntarily reducing pollutant discharges.

252. The Agency acknowledges that using actual current loading as the baseline would protect water quality, but posits that it would do so at a significant cost and for questionable benefit. For the approximately 1,000 NPDES wastewater permits in Minnesota “with anywhere between five to 12 pollutants of concern in each permit, several thousand antidegradation decisions would need to be fulfilled within the next five to seven years.”³²⁵ As the Agency currently completes reviews for about ten permits annually,³²⁶ the costs of using actual current loading as the baseline would result in a significant increase in costs.

253. The Agency considers that the benefits to be gained by changing the baseline to actual current loadings would be minimal because the “vast majority of effluent limit review occurs during a reissuance in which nothing is changing at the facility.”³²⁷ There may be new limits added or new water quality standards, but increases in pollutant loading are unusual unless there are design flow increases.³²⁸

254. Turning to the issue of how baseline loading should be determined when a permit does not contain an effluent limit for a parameter of concern, the Agency explains that “the maximum loading would be defined as the current actual concentration multiplied by a facility design flow value.”³²⁹ In the reissuance of a permit when there are no facility changes and no data on a pollutant of concern, the Agency describes two options: using data from similar types of discharges or requiring the permittee to monitor effluent discharges prior to setting a maximum load.³³⁰ In most circumstances, the Agency contends, effluent data are available.³³¹

³²³ The Agency provides two tables that demonstrate treatment facilities consistently operate over the last 15 years at approximately half of the authorized limit for Total Phosphorus discharges. MPCA Response to Comments, Att. 1 at 47-48 (Apr. 20, 2016).

³²⁴ MPCA Response to Comments, Att. 1 at 48 (Apr. 20, 2016).

³²⁵ *Id.* at 46.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 45.

³³⁰ *Id.*

³³¹ *Id.* at 46.

255. The Agency does not agree with the criticisms that it has “failed in the past to require effluent permits, update permits, enforce permits or used variances and schedules of compliance inappropriately”³³² The record in this proceeding does not permit resolution of this disagreement between the Agency and its critics and the Administrative Law Judge is unable to determine the adequacy of existing control documents with respect to water quality controls.³³³ If existing control documents are substantially flawed, using them to establish a baseline for new or expanded discharges is problematic. However, because permits are renewed on a five year cycle, if no limit is contained in a permit, it could be added during the renewal process. As previously discussed, the Agency explained that it can estimate missing effluent limits in permits from facility design and flow data.

256. In the Agency’s experience, in the majority of circumstances in which a new effluent limit will be added to a permit undergoing review for an expanded discharge, the loading from the facility will decrease, even if the flow will increase.³³⁴ Because the loading will decrease, antidegradation review is unnecessary. To establish the permit limit, the Agency estimates what the concentration or a mass limit of a pollutant would be at “the capacity the facility is designed to handle over a specified period of time.”³³⁵ The procedures for establishing limits have not been set in rule because they but instead are determined on a case-by-case basis.³³⁶

257. One commenter expressed concern that the definition as applied to activities regulated by an existing control document conflicted with Minn. R. 7052.0310, subp. 5A(5). This rule subpart exempts changes in loading for bioaccumulative chemicals of concern (BCC) from antidegradation review when such changes occur because of “new effluent limitations based on improved monitoring data or new water quality standards or criteria that are not a result of changes in pollutant loading.” Federal rules contain a similar exemption from antidegradation review: “Also, excluded from an antidegradation review are new effluent limits based on improved monitoring data or new water quality criteria or values that are not a result of changes in pollutant loading.”³³⁷

258. The Agency responds that it interprets the definition as not requiring antidegradation procedures when new pollutant limits are applied only because of improved monitoring data or the development of a new water quality standard.³³⁸ In light of this criticism, however, the Agency added the following sentence to the definition of a “net increase in loading or other causes of degradation” when a proposed activity is regulated by an existing control document:

³³² MPCA Response to Comments at 14 (Apr. 20, 2016).

³³³ The record contains submissions by WaterLegacy alleging that the MPCA has improperly been influenced by mining interests. Comment by WaterLegacy, Att. 1 (Mar. 23, 2016).

³³⁴ Public Hearing Tr. at 107 (Mar. 31, 2016) (S. Weiss).

³³⁵ *Id.*

³³⁶ *Id.* at 108-09.

³³⁷ Comment by Chamber at 3 (Apr. 20, 2016).

³³⁸ MPCA Response to Comments, Att. 1 at 44-45 (Apr. 20, 2016).

The 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.³³⁹

259. The necessity of a baseline for measuring “net loading and other causes of degradation” is not disputed. The critics of the Agency’s proposal for establishing a baseline raised significant concerns. The Agency has provided reasonable responses to those concerns and the Administrative Law Judge concludes that the Agency’s proposed definition is sufficiently supported by the record. With regard to the modification of the proposed definition, the Administrative Law Judge finds that it is necessary to provide consistency with existing Minnesota rules and federal regulations and to clarify the implications of new effluent limits for antidegradation procedures.³⁴⁰ The modification is within the scope of the rulemaking and does not substantially change the proposed rule.³⁴¹

Subpart 28. Parameter

260. The definition given to “parameter” is “a chemical, physical, biological or radiological characteristic used to describe water quality conditions.”³⁴²

261. One commenter contends that the Agency should also provide a definition for the phrase “parameters of concern” or the principles that guide the selection of parameters of concern.³⁴³ The commenter urged that the definition of “existing water quality” in proposed rule 7050.0255, subp. 16, the determination of existing water quality in proposed rule 7050.0260, subp. 1, and the antidegradation assessment in proposed rule 7050.0280, subp. 2, all be amended so that they concern or apply only to “parameters of concern.”³⁴⁴ The thrust of the suggestion is to focus or limit antidegradation review to the parameters of practical significance.

262. Some commenters found the concept troubling because focusing on parameters of concern meant other parameters were:

either not listed in permits, or listed in permits as monitored but not with effluent limits. Then they become permit-regulated but not enforced because they are not parameters of concern. Those parameters in the permit or not in the permit can and do exceed standards and often contribute to ionic toxicity. But the public has no power to make the MPCA

³³⁹ MPCA Response to Comments at 6 (Apr. 20, 2016).

³⁴⁰ MPCA Response to Comments, Att. 1 at 44-45 (Apr. 20, 2016).

³⁴¹ Minn. Stat. § 14.05, subd. 2(b)(2).

³⁴² SONAR at 39.

³⁴³ Comment by Chamber at 1-2 (Apr. 20, 2016).

³⁴⁴ *Id.*

enforce water quality standard violations, because the parameters are in the permit, or the parameters are not in the permits and not monitored.”³⁴⁵

263. It is reasonable for the Agency, and for permit applicants, to focus their attention on pollutants anticipated to pose the greatest risk. The commenters’ concerns are that the Agency will fail to identify and regulate all parameters that should be of concern. Stated differently, the criticism is more about the Agency’s performance and less about the rule itself. On the record in this proceeding, the Administrative Law Judge cannot make a determination as to whether the Agency will identify and regulate the pollutants that pose the greatest risk in every permit. The Administrative Law Judge defers to the Agency’s expertise and assumes that the Agency will faithfully seek to implement its rules in conformance with their purpose.

264. The Agency considered but rejected attempting to define “parameters of concern.”³⁴⁶ Although it agreed that in the abstract the concept had merit in light of the limited resources of the Agency’s and the regulated community’s resources, after discussion with stakeholders “the MPCA determined that any such definition would be necessarily so vague that it would not be valuable in the application of the rule.”³⁴⁷ Instead, the Agency noted in the SONAR that parameters of concern would be identified in consultation between the applicant and the MPCA prior to the analysis of alternatives that would avoid or minimize degradation.³⁴⁸ The SONAR includes substantial discussion of the factors that should be considered in determining the parameters of concern in the SONAR.³⁴⁹

265. A definition of parameter is needed to identify the constituent elements of “water quality” and the Agency’s definition is reasonable. It is also reasonable for the Agency not to have proposed a definition for “parameters of concern” or to have articulated in rule the principles that guide the effort to identify the parameters of concern. The effort would result either in guidance so general as to be of little use or so case-specific as to be non-generalizable.

Subpart 30. Physical Alteration

266. The Agency defines “physical alteration” as “a physical change that degrades surface waters, such as the dredging, filling, draining, or permanent inundation of a surface water.”³⁵⁰ “Degrade” as discussed previously is defined as “measurable changes: . . . to existing water quality made or induced by human activity resulting in diminished chemical, physical, biological, or radiological conditions of surface waters.”³⁵¹

³⁴⁵ Comment by Bruce and Maureen Johnson at 4 (Apr. 19, 2016).

³⁴⁶ MPCA Rebuttal to Comments at 36 (Apr. 27, 2016).

³⁴⁷ *Id.*

³⁴⁸ SONAR at 2, Att. 4.

³⁴⁹ SONAR at 88-91.

³⁵⁰ SONAR at 38-39.

³⁵¹ SONAR at 39.

267. This definition is needed because the term has implications for several other proposed rules. Although the definition itself has not invoked significant controversy, its use in proposed rule Part 7050.0265, Subpart 3D discussed below at Finding 299 is concerning. That subpart is one subpart of the proposed rules that is disapproved by the Administrative Law Judge. One way of curing the defect would be to revise this definition.

Subpart 47. Water Quality Standard

268. This subpart defines “water quality standard” as “a parameter concentration, level, or narrative statement, representing a quality of water that supports a beneficial use. When water quality standards are met, water quality will generally protect the beneficial use.”³⁵² This definition is needed to explain the relationship of parameters to standards. The Agency states that this definition is reasonable because it is consistent with the term “criteria” as defined in federal regulations.³⁵³

269. A commenter criticized this definition as misaligned with the federal definitions, noting that the Agency defines water quality standard as numeric or narrative water quality criterion while the EPA defines it as the designated use and water quality criterion.³⁵⁴ This commenter recommends adding a sentence to the definition that equates “water quality standards” in the proposed rule with “water quality criteria” in the federal rule.

270. The Agency considers this addition unnecessary in light of the close correspondence of the two definitions. The commenter did not explain the adverse consequences that the Agency’s proffered definition might occasion. The Administrative Law Judge finds the Agency’s definition reasonable.

7050.0260 Determining Existing Water Quality

Subpart 1. Methods

271. Subpart 1 of this rule part is needed to establish the methods for ascertaining existing water quality and the order of preference among the several allowable methods. More than one method must be used when a single method does not adequately describe existing water quality. The methods, in order of preference, are:

- A. using existing Commissioner-approved monitoring data;
- B. undertaking sampling of surface waters in conformance with Minn. R. 7050.0150, subp. 8; and
- C. identifying similar surface waters.

³⁵² SONAR at 46.

³⁵³ SONAR at 46. The federal definition of “criteria” is: “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.” SONAR, Ex. 68.

³⁵⁴ Comment by Chamber at 7 (Apr. 20, 2016).

272. Two commenters urged that Item A be revised with the following addition: “The Commissioner’s approval must be based on using all current EPA methods and guidance.”³⁵⁵

273. The Agency intentionally did not include specific protocols for measuring water quality or confine acceptable protocols to those in current use by the EPA. The Agency reasoned that it is impossible to predict the parameters that will need to be assessed as regulated activities vary widely; variations in environmental conditions (e.g. changes in stream flow, influence the accuracy of the various potentially applicable measurement techniques); and the existence of variations in measurement methods further complicate the identification of specific protocols.³⁵⁶

274. Commenters also opposed the use of method C, identifying similar surface waters, insisting that comparability could not be determined without adequate sampling data.³⁵⁷ For example, the determination that two water bodies are similar in chemical and biological characteristics requires sampling; appearance and location alone are not sufficient to determine similarity, especially for NPDES permits and section 401 certifications.³⁵⁸

275. The MPCA responded to this comment by stating that, although method C is the least preferred option, it is reasonable to use reference or similar waters for determining existing water quality.³⁵⁹ The Agency clarifies, however, that an acceptable reference water body will have monitoring data and have similar attributes (“e.g., land use, vegetative cover, geology, soils, stream morphology, etc.”)³⁶⁰ If such a reference site is not available, the Agency asserts that estimating water quality “will require the use of models “such as Hydrological Simulation Program – Fortran (HSPF; MPCA 2104) or BATHTUB to model existing conditions in the waterbody under review.”³⁶¹ The Agency notes that use of such models will also require data from the same watershed as the waterbody under review.³⁶²

276. As written, the Agency’s proposed method C for determining existing water quality is: “identifying reference surface waters that have similar physical, chemical, and biological characteristics and similar impacts from regulated and unregulated activities.” The description of this method does not include the use of models to substitute for a reference site and the SONAR does not explain the use of models in this context, although the Agency’s post-hearing comments do.³⁶³

³⁵⁵ Comment by Bruce and Maureen Johnson at 5 (Mar. 25, 2016).

³⁵⁶ SONAR at 48.

³⁵⁷ Comment by Bruce and Maureen Johnson at 5 (Mar. 25, 2016).

³⁵⁸ *Id.*

³⁵⁹ MPCA Response to Comments, Att. 1 at 15 (Apr. 20, 2016).

³⁶⁰ MPCA Response to Comments at 15 (Apr, 20, 2016).

³⁶¹ MPCA Post-Hearing Response to Comments at 15 (Apr. 20, 2016).

³⁶² *Id.*

³⁶³ *Id.* at 15-16.

277. Because the Agency has represented that it intends to allow the use of models to substitute for actual reference sites, the Administrative Law Judge disapproves Part 7050.0260, Subpart 1C, as it gives no indication of this intent. It is unreasonable not to specify in the description of method C that the Agency will require use of models if a reference site is not available. This constitutes a defect and Subpart 1C is **disapproved**. The Administrative Law Judge recommends that the Agency either add Item D to the list of methods to describe the acceptable use of models or modify method C to recognize that in cases where no reference water body can be found, certain technical models properly utilized can substitute for a reference waterbody.

278. It is clearly necessary to measure water quality, where it is reasonable to do so, to assess impacts to water quality from regulated activities. As the Agency notes in its justification for this rulemaking, “the ability to accurately assess water quality and implement effective pollution controls has significantly improved since the last major rule revision [in 1988].”³⁶⁴ It is reasonable to assume that techniques for assessing water quality will continue to evolve and so it is reasonable for the Commissioner to determine which measurement techniques are best-suited for each particular situation the Agency encounters. Accordingly, the Administrative Law Judge finds methods A and B reasonable.

Subpart 2. Consideration of Existing Regulated Activities

279. Subpart 2 of this proposed rule part concerns determining water quality in relation to activities that are regulated by existing control documents. It reads:

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 applicable control documents.

280. The controversial portion of this subpart is that “existing water quality includes surface water conditions that are anticipated at loadings or other causes of degradation authorized in the applicable control documents.” The controversy has been addressed at length previously in the discussion of “net increases in loading or other causes of degradation” beginning at Finding 223 and will not be repeated here.

281. This subpart is necessary to determine existing water quality; identify surface waters of high quality; evaluate the impact of new or expanded discharges, including the impact on assimilative capacity; determine existing uses; and inform the public of the extent of potential degradation.³⁶⁵

282. One commenter recommended that the determination of water quality should only involve “parameters of concern” that “are reasonably expected in a discharge

³⁶⁴ SONAR at 2.

³⁶⁵ SONAR at 49-50.

or as a result of a proposed activity and present the greatest risk to the propagation of fish, shellfish, and wildlife and recreation in and on the water.”³⁶⁶

283. Another commenter challenged the reasonableness of Subpart 2 in the circumstance that the effluent limitations or load limits in the applicable control documents were not the result of a prior antidegradation review.³⁶⁷ Making a related point, a third commenter charged that many state-issued NPDES permits expired long ago and “have not been reviewed to ensure compliance with current and revised water quality standards.”³⁶⁸ Several commenters recommended that Subpart 2 be stricken as existing water quality should reflect the actual quality of the water at the time of the application.³⁶⁹

284. As addressed above, the Agency defended its use of control document limits rather than actual current levels because the typical situation in which Subpart 2 would apply is when a wastewater treatment facility seeks reissuance of a control document. Wastewater treatment facilities, the Agency explains, “are designed to accommodate population growth or production over time periods longer than they typical five-year NPDES permit cycle.”³⁷⁰ The Agency reports that sewage treatment facilities will typically be designed for the loading capacities expected in 20 years. The MPCA sets effluent limits for these facilities accordingly.³⁷¹

285. MESERB supported the Agency’s approach as necessary because local governmental units must be allowed to engage in long term planning for facilities that will be expected to accommodate economic and population growth.³⁷² The organization also found the Agency’s rule to be reasonable because it comports with the current NPDES permit process of “setting effluent limits based on environmental need, production design, and population growth beyond a mere five year permit cycle as authorized under the Clean Water Act.”³⁷³ The commenter noted that 40 C.F.R. § 122.45(b)(1) (2015) provides that for publicly owned treatment works seeking NPDES permits “permit effluent limitations, standards, or prohibitions shall be calculated based on design flow.”³⁷⁴

286. A general concern about the proposed permitting processes arises from situations in which a discharge upstream of the proposed new or expanded activity is not in compliance with water quality regulations.³⁷⁵ The Agency stated in its SONAR that it would not make the issuance of an individual permit “contingent on resolving all issues related to upstream sources.”³⁷⁶ The Agency contends that it is unfair to an applicant to

³⁶⁶ Comment by MESERB at 8 (Apr. 20, 2016).

³⁶⁷ Comment by MCEA at 6 (Apr. 20, 2016).

³⁶⁸ Comment GP and FDL at 5 (Mar. 28, 2016).

³⁶⁹ *Id.*; Comment by WaterLegacy at 6, Att. 1 at 3 (Apr. 20, 2016).

³⁷⁰ SONAR at 50.

³⁷¹ SONAR at 50.

³⁷² Comment by MESERB at 11 (Apr. 20, 2016).

³⁷³ *Id.*

³⁷⁴ *Id.* at 12.

³⁷⁵ Comment by WaterLegacy at 15 (Mar. 23, 2016); Comment by MCEA at 3-4 (Mar. 28, 2016).

