



Minnesota Pollution Control Agency

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November 6, 2015

Legislative Reference Library
645 State Office Building
100 Constitution Avenue
St. Paul, Minnesota 55155

Re: In the Matter of the Proposed Amendments to Rules of the Minnesota Pollution Control Agency
Governing Water Quality Variances; Revisor's ID Number 4136

Dear Librarian:

The Minnesota Pollution Control Agency (MPCA) intends to adopt amended rules governing water quality variances, *Minnesota Rules*, Chapter 7050 Waters of the State, Chapter 7052 Lake Superior Basin Water Standards, and Chapter 7053 State Waters Discharge Restrictions. The MPCA plans to publish "Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing Are Received" (Dual Notice) in the November 9, 2015, State Register.

The MPCA has prepared a Statement of Need and Reasonableness (SONAR). As required by *Minnesota Statutes*, sections 14.131 and 14.23, the MPCA is sending the Library an electronic copy of the SONAR at the same time we are mailing our Dual Notice.

If you have questions, please contact me at 651-757-2439.

Sincerely,

A handwritten signature in blue ink that reads "Mary H. Lynn".

Mary H. Lynn
Rule Coordinator
Agency Rules Unit
Resource Management & Assistance Division

MHL:jl

Enclosure: Statement of Need and Reasonableness



**Minnesota Pollution
Control Agency**

STATEMENT OF NEED AND REASONABLENESS

Proposed Amendments to Rules Governing Water Quality Variances,
Minnesota Rule Chapters 7050, 7052, and 7053
Revisor No.: RD4136

Alternative Format:

Upon request, this Statement of Need and Reasonableness (SONAR) can be made available in an alternative format, such as large print, Braille, or audio. To make a request, contact Mary H. Lynn at the Minnesota Pollution Control Agency, Resource Management and Assistance Division, 520 Lafayette Road North, St. Paul, MN 55155-4194; telephone 651-757-2439; fax 651-297-8676; or e-mail mary.lynn@state.mn.us. TTY users may call the Agency at 651-282-5332

Table of contents

Acronyms, citations and/or abbreviations.....	4
1. Introduction.....	5
2. Background.....	5
A. Water quality variance continuous process improvement.....	5
B. Federal variance regulations.....	6
C. Existing State variance regulations.....	9
D. NPDES permits and variances.....	10
3. Public participation and stakeholder involvement in the rule process.....	11
4. Statutory authority.....	12
5. Statement of need for the proposed rules.....	13
6. Reasonableness of the proposed rule amendments as a whole.....	14
7. Rule-by-Rule analysis: Statement of reasonableness of the proposed rules.....	15
A. Chapter 7050, Waters of the State.....	15
B. Chapter 7052, Lake Superior Basin water standards.....	23
C. Chapter 7053, State waters discharge restrictions.....	27
8. Regulatory analysis.....	31
9. Additional notice plan.....	37
10. Consideration of economic factors.....	39
11. Impact on farming operations.....	40
12. Impact on Chicano/Latino people.....	40
13. Consult with Minnesota Management and Budget on local government impact.....	40
14. Determination if local government will be required to adopt or amend an ordinance or other regulation to comply with proposed agency rule.....	41
15. Determination if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for a small business or city.....	41
16. Assessment of differences between the proposed rule and federal standards, rules in bordering states and rules in states within USEPA Region V.....	42
17. List of authors, witnesses and SONAR attachments.....	43
A. Authors.....	43
B. Witnesses.....	43
C. SONAR attachments.....	43
18. Conclusion.....	44
Attachment 1 Summary of Rules in USEPA Region V States and Rules in Bordering States.....	45

Acronyms, citations and/or abbreviations

bio-accumulative chemicals of concern	BCC
Code of Federal Regulations, title 40, part 131	40 CFR 131
Code of Federal Regulations, title 40, part 132	40 CFR 132
Chapter	ch.
Code of Federal Regulations	CFR
Minnesota Department of Agriculture	MDA
Minnesota Rules chapter 7050	Chapter 7050
Minnesota Rules chapter 7052	Chapter 7052
Minnesota Rules chapter 7053	Chapter 7053
Clean Water Act	CWA
Federal Register	FR or Fed. Reg.
Great Lakes Initiative	GLI
Water Quality Guidance for the Great Lakes System (40 CFR 132)	Guidance or 40 CFR 132 Guidance
Minnesota	MN
<i>Minnesota Code of Agency Rules</i>	MCAR
Minnesota Management and Budget	MMB
<i>Minnesota Rules</i>	<i>Minn. R.</i>
<i>Minnesota Statutes</i>	<i>Minn. Stat.</i>
Minnesota Pollution Control Agency	MPCA or Agency
National Pollutant Discharge Elimination System	NPDES
National Pollutant Discharge Elimination System/State Disposal System (permit)	NPDES/SDS
Section (<i>Minn. Stat.</i> Section)	§
Statement of Need and Reasonableness	SONAR
USEPA's Water Quality Standards Handbook	Handbook
United States Environmental Protection Agency	USEPA
Water Pollution Control (rule)	WPC
water quality based effluent limit	WQBEL
water quality standard	WQS

