

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS**

**FOR THE DEPARTMENT OF MINNESOTA POLLUTION CONTROL AGENCY**

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| <p>In the Matter of Proposed Amendments to Minn. Rules, Chapter 7050, Governing the Classification and Standards for Waters of the State, as Required by Minnesota Session Law 2003, Chapter 128, Article 1, Section 156, as Amended by Minnesota Session Law 2005, First Special Session, Chapter 1, Article 2, Section 151.</p> | <p><b>REPORT OF THE<br/>ADMINISTRATIVE LAW JUDGE</b></p> |
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Administrative Law Judge Steve Mihalchick conducted a hearing on these proposed rules beginning at 9:30 a.m. on Wednesday, August 9, 2006, at the office of the Minnesota Pollution Control Agency, 520 Lafayette Road North, St. Paul, Minnesota. The hearing continued until everyone present had an opportunity to state their views on the proposed rules.

A hearing for agency rulemaking is required when a sufficient number of persons request one.<sup>1</sup> It is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Minnesota Pollution Control Agency (MPCA or Agency) received more than twenty-five written requests for a hearing on its proposed rules, and so convened the hearing. Several employees of the Agency were at the hearing, constituting a panel to provide the public with information about the proposed rules and to answer any questions. The panel members were:

- Robert Roche, Assistant Attorney General, representing the MPCA staff,
- David Maschwitz, research scientist for the MPCA,
- Frank Kohlasch, and
- Gerald Blaha.

Four people signed the hearing register.<sup>2</sup>

<sup>1</sup> Minn. Stat. § 14.25, subd. 1 (hearing required if requested by 25 or more persons).

<sup>2</sup> Public Ex. 2.

After the hearing ended, the record remained open for twenty calendar days, until August 23, 2006, to allow interested persons and the Department an opportunity to submit written comments.<sup>3</sup> During this initial comment period the Administrative Law Judge received two written comments, one from David Zoll on behalf of John Bondhus and Spring Valley Ponds, L.L.C. and the other from the MPCA. Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the MPCA the opportunity to file a written response to the comments submitted. The deadline for response to the comments was August 30, 2006. The Administrative Law Judge received one written response. The hearing record closed for all purposes on August 30, 2006.

## NOTICE

The MPCA must make this Report available for review for at least five working days before the MPCA takes any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request. If the Commissioner of MPCA makes changes in the rules as finally proposed, including those suggested or recommended in this Report, the Commissioner must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before the Commissioner may adopt the rules in final form.

After adopting the final version of the rules, the MPCA must submit the rules to the Revisor of Statutes for a review of their form. After the Revisor of Statutes approves the form of the rules, the rules must be filed with the Secretary of State. On the day of that filing, the Department must give notice to everyone who requested notice of that filing.

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

## FINDINGS OF FACT

### Procedural Requirements

1. In 2003, the Minnesota Legislature directed the MPCA to adopt rules regarding changes to the water quality assessment process.<sup>4</sup>

2. A Request for Comments on Possible Amendments to Rules Governing State Water Quality Standards, Minn. R. 7050 and 7052, was published in the *State Register* on November 10, 2003 at 28 S.R. 614.<sup>5</sup>

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<sup>3</sup> Minn. Stat. § 14.15, subd. 1.

<sup>4</sup> Laws 2003, ch. 128, art.1 § 156.

<sup>5</sup> Ex. B, attached ex. 6.

3. On May 9, 2006, the Officer of the Revisor of Statutes approved the proposed rule amendments for publication in the State Register<sup>6</sup>.

4. Also on May 9, 2006, the MPCA notified the Commissioner of Transportation of the proposed rule, pursuant to Minn. Stat. 174.05.<sup>7</sup> Also on May 9, 2006, the MPCA notified the Commissioner of Agriculture of the proposed rule, pursuant to Minn. Stat. 14.111.<sup>8</sup>

5. On May 16, 2006, the MPCA requested that a hearing be scheduled and filed with the Chief Administrative Law Judge a proposed Dual Notice of Hearing, a copy of the proposed rules certified as to form, and a Statement of Need and Reasonableness (SONAR) containing a plan for additional notice. Those documents were transferred to the Administrative Law Judge (ALJ) for review.<sup>9</sup>

