OAH 23-9003-37415
Revisor ID No. R-4692

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Water Quality Standards - Use Classification 2, Minnesota Rules Chapter 7050

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Suzanne Todnem for a rulemaking hearing on February 16, 2023. The public hearing was held remotely through an interactive video conference on the WebEx platform.

The Minnesota Pollution Control Agency (MPCA or Agency) proposes to amend Class 2 stream use designations listed in Minn. R. 7050.0470 to ensure that the assigned beneficial uses are accurate, protective, and attainable as defined by the federal Clean Water Act (CWA) and Minnesota Rules.[1]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).[2] The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permits agency representatives and the Administrative Law Judge to hear public comments regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the public an opportunity to review, discuss, and critique the proposed rules.

The Agency must establish that: (1) it complied with all procedural requirements for rulemaking; and (2) the proposed rules are within the Agency's statutory authority, are necessary and reasonable, and are not substantially different from the rules published in the *State Register* unless the Agency has complied with the procedures set forth in Minn. R. 1400.2110 (2021).[3]

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[1] Exhibit (Ex.) D at 1 (Statement of Need and Reasonableness (SONAR)).
[2] *See* Minn. Stat. §§ 14.131 to 14.20 (2022).
[3] Minn. Stat. §§ 14.05, .14, .25, .26, .50; Minn. R. 1400.2100 (2021).

The Agency panel at the public hearing included: William Bouchard, Ph.D., a research scientist for the MPCA; Michelle Janson, MPCA legal counsel; and Mary Lynn, the MPCA's rule coordinator.[4]

Approximately nine members of the public attended the hearing. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard. No members of the public made statements or asked questions during the hearing.[5] Two written comments were received prior to the hearing during the Notice of Hearing public comment period.[6] No written comments from the public were made or introduced as exhibits at the hearing.[7]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until March 8, 2023 – to permit interested persons and the Agency to submit written comments. No public comments were submitted to the Office of Administrative Hearings during the post-hearing comment period.[8] On March 8, 2023, the MPCA filed a post-hearing response addressing the two comments received prior to the hearing.[9] The hearing record remained open an additional five business days to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[10] The hearing record closed on March 15, 2023.[11]

SUMMARY OF CONCLUSIONS

The MPCA established it has the statutory authority to adopt the proposed rules, it complied with all procedural requirements of law and rule, and that the proposed rules are needed and reasonable. Therefore, the Administrative Law Judge **APPROVES** the proposed rules and recommends they be adopted.

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

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[4] Ex. D at 46-47.
[5] *See* Public Hearing Transcript (Tr.) (Feb. 16, 2023).
[6] Ex. I (Comments of United States Environmental Protection Agency Region 5; Minnesota Center for Environmental Advocacy).
[7] *See* Tr.; MPCA Post-Hearing Response (Mar. 8, 2023).
[8] *See* MPCA Post-Hearing Response (Mar. 8, 2023).
[9] *Id*.
[10] *See* Minn. Stat. § 14.15, subd. 1 (2022).
[11] *See* MPCA Rebuttal Response (Mar. 15, 2023).

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Minn R. ch. 7050 establishes water quality standards (WQS) for the protection of waters of the state.[12] The chapter includes a classification system of beneficial uses applicable to waters of the state, water quality standards that protect specific beneficial uses, antidegradation provisions, and other rules to protect the physical, chemical, and biological integrity of Minnesota's waters.[13] Parts 7050.0400 -.0470 classify all surface waters within or bordering Minnesota, and designate the beneficial uses for which these waters are protected.[14]

2. The MPCA is proposing amendments to Class 2 (Aquatic Life) stream use designations listed in Minn. R. 7050.0470.[15] The term "streams" refers to flowing or moving waters (i.e., lotic waters).[16] These water bodies include streams, rivers, and ditches.[17] The "designated use" (or "beneficial use") is a component of WQS that defines the protections, restoration efforts, expectations and uses of a water body (e.g., drinking water, aquatic life, recreation).[18]

3. The MPCA routinely reviews use designations to ensure that the assigned beneficial uses are protective and attainable, as those terms are defined in the CWA and Minnesota rules.[19] As a result of routine monitoring, the MPCA has identified stream reaches where the current designated beneficial use does not accurately reflect an attainable or existing beneficial use.[20]

4. The proposed rule amendments update the beneficial use designations or classifications for 232 stream reaches.[21] The beneficial use designations affect many water quality protection and restoration efforts (e.g., assessment, stressor identification, National Pollutant Discharge Elimination System (NPDES) permitting, Total Maximum Daily Loads (TMDLs)).[22]

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[12] "Waters of the state" is a term defined in Minn. Stat. § 115.01, subd. 22 (2022).
[13] Minn. R. 7050.0110.
[14] *Id. See also*, Minn. R. 7050.0400.
[15] Ex. D at 1.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] Ex. H (Notice of Intent to Adopt Rules).
[22] Ex. D at 1.

5. According to the MPCA, amending the water quality rules to appropriately assign designated uses will result in better protection and restoration outcomes for aquatic life uses by ensuring appropriate actions are taken to protect and improve water quality in Minnesota streams.[23] Assigning the correct beneficial uses to Minnesota's waters will also more accurately document the types and condition of Minnesota's aquatic resources.[24]

6. The MPCA classifies most surface waters as Class 2, protecting those waters for aquatic life and recreational beneficial uses.[25] Class 2 protections for Minnesota streams and lakes are subdivided into thermal classes, including coldwater (Class 2A) and warm/cool water (Classes 2Bd and 2B) habitats.[26]

7. In 2017, the MPCA adopted rules that moved Class 2 WQS for streams from a "one-size-fits-all" or "pass/fail" classification system to a framework that more accurately reflects the ecological diversity of Minnesota's waters.[27] The framework is called Tiered Aquatic Life Uses (TALUs).[28] The combination of thermal classes and TALUs results in five possible aquatic life use designations for streams and two for lakes.[29] As a result, Class 2 lakes and streams can have different biological protection and restoration goals assigned depending on the natural type of the water body (i.e., thermal class (lakes and streams) and the attainability of goals (i.e., TALU (streams only)).[30]

8. The TALU framework classifies streams based on the biological condition that is attained or can be attained.[31] Under the TALU framework, streams are classified as either "Exceptional Use," "General Use," or "Modified Use."[32] The specific classification of a stream is based on available monitoring and other relevant data, including biological condition and habitat quality.[33] Below is a matrix showing the TALU classifications for Class 2A, 2B, and 2Bd waters:[34]

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[23] *Id*.
[24] *Id*.
[25] *Id*. at 2.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*. at 10.
[32] *Id.* at 2-3.
[33] *Id.*
[34] *Id.* at 2.