1. Introduction

The Minnesota Pollution Control Agency (MPCA) is amending *Minnesota Rules (Minn. R.)* Chapters (chs.) 7050, 7052, and 7053 to address inconsistencies in the rules governing water quality variances, and to better align state rules with federal requirements for variances. A water quality variance is a temporary change in a state water quality standard (WQS) for a specific pollutant. A variance allows a Permittee discharging wastewater, such as a municipal wastewater treatment facility or industrial facility, additional time to meet the otherwise applicable WQS.

Variance provisions currently exist in three different water quality rule chapters. The MPCA may grant variances to the WQS in chapters 7050 and 7052, and the effluent limits and discharge restrictions in chapter 7053; the procedures under which a variance may be granted are different in each rule. The rule amendments are needed because these differences are confusing to the regulated community and complicate the MPCA's ability to maintain consistency and compliance with federal restrictions on issuing variances. Amending the variance procedures will not result in more or less restrictive WQS. Rather, the rule amendments will provide a clearer variance process for the regulated community, consistency among the state's variance rules and federal requirements, and improved efficiency in MPCA processing of variance requests.

This document fulfills the requirements of the Minnesota Administrative Procedures Act which requires a statement of need and reasonableness (SONAR) justifying and explaining the need for the proposed rule amendments. It also addresses the statutory requirements associated with proposed administrative rules.

2. Background

A water quality variance is a short-term deviation from meeting otherwise applicable WQS and their associated water quality-based effluent limits (WQBELs). Variances are temporary and apply to a specific pollutant. Situations can arise in which a Permittee (e.g. municipal wastewater treatment facility, industrial facility) determines it cannot immediately meet a water quality-based effluent limit and is uncertain if and when it can meet it in the future. For example, the Permittee may want to more fully assess whether implementing available control technologies would result in compliance with WQBELs or whether or not it is economically feasible to implement treatment technologies at a facility. For such situations, the amendments afford the flexibility to temporarily modify the WQS that serve as the basis for the permit limit that a Permittee can meet for the duration of the variance.

A. Water quality variance continuous process improvement

In June 2012, MPCA conducted a process improvement project for WQS variances. Prior to this effort, demand for variances was low and resolved on a specific case-by-case basis. New WQS, as well as revised (lowered) method detection limits developed by the United States Environmental Protection Agency (USEPA), may result in an increase in variance requests. These requests will come from permitted facilities that are unable to immediately meet the WQBELs associated with a new or revised standard. Therefore, to maintain program efficiency and effectiveness, MPCA saw a need to proceed in a well-documented, communicated, and coordinated process for identifying and reviewing variance requests.

A team, comprised of internal and external stakeholders, was formed to identify obstacles and weaknesses to the existing process and brainstorm changes and improvements. Stakeholders included representatives from municipal and industrial wastewater treatment facilities, environmental interests, and USEPA Region 5. The team developed an implementation plan for the new process, including guidance for MPCA staff and leadership, and transparent information and guidance for external stakeholders.

Documents generated from the process improvement project can be found on [MPCA's Water Quality Variance](#) webpage. These include the MPCA January 2013 "Guidance for Water Quality Standards Variances" and a Variance Request Form. In addition, the team identified that existing WQS variance rules needed amendment to align them with federal policies and to provide consistent application statewide of the state's variance rules and federal requirements.

B. Federal variance regulations

This section relates specifically to federal variance rule and policy, and USEPA review of variances. The Agency, delegated to implement the Clean Water Act (CWA), has authorities provided in federal rule at *Code of Federal Regulations*, title 40, part 131 ([40 CFR 131](#)). These federal rules require states to designate uses of a water body and the appropriate criteria for those uses, to consider the WQS of downstream waters, and to ensure the attainment and maintenance of the WQS of downstream waters.

Code of Federal Regulations, title 40, part 131.13 (40 CFR 131.13) allows states, at their discretion, to include in their WQS, a process to allow for variances from WQS. This part of the *Code of Federal Regulations* requires that provisions that allow for variances from WQS are subject to USEPA review and approval. That is, USEPA must approve the MPCA's variance rules and requests for variances from WQS.

