

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition for Amendments to  
Minn. R. 7050.0150, 7050.0220 and 7050.0222

**ORDER ON MOTION  
FOR DISMISSAL**

This matter came before Administrative Law Judge Eric L. Lipman on May 25, 2016 for an oral argument on the Minnesota Pollution Control Agency's Motion to Dismiss.

Robert T. Scott and Daniel M. Marx, Flaherty & Hood, P.A., appeared on behalf of the local governmental units that requested the rule amendments (Petitioners).<sup>1</sup> Max H. Kieley, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency (MPCA).

Based upon the submissions of the parties and the hearing record, and for the reasons detailed in the accompanying Memorandum,

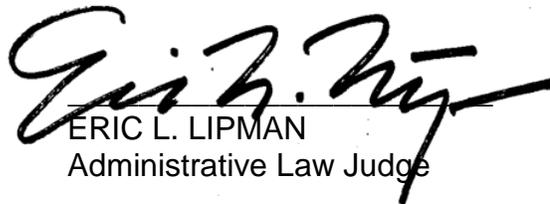
**IT IS HEREBY DETERMINED:**

The Petitioners did not establish that there is "significant new evidence relating to the need for or reasonableness of the rule," as those words are used in Minn. Stat. § 14.091(a)(1) (2014).

**IT IS HEREBY ORDERED:**

1. The MPCA's Motion to Dismiss is **GRANTED**.
2. The milestones of the Second Prehearing Order are **CANCELLED**.
3. The Petition is **DISMISSED**.

Dated: June 2, 2016

  
ERIC L. LIPMAN  
Administrative Law Judge

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<sup>1</sup> See *generally* Minn. Stat. § 114C.21 (2014).

## NOTICE

Under Minn. Stat. § 14.091(c) (2014), this Order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2014).

## MEMORANDUM

### Factual Background

Under the terms of the Clean Water Act (CWA), the MPCA is obliged to review Minnesota's water quality standards (WQS) every three years.<sup>2</sup>

In this context, the CWA is an example of “cooperative federalism” – namely, there are a set of federal supervisory controls that overlay different, and sometimes highly-localized, state water quality programs.<sup>3</sup> As a result, the water quality standards that the EPA approves for Minnesota are not identical to the standards that it approves for Maine or Montana.<sup>4</sup>

After the “Triennial Review,” states promulgate water quality standards according to state law; but then submit the completed standards to the U.S. Environmental Protection Agency (EPA) for final review and approval.<sup>5</sup> If the EPA approves a particular WQS, “such standard shall thereafter be the water quality standard for the applicable waters of that State.”<sup>6</sup>

Part of the WQS approval process includes a review by the EPA of the scientific rationales that underlie particular standards. The WQS “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.”<sup>7</sup>

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<sup>2</sup> See 33 U.S.C. § 1313(c)(1) (2014).

<sup>3</sup> See *generally* 33 U.S.C. § 1251(b) (2014) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter”); 33 U.S.C. § 1251(g) (2014) (“Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources”).

<sup>4</sup> See *generally Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, 8 F. Supp. 3d 500, 556 (S.D.N.Y.), *appeal withdrawn* (2d. Cir. 2014) (“[W]ater quality standards vary from state-to-state and water transferred from one state could meet standards for that state and yet degrade the quality of the waters of the state downstream of a water transfer”); 40 C.F.R. § 131.11(b) (2015).

<sup>5</sup> 33 U.S.C. § 1313(c)(2)(A) (2014) (“Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator.... Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.”); see *also* 40 C.F.R. § 131.5 (2015).

<sup>6</sup> 33 U.S.C. § 1313(c)(3) (2014).

<sup>7</sup> 40 C.F.R. § 131.11 (a)(1) (2015); see *also*, 40 C.F.R. § 131.5 (a)(2) (2015).

## 1. Development of New Water Quality Rules

During the MPCA's 2011 Triennial Review, the agency concluded that it was necessary to promulgate WQS that reduced "eutrophication" in Minnesota's rivers and streams. As the agency explained, eutrophication is:

the increased productivity of the biological community in water bodies in response to increased nutrient loading. Eutrophication is characterized by increased growth and abundance of algae and other aquatic plants, reduced water transparency, reduction or loss of dissolved oxygen, and other chemical and biological changes. The acceleration of eutrophication due to excess nutrient loading from human sources and activities, called cultural eutrophication, causes a degradation of water quality and possible loss of beneficial uses.<sup>8</sup>