Table 1-1. Matrix of aquatic life use designations for streams and lakes.

	2A (cold water)	2B and 2Bd (cool/warm water habitat)
Exceptional	2Ae (streams)	2Be, 2Bde (streams)
General*	2Bg (streams), 2B (lakes)	2Bg, 2Bdg (streams); 2B, 2Bd (lakes)
Modified	-	2Bm, 2Bdm (streams)

***Tiered uses have not been adopted in rule for lakes. The current aquatic life use designated to lakes is equivalent to the General Use under the TALU framework.**

9. The MPCA is reclassifying specific streams where adequate existing monitoring data and a Use Attainability Analysis (UAA), where applicable, have demonstrated the need for a more accurate use designation.[35] Determination of the proposed designated TALUs were made through a review to determine the attainable aquatic life use goal for each stream reach.[36]

10. The proposed rule amendments designate specific streams as Modified or Exceptional Use and as coldwater or warm/cool water habitats.[37] These amendments result in minor revisions to the rule language and to the designation tables incorporated by reference in Minn. R. 7050.0470. [38]

11. Depending on the proposed use designation, standards may be more or less stringent.[39] According to the MPCA, in cases where the proposed use designation results in less stringent standards, this is not a downgrading or removal of an existing use.[40] Instead, the MPCA asserts that these waters had not been reviewed previously and the use designation was assigned by default or data/tools were not available.[41]

12. The proposed rule amendments do not include changes to numeric or narrative WQS, but instead use the existing WQS to amend the use designations of some water bodies.[42]

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[35] *Id*. at 2-3, 11.
[36] *Id*. at 11.
[37] *Id*. at 4.
[38] *Id*.
[39] *Id*. at 8.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 1.

13. In sum, the proposed rules will designate TALUs to address the diversity of aquatic resources in Minnesota streams; designate coldwater and warm/cool water habitats based on adequate data; and improve targeting of water management resources for streams.[43]

II. Rulemaking Authority

14. The CWA requires states to establish WQS to meet the goals and objectives of the CWA and to protect designated beneficial uses for water bodies.[44] The stated purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[45]

15. In Minnesota, the MPCA is the agency charged with the powers and duties to: (1) administer and enforce all laws "relating to pollution of any of the waters of the state"; (2) investigate water pollution, gather data and information necessary to administer and enforce pollution laws, and classify waters of the state "as it may deem advisable"; (3) establish and alter pollution standards for waters of the state; and (4) adopt standards and rules to prevent, control, or abate water pollution.[46]

16. As part of its general duties and powers to protect the quality of the waters of the state, the MPCA is specifically authorized to group bodies of water into classes and adopt classifications and standards of purity and quality.[47] The law further requires the Agency to design and adopt these classes and standards in rules.[48]

17. The Administrative Law Judge concludes that the MPCA has the statutory authority to adopt these rules.

III. Procedural Requirements of Minn. Stat. Ch. 14 and Minn. R. Ch. 1400

A. Request for Comments

18. Minn. Stat. § 14.101 (2022) requires that an agency, at least 60 days prior to the publication of a notice of intent to adopt rules or a notice of hearing, solicit

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[43] *Id*. at 3.
[44] *Id*. at 16; *See* S-16 (33 U.S.C. § 1313(a)-(c) (2022)).
[45] Ex. D at 16. *See* 33 U.S.C. § 1251(a) (2022).
[46] Ex. D at 17-18; Minn. Stat. § 115.03, subd. 1(a), (b), (c), (e) (2022).
[47] Ex. D at 17-18; Minn. Stat. § 115.44, subds. 2-5 (2022).
[48] Ex. D at 18; Minn. Stat. § 115.44, subds.2-5 (2022).

comments from the public on the subject matter of a proposed rulemaking. Such notice must be published in the *State Register*.[49]

19. On April 5, 2021, the MPCA published in the *State Register* a Request for Comments seeking comments on this rulemaking and specifically on the planned amendments to Class 2 use designations.[50]

20. The Request for Comments was published at least 60 days prior to the publication of the Notice of Intent to Adopt Rules, as discussed below.

21. The Administrative Law Judge finds that the MPCA complied with the requirements set forth in Minn. Stat. § 14.101.

B. Publication of Notice of Intent to Adopt Rules

22. Minn. Stat. § 14.14, subd. 1a(a) (2022), and Minn. R. 1400.2080, subp. 6 (2021), require that an agency publish in the *State Register* a notice of intent to adopt rules at least 30 days prior to the date of hearing and at least 30 days prior to the end of the comment period.

23. An agency must request approval of its notice of hearing by an administrative law judge prior to service.[51]

24. The MPCA requested approval of its Additional Notice Plan and Notice of Intent to Adopt Rules with a Hearing (Notice of Hearing) on November 3, 2022.[52] The public hearing was scheduled to take place on January 26, 2023, with the pre-hearing comment period closing on January 17, 2023.[53]

25. On November 16, 2022, the MPCA requested that the hearing be rescheduled to February 16, 2023.[54]

26. By Order dated November 17, 2022, the Administrative Law Judge approved the Agency's Additional Notice Plan and conditionally approved the Notice of

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[49] Minn. Stat. § 14.101.
[50] Ex. A (Request for Comments).
[51] Minn. R. 1400.2080, subp. 5; Minn. Stat. § 14.22 (2022).
[52] Ex. K-3 (Agency Request for Review and Approval of Notice of Hearing and Additional Notice Plan (Nov. 3, 2022)).
[53] *Id*.
[54] Ex. K-4 (Letter to Administrative Law Judge Suzanne Todnem from MPCA Rule Coordinator Mary Lynn (Nov. 16, 2022)).

Hearing.[55] The Administrative Law Judge directed the Agency to delete from the Notice of Hearing the reference to a 4:30 p.m. end time for the hearing.[56] The Agency modified the Notice of Hearing as directed prior to publishing the Notice of Hearing in the *State Register*.[57]

27. The MPCA published the Notice of Hearing in the December 12, 2022, *State Register*.[58] The Notice of Hearing scheduled the hearing to take place by video conference on February 16, 2023, with the pre-hearing comment period closing on February 3, 2023. The Notice of Hearing provided information on how persons could submit comments on the proposed rules and how persons could join the hearing via the internet or telephone.[59]

28. The Notice of Hearing contained all the information required under Minn. R. 1400.2080 and was published more than 30 days before the hearing and the close of the comment period.