6. The ALJ approved the Department's proposed Dual Notice and Additional Notice Plan on May 23, 2006.<sup>10</sup>

7. On June 19, 2006, the MPCA published the Dual Notice and proposed amendments to the rules in the *State Register*, 30 S.R. 1369.<sup>11</sup>

8. On June 20, 2006, the MPCA mailed the Notice to Adopt rules with a copy of the proposed rules attached to all parties on the agency rulemaking list (which includes the Governor's Office) prepared pursuant to Minnesota Statutes, section 14.14, subdivision 1a.<sup>12</sup>

9. As required by Minn. Stat. § 14.116, copies of the notice, proposed rule, and Statement of Need and Reasonableness were mailed to the chairs and ranking minority members of the Minnesota House of Representatives committee on Environment and Natural Resources and the Senate committee on Agriculture, Environment and Natural Resources on June 16, 2006.<sup>13</sup>

10. On July 12, 2006, Paul R. Haik, Krebsbach and Haik, Ltd., requested an extension of the public comment period.<sup>14</sup>

11. On July 19, 2006, the MPCA declined the request to extend the comment period.<sup>15</sup>

12. On July 26, 2006, the MPCA notified individuals who had provided comments on the proposed rule amendments that the scheduled hearing would take place.<sup>16</sup>

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<sup>6</sup> Ex. A.

<sup>7</sup> Ex. G.

<sup>8</sup> *Id.*

<sup>9</sup> Ex. I, 1.

<sup>10</sup> Ex. I, 2.

<sup>11</sup> Ex. D.

<sup>12</sup> Ex. E.

<sup>13</sup> Ex. F.

<sup>14</sup> Ex. J 1.

<sup>15</sup> Ex. J 2.

13. At the hearing on August 9, 2006, the Department introduced the following documents:

1. The proposed rule amendment approved for publication in the *State Register* by the Office of the Revisor of Statutes.<sup>17</sup>
2. Statement of Need and Reasonableness (SONAR)<sup>18</sup> with the following attached exhibits:
  - a. Minn. Session Laws, 2003, Chapter 128.<sup>19</sup>
  - b. Minn. Session Laws, 2005, First Special Session, Chapter 1.<sup>20</sup>
  - c. Proposed draft amendments to Minn. R. 7050, dated April 19, 2006.<sup>21</sup>
  - d. MPCA 2004 303(d) List.<sup>22</sup>
  - e. Request for Comments on Possible Amendments to Rules Governing State Water Quality Standards, Minn. R. 7050 and 7052, as published in the *State Register* on November 10, 2003 at 28 S.R. 614.<sup>23</sup>
  - f. A letter to an interested party from the MPCA staff, dated November 6, 2003.<sup>24</sup>
  - g. A letter from Bruce A. Nelson, president, MESERB, to MPCA, dated December 31, 2003.<sup>25</sup>
  - h. The Request for Comments, published in the *State Register*, May 17, 2004, 28 S.R. 1464.<sup>26</sup>
  - i. A letter to interested party, dated May 11, 2004.<sup>27</sup>
  - j. A memo to MPCA Citizens' Board, dated September 23, 2003, re Plans for Additions and Revisions to Water Quality Standards in Minn. R. chs. 7050 and 7052.<sup>28</sup>

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<sup>16</sup> Ex. L.

<sup>17</sup> Ex. A.

<sup>18</sup> Ex. B, attached ex. 1 (hereafter referred to as "the SONAR").

<sup>19</sup> Ex. B, attached ex. 2.

<sup>20</sup> Ex. B, attached ex. 3.

<sup>21</sup> Ex. B, attached ex. 4.

<sup>22</sup> Ex. B, attached ex. 5.

<sup>23</sup> Ex. B, attached ex. 6.

<sup>24</sup> Ex. B, attached ex. 7.

<sup>25</sup> Ex. B, attached ex. 8.

<sup>26</sup> Ex. B., attached ex. 9.

<sup>27</sup> Ex. B, attached ex. 10.

<sup>28</sup> Ex. B, attached ex. 11.

