MINNESOTA
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HEARINGS

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February 3, 2020

VIA EFILING ONLY
Mary H. Lynn
Principal Planner
Minnesota Pollution Control Agency
520 Lafayette Rd N
Saint Paul, MN 55155
mary.lynn@state.mn.us

Re: Request for Comments on Planned Amendments to Rules Governing Water Quality Standards - Use Class 2 and 7
OAH 65-9003-35561; Revisor R-4561

Dear Ms. Lynn:

Enclosed is the **REPORT OF THE ADMINISTRATIVE LAW JUDGE** in the above-entitled matter. The Administrative Law Judge has determined there are no negative findings in these rules.

The Office of Administrative Hearings has closed this file and is returning the rule record so that the Minnesota Pollution Control Agency can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. Please ensure that the agency's signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor's office following receipt of that order. Our office will then file the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the agency for its rulemaking record. The Agency will then receive from the Revisor's office three copies of the Notice of Adoption of the rules.

The Agency's next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor's office should be submitted to the State Register for publication. A permanent rule with a hearing does not become effective until five working days after a Notice of Adoption is published in the State Register in accordance with Minn. Stat. § 14.27.

If you have any questions regarding this matter, please contact me at (651) 361-7888, at lisa.armstrong@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,

LISA ARMSTRONG
Legal Assistant

Enclosure
cc: Legislative Coordinating Commission
Revisor of Statutes

OAH 65-9003-35561
Revisor ID No. R-4561

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules of the Minnesota Pollution Control Agency Governing Water Quality Standards – Class 2 and Class 7 Use Designations; Minnesota Rules Chapter 7050

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Ann O'Reilly for a rulemaking hearing on December 11, 2019. The public hearing was held at the offices of the Minnesota Pollution Control Agency (MPCA or Agency) in St. Paul, Duluth, Detroit Lakes, Marshall, and Rochester, Minnesota. The Administrative Law Judge and MPCA witnesses appeared at the St. Paul office, and all other locations joined the hearing via interactive video conference.

The MPCA proposes to amend Rule 7050.0219, subps. 12 and 14 (human health-based criteria and standards); Rule 7050.0420 (trout waters); and Rule 7050.0470 (classification of surface waters in major drainage basins), as they related to use designations for Class 2 and Class 7 waters.[1]

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

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

The Agency must establish that: (1) it complied with all procedural requirements for rulemaking; and (2) the proposed rules are within the Agency's statutory authority, are necessary and reasonable, and are not substantially different from the rules published in the *State Register* unless the Agency has complied with the procedures set forth in Minn. R. 1400.2110 (2019).[3]

[1] Exhibit (Ex.) D (Statement of Need and Reasonableness (SONAR)).
[2] *See* Minn. Stat. §§ 14.131 to 14.20 (2018).
[3] Minn. Stat. §§ 14.05, .14, .25, .26, .50 (2018); Minn. R. 1400.2100 (2019).

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

Approximately 35 people attended the hearing and signed the hearing register – 20 in St. Paul; two in Detroit Lakes; 11 in Duluth; two in Rochester; and none in Marshall.[5] The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. Nineteen members of the public made statements or asked questions during the hearing.[6] Eleven written comments were received prior to the hearing;[7] and 19 written comments were introduced as exhibits in the hearing record at the hearing.[8] There were 264 written comments submitted after the hearing.[9] The MPCA responded to the hearing and post-hearing written comments on December 31, 2019. The MPCA filed rebuttal comments on January 8, 2020.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until December 31, 2019 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[10] The hearing record closed on January 8, 2020.

SUMMARY OF CONCLUSIONS

The Agency has complied with all procedural requirements of rule and law. The Agency also has the legal authority to adopt the proposed rules. The Agency has established that the proposed rules are needed, reasonable, and not substantially different from those published in the *State Register* on September 23, 2019. Accordingly, the Administrative Law Judge **APPROVES** the proposed rules, as modified by the Agency in response to public comments. The Administrative Law Judge recommends, however, that the MPCA consider one change to proposed Rule 7050.0420(B) clarifying the term "existing use."

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

[4] Ex. D at 48.
[5] Ex. L-17 (Sign-in Sheets).
[6] *See* Hearing Transcript (Tr.) (Dec. 11, 2019).
[7] Exs. I-1 to I-11 (Public Comments).
[8] Exs. L-4 to L-16; L-18 to L-22 (Comments Submitted during Hearing). Some commenters submitted more than one exhibit.
[9] *See* post-hearing comments filed on the eComments website in the eComments Report. Note that 256 of the post-hearing comments received were the same form letter submitted by different individuals.
[10] *See* Minn. Stat. § 14.15, subd. 1 (2018).

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Minnesota Rules ch. 7050 establishes water quality standards (WQS) for the protection of waters of the state.[11] The chapter includes a classification system of beneficial uses applicable to waters of the state, water quality standards that protect specific beneficial uses, antidegradation provisions, and other rules to protect the physical, chemical, and biological integrity of Minnesota's waters.[12] Parts 7050.0400 to .0470 classify all surface waters within or bordering Minnesota, and designate the beneficial uses for which these waters are protected.[13]

2. Under the federal Clean Water Act (CWA) and Minnesota rules, all waters in Minnesota are grouped into one or more "classes" based upon the beneficial use of the water body.[14] There are seven general classes of waters under Minn. R. 7050.0140 (Class 1 through 7).[15] Within those seven classes are subclasses.[16] The class designation (both class and subclass) determines the physical and chemical criteria that the waters must meet.[17]

3. The MPCA routinely reviews use designations to ensure that the assigned beneficial uses are protective and attainable, as those terms are defined in the CWA and Minnesota rules.[18] The designated beneficial use for each water body must be correct and appropriate because that use designation affects the WQS and restoration efforts attributed to that body of water.[19]

4. The proposed rules update the beneficial use designations (i.e., classifications) for 124 stream reaches and four lakes in Minnesota.[20] The rule changes affect only Class 2 and Class 7 water bodies.[21]

5. Class 2 waters include "all waters that support or may support aquatic biota, bathing, boating, or other recreational purposes and for which quality control is or may be

[11] "Waters of the state" is a term defined in Minn. Stat. § 115.01, subd. 22 (2018).
[12] Minn. R. 7050.0100 (2019).
[13] *Id. See also*, Minn. R. 7050.0400 (2019).
[14] Ex. H (Certificate of Giving Additional Notice).
[15] Ex. D. at 7.
[16] *Id.*
[17] Ex. H.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

necessary to protect aquatic or terrestrial life or their habitats or the public health, safety, or welfare."[22] There are four subclasses of Class 2 waters: 2A, 2Bd, 2B, and 2D.[23]

6. Class 7 waters are waters that have been subject to a use attainability analysis and have been found to have limited value was a water resource (i.e., "limited resource value waters").[24] Class 7 waters are usually low-flow ditches and streams where the goals of fishing and swimming are likely not achievable.[25] Class 7 waters are not intended for the protection of aquatic life and, therefore, do not require biological assessments.[26]

7. The Agency proposes a new sub-classification system for Class 2A, 2B, and 2Bd streams. This system categorizes water bodies based upon their "ecological potential and the ability to protect or restore a water body to that attainable level."[27] The MPCA denominates this sub-classification system as creating a set of "Tiered Aquatic Life Uses" or TALUs.[28]

8. Under the TALU framework, streams are classified as either "Exceptional Use," "General Use," or "Modified Use."[29] The specific classification of a stream is based on available monitoring and other relevant data, including biological condition and habitat quality.[30] In this way, the agency segments different types of water bodies according to their quality and features.[31] Below is a matrix showing the TALU classifications for Class 2A, 2B, and 2Bd waters, as proposed in the rule changes:[32]

[22] Minn. R. 7050.0140, subp. 3 (2019).
[23] Minn. R. 7050.0222. Class 2A is assigned to surface waters to permit the propagation and maintenance of cold water aquatic biota and their habitats. Ex. D at 7. Class 2Bd is assigned to waters to permit the propagation and maintenance of cool or warm water aquatic biota and their habitats. *Id.* Class 2Bd waters are also protected as a source of drinking water. *Id.* Class 2B is assigned to waters to permit the propagation and maintenance of cool or warm water aquatic biota and their habitats, but are not protected as a source of drinking water. *Id.* (Class 2B is the most common classification of water in the state.) *Id.* Class 2D is assigned to waters to permit the propagation and maintenance of aquatic and terrestrial species indigenous to wetlands and their habitats. *Id.*
[24] Minn. R. 7050.0140, subp. 8 (2019).
[25] Ex. H.
[26] Ex. D at 7.
[27] Ex. D at ix; *see also* 3, 28, 43.
[28] *Id.* at ix, 3.
[29] *Id.* at ix, 3.
[30] *Id.* at ix, 3.
[31] *Id.* at 2 (Table 1-1).
[32] *Id.*

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

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

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

9. Having complied data on the "current condition of a water body and an accompanying and adequate assessment of stressors affecting that water body,"[33] the MPCA apportioned particular water bodies among the various TALUs.[34] Each assignment was based upon the agency's assessment of the reasonableness of particular "restoration or protection expectations" and the "attainability" of those expectations.[35] In other words, the TALU framework classifies water bodies based upon the biological condition that is present or can be "reasonably attained," based upon the MPCA's data.