C. Notice Requirements

1. Notice to Official Rulemaking List

29. Minn. Stat. § 14.14, subd. 1a, requires that each agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.

30. On December 12, 2022, the MPCA emailed a copy of the Notice of Hearing to all persons and entities on its official rulemaking list.[60] The official rulemaking list was comprised of all persons and entities who requested to be placed on the MPCA's GovDelivery system for the purpose of receiving such notice.[61] The Notice of Hearing was emailed to 992 GovDelivery subscribers.[62]

31. The Notice of Hearing advised that post-hearing comments must be submitted five working days after the hearing date but the Administrative Law Judge may

[55] Ex. K-5 (Order on Review of Additional Notice Plan and Notice of Hearing (Nov. 17, 2022)).
[56] *Id*.
[57] Ex. F-1 (Notice of Hearing).
[58] Ex. F-2 (Notice of Hearing *State Register* publication).
[59] *Id*.
[60] Ex. G-1 (Certificate of Mailing Notice of Hearing).
[61] *Id.*
[62] Ex. G-2 (GovDelivery email bulletin).

extend this period for no more than 20 calendar days following the hearing on February 16, 2023.[63]

32. Minn. Stat. § 14.14, subd. 1a, requires that an agency give notice of its intent to adopt rules by U.S. mail or electronic mail to all persons on its official rulemaking list at least 30 days before the date of the hearing.

33. Minn. R. 1400.2080, subp. 6, provides that a notice of hearing or notice of intent to adopt rules must be mailed at least 33 days before the end of the comment period or the date of the hearing.

34. The MPCA fulfilled the notice requirements established in Minn. Stat. § 14.14 and Minn. R. 1400.2080, subp. 6.

2. Additional Notice

35. Minn. Stat. § 14.14, subd. 1a(a), requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or through other means of communication.[64] This notice is referred to as "additional notice" and is detailed by an agency in its additional notice plan.

36. Minn. Stat. § 14.131 requires that an agency include in its Statement of Need and Reasonableness (SONAR) a description of its efforts to provide additional notice. Alternatively, the agency must detail why additional notification efforts were not made.[65]

37. An agency may request approval of its additional notice plan by an administrative law judge prior to service.[66]

38. The MPCA requested and was granted approval of its Additional Notice Plan on November 17, 2022.[67]

[63] Ex. F-1 (Notice of Hearing).
[64] Minn. Stat. § 14.14, subd. 1a(a).
[65] Minn. Stat. § 14.131.
[66] Minn. R. 1400.2060 (2021).
[67] Ex. K-5 (Order on Review of Additional Notice Plan and Notice of Hearing (Nov. 17, 2022)).

39. On December 12, 2022, the MPCA provided notice according to its approved Additional Notice Plan, as follows:[68]

(a) Published the Notice of Hearing on the MPCA's website for this rulemaking at: https://www.pca.state.mn.us/get-engaged/use-designations-for-some-stream-reaches;

(b) Provided an extended comment period by scheduling rulemaking hearing at least 60 days after the Notice of Hearing was published;

(c) Provided specific notice via email to the MPCA list of Water Tribal Contacts for the 12 federally recognized tribes in Minnesota. The email included a hyperlink to an electronic version of the Notice of Hearing and the MPCA's Class 2 Use Designation rulemaking website;

(d) Sent notification via email to the two entities, EPA and Water Legacy, and the individual whom submitted comments during the Request for Comments public comment period;

(e) Provided specific notice via email to permittees, associations, and environmental groups identified in the Additional Notice Plan section of the SONAR;[69]

(f) Posted relevant rulemaking updates and associated documents including the Notice of Hearing, SONAR, and proposed rule amendments on the MPCA's website for this rulemaking at https://www.pca.state.mn.us/get-engaged/use-designations-for-some-stream-reaches.

40. The MPCA complied with its Additional Notice Plan and fulfilled the additional notice requirements provided in Minn. Stat. §§ 14.14, subd. 1a(a), .131.

3. Notice to Legislators

41. Under Minn. Stat. § 14.116, an agency is required to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators at the time it mails its Notice

[68] Ex. H.
[69] *See* Ex. H and Ex. D at 36-37.

of Intent to Adopt to persons on its rulemaking list and pursuant to its Additional Notice Plan.

42. On December 12, 2022, the MPCA mailed or emailed a copy of the Notice of Hearing, SONAR, and proposed rules to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the proposed rules, and to the Legislative Coordinating Commission.[70]

43. The MPCA fulfilled its notification responsibilities under Minn. Stat. § 14.116.

4. Notice to the Legislative Reference Library

44. Minn. Stat. § 14.131 and Minn. R. 1400.2070, subp. 3, require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

45. On December 12, 2022, the MPCA mailed a copy of the SONAR to the Legislative Reference Library.[71]

46. The MPCA fulfilled its responsibilities under Minn. Stat. § 14.131.

5. Notice to Commissioner of Agriculture

47. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any proposed rule changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

48. On September 28, 2022, more than 30 days prior to the publication of the proposed rules in the *State Register*, the MPCA mailed a copy of the Revisor's approved draft rules and a signed copy of the SONAR to the Commissioner of Agriculture.[72]

49. The MPCA fulfilled its responsibilities under Minn. Stat. § 14.111.

[70] Ex. K-6 (Certificate of Sending Notice of Hearing and SONAR to Legislators and Legislative Coordinating Commission).
[71] Ex. E.
[72] Ex. K-2 (Certificate of Sending Rules and SONAR to Commissioner of Agriculture).

6. Notice to Municipalities

50. Minn. Stat. § 115.44, subd. 7 (2022) requires the MPCA to mail a copy of the Notice of Hearing to the governing body of each municipality bordering or through which the waters for which standards are sought to be adopted flow.

51. On December 12, 2022, at least 33 days before the end of the comment period, the MPCA emailed or mailed the Notice of Hearing to all townships, cities, counties, and sanitary districts in Minnesota.[73]

52. The MPCA complied with the requirements under Minn. Stat. § 115.44, subd. 7.

D. Rule Hearing

53. The Administrative Law Judge conducted a public rulemaking hearing on February 16, 2023.

54. In support of its request for approval to adopt the proposed rules, the MPCA submitted the following documents into the record, as required by Minn. Stat. § 14.14, subd. 2a and Minn. R. 1400.2220:

> Ex. A: MPCA's Request for Comments as published in the *State Register* on April 5, 2021;
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> Ex. C: Proposed rules dated October 21, 2022, including the Revisor's approval;
>
> Ex. D: MPCA's SONAR, dated September 26, 2022, including exhibits S1 through S-37;
>
> Ex. E: Copy of transmittal letter mailing the SONAR to the Legislative Reference Library on December 12, 2022;
>
> Ex. F: Notice of Hearing as published in the *State Register* on December 12, 2022;

[73] Ex. K-7 (Certificate of Mailing Notice of Hearing to Municipalities).