- k. A memo to MPCA Citizens' Board, dated August 13, 2004, re Update on Proposed Revisions and Additions to Minnesota Water Quality Standards.<sup>29</sup>
- l. A memo to MPCA Citizens' Board, dated September 21, 2004, re Update on Proposed Revisions and Additions to Minnesota Water Quality Standards.<sup>30</sup>
- m. A memo to MPCA Citizens' Board, dated January 13, 2006, re Update on Proposed Revisions and Additions to Minnesota Water Quality Standards.<sup>31</sup>
- n. The MPCA 2003 Administrative Rule Preliminary Proposal Form.<sup>32</sup>
- o. A memo to Scott Wiggins, Legislative Coordinator, Office of the Governor, dated October 31, 2003.<sup>33</sup>
- p. A letter to MPCA staff from Bruce A. Nelson, president, MESERB, dated February 11, 2005.<sup>34</sup>
- q. A letter to MPCA staff from Bruce A. Nelson, president, MESERB, dated March 18, 2005.<sup>35</sup>
- r. A letter to Bruce A. Nelson, president, MESERB, from Greg Gross, Supervisor, Water Standards Unit, MPCA.<sup>36</sup>
- s. A letter to Commissioner Corrigan from Bruce A. Nelson, president, MESERB, dated June 16, 2005.<sup>37</sup>
- t. A letter from Commissioner Corrigan to Bruce A. Nelson, president, MESERB, dated June 29, 2005.<sup>38</sup>
- u. A letter to Commissioner Corrigan from Bruce A. Nelson, president MESRB, dated September 6, 2005.<sup>39</sup>
- v. 40 CFR 131.10 Subpart B Establishment of Water Quality Standards.<sup>40</sup>

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<sup>29</sup> Ex. B, attached ex. 12.

<sup>30</sup> Ex. B, attached ex. 13.

<sup>31</sup> Ex. B, attached ex. 14.

<sup>32</sup> Ex. B, attached ex. 15a.

<sup>33</sup> Ex. B, attached ex. 15b.

<sup>34</sup> Ex. B, attached ex. 16.

<sup>35</sup> Ex. B, attached ex. 17.

<sup>36</sup> Ex. B, attached ex. 18.

<sup>37</sup> Ex. B, attached ex. 19.

<sup>38</sup> Ex. B, attached ex. 20.

<sup>39</sup> Ex. B, attached ex. 21.

<sup>40</sup> Ex. B, attached ex. 22.

- w. EPA Water Quality Standards Handbook: Second Edition, August 1994.<sup>41</sup>
- x. 40 CFR § 130.7.<sup>42</sup>
- y. MPCA Guidance Manual for Assessing the Quality of Minnesota Surface Waters, October 2005.<sup>43</sup>
- z. Minn. Stat. § 14.09 (2005).<sup>44</sup>
- aa. 2006 Administrative Rule Proposed Rule and SONAR Form.<sup>45</sup>
- bb. Email to Rima Kawas, Governor's Office, from Kevin Molloy, dated April 25, 2006, regarding assignment of tracking numbers.<sup>46</sup>

14. The Administrative Law Judge finds that the Department has met all of the procedural requirements of applicable statutes and rules.

### **Background and Nature of the Proposed Rules**

15. Minnesota Stat. ch. 14 requires the Agency to explain the facts establishing the need for and the reasonableness of the rules as proposed. In general terms, "need" means that the Agency must present the reasons for making the proposed changes to Minn. R. ch. 7050. State law mandates this proposed rulemaking.

16. Minnesota Laws 2003, chapter 128, article 1, section 156 reads:

**Sec. 156. WATER QUALITY ASSESSMENT PROCESS.  
Subdivision 1. RULEMAKING.**

- (a) By October 1, 2006, the pollution control agency shall adopt rules under Minnesota Statutes, chapter 14, relating to water quality assessment for the waters of the state. The adopted rules must, at a minimum, satisfy paragraphs (b) to (h).
- (b) The rules must apply to the determination of impaired waters as required by Section 303(d) of the Clean Water Act of 1977, United States Code, title 33, chapter 26, section 1313(d).
- (c) The rules must define the terms "altered materially," "material increase," "material manner,"

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<sup>41</sup> Ex. B, attached ex. 23.

<sup>42</sup> Ex. B, attached ex. 24.

<sup>43</sup> Ex. B, attached ex. 25.

<sup>44</sup> Ex. B, attached ex. 26.

<sup>45</sup> Ex. B, attached ex. 27a.

<sup>46</sup> Ex. B, attached ex. 27b.