10. In sum, the proposed rules do the following:

- remove all references to Class 2C waters in Part 7050.0219, as that classification is now defunct;
- change the description of how cold water habitats (Class 2A waters) are reviewed and designated in Part 7050.0420;[36] and
- review and change some of the beneficial use designations of the 191 stream reaches and lakes identified in Part 7050.0470, subps. 1-9.[37]

II. Rulemaking Authority

11. The federal Clean Water Act requires states to establish WQS to meet the goals and objectives of the Act and to protect designated beneficial uses for water bodies.[38] The stated purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[39]

[33] *Id.* at ix, 3, 9-13, 20-21.
[34] *Id.* at 9-13.
[35] *Id.* at ix, 3, 20-21.
[36] The designation of Class 2A (cold water habitats) currently relies on the Minnesota Department of Natural Resources (DNR's list of "trout waters" set forth in Minn. R. 6264.0050 (2019). *See* existing Rule 7050.0420. The proposed rules change the designations "trout streams," "trout lakes," and "trout waters" to "cold water habitats," thereby no longer relying on the DNR's designations.
[37] Ex. D at 22-23.
[38] 33 U.S.C. § 1313(a)-(c) (2018).
[39] 33 U.S.C. § 1251(a) (2018).

12. In Minnesota, the MPCA is the agency charged with the powers and duties to: (1) administer and enforce all laws "relating to pollution of any of the waters of the state"; (2) investigate water pollution, gather data and information necessary to administer and enforce pollution laws, and classify waters of the state "as it may deem advisable"; (3) establish and alter pollution standards for waters of the state; and (4) adopt standards and rules to prevent, control, or abate water pollution.[40]

13. As part of its general duties and powers to protect the quality of the waters of the state, the MPCA is specifically authorized to group bodies of water into classes and adopt classifications and standards of purity and quality.[41] The law further requires the Agency to design and adopt these classes and standards in rules.[42]

14. With respect to agency authority, some commentators suggested that the MPCA is acting beyond its authority when proposing the amendments to Part 7050, because the proposals would restrict eligibility for assignment of streams and lakes to Class 2A to only those water bodies that currently support healthy populations of aquatic biota.[43]

15. The comments of Water Legacy are illustrative of this point. As Water Legacy reasons, because the CWA requires certain procedures before a state may downgrade a water body that had particular beneficial uses after November 28, 1975, the Agency's proposal to define Class 2A waters as those with an "existing beneficial use that permits propagating and maintaining a healthy community of cold water aquatic biota,"[44] is unlawful. Water Legacy maintains that there are some lakes and streams that had beneficial uses after November 28, 1975, that do not have them currently, and that the proposed rule purports to abandon state and federal protections for these water bodies.[45] As proposed, amended Part 7050.0420(B) reads:

> Cold water habitat waters identified as class 2A, 2Ae, or 2Ag in part 7050.0470 must reflect an existing beneficial use that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats.[46]

16. The dispute turns upon the meaning of "existing beneficial use" in the proposed regulation. Water Legacy reads these terms as describing uses that are extant on the date that any rule amendments are promulgated; whereas, the Agency contends that its word choice is meant to refer to, and import, the much broader CWA rules.[47] The

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[40] Minn. Stat. § 115.03, subd. 1(a), (b), (c), (e) (2018).
[41] Minn. Stat. § 115.44, subds. 2, 4 (2018).
[42] *Id.* The MPCA is also authorized to establish and apply standards and rules for the MPCA's participation in the NPDES permitting program. *See* Minn. Stat. § 115.03, subd. 5 (2018). Establishing scientifically-sound WQS is necessary for the implementation of the NPDES program, as well as other CWA programs.
[43] *See, e.g.,* Post-Hearing Comments of Janet Keough at 3; Comments of Howard Markus at 2 (Ex. L-11).
[44] Post-Hearing Comments of Paula Maccabee, at 2-4.
[45] *Id.* at 4.
[46] Ex. C at 3 (Proposed Rule).
[47] Ex. D at 2, n.2.

federal definition of "existing uses" signifies "uses actually attained in the water body on or after November 28, 1975."[48]

17. In an effort to address this concern, and others, as to the breadth of the beneficial use designation, the MPCA proposed additional text at the rulemaking hearing:

> Cold water habitat waters identified as class 2A, 2Ae, or 2Ag in part 7050.0470 must reflect an existing beneficial use or feasibly attainable use that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats.[49]

18. Indeed, so as to better reflect the requirements of the CWA, such a revision was urged by the U.S. Environmental Protection Agency (EPA) in its pre-hearing comments.[50]

19. It is clear from the record that the Agency does not intend to propose a rule that conflicts with federal law, nor does it do so in fact. Yet, because of the continuing confusion around the terms that the Agency selected, the MPCA should consider including some additional text to Part 7050.0420(B) in order to make its objectives clear. For example, the addition of the following phrase would be needed and reasonable (and would not result in a regulation that is substantially different from those originally proposed by the MPCA): "For the purpose of this subpart, an existing use is one that was attained in the water body on or after November 28, 1975."[51]

20. With this additional language, the Administrative Law Judge finds that the asserted potential conflict with the CWA, and the legal authority to issue the proposed changes, are properly addressed.

21. The proposed rules entail revisions to beneficial use designations for Class 2 and Class 7 waters, a component of WSQ. Such authority has been delegated to the MPCA under both state and federal law. Subject to adoption of the recommended additional language clarifying the term "existing use," the Administrative Law Judge concludes that the MPCA has the statutory authority to adopt these rules.

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

A. Request for Comments

22. Minnesota Statutes section 14.101 (2018) requires that an agency, at least 60 days prior to the publication of a notice of intent to adopt rules or a notice of hearing,

[48] 40 C.F.R. § 131.3(e) (2019) ("Existing uses are 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").
[49] Tr. at 66-67.
[50] Ex. I4 at Comment 2 (EPA Comment).
[51] *See generally* Tr. at 36.

solicit comments from the public on the subject matter of a proposed rulemaking. Such notice must be published in the *State Register*.[52]

23. On September 24, 2018, the MPCA published in the *State Register* a Request for Comments seeking comments on amendments to Minn. R. ch. 7050 related to water quality standards for Class 2 and 7 uses.[53]

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

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

B. Publication of Notice of Intent to Adopt Rules

26. Minnesota Statutes sections 14.14, subdivision 1a(a), 14.22 (2018) and Minn. R. 1400.2080, subp. 6 (2019), require that an agency publish in the *State Register* a notice of intent to adopt rules at least 30 days prior to the date of hearing and at least 30 days prior to the end of the comment period.

27. An agency may request approval of its notice of intent to adopt rules by an administrative law judge prior to service.[54]

28. The Agency requested approval of its Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice) on August 19, 2019.[55]

29. On August 27, 2019, the Administrative Law Judge approved the MPCA's Dual Notice for form and substance.[56]

30. The Dual Notice was published in the September 23, 2019 *State Register.*[57] The Dual Notice set November 7, 2019, as the deadline for submitting comments and requesting a hearing.[58]

31. The Dual Notice identified the date and locations of the hearing in this matter, including the satellite locations where members of the public could participate in the hearing via video conference.[59]

32. The Dual Notice contained all information required in Minn. R. 1400.2080 (2019).

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[52] Minn. Stat. § 14.101.
[53] Ex. A (Request for Comments).
[54] Minn. R. 1400.2080 (2019); Minn. Stat. § 14.22.
[55] Ex. K-6 (Letter from MPCA Aug. 19, 2019).
[56] Ex. K-7 (Amended Order and Recommendations Aug. 27, 2019).
[57] Exs. F-1, F-2 (Dual Notice).
[58] Exs. F-1, F-2.
[59] Exs. F-1, F-2.

C. Notice Requirements

1. Notice to Official Rulemaking List

33. Minnesota Statutes section 14.14, subdivision 1a (2018) requires that each agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.

34. On September 23, 2019, the MPCA mailed or emailed a copy of the Dual Notice to all persons and entities on its official rulemaking list.[60] The official rulemaking list was comprised of all persons and entities who requested to be placed on the MPCA GovDelivery system for the purpose of receiving such notice.[61]

35. The Dual Notice advised that the comment period expired at 4:30 p.m. on November 7, 2019.[62] There are 45 days between September 23, 2019, and November 7, 2019.

36. The date of hearing was December 11, 2019. There were 79 days between the end of the comment period (September 23, 2019) and the date of the hearing (December 11, 2019).

37. Minnesota Statutes section 14.14, subdivision 1a, requires that agencies give notice of intent to adopt rules by U.S. mail or electronic mail to all persons on its official rulemaking list at least 30 days before the date of hearing.