Ex. G: the Certificate of Mailing the Notice of Hearing to the Agency's rulemaking mailing list on December 12, 2022, and the Certificate of Accuracy of the Mailing List;

Ex. H: the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on December 12, 2022;

Ex. I: written comments on the proposed rules that MPCA received during the comment period that followed the Notice of Hearing;

Ex. K-1: Certificate of Consulting with the Commissioner of Minnesota Management and Budget (MMB) on September 28, 2022, and Memorandum from MMB dated October 17, 2022;

Ex. K-2: Certificate of Sending the Rules and SONAR to the Commissioner of Agriculture;

Ex. K-3: Letter from MPCA to Administrative Law Judge Suzanne Todnem dated November 3, 2022, requesting to schedule a rule hearing, and requesting review and approval of Additional Notice Plan and Notice of Hearing;

Ex. K-4: Letter from MPCA to Administrative Law Judge Suzanne Todnem dated November 16, 2022, requesting to re-schedule rule hearing;

Ex. K-5: Order on Review of Additional Notice Plan and Notice of Hearing dated November 17, 2022;

Ex. K-6: Certificate of Sending the Notice of Hearing and SONAR to Legislators and Legislative Coordinating Commission on December 12, 2022;

Ex. K-7: Certificate of Mailing Notice of Hearing to Municipalities in Compliance with Minn. Stat. § 115.44, subd. 7, on December 12, 2022;

Ex. K-8: GovDelivery Bulletin sent by MPCA to subscribers of the GovDelivery list: "Rulemaking 2021-2022 Use class changes - Class 2" dated January 10, 2023, titled "Notice of Intent to Adopt Rules - WQS Class 2 Use Designations. The bulletin was in

response to requests for additional information and notified recipients that MPCA posted the requested information regarding permitted municipal wastewater facilities on the MPCA's rulemaking website; and

Ex. L-1: Copy of slides from MPCA's presentation at the February 16, 2023, rulemaking hearing.

55. Michelle Janson, MPCA's legal counsel, offered the Agency's exhibits and addressed the procedural requirements for rulemaking.[74] Mary Lynn, the Agency's rule coordinator, explained the general rulemaking process.[75] William Bouchard, MPCA's lead research scientist for the rulemaking, made a presentation explaining the need and reasonableness of the rule.[76]

56. Approximately nine members of the public attended the hearing. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules.

57. No members of the public made statements or asked questions during the hearing.[77] Two written comments were received prior to the hearing.[78] No written comments were introduced as exhibits in the hearing record at the hearing and there were no written comments from the public submitted after the hearing.

58. The MPCA submitted a post-hearing response to comments on March 8, 2023.[79] The hearing record closed on March 15, 2023, the deadline for submitting rebuttal comments. No rebuttal comments were submitted.

IV. Statutory Requirements for the SONAR

A. Regulatory Factors

59. The APA requires an agency adopting rules to address eight factors in its SONAR.[80] Those factors are:

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[74] Tr. at 8-11.
[75] *Id.* at 12-15.
[76] *Id.* at 16-37. *See also* Ex. L-1 (Copy of MPCA's PowerPoint presentation at rulemaking hearing).
[77] *See* Tr.
[78] Ex. I (Public Comments).
[79] MPCA Post-Hearing Response (Mar. 8, 2023).
[80] Minn. Stat. § 14.131.

1) 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;

2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

4) 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;

5) the probable costs of complying with the proposed rule, 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;

6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.[81]

[81] *Id.*

1. Classes of Persons Affected, Benefitted, or Bearing Costs of the Proposed Rule

60. In the SONAR, the MPCA states that all Minnesotans could be affected by, and will benefit from, the adoption of the use designations in the proposed rules.[82] The MPCA explains that the beneficial use designations will ensure that the state water quality assessments are accurate and protective.[83]

61. The MPCA maintains that the rule amendments will also provide a social benefit to the classes of persons whose quality of life is enhanced by engaging in recreational activities (e.g., fishing, swimming, boating, etc.) in or near Minnesota's aquatic resources.[84] Persons who appreciate the aesthetic value aquatic resources provide across Minnesota's landscape will also benefit from knowing that higher quality Exceptional Use waters will be appropriately protected in the foreseeable future.[85]

62. Certain classes of persons engaged in Minnesota's water-oriented tourism and recreational industries, may see monetary benefits related to maintenance and improvement of Minnesota's water quality.[86] Likewise, counties, cities and other local governments could benefit from the proposed rule through increased property and sales tax revenues, increased tourism dollars, added jobs, lower water treatment costs, and other benefits related to improved water quality.[87] In addition, persons who own property on or near waters could see a benefit in increased property values as a result of water quality improvements.[88]

63. MPCA asserts that the aquatic life use designations will also result in benefits to nonprofit organizations and taxpayer-supported entities who work to protect and restore Minnesota's waters, by reducing expenditures.[89] According to the MPCA, by adopting more accurate use designations, these types of organizations will not waste money and effort trying to restore waters to a goal that cannot be achieved given the conditions – such as ditches with naturally warm/cool water habitat.[90] Likewise, the MPCA states that cities, counties, and watershed districts will realize savings as implementation

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[82] Ex. D at 20.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*. at 20-21.
[88] *Id*. at 21. *See* K-1 (MMB fiscal analysis memorandum, Oct. 17, 2022).
[89] Ex. D at 21.
[90] *Id*.

strategies will be better targeted and more likely to result in attainment of the beneficial use.[91]

64. With respect to costs, the MPCA maintains that the proposed amendments are not expected to result in major costs to permitted entities.[92] The MPCA concedes, however, that a subset of the proposed use designations could result in some additional costs related to implementing best management practices (BMP) and administering new requirements to protect these waters from pollutants carried by stormwater.[93] The MPCA notes, however, that these impacts would be made on a case-by-case basis. Therefore, it is not possible to determine which permits, if any, would be impacted by the use designations.[94] Overall, MPCA maintains few parties will incur additional costs as a result of the proposed use designations.[95]