The federal rules at 40 CFR 132.1 to 132.6 identify minimum WQS, anti-degradation policies, and implementation procedures for the Great Lakes System to protect human health, aquatic life, and wildlife. These federal rules specify requirements for the Great Lakes States and Tribes related to granting of variances from WQS applicable to waters of the Great Lakes, including Minnesota and the Lake Superior Basin, and for USEPA approval of such variances granted by the States and Tribes (see 40 CFR 132, Procedure 2 of Appendix F).

The intent of the variance provision has been to: 1) provide a mechanism by which permits can be written to meet a modified WQS where compliance with the underlying WQS is demonstrated to be infeasible at the time the variance is requested; 2) facilitate maintenance of original WQS rather than removing uses that may be ultimately attainable; and 3) ensure the highest level of water quality achievable during the term of the variance.

State-granted WQS variances must be approved by the USEPA. There is a two-fold process required for approving a request for a WQS variance under chapters 7050 and 7052. First the MPCA must determine if the variance should be granted based on the Permittee's demonstration of eligibility; then the MPCA must submit to USEPA for approval, its preliminary determination to grant the variance request and information supporting its' determination. Because it is the Permittee, not the MPCA, who requests the variance, the Permittee makes the demonstration of eligibility for the variance. The Permittee must meet certain conditions before the MPCA can make a preliminary determination to grant the

variance request. The MPCA makes this preliminary determination under its authorities provided in *Minn. R. 7000.7000*.

Next, the USEPA is required to review WQS variance requests and, ultimately, approve or deny the request; that is, USEPA must approve the variance to the WQS. Although the Permittee receives the variance, the MPCA must get approval for the temporary change from the WQS from USEPA. If USEPA approves the variance request, the MPCA may grant the WQS variance, and then must include in the permit, specific variance terms and conditions. A variance is then implemented through the permit issued by the MPCA. Variances from discharge effluent limits granted by the MPCA under chapter 7053 are not required to be submitted to USEPA for approval.

The USEPA uses conditions supported by 40 CFR 131.10(g) to review variances submitted by the MPCA. These conditions identified below are referenced by USEPA in a number of documents including *Federal Register* notice dated July 7, 1998, Proposed Rules (63 FR 36742) which includes the advance notice of proposed rulemaking to 40 CFR 131 and USEPA's Water Quality Standards Handbook (Handbook). The Handbook is a compilation of the USEPA's WQS program guidance and includes recommendations for states, authorized tribes, and territories in reviewing, revising, and implementing WQS. The guidance in the Handbook aligns with the USEPA's WQS regulations at [40 CFR 131](#). Based on these conditions, the USEPA has approved MPCA variances to WQS in the past and will continue to do so if:

- Meeting the standard is unattainable based on one or more of the factors outlined in 40 CFR 131.10(g) for removing a designated use;
- Justification submitted by the State includes documentation that treatment more advanced than that required by CWA sections 303(c)(2)(A) and (B) has been carefully considered, and that alternative effluent control strategies have been evaluated;
- A more stringent state standard is maintained and is binding upon all other dischargers on the water body;
- The discharger who is given a variance for one particular constituent is required to meet the applicable standard for other constituents;
- The variance is granted for a specific period of time and must be re-justified upon expiration with a new demonstration of "unattainability";
- Reasonable progress is being made toward meeting the WQS standards; and
- The variance was subject to public notice, opportunity for comment, and public hearing in accordance with 40 CFR 131.20.

Approval of a variance involves the same substantive and procedural requirements analysis as removing a designated use (40 CFR 131.10(g)). However, unlike use removal, variances are both discharge and pollutant specific, are time-limited, and do not forego the current designated use. Because a variance is temporary, it actively supports water quality improvements and it can, under appropriate circumstances, serve as an environmentally preferable alternative to what otherwise might become a permanent change; that is, removal of a designated use.

A variance should be used instead of removal of a designated use where the State believes the WQS can ultimately be attained. By allowing a temporary change to the standard rather than removing the use and the associated standard, the State will assure that further

progress is made in improving water quality and attaining the standard. With a variance, National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) permits may be written such that reasonable progress is made toward attaining the standards without violating CWA section 402(a)(1), which requires that NPDES permits must meet the applicable WQS.

The principal difference between a variance and a downgrade of a designated use (a change in use to one with a less stringent standard) is that a variance is temporary. The USEPA found this approach acceptable as it would lead to only a temporary change in a WQS rather than a permanent downgrade.

