

In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Minnesota Rules parts 7050.0130, 7050.0220, 7050.0224, 7050.0470, 7050.0471, 7053.0135, 7053.0205 and 7053.0406

**CHIEF ADMINISTRATIVE LAW  
JUDGE'S ORDER ON REVIEW  
OF RULES UNDER MINN. STAT.  
§ 14.16, SUBD. 2, AND MINN. R.  
1400.2240, SUBP. 5.**

## **Background**

The Minnesota Pollution Control Agency (MPCA or Agency) proposes to amend the state's existing rules governing Minnesota's water quality standard to protect wild rice from excess sulfate. The current standard limits sulfate to 10 milligrams per liter in waters used for the production of wild rice as well as in wild rice waters that do not contain cultivated wild rice.<sup>1</sup> The proposed rule amendments identify approximately 1,300 bodies of water in Minnesota as "wild rice waters" designated as subject to the new sulfate standard.<sup>2</sup>

The new standard is set forth in proposed rule at Minn. R. 7050.0224, subd. 5(B).<sup>3</sup> The proposed standard establishes an equation used to calculate the sulfate limit for each MPCA-designated body of water. The equation factors site-specific information and establishes a unique sulfate limit based upon the concentration of iron, organic carbon, and sulfide in the sediment of each designated body of water.<sup>4</sup>

When sulfate in water interacts with iron and organic carbon in sediment, sulfide can form, which the MPCA has determined is toxic to wild rice.<sup>5</sup> Key features of the proposed rules include limits on the amount of sulfide in the sediment of designated waters, and sampling and analytical methods to determine the amount of sulfide, carbon and iron present in the saturated sediment.<sup>6</sup>

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<sup>1</sup> See, e.g., Minn. R. 7050.0224, subs. 1 and 2 and Minn. R. 7050.0220, subs. 1, 3a, 4a,5a, and 6a (2017).

<sup>2</sup> MPCA Resubmission at 8 and Attachment 8, at 58 – 116.

<sup>3</sup> In the July 24, 2017 version of the proposed rules, the methods for calculating sulfate limits were found in part 7050.0224, subp. 5(B)(1). In the revised draft dated March 16, 2108, the requirements appear in part 7050.0224, subp. 5(B).

<sup>4</sup> See MPCA's Resubmission, Attachment 1, at 1, and Attachment 8, at 54-55.

<sup>5</sup> Report of the Administrative Law Judge, OAH Docket No. 80-9003-34519, at 1, 5 (January 9, 2018) (Report of the Administrative Law Judge).

<sup>6</sup> See *generally*, MPCA Resubmission, Attachment 8.

## Procedural Posture

The Minnesota Pollution Control Agency commenced this rulemaking process on October 26, 2015 with its publication of a Request for Comments in the *State Register*.<sup>7</sup> With necessary approval, the Agency published its initial Notice of Hearing on August 21, 2017<sup>8</sup> and announced a series of hearings scheduled in October and November, 2017.<sup>9</sup> Over 350 individuals attended the six public hearings.<sup>10</sup> Members of the public submitted approximately 4,500 written comments on the proposed rule amendments.<sup>11</sup>

In a report dated January 9, 2018, Administrative Law Judge LauraSue Schlatter disapproved many of the proposed revisions to Minn. R. 7050.0220, 7050.0224 and 7050.0471. The matter then came before the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.15, subd. 3 (2016), and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's disapproval of an Agency's proposed rule.

In a Report dated January 11, 2018, the Chief Administrative Law Judge concurred with the disapproval determinations of the Administrative Law Judge.<sup>12</sup> As a result:

1. The following proposed rules were disapproved:
  - a. Proposed Minn. R. 7050.0220, subps. 3a, 4a, 5a, 6a
  - b. Proposed Minn. R. 7050.0224, subp. 2
  - c. Proposed Minn. R. 7050.0224, subp. 5, A
  - d. Proposed Minn. R. 7050.0224, subp. 5, B (1)
  - e. Proposed Minn. R. 7050.0224, subp. 5, C
  - f. Proposed Minn. R. 7050.0224, subp. 6
  - g. Proposed Minn. R. 7050.0471, subps. 3 through 9
  
2. The following modifications to rules as originally proposed were also disapproved:
  - a. Proposed changes to Minn. R. 7050.0224, subp. 5, B (1)
  - b. Proposed changed to Minn. R. 7050.0224, subps. 5, E, F
  - c. Proposed changes to Minn. R. 7050.0224, subp. 5, B (2)

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<sup>7</sup> *Id.* at 9, Finding 17.

<sup>8</sup> A second Notice of Hearing was published in September 2017 after the Agency scheduled a hearing to be held at the Fond du Lac Tribal Community College.