³⁷⁶ MPCA Post-Hearing Response to Comments at 19 (Apr. 20, 2016).

deny a permit because of what another entity is doing.³⁷⁷ A commenter rejected this response, making the point that doing so reflected the viewpoint of dischargers and not the viewpoint of protecting the water.³⁷⁸

287. There are two circumstances to consider with regard to the non-compliant upstream dischargers: when the discharger's activity is regulated by the Agency and when it is not. With respect to a non-compliant dischargers subject to MPCA regulation, the MPCA "expects that requests for permit approval and antidegradation review [of the non-compliant discharger] will be received from dischargers downstream" ³⁷⁹ The Agency would proceed with permitting the downstream applicant provided it had reasonable assurance of future compliance by the upstream discharger.³⁸⁰

288. With respect to non-compliant dischargers not subject to MPCA regulation, the Agency adopts the policy that it is preferable to allow the proposed activity to proceed under appropriate permit conditions rather than prohibit an activity that would otherwise be permissible but for the upstream discharger. In many cases, the upstream discharge is very likely to involve nonpoint pollutant sources, such as agricultural runoff. The MPCA does not have regulatory authority over nonpoint sources.³⁸¹

289. The EPA's guidance on the question of whether state antidegradation rules must establish and implement best management practices for nonpoint sources before allowing degradation is found in 40 C.F.R. § 131.13(a)(2). This rule does not require a state to establish best management practices for nonpoint sources where they are not already required. The EPA interprets this provision as only requiring that "all cost-effective and reasonable BMPs [Best Management Practices] established under State authority are implemented for nonpoint sources before the State authorizes degradation of high quality waters by point sources."³⁸²

290. Although the Agency's policy will not avoid degradation to the maximum extent possible by refusing to permit an activity because of upstream noncompliance, it is reasonable to interpret the requirements of 40 C.F.R. § 131.12(a)(2) as applying to the antidegradation review of a specific discharger, not to every source of pollutants.

7050.0265 Antidegradation Standards When Changes in Existing Water Quality are Reasonably Quantifiable

291. This part is needed because it establishes the standards to be applied in an antidegradation review when changes in existing water quality are reasonably quantifiable. The procedure set out in this part involves the comparison of existing water quality with the anticipated water quality after the proposed activity is fully implemented.

³⁷⁷ SONAR at 67.

³⁷⁸ Public Hearing Tr. at 126 (Mar. 31, 2016) (P. Maccabee).

³⁷⁹ MPCA Post-Hearing Response to Comments at 19 (Apr. 20, 2016).

³⁸⁰ SONAR at 67.

³⁸¹ SONAR at 67.

³⁸² *Id.*, Ex. 98.

Part 7050.0270 establishes the standards for antidegradation review when changes in existing water quality are not reasonably quantifiable.

292. The Chamber suggests that because the SONAR explains that changes in existing water quality are reasonably quantifiable when a single or limited number of waters are affected and not reasonably quantifiable when affected waters are numerous, the titles of rules and relevant subparts of Parts 7050.0265 and 7050.0270 should reflect the number of affected waters each rule concerns.³⁸³

293. The Agency responds to this concern by stating that it “is reasonable to divide control documents into two classes when the classes are based on similar characteristics of the control documents assigned to each class.”³⁸⁴ The Agency also notes that titles of rules are not regulatory language, not part of the text of the rules. The Chamber’s suggestion is reasonable, but so is the Agency’s proposal.

Subpart 1. Scope

294. This subpart is needed to identify the types of permits where it is reasonable to require that existing water quality and projected impacts can be quantified. These are individual wastewater, industrial stormwater and construction stormwater NPDES permits; section 401 certifications for individual federal licenses and permits, and other control documents that authorize net increases in loading where changes in existing water quality can be quantified.

295. One commenter maintains that it is unrealistic to require applicants for industrial and construction stormwater permits to provide quantitative comparisons of existing water quality to the anticipated water quality.³⁸⁵ This issue is discussed below under proposed rule 7050.0280 which sets out the antidegradation procedures where the standards described in this rule part are applied.

296. It is necessary to describe the activities regulated by control documents because the control document is the means by which the Agency regulates pollutant discharges by regulated activities. The Agency’s identification of types of control documents to which this part applies is reasonable.

Subpart 2. Protection of Existing Uses

297. This subpart is needed to establish that a proposed activity shall be approved only if existing uses and the level of water quality necessary to protect existing uses are protected and maintained. Existing uses to be considered are aquatic life, recreation, the environmental conditions necessary for such uses and commercial activity. Evaluating the impact of a proposed activity so as to secure the maintenance and protection of existing uses:

³⁸³ Comment by Chamber at 3 (Apr. 20, 2016).

³⁸⁴ MPCA Rebuttal Response to Comments at 3 (Apr. 27, 2016).

³⁸⁵ Comment by MESERB at 4 (Apr. 20, 2016).

includes consideration of:

- A. aquatic life that utilizes or is present in or on the surface waters;
- B. recreational opportunities in or on the surface waters;
- C. hydrologic conditions, geomorphic conditions, water chemistry, and habitat necessary to maintain and protect existing aquatic life or recreation in or on the surface waters; and
- D. commercial activity that depends on the preservation of water quality.

298. One commenter objected to the inclusion of subpart Items A through D which are potential uses of water bodies because doing so implies that uses not listed are not protected.³⁸⁶ Another commenter suggests striking Items A to D and the reference to those items in Subpart 2.³⁸⁷ Two other commenters argued that Items A to D are insufficient because there is no recognition of the need to consider “the combination of chemicals’ potential synergistic reactions. . . .”³⁸⁸

299. The Agency agreed with the comment that listing some uses could imply the exclusion of other uses and proposed to strike Items A through D, the language requiring consideration of certain existing uses.³⁸⁹ This is a reasonable response to the criticisms of these commenters. The modifications are within the scope of the rulemaking and do not substantially modify the rule.³⁹⁰

Subpart 3. Compensatory Mitigation

300. The Agency proposed amending several parts of Subpart 3 in response to comments. Given that the several commenters objected to use of compensatory mitigation, it is worthwhile to consider the subpart with the Agency’s proposed revisions.

301. This proposed rule, as subsequently modified by the Agency, reads:

Subpart 3 Compensatory mitigation; ~~loss of existing uses.~~

A. Except as provided in item D, the commissioner shall allow compensatory mitigation as a means to preserve an existing use when there is a for the loss of an existing use resulting from physical alterations alteration to 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 existing use surface water;

³⁸⁶ Comment by WaterLegacy at 4 (Apr. 20, 2016); Comment by Chamber at 5 (Apr. 20, 2016).

³⁸⁷ Comment by MCEA at 6 (Mar. 28, 2016).

³⁸⁸ Comment by Bruce and Maureen Johnson at 6 (Mar. 25, 2016).

³⁸⁹ MPCA Post-Hearing Response to Public Comments at 7 (Apr. 20, 2016).

³⁹⁰ Minn. Stat. § 14.05, subd. 2(b)(2).

- (2) the mitigation is sufficient in quality and quantity to ensure replacement of the lost ~~existing-use~~ surface water;
- (3) the mitigation is accomplished by restoring a previously impacted surface water of the same type or, when restoring is not a prudent or feasible alternative, establishing or enhancing a surface water of the same type;
- (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.

D. The commissioner shall prohibit ~~the loss of existing uses resulting from~~ physical alterations to surface waters, regardless of the compensatory mitigation proposed, when the proposed activity would physically alter or otherwise degrade the exceptional characteristics of an outstanding resource value water designated in part 7050.0335.³⁹¹

302. It is important to note that compensatory mitigation is only allowed where the harm arises from the physical alteration of a water body. The Agency notes that only “those physical alterations permitted under CWA section 404³⁹² will be allowed to provide compensatory mitigation for the loss of existing uses.”³⁹³ Section 404 regulates the discharge of dredged or fill material into waters of the United States and 33 C.F.R. § 332 (2015) regulates compensatory mitigation.

303. MDOT commented on Item A, Subitem (4) that the SONAR suggests “a cumbersome stepwise watershed by watershed search for possible sites” for compensatory mitigation, starting at the smallest watershed and moving to more encompassing watersheds.³⁹⁴ The Agency explains that this is a misinterpretation of the proposed language. Item A, Subitem (4), does “not specify a mandatory watershed size for implementing a watershed approach to compensatory mitigation. Likewise the proposed rules do not specify the watershed size.”³⁹⁵

³⁹¹ MPCA Post-Hearing Response to Public Comments at 7-8 (Apr. 20, 2016).

³⁹² SONAR Ex. 69.

³⁹³ SONAR at 24.

³⁹⁴ Comment by MDOT at 2 (Apr. 20, 2016). It was helpful to the Administrative Law Judge when Ms. Lotthammer explained that “watersheds are nested within each other . . . [i]ts almost like if you had a set of nested bowls.” Public Hearing Tr. at 182-83 (Mar. 31, 2016).

³⁹⁵ SONAR at 56.

304. MDOT also proposed that Item A, Subitem (5) be revised to allow the option of an in-lieu fee program as authorized by the 2015 Legislature in revising Minn. Stat. ch. 103G (2014).

305. The Agency observed that, as yet, Minnesota lacked an operating in-lieu fee arrangement and until such a program was developed, the option was not available. The Agency would, however, continue to monitor the situation and would consider conforming changes when appropriate.³⁹⁶

306. MDOT further objected to the Agency's exclusion of preserving a water body as a type of compensatory mitigation because preservation is allowed under the federal mitigation program.³⁹⁷

307. The Agency rejected preservation as a means of compensatory mitigation "because preserving of a water body in its existing condition cannot reasonably compensate for the loss of an existing use. In other words, preserving an existing use that has not been lost simply does not replace a lost use."³⁹⁸ The Agency interprets 40 C.F.R. § 131.12(a)(1) to require that there be no net loss of existing uses.³⁹⁹ In any event, in Minn. Stat. § 115.03, subd. 5, the legislature has authorized the Agency to impose requirements that are more stringent than federal requirements to ensure that Minnesota's water quality standards are met.

308. MDOT next expressed concern that this proposed subpart could lead to inefficient and unnecessary compensatory mitigation requirements when dry roadside ditches or dry day ponds were physically altered.⁴⁰⁰ MDOT urged the Agency to clarify that physical alterations to ditches and other human-made features will be allowed without the requirement of compensatory mitigation.⁴⁰¹

309. The Agency responds that it has authority over all surface waters and seeks to maintain the authority to require compensatory mitigation for all surface waters. However, the "physical alterations" which give rise to compensatory mitigation are the physical alterations occurring under a section 404 dredge and fill permit.⁴⁰² It is unlikely that section 404 permits are required for the situations with which MDOT is concerned.

310. Item A of Subpart 3 is accompanied by Items B, C, and D. Item C pertains to physically altered high quality waters and requires that the antidegradation procedures found in Subpart 5 of this rule also be met. Item D of Subpart 3 prohibits the loss of existing uses resulting from physical alterations to ORVWs, regardless of the compensatory mitigation proposed.

³⁹⁶ MPCA Rebuttal Response to Comments at 5 (Apr. 27, 2016).

³⁹⁷ Comment by MDOT at 2 (Apr. 20, 2016).

³⁹⁸ SONAR at 24-25.

³⁹⁹ *Id.*

⁴⁰⁰ Comment by MDOT at 3 (Apr. 20, 2016).

⁴⁰¹ *Id.*

⁴⁰² MPCA Rebuttal Response to Comments at 4 (Apr. 27, 2016).

311. MDOT questioned the need to include compensatory mitigation in the antidegradation rules as the federal antidegradation rules do not require compensatory mitigation, other states do not have it as part of their antidegradation programs, and it is addressed through numerous other programs.⁴⁰³

312. The EPA supported the inclusion of compensatory mitigation. The EPA agreed with the Agency that inclusion of compensatory mitigation is a mechanism for preserving existing uses.⁴⁰⁴ Without including compensatory mitigation, the question would arise of other programs as to whether they required existing uses to be preserved.⁴⁰⁵

313. MDOT also pointed out that Minn. Stat., ch. 103G, “prescribes the process to be followed and conditions to be met when Public Waters and wetlands are proposed to be impacted.”⁴⁰⁶ This chapter also “describes which types of actions are eligible for wetland replacement credit.”⁴⁰⁷ MDOT noted that the legislature in 2015 added two items to the list of eligible activities and “[n]either of these would appear to qualify for the same surface water type requirement.”⁴⁰⁸ Consequently, the Agency’s proposed rule is inconsistent with state statutes.⁴⁰⁹

314. The Agency explained that it was aware of the changes to Chapter 103G while developing its proposed rules but noted that rules implementing the changes had not yet been promulgated. The Board of Water and Soil Resources has initiated a rulemaking proceeding to conform Minnesota Rules chapter 8420 (2015) to the statutory changes. The Agency will consider making future conforming changes in chapter 7050 as the rulemaking progresses.⁴¹⁰

315. Given that a rulemaking proceeding implementing statutory changes is underway, it is reasonable for the Agency to wait until the rulemaking concludes to revisit this subpart. To make changes now and shortly have to make them again is inefficient. However, rule provisions cannot stand in conflict with statutory provisions. In this particular instance, until the implementing rules are established neither MDOT nor the Agency can be certain that there is a conflict. The Administrative Law Judge recommends that Item A3 be revised as follows:

the mitigation is accomplished by restoring a previously impacted surface water of the same type, or other type if required by statute, or, when

⁴⁰³ Comment by MDOT at 1 (Apr. 20, 2016).

⁴⁰⁴ MPCA Rebuttal Response to Comments at 3 (Apr. 27, 2016).

⁴⁰⁵ *Id.*

⁴⁰⁶ Comment by MDOT at 1 (Apr. 20, 2016).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* (emphasis added).

⁴⁰⁹ Other commenters asserted that mitigation must be of the same type as the degraded water body. Comment by WaterLegacy at 9 (Mar. 23, 2016); Comment by Bruce and Maureen Johnson at 7 (Mar. 25, 2016). These commenters were concerned not to allow one body of water to be degraded so that another body of water is rendered less degraded because that would fail to preserve and protect existing uses.

⁴¹⁰ MPCA Rebuttal Response to Comments at 5 (Apr. 27, 2016).

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;

316. Another concern with compensatory mitigation is that the federal policy deals with compensatory mitigation for replacing wetlands, not for water quality degradation.⁴¹¹ The Agency justified its inclusion of the practice with reference to EPA policies. While the EPA agreed that compensatory mitigation “is not specifically addressed in the federal antidegradation regulations,” it nonetheless accepted the concept in Minnesota’s rules because compensatory mitigation is “an accepted mechanism of preserving uses of surface waters under section 404 of the CWA.”⁴¹²

317. The SONAR explains that the Agency “anticipates that only those physical alterations permitted under CWA section 404 will be allowed to provide compensatory mitigation for the loss of existing uses.”⁴¹³ The Agency states that, for example, the construction of a new wastewater treatment facility could result in the loss of an existing use of a water body. In such a case, compensatory mitigation would not be permissible.⁴¹⁴ In its post-hearing comments, one commenter agreed that the revisions the Agency made to its proposed rule reduced the “risk that ‘compensatory mitigation’ will result in loss of existing uses of water”⁴¹⁵

318. MDOT further expressed concern that the Agency’s proposed Item D would prohibit physical alterations of ORVWs that are often unavoidable when the proposed activity is the construction or maintenance of roads, bridges, and other public infrastructure.⁴¹⁶

319. The Agency responded to MDOT’s comment by stating that it is not the intent of the proposed rules to prohibit the construction, maintenance or repair of public infrastructure in ORVWs. The Agency states that the intent of the proposed rules is to ensure that the exceptional characteristics of ORVWs are maintained and protected.⁴¹⁷ The Agency also explained that it “views physical alteration as actions such as the complete or partial filling in or excavation of a stream segment or wetland, such that the stream or wetland can no longer function as a stream or wetland.”⁴¹⁸

320. The MPCA’s response is presumably intended to indicate that “physical alterations” occur much less frequently than MDOT might fear. However, the definitions the Agency provides for “physical alteration” and “degrade” indicate that disturbances

⁴¹¹ Comment by WaterLegacy at 9 (Mar. 23, 2016).

⁴¹² Hearing Ex. I-6.

⁴¹³ SONAR at 53.

⁴¹⁴ *Id.*

⁴¹⁵ Comment by WaterLegacy at 1 (Apr. 27, 2016).

⁴¹⁶ Comment by MDOT at 2 and 4 (Apr. 20, 2016).

⁴¹⁷ MPCA Rebuttal Response to Comments at 6 (Apr. 27, 2016), *citing* 40 C.F.R. § 131.12(a)(3).

⁴¹⁸ MPCA Rebuttal Response to Comments at 7 (Apr. 27, 2016).

amounting to less than a loss of function as a stream or wetland would constitute degradation from a physical alteration.⁴¹⁹

321. As modified, proposed Rule 7050.0265, Subpart 3D, would prohibit physical alterations to surface waters when the activity would physically alter or otherwise degrade the exceptional characteristics of an ORVW. The Administrative Law Judge finds that Subpart 3D is unreasonable as it could preclude construction, maintenance or repair work on infrastructure such as roads, bridges, and other public facilities in ORVWs “when the proposed activity would physically alter or otherwise degrade the exceptional characteristics of an outstanding resource value water” Minnesota Rules part 1400.2100B requires that a proposed rule be disapproved by the administrative law judge if “the record does not demonstrate the need for and reasonableness of the rule.” According to MDOT, there currently exist public infrastructure facilities in ORVWs in populated areas of the state.⁴²⁰ It is not reasonable to promulgate a rule that could prohibit the repair and maintenance of these facilities. Should a project require an individual permit or certification, Subpart 3D would bar the Agency from providing it if the project would “physically alter or otherwise degrade the exceptional characteristics of an outstanding resource value water” The Agency has failed to show that the proposed rule is reasonable and this constitutes a defect in the proposed rule.