The water quality standards that the MPCA proposed included a two-pronged assessment of water quality: It established numeric values for a "causal variable," total phosphorus, as well as numeric values for four different "response variables":<sup>9</sup> (1) chlorophyll-a;<sup>10</sup> (2) "five-day biochemical oxygen demand" or "BOD<sub>5</sub>";<sup>11</sup> (3) "diel dissolved oxygen flux" or "DO flux";<sup>12</sup> and (4) pH.<sup>13</sup>

The agency maintained that water bodies in which there was excessive levels of phosphorous, and also excessive levels of either chlorophyll-a, BOD<sub>5</sub>, DO flux, or pH, were so impaired that they did not "fully support applicable beneficial uses."<sup>14</sup> The Clean Water Act obliges that state water quality standards be crafted so as to protect health, welfare and the varied uses of these "public water supplies."<sup>15</sup>

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<sup>8</sup> Minn. R. 7050.0150, subp. 4(G) (2015).

<sup>9</sup> Minn. R. 7050.0150, subps. 5, 5b, .0222, subps. 2, 2b, 3, 3b, 4, 4b (2015).

<sup>10</sup> See Minn. R. 7050.0150, subp. 4(D) (2015) ("Chlorophyll-a' means a pigment in green plants including algae. The concentration of chlorophyll-a, expressed in weight per unit volume of water, is a measurement of the abundance of algae.").

<sup>11</sup> See Minn. R. 7050.0150, subp. 4(C) (2015) ("BOD<sub>5</sub>' or 'five-day biochemical oxygen demand' means the amount of dissolved oxygen needed by aerobic biological organisms to break down organic material present in a given water sample at a certain temperature over a five-day period").

<sup>12</sup> See Minn. R. 7050.0150, subp. 4(C) ("Diel dissolved oxygen flux means the difference between the maximum daily dissolved oxygen concentration and the minimum daily dissolved oxygen concentration.").

<sup>13</sup> pH is a measure of acidity and alkalinity of a solution that is a number on a scale on which a value of 7 represents neutrality and lower numbers indicate increasing acidity and higher numbers increasing alkalinity. See *Merriam-Webster Online Dictionary* (last accessed May 30, 2016).

<sup>14</sup> See Minn. R. 7050.0222 (2015); see also Minn. R. 7050.0150, subp. 4(K) (2015) ("Impaired water' or 'impaired condition' means a water body that does not meet applicable water quality standards or fully support applicable beneficial uses, due in whole or in part to water pollution from point or nonpoint sources, or any combination thereof").

<sup>15</sup> 33 U.S.C. § 1313(c)(2)(A) ("Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation").

For example, the MPCA proposed the following eutrophication standards for “Class 2A rivers and streams”<sup>16</sup> in Minnesota:

	Density	North River Nutrient Region	Central River Nutrient Region	South River Nutrient Region
Phosphorus, total	µg/L	less than or equal to 50	less than or equal to 100	less than or equal to 150
Chlorophyll-a (seston)	µg/L	less than or equal to 7	less than or equal to 18	less than or equal to 35
Diel dissolved oxygen flux	mg/L	less than or equal to 3.0	less than or equal to 3.5	less than or equal to 4.5
Biochemical oxygen demand (BOD <sub>5</sub> ) <sup>17</sup>	mg/L	less than or equal to 1.5	less than or equal to 2.0	less than or equal to 3.0

During the state rulemaking proceedings on these standards, the Petitioners and others criticized MPCA’s proposal to include BOD<sub>5</sub> and DO flux as response variables. The Petitioners maintained then, as they do today, that there are reasons for changes in the levels of BOD<sub>5</sub> and DO flux in a particular water body that are unrelated to pollution or “nutrient loading.”<sup>18</sup> Moreover, they maintained that there is no scientific basis upon which MPCA could conclude that an increase in the level of phosphorous causes later increases in either BOD<sub>5</sub> or DO flux.<sup>19</sup>

Significantly, however, the MPCA does not maintain that higher levels of phosphorous in a water body *causes* increases in any of the response variables. Rather, it asserts that when the levels of phosphorus, and one of the other four variables, exceed the specified thresholds, the water is impaired.<sup>20</sup>

The distinction, therefore, is between causation and correlation. The MPCA argues that a series of detailed field studies point to strong correlations between high levels of phosphorus, “exceedance” in one of the other variables, and impairment of

<sup>16</sup> See generally Minn. R. 7050.0150, subp. 4(X) (2015) (“‘River nutrient region’ means the geographic basis for regionalizing the river eutrophication criteria as described in Heiskary, S. and K. Parson, *Regionalization of Minnesota’s Rivers for Application of River Nutrient Criteria*, Minnesota Pollution Control Agency (2013)”); Minn. R. 7050.0222, subp. 2 (2015) (“The quality of Class 2A surface waters shall be such as to permit the propagation and maintenance of a healthy community of cold water sport or commercial fish and associated aquatic life, and their habitats. These waters shall be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable. This class of surface waters is also protected as a source of drinking water.”).