38. Minnesota Rule 1400.2080, subpart 6 (2019) provides that a notice of hearing or notice of intent to adopt rules must be mailed at least 33 days before the end of the comment period or the state of the hearing.

39. The Administrative Law Judge concludes that the MPCA fulfilled the notice requirements set forth in Minn. Stat. § 14.14 (2018) and Minn. R. 1400.2080, subp. 6.

2. Additional Notice

40. Minnesota Statutes section 14.14, subdivision 1a(a) (2018) requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or through other means of communication.[63] This notice is referred to as “additional notice” and is detailed by an agency in its additional notice plan.

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[60] Ex. G (Certificate of Mailing).
[61] *Id.*
[62] Exs. F-1, F-2.
[63] Minn. Stat. § 14.14, subd. 1a(a).

41. Minnesota Statutes sections 14.131 and 14.23 (2018) require that an agency include in its SONAR a description of its efforts to provide additional notice. Alternatively, the agency must detail why additional notification efforts were not made.[64]

42. An agency may request approval of its additional notice plan by an administrative law judge prior to service.[65]

43. The MPCA requested approval of its Additional Notice Plan on August 19, 2019.[66]

44. On August 27, 2019, the Administrative Law Judge approved the Agency's Additional Notice Plan with some modifications.[67]

45. The MPCA provided notice according to the approved Additional Notice Plan, as follows:[68]

(a) on September 20, 2019, the Agency mailed a copy of the Dual Notice to the three organizations identified by the Administrative Law Judge in the Amended Order on Review of Additional Notice Plan and Dual Notice;

(b) on or before September 23, 2019, the Agency published its Dual Notice on the MPCA's public notice webpage, https://www.pca.state.mn.us/public-notices;

(c) the Agency provided a 45-day (extended) comment period in its Dual Notice;

(d) the Agency held a public meeting at the MPCA offices in St. Paul on October 29, 2019, to provide information on the proposed rule amendments;

(e) on or about September 23, 2019, the Agency emailed the Dual Notice to the air and water tribal contacts for the 11 federally-recognized tribes in Minnesota;

(f) on September 20, 2019, the Agency sent a copy of the Dual Notice to all permitees owning property adjacent to, or upstream of, a body of water in which there is a proposed use designation change that is more stringent than its current classification;

[64] Minn. Stat. §§ 14.131, .23.
[65] Minn. R. 1400.2060, subp. 3 (2019).
[66] Ex. K-6.
[67] Ex. K-7.
[68] Ex. H.

(g) on September 23, 2019, the Agency emailed the Dual Notice to all associations and environmental groups listed in the approved Additional Notice Plan;

(h) the Agency provided notification of the proposed rulemaking in the September 23, 2019 editions of the MPCA electronic newsletters, *On Point* and *Waterfront Bulletin*;[69] and

(i) the Agency posted the Dual Notice, SONAR, and proposed rules on the Use Classifications 2 and 7 Rule webpage (https://www.pca.state.mn.us/water/wqs-designated-uses), on or about September 23, 2019.

34. The Administrative Law Judge finds that the MPCA complied with its Additional Notice Plan and fulfilled the additional notice requirements set forth in Minn. Stat. §§ 14.14, subd. 1a(a), .131, .23.

3. Notice to Legislators

46. On September 20, 2019, the MPCA mailed or emailed a copy of the Dual Notice, SONAR, and proposed rules the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the proposed rules, and to the Legislative Coordinating Commission, in compliance with Minn. Stat. § 14.116 (2018).[70]

47. Minnesota Statutes section 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators at the time it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.[71]

48. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities under Minn. Stat. § 14.116."[72]

4. Notice to the Legislative Reference Library

49. On September 20, 2019, the MPCA mailed a copy of the SONAR to the Legislative Reference Library.[73]

50. Minnesota Statutes sections 14.23 and 14.131 (2018) and Minn. R. 1400.2070, subp. 3, require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

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[69] These electronic newsletters were sent to all GovDelivery subscribers of the MPCA newsletters.
[70] Ex. K-2 (Certificate of Sending Dual Notice and SONAR to Legislators).
[71] Minn. Stat. § 14.116.
[72] *Id*.
[73] Ex. E.

51. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities under Minn. Stat. §§ 14.23 and .131.

5. Notice of Impact on Farming Operations

52. Minnesota Statutes section 14.111 (2018) imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any proposed rule changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

53. On July 25, 2019, over 30 days prior to the publication of the proposed rules in the *State Register*, the MPCA mailed a copy of the Revisor's approved draft rules and a signed copy of the SONAR to the Commissioner of Agriculture.[74]

54. The Administrative Law Judge concludes that the MPCA fulfilled its responsibilities under Minn. Stat. § 14.111.

6. Notice to Municipalities

55. Minnesota Statutes section 115.44, subdivision 7 (2018) requires that the MPCA mail a copy of the Dual Notice to the governing body of each municipality bordering or through which the waters, for which standards are sought to be adopted, flow.

56. On September 20 and 23, 2019, at least 33 days before the end of the comment period, the MPCA emailed or mailed the Dual Notice to all townships, cities, counties, and sanitary districts in Minnesota.[75]

57. The Administrative Law Judge finds that the MPCA complied with its requirements under Minn. Stat. § 115.44, subd. 7.

7. Notice of Hearing to Those Who Requested a Hearing

58. In response to the Dual Notice, more than 25 persons requested a hearing in this matter.[76] In fact, the Agency received two letters, one email, and 261 identical form letters requesting a hearing.[77]

59. As a result, on November 8, 2019, the MPCA emailed a Notice of Hearing to all those who requested a hearing in compliance with Minn. Stat. § 14.25, subd. 1 (2018).[78]

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[74] Ex. K-1 (Certificate of Sending Dual Notice to Commissioner of Agriculture).
[75] Ex. K-5 (Certificate of Mailing Dual Notice to Municipalities).
[76] Ex. I-12 (Hearing Requests).
[77] *Id.*
[78] Ex. K-4 (Certificate of Mailing at Notice of Hearing to those who Requested a Hearing). A separate Notice of Hearing was not required because the Agency's Dual Notice provided sufficient information about the hearing under Minn. Stat. § 14.22, subd. 2. Accordingly, the MPCA was not required to publish the additional Notice of Hearing in the *State Register*.

D. Rule Hearing

60. A hearing was held on December 11, 2019, at the MPCA offices in St. Paul, Minnesota. The hearing was simultaneously aired by video conference at the MPCA offices in Detroit Lakes, Duluth, Marshall, and Rochester, Minnesota. Participants at satellite locations were provided equal opportunity to provide comment, ask questions, and participate in the hearing.

61. At the hearing, the Agency submitted copies of the following documents, as required by Minn. R. 1400.2220 (2019):

> Ex. A: the Agency's Request for Comments as published in the *State Register* on September 24, 2018;
>
> Ex. C: the proposed rules dated July 9, 2019, including the Revisor's approval;
>
> Ex. D: the Agency's SONAR, dated July 19, 2019, including exhibits S1 through S-56;
>
> Ex. E: the Certificate of Mailing the SONAR to the Legislative Reference Library on September 20, 2019;
>
> Ex. F: the Dual Notice as mailed and posted on the MPCA website and as published in the *State Register* on September 23, 2019;
>
> Ex. G: the Certificate of Mailing the Dual Notice to the rulemaking mailing list on September 23, 2019, and the Certificate of Accuracy of the Mailing List;
>
> Ex. H: the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on September 23, 2019, or earlier;
>
> Ex. I: the 12 written comments on the proposed rules that the Agency received during the comment period that followed the Dual Notice, as well as the requests for hearing;
>
> Ex. K-1: the Certificate of Sending Rules and SONAR to the Commissioner of Agriculture on July 23, 2019;
>
> Ex. K-2: the Certificate of Sending the Dual Notice and SONAR to Legislators and Legislative Coordinating Commission on September 20, 2019;
>
> Ex. K-3: Certificate of Consulting with the Commissioner of Management and Budget on July 25, 2019, and Memorandum from Minnesota Management and Budget dated August 25, 2019;

Ex. K-4: Certificate of Mailing a Notice of Hearing to those who Requested a Hearing on November 8, 2019;

Ex. K-5: Certificate of Mailing Dual Notice to Municipalities on September 23, 2019;

Ex. K-6: Letter from the MPCA dated August 19, 2019, to Administrative Law Judge requesting a hearing and requesting review and approval of Dual Notice and Additional Notice Plan;

Ex. K-7: Amended Order and Recommendations on Review of Additional Notice Plan and Dual Notice dated August 27, 2019;

Ex. L-1: a copy of the MPCA's presentation at the December 11, 2019 hearing;

Ex. L-2: draft modification to the Proposed Rules in response to comments received during comment period; and

Ex. L-3: Amended Certificate of Notice of Mailing a Notice of Hearing to those who Requested a Hearing.