"seriously impaired," and "significant increase," contained in Minnesota Rules, part 7050.0150, subpart 3.

- (d) The rules must define the terms "normal fishery" and "normally present," contained in Minnesota Rules, part 7050.0150, subpart 3.
- (e) The rules must specify that for purposes of the determination of impaired waters, the agency will make an impairment determination based only on pollution of waters of the state that has resulted in degradation of the physical, chemical, or biological qualities of the water body to the extent that attainable or previously existing beneficial uses are actually or potentially lost.
- (f) The rules must provide that when a person presents information adequately demonstrating that a beneficial use for the water body does not exist and is not attainable due to the natural condition of the water body, the agency shall initiate an administrative process for reclassification of the water to remove the beneficial use.
- (g) The rules must provide that the agency, in considering impairment due to nutrients and application of nutrient objectives and effluent limitations related to riverine systems or riverine impoundments, must consider temperature and detention time effects on algal populations when the discharge of nutrients is expected to cause or contribute to algal growth that impairs existing or attainable uses.
- (h) The agency shall apply Minnesota Rules, part 7050.0150, consistent with paragraphs (e) and (g).

17. At the Agency's request, the Legislature amended Minnesota Laws 2003, ch. 128, art. 1, §156 in 2005 to extend the deadline for completing this rulemaking from January 1, 2006 to October 1, 2006.<sup>47</sup>

18. The laws require the MPCA adopt new rules that: (1) define terms existing in the narrative water quality standards found Minn. R. 7050.0250, subp. 3; (2) consider actual or potential loss of obtainable or existing beneficial uses when assessing surface waters; (2) create a citizen petition process regarding requests to review the beneficial uses assigned to a water body; and (4) include

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<sup>47</sup> Laws 2005, ch. 1, art. 2, § 151.

temperature and hydraulic detention time as factors the Agency considers when assessing surface waters.

19. The aspects of the proposed rules that attracted the most attention and dispute were those that relate to whether the proposed rules reflected an impermissible construction of the Clean Water Act, the absence of clarification regarding “reference water body” and concerns about the impact of the proposed rule upon cold water fishery. Each of the proposed rules is discussed in more detail below.

### **Statutory Authority**

20. In its Statement of Need and Reasonableness (SONAR), the MPCA sufficiently demonstrated its statutory authority to adopt the proposed rules at issue. Minn. Laws 2003 ch. 128, art. 1 § 156 as amended by Minn. Laws 2005 ch. 1, art 2, § 151 and Minn. Stat. §§ 115.03 1(b), 1(c) and subd. 5, and 115.44, which give the Agency authority to adopt water quality standards and classify waters of the state.

21. The Administrative Law Judge finds that the MPCA has statutory authority to adopt the proposed rules.

### **Rulemaking Legal Standards**

22. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>48</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>49</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>50</sup> The Minnesota Supreme Court has further defined an agency’s burden in adopting rules by requiring it to “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”<sup>51</sup>

23. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is entitled to make choices between possible approaches so long as its choice is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the “best” approach since this would invade the policy-making discretion of the

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<sup>48</sup> *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

<sup>49</sup> *Greenhill v. Bailey*, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>50</sup> *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem’l Home v. Minnesota Dep’t of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>51</sup> *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d at 244.

agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.<sup>52</sup>

24. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the agency complied with rule adoption procedures, whether the proposed rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>53</sup>

25. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State, “unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different.”<sup>54</sup>

26. The standards to determine whether changes create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if “the differences are within the scope of the matter announced ... in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the ... notice of hearing, and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.” In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether “persons who will be affected by the rule should have understood the rulemaking proceeding ... could affect their interests,” whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the ... notice of hearing,” and whether the “effects of the rule differ from the effects of the proposed rule contained in the ... notice of hearing.”

### **Impact on Farming Operations**

27. Minnesota Statutes, section 14.111, imposes an additional notice requirement when rules are adopted that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

28. The MPCA has notified the Commissioner of Agriculture. The Administrative Law Judge finds that the MPCA has complied with the additional notice required by Minn. Stat. 14.111.

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<sup>52</sup> *Federal Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

<sup>53</sup> Minn. R. part 1400.2100.

<sup>54</sup> Minn. R. part 1400.2240, subp. 8.