<sup>17</sup> *Id.*

<sup>18</sup> See *In the Matter of the Proposed Rules of the Pollution Control Agency for Rule Amendments Governing Water Quality Standards — River Eutrophication, Total Suspended Solids and Minor Corrections and Clarifications to Minnesota Rules 7050 and 7053*, OAH 60-2200-30791, 2014 WL 2157014, at \*16 (2014).

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Minn. R. 7050.0222, subp. 2b(A), (B) (2015) (“Exceedance of the total phosphorus levels and chlorophyll-a (seston), five-day biochemical oxygen demand (BOD<sub>5</sub>), diel dissolved oxygen flux, or pH levels is required to indicate a polluted condition ... Rivers and streams that exceed the phosphorus levels but do not exceed the chlorophyll-a (seston), five-day biochemical oxygen demand (BOD<sub>5</sub>), diel dissolved oxygen flux, or pH levels meet the eutrophication standard.”).

water bodies.<sup>21</sup> In the MPCA's view, apart from identifying the underlying cause of the impairment, when the listed thresholds are crossed together, they indicate a significant problem in the particular lake, stream or river.<sup>22</sup>

Moreover, MPCA is not alone, or even an outlier, in reaching those conclusions. As Administrative Law Judge LaFave noted in his report on the proposed standards, a multi-disciplinary team of scientists and program managers from the Minnesota Department of Natural Resources credited the "sound scientific methods" by which the standards were developed.<sup>23</sup> Additionally, Judge LaFave highlighted the favorable, albeit preliminary review of the methods, from the EPA:

An independent scientific review of Minnesota's proposed nutrient water quality standards for rivers and streams was prepared at the request of the EPA. The EPA routinely utilizes external technical review when evaluating state and tribal water standards to help identify potential scientific issues. The three independent experts reviewed the proposed Agency rule and all three expressed support for the proposal.

In addition, the EPA conducted its own independent review of the Agency's proposed rule. The EPA determined that "based on the experts' comments in total and our independent review of the proposal, Region 5's preliminary evaluation is that the technical components of Minnesota's proposed eutrophication standards under peer review for rivers and streams appear to be scientifically defensible."<sup>24</sup>

The MPCA adopted the new water quality standards on August 4, 2014.<sup>25</sup>

## **2. Continuing Inquiries into the BOD<sub>5</sub> and DO Flux Tests**

Following the adoption of the standards by MPCA, the Petitioners continued to investigate the science behind the new response variables. Their consultant submitted a set of public records requests to the EPA relating to BOD<sub>5</sub> and DO flux.

Presumably, these requests were intended to obtain copies of the peer review studies that were identified by MPCA, but not publicly disclosed, during the rulemaking proceedings. As to DO flux, the consultant requested:

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<sup>21</sup> MPCA's MOTION TO DISMISS, at 14; *In Re Water Quality Standard Rules*, *supra*, at \*17

<sup>22</sup> MPCA's MOTION TO DISMISS, at 11, 14-18; *In Re Water Quality Standard Rules*, *supra*, at \*17.

<sup>23</sup> *In Re Water Quality Standard Rules*, *supra*, at \*18. See also, *Minnesota Env'tl. Sci. & Econ. Review Bd. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97, 102 (Minn. Ct. App. 2015) ("[H]ere, the MPCA cited a number of scientific studies that supported the disputed WQS standards, including an EPA review, DNR studies, and the opinion of an agronomist from the Water Resources Center at the University of Minnesota. The MPCA provided scientific studies to rebut the specific challenges to the failure to distinguish small streams from large rivers and to the use of BOD<sub>5</sub> and DO flux.").

<sup>24</sup> *Id.* at \*14; see also PETITION, Ex. 5 at 7388 ("Your Honor, EPA had multiple reviewers of all of the materials submitted in the Statement of Need and Reasonableness, the technical support documents and the rule revisions. Each of those reviewers, I assume, reviewed the scientific analysis and, in whole, the conclusion was that EPA supported the scientific analysis") (Testimony of Jean L. Coleman).