<sup>9</sup> *Id.* at 9, Finding 20.

<sup>10</sup> *Id.* at 2-3.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Report of the Chief Administrative Law Judge, OAH Docket No. 80-9003-34519, at 1, 5 (January 11, 2018) (Report of the Chief Administrative Law Judge).

The Report of the Chief Administrative Law Judge specifically instructed the MPCA on the statutory procedure for the Agency to follow in the event it decided not to correct the defects identified in the proposed rules, as follows:

If the Department elects not to correct the defects associated with the repeal of the existing rules and the defects associated with the proposed rules, the Department must submit the proposed rules to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2016).<sup>13</sup>

Effective on April 2, 2018, the MPCA requested that the Chief Administrative Law Judge review additional submissions in the matter, including the following:

a) March 28, 2018, Letter Response to the Report of the Chief Administrative Law Judge dated January 11, 2018 (Response), with the following attachments:

- Attachment 1: March 5, 2018 Letter from Christopher Korleski, Environmental Protection Agency, Region V, to Shannon Lotthammer, Assistant Commissioner, MPCA (EPA 2018 Letter);
- Attachment 2: November 5, 2015 Letter from Tinka G. Hyde, Environmental Protection Agency, Region V, to Rebecca Flood, MPCA (EPA 2015 Letter);
- Attachment 3: EPA's Review of Revisions to Minnesota's Water Quality Standards: Human Health Standards Methods (Nov. 5, 2015);
- Attachment 4: November 22, 2017 Letter from Christopher Korleski, Environmental Protection Agency, Region V, to LauraSue Schlatter, Administrative Law Judge with enclosed comments on Minnesota's "Proposed Rules Relating to Wild Rice Sulfate Standard and Wild Rice Water" (EPA 2017 Comments);
- Attachment 5: Sampling and Analytical Method for Wild Rice Methods (March 2018);
- Attachment 6: Technical Discussion of Proposed Equation Related Changes to the Rule;
- Attachment 7: List of Proposed Rule Changes;

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<sup>13</sup> Report of the Chief Administrative Law Judge at 2.

- Attachment 8: Revisor’s March 16, 2018, version of Proposed Rule incorporating changes as proposed in March 28, 2018 filing (Revisor’s AR4324);
  - Attachment 9: January 19, 1999 Memorandum from Marvin E. Hora, Manager, Environmental Research and Reporting, Environmental Outcomes Division to the Minnesota Pollution Control Agency Board Water Quality Committee regarding Proposed Revisions of Minn. Rules ch. 7050;
  - Attachment 10: Statement of Need and Reasonableness “In the Matter of the Proposed Revisions to the Rules Governing the Classification and Standards for Waters of the State, Minnesota Rules Chapter 7050” page 54 (April 27, 1993) and attached draft rule page;
- b) Draft Order Adopting Rules (filed April 2, 2018); and
- c) Revisor’s July 24, 2017, version of Proposed Rules (Revisor’s RD4324A).

The MPCA’s request for review was made pursuant to Minn. Stat. § 14.16, subd. 2 (2016) and Minn. R. 1400.2240, subp. 5 (2017).

## Legal Analysis

Rulemaking is a statutory process governed by the provisions of the Minnesota Administrative Procedure Act (Act), Minn. Stat. Ch. 14. The Office of Administrative Hearings is statutorily required to review rulemaking matters in accordance with the dictates of that Act.<sup>14</sup>

Relevant to the current proceeding, Minn. Stat. § 14.14, subdivision 2 (2016), provides as follows:

**At the public hearing** the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule and fulfilling any relevant substantive or procedural requirements imposed on the agency by law or rule. The agency may, in addition to its affirmative presentation, rely upon facts presented by others on the record during the rule proceeding to support the rule adopted.<sup>15</sup>

In this case, the Administrative Law Judge determined that the MPCA failed to meet this and other requirements of the Act and therefore disapproved the proposed rule.<sup>16</sup> As required by law, the disapproval was reviewed by the Chief Administrative Law

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<sup>14</sup> Minn. Stat. §§14.05 and 14.08 (2016).

<sup>15</sup> Emphasis added.

<sup>16</sup> Report of the Administrative Law Judge at 5-6.

Judge and, in a January 11, 2018 Report, the MPCA was advised regarding how to correct the determined defects.

Building upon the statutory directive that an agency meet all requirements of the Act relevant to rulemaking, Minn. Stat. § 14.15, subd. 4, provides as follows:

If the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the Legislative Coordinating Commission and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment. The agency may not adopt the rule until it has received and considered the advice of the commission and committees. However, the agency is not required to wait for advice for more than 60 days after the commission and committees have received the agency's submission.