## Statutory Requirements for the SONAR

29. Minnesota Statutes, Section 14.131 requires an agency adopting rules to include in its SONAR:

- 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;
- b. 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;
- c. a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- d. a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- e. the probable costs of complying with the proposed rule; and
- f. an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for a reasonableness of each difference.

30. The SONAR includes the analysis performed by the MPCA to meet the requirements of the statute.<sup>55</sup>

31. The proposed rules potentially affect all citizens of Minnesota because the standards established by the rules are applicable statewide. The EPA also has an interest in the proposed regulations since under the Clean Water Act, the EPA Regional Administrator must approve all changes to Minnesota's water quality standards.<sup>56</sup>

32. The MPCA contends that all citizens will benefit from the proposed rules because they address questions, policy, and procedures that involve the administration of state law.<sup>57</sup>

33. With the exception of the creation of a petition process, the Agency does not anticipate that the proposed rules will create additional costs for the

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<sup>55</sup> Ex. 1, Statement of Need and Reasonableness In the Matter of Proposed.

<sup>56</sup> Ex. 1, p. 19.

<sup>57</sup> Ex. 1, p. 20.

MPCA or other agencies.<sup>58</sup> The MPCA will incur additional costs if petitioners for review are submitted to the Agency, but these costs are speculative.<sup>59</sup> The Agency estimates that each petition could cost approximately \$1500, but this estimate could vary depending upon the water body and the uses being challenged and other factors.<sup>60</sup>

34. The MPCA has not seriously considered any alternatives to the proposed rule language because the Legislature directed the Agency to conduct rulemaking.<sup>61</sup>

35. The proposed rules will not result in any increased costs by affected parties.<sup>62</sup>

36. None of the proposed amendments to the rules conflict with federal regulations or EPA water quality standards guidance.<sup>63</sup>

### **Performance-Based and Cost Regulation**

37. Minnesota Statutes, section 14.131, requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

38. In this case, the MPCA performed an analysis on a rule-by-rule basis. The proposed amendments represent a reasonable balance between detail and flexibility.<sup>64</sup>

39. The Administrative Law Judge finds that MPCA 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.

40. Minnesota Statute, section 14.127, subds. 1 and 2 require the Agency to determine if the cost for complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for any business that has less than 50 full-time employees, or any statutory or home rule charter city that has less than ten full-time employees.

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<sup>58</sup> *Id.*

<sup>59</sup> Ex. 1, p. 32.

<sup>60</sup> *Id.*

<sup>61</sup> Ex. 1, p. 20.

<sup>62</sup> Ex. 1, p. 21.

<sup>63</sup> Ex. 1, p. 21.

<sup>64</sup> Ex. 1, p. 22.

41. Because the proposed amendments to the rules do not fundamentally change the manner in which the Agency assesses water bodies for potential impairment, the Agency contends that no business or city will incur additional costs as the result of these amendments.<sup>65</sup>

42. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. § 14.127, subds. 1 and 2.

### **Analysis of Specific Proposals**

43. This Report is limited to the discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the MPCA has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

44. An agency's burden in adopting rules is to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>66</sup>

### **Definition of terms**

45. The 2003 Session Law required the MPCA to define the following terms: altered materially, material increase, material manner, seriously impaired, and significant increase.

46. The Agency has proposed to define all the terms together because they all have the same basic meaning. They all mean a measurable, negative affect that can be quantified over and above normal variability in biological or chemical data.<sup>67</sup> The proposed definition, Minn. R. 7050.0150, subp. 4A, reads:

"Altered materially," "material increase," "material manner," "seriously impaired," and "significant increase," as used in subparts 3, 5, and 6, mean that pollution of the waters of the state has resulted in degradation of the physical, chemical, or biological qualities of the water body to the extent that

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<sup>65</sup> Ex. 1, p. 24.

<sup>66</sup> *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d at 244.

<sup>67</sup> Ex. 1, p. 26.

attainable or previously existing beneficial uses are actually or potentially lost.