322. If the meaning of “physical alteration” that the Agency intends, an alteration so extensive as to eliminate the function of a water body as a stream or wetland, the apparent remedy is to revise the definition of physical alteration. The consequence of doing so, however, is that the circumstances in which compensatory mitigation is allowable are much reduced. “Compensatory mitigation” is allowable only in situations in which proposed activities result in physical alterations of the water body. If the term “physical alteration” refers only to alterations so extensive as to result in the water body ceasing to function as a stream or wetland, compensatory mitigation will not be allowed for physical alterations less extreme. The Administrative Law Judge consequently is hesitant to direct the Agency to revise its definition of physical alteration to address MDOT’s concern. The Agency may devise another superior solution, however, as this proposed **subpart 3D** stands now, it **is disapproved**.

323. Apart from Subpart 3D, this proposed rule is necessary. Without it, while compensatory mitigation would be allowed under federal law with regard to section 404 permits it would not be considered in a state section 401 certification proceeding. The rule permits state law to correspond to federal law. The rule represents a reasonable policy judgment that compensatory mitigation should be permitted, but only in the context of unavoidable adverse impacts caused by physical alterations of dredge and fill activities. The Agency’s modification to change “loss of existing uses” to “as a means to preserve an existing use” is necessary in light of the similar modification to the definition of “compensatory mitigation.”

⁴¹⁹ See definitions of “degradation or degrade” and “physical alteration” at proposed Minn. R. 7050.0255, subps. 11, 30.

⁴²⁰ Comment by MDOT at 2 (Apr. 20, 2016).

324. The Agency's insertion of language that mitigation must be sufficient in "quality and quantity" clarifies what the replacement of lost surface water involves.⁴²¹ The Agency explains that replacement of "existing use" with "surface water" "makes it clear that all surface waters are protected by these requirements."⁴²² This modification is within the scope of the rulemaking, does not make a substantial change to the proposed rule subpart and is permissible under Minn. Stat. § 14.05, subd. 2(1), (2).

Subpart 4. Protection of Beneficial Uses

325. This subpart prohibits the Commissioner from approving an activity that "would permanently preclude attainment of water quality standards." This subpart is needed because federal regulations for NPDES permits require that permit limits be set at a level that will not cause or contribute to violations of standards.⁴²³

326. One commenter objected to this subpart concerning "beneficial uses," and the corresponding Subpart 3 to proposed rule Part 7050.0270, as confusing because Subpart 2 of this rule and Subpart 3 of Part 7050.0270 protect "existing uses" and the commenter contends that in introducing this subpart, the MPCA goes beyond the federal requirements in 40 C.F.R. § 131.12.⁴²⁴ Whereas "existing uses" is defined in proposed rule Part 7050.0255, Subpart 15 as "those uses actually attained in the surface water on or after November 28, 1975," Subpart 4 of the rule "beneficial use" means a "designated use described under part 7050.0140 [Use Classification for Waters of the State] and listed under parts 7050.0400 to 7050.0470 [Beneficial Use Classification for Surface Waters] for each surface water or segment thereof, whether or not the use is being attained."

327. The Agency responds that its proposed rules are consistent with federal regulations 40 C.F.R. § 122.47(a) and 40 C.F.R. § 131.14.⁴²⁵ 40 C.F.R. § 122.47(a) allows for state permits to include schedules of compliance. Section 122.47(a) provides that compliance with the CWA and regulations must be effected "as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 131.14 allows states to adopt water quality standards variances. Although federal antidegradation standards do not include explicit protection of beneficial uses, 40 C.F.R. § 122.44(d) does. The Agency contends that it is reasonable to "include beneficial use protection in the proposed rules simply to fulfill the stated purpose of antidegradation 'to achieve and maintain the highest possible quality in surface waters of the state' (proposed rule 7050.0255)."⁴²⁶ The Administrative Law Judge agrees that it is reasonable to include protection of beneficial uses, both in this rule and in proposed rule Part 7050.0270.

328. Another concern with this subpart involves the phrase "permanently preclude," which some commenters read as allowing water quality standards to be

⁴²¹ This change was suggested by the EPA in its comments. Public Hearing Ex. I-6.

⁴²² MPCA Response to Comments at 7 (Apr. 20, 2016).

⁴²³ SONAR at 58, Ex. 91.

⁴²⁴ Comment by Chamber at 5 (Apr. 20, 2016).

⁴²⁵ MPCA Post-Hearing Response to Comments, Att. 1 at 21 (Apr. 20, 2016).

⁴²⁶ *Id.*

violated indefinitely.⁴²⁷ Proposed rule Part 7050.0275, Subpart 1 also uses “permanently preclude” as a standard for allowing an exemption from antidegradation procedures.

329. By use of the term “permanently preclude,” the Agency does not intend to allow indefinite violations of water quality. Temporary violations are allowed under 40 C.F.R. § 122.47(a) and a compliance schedule is required for nonattainment conditions expected to continue for longer than one year. Minnesota Rules part 7001.0140, subpart 1 (2015) authorizes the MPCA to require a schedule of compliance. Minnesota Rules part 7001.0150, subpart 2A (2015) requires a permit to contain a schedule of compliance that requires “compliance in the shortest reasonable period of time or by a specified deadline if required by Minnesota or federal statute or rule.”

330. The Agency also explains that a use attainability analysis may determine that a designated beneficial use is not attainable. 40 C.F.R. § 131.10(g) and Minn. R. 7050.0405 authorize the reclassification of waters. Rule Part 7050.0405 allows persons to file petitions with the Agency to reclassify a water body designated for a beneficial use that does not exist or is not attainable. The petition may result in a use attainability analysis that could support a reclassification that would be implemented in a rulemaking proceeding. Before the designated use is changed through rulemaking however, the water body is in violation of water quality standards.

331. Rather than stating the requirement as a negative and raising the question of indefinite duration, the Agency could place a limit on nonattainment by rewording the subpart with language from Part 7050.0150, Subpart 2A and including a reference to a variance:

The commissioner shall only approve a proposed activity that ~~would permanently preclude attainment of water quality standards~~ will result in nonattainment of water quality standards if the control document requires compliance with water quality standards in the shortest reasonable period of time, or immediately upon conclusion of a variance granted by the commissioner, or during a reclassification proceeding, or by a specified date if required by Minnesota or federal statute or rule.⁴²⁸

The Administrative Law Judge’s suggested modification is not a finding of a defect and if made, the modification is within the scope of the rulemaking and is not a substantial change in the rule.

⁴²⁷ Comment by WaterLegacy at 8 (Mar. 23, 2016); Comment by WaterLegacy at 4 (Apr. 20, 2016).

⁴²⁸ If this revision is made, proposed Rule 7050.0275, Subp. 1, might also be revised to replace “permanently preclude” attainment with a more definitely limited period of nonattainment. This suggested modification is not a finding of a defect and, if made, would be within the scope of the rulemaking and is not a substantial change.

Subpart 5. Protection of surface waters of high quality

332. This subpart implements Tier 2 protection where water quality changes are reasonably quantifiable. Subpart 5 consists of Items A through D. Before the quality of high quality waters can be lowered, the conditions in A through D must be satisfied.

333. Item A requires that the Commissioner first find that although “prudent and feasible prevention, treatment or loading offset alternatives are not available to avoid degradation” that nonetheless “degradation will be prudently and feasibly minimized.”

334. The first sentence of Item B in this proposed rule (and in proposed rule Part 7050.0270, Subpart 4, Item C) is of critical importance as it provides Tier 2 protection to high quality waters. This sentence establishes the standard that must be met before high quality waters may be lowered in quality. As initially proposed, the first sentence in Item B reads:

The commissioner shall approve a proposed activity only when the commissioner makes a finding that economic or social changes resulting from the proposed activity are important in the geographic area in which degradation of existing high water quality is anticipated.

335. Commenters expressed concern that the proposed language departed substantially from the language establishing Tier 2 protection for high quality water in federal rule 40 C.F.R. § 131.12(a)(2)(ii), which reads:

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.

In particular, commenters objected that the rule as proposed failed to require the Commissioner to make a finding that it was “necessary” to lower water quality.”⁴²⁹

336. The federal rule establishes a two-part test for Tier 2 protection. First, there must be an analysis of alternatives. Second, the state must find that lowering high quality water “is necessary to accommodate important economic or social development.”⁴³⁰ The Agency explains that Item A of this rule (and Item B of Subpart 4 in rule 7050.0270) serves to meet the requirement to analyze alternatives, and Item B (Item C in Subpart 4 of rule Part 7050.0270) meets the requirement to make a finding of importance.⁴³¹

⁴²⁹ Comment by WaterLegacy at 9-10 (Mar. 23, 2016); Comment by MCEA at 8-9 (Apr. 20, 2016); Comment by GP and FDL at 9 (Mar. 28, 2016).

⁴³⁰ 40 C.F.R. § 131.12(a)(2) (2015).

⁴³¹ MPCA Response to Comments, Att. 1 at 29 (Apr. 20, 2016).

337. Although the Agency considered that its proposed language met the federal standard,⁴³² it agreed with the commenter that the language could more closely follow federal wording and revised proposed Item B to read:

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 ~~resulting from the proposed activity are important~~ in the geographic area in which degradation of existing high water quality is anticipated.⁴³³

338. This subpart continues with a listing of six factors the Commissioner is to consider in assessing the importance of the economic and social changes that the proposed activity allows. Item B is needed because federal law provides only general guidance that high quality water may be lowered to accommodate important economic or social developments. The specific factors listed provide guidance to an applicant as well as direction to the Commissioner and are reasonable. The Agency's modification to Item B is within the scope of the rulemaking and is not a substantial change to the rule subpart.⁴³⁴

339. Item C states that a proposed activity that will result in the degradation of a water body will only be permitted if "the 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." Item D requires the Commissioner to provide an opportunity for intergovernmental coordination and public participation before allowing degradation of high quality water.

340. Compliance with Item A means that degradation is, at least to some extent, necessary if the activity is to be permitted: there are no prudent and feasible means to avoid degradation, but to the extent that there is a prudent and feasible way to minimize degradation it will be required. Item B then allows the activity to be permitted only if the social and economic benefits to be attained thereby are important.

341. One commenter objected that the term "prudent and feasible" needed to be more specific and to coincide with the federal term "practical alternatives," which means "technologically possible, able to be put into practice, and economically viable."⁴³⁵ This report discusses this objection in the context of the definition of "feasible alternative" above. While there may be some difference between the term "economically viable" and "affordable" as used in defining "feasible," it is not unreasonable to use the term

⁴³² A conclusion apparently shared by the EPA as it did not comment on the Agency's proposed language.

⁴³³ The Agency also revised its proposed language for Subpart 4, Item C of rule Part 7050.0270 to allow the issuance of a control document only upon a finding that doing so "is necessary to accommodate important economic or social change." MPCA Response to Comments at 8 (Apr. 20, 2016). These changes do not make the proposed rule substantially different. Minn. Stat. § 14.05, subd. 2(b)(2).

⁴³⁴ Minn. Stat. § 14.05, subd. 2(b)(2).

⁴³⁵ Comment by Bruce and Maureen Johnson at 7 (Mar. 25, 2016).

“affordable.” The Agency also explains that the standard of “prudent and feasible” is also used in “various Minnesota Statutes governing environmental protection”⁴³⁶

342. The Agency states that it is following the EPA’s guidance in barring degradation when there are prudent and feasible alternatives and, if degradation is unavoidable, the least degrading reasonable alternative is employed.⁴³⁷ While prevention is preferred, if it is not prudent and feasible to do so Item A also allows for treatment or loading offsets. This search for and use of methods to avoid or minimize degradation is necessary to comply with federal law and provides reasonable guidance for making antidegradation determinations.

343. Under existing rule Part 7050.0185, Subpart 3, the baseline for determining how degradation is to be minimized is the water quality standard necessary to sustain beneficial uses. Under the proposed rule, the baseline is existing water quality and not the water quality standard. This is reasonable because the goal of Tier 2 protection is to protect existing high quality water and not only the beneficial uses thereof. To the extent that existing water quality exceeds the standards necessary for its beneficial uses, this difference is important.

344. A commenter contended that federal regulations require state antidegradation rules to “contain assurance . . . that all cost-effective and reasonable best management practices for nonpoint source control shall be achieved.”⁴³⁸ However, nothing in this rule or other proposed rules “even mentions ‘nonpoint’ sources of pollution.”⁴³⁹

345. The Agency responds to this point by noting that other rules and statutes regulate nonpoint source best management practices. The phrase in Item C that “all applicable state and federal surface water pollution control statutes and rules administered by the commissioner” invokes the regulations pertaining to nonpoint pollutants. It is a common drafting practice to not specifically name the entire list of applicable regulations.⁴⁴⁰ The Agency also notes that its proposed rules “do not extend the application of the existing rules governing non-point discharges beyond their current scope.”⁴⁴¹

346. Subpart 5 is needed to establish the analysis and findings that Tier 2 antidegradation review requires. This subpart reasonably implements federal and state requirements and requires that the review consider the proposed activity’s impacts broadly, for example, how it would affect other aspects of the natural and social environment.

⁴³⁶ SONAR at 60-61.

⁴³⁷ *Id.*

⁴³⁸ Comment by Bruce and Maureen Johnson at 11 (Mar. 25, 2016).

⁴³⁹ Comment by Bruce and Maureen Johnson at 11 (Mar. 25, 2016).

⁴⁴⁰ MPCA Response to Comments, Att. 1 at 18 (Apr. 20, 2016). The same criticism, and the same response by the Agency, are made for proposed Rule 7050.0270, subp. 4D.

⁴⁴¹ SONAR at 19.

Subpart 6. Protection of Restricted ORVWs.

347. This subpart creates a level of protection for surface waters that lies between Tier 2 and Tier 3 (Tier 2.5), which is permissible under federal law and necessary for the Agency's implementation of this policy.⁴⁴² It requires the Commissioner to "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." Proposed Part 7050.0335 lists Minnesota's ORVWs from the current rule, but re-organizes the listings to consolidate each type of ORVW in a single subpart.

348. This subpart closely matches subpart 6 of the current rule Part 7050.0180 which is proposed to be repealed. It too uses the term "restrict" rather than "prohibit." "Prohibition" is inappropriate because measures can be taken to modify the discharge of a proposed activity to avoid degrading any of the characteristics for which the restricted ORVW has been designated.⁴⁴³ Appropriate restrictions can protect the water body's exceptional characteristics, but high quality water "not associated with designation characteristics may be lowered, but only when both Tier 1 and Tier 2 protection requirements are satisfied."⁴⁴⁴

349. The proposed rule uses the term "existing water quality" rather than the term "high quality" as used in part 7050.0180 because the existing water quality of some parameters in restricted ORVWs may not be of "high quality" under the proposed definition.⁴⁴⁵

350. If the Agency had chosen not to create Tier 2.5, it would have (1) made a substantial change to the existing degradation rule and (2) rendered all ORVWs subject to the higher level of Tier 3 protection. While that would serve to protect all ORVWs from any degradation, it would also prohibit proposed activities that would only degrade characteristics of the water body that were not associated with its exceptional features. The Agency could reasonably decide that it is preferable to allow activities that will not impair a water body's exceptional characteristics than it is to prohibit them entirely.

Subpart 7. Protection of Prohibited Outstanding Resource Value Waters

351. This subpart requires the Commissioner to "prohibit a proposed activity that results in a net increase in loading or other cause of degradation to prohibited outstanding resource value waters identified under part 7050.0335, subparts 3 and 4." 40 C.F.R. § 131.12(a)(3) requires that the high water quality of ORVWs be "maintained and protected." This is the Tier 3 level of protection which is reserved for unique and extraordinary water bodies. The EPA interprets "maintained and protected" as barring

⁴⁴² SONAR at 68.

⁴⁴³ *Id.* at 69.

⁴⁴⁴ *Id.* at 70.

⁴⁴⁵ SONAR at 69.

new or expanded discharges that would lower water quality.⁴⁴⁶ The phrase “maintained and protected” prohibits “a proposed activity that results in a net increase in loading or other causes of degradation to prohibited outstanding resource value waters identified under part 7050.0335, subparts 3 and 4.”

352. The controversy concerning the concepts of “loading offsets” and “net increases in loading” were previously discussed in considering the definitions of these terms. Several commenters argued that use of the concept of a “net increase in loading” creates a loophole through which prohibited ORVWs can be degraded despite having Tier 3 protection.⁴⁴⁷

353. As previously mentioned, the Agency proposes to define a “loading offset” as involving the following elements: (1) a reduction in loading; (2) from a regulated or unregulated activity; (3) that creates capacity for proposed net increases in loading. A loading offset must (4) occur before or at the same time as the proposed net increase in loading; (5) be secured with legal instruments between involved persons for the life of the project being offset; and (6) occur either adjacent to or upstream of the proposed activity.⁴⁴⁸

354. The Agency explained that a party proposing to use a loading offset would be required “to demonstrate that the proposed offset is equivalent to the proposed discharge of a specific pollutant.”⁴⁴⁹ Implemented properly then, loading offsets will not cause or contribute to the degradation of prohibited ORVWs. Loading offsets are efficient way to manage public waters because they allow a party seeking to implement a proposed activity that will cause an increase in loading to compensate another party for taking actions that will reduce discharge of the pollutant. This subpart is necessary to implement such a trading policy. It is reasonable because it allows parties to enter into mutually beneficial trades while avoiding degradation of prohibited ORVWs.

Subpart 8. Protection Against Impairments Associated with Thermal Discharges

355. 40 C.F.R. § 131.12(a)(4) requires that the antidegradation provisions that states establish must be consistent with section 316 of the CWA.⁴⁵⁰ This subpart in turn requires that the Commissioner comply with section 316 when there is a potential for thermal impairment of water quality.⁴⁵¹ If a discharger of thermal pollution can demonstrate that a thermal standard is more stringent than necessary to protect the propagation of fish, shellfish, and wildlife, the state may grant a variance and set a less

⁴⁴⁶ *Id.* at 70.

⁴⁴⁷ Comment by GP and FDL at 10 (Mar. 28, 2016); Comment by WaterLegacy at 2 (Mar. 23, 2016); Comment by Bruce and Maureen Johnson at 4 (Mar. 25, 2016).