The MPCA has not complied with the law in this regard. In its Resubmissions, it has not followed the Chief Administrative Law Judge's directives regarding how to correct the defects in the proposed rule, nor has it submitted the disapproved rule to the identified legislative bodies for advice. Instead, the MPCA has, in effect, requested reconsideration of the rule's disapproval and seeks an order allowing adoption of the proposed rule, in modified form.

The Chief Administrative Law Judge declines to grant the MPCA its requested relief. While it is clear that the Agency has made significant efforts to reexamine the proposed rule and make clarifications and revisions where deemed appropriate, it is just as clear that the Agency has not followed the provided directives for curing all identified defects, nor identified other record-based and public-vetted solutions to achieve the same ends consistent with the spirit and the letter of the Minnesota Administrative Procedure Act.<sup>17</sup> Neither has the Agency availed itself of the only other statutory alternative: seeking legislative advice as required by the law.

The Chief Administrative Law Judge is cognizant of the fact that the Agency is dedicated to protecting the quality of the waters in the state and so has invested significant human, temporal and financial resources in this effort. Mindful that the protection of Minnesota's wild rice waters will remain an important policy and regulatory goal for and in the state, the Chief Administrative Law Judge has set forth below additional information that may prove useful to the Agency as it continues to address this issue on behalf of all Minnesotans.

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<sup>17</sup> Minn. Stat. 14.001 (2016).

## Substantive Review of Agency Resubmissions

The Agency submitted three categories of information to the Chief Administrative Law Judge in support of its request for review. The bulk of the submissions constitute legal argument intended to serve as a basis for reversal of various findings of rule disapproval contained in both the Administrative Law Judge's Report and the Chief Administrative Law Judge's Report.<sup>18</sup> In addition, the submissions include proposed modifications to portions of the disapproved rule. Last, the filings encompass other proposed rule changes not recommended by the Administrative Law Judge.<sup>19</sup> The MPCA's filings are silent on many of the disapproved rule parts notwithstanding the fact that the Administrative Law Judge specified various legal grounds for their disapproval.

Below, the Chief Administrative Law Judge has summarily addressed each of the major issues raised in the MPCA's Resubmissions.

### I. Equation-Based Standard

#### A. Numeric Expression of the Standard

The MPCA argues that the Administrative Law Judge found the proposed equation-based standard to be *per se* invalid, and argues that the existence of other approved rules which rely on mathematical equations proves the Administrative Law Judge's determination to be incorrect.<sup>20</sup> In fact, it is the MPCA that is incorrect. The Administrative Law Judge did not disapprove the proposed standard based on the fact that it contained an equation, but instead determined that the Agency had met its statutory burden to show the equation-based standard to be necessary and reasonable.<sup>21</sup> The Administrative Law Judge went on to find that the proposed implementation of the equation-based standard requires measurement of 1,300 identified waters, a feat that will require approximately ten years to accomplish, and until that is completed no one can know exactly what standard applies and must be met in each identified body of water.<sup>22</sup> Given these facts, the Administrative Law Judge determined that the proposed rule was insufficiently specific to be approved<sup>23</sup> and that it was not "rationally related to the Agency's objective" of "protect[ing] wild rice from the impact of sulfate, so that wild rice can continue to be used as a food source by humans and wildlife."<sup>24</sup> Pursuant to Minn. R. 1400.2100.B., a rule cannot lawfully be approved if it does not rationally relate to the

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<sup>18</sup> The Report of the Chief Administrative Law Judge concurred in all respects with the findings and conclusions contained in the Report of the Administrative Law Judge. For the convenience of the reader, further references to the issued Reports will cite only to the Report of the Administrative Law Judge.

<sup>19</sup> MPCA Resubmission at 1.

<sup>20</sup> MPCA Resubmission at 1-4.

<sup>21</sup> Report of the Administrative Law Judge at 60-61, Findings 251, 256, 257.

<sup>22</sup> *Id.* at 61, Finding 258 and at 55-59, Findings 234-249.

<sup>23</sup> *Id.* at 58, Finding 247. See also *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. Ct. App. 1991) ("A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

<sup>24</sup> Report of the Administrative Law Judge at 58, Finding 246.

Agency's objectives. Having reached this conclusion, the Administrative Law Judge disapproved the proposed rule.