47. During the rule drafting process, the Office of the Revisor of Statutes recommended that the MPCA change the introductory sentence of Minn. R. 7050.0150, subd. 4 from “part” to the more inclusive term “chapter.”<sup>68</sup>

48. The fisheries staff of the Minnesota Department of Natural Resources expressed concern about how the proposed definition of “material increase” might affect the interpretation of the Class 2A temperature standard found in Minn. R. 7050.0222, subp. 2.<sup>69</sup>

49. The MPCA responded to this concern by changing, with approval of the Revisor’s Office, the word in the introductory sentence of Minn. R. 7050.0150, subp. 4 from “chapter” back to “part.”<sup>70</sup> The revised with this change was presented by the MPCA for consideration at the hearing on August 9, 2006. MPCA staff stated that the description of the Class 2A temperature standards as described in the record is consistent with how the Agency has interpreted the standards.<sup>71</sup>

50. Spring Valley Ponds, LLC expressed concern at the hearing and in post hearing written comment that revised rule would still result in inappropriate interpretation of the term “material increase” in the rules governing Class 2A (trout waters) temperature standard found in other rules.<sup>72</sup>

51. The MPCA responded to the concerns raised by Spring Valley Ponds. The Class 2A temperature standards that affect trout streams are not part of this rulemaking. The MPCA recognizes a difference between “material” as it is used in the context of the nondegradation aspect of the “no material increase” standard, as discussed in Exhibit M, as opposed to the context in which the word “material” is used as it pertains to the Class 2A temperature standard.<sup>73</sup>

52. The Administrative Law Judge finds the modification to initially published proposal, changing the word “chapter” to “part” is not substantially different from the proposed rule.<sup>74</sup>

53. The Administrative Law Judge concludes that the MPCA’s proposed definition of the terms “altered materially,” “material increase,” “material manner,” “seriously impaired,” and “significant increase are reasonable and necessary.

54. The 2003 Session Law also required the MPCA to define the meaning of the terms “normal fishery” and “normally present.” The Agency uses

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<sup>68</sup> Testimony of David Maschwitz, TR. 8-12, Ex. M.

<sup>69</sup> Ex. K 6.

<sup>70</sup> Ex. M, Testimony of D. Maschwitz, Tr. 11-13.

<sup>71</sup> *Id.*

<sup>72</sup> Testimony of David Zoll, Tr. 28, Post-hearing letter from David Zoll, date August 23, 2006.

<sup>73</sup> MPCA Staff Post-Hearing Response to Public Comments, August 23, 2006.

<sup>74</sup> Minn. Stat. § 14.05, subd. 2.

these terms to refer to the fish community and other aquatic organisms that one would reasonable expect to find living in an unpolluted water body, taking into account natural variability, geographic area and other characteristics of the water bodies.<sup>75</sup> The proposed definition reads:

"Normal fishery" and "normally present" mean the fishery and other aquatic biota expected to be present in the water body in the absence of pollution of the water, consistent with any variability due to natural hydrological, substrate, habitat, or other physical and chemical characteristics. Expected presence is based on comparing the aquatic community in the water body of interest to the aquatic community in representative reference water bodies.<sup>76</sup>

55. Pat Bailey, Winona County Water Plan Coordinator, and Paul R. Haik, Kresbsbach and Haik, Ltd, expressed concern that the "normal fishery" and "normally present" standards where potentially inconsistent with the representative reference concept because "normal" might be interpreted to mean fishery and aquatic biota as they existed predevelopment.<sup>77</sup>

56. The MPCA recognizes that modern society has brought certain changes to the environment that is not likely to be reversed and did not intend that the act of comparing a potentially impaired water body to a reference water body would mean that the impaired water body should be restored to a "predevelopment" condition. In most cases, the goal of the MPCA is to restore the impaired water body to a condition that meets water quality standards; a condition which usually falls short of matching the relatively unimpacted conditions of the reference water body.<sup>78</sup>

57. The Administrative Law Judge finds that the amendment to Minn. R. 7050.0150, subp. 4, I is reasonable and necessary.

### **Beneficial use**

58. The 2003 Session Law requires the MPCA to adopt rules that associate the determination of impaired water quality condition with the actual or potential loss of beneficial uses.<sup>79</sup>

59. The MPCA's current water quality assessment process: (1) assembles appropriate monitoring data collected over a specified time frame; (2) determines whether the data exceeds the relevant standard; and (3) reviews the

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<sup>75</sup> Ex. 1, p. 27.

<sup>76</sup> Minn. R. 7050.0150, subp. 4, I.