⁴⁴⁸ SONAR at 36; MPCA Response to Comments at 5-6 (Apr. 20, 2016).

⁴⁴⁹ MPCA Response to Comments, Att. 1 at 13 (Apr. 20, 2016).

⁴⁵⁰ SONAR, Ex. 99.

⁴⁵¹ SONAR at 71.

stringent standard; however, antidegradation procedures still apply: “[t]hermal discharges are subject to the best practicable and best available control technology requirements.”⁴⁵²

356. The current rule provides a general statement that a discharger must comply with all applicable federal and state point source treatment requirements. The proposed new rule makes compliance with section 316 explicit. It also makes it clear that antidegradation standards under this part still apply. This subpart is necessary and reasonable.

Proposed Rule 7050.0270. Antidegradation Standards When Changes in Existing Water Quality Are Not Reasonably Quantifiable

357. This proposed rule is the counterpart to proposed rule 7050.0265 and its subparts address similar concerns. As there are situations when existing water quality cannot be reasonably measured, it is not obvious how antidegradation policies can be applied. An example of a type of discharge that would be unreasonably difficult to quantify is a municipal separate storm sewer system (MS4). An MS4 could discharge to dozens or hundreds of different places with the discharges affecting many different receiving waters.⁴⁵³ It is necessary to have an antidegradation rule for discharges to many water bodies.

Subpart 1. Scope

358. Subpart 1 is needed to establish the applicability of the part to specific types of control documents. These are types of control documents covering situations where “the identity of which individual waters may be impacted is not known when the control document is issued.”⁴⁵⁴ Item A refers to individual NPDES permits for MS4s; Item B to general NPDES permits; Item C to section 401 certifications; and Item D is a catch-all for other types of control documents that may develop that authorize degradation when changes in existing water quality are not reasonably quantifiable.

359. General authorizations are issued to permittees whose “operations, emissions, activities, discharges, or facilities are the same or substantially similar.”⁴⁵⁵ A general authorization is typically issued before it is known who will apply for coverage under it but it is expected that there will be numerous applicants: “[b]etween 2008 and 2012, the MPCA provided coverage under the NPDES general construction stormwater permit for an average of 2,023 permittees each year.”⁴⁵⁶

360. The Agency claims that it is unreasonable to undertake an assessment of existing water quality for each activity taken under a general permit because they are so numerous. Similarly, it is unreasonable to require the assessment of all the waters that

⁴⁵² *Id.*

⁴⁵³ Public Hearing Tr. at 160-64 (Mar. 31, 2016) (R. Neprasch).

⁴⁵⁴ SONAR at 72.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

MS4s discharge to because waters affected by discharges are so numerous. It is reasonable to avoid the costs of so many assessments if those costs outweigh the expected benefits from doing the assessments.

361. An additional concern expressed by MDOT was whether an individual statewide NPDES stormwater permits or certifications for statewide construction activities such as it might request would be considered a control document, and if so, whether the same antidegradation procedures as for other types of individual permits would be required.⁴⁵⁷ This concern arises because the Agency proposes that existing individual permits are subject to the antidegradation procedures where changes to existing water quality are reasonably quantifiable. A statewide permit would be more similar to a general permit in that the identity of the affected waters would not be known at the time of issuance. MDOT requests assurance that such permits or certifications would be eligible as “other control documents” under Item D.

362. The Agency responds that its definition of “control document” in proposed rule Part 7050.0255, Subpart 10 allows for new types of permits and certifications to be considered as control documents.⁴⁵⁸ This subpart is necessary and reasonable.

Subpart 2. Protection of Existing Uses

363. As in proposed rule Part 7050.0265, this subpart also requires that control documents “maintain and protect existing uses” as required by federal law. The Agency notes that, unlike 7050.0265, this part does not allow for compensatory mitigation which requires that water bodies be assessed on a case-by-case basis.

364. This subpart is necessary and it is reasonable not to allow compensatory mitigation when existing water quality cannot reasonably be measured. Without such measurements, whether a pollutant discharge would be compensated for could not be established.

Subpart 3. Protection of Beneficial Uses

365. This subpart provides that “the commissioner shall not issue a control document that would permanently preclude attainment of water quality standards.” This subpart is discussed in the parallel provision in Subpart 4 of proposed rule Part 7050.0265 above and is needed and reasonable.

Subpart 4. Protection of Surface Waters of High Quality

366. This subpart protects waters of high quality from degradation when existing water quality cannot be reasonably measured.

⁴⁵⁷ Comment by MDOT at 3 (Apr. 20, 2016).

⁴⁵⁸ MPCA Rebuttal Response to Comments at 7 (Apr. 27, 2016).

367. Class 2 surface waters not identified as impaired under section 303(d) of the CWA are considered to be of high quality on a parameter-by-parameter basis. Items B through E, the Tier 2 protections, apply to such waters.

368. Item B states that a control document will not be issued when prudent and feasible “prevention, treatment or loading offset alternatives exist that would avoid net increases in loading or other causes of degradation.” If such alternatives are not available, a control document shall only be issued if it “will prudently and feasibly minimize net increases in loading or other causes of pollution.”

369. Item C as modified by the Agency states:

The commissioner shall issue a control document that authorizes a net increase in loading or other causes of degradation only when the commission makes a finding that issuance of the control document is necessary to accommodate ~~accommodates~~ important economic or social change.⁴⁵⁹

This subpart was modified to correspond with the change made to Subpart 5 of proposed rule Part 7050.0265, and is equally within the scope of the rulemaking and does not make a substantial change to the rule.⁴⁶⁰

370. Item D requires that the 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.”

371. Item E requires that there be an “opportunity for intergovernmental coordination and public participation before issuing a control document that would result in net increases in loading or other causes of degradation.”

372. There are three significant differences between the Tier 2 protections in this part and those in Part 7050.0265. The first difference is in how high quality waters are identified. In Part 7050.0265, high quality waters are identified by measurements presented by the applicant and reviewed by the Agency. In Part 7050.0270, high quality waters are identified as Class 2 waters not designated as impaired under section 303(d) of the CWA. The Agency defends this as reasonable because “it is not realistic to make assessments of individual waters for each activity covered under the applicable control documents (e.g. general permits).”⁴⁶¹

373. The second difference is that, in Part 7050.0270, the standards are based on net increases in loadings or other causes of degradation and not degradation of water quality itself.⁴⁶² That is, degradation can be and is measured in situations in which

⁴⁵⁹ MPCA Response to Comments at 8-9 (Apr. 20, 2016).

⁴⁶⁰ Minn. Stat. § 14.05, subd. 2(b)(2).

⁴⁶¹ SONAR at 74.

⁴⁶² *Id.*

Part 7050.0265 is applicable whereas the premise of Part 7050.0270 is that such assessments cannot reasonably be made.

374. The third difference is in how the determination of importance is made. Under Part 7050.0265, the demonstration involves a comparison of the detriments of lowering water quality against the economic or social benefits resulting from the proposed activity. In situations under Part 7050.0270, the determination of the economic or social benefits must occur without the MPCA knowing which waters will be degraded or by how much.⁴⁶³

375. The Agency notes that Washington State adopted the same general approach to implementing antidegradation through general permits. The EPA approved Washington's approach.⁴⁶⁴ The Agency may also require individual permits when a general permit is not appropriate.⁴⁶⁵

376. This subpart is needed and reasonable.

Subpart 5. Protection of Restricted Outstanding Resource Value Waters

377. Subpart 5 is similar to Subpart 6 of Part 7050.0265. It also requires that control document conditions must ensure that the exceptional characteristics of ORVWs are maintained and protected. The need for and reasonableness of the two subparts is the same.

Subpart 6. Protection of Prohibited Outstanding Resource Value Waters

378. Subpart 6 is similar to Subpart 7 of Part 7050.0265. Whereas Subpart 7 of Part 7050.0265 requires the commissioner to prohibit a proposed activity that will cause a net increase in loading or other cause of degradation to a prohibited ORVW, Subpart 6 applies to a general permit. Consequently, the terms of the permit must prohibit a net increase in loading or other causes of degradation. This subpart is needed and reasonable with the same caveat as for Subpart 5 above.

Subpart 7. Protection Against Impairments Associated with Thermal Discharges

379. This subpart is identical to Subpart 8 of Part 7050.0265 and the same analysis applies to the determination of its need and reasonableness.

⁴⁶³ *Id.* at 74-75.

⁴⁶⁴ SONAR, Ex. 100 (*EPA Review of the 2003 Water Quality Standards for Antidegradation*, EPA Region 10 (May 2, 2007)).

⁴⁶⁵ SONAR at 75.

Rules Implementing Antidegradation Procedures

380. This section of the report provides a part-by-part review of the proposed rules establishing procedures for implementing the standards for prescribed in rule Parts 7050.0180 and 7050.0185 as well as setting out conditions exempting an activity from antidegradation procedures. Commenters raised a concern about the opportunity for public review and intergovernmental coordination with regard to the review of temporary exclusions, general permits, compensatory mitigation, and degradation of Class 7 waters that is most efficiently addressed at one time rather than in each rule.⁴⁶⁶ The proposed rules⁴⁶⁷ discussed below require public participation and intergovernmental coordination before:

- Allowing degradation of existing high quality water when changes in water quality are reasonably quantifiable, Part 7050.0265, Subpart 5D.
- Issuing a control document that would result in net increases in loading or other causes of degradation when changes in water quality are not reasonably quantifiable, Part 7050.0270, Subpart 4E.
- Issuing individual NPDES wastewater and individual NPDES stormwater permits for industry and construction, Part 7050.0280, Subpart 5.
- Issuing section 401 certifications of individual federal licenses and permits, Part 7050.0285, Subpart 5.
- Issuing individual NPDES permits for municipal separate storm sewer systems, Part 7050.0290, Subpart 5.
- Issuing a general NPDES permit, Part 7050.0290, Subpart 5.
- Identifying and establishing new ORVWs or changing the effective date of an ORVW, Part 7050.0335, Subpart 5.

381. The proposed rules do not eliminate the opportunities for public comment and further participation in the permit issuance process that exist in current rules. The antidegradation rules must be read in the context of all the rules applicable to the issuance of permits and certifications. Rule Part 7001.0100 provides for public notice of draft permits, rule Part 7001.0110 provides for a comment period; rule Part 7001.0120 allows parties to request that a public informational meeting be held; rule Part 7001.0125 provides for meetings with the commissioner by parties who have petitioned for a contested case; and rule Part 7001.0130 provides for contested cases.

382. The proposed rules do not separately identify tribal entities or governmental entities that should be involved in the antidegradation review process, and instead treat

⁴⁶⁶ See, e.g., Comment by WaterLegacy at 20-21 (Mar. 23, 2016).

⁴⁶⁷ Proposed rule Part 7050.0275 concerning exemptions from antidegradation procedures, unlike the other procedural rules, does not have an explicit requirement for public comment in intergovernmental coordination. However, the opportunity for comment comes through the public participation procedures for the issuance of the permit under Part 7001.0110.

all interested parties similarly. There are several policies that guide the Agency on communications with tribal entities.⁴⁶⁸ Water quality consultation guidance “requires the Agency to notify tribes of significant water quality actions involving permits and 401 certifications.”⁴⁶⁹

383. Minnesota Rules Part 7001.0100, Subpart 5(B) “incorporates by reference the requirements of Minn. R. 7001.0660, subp. C, which requires additional notification of certain local governments, federal and state agencies, and other officials for draft permits.”⁴⁷⁰

384. With regard to activities authorized under general permits, the Agency contends that it is not practical to perform an individual review of each application for coverage under a general permit and allow a 30 day public comment period. The Agency does issue a general 401 certification that accompanies each general section 404 permit and does provide public notice of its issuance.⁴⁷¹

385. There is a significant difference in scope between the MS4 General Permit and the general permits that have been developed for the Construction and Industrial Stormwater Programs. While the MS4 General Permit applies to a jurisdiction, the Construction and Industrial Permits apply to a specific site or facility. Therefore, the conditions of these permits are more directly tied to the actions that will be required at any construction site or industrial facility. The best management practices (BMPs) that each permittee will employ are more clearly prescribed by permit requirements and requiring an additional public noticing process for coverage under these general permits is unwarranted.

386. The commenter’s position is also unworkable given the large number of permittees which are covered under the construction and industrial general permits. The MS4 General Permit currently covers 233 permittees and significant MPCA staff resources are required to complete the individual review and public noticing of each of the applications submitted by these permittees.⁴⁷² For the Construction Stormwater Program, the MPCA typically processes permit coverage for about 2,000 construction sites a year. Standard procedures also require that the permittee for the construction project be issued coverage seven days after the permittees submit their application. Given the large number of permittees and the short timeline for extending coverage, it would be unrealistic to implement the process suggested by the commenter for these

⁴⁶⁸ According to the MPCA, consultation and coordination with tribal entities is required by Executive Order 13-10 for actions the Agency takes that may directly affect tribes. The MPCA has adopted a policy in compliance with the Executive Order. In addition, over the past year, the Agency and tribes have been developing more specific guidance on consultation on water quality actions. The draft water quality consultation guidance has received final review by the tribes and will be finalized by the Agency by the end of May 2016. The water quality guidance requires the Agency to notify tribes of significant water quality actions involving permits and 401 certifications. The Agency has already begun to implement this guidance. See MPCA Post-Hearing Response to Comments at 55 (Apr. 20, 2016).

⁴⁶⁹ MPCA Post-Hearing Response to Comments at 55 (Apr. 20, 2016).

⁴⁷⁰ *Id.* at 54.

⁴⁷¹ *Id.* at 56.

⁴⁷² MPCA Post-Hearing Response to Comments at 57 (Apr. 20, 2016).

construction sites.⁴⁷³ There are approximately 3,300 facilities covered by the Industrial Stormwater Permit. Having MPCA staff complete individual antidegradation determinations for each facility and the public noticing of each determination would be unrealistic.

387. The Administrative Law Judge concludes that the proposed rules provide adequate opportunity for public participation and intergovernmental coordination and are needed and reasonable.

7050.0275 Exemptions from Procedures

388. This part is needed to establish when antidegradation procedures do not apply. This proposed rule has two subparts.

Subpart 1. Class 7 Surface Waters

389. Class 7 surface waters are limited resource value waters as defined in Minn. R. 7050.0140, subp. 8, and as that description implies, these waters are valued only for limited uses. Class 7 waters are specifically listed in Minn. R. 7050.0470. They are to 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.”⁴⁷⁴

390. Subpart 1 of this rule exempts proposed activities resulting in a net increase in loading or other causes of degradation to a Class 7 surface water from proposed rule Parts 7050.0280 and 7050.0285, unless there is a reasonable risk of any items listed in A through D occurring. Proposed rule Part 7050.0280 establishes procedures for individual NPDES wastewater and stormwater permits for industrial and construction activities. Proposed rule Part 7050.0285 similarly establishes procedures for section 401 certifications of individual federal licenses and permits. That means that the exemptions are available only for these kinds of individual permits. An activity regulated under a general permit, for example, is not eligible for the exemptions proposed in this part.

391. Item A is the risk of “the loss of existing uses and the level of water quality necessary to protect those uses in Class 7 surface water and downstream surface waters.”⁴⁷⁵ The Agency proposed to modify this subpart with the addition of the underlined phrase to ensure protection of all existing uses, including existing uses downstream of the Class 7 water body where the proposed discharge(s) would occur. This modification is within the announced scope of the rulemaking and is not a substantial change in the context of this rulemaking.

392. Item B is the risk of permanently precluding attainment of water quality standards.

⁴⁷³ *Id.*

⁴⁷⁴ Minn. R. 7050.0140, subp. 8.

⁴⁷⁵ MPCA Response to Comments at 9 (Apr. 20, 2016).

393. Item C is the risk of degradation of downstream existing high water quality.

394. Item D is risk of degradation of downstream existing water quality essential to preserve the exceptional characteristics of ORVWs.

395. Under rule Part 7050.0185, which the Agency proposes be repealed, new or expanded discharges of more than 200,000 gallons per day to Class 7 waters are not subject to nondegradation procedures. Discharges under this magnitude are not considered significant.⁴⁷⁶ However, multiple *de minimis* emissions risk exhausting the assimilative capacities of the receiving waters or adding to accumulations of toxins that threaten existing uses. The proposed rule eliminates the *de minimis* exemption to antidegradation review for Class 7 waters and introduces three new categories of exemptions.

396. WaterLegacy proposed eliminating this proposed rule because it replaced *de minimis* exemptions that are allowed under federal regulations with a much broader set of exemptions.⁴⁷⁷ The Johnsons proposed the addition of “or in a water receiving Class 7 surface water” to Item A and adding to Item E the requirement to monitor the affected surface waters and the imposition of additional controls if degradation is worse than anticipated.⁴⁷⁸ WaterLegacy and the Fond du Lac and Grand Portage Bands shared a concern that this rule would shield from public review projects that degrade Class 7 waters.⁴⁷⁹

397. The Agency’s rejection of *de minimis* exemptions is reasonable. This rule better protects ORVWs (Tier 3) and high quality (Tier 2) waters than the existing rule by requiring antidegradation procedures when a proposed activity poses a risk to such waters.

398. Under existing rule Part 7050.0185, Subpart 3, the baseline for determining how degradation is to be minimized is the water quality standard necessary to sustain beneficial uses. Under the proposed rule, the baseline is existing water quality and not the water quality standard. This is reasonable because the goal of Tier 2 protection is to protect existing high quality water and not just the beneficial uses thereof. To the extent that existing water quality exceeds the standards necessary for its beneficial uses, this difference is important.

399. Items B to D are necessary because federal law provides only general guidance that high quality water may be lowered when “necessary to accommodate important economic or social development in the area in which the waters are located.”⁴⁸⁰

⁴⁷⁶ SONAR at 77.

⁴⁷⁷ Comment by WaterLegacy at 19-20 (Mar. 23, 2016).

⁴⁷⁸ Comment by Bruce and Maureen Johnson at 8-9 (Apr. 19, 2016).

⁴⁷⁹ Comment by WaterLegacy at 20 (Mar. 23, 2016); Comment by GP and FDL at 6 (Mar. 28, 2016).