In its Resubmissions the Agency reverts to its argument that:

"[e]ffluent limit review is case-specific and includes evaluating information such as pollution concentrations in the receiving water and the discharge . . . and how many sources contribute to the receiving water. . . . Until that information is reviewed and the effluent limit is established, no permittee can know if or to what extent they will have to treat their wastewater discharge for the given pollutant, even if the standard that the effluent limit is protecting is a single numeric value."<sup>25</sup>

In essence, the Agency ignores the Administrative Law Judge's rational relationship analysis and continues to insist that the proposed equation-based rule should be approved based upon the fact that it is necessary and reasonable. Unfortunately, the Administrative Procedure Act does not provide for approval based on that factor alone; all other requirements of statute and rule must also be met in order for rule approval to be lawfully granted.<sup>26</sup>

Even while continuing to argue that the proposed equation-based standard is legally sufficient and should be approved, the MPCA's Resubmissions include several key clarifications and revisions to the equation and required analysis. Three major revisions, and the Chief Administrative Law Judge's responses to each, are addressed below.

#### (1) Removal of Second Lake

The MPCA revised the proposed equation through the removal of one of four identified outliers in the dataset upon which it had relied in originally promulgating the formulaic equation. This proposed change was made as a result of the Agency's apparent post-January 2018 recognition, grounded in "new information" published in a 2017 study which the Agency relied upon at the rulemaking hearings,<sup>27</sup> which established that "the equation would potentially be made inaccurate if the concentrations [of sulfate compared between groundwater and surface water] were significantly different."<sup>28</sup> A significant difference in the concentrations suggests that upwelling groundwater rather than downward-moving sediment from overlying surface water could be responsible for the "observed false positives in the MPCA data set (false positives are waterbodies for which the equation predicts that sulfide should exceed 120 micrograms per liter, but the sulfide is less than 120)."<sup>29</sup> Having found the concentrations to be materially different in four water bodies, but only having data documenting the fact of upwelling groundwater in one of the four (Second Creek), the Agency proposes removal of this one outlier water body

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<sup>25</sup> *Id.* at 4.

<sup>26</sup> Minn. Stat. § 14.05 (2016).

<sup>27</sup> See Hearing Exhibit L.2, Ng et al., 2017.

<sup>28</sup> MPCA Resubmissions, Attachment 6 at 1.

<sup>29</sup> *Id.*

from the data set. The result of this removal is a resulting in a change in the mathematical terms included in the equation.<sup>30</sup>

The Agency's newly-submitted revision, based on the exclusion of one outlier in the data set, is based on information available at the time of hearings. This indicates that the Agency's discernment of the proper criteria for inclusion/non-inclusion in the proposed equation-based standard continues to evolve. While this is laudatory, it supports the view expressed at hearing that the proposed standard is too much a continuing work-in-progress to be adopted as an enforceable rule.

By law, a rule is defined as an "agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."<sup>31</sup> It is not difficult to understand how the public questions whether a standard that is unknowable until sufficiently sampled and calculated over a period of ten years, which consists of an equation with mathematical terms that continue to evolve even before adoption, can constitute a rule by which their actions can be regulated.

## (2) Inserted Caps

In the proposed revised standard, the MPCA sets minimum and maximum sulfate limits separate and apart from the site-specific limits derived from the equation calculation in proposed rule Minn. R. 7050.0224, subd. 5(B). Functioning as boundaries on the standard, the Agency proposes that the minimum numeric expression of the sulfate standard would be 0.5 milligrams per liter and the maximum numeric expression of the standard would be 335 milligrams per liter.<sup>32</sup>

The insertion of capped boundaries appears to be a prudent and reasonable change to the proposed standard. The Chief Administrative Law Judge notes, however, that the public has had no opportunity to comment regarding whether these specific, proposed caps are the appropriate ones for inclusion in the proposed rule.

## (3) Choosing Between Competing Values

The Administrative Law Judge disapproved the proposed rule, in part, based upon the fact that the Agency allowed for any person to measure and propose the standard for an identified water body but had provided no written, transparent process or criteria for doing so. Neither had the Agency identified what process it would rely upon when required to choose among differing, submitted numeric standards.<sup>33</sup>

In its Resubmissions, the Agency clarified that any person, including persons who are not MPCA staff, are allowed to calculate the allowable amount of sulfate for a

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<sup>30</sup> *Id.*; Part 7050.0224, subp. 5, Item B.

<sup>31</sup> Minn. Stat. § 14.02, subd. 4 (2016).

<sup>32</sup> MPCA Resubmissions, Attachment 8 at 55.

<sup>33</sup> Report of the Administrative Law Judge at 74, Findings 308-310.

particular body of water by undertaking collection and calculation processes in compliance with the Agency's publication titled *Sampling and Analytical Methods for Wild Rice Waters*.<sup>34</sup> This required technical methodology is incorporated by reference at proposed Minn. R. 7050.0224, subd. 5 (E).