<sup>25</sup> 39 *State Register* 154 (August 4, 2014).

any records which are the basis for EPA's assertion that diurnal DO variation, by itself, causes aquatic life impairment, including any public notices that EPA has reached this conclusion under Section 304(a) of the Act. In particular, this FOIA response should identify the scientific studies that form the basis for EPA's position and explain the degree of diurnal DO variation that may be expected to cause use impairment, even when DO levels do not fall below the minimum concentrations specified in the Gold Book.<sup>26</sup>

While perhaps not directly responsive to this inquiry, on September 12, 2014, the EPA provided an excerpt from a 1986 agency publication, *Quality Criteria for Water*. The excerpt detailed specific levels of ambient dissolved oxygen concentrations in water, so as to avoid harmful impacts to aquatic life.<sup>27</sup>

In November of 2014, the same consultant inquired as to EPA records relating to BOD<sub>5</sub>. The consultant requested:

all records from EPA Headquarters ... announcing to the public or providing guidance to state agencies under Section 304(a) indicating that the BOD<sub>5</sub> test may be used as a valid response criterion when establishing numeric nutrient criteria and any correspondence approving such criteria under Section 303(c) of the Act.<sup>28</sup>

By way of a letter dated December 5, 2014, agency officials re-cast and narrowed the terms of the records request, before making its response. The agency wrote:

Your FOIA requests copies of the following EPA headquarters records identifying the use of the five-day biochemical oxygen demand as an appropriate nutrient response criterion:

- 1) Federal guidance documents addressing the development of scientifically defensible numeric nutrient criteria under CWA Section 304(a),
- 2) Federal register notices regarding acceptable methods for development of Section 304(a) water quality criteria, and
- 3) Letters and memoranda regarding the approval of such numeric nutrient criteria under Section 303(c) of the Act.

EPA does not have any documents responsive to your request.<sup>29</sup>

Lastly, the Petitioners obtained a memorandum from a respected organization on environmental science, *Standard Methods for the Examination of Water and*

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<sup>26</sup> PETITION, Ex. 9, at 2.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> PETITION, Ex. 7, at 2.

<sup>29</sup> *Id.*, at 3.

Wastewater. This consortium – known as “Standard Methods” – is an association of public health, environmental and industry groups that work on water-related analyses and best practices. The organization’s Joint Editorial Board wrote, in part:

This letter is in response to questions about the use of the BOD test as a measure of nutrient pollution. The BOD test (Standard Method 5210 B) is not considered to provide an appropriate measure of nutrient pollution nor is it a valid predictor of nutrient impacts.<sup>30</sup>

### 3. EPA’s Approval of the New WQS

By way of a report dated January 23, 2015, the EPA formally approved the new WQS. In this approval document, EPA scientists noted the concerns regarding use of BOD<sub>5</sub> and DO flux as response criteria. The EPA reviewed the competing claims, underlying data sets and regression analyses before siding with the MPCA on these points. It wrote:

A comment was raised during Minnesota's public review period regarding whether BOD<sub>5</sub> and diel DO flux were sufficiently related to [Total Phosphorus (TP)] to be included as indicators in Minnesota's eutrophication criteria. MPCA responded that its approach of using combinations of causal and response indicators to assess rivers for impairment ensures that rivers exhibiting only elevated chlorophyll a, BOD<sub>5</sub>, or diel DO flux without elevated phosphorus would not be assessed as impaired without further analysis. MPCA recognized that all of the response indicators (i.e. chlorophyll a, diel DO flux, and BOD<sub>5</sub>) can be influenced by factors other than phosphorus. Accordingly, MPCA developed a structure for its eutrophication criteria so that both TP and a response indicator (e.g., BOD<sub>5</sub>) must be exceeded to conclude that aquatic life uses would not be protected. **MPCA agreed in its response to the comment that BOD<sub>5</sub> cannot be used as a stand-alone criterion of nutrient enrichment** based on the very reason raised by the commenter, that factors other than phosphorus can increase BOD<sub>5</sub> concentrations. However, for the reasons explained in MPCA's response to this comment, **MPCA had a sound scientific rationale to conclude that high BOD<sub>5</sub> concentrations and high diel DO flux result from phosphorus enrichment, as supported by the coefficients of determination found in the MPCA data sets** (Eutrophication TSD, pp 4444) ....

....