62. Jean Coleman, MPCA's legal counsel, offered the Agency's exhibits and addressed the procedural requirements for rulemaking.[79] Mary Lynn, the Agency's rule coordinator, explained the general rulemaking process.[80] R. William Bouchard, Ph.D., a research scientist for the MPCA, made a presentation explaining the need and reasonableness of the rule.[81]

63. Approximately 35 people attended the hearing and signed the hearing register – 20 in St. Paul; two in Detroit Lakes; 11 in Duluth; two in Rochester; and none in Marshall.[82] The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules.

64. Nineteen members of the public made statements or asked questions during the hearing.[83] Eleven written comments were received prior to the hearing;[84] and 19 written comments were introduced as exhibits in the hearing record at the hearing.[85] There were 264 written comments submitted after the hearing.[86]

[79] Tr. at 19-26.
[80] *Id.* at 26-29.
[81] *Id.* at 29-71. *See also* Ex. L-1.
[82] Ex. L-17.
[83] *See* Tr.
[84] Exs. I-1 to I-11.
[85] Exs. L-4 to L-16; L-18 to L-22. Some commenters submitted more than one exhibit.
[86] *See* post-hearing comments filed on the eComments website in the eComments Report. Note that 256 of the post-hearing comments received were the same form letter submitted by different individuals.

65. The MPCA responded to the hearing and post-hearing comments on December 31, 2019. The MPCA filed rebuttal comments on January 8, 2020.

IV. Statutory Requirements for the SONAR

A. Regulatory Factors

66. The Administrative Procedure Act requires an agency adopting rules to address eight factors in its SONAR.[87] Those factors are:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

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

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

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

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

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

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.[88]

[87] Minn. Stat. § 14.131.
[88] *Id.*

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

67. In the SONAR, the MPCA describes the classes of persons who will likely be affected by the proposed rule amendments, including the classes of persons that will bear the costs of the proposed rules and the classes that will benefit from the proposed rules.

68. The MPCA explains that all citizens in Minnesota could be affected by, and benefit from, the proposed rules because the rule changes are intended to make water quality assessments more accurate and protective of Minnesota waters.[89] The MPCA asserts that better water quality supports recreational activities and tourism, increases property values and tax base, and provides aesthetic value to the state.[90]

69. In addition, the MPCA notes that more accurate classifications of state waters will benefit entities dedicated to protecting and restoring Minnesota's water quality.[91] It will help these organizations to better allocate their resources and not expend funds in attempts to restore waters to levels that cannot be practically achieved.[92]

70. With respect to costs, the MPCA claims that neither permit holders nor other classes of persons are expected to incur significant costs as a result of the proposed rule changes.[93] There may, however, be some additional costs to public regulatory entities in implementing best management practices and administering the new requirements.[94] But overall, the Agency notes that very few parties will incur additional costs as a result of the proposed changes.[95]

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

71. The SONAR next analyzes the probable costs to the MPCA and to other agencies in implementing and enforcing the proposed rule changes, as well as what effect the proposed rules may have on state revenues.[96]

72. The MPCA believes that the proposed rules will result in a net reduction in costs.[97] According to the Agency, under the proposed rule changes, some waters will be subjected to less restrictive biological criteria and goals.[98] The less restrictive standards will reduce the efforts required of the Agency to list, identify stressors, and develop

[89] Ex. D at 23-24.
[90] *Id.* at 24.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Ex. D at 24-25.
[97] *Id.* at 24.
[98] *Id.*

restoration plans for waters that are unlikely to meet the standards currently imposed.[99] The result is a reduction in costs for the Agency.[100]

73. The Agency notes that it is possible it could incur some additional costs for processing and reviewing National Pollution Discharge Elimination System/State Disposal System (NPDES/SDS) permit applications for new or expanded dischargers to Exceptional Use or cold water habitats.[101] However, the MPCA believes these costs will be modest, if they occur, and the processing of additional applications can be completed with current staff.[102]

74. With respect to impacts on other state agencies, the MPCA states that the proposed rule changes are not anticipated to require implementation or enforcement from other agencies.[103] In addition, the proposed rules are not expected to have any effect on state revenues.[104]

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

75. The SONAR evaluated whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule changes.[105] The asserted purpose of the proposed rules to designate more accurate aquatic life beneficial uses.[106]

76. After a full analysis, the MPCA concludes that there are no less costs or less intrusive alternatives for achieving this purpose other than amending the current use designations consistent with the scientific data.[107]

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

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

78. The SONAR describes the alternative methods for achieving the purpose of the proposed rule changes that were seriously considered by the MPCA and explains the reasons why these alternatives were rejected in favor of the proposed rule changes.[108]

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 25.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 25-26.

79. According to the MPCA, the proposed rule amendments will allow the Agency to better manage Minnesota's aquatic resources by establishing attainable aquatic life uses and tailoring water quality management to those attainable uses.[109]

80. The Agency evaluated alternatives to both the designated use changes and the habitat designation changes.[110]

81. An alternative to the Exceptional Use designation change evaluated by the MPCA was to expand the antidegradation provisions in Minn. R. parts 7050.0250 to .0335.[111] This would include designating waters that meet the Exceptional Use criteria as "Outstanding Resource Value Waters." Such a change would prohibit or restrict discharges to these waters.[112] The Agency found that this change would not be enforceable for some sources of pollution, such as unregulated discharges or activities not requiring a permit.[113] In addition, this would expand the antidegradation provisions beyond that required by the CWA, resulting in additional costs and intrusion.[114] Consequently, the Agency rejected this option.[115]

82. An alternative to the Modified Use designation changes that the Agency evaluated was to assess the affected streams using General Use biocriteria.[116] The MPCA found that this analysis would result in more waters being identified as impaired under the CWA.[117] However, the MPCA notes that the ultimate management of these streams would likely be the same whether designated as a Modified Use stream or as an impaired water body.[118] The only difference would be more costs and delays in reaching the final management strategy.[119] Accordingly, the Agency found this alternative to be inferior to the proposed rule changes.[120]

83. The Agency identified no viable alternatives for the cold water and warm and cool water habitat designation changes in the proposed rules. The MPCA found that the current use designations for these waters result in the application of standards unsuitable for managing these waters and their aquatic life.[121]

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[109] *Id.* at 25.
[110] *Id.* at 25-26.
[111] *Id.* at 25.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 26.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

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

84. The SONAR includes an extensive analysis of the probable costs of complying with the proposed rule changes, identifying the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.[122]

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

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

86. In addition to identifying the costs of complying with the rule changes, the SONAR also evaluates the probable costs or consequences of not adopting the proposed rule changes.[123] This analysis reviewed the costs or consequences that could be borne by identifiable categories of affected parties, such as separate classes of government units, business, or individuals.[124]

87. The MPCA asserts that the consequences of not adopting the proposed amendments would be the continuation of the Agency's current monitoring, restoration, and protection activities for the Minnesota's waters, including the waters identified for change in the proposed rules.[125] According to the Agency, the status quo results in inefficient and ineffective use of resources for waters that are improperly designated.[126]

88. Through its extensive analyses of Minnesota waters, the Agency has found that some water bodies have changed due to legal habitat alterations (such as fish stocking) or natural conditions.[127] If these waters continue to be evaluated under naturally unattainable standards, then the Agency asserts resources could be ineffectively utilized.[128] Conversely, the MPCA found that some waters are improperly classified as General Use or warm/cool water habitats and should be held to higher standards applicable to cold water habitats.[129] Under both scenarios, the MPCA asserts that the result is the inefficient and ineffective use of resources – resources taken away from achieving attainable goals and used to address unattainable goals.[130]

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[122] *Id*. at 39-48.
[123] *Id.* at 26.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*

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

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

90. The SONAR assesses the difference between the proposed rule changes and existing federal regulations.[131]

91. The MPCA states that the proposed rule changes are consistent with all existing federal regulations.[132]

92. The CWA requires states to promulgate WQS based on federal regulations and guidance.[133] The CWA also requires periodic review of WQS by states and the modification of the standards based upon scientifically defensible data.[134] The MPCA states that the proposed rule changes comply with these federal mandates.[135] Accordingly, the MPCA finds no differences or conflicts between the proposed rules and existing federal regulations.[136]

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

93. The SONAR assesses the cumulative effect of the proposed rule changes with other federal and state regulations related to the specific purpose of the proposed rules.[137]

94. The specific purpose of the proposed rule amendments is to designate more accurate aquatic life beneficial uses so as to apply appropriate WQS to those uses.[138]

95. The MPCA asserts that the cumulative effect of the proposed rule changes will be positive because they: (1) result in more appropriate water quality goals; and (2) allow for more efficient use of resources to protect and restore Minnesota waters.[139] Consequently, the Agency states that the proposed rules will be better aligned with existing state and federal regulations aimed at water quality.[140]

96. The Agency identified a potential, but unlikely, minor cumulative effect with Minnesota's antidegradation rules.[141] The MPCA concludes, however, that the interaction

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[131] *Id*. at 27.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 27-28.
[138] *Id.* at 27.
[139] *Id.*
[140] *Id.*
[141] *Id.*

between the two rules would be rare because it would require that an Exceptional Use water be threatened by an activity that is subject to antidegradation requirements.[142] This is unlikely because: (1) Exceptional Use waters are in areas with little human activity and are unlikely to be impacted by a permitted discharge; and (2) any current discharge permits related to Exceptional Use waters are sufficient to protect the Exceptional Use.[143] For this reason, the MPCA asserts that cumulative impacts are expected to be minimal.[144]

97. The MPCA further concluded that the proposed amendments will not add new requirement or extend the impact of existing state or federal law.[145] While the DNR has regulations related to trout waters, the DNR is not obliged to adopt or modify its rules, and the two agencies (and sets of rules) regulate different subject matters.[146]

B. Performance-Based Regulation

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

99. According to the MPCA, the designations contained in the proposed rules represent the implementation of performance-based criteria to directly measure the attainment of use goals.[149] These designations, in turn, allow for flexibility in how protection and restoration goals may be achieved.[150]

C. Consultation with the Commissioner of Minnesota Management and Budget

100. Minnesota Statutes section 14.131 requires that agencies consult with the Commissioner of Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and fiscal benefits of the proposed rule on local units of government.