2. Probable Costs to the Agency and Other Agencies for Implementation and Enforcement and the Effect on State Revenues

65. The MPCA believes that the proposed rules will result in a net reduction in costs.[96] According to the Agency, under the proposed rule changes, some waters will be subjected to less restrictive biological criteria and goals.[97] The less restrictive standards will reduce the efforts required of the Agency to list, identify stressors, and develop restoration plans for waters that are unlikely to meet the standards currently imposed.[98] The result is a reduction in costs for the Agency.[99]

66. The MPCA notes that it is possible it could incur some additional costs for processing and reviewing National Pollution Discharge Elimination System/State Disposal System (NPDES/SDS) permit applications for new or expanded dischargers to Exceptional Use or coldwater habitats.[100] However, the MPCA believes these additional costs will be modest, if they occur, and the processing of additional applications can be completed with current staff.[101]

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[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

67. With respect to impacts on other state agencies, the MPCA states that the proposed rule changes are not anticipated to require implementation or enforcement from other agencies.[102] In addition, the proposed rules are not expected to have any effect on state revenues.[103]

3. Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rule

68. The SONAR evaluated whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule changes.[104] The asserted purpose of the proposed rules is to designate more accurate aquatic life beneficial uses.[105]

69. After a full analysis, the MPCA concludes that there are no less costly or less intrusive alternatives for achieving this purpose other than amending the current use designations consistent with the scientific data.[106]

70. The alternative methods evaluated by the MPCA are discussed in Section IV.A.4. below.

4. Description of Alternative Methods for Achieving the Purpose of the Proposed Rule Considered by the Agency and Why Alternatives Were Rejected

71. The SONAR describes the alternative methods for achieving the purpose of the proposed rule changes that were seriously considered by the MPCA and explains the reasons why these alternatives were rejected in favor of the proposed rule changes.[107]

72. According to the MPCA, the proposed rule amendments will allow the Agency to better manage Minnesota's aquatic resources by establishing attainable aquatic life uses and tailoring water quality management to those attainable uses.[108]

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[102] *Id.*
[103] *Id.*
[104] *Id.* at 22.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 22-23.
[108] *Id.* at 22.

73. The Agency evaluated alternatives to both the designated use changes and the habitat designation changes.[109]

74. An alternative to the Exceptional Use designation change evaluated by the MPCA was to expand the antidegradation provisions in Minn. R. parts 7050.0250 -.0335.[110] This would include designating waters that meet the Exceptional Use criteria as "Outstanding Resource Value Waters." Such a change would prohibit or restrict discharges to these waters.[111] The Agency found that this change would not be enforceable for some sources of pollution, such as unregulated sources of nonpoint source pollution.[112] In addition, the antidegradation rules would need to be expanded beyond that required by the CWA to include activities that do not currently require a permit, resulting in additional costs and intrusion.[113] Consequently, the Agency rejected this option.[114]

75. An alternative to the Modified Use designation changes that the Agency evaluated was to assess the affected streams using General Use biocriteria.[115] The MPCA found that this analysis would result in more waters being identified as impaired under the CWA.[116] However, the MPCA notes that the ultimate management of these streams would likely be the same whether designated as a Modified Use stream or as an impaired water body.[117] The only difference would be more costs and delays in reaching the final management strategy.[118] Accordingly, the Agency found this alternative to be inferior to the proposed rule changes.[119]

76. The Agency identified no viable alternatives for the coldwater and warm and cool water habitat designation changes in the proposed rules. The MPCA found that the current use designations for these waters result in the application of standards unsuitable for managing these waters and their aquatic life and seeks to correct the designations.[120]

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 22.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 23.
[120] *Id.*

5. Probable Costs of Complying with Proposed Rules, Including the Portion of the Total Costs Borne by Identifiable Categories of Affected Parties

77. The SONAR includes an extensive analysis of the probable costs of complying with the proposed rule changes, identifying 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.[121]

78. These costs, and the categories of parties subject to the costs, are discussed in Section IV.G. below.

6. Probable Costs or Consequences of not Adopting the Proposed Rules, Including Costs Borne by Individual Categories of Affected Parties

79. In addition to identifying the costs of complying with the rule changes, the SONAR evaluates the probable costs or consequences of not adopting the proposed rule.[122] This analysis reviews the costs or consequences that could be borne by identifiable categories of affected parties, such as separate classes of government units, business, or individuals.[123]

80. The MPCA asserts that the consequences of not adopting the proposed amendments would be the continuation of the Agency's current monitoring, restoration, and protection activities for Minnesota's waters, including the waters identified for change in the proposed rules.[124] According to the Agency, the status quo results in inefficient and ineffective use of resources for waters that are improperly designated.[125]

81. Through its extensive analyses of Minnesota waters, the Agency has found that some water bodies have changed due to legal habitat alterations (such as fish stocking) or natural conditions.[126] If these waters continue to be evaluated under naturally unattainable standards, then resources could be ineffectively utilized.[127] Conversely, the MPCA found that some waters are improperly classified as General Use

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[121] *Id*.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

or warm/cool water habitats and should be held to higher standards applicable to coldwater habitats.[128] Under both scenarios, the MPCA asserts that the result of not adopting the proposed rule amendments is the inefficient and ineffective use of resources – resources taken away from achieving attainable goals and used to address unattainable goals.[129]

82. With respect to potential costs for identifiable categories of affected parties in not adopting the proposed changes, those costs and parties are discussed in Section IV.G.7. below.

7. Assessment of Differences Between Proposed Rules and Existing Federal Regulations

83. The SONAR assesses the difference between the proposed rule and existing federal regulations.[130]

84. The MPCA states that the proposed rule changes are consistent with all existing federal regulations.[131]

85. The CWA requires states to promulgate WQS based on federal regulations and guidance.[132] The CWA also requires periodic review of WQS by states and the modification of the standards based upon scientifically defensible data.[133] The MPCA states that the proposed rule changes comply with these federal mandates.[134] The proposed use designations are the application of existing rules. Accordingly, the MPCA finds no differences or conflicts between the proposed rules and existing federal regulations.[135]

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[128] *Id.*
[129] *Id.*
[130] *Id*. at 23-24.
[131] *Id.* at 23.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*at 23-24.