MPCA's decision to include BOD in the multi-indicator eutrophication criteria is consistent with the conclusion of the proceedings from the U.S. EPA expert workshop: nutrient enrichment indicators in

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<sup>30</sup> PETITION, Ex. 8.

streams, September, 2014, which identifies BOD as an indicator of eutrophication's impacts on ecosystem function. Additionally, diel DO flux and especially BOD<sub>5</sub> are related to chlorophyll a, meaning it is unlikely that a response in diel DO flux or especially BOD<sub>5</sub> would occur without the presence of a similar response in chlorophyll a.

....

In conclusion, MPCA's approach to exploratory data analysis is based on sound scientific rationale, as it uses the recommendations and statistical tools from EPA's Stressor-response Guidance. In particular, given the conceptual model, the correlations between TP and diel DO flux and between TP and BOD<sub>5</sub>, and **the correlations among the indicator variables** (i.e., chlorophyll a, diel DO flux, and BOD<sub>5</sub>), both MPCA's selection of TP, chlorophyll a, BOD<sub>5</sub> and diel DO flux as criteria components and **MPCA's determination that TP and indicator variables must both be exceeded to demonstrate that aquatic life uses are not protected has a sound scientific rationale.** Further, MPCA had a sound scientific rationale for selecting TP and pH as criteria components since increased primary production and bacterial activity may result in variation in pH, consistent with MPCA's conceptual model.<sup>31</sup>

Importantly, however, it does not appear that the Petitioners had a copy of the January 23, 2015 approval document before it filed the petition in this matter.

#### 4. The Petitioners' Claims

The Petitioners assert that the documents they obtained from EPA in late 2014, and the memorandum from *Standard Methods*, show that the WQS are unsupported. They argue that if the EPA does not have the requested peer review studies, and the Joint Editorial Board of *Standard Methods* disclaims the MPCA's use of the BOD<sub>5</sub> tests, the recently-promulgated rules are arbitrary and capricious.<sup>32</sup> Petitioners request an evidentiary hearing to establish these claims.

### Legal Analysis

#### 1. The Appropriate Standard of Review

Minn. Stat. § 14.091(a)(1) does not make clear what evidentiary burden the Petitioners must bear in order to obtain a hearing. Specifically, the statute does not make clear how much evidence qualifies as "significant new evidence relating to the need for or reasonableness of the rule," or the required strength of the new items. Not surprisingly, the Petitioners and MPCA differ sharply on what amount of evidence is needed before an Administrative Law Judge may set a hearing under section 14.091 (2014).

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<sup>31</sup> MPCA's MOTION TO DISMISS, Ex. A at 17-18 (emphasis added).

<sup>32</sup> PETITION, at 7-8.

MPCA maintains that the proper analogy is to motions for a new trial under Minn. R. Civ. P. 59.01 (d). Under Rule 59.01, a new trial will not be granted unless the newly discovered evidence is so weighty that it would probably produce a different result than the earlier trial. For that reason, evidence which is “merely contradictory, impeaching, or cumulative” will not suffice to obtain a new hearing.<sup>33</sup>

Because they seek an evidentiary hearing, the Petitioners argue that the proper analogy is to motions for summary judgment under Minn. R. Civ. P. 56.03. They maintain that the letters and memoranda obtained in the fall of 2014 are “significant,” because they create a genuine and material dispute over the reasonableness of the WQS, and that dispute should be resolved at a hearing.<sup>34</sup>

The MPCA has the better reading of the statute. Particularly because in the context of rulemaking, a genuine and material dispute between an agency and its stakeholders is not a strong forecast that the proposed rules are invalid. Agencies are often asked by the state legislature to promulgate regulations on controversial topics; matters as to which there may be no broad areas of agreement. For that reason, an agency is legally entitled to make choices among different regulatory approaches, so long as the alternative that is selected by the agency is a rational one.<sup>35</sup> Thus, while reasonable minds might differ as to whether one or another approach represents the best alternative to address a particular policy problem, an agency’s selection is valid if it is one that a rational person could have made.<sup>36</sup>

This framework also recognizes the key fact that delegations of rulemaking authority run from the state legislature to particular executive branch agencies, and not to administrative law judges.

In this case, the MPCA and Petitioners are divided as to the propriety of using BOD<sub>5</sub> and DO flux when assessing water quality. They were divided on this point during the earlier rulemaking hearing, in proceedings before the Minnesota Court of Appeals, and remain so today. The fact that there are genuine disagreements about the science that underlies the standards would not have been a basis to invalidate the rules when they were first proposed; and it should not be the standard for obtaining a new hearing under section 14.091. In the view of the Administrative Law Judge, something more is required.