In an apparent attempt to address the issue of choosing between competing and differently valued samples, the Agency's Resubmissions provide as follows:

All data collected in a wild rice water would be used to set the numeric expression of the standard for that wild rice water. If MPCA has already collected and analyzed 15 (or more) values, then the next 15 (or more) values would be added to the calculation. Moving to a percentile approach will provide greater stability in the numeric expression of the standard – as more data is collected, the numeric expression will converge on the “true” value. This will reduce the likelihood of major changes in the calculated expression of the standard.<sup>35</sup>

The Chief Administrative Law Judge finds this statement to be an insufficient response to the stated concern. First, the statement is not contained in the language of the proposed rule; it is included only in correspondence filed with the Chief Administrative Law Judge as part of the Agency's Resubmissions. This will not become part of any published rule available for future reference or review, and will not have the force and effect of law. Second, the described process does not address the Agency's planned response when less than 15 samples are submitted. For example, assume that Measurer A samples, calculates and submits a proposed standard of .1X for an identified water and Measurer B samples, calculates and submits a proposed standard of 100X for the same body. While the Resubmissions imply that the Agency would average the two submissions into its existing 15 or more samples, that process is not explicitly stated.

In addition, the Agency's Resubmissions clearly indicate that “as more data is collected” the standard for any specified water body will continue to change.<sup>36</sup> In essence, then, the public will be unable to rely upon even the Agency's publication of any specified standard. As an example, consider a situation wherein a water body is sufficiently sampled and the standard calculated to be Y, a value with the Agency publishes on its website and is relied upon by the public. An hour after publication, a different measurer gathers, calculates and submits 15 additional samples to the Agency, which promptly “add[s] them to the calculation” so as to allow the standard to “converge on the ‘true’ value.”<sup>37</sup> As a result, the enforceable standard is immediately changed, and the public would have no knowledge of the change absent continual monitoring of the Agency's website. In essence, the proposed standard becomes not a measuring stick, but a slide

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<sup>34</sup> MPCA Resubmission at 4 (“the proposed wild rice rule requires sampling from specific water bodies in order to generate data needed to plug into the equation before a numeric expression can be developed and provides notice of how that data should be gathered and the numeric expression to be determined”). Part 7050.0224, subp. 5, item E.

<sup>35</sup> *Id.*, Attachment 6 at 10.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

rule. It is difficult to conclude that such a process could ever “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or ... provide sufficient standards for enforcement.”<sup>38</sup> Failing to do so, the proposed rule cannot withstand legal scrutiny.

Overall, it is possible that the Agency’s submitted clarifications and revisions noted above may represent improvements in the proposed rule. Even so, the fact remains that none of these refinements were made available for public comment or discussion, at hearing or otherwise.

B. Repeal of existing 10 mg/L standard

In her Report disapproving the rule, the Administrative Law Judge noted the public’s significant concern that increases in sulfate could lead to increases in methyl mercury, which bio-accumulates in fish and has long-term serious health effects on humans.<sup>39</sup> The MPCA agreed that “enhanced production of methylmercury is a significant concern,”<sup>40</sup> but insisted that this issue was outside the scope of this rulemaking process.<sup>41</sup>

In its Resubmissions, the Agency clarified that it would continue to rely on the state’s existing eutrophication standards and mercury standards to ensure that all applicable water standards are met.<sup>42</sup> The Agency admitted that this fact was “so fundamental” to its work that it “escaped mention” in its written response to the public’s comments on this issue.<sup>43</sup> If the Agency resubmits this rule in the future, it should include evidence in the record to support its allegations regarding its ability to ensure that all applicable water standards are met.

C. Downstream Waters: Tribes

Both the Fond du Lac Band and the Grand Portage Band of Lake Superior Chippewa have in place wild rice water quality standards that limit sulfate to 10 milligrams/liter. These standards are federally approved and not alterable by the state.<sup>44</sup> The Administrative Law Judge expressed a concern that loosening the sulfate standard for the state’s designated waters could degrade the quality of the Bands’ wild rice waters.<sup>45</sup>

In its Resubmissions, the Agency recognized the possibility that completing the calculation in proposed Minn. R. 7050.0224, subd. 5(B), might result in numeric expressions of the sulfate standard that are greater than 10 milligrams per liter. In such

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<sup>38</sup> *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. Ct. App. 1991).

<sup>39</sup> Report of the Administrative Law Judge at 51-52, Findings 219-221.

<sup>40</sup> *Id.* at 52, Finding 220.

<sup>41</sup> *Id.* at 52, Finding 221.

<sup>42</sup> MPCA Resubmission at 5.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> Minn. R. 7050.0155; Report of the Administrative Law Judge at 52, n. 326, citing Hearing Ex. 1020.