8. Cumulative Effect of the Rule with Other Federal and State Regulations

86. The SONAR assesses the cumulative effect of the proposed rule changes with other federal and state regulations related to the specific purpose of the proposed rules.[136]

87. The specific purpose of the proposed rule amendments is to designate more accurate aquatic life beneficial uses so as to apply appropriate WQS to those uses.[137]

88. The MPCA asserts that the cumulative effect of the proposed rule changes will be positive because they: (1) result in more appropriate water quality goals; and (2) allow for more efficient use of resources to protect and restore Minnesota waters.[138] Consequently, the Agency states that the proposed rules will be better aligned with existing state and federal regulations aimed at water quality.[139]

89. The Agency identified a potential, but unlikely, minor cumulative effect with Minnesota's antidegradation rules.[140] The MPCA concludes, however, that the interaction between the two rules would be rare because it would require that an Exceptional Use water be threatened by an activity that is subject to antidegradation requirements.[141] This is unlikely because: (1) Exceptional Use waters are in areas with little human activity and are unlikely to be impacted by a permitted discharge; and (2) any current discharge permits related to Exceptional Use waters are demonstrably sufficient to protect the Exceptional Use.[142] For this reason, the MPCA asserts that cumulative impacts are expected to be minimal.[143]

90. The MPCA further concluded that the proposed amendments will not add new requirements or extend the impact of existing state or federal law.[144] While the DNR has regulations related to trout waters, the DNR is not obliged to adopt or modify its rules,

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[136] *Id.* at 24-25.
[137] *Id.* at 24.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

and the two agencies (and sets of rules) regulate different subject matters.[145] Only the MPCA establishes WQS under the CWA.[146]

B. Performance-Based Regulation

91. The APA requires an agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance based regulatory systems.[147] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[148]

92. According to the MPCA, the designations contained in the proposed rules represent the implementation of performance-based criteria to directly measure the attainment of use goals.[149] These designations, in turn, allow for flexibility in how protection and restoration goals may be achieved.[150] The MPCA maintains that adoption of designated uses tailored to a water body's potential provides more flexibility in the application of TMDLs and antidegradation reviews as well as in how protection and restoration goals may be achieved.[151]

C. Consultation with the Commissioner of Minnesota Management and Budget

93. Minn. Stat. § 14.131 requires that agencies consult with the Commissioner of MMB to help evaluate the fiscal impact and fiscal benefits of the proposed rule on local units of government.

94. On September 28, 2022, the MPCA sent a letter to the Commissioner of the MMB, along with the proposed rules and SONAR, seeking the required consultation.[152]

95. On October 17, 2022, the MMB issued a memorandum analyzing the fiscal impacts and benefits on local units of government.[153] The MMB concluded that that the proposed Exceptional Use, Modified Use, and warm/cool water habitat designations will

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[145] *Id.*
[146] *Id*.
[147] Minn. Stat. §§ 14.002, .131.
[148] Minn. Stat. § 14.002.
[149] Ex. D at 25.
[150] *Id.*
[151] *Id*.
[152] Ex. K-1 (Certificate of Consulting with Comm'r of MMB).
[153] *Id.*

not have any effect on local ordinances or regulations.[154] The MMB noted that the coldwater habitat designation may require some Municipal Separate Storm Sewer System (MS4) permittees to develop, implement, and enforce ordinances for construction activities.[155] However, in most or all cases, these municipalities already have adopted ordinances that address protection of these habitats.[156]

96. The MMB further determined that the proposed use designations will result in more accurate water quality assessment.[157] This, in turn, will positively impact local units of government by allowing them to engage in more effective and efficient water planning and management activities.[158] Other benefits related to improved water quality, according to the MMB, include increased property and sale tax revenues, increased tourism dollars, added jobs, and lower water treatment costs.[159]

D. Summary of Requirements Set Forth in Minn. Stat. § 14.131

97. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

98. Minn. Stat. § 14.127 requires agencies to "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." Agencies 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.[160]

99. The MPCA determined that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city in the first year after the rule takes effect.[161]

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[154] *Id.*
[155] *Id*.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Minn. Stat. § 14.127, subds. 1 and 2.
[161] Ex. D at 26-27.

100. The Administrative Law Judge finds that the Agency has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

F. Adoption or Amendment of Local Ordinances

101. Under Minn. Stat. § 14.128, agencies 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. Agencies 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.[162]

102. The MPCA concluded that it is unlikely a local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The MPCA states that the designation of coldwater habitats and Exceptional Use streams may result in the requirement that MS4 permittees develop, implement, and enforce a regulatory mechanism (e.g., city ordinance) which construction activities must follow. The Agency notes, however, that this would only be required if a regulatory mechanism is not already in place.[163] According to the Agency, the proposed Modified Use and warm/cool water habitat designations will not have any effect on local ordinances or regulations.[164]

103. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

G. Consideration of Economic Factors

104. In addition to the evaluation of costs and parties likely to incur costs as a result of the proposed rule changes (as required in Minn. Stat. § 14.131), the MPCA is required by Minn. Stat. §§ 115.43, subd. 1 and 116.07, subd. 6 (2022), to give due consideration to:

> [T]he establishment, maintenance, operation and expansion of business, commerce, trade industry, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or

[162] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.
[163] Ex. D at 27.
[164] *Id*.

provide for such action as may be reasonable, feasible, and practical under the circumstances.[165]

105. To this end, the MPCA considered the economic factors associated with the proposed amendments.[166] The MPCA concluded that the changes "are not anticipated to result in considerable increased costs for water management entities or for MPCA permitted dischargers in the foreseeable future."[167]

106. The MPCA contends that the proposed use designations will result in more accurate water quality assessments, which will lead to more effective and efficient water quality management activities.[168] This, in turn, benefits all Minnesota residents because water quality can be maximized and resources can be best directed where necessary to help waters meet attainable goals.[169]

107. The MPCA asserts that if high water quality and coldwater habitats are not held to their highest attainable use, Minnesota stands to lose a portion of the value of its resources. Ecosystem services lose value as the quality of the water degrades. Ecosystem services are natural processes that directly or indirectly benefit human beings.[170] According to the MPCA, these use designations can preserve the economic benefits, including economic value from fishing and recreation, but also numerous other benefits, which Minnesota residents derive from the ecosystem services of aquatic habitats.[171]

108. With respect to Exceptional Use designations, the MPCA asserts that the designations will translate into improved protections and water quality in these streams. Attaining and maintaining Exceptional Use high-quality water support tourism, recreational uses, and the intrinsic value of the existence of high-quality streams in Minnesota will benefit Minnesota residents.[172]

109. The MPCA determined that the proposed Exceptional Use stream designations are unlikely to affect existing NPDES/SDS permittees.[173] The MPCA