<sup>77</sup> Letter of Pat Bailey, Ex. K- 2; Correspondence of Paul Kaik, Ex. K-10.

<sup>78</sup> Testimony of D. Maschowitz; MPCA Staff Post-Hearing Response to Public Comments, August 23, 2006.

<sup>79</sup> Laws 2003, ch. 128, art. 1 § 156, subd. 1 (e).

monitoring data with a team of professionals, if necessary, to make an impairment recommendation.<sup>80</sup>

60. During the rule drafting process, the Minnesota Environmental Science and Economic Review Board (MESERB) expressed concern about the assessment process, the listing of waters as impaired and the resulting expense (time and money) required to do total maximum daily load studies. The MESERB also expressed concern that the process could result in waters being considered impaired without a showing of whether or not the beneficial uses are actually or potentially lost.<sup>81</sup>

61. The proposed language in Minn. R. 7050.0150, subp. 1 reads:

The agency shall determine an exceedance of water quality standards or an impaired condition based on pollution of the waters of the state from point and nonpoint sources that has resulted in degradation of the physical, chemical, or biological qualities of the water body to the extent that attainable or previously existing beneficial uses are actually or potentially lost.

62. The Agency maintains that the proposed language emphasizes the loss of beneficial uses when waters become polluted. The proposed language reinforces water quality concepts that include standards are: (1) the designated beneficial use, and (2) the numeric or narrative standard that protects that beneficial use. When the data show that the standard is exceeded, that is “indicative” of a polluted condition, and indicative of the “actual or potential” loss of the beneficial use.<sup>82</sup>

63. Terry Stone, representing the National Union of Land and Water Rights, the Keep Minnesota Green Society and individuals from Duluth, Virginia and International Falls, Minnesota asked if a water body was impaired by point and nonpoint sources of pollution did the Agency had a policy to clean up the point or nonpoint source first.<sup>83</sup>

64. Mr. Maschwitz was unaware of any policy by the Agency to assign a priority to cleaning up point or nonpoint sources of pollution first.<sup>84</sup>

65. The Administrative Law Judge finds that the new language in Minn. R. 7050.0150, subp. 1 does not fundamentally change the way the Agency

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<sup>80</sup> Ex. 1, pp. 27 – 28.

<sup>81</sup> Ex. B, pp. 9 – 21. The MESERB’s correspondence with the MPCA raised issues concerning rules that are not part of this rulemaking proceeding. Those issues are not discussed in this report. Some these issues are discussed by the MPCA Staff in the MPCA Staff Post-Hearing Response to Public Comments, August 23, 2006.

<sup>82</sup> Ex. 1, p. 28.

<sup>83</sup> Testimony of T. Stone, Tr. 18, Public Ex. 1. Mr. Stone raised other issues concerning rules that are not part of this rulemaking proceeding. Those issues are not discussed in this report.

<sup>84</sup> Testimony of T. Stone , Tr. 19.

assesses water bodies for potential impairment and is reasonable and necessary.

### **Petition Process**

66. The Legislature has directed the MPCA to adopt a rule which would give any party the opportunity to question the existence or attainability of a beneficial use for a water body, and to petition the Agency for review.<sup>85</sup>

67. The proposed rule reads:

#### **7050.0405 PETITION BY OUTSIDE PARTY TO CONSIDER ATTAINABILITY OF USE.**

Subpart 1. **Petition.** Any person may present evidence to the agency that a beneficial use assigned to a water body in this chapter does not exist or is not attainable and petition the agency to consider a reclassification of that water body under Minnesota Statutes, section 14.09. Outside parties must submit written evidence in support of the petition to the commissioner that includes:

- A. the name and address of the petitioner;
- B. the name, location, and description of the water body;
- C. the specific designated use or uses that do not exist or are unattainable in the water body and the reasons they do not exist or are unattainable;
- D. the reasons the current use classification is causing harm, unnecessary expense, or other hardship to the petitioner; and
- E. any additional supporting evidence including, but not limited to, water quality, hydrological, and other relevant data; pictures; testimony of local residents; survey results; and resolutions or actions by local organizations or governmental entities.