101. On July 25, 2019, the MPCA sent a letter to the Commissioner of the MMB, along with the proposed rules and SONAR, seeking the required consultation.[151]

102. On August 15 2019, the MMB issued a Memorandum analyzing the fiscal impacts and benefits on local units of government.[152] The MMB concluded that that the proposed Exceptional Use, Modified Use, and warm/cool water habitat designations will

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[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 28.
[146] *Id.*
[147] Minn. Stat. §§ 14.002 and 14.131 (2018).
[148] Minn. Stat. § 14.002.
[149] Ex. D at 28.
[150] *Id.*
[151] Ex. K-3 (Certificate of Consulting with Comm'r of MMB).
[152] *Id.*

not have any effect on local ordinances or regulations.[153] The MMB noted that the cold water habitat designation may require some Municipal Separate Storm Sewer System (MS4) permittees to develop, implement, and enforce ordinances for construction activities.[154] However, in most or all cases, these municipalities already have adopted ordinances that address protection of these habitats.[155]

103. The MMB further determined that the proposed use designations will result in more accurate water quality assessment.[156] This, in turn, will positively impact local units of government by allowing them to engage in more effective and efficient water planning and management activities.[157] Other benefits related to improved water quality, according to the MMB, include increased property and sale tax revenues, increased tourism dollars, added jobs, and lower water treatment costs.[158]

104. The Administrative Law Judge finds that the MPCA fulfilled its legal requirements under Minn. Stat. § 14.131, with respect to consultation with the MMB.

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

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

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

106. Minn. Stat. § 14.127 (2018), requires the Agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[159]

107. The MPCA determined that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city in the first year after the rule takes effect.[160]

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

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[153] *Id.*
[154] Ex. K-3.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] Minn. Stat. § 14.127, subds. 1 and 2 (2018).
[160] Ex. D at 30.

F. Adoption or Amendment of Local Ordinances

109. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[161]

110. The MPCA concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Agency's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[162]

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

G. Consideration of Economic Factors

112. In addition to the evaluation of costs and parties likely to incur costs as a result of the proposed rule changes (as required in Minn. Stat. § 14.131), the MPCA is required by Minn. Stat. §§ 115.43, subd. 1 and 116.07, subd. 6 (2018), to give due consideration to:

> the establishment, maintenance, operation and expansion of business, commerce, trade industry, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

113. To this end, the MPCA considered the economic factors associated with the proposed amendments.[163] The MPCA concluded that the changes "are not anticipated to result in considerable increased costs for water management entities or for MPCA permitted dischargers in the foreseeable future."[164]

114. The MPCA contends that the proposed use designations will result in more accurate water quality assessments, which will lead to more effective and efficient water quality management activities.[165] This, in turn, benefits all citizens because water quality

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[161] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3 (2018).
[162] Ex. D at 31.
[163] Ex. D. at 39-48.
[164] *Id.* at 39.
[165] *Id.*

can be maximized and resources can be best directed at waters to meet attainable goals.[166]

115. With respect to the new Exceptional Use designations, these designations will apply to 20 streams.[167] The MPCA asserts that the designations will translate into improved protections and water quality in these 20 streams.[168] The economic benefits to citizens will include improved recreation, increased jobs and income from tourism, increased property values, more tax revenues, and better aesthetics and ecosystems.[169]

116. The MPCA determined that the proposed Exceptional Use stream designations are unlikely to, if at all, affect existing NPDES/SDS permittees.[170] There are 14 NPDES/SDS permittees that discharge directly to, or upstream of, a stream proposed to be designated Exceptional Use under the proposed amendments: one MS4 permittee, nine sand and gravel mining facilities, two municipal wastewater plans, a peat moss mine, and a metallic mining facility.[171] The MPCA evaluated the economic impact on all of these facilities and determined that none of them are anticipated to incur additional costs or will be required to undertake additional treatment of their discharges.[172] Construction stormwater permittees, however, may, in rare cases, be required to implement additional best management practices.[173]

117. With respect to Modified Use designations, the MPCA determined that there will be no increased cost to citizens or dischargers, and that these groups are likely to enjoy cost savings.[174] According to the Agency, citizens will incur economic benefits from the setting of attainable water quality goals, which will then allow water management entities to most effectively direct resources.[175] As for permitted dischargers, the MPCA states that no permittees that discharge to, or upstream of, a proposed Modified Use stream will incur costs.[176] In fact, the MPCA contends that these permittees may receive some cost savings by not having to conduct reviews to determine if their discharge is contributing to impairment.[177] Similarly, the Agency determined that there are no direct impacts or costs to entities responsible for non-point source discharges to Modified Use streams.[178]

118. With respect to the proposed Cold Water Habitat designations, there are 38 water bodies that will be affected by the proposed cold water habitat designation.[179] The MPCA asserts that Minnesota citizens will receive the same type of general economic

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166 *Id.*
167 *Id.* at 42.
168 *Id.* at 40.
169 *Id.* at 40-41.
170 *Id.* at 40-42.
171 *Id.* at 41-42.
172 *Id*.
173 *Id.* at 42.
174 *Id.* at 42-44.
175 *Id.* at 43.
176 *Id.*
177 *Id.*
178 *Id*. at 43-44.
179 *Id.* at 46.

benefits that befall the public when water quality is maintained and protected: improved recreation, increased property values, more jobs and income from tourism, increased tax revenues, and overall ecosystem benefits.[180]

119. The Agency determined that there are 30 NPDES/SDS permittees that discharge directly to, or upstream of, the proposed cold water habitats: 13 MS4 permittees, seven sand and gravel mining facilities, three municipal wastewater facilities, six industrial stormwater permittees, and one fish hatchery.[181] According to the MPCA, no existing permitted dischargers are likely to require additional treatment or costs as a result of this new designation.[182] MS4 permittees may be required to develop, implement, and enforce a regulatory mechanism (e.g., ordinances) for construction activities.[183] The sand and gravel mining facilities and the industrial stormwater permittees may have to adopt additional best management practices (in which some costs would be associated), but that is speculative.[184] There would be no additional costs or impacts for the municipal wastewater facilities or the fish hatchery.[185] Overall, MPCA's analysis determined no existing MPCA-permitted discharger is likely to require additional treatment or incur significant additional costs.[186]

120. Finally, with respect to the proposed warm and cool water habitat designations, the MPCA determined that no party is likely to incur costs -- and some may even see a cost savings.[187] According to the Agency, Minnesota citizens will see a net savings because the new designation will allow water management authorities to better prioritize their efforts and use resources more efficiently.[188] In addition, no permitted entities will incur costs from the proposed designation change.[189] Entities responsible for non-point discharges to cool/warm water stream will not be impacted.[190]

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

H. External Peer Review

122. Minnesota Statutes section 115.035(a) (2018) requires that:

> Every new or revised numeric water quality standard must be supported by a technical support document that provides the scientific basis for the proposed standard and that has undergone external, scientific peer review.

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[180] *Id.* at 44.
[181] *Id.* at 44-46.
[182] *Id.* at 45.
[183] *Id.*
[184] *Id.* at 45-46.
[185] *Id.*
[186] *Id.* at 46.
[187] *Id.* at 47-48.
[188] *Id.* at 47.
[189] *Id.* at 47-48.
[190] *Id.* at 48.

123. Because the proposed rule changes do not amend any numeric or narrative standards, no external peer review was required.