⁴⁸⁰ 40 C.F.R. § 131.12(a)(2).

Subpart 2. Temporary and Limited Degradation

400. This subpart exempts proposed activities from Parts 7050.0280 and 7050.0285 procedures when the activities result in temporary and limited degradation of high quality water provided that the requirements of Items A to D are met.

401. Proposed rule Parts 7050.0280 and 7050.0285 presuppose that existing water quality and changes to existing water quality can be described in quantitative terms. Proposed rule Parts 7050.0290-.0315 concern situations where changes to water quality cannot reasonably be described in quantitative terms and consequently are not subject to a similar exemption.

402. Item A requires that the applicant request an exemption and include a variety of information, including: (1) the waters and uses of the water that will be harmed; (2) the parameters likely to cause the harm; (3) the length of time, not longer than one year, during which the water will be adversely affected; (4) a description of water quality at the time the exemption is requested and the alternatives considered to avoid and minimize net increases in loading or other causes of degradation; (5) why the selected alternative was chosen; (6) how the water will be restored to pre-activity conditions within 12 months of commencement; and (7) any long term impacts on existing uses.

403. MDOT stated that certain projects, such as bridge construction, could take longer than one year to complete and requested that the Agency modify its proposed subitem A(3) to allow case-by-case exceptions to the duration of an exemption.⁴⁸¹

404. The Agency argues that a specific time limitation creates consistency with Minn. R. ch. 7052 (2015) which governs “the discharge of bioaccumulative chemicals of concern (BCCs) in the Lake Superior basin, and with federal guidance.”⁴⁸² Further, the Agency believes activities extending beyond one year should be required to undergo antidegradation review.⁴⁸³

405. Item B requires the Commissioner to consider three sources of information before approving or denying the exemption: information submitted by the applicant; information on the cumulative effects on water quality from multiple temporary and limited exemptions; and other reliable information.

406. Item C requires the Commissioner to issue an exemption only when (1) existing uses, and the water quality necessary to protect them, will be maintained and protected; (2) “it would not cause a permanent deviation from an exceedance of water quality standards”; and (3) there is no prudent and feasible alternative that would avoid or minimize degradation.

⁴⁸¹ Comment by MDOT at 4 (Apr. 20, 2016).

⁴⁸² MPCA Rebuttal Response to Comments at 9 (Apr. 27, 2016).

⁴⁸³ *Id.* at 10.

407. The Agency modified Subitem C(2) as indicated in response to a clarification requested by the EPA. The EPA was concerned a “permanent deviation” could be understood to mean that adverse impacts from the temporary exemption could temporarily lower water quality, but not to the point where the applicable water quality standards were exceeded.⁴⁸⁴ The Agency agreed that the EPA’s suggestion better expressed its intent for this subitem.⁴⁸⁵

408. The Agency’s modification is within the scope of the rulemaking and it is not a substantial change in the rule. To protect and maintain the existing uses of a water body, the water quality standards for those uses must be maintained and protected.

409. Current rules do not provide for temporary and limited degradation while EPA guidance allows it for some limited activities that temporarily degrade ONRWs.⁴⁸⁶ The EPA recognizes that installation, maintenance, repair, and replacement of infrastructure facilities must be allowed even though such activities will temporarily disturb uses and lower water quality.⁴⁸⁷

410. The Agency has extended this concept of allowing temporary degradation of Tier 3 waters to Tier 2 waters as well. This is reasonable because if the most protected waters can have their water quality temporarily lowered, it is reasonable to permit the same for Tier 2 waters. The Agency notes that Indiana, Iowa, and Michigan also allow temporary degradation of Tier 2 and Tier 3 waters.⁴⁸⁸ It is not reasonable to require the Agency and applicants to undertake a full antidegradation review for impacts that will be minor and temporary.

411. This exemption applies to infrequently occurring activities, not frequently occurring ones. For example, maintenance dredging would not qualify for this exemption.⁴⁸⁹

412. This rule part requires an applicant to apply for an exemption before submitting a control document application. An opportunity for public comment regarding the temporary and limited exemption is provided under Minn. R. 7001.0100-.0110.

413. Both Subparts 1 and 2 of this rule are necessary. It is not practically possible to construct, maintain, and repair structures in, on, or adjacent to surface waters without affecting water quality. This rule allows for temporary and limited exemptions from antidegradation procedures for proposed activities that are short-term in nature and are not regularly recurring. The conditions for Class 7 water in Subpart 1 and high quality waters in Subpart 2 are reasonable.

⁴⁸⁴ Public Hearing Ex. I-6.

⁴⁸⁵ MPCA Response to Comments at 9 (Apr. 20, 2016).

⁴⁸⁶ SONAR at 79-80. Waters designated as prohibited OVRWs in Minnesota are the equivalent of ONRWs.

⁴⁸⁷ SONAR at 80.

⁴⁸⁸ SONAR at 82.

⁴⁸⁹ *Id.* at 83.

Minn. R. 7050.0280 Procedures of Individual NPDES Wastewater Permits and Individual NPDES Stormwater Permits for Industrial and Construction Activities

414. This part is needed to establish procedures for implementing antidegradation requirements through individual NPDES permits for regulated wastewater treatment, industrial stormwater and construction stormwater. The MPCA authorizes CWA section 402 NPDES permits pursuant to the legislative delegation in Minn. Stat. § 115.03, subd. 5.⁴⁹⁰ This rule establishes procedures for implementing the antidegradation standards of proposed rule Part 7050.0265 (antidegradation standards when changes in existing water quality are reasonable quantifiable). The activities regulated under this part involve situations where identities of the receiving waters are known and typically consist of a single or few surface waters, making it reasonable to combine review of applications for individual wastewater and individual construction and industrial stormwater permits in the same procedure.⁴⁹¹

Subpart 1. Antidegradation Procedures Required

415. The first subpart is needed to require antidegradation for new, reissued or modified individual NPDES permits for wastewater, construction stormwater, and industrial stormwater that the commissioner anticipates will result in increased loading or other causes of degradation to surface waters. For new activities, antidegradation review will always be triggered. For reissued permits, antidegradation review is triggered when anticipated loading or other causes of degradation exceed the maximum authorized in the existing permit. For NPDES permits for wastewater discharge, anticipated loadings are determined from numeric effluent limits and the design features of the treatment facility.⁴⁹²

416. As an initial matter, the Chamber asserts that it is a “non-trivial process” to compare “existing water quality to the anticipated water quality with the proposed activity is fully implemented . . . but [it] can be done by relying on relatively well established federal and state permitting processes and protocols.”⁴⁹³ However:

establishing the anticipated impact from proposed activities controlled by individual stormwater permits is extremely difficult given the episodic nature of stormwater runoff events and the variability of the ‘existing’ conditions at the time – for stormwater, the process and protocols for computing future water quality are not established by state or federal rule or guidance.⁴⁹⁴

The Chamber contends that if:

⁴⁹⁰ The NPDES is a federal program established to protect the nation’s waterways from regulated point sources. *Id.*

⁴⁹¹ *Id.*

⁴⁹² SONAR at 86.

⁴⁹³ Comment by Chamber at 4 (Apr. 20, 2016).

⁴⁹⁴ *Id.*

the requirements of an individual stormwater permit are at least as protective as the general permit, high water quality will be maintained and protected and the commissioner's antidegradation determination made for the general permit should also apply to those individual permits.⁴⁹⁵

417. The Agency notes that it has not previously issued individual construction stormwater permits, but could do so in the future.⁴⁹⁶ It has not been necessary to issue individual permits because, [s]ince January 1, 1994, all projects that have been eligible for coverage (approximately 40,000+) have been successfully covered under the general permit.⁴⁹⁷ But, should an occasion arise where a proposed activity does not qualify for a general permit, water quality changes from individual construction stormwater permits "can be broken down into temporary impacts during construction and post-construction impacts."⁴⁹⁸ The Agency explains that stormwater consultants and applicants are familiar with the tools and data available that can quantify existing and anticipated water quality.⁴⁹⁹ The Agency provides a link to the Minnesota Stormwater Manual web page entitled "Available stormwater models and selecting a model."⁵⁰⁰

418. Industrial stormwater discharges involve various pollutants, depending upon the specific industrial processes.⁵⁰¹ Individual industrial stormwater permits are only necessary when a proposed activity does not qualify for coverage under the general permit.⁵⁰² In that case, water quality changes from industrial facilities are reasonably quantifiable "because effluent characteristics can be estimated."⁵⁰³ In addition, "[m]ost, if not all, individual industrial stormwater permits contain some form of effluent monitoring to determine compliance with applicable rules and regulations."⁵⁰⁴ Changes in effluent characteristics can be estimated from anticipated changes at the facility so that water quality changes are reasonably quantifiable: "[e]ffluent data (or estimated effluent data), in conjunction with existing receiving water data, could be used to determine anticipated water quality impacts."⁵⁰⁵

419. The Agency anticipates that following the adoption of its proposed rules, there will be two individual industrial stormwater applications reviewed each year.⁵⁰⁶ The

⁴⁹⁵ *Id.*

⁴⁹⁶ SONAR at 83; MPCA Post-Hearing Response to Comments, Att. 1 at 52 (Apr. 20, 2016).

⁴⁹⁷ MPCA Post-Hearing Response to Comments, Att. 1 at 52 (Apr. 20, 2016).

⁴⁹⁸ *Id.* at 52-53.

⁴⁹⁹ MPCA Post-Hearing Response to Comments, Att. 1 at 53 (Apr. 20, 2016); MPCA Rebuttal Response to Comments at 15 (Apr. 27, 2016).

⁵⁰⁰ http://stormwater.pca.state.mn.us/index.php/Available_stormwater_models_and_selecting_a_model.

⁵⁰¹ SONAR at 90.

⁵⁰² MPCA Post-Hearing Response to Comments, Att. 1 at 51 (Apr. 20, 2016). The Agency explains the circumstances when a proposed activity would not qualify for a general industrial stormwater permit as follows: a facility is not eligible for a general permit, it exceeds the limitations on authorization for a general permit, or it does not qualify for some other reason. Some of the reasons why a general permit would not be applicable includes facilities that allow stormwater discharges to be mixed with other discharges.

⁵⁰³ MPCA Post-Hearing Response to Comments, Att. 1 at 51 (Apr. 20, 2016).

⁵⁰⁴ *Id.* at 52.

⁵⁰⁵ *Id.*

⁵⁰⁶ SONAR at 138, Table 2.

Agency notes that water pollution from stormwater discharges “is generally controlled through BMPs rather than numeric effluent limits.”⁵⁰⁷ Industrial stormwater discharges are similar in some ways to “wastewater facilities in that the discharges typically enter surface waters at relatively discrete locations and the facilities are owned and/or operated by a single entity.”⁵⁰⁸ In addition, such facilities discharge to relatively few surface waters, rendering the quantitative comparison of existing to anticipated water quality more readily performed.⁵⁰⁹

420. The Chamber’s objection to the quantitative comparisons required for individual construction and industrial stormwater permits seems sensible. However, the Agency’s responses indicate that the procedures it is proposing are workable as it reports having successfully implemented general permits for these kinds of activities. Where a proposed activity does not meet the requirements for a general permit, the Agency holds fast to insisting that the antidegradation procedures for individual permits must apply. The Agency has expertise in assessing water quality and in determining when changes in water quality can be reasonably quantified. Although determining changes in water quality for individual construction and industrial stormwater permits may not be easily accomplished, the purpose of these rules is to protect water quality and the Administrative Law Judge does not find this proposed rule to be unreasonable.

421. Current rule Part 7050.0185, Subpart 1 requires that high water quality be maintained and protected unless “a lowering of water quality is acceptable.” It permits *de minimis* discharges without considering the consumption of the water’s assimilative capacity.⁵¹⁰ This corresponds poorly to the EPA’s guidance, which is to use significance thresholds defined in terms of the receiving water’s assimilative capacity.⁵¹¹ The guidance defines “assimilative capacity” as “the difference between the applicable water quality criterion for a pollutant parameter and the ambient water quality for that pollutant parameter where it is better than the criterion.”⁵¹² Federal guidance urges states to establish caps on the use of assimilative capacity such that when that amount of assimilative capacity is consumed, antidegradation procedures are required regardless of how much assimilative capacity will be consumed by the proposed activity.⁵¹³

422. The current rule does not require antidegradation procedures for new or expanded discharges that do not increase daily flow rates by less than 200,000 gallons or do not increase the concentration of a toxic pollutant to a level greater than 1 percent over that consistently attained by January 1, 1988.⁵¹⁴ These significance thresholds do not consider the impact of a discharge on assimilative capacity or the impact of multiple

⁵⁰⁷ SONAR at 86.

⁵⁰⁸ SONAR at 151.

⁵⁰⁹ *Id.*

⁵¹⁰ SONAR at 15.

⁵¹¹ SONAR, Ex. 55.

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ SONAR at 16.

de minimis discharges.⁵¹⁵ Further, not all parameters that degrade high water quality have numeric standards. Significance thresholds are not easily applied where numeric water quality standards are lacking.⁵¹⁶ Further, the Agency might not have all of the data or resources necessary to measure the consumption of assimilative capacity in every water body.⁵¹⁷

423. The Administrative Law Judge agrees that the current rule does not adequately protect water quality from degradation from the accumulated impacts of *de minimis* discharges or from the effects of small increases in the concentration of toxic pollutants that may have substantially harmful impacts. The proposed rule is necessary to comply with federal guidance. It is reasonable to consider assimilative capacity and the impacts of pollutants for which there are no numeric limits in an antidegradation review.

Subpart 2. Applicant's Antidegradation Assessment

424. This subpart is needed to inform an applicant for a permit under this part of the information the applicant must submit for Agency review. Item A is "an analysis of alternatives that avoid net increases in loading or other causes of degradation through prudent and feasible prevention, treatment, or loading offsets." This places a burden on applicants to justify their chosen alternative to avoid net increases in loading or other causes of degradation.⁵¹⁸

425. Under Item A, applicants are not required to avoid degradation as that "would require an assessment of measurable changes to existing water quality."⁵¹⁹ The assessment of existing water quality is not necessary if the applicant can demonstrate that the alternative can avoid net increases in loading or other causes of degradation. If however, some increase in net loading or other cause of degradation is unavoidable, the applicant must provide an assessment of existing water quality.

426. Item A is necessary to implement federal antidegradation regulations by requiring a demonstration that a lowering of water quality is necessary as required by 40 C.F.R. § 131.12(a)(2). It is reasonable to require applicants to perform this analysis because they know the activity they propose to undertake best. The Agency notes that the EPA recommends this approach.⁵²⁰

427. Alternatives must be "prudent and feasible," a standard the Agency justifies because it "allows for considerations that are unique to a specific project and the

⁵¹⁵ The Agency cites several cases from other jurisdictions in which the use of significance thresholds for triggering antidegradation review have been rejected by courts. SONAR at 16.

⁵¹⁶ SONAR at 84.

⁵¹⁷ *Id.* at 85.

⁵¹⁸ Commenters' concerns with loading offsets is discussed above at Finding 237 and not further discussed here.

⁵¹⁹ SONAR at 91.

⁵²⁰ *Id.*

applicant's ability to implement alternatives that avoid or minimize degradation."⁵²¹ Proposed rule Part 7050.0255, Subpart 32 defines "prudent alternative" as "a pollution control alternative selected with care and sound judgment." A "feasible alternative" is defined in proposed rule Part 7050.0255, Subpart 17 as "a pollution control alternative that is consistent with sound engineering and environmental practices, affordable, and legal and that has supportive governance that can be successfully put into practice to accomplish this task."

428. The requirement of sound engineering practices means that alternatives must employ reliable technologies. The requirement of sound environmental practices means that alternatives are considered for their impacts on any part of the environment, and not only surface waters.⁵²²

429. The Agency also states that an applicant's ability to pay for an alternative will also be considered. An applicant has the burden of demonstrating that an alternative is unaffordable, which is a case specific determination.⁵²³ The EPA has not yet provided final guidance on the determination of affordability. The EPA's *Interim Economic Guidance for Water Quality Standards*, EPA (1995)⁵²⁴ provides procedures for public and private sector projects. For public projects, a determination should be made on the basis of average total pollution control cost per household, the community's debt-financing capacity, and the general economic health of the community.⁵²⁵ For private sector projects, the determination should be made upon the effect of the proposed alternative on profits and a full picture of the applicant's financial health.⁵²⁶

430. The qualification that an alternative be legal needs no comment. Supportive governance is required to ensure that the alternative is not thwarted by regulations, laws, or authoritative guidance that while not legally prohibiting the alternative, make its implementation difficult or impossible.⁵²⁷

431. Item A requires an applicant to evaluate the alternatives in terms of prevention, treatment, and loading offsets. It is more preferable not to release pollutants than to treat them after release, but if prevention alternatives are not prudent and feasible, then considering treatment is reasonable. Loading offsets "create addition[al] capacity for proposed loading," but the "reduction in loading must occur upstream of the proposed activity."⁵²⁸

⁵²¹ *Id.* at 40.

⁵²² *Id.* at 92.

⁵²³ *Id.*

⁵²⁴ SONAR, Ex. 97.

⁵²⁵ SONAR at 93.

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

432. Finally, the Agency intends to issue guidance on alternatives that may generally merit consideration with respect to certain kinds of facilities, e.g. wastewater treatment plants.⁵²⁹

433. Item B requires an assessment of existing uses and existing water quality if the “commissioner determines that there are no prudent and feasible alternatives to avoid net increases in loading or other causes of degradation” It is reasonable to place the burden to assess existing water quality on the applicant as the applicant will be most familiar with the characteristics and uses of the receiving water.⁵³⁰ The applicant must also assess existing water quality to determine if it is high quality, i.e. whether Tier 2 antidegradation protections apply.