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[165] Minn. Stat. §§ 115.43, subd. 1; 116.07, subd. 6.
[166] Ex. D. at 37-46.
[167] *Id.* at 37-38
[168] *Id.* at 38.
[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] *Id*. at 39.
[173] *Id.*

determined there are 34 NPDES/SDS permittees that discharge directly to, or upstream of, a stream proposed to be designated Exceptional Use under the proposed amendments. These 34 permittees include: MS4 permittees, metallic mining; sand and gravel mining facilities; municipal wastewater; industrial stormwater; construction stormwater, and others.[174]

110. The MPCA evaluated the economic impact on all of these facilities and determined that none of them are anticipated to incur additional costs or will be required to undertake additional treatment of their discharges.[175] Construction stormwater permittees may, in rare cases, be required to implement additional best management practices.[176]

111. With respect to Modified Use designations, the MPCA determined that there will be no increased cost to citizens or dischargers, and these groups are likely to enjoy cost savings.[177] According to the Agency, citizens will incur economic benefits from the setting of attainable water quality goals, which will then allow water management entities to most effectively direct resources.[178]

112. As for permitted dischargers, the MPCA states that no permittees that discharge to, or upstream of, a proposed Modified Use stream will incur new costs.[179] In fact, the MPCA contends that some of these permittees may see cost savings by not having to conduct reviews to determine if their discharge is contributing to impairment.[180]

113. The Agency also determined that there are no direct impacts or costs to entities responsible for non-point source discharges to Modified Use streams.[181] Further, there is potential cost savings when compared to the current use designations.[182] Having more accurate use designations is anticipated to result in better outcomes for protection and restoration of water quality in ditches and better deployment of limited water quality management resources.[183]

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[174] *Id.*
[175] *Id.* at 39-41.
[176] *Id.* at 40-41.
[177] *Id.* at 41.
[178] *Id.*
[179] *Id.* at 42.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*

114. With respect to the proposed coldwater habitat designations, the MPCA asserts that Minnesota citizens will receive the same type of general economic benefits that befall the public when water quality is maintained and protected: improved recreation, increased property values, more jobs and income from tourism, increased tax revenues, and overall ecosystem benefits.[184]

115. The MPCA determined that there are 31 NPDES/SDS permittees that discharge directly to, or upstream of, the proposed coldwater habitats: 11 MS4 permittees, two metallic mining facilities; ten sand and gravel mining facilities, one municipal wastewater facility, and seven industrial stormwater permittees.[185]

116. The MPCA states that some permits may have additional costs associated with the protection of coldwater habitats.[186] However, the MPCA notes that no individual permittee could be identified that will likely have increased costs.[187] Overall, MPCA's analysis determined there are unlikely to be permittees impacted by the coldwater habitat use designations proposed in this rulemaking, and no permittees offered comments regarding costs.[188]

117. Finally, with respect to the proposed warm and cool water habitat designations, the MPCA determined that no party is likely to incur costs -- and some may even see a cost savings.[189] According to the Agency, Minnesota citizens will see a net savings because the new designation will allow water management authorities to better prioritize their efforts and use resources more efficiently.[190] In addition, no permitted entities will incur costs from the proposed designation change.[191] Entities responsible for non-point discharges to cool/warm water stream will see no direct impacts or costs and may see some cost savings compared to the current designation.[192] Currently these waters are held to coldwater biological goals which were determined to result in unattainable goals for these water bodies.[193]

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[184] *Id.* at 42-43.
[185] *Id.* at 43.
[186] *Id*. at 45.
[187] *Id*.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* at 46.
[192] *Id.*
[193] *Id*.

118. The Administrative Law Judge finds that the MPCA properly evaluated the potential costs to identifiable person or entities as a result of the proposed rule changes, as required by Minn. Stat. §§ 14.131, 115.43, subd. 1, and 116.07, subd. 6.

H. Comparison to Federal and Other State Standards

119. In addition to the regulatory analysis in Section IV, item 7 above, an agency, under Minn. Stat. § 116.07, subd. 2(f) (2022), has a special obligation in any rulemaking that seeks to adopt standards for water quality under Minn. Stat. ch. 115 (2022), to assess any differences and the need and reasonableness of each difference between the proposed rule and:

i. existing federal standards adopted under the Clean Air Act, title 42, section 7412(b)(2); CWA, 33 U.S.C. § 1312(a) and 1313(c)(4); and the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(b)(1);

ii. similar standards in states bordering Minnesota; and

iii. similar standards in states within the EPA Region 5 (Region V).

120. The MPCA states that all neighboring states[194] and all EPA Region V states[195] use biological monitoring tools and biological criteria to assess attainment of aquatic life uses.[196]

121. The MPCA notes that the cooperative federalism structure of the CWA requires states to establish WQS, including beneficial uses. As a result, the beneficial use framework is different for each state and is tailored specifically to the aquatic resources and biological monitoring and assessment programs in each state. The MPCA states that as part of WQS programs, all neighboring states and Region V states review and revise designated uses as needed to ensure that assigned designated uses are appropriate. The technical details regarding use designations differs between these states, but the need and reasonableness is similar. The greatest difference between Minnesota and most other states is the fact that only Minnesota and Ohio have formally adopted and implemented a TALU framework.[197]

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[194] North Dakota, South Dakota, Iowa, and Wisconsin. *See* Ex. D at 26.
[195] Wisconsin, Illinois, Ohio, Indiana, and Michigan. *See* Ex. D at 26.
[196] Ex. D at 26.
[197] *Id*.

122. The Administrative Law Judge finds the MPCA has met its obligation to assess the differences between the proposed rule and federal regulations and the reasonableness of each difference.

123. The Administrative Law Judge also finds that the MPCA has met its special obligations under Minn. Stat. § 116.07, subd. 2(f) to assess the impact of the proposed rule and the approaches taken by neighboring states.

I. External Peer Review

124. Minn. Stat. § 115.035(a) (2022) requires that every new or revised numeric water quality standard be supported by a technical support document that provides the scientific basis for the proposed standard and that has undergone external, scientific peer review.