I. Environmental Justice Policy

124. Presidential Executive Order 12898 directs each federal agency to make "achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations."[191] In furtherance of this directive on a state-level, the MPCA adopted a policy for environmental justice, which states:

> The Minnesota Pollution Control Agency will, within its authority, strive for the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[192]

125. The MPCA asserts that its proposed rule amendments will not have any negative environmental consequences.[193] Indeed, the MPCA contends that the amendments will improve how the Agency protects Minnesota's water quality and aquatic life.[194]

126. The MPCA evaluated whether the proposed rule changes will have the potential to impact areas that have populations that are predominately low-income, people of color, or both.[195] The Agency determined that there will be no disproportionate impacts to these communities.[196]

127. With respect to meaningful involvement, the MPCA implemented an extensive additional notice plan that gave ample opportunity to all populations, including low income populations and communities of color.[197] Because these proposed rule changes impact Minnesota's water quality, the Agency specifically reached out to Minnesota's tribal communities for input and comment.[198]

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

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[191] *Id.* at 31.
[192] *Id.*
[193] *Id.* at 32.
[194] *Id.*
[195] *Id.* at 31-35.
[196] *Id.* at 33, 35.
[197] *Id.* at 35.
[198] *Id.*

V. Rulemaking Legal Standards

129. The Administrative Law Judge must make the following inquiries: (1) whether the agency has statutory authority to adopt the rule; (2) whether the rule is unconstitutional or otherwise illegal; (3) whether the agency has complied with the rule adoption procedures; (4) whether the proposed rule grants undue discretion to government officials; (5) whether the rule constitutes an undue delegation of authority to another entity; and (6) whether the proposed language meets the definition of a rule.[199]

130. Under Minn. Stat. § 14.14, subd. 2 (2018), and Minn. R. 1400.2100 (2019), the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[200] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[201] and the agency's interpretation of related statutes.[202]

131. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[203] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[204]

132. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[205] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[206]

133. Because the Agency adopted changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.[207]

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[199] *See* Minn. R. 1400.2100 (2019).
[200] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[201] *Compare generally, U. S.* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[202] *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[203] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[204] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[205] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[206] *Minn. Chamber of Commerce*, 469 N.W.2d at 103.
[207] Minn. R. 1400.2110 (2019).

134. At the rule hearing on December 11, 2019, the Agency detailed the revisions it would make to the proposed rules in response to the stakeholder feedback received during the comment period.[208]

135. The change involved proposed Rule 7050.0410(B) in which the Agency inserts the words "or feasibly attained", as set forth below:

> B. Cold water habitat waters identified as class 2A, 2Ae, or 2Ag in part 7050.0470 must reflect an existing or feasibly attainable beneficial use that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats.

136. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2018). The statute specifies that a modification does not make a proposed rule substantially different if:

> (1) 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;
>
> (2) the differences are a logical outgrowth of the contents of the notice of hearing, and the comments submitted in response to the notice; and
>
> (3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

137. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

> (1) "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests";
>
> (2) 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
>
> (3) "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[209]

VI. Rule by Rule Analysis

138. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows

[208] Ex. L-2.
[209] *See* Minn. Stat. § 14.05, subd. 2.

below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

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

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

A. Minn. R. 7050.0219 (Human Health-Based Criteria and Standards)

141. The MPCA proposes to revise this subpart to eliminate Class 2C from its list of lakes and streams on the grounds the class is obsolete and its constituent elements are all covered by other water classifications.[210] Moreover, the references to Class 2C have already been removed from other portions of Part 7050, as a result of a separate, earlier rulemaking.[211]

142. It does not appear that any commentator objected to the revision.[212]

143. The Administrative Law Judge finds that removing an obsolete classification from Part 7050 is needed and reasonable.

B. Minn. R. 7050.0420 (Cold Water Habitat Waters)

144. The MPCA proposes to revise this subpart to eliminate the direct linkage between this regulation and Minn. R. 6264.0050 (2019).[213] Under Rule 6264.0050, the DNR identifies waters as "trout lakes" and "trout streams."

145. The Agency proposes to substitute the phrases "trout stream" and "trout lake," as well as references to the DNR, with class designations that describe particular types of waters.[214] As used in the MPCA regulations, "Class 2A" broadly refers to cold water habitat designations, including Classes 2A, 2Ae, and 2Ag.[215] Similarly, Class 2B broadly refers to warm/cool water habitat designations, including Classes 2B, 2Be, 2Bg, 2B, 2Bd, 2Bde, 2Bdg, and 2Bdm.[216]

146. The MPCA maintains that incorporation of a regulation promulgated by a separate agency, for a different set of regulatory objectives, impairs its ability to carry its

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[210] *See* Ex. D at S-31 at 48-50.
[211] *See In the Matter of the Proposed Amendments to MPCA Water Quality Standards Relating to Tiered Aquatic Life Uses and Modification of Class 2 Beneficial Uses*, REPORT OF ADMINISTRATIVE LAW JUDGE, No. 5-9003-33998, at 16-17, 69 (Minn. Off. Admin. Hrgs. Apr. 24, 2017).
[212] *See generally* Tr., Post-Hearing Comments.
[213] *See* Minn. R. 6264.0050, subps. 2, 4.
[214] Ex. D at 13-14.
[215] *Id*.
[216] *Id.*

duties under the CWA. Moreover, it contends that the DNR's designated list of trout habitats is both over-inclusive and under-inclusive; making the list a poor fit for its role in maintaining water quality standards.[217]

147. For its part, the EPA seems to agree.[218] In its comments on the proposed rule, the EPA noted that observing the presence of trout in a specific water body (particularly after the arrival of state or local staff who have stocked the lake or stream with trout) is a disfavored method of creating water quality standards.[219] Instead, it urges classifications that distinguish between naturally-occurring biota and circumstances that follow interventions like trout-stocking.[220] It wrote:

> While trout stocking may be a surface water use that MPCA wishes to protect in its water quality standards, the application of biological criteria derived based on cold water communities to waters with cool or rain water habitats stocked with trout may result in inaccurate assessment decisions. To ensure that assessment decisions are based on the biological criteria that are most appropriate for the naturally occurring aquatic biota in those waters, EPA recommends that MPCA's water quality standards distinguish between waters that naturally support cold water biota and waters stocked with cold water fish such as trout.[221]

148. The decoupling of the water quality standards for Class 2A waters from the DNR's trout lake and trout stream designations, however, is very controversial. Among the key critiques of this proposal is that removal of the references to trout lakes and trout streams from the proposed regulation signifies MPCA's retreat from protecting trout habitats from pollution.[222] Further, some commentators maintain that, to extent the MPCA has come to a different scientific judgment about habitats that are listed in the DNR's regulation, the MPCA's judgment is arbitrary.[223] Finally, some opponents of the regulation argue that the proposal is unreasonable because important stakeholders were not consulted on the regulatory text before the proposal was published in the *State Register.*[224] Each of these claims are addressed, in turn, below.

1. Reasonableness of the Change in Nomenclature to an Unfamiliar Term

149. Some commentators maintain that changing the regulatory terminology from "trout stream" to "cold water habitat" was confusing and unreasonable. Amy Cordry,

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[217] *Id.* at 3, 8-9, 11, 13-15.
[218] Comments of Aaron Johnson at 2.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *See, e.g.,* Post-Hearing Comments of John P. Lenczewski, at 5; Post-Hearing Comments of Janet Keough, at 3; Post-Hearing Comments of Howard Markus, at 2-3.
[223] Post-Hearing Comments of John P. Lenczewski, at 2-3.
[224] *Id.* at 5-6; Post-Hearing Comments of Paula Maccabee, at 7.

a member of the Izaak Walton League, expressed the view of many when she testified at the rulemaking hearing:

> The citizens of Minnesota have long recognized the term 'trout stream.' Our relatives, personally speaking, from Chicago and their friends and families come to our area to fly fish in the trout streams. . . . But cold water habitat isn't what those fisher folk are going to look for.
>
> MPCA has many fine scientists striving to do the right thing. But in my experience they often lose touch with the common citizen. The common citizen knows 'trout streams' not 'cold water habitat.' Please consider this when making your decision. These changes are not needed nor are they reasonable.[225]

150. The Administrative Law Judge disagrees. The MPCA was charged by the legislature to "group the designated waters of the state into classes, and adopt classifications and standards of purity and quality therefor. . . . "[226] As part of this charge, the Agency was given several factors to consider,[227] and still other "qualities and properties" to prescribe.[228] Yet, retaining existing terms or particular regulatory language was not among these directives. Thus, as useful as having commonplace and easily understandable terms can be in state rulemaking,[229] it is neither a required element of these rules nor a legal defect if the MPCA chooses a less familiar term.