434. If the parameter of concern is not of high quality, no further information on that parameter is required – the water is impaired for that parameter. If there is an EPA-approved TDML (Total Daily Maximum Load) for that parameter, the permit will contain conditions consistent with that. If there is no EPA-approved TDML, the proposed activity will not be allowed to contribute to the impairment.⁵³¹

435. If a parameter of concern is of high quality, the applicant must assess the existing water quality to establish a baseline from which degradation will be measured. Minnesota’s Class 2 waters generally represent high quality waters as water exceeding the level of quality necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.⁵³²

436. Item C provides that when net increases in loading or other causes of degradation are unavoidable, the applicant must submit additional information. Item C (1) requires 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.” Subitem C(2) requires a variety of information about the least degrading and feasible alternatives. Subitem C(3) requires that the limits authorized in the most recently issued control document be compared with the projected discharges, that projected water quality be compared with existing water quality. It also requires for the geographic area in which degradation is anticipated, a comparison of existing and expected economic conditions and social services. Subitem C(3) requires the use of the factors for assessing social and economic importance in Part 7070.0265, Subpart 5, Item B, Subitems (1)-(6).

437. The Agency explains that this rule makes clear the responsibilities of applicants and the MPCA. It is reasonable to require applicants to perform the analysis of alternatives because it is the applicant who is most familiar with the proposed activity and so is best able to provide this information.⁵³³

⁵²⁹ *Id.* at 94.

⁵³⁰ *Id.*

⁵³¹ *Id.* at 96.

⁵³² SONAR at 97.

⁵³³ *Id.* at 88.

438. Item A requires the applicant to identify alternatives that “avoid net increases in loading or other causes of degradation” through “prudent and feasible” means. Item B requires the applicant to provide information about existing uses and water quality when the commissioner finds “there are no prudent and feasible alternatives” that avoid such degradation. When the water body under consideration is of high quality, and there are no prudent and feasible alternative to avoid such degradation, the applicant must provide information of “prudent and feasible alternatives that minimize degradation through prudent and feasible” means, and additional information for the “least degrading prudent and feasible alternatives.”

439. MESERB states that Subpart 2 requires that an applicant implement an alternative that avoids degradation if the alternative is prudent and feasible. If there is no such alternative, the applicant must implement an alternative that minimizes degradation. MESERB objects to these provisions as being more stringent than federal regulations which allow implementation of alternatives that “prevent or lessen” degradation.⁵³⁴ MESERB asserts that:

'the least degrading prudent and feasible alternative' will generally equal the *most expensive alternative* and that because it is categorically required, this expense is not *necessarily* justified by ecological need, or a careful balancing of the variety of interests at stake.⁵³⁵ (Emphasis in original.)

MESERB is concerned to avoid a requirement in the rules that regulated entities must implement pollution control alternatives that could mandate the implementation of excessively costly pollution controls.

440. In proposed rule Part 7050.0255, Subpart 34, “prudent alternative” is defined as “a pollution control alternative selected with care and sound judgment.” Subpart 17 of Part 7050.0255 defines a “feasible alternative” as “a pollution control alternative that is consistent with sound engineering and environmental practices, affordable, legal, and that has supportive governance that can be successfully put into practice to accomplish the task.” The Agency disagrees that these proposed subparts require that the least degrading prudent and feasible alternative always be chosen regardless of other concerns. The Agency explains that the “prudent and feasible” standard for a pollution control alternative “creates a lot of latitude for cities . . . to be able to argue why in a particular case one alternative is not preferred over another.”⁵³⁶

441. As discussed above in Finding 207, the Agency has not provided a definition of “affordable.” A common understanding of the term is “ability to pay,” which the Agency states it will consider. The Agency places the burden on the applicant to prove a pollution control is not “affordable.”⁵³⁷ The Agency goes so far as to state that an “applicant will

⁵³⁴ Comment by MESERB at 2-3 (Apr. 20, 2016).

⁵³⁵ *Id.* at 3.

⁵³⁶ Public Hearing Tr. at 91 (Mar. 31, 2016) (W. Cole).

⁵³⁷ *Id.*

not be required to implement compliance alternatives that are not affordable.”⁵³⁸ The standard gives applicants latitude to make their case on whether in the applicant’s particular situation a pollution control is “affordable.” Affordable is not something the elements of which can be concisely described for all applicants in all situations, although certain types of facts may be relevant to many different categories of applicants. The Agency provides in Attachment 4 to its SONAR some guidance for what public sector facilities should consider, but the costs remain largely situation specific.⁵³⁹ It is clear that the standard of “prudent and feasible” involves balancing a number of concerns – that is what the exercise of care and sound judgment involves in considering the concerns of sound engineering, sound environmental practices, affordability, legality, and supportive governance.

442. MESERB’s desire to more definitively constrain the costs a community might be required to bear to implement pollution controls is entirely understandable, but given the wide variety of factors to be considered, and the great differences in how those factors apply to Minnesota’s many and varied communities, including the extent of degradation and the uses of the waters at stake, it is not unreasonable for the Agency to rely upon a general standard to guide what must be a case-by-case determination.

443. In the SONAR, the Agency explains that antidegradation review will be limited to parameters of concern. “Parameter” is defined in proposed rule Part 7050.0255, Subpart 28, as “a chemical, physical, biological or radiological characteristic used to describe water quality conditions.” The parameters of concern are different for each Tier of antidegradation review. For Tier 1, the parameters of concern are those that present risks for the loss of existing uses.⁵⁴⁰ For Tier 2, the parameters that present risks to aquatic life and recreation (e.g. Class 2 numeric or narrative standards).⁵⁴¹ For Tier 3, the parameters of concern are those that present risks to degrading the exceptional characteristics of the ORVW.⁵⁴²

444. The Agency defends limiting antidegradation review to parameters of concern on a number of grounds. It is most efficient to focus limited resources on the parameters that pose the greatest risk. Requiring an assessment of every parameter that could potentially affect water quality would require extensive resources. It is better to devote those resources to analyzing alternatives.⁵⁴³ In addition, parameters of concern are identified by the characteristics of the discharge and the characteristics of the receiving surface water, for example, its assimilative capacity for relevant effluents.⁵⁴⁴ The alternatives analysis should focus on parameters of concern and not on parameters where there is little anticipated impact or substantial assimilative capacity. The selection

⁵³⁸ MPCA Rebuttal Response to Comments at 18 (Apr. 27, 2016).

⁵³⁹ *Id.*

⁵⁴⁰ SONAR at 88.

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ *Id.* at 89.

⁵⁴⁴ *Id.*

of the parameters that will be reviewed is subject to public comment.⁵⁴⁵ The SONAR gives examples of parameters of concern based on the type of regulated activity.

445. The antidegradation assessment that the Agency proposes an applicant undertake and submit with its application is reasonable.

Subpart 3. Antidegradation Review

446. This subpart is needed to describe the information the Commissioner will consider in an antidegradation review, which consists of the information presented under Subpart 2 and “other reliable information.” The purpose of the review is to determine if the proposed activity satisfies Part 7050.0265. If in the Commissioner’s judgment the antidegradation standards will not be satisfied, the Commissioner must provide the applicant with a written notice of the application’s deficiencies and recommendations as to how the applicant might satisfy the antidegradation standards.

447. This subpart is also necessary because it describes how the Commissioner will evaluate the information in the application. It is reasonable for the evaluation to consider reliable information along with information provided by the applicant and it is reasonable for the commissioner to notify the applicant of any shortcomings to allow the applicant to cure and defects and to make the process of review more transparent.⁵⁴⁶

Subpart 4. Preliminary Antidegradation Determination.

448. Based upon the review in Subpart 3, the Commissioner will prepare a written preliminary antidegradation determination on whether the proposed activity will satisfy the requirements of Part 7050.0265. The preliminary antidegradation determination must accompany the Commissioner’s preliminary determination of whether to issue or deny a permit in compliance with Part 7001.0100.⁵⁴⁷ This subpart is needed to explain the first step of the commissioner’s permit review process.

449. Minnesota Rules Parts 7001.0090-.0210 (2015) are concerned with the process for issuing permits. To understand how antidegradation review fits into the processes of permit review and issuance, an overview of these rules is helpful.

450. In preparing the preliminary review and draft permit, Subpart 3 of rule Part 7001.0100 requires the Commissioner to prepare a fact sheet for each draft permit. The fact sheet “must set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit.”⁵⁴⁸ Subpart 3 lists a number of concerns the fact sheet must address such as a description of the proposed facility or activity, the type and quantity of pollutants that will be involved,

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.* at 100.

⁵⁴⁷ SONAR at 100. Minn. R. 7001.0100 (2015) establishes the general requirements for the preliminary determination on whether to issue or deny any permit.

⁵⁴⁸ Minn. R. 7001.0100, subp. 3.

and the procedures for reaching a final decision on the draft permit which includes a period for public comment and procedures for requesting a public meeting or contested case.⁵⁴⁹

451. Subpart 4 of rule Part 7001.0100 requires public notice of the permit application and the preliminary determination and a 30-day public comment period. Also included in the notice are procedures for requesting a public meeting or a contested case hearing. Rule Part 7001.0110 governs the submission of written public comments. Rule Part 7001.0120 provides that the Commissioner shall hold a public informational meeting if it would help clarify and resolve issues concerning the draft permit or if requested. A petition for a contested case hearing on a permit must be submitted during the public comment period.⁵⁵⁰ In deciding whether to grant a petition for a contested case hearing, the Agency must consider whether there is a disputed issue of material fact with respect to the draft permit that a contested case would develop evidence to resolve.⁵⁵¹ The Agency shall hold a public informational issue if it denies a request for a contest case hearing.⁵⁵²

452. The preliminary antidegradation provisions are reasonable because they rely on existing rules that the regulated community is familiar with.

Subpart 5. Opportunity to Comment

453. When the Commissioner issues the preliminary antidegradation determination, the Commissioner shall also issue the public notice required under subpart 4 of 7001.0100 and provide opportunity for comment on the preliminary determination. This subpart is necessary to provide an opportunity for public comments.⁵⁵³ Federal regulations at 40 C.F.R. § 131.12(a)(2) require the “full satisfaction” of the “intergovernmental coordination and public participation provisions of the State’s continuing planning process” in the states’ antidegradation review process.

454. The Agency proposes to meet the requirement for intergovernmental coordination and public comment by utilizing procedures in existing rules which have proven to be an effective way of receiving comments.⁵⁵⁴ The rules allow any interested party to comment and requires the delivery of notices to all persons who have registered on the mailing list established under Part 7001.0200, which includes government agencies which have an interest in MPCA’s permit issuances.⁵⁵⁵

⁵⁴⁹ Minn. R. 7001.0100, subps. 3A, B, G.

⁵⁵⁰ Minn. R. 7000.1800 subp. 1A (2015).

⁵⁵¹ Minn. R. 7000.1900, subp. 1 (2015).

⁵⁵² Minn. R. 7001.0130, subp. 2 (2015). Minnesota Rules Parts 7000.1750, .1800 (2015) govern contested case hearings.

⁵⁵³ SONAR at 101.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*; Minn. R. 7001.0100, subp. 5B.

455. Criticisms of the public participation and intergovernmental coordination provisions were discussed above beginning at Finding 135. For the reasons given there, this subpart is reasonable.

Subpart 6. Final Antidegradation Determination

456. This subpart is needed to ensure that the opportunity for public comment is meaningful. Before the Commissioner issues a final determination on a permit application, the Commissioner must consider all comments received under Subpart 5. The final determination must include a statement as to why the proposed activity complies with, or fails to comply with, antidegradation standards in Part 7050.0265. The final antidegradation determination is to be included with the Commissioner's final determination on issuance of the permit under Minn. R. 7001.0140.

457. It is necessary to issue a final antidegradation determination that informs the applicant, the public, and other governmental entities of the outcome of an application. It is reasonable for the final antidegradation determination to accompany the determination on the issuance of the permit.

Proposed Rule Part 7050.0285. Procedures for Section 401 Certifications of Individual Federal Licenses and Permits

458. As previously noted, section 401 of the CWA requires anyone who seeks to obtain a federal license or permit for an activity that may result in a discharge to waters of the United States to obtain a section 401 certification to ensure the activity will comply with the state's water quality standards.⁵⁵⁶ EPA guidance specifically requires states to apply antidegradation requirements to any activity that requires a permit or a water quality certification, such as a section 401 certification.⁵⁵⁷ Consequently this rule part is needed to fulfill the federal requirement that section 401 permits comply with Minnesota's water quality rules.

459. The "vast majority of federal licenses and permits for which section 401 actions are taken by the MPCA are CWA section 404 dredge and fill permits issued by the ACE [Army Core of Engineers]."⁵⁵⁸ Other types of federal licenses and permits that require MPCA review and certification under section 401 are hydropower projects, Rivers and Harbors Act permits, and other permits issued by the ACE or the Coast Guard.⁵⁵⁹

Subpart 1. Antidegradation Procedures Required

460. This subpart explains that this rule part applies to section 401 certifications of new, reissued, or modified individual federal licenses and permits that the Commissioner anticipates will result in net increases in loading or other causes of

⁵⁵⁶ *Id.* at 101.

⁵⁵⁷ *Id.* at 102.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

degradation. It is needed to describe the circumstances that trigger antidegradation procedures when the Agency considers section 401 certifications. The trigger is the same for section 401 certifications as it is for individual NPDES wastewater permits and NPDES permits for construction and industrial stormwater and is needed and reasonable for the same reasons (7050.0280).

Subpart 2. Applicant's Antidegradation Assessment

461. This subpart requires an applicant to provide the information required of applicants for individual NPDES permits under Part 7050.0280, Subpart 2, "unless the applicant is notified that the commissioner is waiving the agency's authority to certify the federal license or permit under part 7001.1460, subp. 2." The applicant:

may also propose compensatory mitigation ~~for the loss~~ to preserve existing uses and the level of water quality necessary to protect the existing uses resulting from physical alterations allowed by the Clean Water Act. In such cases, the applicant must provide a proposed compensatory mitigation plan that includes: items A to E.⁵⁶⁰

462. The modification proposed by the Agency for the definition of "compensatory mitigation," to replace the phrase "loss of existing uses" with "preserve existing uses" is also made here to conform to the modified definition. The "Clean Water Act" is added to clarify that compensatory mitigation is only allowable for the physical alterations the Act permits. The addition of "proposed" to "compensatory mitigation plan" clarifies that the burden is on the applicant to propose compensatory mitigation. As with the parallel subpart in Part 7050.0280, this subpart is needed and reasonable. These modifications are within the scope of the rulemaking and do not substantially change this subpart.⁵⁶¹

463. Item A requires a description of existing uses and the water quality necessary to protect existing uses for the surface water that will be physically altered. Item B. requires the same for the surface waters where the mitigation will occur.

464. Item C requires a description of how the mitigation will fully replace existing uses and the water quality necessary to protect existing uses. The Agency proposed a clarifying modification of its proposed language:

C. a description of how compensatory mitigation will ~~fully replace~~ establish sufficient quality and quantity of uses to preserve existing uses and the level of water quality necessary to protect existing uses.⁵⁶²

This modification is essentially the same modification that was made to Subpart 3, Item A, Subitem 2 of proposed rule Part 7050.0265 and clarifies what is required to qualify as a

⁵⁶⁰ MPCA Post-Hearing Response to Comments at 10 (Apr. 20, 2016).

⁵⁶¹ Minn. Stat. § 14.05, subd. 2(b)(2).

⁵⁶² MPCA Response to Comments at 10 (Apr. 20, 2016).

compensatory mitigation. Criticisms of the Agency's compensatory mitigation policy are discussed above beginning at Finding 173.

465. Item D requires a proposal from the applicant for monitoring and reporting changes in existing uses and the level of water quality necessary to protect existing uses of the surface waters where the mitigation will occur.

466. Item E is an additional modification to the originally proposed rule that reads: "E. a description of how the compensatory mitigation will be maintained."⁵⁶³ This modification is within the scope of the rulemaking and is not a substantial change to the rule.⁵⁶⁴ A compensatory mitigation that is not maintained ceases to preserve existing uses. The Commissioner must know how the mitigation will be maintained to meet federal regulations.

467. It is necessary to make an antidegradation assessment and it is reasonable to require applicants to provide the same information as is required in the context of individual NPDES permits under rule Part 7050.0280. The additional information required if approval of compensatory mitigation is sought is also necessary for the determination of if it should be allowed and, if allowed, how the mitigation is to be maintained.

468. Subpart 2 also provides an exception to the applicant's requirement to provide the requested information in circumstances that the Agency waives its authority to certify the federal license or permit under Minn. R. 7001.1460 (2015). This latter part provides that the Agency waives its authority to issue a 401 certification if it notifies the applicant in writing of its waiver (or in the case of a conditional waiver, of the conditions) or if it fails to make a final determination after one year. In such circumstances, it is reasonable to not require the submission of information that the Agency will not consider.

469. The fact that the Agency can waive its authority to issue a section 401 certification raises concerns as to under what circumstances the Agency will choose to do so, as it would seem that when the Agency waives its authority there will be no application of state antidegradation standards.⁵⁶⁵ One commenter is troubled that the MPCA has unbounded discretion to waive its authority and proposes that this discretion must be limited to bar arbitrary Agency waivers that undermine antidegradation policy.⁵⁶⁶

470. That the Agency may waive its section 401 authority does not render its other section 401 certifications ineffective as control documents. It does raise the question of under what circumstances will the Agency waive its authority. The Agency notes:

⁵⁶³ MPCA Response to Comments at 10 (Apr. 20, 2016).

⁵⁶⁴ The EPA recommended this language be added to Part 7050.0285, Subpart 2 to "ensure that existing uses truly are preserved" Public Hearing Ex. I-6.

⁵⁶⁵ Comment by Randy Johnson at 1 (Apr. 27, 2016).

⁵⁶⁶ *Id.*

[a] waiver does not mean the Agency has reviewed the facts pertaining to a proposed project. As stated in the interim Clean Water Action Section 401 guidance from EPA, ‘Under the CWA, waiver does not indicate a state or tribe’s substantive opinion regarding the water quality implications of a proposed activity or discharge. A state or tribe may waive certification for a variety of reasons, including a lack of resources to evaluate the application Waiver merely means the federal permitting or licensing agency may continue with its own application evaluation process and issue the license or permit in the absence of an affirmative state or tribal certification.’⁵⁶⁷

471. The proposed rules do not change the Agency’s ability to waive section 401 certifications, which is given by statute. The record contains little information from which to assess when and under what circumstances the Agency waives its authority. WaterLegacy proposes that language be adopted clarifying the “process and basis for waiver.”⁵⁶⁸ WaterLegacy’s proposal is to revise Subpart 2 to read:

The commissioner may make a determination to waive the agency’s authority to certify a federal license or permit based on a reasonable analysis of agency policy and facts pertaining to the proposed project. In addition to providing notice to the applicant, the commissioner shall provide notice pursuant to part 7001.1440, subp. 1 of the grounds and decision to waive certification.