<sup>45</sup> Report of the Administrative Law Judge at 52-53, Findings 223-225.

cases, the Agency asserts that it would use other regulatory controls to ensure that waters flowing downstream into areas still governed by the current 10 milligram per liter standard continue to meet applicable water quality standards.<sup>46</sup> If this rule is resubmitted for approval, the Agency should include in the record sufficient evidence to support this assertion.

## II. Proposed List of Waters

Federal law delegates to states the authority to establish designated uses of waters and to establish water quality criteria to protect those designated uses in bodies of water.<sup>47</sup> States are prohibited from removing a designated use, if such a use is an “existing use,” unless a use with more stringent criteria is added.<sup>48</sup> An existing use is one “actually attained in the water body on or after November 28, 1975, whether or not it is included in the water quality standards.”<sup>49</sup>

In the proposed rule, the Agency identified a list of approximately 1,300 waters at Minn. R. 7050.0471. The MPCA based its list upon, among other sources, a comprehensive, reviewed list compiled by the Minnesota Department of Natural Resources (DNR) in a 2008 Report to the Legislature.<sup>50</sup> The MPCA recognized that the DNR’s list “is widely considered the most comprehensive source of information regarding where rice may be found in Minnesota” and so extensively reviewed the DNR list when making its designations.<sup>51</sup> In compliance with its legislative directive, the MPCA also consulted with the various Tribes when compiling its list.<sup>52</sup>

In making its determinations as to which water bodies would be included in the list, the MPCA did not explicitly apply the standards it intends to use in future rulemakings to determine whether a water body should be added to the list of wild rice waters.<sup>53</sup> Instead, the Agency used a “weight of evidence” standard to identify waters that met its criteria for “beneficial use as a wild rice water.”<sup>54</sup> The rulemaking record does not identify each water considered and rejected for inclusion on the list, nor does it reveal on what basis the Agency rejected any proposed water from inclusion on the list.<sup>55</sup> The MPCA

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<sup>46</sup> MPCA Resubmission, at 6 (“Protection of downstream waters is required by 40 CFR 131.10(b). The MPCA already complies with this requirement and there is now a state rule that expressly requires such compliance, Minn. R. 7050.0155.... [To protect these waters, MPCA will] ‘facilitate consistent and efficient implementation and coordination of water quality-related management actions’ such as permits.”).

<sup>47</sup> 40 C.F.R. § 131.3.

<sup>48</sup> 40 C.F.R. § 131.11(h)(1).

<sup>49</sup> 40 C.F.R. § 131.3(e); See Report of the Administrative Law Judge at 65, 68, Findings 269, 283.

<sup>50</sup> Report of the Administrative Law Judge at 63-64, Findings 263, 265.

<sup>51</sup> *Id.* at 64, Finding 265.

<sup>52</sup> *Id.* at 62, Finding 261.

<sup>53</sup> *Id.* at 67, Finding 279.

<sup>54</sup> *Id.* at 67, Finding 278.

<sup>55</sup> *Id.* at 67, Finding 279. According to its Resubmissions, the Agency recently asked the federal Environmental Protection Agency (EPA) how uses are designated and whether an existing use can be a designated use. The EPA responded in a March 5, 2018 letter to the Agency (March 28 letter, Att. 1, at 5-8). The only discussion of “existing use” is a clarification of the regulatory definition at 40 CFR 131.3 (e) (“those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.”) The EPA explains “that existing uses are known to be ‘actually

acknowledged that it may not have included in the proposed list all waters where the wild rice use has existed since Nov. 28, 1975.<sup>56</sup>

The Administrative Law Judge disapproved the proposed list, concluding that the MPCA's approach excluded hundreds of water bodies previously on lists from the DNR and other sources, including the 1854 Treaty Authority's 2016 and 2017 lists of wild rice waters.<sup>57</sup> The Administrative Law Judge determined that these exclusions violated the federal prohibition against removing a designated use if such a use is an existing use.<sup>58</sup> She also expressed concerns with the reasonableness of the Agency's exclusion of waters without any explicit standards or discussion.<sup>59</sup>

In its Resubmissions, the Agency argued that it compiled its list in consultation with the DNR and tribes, but insisted that it alone can determine what constitutes an "existing use" in Minnesota for purposes of the federal Clean Water Act (CWA).<sup>60</sup> Citing Minn. Stat. §§ 115.03, subd. 1(b) and 115.44, the MPCA argues that it is the only state agency with legal authority to classify waters of the state and assign designated uses.<sup>61</sup>

The Agency's authority is not as clear as it asserts. Minn. Stat. §§ 115.03, subd. 1(b) and 115.44 address the Agency's authority to classify waters, not specifically to determine existing uses for purposes of the CWA. While federal law provides that "the state" may determine existing uses, it does not specify which agency within a state has that unique authority.<sup>62</sup>