2. Arbitrariness of Selecting a Term Different from DNR

151. As noted above, Part 6264.0050 includes a listing of designated "trout lakes" and "trout streams" – habitats that are frequently managed as Class 2A cold water resources.[230] Some commentators objected to the proposed rule to the extent that it reflects MPCA's judgment that some of the water bodies, which are currently designated by the DNR as trout streams, are cool water or warm water habitats. According to these commentators, the DNR's designation in Part 6264.0050 reflects an authoritative scientific judgment as to the nature of the listed water bodies and MPCA's differing assessment is proof that the proposed rule is arbitrary. As John P. Lenczewski, Executive Director of Minnesota Trout Unlimited, argued:

> The MPCA proposes to downgrade protections for numerous miles of trout habitat which DNR fisheries experts have determined are important for maintaining important coldwater fisheries. For 43 years[,] the State has declared these stream segments to be coldwater systems supporting coldwater fisheries and recreational use. The assessment of DNR fisheries

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[225] Tr. at 91.
[226] Minn. Stat. § 115.44, subd. 1 (2018).
[227] Minn. Stat. § 115.44, subd. 5 (2018).
[228] Minn. Stat. § 115.44, subd. 4 (2018).
[229] *See generally* 2001 Minn. Laws ch. 106 §§ 8, 12 (adding a requirement that rule making notices include "easily readable" summaries and descriptions of proposed agency actions).
[230] Ex. D at 13 ("Class 2A designation of water bodies has in the past relied almost solely on the MDNR list of designated trout waters in Minn. R. 6264.0050").

> biologists is that these segments still are important parts of coldwater fisheries. The MPCA has suggested that its purpose in designating coldwater fisheries uses is different from the DNR's purpose and[,] therefore[,] the DNR's professional judgment can be ignored by the MPCA. We disagree. Both the MPCA and DNR are charged with protecting coldwater fisheries and associated recreation. They may do so through different means, but the resource being protected is the same.
>
> . . . .
>
> Between 2014 and 2017[,] the DNR conducted a statewide review of all designated trout streams for the purpose of identifying any sections not important as trout habitat which should be removed from the designated trout stream list. Most of stream segments which MPCA proposes to downgrade from [Class] 2A to 2B were NOT identified as no longer being coldwater fisheries. The DNR disagrees with the MPCA proposal to reclassify (downgrade) portions of the Knife River, Blackhoof River, Nemadji River, Stoney Brook, Cory (Corey) Brook, Willow Creek [record of wild trout present], Johnson Creek, Browns Creek, Whitewater River, and others. We object to MPCA's proposal to remove a [Class] 2A designation from any stream segment or tributary thereof which the DNR has determined are essential for maintaining or restoring coldwater fisheries and kept on its list of designated trout streams. The MPCA has failed to affirmatively demonstrate why the professional judgment of DNR biologists should be overturned and why the MPCA sudden reversal of its earlier, presumably well-grounded, coldwater designations should be deemed anything other than arbitrary and unreasonable.[231]

152. The Administrative Law Judge disagrees. Particularly as to emerging and developing matters of scientific inquiry, differences of opinion are likely to exist. Good faith differences of view can occur between scientists, government officials, members of the public, or all of the above simultaneously.[232]

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[231] Post-Hearing Comments of John P. Lenczewski, at 6-7 (emphasis in original).

[232] *See generally* Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36749 (July 7, 1998) ("Reaching a conclusion on the uses that appropriately reflect the potential for a water body, determining the attainability of those goals, and appropriately evaluating the consequences of a designation, however, can be a difficult and controversial task. Appropriate application of this process involves a balancing of environmental, scientific, technical, and economic and social considerations as well as public opinion and is therefore one of the most challenging areas of the current regulation."); *see also Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 159 (Minn. 2012) ("While all scientists agree that there are many types of memory loss, Dr. Pope testified that scientists do not agree that repressed and recovered memories exist"); *People v. Johnson*, 23 Cal. Rptr. 2d 703, 710 (Cal. App. 1993) ("Not only do laymen not agree on the effect of stress on eyewitness identification — behavioral scientists do not agree either. A recent review of the relevant literature disclosed nine studies suggesting that stress improves (or at least does not worsen) eyewitness accuracy, and ten suggesting the contrary."); *Atwood v. Rodman*, 355 S.W.2d 206, 212 (Tex. Civ. App. 1962) *writ refused* (Tx. 1962) ("Geologists, scientists, courts, legislatures, dictionaries, and even encyclopedias, do not agree" on the meaning of the word 'mineral'").

153. The key inquiry, therefore, is not the credentials or good faith of those who disagree with the MPCA's technical judgments. Instead, as the Minnesota Court of Appeals explained in the context of an earlier challenge to MPCA rulemaking for Part 7050, the important question is whether the agency has a reasonable basis for the scientific judgment that is expressed in the proposed rule.[233] The Court wrote:

> An agency must 'explain on what evidence it is relying and how that evidence connects rationally with the agency's choice of action.' Agencies must at times 'make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like.'
>
> In [*Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn.1984)], the supreme court concluded that the agency had not demonstrated a rational relationship between the record evidence and the proposed standard for ambient formaldehyde in housing. In that agency record, the hearing examiner noted that 'nothing in the record . . . justif[ies] the selection of [a lesser rather than a higher standard] other than the fact that the lesser concentration that exists, the less chance there is that any effects may be felt. Even that assumption is questionable, however, based upon the wide disparity of study results.' In contrast, here, 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 BOD5 and DO flux.
>
> This record is extensive and includes scientific evidence to support the rules adopted by the MPCA. While the petitioners may not agree with the rules adopted, the MPCA explained the reasons for adoption and provided supporting documentation. This is a sufficient and meaningful response to the public comments in opposition to the proposed rules.[234]

154. As part of this proceeding, 191 stream reaches and lakes were assigned a use designation following MPCA's Intensive Watershed Monitoring (IWM) efforts.[235] The MPCA reclassifies a stream or lake where its own monitoring data, the DNR's data, or in some cases, a detailed Use Attainability Analysis (UAA) suggested a different use designation.[236]

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[233] *Id.*

[234] *Minn. Envtl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 102 (Minn. Ct. App. 2015) (citations omitted).

[235] Ex. D at 13-14.

[236] Ex. D at 9, 13-14. *See also* Ex. D at S-32.

155. The MPCA's watershed monitoring program includes a revolving 10-year cycle of testing across 105,000 river miles, 4.5 million acres of lakes and reservoirs, and approximately 9.3 million acres of wetlands in Minnesota.[237]

156. The proposed changes in this rulemaking are reasonably supported by the MPCA's review of the chemical, thermal, and biological factors present in the particular water bodies for which a change in "use designation" is made.[238]

3. Failure to Consult with Fishery Users Prior to Issuance of the Dual Notice

157. Among the criticisms of the proposed rule is that it was not adequately supported by early feedback and suggestions from knowledgeable stakeholders. For its part, Water Legacy maintains that MPCA cannot establish the need or reasonableness of the proposed rules because the rules "fail to reflect coordination with key stakeholders."[239] Minnesota Trout Unlimited similarly noted:

> Our specific concern is that changes from [Class] 2A to 2B continue to be made without any, or any meaningful, input by affected stakeholders such as trout anglers. The Watershed Assessment Team (WAT) includes no stakeholders. There is no guarantee that the Professional Judgment Group (PJG) will include an adequate representation of stakeholders, despite the fact that the PJG makes final use-support determinations and in the process often proposes use designation changes. It is possible for an individual MPCA regional watershed project manager to invite one or more stakeholders, such as users of coldwater fisheries, but this is not required or guaranteed.[240]

158. The Administrative Law Judge disagrees that the composition of the MPCA's advisory team, in this instance, renders the rules defective or unsupported.

159. While a key purpose of the Minnesota Administrative Procedure Act is to "to increase public participation in the formulation of administrative rules," the specific requirements of Minn. Stat. § 115.44 answer the dual questions of who was required to receive notice of the proposed rule and when that notice needed to occur. Minnesota Statutes section 115.44 provides, in part:

> Subd. 6. Modifying standards. The adoption, alteration, or modification of the standards of quality and purity in subdivision 4 *shall be made by the agency in accordance with chapter 14*.
>
> Subd. 7. Rule notices. For rules authorized under this section, the notices required to be mailed under *sections 14.14, subdivision 1a, and 14.22 must*

[237] *See* Ex. D, Ex. D at S-5 at 1-3.
[238] Ex. D at vi, 8-15, S-32.
[239] Post-Hearing Comments of Paula Maccabee, at 7.
[240] Post-Hearing Comments of John P. Lenczewski, at 5.

> *also be mailed to the governing body of each municipality bordering or through which the waters for which standards are sought to be adopted flow*.[241]

160. When read together, these provisions make clear that circulation of MPCA's proposed rule changes was not required prior to the Dual Notice.[242] Instead, the required minimums were that enrollees on the agency's rulemaking list, those identified in the MPCA's additional notice plan, and municipalities that abut a lake and stream in Class 2, each receive a copy of the Dual Notice 30 days before the close of the comment period.[243]

161. In addition, the MPCA did comply with the Requests for Comments requirements in Minn. Stat. § 14.101. Perhaps the Agency could have more widely distributed drafts of the proposed regulations for comment once those changes were developed, but it was not a legal error for the MPCA to wait until the Dual Notice before making these disclosures.