125. Because the proposed rule does not amend any numeric or narrative standards, no external peer review was required.

J. Environmental Justice Policy

126. The MPCA adopted a policy for environmental justice, which it recently updated in May 2022.[198] The MPCA's policy states that, in addition to improving the environment and public health, the outcome of its work must address environmental justice concerns.[199] The MPCA also expects the fair treatment and meaningful involvement of communities of color, indigenous communities, and low-income communities in agency actions and decisions that affect them.[200]

127. The MPCA states that when undertaking rulemaking, it considers how the impacts of a proposed rule are distributed across Minnesota and works to actively engage all Minnesotans in rule development.[201] The MPCA maintains it strives to evaluate how proposed rule amendments may affect low-income populations and communities that have a high proportion of people of color.[202] The MPCA's goal is to look at whether implementing the proposed rules will create any disproportionate environmental burdens

[198] Ex. D at 28.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*.

or negative impacts.[203] Where applicable, the MPCA also looks at the distribution of the economic costs of the proposed rule, and whether those costs are disproportionally borne by low-income populations and communities of color.[204]

128. The MPCA asserts that it does not expect its proposed use designations and associated rule amendments will have any negative environmental consequences.[205] Indeed, the MPCA contends that the amendments will improve how the Agency protects Minnesota's water quality and aquatic life.[206]

129. The MPCA evaluated whether the use designations for certain stream reaches under the proposed rulemaking will have the potential to impact areas that have populations that are predominately low-income, people of color, or both.[207] The Agency determined that there will be no disproportionate impacts to these communities.[208]

130. With respect to meaningful involvement, the MPCA implemented an extensive additional notice plan that gave ample opportunity to all populations, including low-income populations and communities of color.[209] Because these proposed rule changes impact Minnesota's water quality, the Agency specifically reached out to Minnesota's tribal communities for input and comment.[210]

131. The Administrative Law Judge concludes that the MPCA has complied with its environmental justice policy and federal law requiring such an analysis.

V. Rulemaking Legal Standards

132. The Administrative Law Judge must make the following inquiries: (1) whether the agency has statutory authority to adopt the rule; (2) whether the rule is unconstitutional or otherwise illegal; (3) whether the agency has complied with the rule adoption procedures; (4) whether the proposed rule grants undue discretion to government officials; (5) whether the rule constitutes an undue delegation of authority to another entity; and (6) whether the proposed language meets the definition of a rule.[211]

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[203] *Id*. at 28-29.
[204] *Id*. at 29.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.* at 33.
[210] *Id.*
[211] *See* Minn. R. 1400.2100.

133. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[212] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[213] and the agency's interpretation of related statutes.[214]

134. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[215] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[216]

135. An important corollary to these standards is that when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[217] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[218]

VI. Rule by Rule Analysis

136. The meaningful changes in the proposed rule occur in the Beneficial Use Designations for Stream Reaches tables that are incorporated by reference in the rule.[219] In total, 232 stream assessment units will be changed as a result of the proposed rule based on Use Attainability Analyses and other monitoring data.[220]

137. Of the 232 stream assessment units subject to change in the proposed rule, only some generated public inquiry. The proposed changes are adequately supported by

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[212] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[213] *Compare generally, U. S.* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[214] *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[215] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[216] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[217] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[218] *Minn. Chamber of Commerce*, 469 N.W.2d at 103.
[219] Ex. C (Proposed Rule draft (October 21, 2022)).
[220] Ex. D at 3.

the SONAR and supplemented information provided by the MPCA in its post-hearing response. This report will not individually address each proposed change in the incorporated use tables.

138. The proposed changes can be divided into two groups: 1) TALU reviews and 2) cold and cool/warm water reviews.[221]

139. Within the TALU reviews, there are two types of aquatic life use changes: from general use to exceptional use; and from general use to modified use. In response to concern about "downgrading" some designations from general use to modified use and the sufficiency of data, the MPCA relied on evidence provided in its technical documents and industry and federal acceptance of TALU standards.

140. Changes resulting from MPCA's cold and cool/warm water reviews are based on scientific data and required analysis. In response to a request for additional explanation regarding these proposed changes, the MPCA provided that additional explanation and made additional data available.

141. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions and changes in the incorporated use designation tables that are not specifically addressed in this Report.

142. Further, the Administrative Law Judge finds that all provisions and changes in the incorporated use designation tables that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

VII. Further Technical Corrections

143. A finding or conclusion regarding need and reasonableness of any particular rule subsection does not preclude the MPCA from modification of the proposed rules. The rule finally adopted, however, must be based upon facts appearing in this rule hearing record and, if the modification results in a substantially different rule, the Agency must comply with the requirements of Minn. R. 1400.2110.

144. For example, the publication dates of the tables entitled "Beneficial Use Designations for Stream Reaches" in the proposed rule is the MPCA's projected estimate

[221] Ex. D at 8.

of “March 2023.” Because of the lengthy rulemaking process, the Commissioner may wish to consider adjusting the stated publication date to more accurately reflect the final publication date. If only the publication date is changed, such a modification would be supported by the facts in the hearing record.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority and jurisdiction to review these rules under Minn. Stat. § 14.14, .15, .50 (2022), and Minn. R. 1400.2100 (2021).

2. The MPCA gave all required notice to interested persons in this matter pursuant to Minn. Stat. §§ 14.101, .111, .116, .131, .14, .22, .23, .25, .37, 115.44 (2022) and Minn. R. 1400.2060, .2070, .2080, .2230 (2021), including all additional notice requirements of rule and law.

3. The MPCA has fulfilled the procedural requirements of Minn. Stat. §§ 14.101, .111, .116, .131, .14, .20, .22, .23, .24, .25, 115.44, and Minn. R. .2060, .2070, .2080, .2090, .2210, .2220, .2230, and all other applicable rules and laws.

4. The Agency has demonstrated its statutory authority to adopt the proposed rules pursuant to Minn. Stat. §§ 14.05, subd. 1 (2022).

5. The Agency has fulfilled all substantive requirements of Minn. Stat. §§ 14.002, .127, .128, .131, .14, .23, .24 (2022) and Minn. R. 1400.2070, .2080, .2100, and all other applicable rules and laws.

6. The Additional Notice Plan, Notice of Hearing, proposed rules, and the SONAR complied with Minn. Stat. §§ 14.131, .22, .23 and Minn. R. 1400.2060, .2070, .2080.

7. 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 and 14.50.

8. If the Agency modifies the published table dates in the final adopted rule, such a modification would not result in a substantially different rule as described in

Minn. Stat. § 14.05, subd. 2, and therefore not be subject to the procedures in Minn. R. 1400.2110.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated: April 14, 2023

SUZANNE TODNEM
Administrative Law Judge

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The Agency may then adopt the final rules or modify or withdraw its proposed rule. If the Agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the Office of Administrative Hearings will file certified copies of the rules with the Secretary of State. At that time, the Agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.