Significant evidence, as that term is used in section 14.091, signals a reason to conclude that the rules themselves are irrational; and that had the newly-obtained

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<sup>33</sup> MPCA’S MOTION TO DISMISS, at 9-10 (citing *Dostal v. Curran*, 679 N.W.2d 192, 194 (Minn. Ct. App. 2004); *Peller v. Harris*, 464 N.W.2d 590, 593 (Minn. Ct. App. 1991)).

<sup>34</sup> PETITIONERS’ RESPONSE, at 6.

<sup>35</sup> *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. App. 1999).

<sup>36</sup> See *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

evidence been available during the earlier proceedings, the agency's regulatory choice is not one a reasonable person would have made.<sup>37</sup>

## 2. The Significance of the 2014 Documents

The Petitioners submit the documents that they obtained from Standard Methods and the EPA for two related propositions: (1) the peer review studies that the MPCA claimed supported the proposed standards were never performed; and (2) the use of a BOD<sub>5</sub> calculation as a response variable is at odds with sound, scientific practice.<sup>38</sup> The new documents do not stand for either proposition.

Because it is not clear that EPA ever asserted that “diurnal DO variation, *by itself*, causes aquatic life impairment,” a records request that was limited in this way was unlikely to uncover peer reviews of the Minnesota standards. It is unsurprising to learn that EPA has no documents which reflect views that it never espoused.

Petitioners face a similar problem in their second request for documents. The Petitioners' consultant requested “all records from EPA Headquarters ... announcing to the public or providing guidance to state agencies under Section 304(a) indicating that the BOD<sub>5</sub> test may be used as a valid response criterion when establishing numeric nutrient criteria.”

EPA's reply that it had no documents that were “responsive to [this] request” does not establish, or even make likely, that the peer review studies never existed. Instead, it is far more likely that the work of independent scientific reviewers were not regarded by agency staff as being “from EPA Headquarters,” as specified in the request. Further, such review work, was likely not considered by EPA as “announcing to the public or providing guidance to state agencies under Section 304(a)” a particular stance on “establishing numeric nutrient criteria.”

As important, EPA's narrowing of the second record request makes clear that it was likely excluding peer review materials from the reply. Materials from independent reviewers are not “federal guidance documents;” “federal register notices” or “letters and memoranda regarding the approval of such numeric nutrient criteria under Section 303(c)” of the Clean Water Act. If Petitioners were hoping to obtain copies of the peer reviews of the Minnesota standards, it was clear in the autumn of 2014 that the EPA did not understand the records request in this same way. And it said so in writing.

Because of the wobbly and indirect phrasing of these records requests, EPA officials were able to make brief replies and move on to the next request in their inbox. Its replies are not the proverbial “smoking guns” that peer reviews of the Minnesota standards were never made.

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<sup>37</sup> Minn. Stat. § 14.091 (a)(1) (“The petition must ... demonstrate that one of the following has become available since the adoption of the rule in question ... (1) significant new evidence relating to the need for or reasonableness of the rule”).

<sup>38</sup> PETITION, at 7-8.

Even if one assumes that MPCA officials lied, or were mistaken about the existence of favorable peer reviews from EPA's consultants, the reasonableness of the WQS is not undermined. This is because the rulemaking record at the time, and EPA's later approval document, both include testimony from other scientists as to the rigor and validity of MPCA's approach. Thus, even if the support of the independent peer reviewers is excluded from consideration, the WQS would still survive. Petitioners cannot establish that BOD<sub>5</sub> and DO flux are variables that no reasonable person would have selected for the regulation, because other, reasonable scientists did.

Lastly, the Standard Methods memorandum does not aid the Petitioners' argument. MPCA does not use BOD<sub>5</sub> as either a "measure of nutrient pollution" or a "predictor of nutrient impacts," as disclaimed in the Standard Methods memorandum. It is clear from Judge LaFave's report, and the later EPA approval document, that MPCA agrees that BOD<sub>5</sub> cannot be used as a stand-alone criterion of nutrient enrichment. On this point MPCA, Standard Methods, and Petitioners all agree.

For MPCA, however, BOD<sub>5</sub> is a valuable "indicator variable"; which alongside total phosphorus, points to impairments of water bodies. And that is a different matter.

Petitioners' newly discovered evidence is not "significant" because it does not call into serious question the reasonableness of the earlier-promulgated rules. MPCA is entitled to dismissal of the petition.

**E. L. L.**