It is the State's responsibility to demonstrate to USEPA that a variance is needed under 40 CFR 131.10(g). USEPA must ultimately approve the variance to the WQS. Under 40 CFR 131.10(g), states, using information submitted by the Permittee, must demonstrate that attaining the designated use is not feasible because:

- Naturally occurring pollutant concentrations prevent the attainment of the use; or
- Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
- Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
- Physical conditions related to the natural features of the water body, such as the lack of proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
- Controls more stringent than those required by CWA sections 301(b) and 306 would result in substantial and widespread economic and social impact.

The USEPA proposed changes to federal WQS regulations including a new section for variances in the *Federal Register* notice dated September 4, 2013, Proposed Rules (78 FR 54518). The comment period for the draft rules was extended until January 3, 2014, due to the federal government shutdown. The USEPA had been developing these changes in response to feedback from states, Tribes, and stakeholders that there is confusion, inconsistency, and mixed interpretations about how, when, and where variances can be used appropriately, leading to underutilization of this WQS tool.

Following the same policy it has applied through the years, USEPA is proposing the six factors (listed immediately above) used to evaluate a designated use change also be used to evaluate approval of a variance, as well as what is required during the term of a variance, and the duration of a variance. The USEPA explains that a variance is different from a permit compliance schedule, which is used where the designated use is deemed currently attainable, but the Permittee needs additional time to modify or upgrade treatment facilities in order to meet the WQBEL. Under a variance, no known economically achievable

solution exists to meet WQS at the time of the variance, but the hope is that new technology, economic circumstances, or other changes will allow the designated use to be met with respect to the specific pollutant and discharges. The USEPA is proposing numeric interim requirements be required in a permit as a component of any variance, reflecting the highest attainable use. The USEPA is also proposing that all variances include an expiration date and that variances be as short as possible but expire no later than 10 years after the USEPA approval date of the variance.

C. Existing State variance regulations

Variance provisions currently exist in three different chapters of the State water quality rules. The MPCA may grant variances to the WQS in *Minn. R.* chs. 7050 and 7052, and the effluent limits and discharge restrictions in chapter 7053. Variances to chapters 7050 and 7052 must be reviewed and approved by the USEPA. (For *Minn. R.* ch. 7050, see 40 CFR 131.20, State review and revision of WQS. For *Minn. R.* ch. 7052, see 40 CFR 132.5, Procedures for adoption and USEPA review.) The procedures under which a variance may be granted are different in each rule. The chapter 7052 rules for variance procedures are based on federal rules and apply to the Lake Superior Basin; the chapter 7050 and 7053 rules for variance procedures apply to the rest of the state and differ from federal requirements.

Chapter 7050

The provisions for variances in chapter 7050 have changed little since the Water Pollution Control (WPC) Rule in 1964. The WPC Rule was the original water protection law for the State of Minnesota, including first-time adoption of beneficial uses of water bodies and standards to protect those beneficial uses. (The MPCA's use of the term "beneficial use" has the same meaning as USEPA's term "designated use".) This rule was one of the first in the nation to protect and improve waters and establish requirements for domestic and industrial wastewater discharges. WPC Rule (See Chapters 1 through 4.)

The rule title was changed from "Variances" to "Variances from Standards" in 1974. At the same time, multiple chapters referencing water rules were consolidated into one chapter, WPC Rules Chapter 14. Before the 1980's, Minnesota did not have a unified numbering system for rules. The WPC Rule was eventually changed to *Minnesota Code of Agency Rules* (or MCAR), with *Minnesota Rules* formatting going into effect in 1984. Throughout, and with minor language changes (e.g. changed "commission" to "Agency"), the underlying components of the variance rule provisions have remained the same.

Currently, variances referenced in *Minn. R.* 7050.0190 are restricted to variances from WQS and associated effluent limits that protect receiving waters for their designated uses.

Chapter 7052

In 1995, the USEPA developed the Great Lakes Initiative (GLI), a comprehensive plan to restore the health of the Great Lakes. As described above in Section 2.B, the federal rules at 40 CFR 132 identify the minimum WQS, anti-degradation policies, and implementation procedures for the Great Lakes System to protect human health, aquatic life, and wildlife. These federal rules include water quality criteria for states to use when setting WQS in the Great Lakes. State water quality programs do not need to be identical to items within 40 CFR 132, but must contain provisions that are consistent with (i.e. as protective as) the requirements of 40 CFR 132.