Even if the MPCA can establish that its authority trumps that of the DNR or any other state agency, it cannot establish that it is the sole decider of what constitutes an existing use for purposes of federal law. The CWA specifically authorizes certain Indian tribes to make designations as well. The Fond du Lac Band and the Grand Portage Band of Lake Superior Chippewa are both authorized to do so based on approved agreements with the federal government regarding water quality standards.<sup>63</sup> Both Bands agreed that, in rejecting the DNR's report and the 1854 Treaty Authority's list, the MPCA was removing waters that the Bands had already designated as having wild rice as an existing use under federal law.<sup>64</sup>

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attained' when the use has actually occurred *and* the water quality necessary to support the use has been attained. EPA recognizes, however, that all necessary data may not be available to determine whether the use actually occurred or the water quality to support the use has been attained. When determining an existing use, the EPA provides substantial flexibility to states and authorized tribes to evaluate the strength of the available data . . . ." See MPCA Resubmissions, Attachment 1 at 8, citing 80 Fed. Reg. 51027.

<sup>56</sup> Report of the Administrative Law Judge at 67, Findings 280-282.

<sup>57</sup> *Id.* at 65, Finding 269.

<sup>58</sup> *Id.* at 69, Finding 287.

<sup>59</sup> *Id.* at 68, Finding 283.

<sup>60</sup> MPCA Resubmissions at 8-10.

<sup>61</sup> *Id.* at 9.

<sup>62</sup> The Chief Administrative Law Judge notes that the MPCA is designated as the "agency responsible for providing section 401 certifications for nationwide permits: under the CWA. Minn. Stat. 115.03, subd. 4a (2016).

<sup>63</sup> MPCA Resubmissions at 9, n 44.

<sup>64</sup> Report of the Administrative Law Judge at 65, Finding 269, n 395.

### III. Narrative criteria: Minn. R. 7050.0224, subp. 6

In Part 7050.0224, subp. 6,<sup>65</sup> the MPCA leaves in place an existing (but slightly reworded) narrative standard for protecting certain wild rice waters. The Administrative Law Judge disapproved this standard because it applies only to some, and not all, wild rice waters.<sup>66</sup> The record reveals no showing of need and/or reasonableness for distinguishing between application of the narrative standard to some waters and the numeric standard to others.<sup>67</sup>

In its resubmissions, the Agency clarified that establishing a sulfate limit standard for certain bodies of water designated in the proposed rule does not remove protections under the federal Clean Water Act for other bodies of water not designated in the proposed rule.<sup>68</sup> The Agency argued that federal law allows a narrative standard to be applied to a set of identified waters that are not the same set to which a numeric standard applies.<sup>69</sup>

Without more, this argument is not convincing. While federal law clearly allows for different regulatory standards for subgroups of waters, Minnesota's rulemaking statute requires an explanation for differentiating between similarly situated groups in these circumstances. The missing explanation relates to whether the differentiation is necessary and reasonable, a foundational criteria for approval of any proposed rule.

### IV. Unaddressed Technical Errors<sup>70</sup>

The Chief Administrative Law Judge's review of the Agency's resubmissions has revealed the following instances wherein the Agency has failed to address technical errors identified as additional bases for disapproval.

#### A. Part 7050.0220, subp. 5a.<sup>71</sup>

According to a review of the 2017 rule language published at the Revisor of Statutes website, the existing rule language highlighted below continues to be missing from the proposed rule amendment.

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<sup>65</sup> See Lines 9.13 - 9.18 in 7/24/17 version and lines 56.18 - 56.23 in 3/16/18 version.

<sup>66</sup> Report of the Administrative Law Judge at 69, Finding 287b.

<sup>67</sup> Report of the Administrative Law Judge at 69-70.

<sup>68</sup> MPCA Resubmissions at 7 (“[H]aving different standards for different reaches is not inherently unprotective of downstream waters. As required by federal law, the MPCA has met, and will continue to meet requirements to ensure that downstream standards are protected in the permitting process. The MPCA submits that ... with respect to the proposed rule, as with all its rules, it has and is obligated to implement its rules so as to be protective of downstream uses.”).

<sup>69</sup> *Id.*, Attachment 1 at 8-9. The EPA cited to 40 CFR 131.10(c), which provides that “States may adopt sub-categories of a use and set the appropriate criteria to reflect varying needs of such sub-categories of uses, for instance, to differentiate between cold water and warm water fisheries.” The MPCA offers no explanation for distinguishing between the categories of wild rice waters.

<sup>70</sup> MPCA Resubmissions, Proposed Order at 7, comment 28.