472. The Agency did not provide a specific response to the issue of limiting its discretion to waive section 401 certification authority. The Agency’s authority to waive section 401 certifications is not changed by the proposed rules nor are the provisions under which the Agency has certification authority addressed. It would be concerning if the Agency abused its discretion to waive its authority. The evidence in the record is that prior to 2007, the Agency waived its authority for the majority of section 401 actions because it was understaffed but there is no evidence of more recent waivers or the reasons for them.⁵⁶⁹ In any event, the Agency’s authority to waive its certification authority is given by statute and is not a subject of this rulemaking.

473. Under rule Part 7050.0280, Subpart 2, the applicant’s antidegradation assessment must be part of its written application for a permit. That is not the case under proposed rule Part 7050.0285 because the application is filed with the permitting or licensing federal agency.⁵⁷⁰ It is necessary to obtain the information relating to the proposed activity’s potential harms and an analysis of feasible alternatives to avoid or minimize harmful effects as well as to evaluate any compensatory mitigation proposal.

⁵⁶⁷ MPCA Rebuttal Response, Att. 1 at 16 (Apr. 27, 2016).

⁵⁶⁸ Comment by WaterLegacy at 7 (Apr. 20, 2016).

⁵⁶⁹ SONAR, Att. 2d, note at 8.

⁵⁷⁰ SONAR at 104.

474. This detailed information and analysis will not be requested of applicants seeking coverage under a general permit unless antidegradation review is triggered. The information will be required of applicants for individual permits.⁵⁷¹

475. MDOT observed that a compensatory mitigation plan could be extremely challenging and time consuming to implement. For example, MDOT noted that a miles long road project could impact numerous surface waters and thereby create a need to make dozens of assessments.⁵⁷²

476. The Agency responded that compensatory mitigation plans could vary widely in complexity. The information needed to assess projects with multiple smaller impacts might only consist of “wetland delineation, description of the types of wetlands impacted, and a description of the mitigation”⁵⁷³ It recommended that MDOT “continue to provide information on impacts and mitigation as they have been to date, and the MPCA will ask for additional information if needed.”⁵⁷⁴

477. It is reasonable for the applicant’s antidegradation assessment to include these various elements. In light of the variety of surface waters and potential activities, it would not be reasonable for the Agency to provide specific direction to applicants on the information required for every possible situation.

Subpart. 3. Antidegradation Review

478. As in Subpart 3 of proposed rule Part 7050.0280, this subpart is needed to establish the information on which the Commissioner’s antidegradation review will be based. It is reasonable to base the review on the information submitted by the applicant and other reliable information. Unlike Subpart 3 of Subpart 7050.0280, this subpart does not require the Agency to issue written notice to the applicant when it finds the antidegradation standards cannot be satisfied because the Agency instead places conditions on the license or permit to ensure antidegradation standards are satisfied.⁵⁷⁵

Subpart 4. Preliminary Antidegradation Determination

479. This subpart is substantially similar to Subpart 4 of proposed rule 7050.0280. It is necessary and reasonable for the same reasons.

Subpart 5. Opportunity for Comment

480. The need for and reasonableness of an opportunity for public comment is the same as for Subpart 5 of proposed rule Part 7050.0280. In this instance, the Agency cannot rely on the federal authority’s public notice because it is generally issued at the

⁵⁷¹ *Id.*

⁵⁷² Comment by MDOT at 4 (Apr. 20, 2016).

⁵⁷³ MPCA Rebuttal Response to Comments at 10 (Apr. 27, 2016).

⁵⁷⁴ *Id.*

⁵⁷⁵ SONAR at 106.

time of the application and prior to the Agency's review of the proposed activity. Given only the federal notice, the public would be unable to comment on whether the proposed project satisfied antidegradation provisions. Federal regulations require the Agency to make a finding that lowering of high water quality is necessary to accommodate important economic or social development only after the public has had an opportunity to comment.⁵⁷⁶

481. Accordingly, it is necessary for the Commissioner to distribute a public notice of its preliminary antidegradation determination and it is reasonable to issue it together with its preliminary determination on granting a 401 certification.

Subpart 6. Final Antidegradation Determination

482. This subpart is identical to Subpart 6 of proposed rule Part 7050.0280 except that, in this part, the final antidegradation determination is issued with the final decision on the issuance of the section 401 certification under Part 7001.1450. In Part 7050.0280, Subpart 6, the final antidegradation determination is issued with the final permit determination in Part 7001.0140.

483. The need and reasonableness of this part is the same as for Subpart 6 of Part 7050.0280.

Proposed Rule Part 7050.0290. Procedures for Individual NPDES Permits for MS4s

484. This part implements antidegradation provisions through the issuance of individual NPDES permits for municipal separate stormwater activities. It is needed because MS4s have uniquely distinctive characteristics.

Subpart 1. Antidegradation Procedures Required

485. The procedures in this part apply to new, reissued, or modified individual NPDES permits for M4Ss that the Commissioner anticipates will result in net increases in loading or other causes of degradation. As with other procedures for antidegradation, this subpart is needed to identify the specific circumstance that triggers the review, which is an anticipated increase in net loading or other causes of degradation just as in the proposed procedures for other control documents.⁵⁷⁷

486. Because M4S permits involve the discharge of stormwater to multiple surface waters, a question arises as to whether the trigger should be an anticipated increase in net loadings or other cause of degradation as measured on an aggregate basis or as measured separately for each individual surface water that is affected. The Agency chose the latter as more in keeping with the intent of antidegradation policies to

⁵⁷⁶ 40 C.F.R. § 131.12(a)(2).

⁵⁷⁷ SONAR at 108.

protect individual surface waters.⁵⁷⁸ Therefore, antidegradation procedures are invoked for any net increase in loading or other cause of degradation for any surface water within the municipality's jurisdiction. The Administrative Law Judge finds this part to be reasonable.

Subpart 2. Applicant's Antidegradation Assessment

487. This subpart is similar to the assessment requirements found in the two previous procedures: procedures for individual NPDES wastewater and individual NPDES for construction and industrial stormwater; and procedures for section 401 certifications.

488. In this rule part, applicants are directed to analyze "prudent and feasible prevention, treatment, or loading offset alternative that avoid or minimize net increases in loading or other causes of degradation to high water quality."⁵⁷⁹ The phrase "minimize net increases" is used because existing water quality and impacts to existing water quality are not reasonably quantifiable with regard to the waters affected by M4S systems.⁵⁸⁰

489. Item A requires applicants to list the Class 2 waters identified as impaired and the ORVWs within their jurisdictions. This is reasonable so that permit conditions may be developed that avoid net increases in loading. Conditions for water of high quality will need to ensure that any increases in loadings are minimized to the extent prudent and feasible.⁵⁸¹

490. Item B requires applicants to list the ORVWs within their jurisdiction. This is reasonable as permit conditions relating to ORVWs will need to protect and maintain the exceptional characteristics of such waters.⁵⁸²

491. Item C requires applicants to identify prudent and feasible prevention, treatment, or loading offset alternatives that avoid or minimize net increases in loading or other causes of degradation."

492. Item D requires applicants to also identify the prudent and feasible alternatives that "result in the least net increase in loading or other causes of degradation to high water quality" These provisions are reasonable as they will assist the Agency in determining whether increased loading is necessary.⁵⁸³

493. Item E requires applicants to evaluate whether the increased loading will accommodate important economic or social development in the area in which high water quality degradation is reasonably expected. Applicants are not asked to assess existing water quality because of the impracticality of taking measurements where very large

⁵⁷⁸ *Id.*

⁵⁷⁹ Proposed Rule Part 7050.0290, Subpart 2C.

⁵⁸⁰ SONAR at 109.

⁵⁸¹ SONAR at 109.

⁵⁸² *Id.*

⁵⁸³ *Id.*

numbers of surface waters are covered by a single control document.⁵⁸⁴ While measuring water quality is impractical, net increases in loading or other causes of degradation are only permissible to accommodate important economic or social development, rendering an evaluation of these impacts necessary. It is reasonable for the applicant to provide this evaluation as the applicant best knows the needs the proposed activity will serve.

Subpart 3. Antidegradation Review

494. This subpart requires the Commissioner to conduct an antidegradation review on the basis of the information supplied by the applicant and other reliable information. It is essentially similar to the antidegradation review under proposed rule Part 7050.0280 except that instead of determining whether the antidegradation standards under proposed rule Part 7050.0265, Subpart 3 are satisfied, the applicable standards are supplied by proposed rule Part 7050.0270 because making individual water quality assessments is not reasonable practical.⁵⁸⁵

495. An antidegradation review is necessary to comply with federal regulations and it is reasonable to have standards that do not require water quality assessments on receiving waters when there are so many as to render the task impractical.

Subpart 4. Preliminary Antidegradation Determination

496. This subpart is very similar to Subpart 4 in proposed rule Part 7050.0280. As noted previously for this proposed rule, the antidegradation standards are found in proposed rule Part 7050.0270 rather than in Part 7050.0265. It is necessary for the Commissioner to make a preliminary determination on whether antidegradation standards are met and it is reasonable to do so at the same time as the Commissioner makes a preliminary determination on permit issuance.

Subpart 5. Opportunity for Comment

497. This subpart is identical to Subpart 5 in proposed rule Part 7050.0280. An opportunity for public participation is required in antidegradation proceedings pursuant to 40 C.F.R. § 131.12(a)(2). It is reasonable for the notice to concern both the preliminary antidegradation and permit issuance determinations.

Subpart 6. Final Antidegradation Determination

498. This subpart also closely corresponds to the parallel provision in proposed rule Part 7050.0280, Subpart 6, with the exception that the standards in proposed rule Part 7050.0270 apply rather than the standards in Part 7050.0265.

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.* at 109-110.

499. It is necessary to make a final determination on antidegradation and reasonable to make the determination contemporaneously with the commissioner's final decision on the issuance of the permit.

Proposed Rule Part 7050.0295. Procedures for General NPDES Permits.

500. General NPDES permits are issued to permittees "whose operations, emissions, activities, discharges, or facilities are the same or substantially similar."⁵⁸⁶ The reason for issuing general permits is primarily administrative efficiency in permitting large numbers of similar applicants. This rule is necessary to implement antidegradation procedures for such permits. It is reasonable to implement antidegradation procedures in the permitting process and it is reasonable for this rule's subparts to parallel the rules proposed for implementing antidegradation review in other proposed permit issuance processes.

Subpart 1. Antidegradation Procedures Required.

501. As with the rules proposed of other types of permits, this subpart identifies the same trigger for antidegradation review for general permit applications, i.e. whether the Commissioner anticipates that a proposed activity will result in net increases in loading or other causes of degradation to surface waters.⁵⁸⁷

502. The need and reasonableness of this subpart is the same as in the other proposed rules for conducting an antidegradation review in the permitting process.

Subpart 2. Antidegradation Review.

503. The subpart is needed to require that the commissioner conduct an antidegradation review during the development of general permits. The purpose of the review is to develop permit conditions that will satisfy the antidegradation standards in 7050.0270 which is necessary to comply with federal law.

504. The process for general permit applications does not require applicants to provide antidegradation assessments. It is impractical to require each applicant seeking coverage under a general permit to prepare, and the MPCA to review, each antidegradation assessment. The Agency notes that between 2008 and 2012, the NPDES general construction stormwater permit covered an average of 2023 permittees each year.⁵⁸⁸

505. The Agency must analyze the pollution control measures that will avoid or minimize net increases in loadings or other causes of degradation. It is reasonable for the Agency to undertake this task because "it fits well with current permit development

⁵⁸⁶ SONAR at 111.

⁵⁸⁷ *Id.*

⁵⁸⁸ SONAR at 111.

practices.”⁵⁸⁹ The Agency currently practices adaptive management whereby it evaluates the effectiveness of control measures over permit cycles. Effective control measures continue to be applied in subsequent permits while ineffective measures are dropped.⁵⁹⁰ Knowledge about pollution control practices increases over time and the Agency can implement improvements in pollution controls due to this evolved knowledge during the permit cycle.

506. To comply with the antidegradation standards, the Agency must complete an alternative analysis either under Minn. R. 7050.0265 or 7050.0270 (2015). BMPs are frequently employed in stormwater permits to protect water quality, but other methods may also be employed such as the development of effective design standards as authorized by Minn. Stat. § 115.03, subd. 5c(c). The Agency has been working on developing Minimal Impact Design Standards with a number of other parties.

507. The Agency does not know what waters will be affected when it establishes the conditions for a general permit. Nonetheless, the Agency must evaluate the benefits of issuing a general permit and the types of activities it covers. The Agency has the ability to require individual permit coverage when it determines a general permit is not appropriate under Minn. R. 7001.0210, subp. 6.

508. It is reasonable to have the Agency conduct an alternative analysis in developing the conditions of a general permit as the Agency can do so in light of its experience with issuing similar permits in the past.

Subpart 3. Preliminary Antidegradation Determination

509. Under this subpart, the Agency must prepare a written preliminary antidegradation determination as to whether the general permit conditions will satisfy the antidegradation standards in proposed rule Part 7050.0270. This subpart further provides that this written determination must be included in the Agency’s fact sheet according to rule Part 7001.0100, Subpart 3.

510. The preliminary determination is necessary and reasonable because it provides persons interested in the issuance of a general permit with the information they need to comment upon it, and federal and state regulations require that the public has the information necessary to afford a meaningful opportunity to comment.

Subpart 4. Opportunity for Comment

511. This subpart requires the Commissioner to include the preliminary antidegradation determination with the public notice of intent to issue a general permit according to 7001.0210, subp. 4.

⁵⁸⁹ *Id.* at 112.

⁵⁹⁰ *Id.*

512. This subpart is similar to the provisions for public notice for individual NPDES permits found at 7050.0280 and 7050.0290. It is necessary to allow for public participation to comply with federal regulations and distributing the notice with the notice of the general permit's prospective issuance is reasonable.⁵⁹¹

Subpart 5. Final Antidegradation Determination

513. This subpart requires the commissioner to consider comments received before preparing a written final antidegradation determination. It is similar to the provision for final antidegradation determinations for individual NPDES permits for municipal stormwater in proposed rule Part 7050.0290, Subpart 6, as both types of permits must satisfy the antidegradation standards proposed in rule Part 7050.0270.⁵⁹²

514. It is necessary for the Commissioner to make a final decision on whether the proposed general permit satisfies the applicable antidegradation standards, and reasonable to require the Commissioner to consider public comments before doing so.

Subpart 6. Further Antidegradation Procedures Not Required

515. Except as provided for in proposed rule Part 7050.0325 (Procedures for Multiple Control Documents), if the Commissioner's final determination is that the proposed general permit will achieve the antidegradation standards specified in Part 7050.0270, further antidegradation procedures are not required when a person seeks coverage under a general permit and certifies that the permit conditions can and will be met.⁵⁹³

516. If a proposed activity is covered under another control document where assessments to existing water quality are reasonable, then the proposed activity will be considered under the more protective standards of Part 7050.0265.⁵⁹⁴ It is necessary and reasonable to impose standards that require assessments of water quality if the assessments are themselves reasonably practical to accomplish.

Proposed Rule Part 7050.0305. Procedures for Section 401 Certifications of General Section 404 Permits

517. This part is needed to implement the antidegradation requirements for section 401 certifications of section 404 general permits. As noted above, section 404 of the CWA concerns permits for the discharge of dredged or fill material into the navigable waters of the United States. Section 404 of the CWA authorizes ACE to issue general permits for states, regions, or the entire nation, provided that the activities allowed under the general permit "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect

⁵⁹¹ SONAR at 114.

⁵⁹² *Id.*

⁵⁹³ SONAR at 114.

⁵⁹⁴ *Id.*

on the environment.”⁵⁹⁵ Section 404 general permits must comply with the guidelines in section 404 (b)(1) found in 40 C.F.R. § 230⁵⁹⁶ and the public interest review requirements in 33 C.F.R. § 320.4.⁵⁹⁷

Subpart 1. Antidegradation Procedures Required

518. This subpart states that antidegradation procedures in this part must be applied to section 401 certifications of section 404 general permits if the Commissioner anticipates that the proposed activity will result in net increases in loadings or other causes of degradation, unless the Agency waives its authority to certify the permit under rule Part 7001.1460.

519. As with the other invocations of antidegradation procedures in the proposed rules, this part is also necessary to describe the trigger for antidegradation review. It is reasonable to trigger the review on an anticipated reduction in water quality. It is also reasonable to forgo such a review if the Agency waives its certification authority.

Subpart 2. Antidegradation Review

520. This subpart provides that, on public notice of a draft general section 404 permit, the Commissioner shall review the determination set out in 33 C.F.R. § 320.4 and 40 C.F.R. § 230.7. The purpose of this antidegradation review is to “evaluate whether issuing the section 401 certification for the general section 404 permit will satisfy the antidegradation standards in part 7050.0270.”

521. As with previous proposed rules where water quality assessments are not practical, the antidegradation standards are those in proposed Part 7050.0270. 40 C.F.R. § 230.7 requires that the ACE undertake an analysis similar to antidegradation requirements.⁵⁹⁸ 33 C.F.R. § 320.4(a) requires the ACE to conduct a public interest review which is similar to the evaluation of social and economic benefits balanced against a lowering of water quality in antidegradation assessments.⁵⁹⁹

522. The ACE’s determinations on the general permit are made at the time of permit issuance and not at the time of each discharge allowed under the permit.⁶⁰⁰ The ACE is required to issue a public notice of section 404 general permits under 33 C.F.R. § 325.3(b).⁶⁰¹ At this time, the Agency can review the draft permit to determine if its issuance will comply with state water quality standards. The Agency can include conditions in its section 401 certification to ensure that antidegradation requirements are satisfied. 33 C.F.R. § 325.4(a) states that special conditions that may be added to a general permit are “requirements imposed by conditions on state section 401 water

⁵⁹⁵ *Id.* at 115.