Subp. 2. **Disposition of petition.** Upon receiving a petition, the commissioner has 60 days to reply in writing and indicate a plan for disposition of the petition. The commissioner may request additional information from the petitioner if the request is considered incomplete, in which case the commissioner has 60 days to reply after the additional information is received and the petition is complete. If the commissioner finds that the evidence submitted supports a review of the designated uses, a use attainability analysis must be commenced within six months of the commissioner's reply to the complete petition. The petition

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<sup>85</sup> Laws 2003, ch. 128, art. 1, § 156 (f).

becomes part of the use attainability analysis. If the commissioner finds that the use attainability analysis supports a change in use classification, the commissioner shall propose the change through rulemaking.

68. The proposed rule creates a petition process, provides guidance on the types of information a petitioner would have to include with a request for review, and asks the petitioner to explain why the current use classification is causing harm or costing the petitioner money unnecessarily. The rules also establish an appropriate standard for the Commissioner to respond to a completed petition.

69. Pat Bailey commented that the proposed petition process appeared to only be intended to be used to eliminate or restrict an existing designated use and not to restore an existing designated use or restore uses restricted in an earlier process.<sup>86</sup>

70. The MPCA stated that the proposed petition process is not intended to preclude a party from petitioning to restore a beneficial to a water body.<sup>87</sup>

71. The Administrative Law Judge finds that Minn. R. 7050.0405 is reasonable and necessary.

### **Temperature and Hydraulic residence time**

72. The Legislature also directed the MPCA to consider the effects of temperature and hydraulic detention time on algal populations when assessing lakes for impairment due to excess nutrients.<sup>88</sup>

73. Temperature and hydraulic detention time are two of many factors that can influence the reaction of a water body to the influx of nutrients.<sup>89</sup> The MPCA already considers temperature and hydraulic detention time, among with other factors when it assesses a water body for an impairment determination.<sup>90</sup> The term “hydraulic residence time” is already in existing rule language.<sup>91</sup> The MPCA’s proposed rule adds the word “temperature” to Minn. R. 7050.0150, subp. D to comply with the Legislature’s direction to the Agency.<sup>92</sup>

74. Terry Stone, representing the National Union of Land and Water Rights, the Keep Minnesota Green Society and individuals from Duluth, Virginia and International Falls, Minnesota, asked if the MPCA was writing thermal total maximum daily loads (TMDL) and how the MPCA would determine the

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<sup>86</sup> Comment of P. Bailey, K-12.

<sup>87</sup> MPCA Staff Post-Hearing Response to Public Comments, August 23, 2006.

<sup>88</sup> Laws 2003, ch. 128, art. 1, § 156, subd. 1 (g).

<sup>89</sup> Ex. 1, p. 31.

<sup>90</sup> *Id.*

<sup>91</sup> Minn. R. 7050.0150, subp. 5.

<sup>92</sup> Ex. 1, p. 31.

temperature reference standard for waters where the climax forest has been logged.<sup>93</sup>

75. Mr. Maschwitz stated that he was unaware of any thermal TMDL studies and that reference standards use data obtained from water bodies where there is a forest that provides shade to the stream.<sup>94</sup> The MPCA Staff Post-Hearing Response to Public Comments, dated August 23, 2006, noted Mr. Maschwitz was incorrect. There is one water body listed on the 2006 303(d) impaired waters list that is impaired due to temperature. A TMDL is underway for this stream.<sup>95</sup>

76. The Administrative Law Judge finds that the addition of the word “temperature” to Minn. R. Minn. R. 7050.0150, subp. D is reasonable and necessary.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Minnesota Pollution Control Agency gave proper notice in this matter.
2. The MPCA has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.
3. The MPCA has demonstrated its statutory authority to adopt the proposed rules.
4. The MPCA 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. §§ 14.131.
5. The MPCA has modified the proposed rule since it was published in the *State Register* in ways that do not make the rule substantially different according to Minn. Stat. § 14.05, subd. 2 (b)., but which remove from the rule inappropriate unbridled discretion.

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

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<sup>93</sup> Testimony of Terry Stone, Tr. 15, Public Ex. 1.

<sup>94</sup> Testimony of D. Maschwitz, Tr. 17.

<sup>95</sup> MPCA Staff Post-Hearing Response to Public Comments, August 23, 2006.

## RECOMMENDATION

**IT IS RECOMMENDED** that the proposed amendments to the permanent rules be adopted.

Dated this 21st day of September 2006.

/s/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Transcript prepared by:  
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