<sup>71</sup> See Lines 4.19-4.24 of 7/24/17 version and lines 38.21-39.3 of 3/16/18 version.

## **Subp. 5a.**

### **Cool and warm water aquatic life and habitat and associated use classes.**

Water quality standards applicable to use classes 2B, 2Be, 2Bg, 2Bm, or 2D; 3A, 3B, or 3C; 4A and 4B; and 5 surface waters. See parts 7050.0223, subpart 5; 7050.0224, subpart 4; and 7050.0225, subpart 2, for class 3D, 4C, and 5 standards applicable to wetlands, respectively. The water quality standards in part 7050.0222, subpart 4, that apply to class 2B also apply to classes 2Be, 2Bg, and 2Bm. In addition to the water quality standards in part 7050.0222, subpart 4, the biological criteria defined in part 7050.0222, subpart 4d, apply to classes 2Be, 2Bg, and 2Bm.

B. Part 7050.0470, subs. 1 through 9.<sup>72</sup>

Based on the 2017 rule language available for review on the Revisor of Statutes website, the Agency is proposing to amend an outdated version of subparts 1-9. Subpart 1 is given as an example, below. The highlighted language is the language on the Revisor's website and noted as "published electronically on November 20, 2017." The language without highlighting is the language the Agency now presents as the current language, with proposed amendments indicated.

## **Subpart 1.**

### **Lake Superior basin.**

The water use classifications for the listed waters in the in the Lake Superior basin are as identified in items A to D. See parts 7050.0425 and 7050.0430, and 7050.0471 for the classifications of waters not listed. Thus, it appears that the Agency proposes to amend an out-of-date version of the rule. This applies to all 9 subparts of part 7050.0470.

### **Lake Superior basin.**

The water-use classifications for the stream reaches within each of the major watersheds in the Lake Superior basin listed in item A are found in tables entitled "Beneficial Use Designations for Stream Reaches" published on the Web site of the Minnesota Pollution Control Agency at [www.pca.state.mn.us/regulations/minnesota-rulemaking](http://www.pca.state.mn.us/regulations/minnesota-rulemaking). The tables are incorporated by reference and are not subject to frequent change. The date after each watershed listed in item A is the publication date of the applicable table. The water-use classifications for the other listed waters in the Lake Superior basin are as identified in items B to D. See parts 7050.0425 and 7050.0430 for the classifications of waters not listed. Designated use information for water bodies can also be accessed through the agency's

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<sup>72</sup> See Lines 9.21-11.13 of 7/24/17 version and lines 57.3-58.17 of 3/16/18 version.

Environmental Data Access (<http://www.pca.state.mn.us/quick-links/eda-surface-water-data>).

## V. Approved Rule Modifications

In Attachment 7 of its Resubmissions, the Agency provides a list of 22 proposed rule changes for consideration by the Chief Administrative Law Judge. Upon review, the Chief Administrative Law Judges finds as follows:

- Proposed Rule Changes 1 – 4: Already approved in the Report of the Administrative Law Judge
- Proposed Rule Changes 5 – 8: Relate to the proposed equation-based standard and not approved for the reasons specified in the Report of the Administrative Law Judge and this Order.
- Proposed Rule Changes 9 – 11: Already approved in the Report of the Administrative Law Judge
- Proposed Rule Changes 12 – 13: Approved as related to Proposed Rule Change 11
- Proposed Rule Changes 14 – 16: Approved as minor clarifications
- Proposed Rule Changes 17 – 21: Already approved in the Report of the Administrative Law Judge
- Proposed Rule Change 22: Not approved for the reasons set forth in the Report of the Administrative Law Judge and this Order.

Based upon a review of the rulemaking docket, the Report of the Administrative Law Judge, the Report of the Chief Administrative Law Judge and the Agency's Resubmissions, the Chief Administrative Law Judge issues the following:

### ORDER

1. The proposed rules, dated July 27, 2017, as modified by the Agency's Resubmissions, remain disapproved for the reasons set forth in the Report of the Administrative Law Judge, as modified and or clarified by the provisions of this Order.

2. Pursuant to Minn. Stat. 14.15, subd. 4, if the Agency elects not to correct the identified defects as identified in the Report of the Chief Administrative Law Judge, the Agency shall submit the proposed rule to the Legislative Coordinating Commission

and to the legislative policy committees with primary jurisdiction over state governmental operations for advice and comment. The Agency may not adopt the rule until it has either: received and considered the advice of the commission and committees; or 60 days have passed following the Agency's submission of the rule to the commission and committees.

Dated: April 12, 2018

A handwritten signature in black ink, appearing to read 'T. Pust', with a long horizontal stroke extending to the right.

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TAMMY L. PUST  
Chief Administrative Law Judge