⁵⁹⁶ SONAR, Ex. 84.

⁵⁹⁷ SONAR, Ex. 111.

⁵⁹⁸ SONAR at 116.

⁵⁹⁹ *Id.*, Ex. 111.

⁶⁰⁰ *Id.*, Ex. 115.

⁶⁰¹ *Id.*, Ex. 117.

quality certifications.”⁶⁰² Consequently, it is reasonable for the Agency to implement antidegradation requirements through conditions in a section 401 certification for a general section 404 permit.

Subpart 3. Preliminary Antidegradation Determination

523. This subpart requires the Commissioner to make a preliminary antidegradation determination as to whether the conditions of proposed rule Part 7050.0270 are satisfied by the conditions of the general permit or can be satisfied by issuing a section 401 certification with conditions. As with other preliminary antidegradation determinations, it must be in writing and be included in the Commissioner’s preliminary determination of whether to issue or deny the section 401 certification.

524. This provision is similar to the preliminary antidegradation determination provisions proposed in rule Parts 7050.0280 and 7050.0285, except that the antidegradation standards are in Part 7050.0270 and not Part 7050.0265. This determination is necessary to provide the public with the information it reasonably needs to comment on the application.

Subpart 4. Opportunity for Comment

525. This subpart provides the same opportunity for comment as did Subpart 4 for section 401 certifications for individual federal licenses and permits pursuant to Subpart 7050.0285.⁶⁰³ It is necessary to allow for public participation in antidegradation determinations under federal law and it is reasonable to provide the opportunity to comment through the procedures in Part 7001.1440.⁶⁰⁴

Subpart 5. Final Antidegradation Determination

526. This subpart is similar to Subpart 5 of proposed rule Part 7050.0295 which dealt with procedures for general NPDES permits. It differs only in that the Commissioner’s final determination of whether antidegradation standards have been met is included with the Commissioner’s final determination under Part 7001.1450, which concerns final determinations on section 401 certifications.

527. A final determination is necessary to issue or deny a section 401 certification. It is reasonable to use as much of the same process and same rule language throughout the various permit procedures as the specific aspects of the antidegradation process implementations allow as doing so facilitates understanding and applying the rules.

⁶⁰² *Id.*, Ex. 118.

⁶⁰³ SONAR at 117.

⁶⁰⁴ Subpart 2 of Rule Part 7001.1440 does not apply as the public notice from the ACE cannot substitute for the public notice by the Agency of the preliminary antidegradation determination.

Subpart 6. Further Antidegradation Procedures Not Required

528. This subpart states that if the Commissioner's final antidegradation determination is that issuing a general section 404 permit will achieve the antidegradation standards in proposed rule Part 7050.0270, no further antidegradation proceedings are required "when a person seeking coverage under the general section 404 permit certifies that the permit conditions can and will be met." That is, no further antidegradation procedures are required with respect to the section 401 certification, but if the activity proposed is also subject to another control document, proposed rule Part 7050.0325 may require further antidegradation procedures.

529. This subpart is similar to Subpart 6 of proposed rule Part 7050.0295 for general NPDES permits. It too made an exception if a proposed activity was subject to a control document premised on the finding that it would be reasonable to require an assessment of the water quality of any affected surface waters. If assessments of existing water quality are reasonably quantifiable, then the proposed activity will be considered under the more protective standards of Part 7050.0265.⁶⁰⁵ It is reasonable to impose standards that require assessments of water quality if the water quality is reasonably quantifiable.

Proposed Rule Part 7050.0315. Procedures for Section 401 Certifications of General Federal Licenses and Permits Other Than Section 404 Permits

530. Although section 404 permit requirements are quite similar to antidegradation standards, not all general federal license and permit requirements are the same. It is reasonable to have a separate procedure for such general licenses and permits.⁶⁰⁶

Subpart 1. Antidegradation Procedures Required

531. The same trigger is used for requiring antidegradation procedures: they apply if the commissioner anticipates that issuing the section 401 certification will result in net increases in loading or other causes of degradation for new, reissued, or modified general federal licenses or permits other than those issued under section 404. As with other antidegradation procedures, those in this part do not apply if the Agency waives its authority to certify the permit or license under rule Part 7001.1460.⁶⁰⁷

532. For the same reasons as applied to the parallel subparts previously considered in other antidegradation proposed procedures, this subpart too is needed and reasonable.

⁶⁰⁵ SONAR at 114-115.

⁶⁰⁶ SONAR at 118.

⁶⁰⁷ *Id.*

Subpart 2. Antidegradation Review

533. This subpart is similar to Subpart 2 of proposed rule Part 7050.0295. When public notice is given of the draft general federal license or permit, this subpart requires the Commissioner to review it to “evaluate whether issuing the section 401 certification for the general federal license or permit will satisfy the antidegradation standards in part 7050.0270.”

534. As noted with general permits, the identities of affected waters are not known until after the permit is issued. Therefore, it is reasonable for the Agency to review the draft permit or license to perform the antidegradation analysis.

Subpart 3. Preliminary Antidegradation Determination

535. The subpart requires the Commissioner to prepare a written preliminary determination of whether the antidegradation standards in Part 7050.0270 are satisfied or can be satisfied by issuing a section 401 certification with conditions.⁶⁰⁸ This preliminary determination must be included in the Commissioner’s preliminary determination to issue or deny the section 401 certification. If the Commissioner’s decision is that the antidegradation standards are not satisfied, the Commissioner must also explain why they are not satisfied.

536. The need for this provision is to comply with federal antidegradation regulations. It is reasonable for the Commissioner to make a preliminary determination to provide interested parties with the information necessary for them to make informed comments.

Subpart 4. Opportunity for Comment

537. This subpart requires the Commissioner to issue a public notice of the preliminary antidegradation determination with the preliminary determination of whether to issue or deny the section 401 certification through the procedures described in Part 7001.1440, excluding Subpart 2.

538. This part too is needed to comply with federal regulations requiring public participation and intergovernmental coordination. It is reasonable to rely on existing procedures for the issuance of the notice.

Subpart 5. Final Antidegradation Determination

539. This subpart requires the Commissioner to consider the comments received in response to the public notice in making a final determination. The final antidegradation determination must include a statement of whether issuing the general federal license or permit achieves or fails to achieve the antidegradation standards in Part 7050.0270. The

⁶⁰⁸ *Id.* at 119.

final antidegradation determination must be included with the Commissioner's final determination on issuing or denying the section 401 certification as per Part 7001.1450.

540. This part has its counterparts in the other antidegradation procedures proposed. It is necessary to issue a final antidegradation determination and reasonable to do so at the same time as the Commissioner issues a final determination on the certification.⁶⁰⁹

Subpart 6. Further Antidegradation Procedures Not Required

541. This subpart requires further antidegradation procedures only when, as with proposed rule Part 7050.0325, an additional control document applies to the activity for which a general federal permit or license provides coverage, and that document requires an assessment of existing water quality. If the activity does not involve other control documents, or the other control document does not require an assessment of existing water quality, the person seeking coverage under the general federal license or permit must only certify that the license or permit conditions can and will be met in order to avoid further antidegradation proceedings.

542. This provision is substantially similar to parallel provisions in antidegradation procedures for general permits under proposed rule Part 7050.0295. It is reasonable not to require further antidegradation procedures because a review has already been conducted, the public has had an opportunity to comment, and a final determination has been made that the antidegradation standards will be met when the permit or license conditions are met.

Proposed Rule 7050.0325. Procedures for Multiple Control Documents

543. This part addresses how antidegradation requirements will be satisfied when there is more than one control document regulating a single activity. It is necessary because these situations will arise. For example, a proposed activity may be covered under a general stormwater permit and also require a section 401 certification for an individual section 404 permit.⁶¹⁰

544. Item A provides that if the proposed activity requires compliance with standards in both Parts 7050.0265 and 7050.0270, the Commissioner shall require procedures where the standards in Part 7050.0265 apply. Part 7050.0265 applies where existing water quality impacts are reasonably quantifiable.

545. Item B provides that if the proposed activity requires compliance with the 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 applies.

⁶⁰⁹ SONAR at 119.

⁶¹⁰ SONAR at 120.

546. It is necessary to establish how antidegradation requirements will be satisfied in situations where more than one control document will apply to a proposed activity. It is not reasonable to impose multiple antidegradation reviews on applicants, the Agency or the interested public. When existing water quality impacts are reasonably quantifiable, the standards of Part 7050.0265 can be used and it is reasonable to use them. Where multiple control documents provide that the standards of Part 7050.0265 apply, it is reasonable to have the Commissioner decide which procedure is most protective of water quality as the Agency is accountable for protecting water quality.⁶¹¹

Proposed Rule Part 7050.0335. Designated ORVWs

547. This part is needed to identify the waters of the state which receive the highest levels of antidegradation protection.

Subpart 1. Designated ORVWs

548. Subpart 1 identifies restricted ORVWs. This list is identical to the lists that are in the current, but proposed to be repealed, rule Part 7050.0180, Subparts 6, 6a, and 6b. The list proposed in Subpart 1 consolidates the list of designated water bodies into one subpart but does not change the water bodies listed.

549. Restricted ORVWs include waters specifically protected by the federal government or by the Minnesota Department of Natural Resources (MDNR).⁶¹² Minnesota Statutes section 103F.325, subpart 5 (2014) of the Wild and Scenic Rivers Act provides that the Minnesota legislature “may at any time designate additional rivers to be included within the system, exclude rivers previously included in the system, or change the classification of rivers classified by the commissioner [of the MDNR].” After such waters have been designated, they are “listed” in rule through a rulemaking process. Proposed subpart 1 is needed and reasonable.

Subpart 2. Unlisted Restricted ORVWs

550. This subpart identifies unlisted ORVWs and provides that:

[u]ntil such time that surface waters identified as state or federally designated scenic or recreational river segments and state designated calcareous fens are designated in rule as restricted outstanding resource value waters, the commissioner shall restrict any proposed activity in order to preserve the existing water quality necessary to maintain and protect their exceptional characteristics.

Most ORVWs “are specifically designated through the administrative rulemaking process” after being designated by the MDNR or the federal government.⁶¹³ This provision

⁶¹¹ *Id.*

⁶¹² SONAR at 124.

⁶¹³ *Id.*

identifies restricted ORVWs that have been designated as such but have not yet been adopted into the rules. This ensures such waters will receive the protections of listed ORVWs.

551. The current rule Part 7050.0180, Subpart 7, describes unlisted ORVWs as “not specified” rather than unlisted. The meaning of “not specified” is unclear. The change in terminology to “unlisted” is reasonable.⁶¹⁴

552. Commenters contend that this subpart excludes some unlisted ORVWs that are neither scenic nor recreational river segments nor calcareous fens. Proposed to be repealed rule Part 7050.0180 for ORVWs has a broader definition of unlisted ORVWs.⁶¹⁵

553. The SONAR explains how and by what authority designations are made. Federal authorities may designate wild, scenic or recreational river segments while the MDNR may designate waters as wild, scenic or recreation river segments, scientific and natural areas or calcareous fens.⁶¹⁶

554. The commenter points out that while the MDNR may designate waters as “scientific and natural areas,” Subpart 2 does not mention those designations. However, unlisted state designated natural and scientific areas are specifically protected under subpart 4 as unlisted prohibited ORVWs and receive a higher level of protection than they would as unlisted restricted waters.⁶¹⁷ The different level of protection for unlisted state designated natural and scientific areas replicates the level of protection provided for such waters in the current rules. Rule Part 7050.0180, Subpart 6E, restricts discharges to “federal or state designated scenic or recreational river segments” and Subpart 6F similarly restricts discharges to calcareous fens. Subpart 4 of Part 7050.0180 lists state designated scientific and natural areas and subpart 3 includes such waters in its list of prohibited waters.

555. In light of the proposed repeal of rule Part 7050.0180, it is necessary to list restricted ORVWs in a new rule. The Administrative Law Judge finds Subpart 2 necessary and reasonable in that it accurately reflects the classifications of designated waters in the current rule.

Subpart 3. Prohibited ORVWs

556. This subpart identifies prohibited ORVWs for the purposes of antidegradation protections. The waters listed here are identical to the waters listed as prohibited ORVWs in the current rule Part 7050.0180, Subparts 3, 4, and 5. This proposed subpart improves upon the current listing by consolidating the waters into a single list.⁶¹⁸

⁶¹⁴ *Id.*

⁶¹⁵ Comment by Bruce and Maureen Johnson at 4 (Apr. 19, 2016).

⁶¹⁶ SONAR at 124.

⁶¹⁷ Proposed Rule Part 7050.0335, Subpart 4.

⁶¹⁸ SONAR at 125.

557. Because rule Part 7050.0180 is proposed to be repealed, the prohibited ORVWs that are listed in several subparts of the rule must be listed in a new rule. It is reasonable to consolidate the waters into a single subpart.

Subpart 4. Unlisted Prohibited ORVWs

558. As Subpart 2 of this proposed rule did for unlisted restricted ORVWs, Subpart 4 provides similar protection for designated but as of yet unlisted prohibited ORVWs:

[u]ntil such time that surface waters identified as state or federally designated wild river segments and surface waters necessary to maintain state designated scientific and natural areas are designated in rule as prohibited outstanding resource value waters, the commissioner shall prohibit any proposed activity that results in a net increase in loading or other causes of degradation.

559. Whereas the level of protection applied to unlisted restricted ORVWs was to restrict activities that threatened the existing water quality necessary to protect their exceptional characteristics, the proposed rule protects these waters by prohibiting any activity that results in a net increase in loading or other causes of degradation.⁶¹⁹

560. It is necessary to protect designated prohibited ORVWs until they are listed through a rulemaking process, and it is reasonable to have a rule subpart that protects such waters in the interim.

Subpart 5. Public Hearing

561. This subpart provides for a public hearing before establishing additional ORVWs (Item A) and before changing the effective date of an ORVW (Item B).⁶²⁰

562. Current rule 7050.0180, which is proposed to be repealed, provides for a public hearing before establishing additional ORVWs, determining prudent and feasible alternatives, or restricting or prohibiting new or expanded discharges. The latter two processes are incorporated into specific antidegradation procedures. Because additional ORVWs are listed through a rulemaking and Minn. Stat. § 14.25 provides for a public hearing in a rulemaking if 25 or more persons request a hearing in writing, a public hearing may be required in any event. Because many persons are interested in or affected by such additional designations, it is reasonable to simply require a public hearing in any event.

563. Item B also provides for a public hearing before the effective date of an ORVW is changed. This item implements Part 7050.0255, Subpart 13, Item B, which

⁶¹⁹ *Id.*

⁶²⁰ *Id.* at 126.

requires the effective date of an ORVW to be changed under two circumstances. Subitem A provides for such a change when the commissioner determines that “there is an improvement in exceptional characteristics of the outstanding resource value water as a result of changes to water pollution control conditions specified in a reissued control document” In such a case, the effective date becomes the date the control document was reissued. Subitem B provides for such a change when the commissioner determines “there is an improvement in exceptional characteristics of the outstanding resource value water as a result of a regulated activity ceasing to discharge to or otherwise adversely impact an outstanding resource value water. . . .” In this case, the effective date is the expiration date of the associated control document.⁶²¹

Proposed Amendments to Rule 7001.0050

564. The Agency proposes amending Item I of Minn. R. 7001.0050 which concerns information to be provided in an application for a permit. Proposed rules Part 7050.0280, Subpart 2 and Part 7050.0290, Subpart 2 both concern antidegradation procedures for individual NPDES permits. Both proposed rules require applicants to submit an antidegradation assessment with their applications. The Agency proposes to add those requirements to item I of rule Part 7001.0050, as follows: “other information relevant to the application as required by parts . . . 7050.0280, subp. 2 or 7050.0290, subp. 2 . . .” It is clearly necessary to conform the proposed rules with existing rules and, in this situation, amending the existing rule to include reference to new permit procedures is certainly reasonable.

565. It also is reasonable to require the antidegradation assessments be filed with an application for a permit because Minn. Stat. § 116.03, subd. 2 (b) (2014), establishes a 150-day period for the issuance or denial of a permit that requires “individualized actions or public comment periods.” The Agency explains that requiring the assessment to be submitted with the application will “allow the MPCA enough time to review the assessment and make a preliminary determination.”⁶²² While a preliminary determination is not the same as the issuance or denial, the Agency does require a reasonable amount of time to consider the antidegradation assessment.

Proposed Housekeeping Changes to Other Minnesota Rules

566. The Agency proposes to repeal Minn. R. 7050.0180 and 7050.0185. Consequently, references to those rules in other rules must be changed. The Agency proposes several housekeeping changes to rule Parts 7050.0218 and 7052.0300. No one commented on these proposed changes and they are needed and reasonable.

567. With a number of other rule parts, references to the current rules can simply be changed to reference the proposed new rules. The Agency proposes to renumber references in 13 rule parts. No one commented on these proposed changes and they are needed and reasonable.

⁶²¹ SONAR at 127.

⁶²² *Id.* at 126.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The MPCA gave proper notice of the hearing in this matter and has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. Modifications to the proposed rules suggested by the Agency after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

3. The MPCA has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

4. The Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii), except as noted in Findings 277 and 322.

5. The Administrative Law Judge has suggested an action to correct the defect cited in Conclusion 4, at Finding 277 as noted therein. There may be several cures for the defect cited in Conclusion 4, at Finding 322, depending upon the Agency's intentions.

6. Due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for her approval pursuant to Minn. Stat. § 14.15, subd. 3.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on the Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Agency's proposed rules, as modified, be adopted, with the exception of proposed rules **Part 7050.0260, Subpart 1C,** and **Part 7050.0265, Subpart 3D** which are **DISAPPROVED**.

Dated: May 27, 2016



JEFFERY OXLEY
Administrative Law Judge