C. Minn. R. 7050.0470, subp. 1(B)(25) (Classification of Major Surface Waters)

162. Several commentators challenged the wisdom and lawfulness of the MPCA's proposed re-designation of Cedar Lake from a Class 2A water to Class 2bd.[244]

163. Class 2A broadly refers to cold water habitat designations. Class 2B broadly refers to warm/cool water habitat designations, and includes Class 2Bd.[245] Class 2Bd is assigned to particular water bodies so as to "permit the propagation and maintenance of a healthy community of cool or warm water aquatic biota and their habitats" and preserve sources of drinking water.[246]

164. The MPCA candidly concedes, as it must, that, until this time, its designations of cold water habitats was strongly influenced by the DNR's listing of trout streams and lakes. As Dr. Bouchard noted during the rulemaking hearing:

> [H]istorically, anything the DNR classified as a trout water we automatically designate it as a cold water Class 2A. And, for the most part, this is a very good list. This is a good starting point. Most of those trout waters are in fact cold water habitats. But the MPCA and the DNR's goals differ to some degree.[247]

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[241] Minn. Stat. § 115.44, subds. 6, 7 (2018) (emphasis added).
[242] Ex. F-2.
[243] Minn. Stat. § 115.44, subds. 6, 7; Minn. R. 1400.2080, subp. 6.
[244] *See, e.g.,* Tr. at 106, 113-14, 165, 167.
[245] Ex. D at 13, n.14.
[246] Minn. R. 7050.0222, subp. 3 (2019) ("The quality of class 2Bd surface waters shall be such as to permit the propagation and maintenance of a healthy community of cool or warm water aquatic biota 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.").
[247] Hearing Transcript at 41; *see also* Ex. D at 13.

165. As noted above, this rulemaking proceeding is part of an effort by the MPCA to separate its own designations and classifications under the Water Quality Standards from the DNR's trout lake and trout stream designations in Minn. R. 6264.0050 (2019).[248]

166. The proposed change in designation for Cedar Lake is a meaningful one. As the MPCA explains in the SONAR, different regulatory criteria apply to different classifications of water bodies:

> Depending on the use designation of a water body, different chemical and physical criteria apply. For example, cold water habitats (*i.e.*, 2A, 2Ae, 2Ag) have a dissolved oxygen standard of 7 mg/L as a minimum to protect cold water communities. In contrast, the dissolved oxygen standard for warm/cool water habitats (*i.e.,* 2B, 2Be, 2Bg, 2Bm, 2Bde, 2Bdg, 2Bdm) is 5 mg/L as a minimum. The differences in these standards results from the need to protect different types of aquatic communities with varying ecological requirements and sensitivities to pollutants.[249]

167. Additionally, the re-designation follows a 12-year hiatus in the DNR's efforts to stock the lake with trout and a recent assessment of the conditions that were present when that fish stocking was no longer occurring. As the MPCA summarized:

> The DNR delisted Cedar Lake as a trout lake in 2018 because this lake is no longer managed for trout due to the presence of species of fish (bluegills and northern pike) that compete or prey upon trout. Repeated lake treatments to remove non-trout species have been ineffective and the DNR ceased trout stocking [in] 2007. Considering this information, it is reasonable to remove the Class 2A classification assigned to cold water aquatic life and habitat and replace it with the use assigned to cool and warm waters also protected as a source of drinking water (Class 2Bd). The MPCA will propose to make this change in Minn. R. 7050.0470, subp. 1, Item B to acknowledge the cool or warm water aquatic life and habitat use for this lake.[250]

168. The re-designation of Cedar Lake to Class 2Bd is opposed by commentators like Janet Keough, from Duluth, on the grounds that it is a retrogression in water quality that is prohibited by the CWA. As Ms. Keough argues:

> This lake is about 32 acres in size and is located in St. Louis County. It is a relatively small managed trout lake with a mostly forested shoreline with a few scattered homes. It had been managed for trout by the MnDNR but they stopped in 2007. This is not about a MnDNR decision on where they want to spend their resources controlling other fish species or efforts to

[248] *See also* Ex. D at 13.
[249] *Id.* at 8.
[250] Ex. D at S-32 at 29.

> continuing to restock; this is about Minnesota statutes and rules about the potential for a water resource to meet its use potential.
>
> So while Cedar Lake's actual trout status is poor, it had potential as recently as 2006 and it still has that potential. Unless there is a significant loss of habitat or water temperature change in Cedar Lake, if it had been a trout lake, it certainly must continue to have the potential to become a trout lake again. This proposed loss of use must not be allowed.[251]

169. While it is a close and difficult question, as to which the case law does not provide clear answers, the Administrative Law Judge disagrees that such a re-designation is prohibited by the CWA. Even those who oppose the change in designation do not contend that it was MPCA's inaction, inattention by the state of Minnesota, or pollution from surrounding point sources that resulted in Cedar Lake being a poor habitat for cold water trout species. To the contrary, the best evidence of the proper classification of Cedar Lake's natural uses is what the surveys revealed after the DNR's trout stocking venture ended: the lake was an appropriate habitat for cool or warm water aquatic biota and as a potential source for drinking water.[252]

170. A better reading of the CWA requirements is that it obliges naturally occurring conditions attained after November 28, 1975, to be maintained and that use designations should not follow from man-made activities that are separate from the nature characteristics of the water resources themselves. The EPA appears to agree. In regulatory guidance to the states, it made the following observations:

> Obviously, any decision about whether or not a use is an 'existing use' must be a water body-specific determination. The existing use determination is, therefore, site-specific, and decisions should consider water quality and other limiting factors such as the physical habitat specific to a particular water body. A few examples may help illustrate the issue. A somewhat common existing use question applies to primary contact recreation: if a few people on a few occasions 'swim' in a water body that does not have the quality or physical characteristics to support swimming, is this an existing use, even if the water body is posted 'no swimming' due to bacterial contamination and lacks the physical features to actually support swimming? The straightforward answer to this question is that 'swimming' is not an existing use because the present (or past) condition does not support that use. This conclusion is based on the very limited actual 'use' and, more importantly, the lack of suitable water quality and physical characteristics that would support a recreational swimming use now or in the future (as determined by the water quality requirements and recreational swimming considerations, including safety considerations, in the State or Tribal classification system for primary contact recreation).[253]

[251] Post-Hearing Comments of Janet Keough, at 3.
[252] Ex. D at S-32 at 29.
[253] Water Quality Standards Regulation, 63 Fed. Reg. at 36752-53.

Like the swimming example cited above, a history of trout-stocking by the DNR does not establish a particular use that is not indicated by the physical characteristics of the water itself.

171. In its comments, the EPA made this precise point:

> To ensure that assessment decisions are based on the biological criteria that are most appropriate for the naturally occurring aquatic biota in those waters, EPA recommends that **MPCA's water quality standards distinguish between waters that naturally support cold water biota and waters stocked with cold water fish such as trout**.[254]

172. For these reasons, the "water body-specific determination" made by the MPCA about Cedar Lake lawfully can, and should, guide the later use designation. Accordingly, the proposed changes to Rule 7050.0470, subp. 1(8)(25) are not preempted by the CWA.

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

CONCLUSIONS

1. The Administrative Law Judge has authority and jurisdiction to review these rules under Minn. Stat. § 14.14, .15, .50 (2018), and Minn. R. 1400.2100 (2019).

2. The MPCA gave all required notice to interested persons in this matter pursuant to Minn. Stat. §§ 14.101, .111, .116, .131, .14, .22, .23, .25, .37, 115.44 (2018) and Minn. R. 1400.2060, .2070, .2080, .2230 (2019), including all additional notice requirements of rule and law.

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

4. The Agency has demonstrated its statutory authority to adopt the proposed rules pursuant to Minn. Stat. §§ 14.05, subd. 1 (2018).

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

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

[254] Comments of Aaron Johnson at 2 (emphasis added).

7. The Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

8. The modification to Rule 7050.0420(B) proposed by the Agency after publication of the proposed rules in the *State Register* is not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2. Such modification is needed and reasonable, and should be adopted by the Agency.

9. The modification to Rule 7050.0420(B) recommended by the Administrative Law Judge in this Report does not render the proposed rule changes substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2. Accordingly, should the Agency adopt the Judge's recommended change, it will not require compliance with the procedures set forth in Minn. R. 1400.2110 (2019).

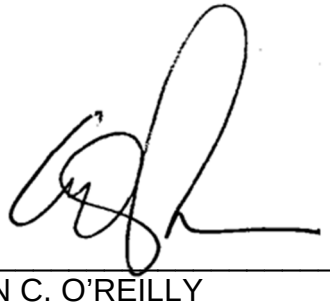
10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the MPCA from further modification of the proposed rules, provided that the rule finally adopted is based upon facts appearing in this rule hearing record and the Agency complies with the requirements of Minn. R. 1400.2110, if the modification results in a substantially different rule.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: February 1, 2020



ANN C. O'REILLY
Administrative Law Judge

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The Agency may then adopt the final rules or modify or withdraw its proposed rule. If the

Agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the Office of Administrative Hearings will file certified copies of the rules with the Secretary of State. At that time, the Agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.