The criteria to approve a variance in 40 CFR 132 are consistent with USEPA's rules for removal of a designated use (40 CFR 131.10(g)). That is, the conditions that must be met for the removal of a designated use of a water body are the same conditions that an applicant must meet for the USEPA to approve a variance. USEPA has also required applicants to meet these criteria when approving variances in waters other than the Great Lakes.

The MPCA promulgated the chapter 7052 Rules in 1997-1998, based on the 40 CFR 132, Guidance to protect the Lake Superior Basin. The water quality variance procedures in *Minn. R. 7052.0195*, which are based on USEPA's procedures in 40 CFR 132, are specific to variance requests from WQS in the Lake Superior Basin.

Originally, the 40 CFR 132 Guidance specified a variance term that could not exceed three years, mirroring the triennial review required of all standards under CWA section 303(c). However, USEPA received a large number of comments, the majority of which favored extending the life of the variance to match the five year term of the permit for which it is granted. The final 40 CFR 132 Guidance supported this, stating that it would reduce administrative burden on the facility, states and Tribes because it would coincide with the permit application submittal and public review. To insure the variances were modified as appropriate, USEPA added language that allowed for reopening and modifying of permits as appropriate based on changes made during the triennial review. The existing *Minn. R. 7052.0280*, subpart 2, which establishes that the term of the variance must not exceed five years, is not being revised as part of these proposed rule amendments.

Chapter 7053

A Permittee can also apply for a variance from effluent limits that establish minimum performance requirements for specific sectors or facility types. Secondary treatment limits are a type of technology-based effluent limit and are found in *Minn. R. ch. 7053*. The MPCA also relies heavily on USEPA Effluent Limit Guidelines to include technology-based effluent limits in permits.

Until 2008, wastewater treatment requirements, effluent limits, mixing zones and other items related to wastewater treatment and point source discharges were contained in chapter 7050, including variance language. An effort was made to split the chapters, making statewide water quality rules shorter and easier to use and understand. Treatment requirements and other state discharge restrictions now reside in chapter 7053.

D. NPDES permits and water quality variances

As the agency delegated to implement the CWA, the MPCA has the authority as provided for in federal rule at 40 CFR 131.13 to include variance provisions in the state's WQS. The State variance provisions must be consistent with (i.e. as protective as) the requirements of 40 CFR 131.

The MPCA processes WQS variance requests in conjunction with the NPDES permit application as required under *Minn. Stat. § 116.02 subd. 6.(4)(i) and (6)(i)-(iii)* which states:

Subd. 6. Required decisions. The agency shall make final decisions on the following matters:

(4) issuance, reissuance, modification, or revocation of a permit if:

(i) a variance is sought in the permit application or a contested case hearing request is pending;

- (6) approval or denial of an application for a variance from an agency rule if:*
- (i) granting the variance request would change an air, soil, or water quality standard;*
 - (ii) the commissioner has determined that granting the variance would have a significant environmental impact; or*
 - (iii) the applicant or a person commenting on the variance request requests that the decision be made by the agency and the agency requests that it make the decision under subdivision 8;*

Water quality standards variances are granted by the MPCA under chapters 7050 and 7052; these variances must be submitted to and approved by USEPA before they can become effective. Variances from discharge effluent limits are granted by the MPCA under chapter 7053 and do not require USEPA approval.

The MPCA implements WQS variances through its NPDES/SDS permit program. The MPCA was given authority to administer the NPDES program by USEPA on June 30, 1974. NPDES/SDS permits serve as the legal document to improve water quality, with the ultimate effort being compliance with the underlying WQS. Because the USEPA has final approval of WQS variances granted by the MPCA, it is in the best interest of the State to use the same or similar review criteria as USEPA. NPDES/SDS permits have a term of five years. The permit issued by the MPCA must include specific variance terms and conditions. If Permittees are in compliance with their permit and submit an application for permit reissuance in a timely manner, permits can continue administratively until the state reissues the permit.

The MPCA has received requests for variances from 56 facilities since 1969. These include both single and multiple pollutant variance requests. Of these 56, five were denied by MPCA and 17 were withdrawn by the Permittee. The MPCA granted and USEPA approved variances for 29 facilities that have since expired. In most cases, variances were approved by USEPA and subsequently expired; in other cases, variances were renewed once or more before expiration. The remaining five variances were active during the development of this SONAR.

3. Public participation and stakeholder involvement in the rule process

The MPCA took the following steps to develop the rule amendments, notify interested parties about the rule revisions, and to solicit their input on draft rule language:

- A. The MPCA conducted a continuous improvement effort concerning water quality variances in June 2012. MPCA and USEPA Region V staff and facilities with existing variances were asked to provide feedback on the process. It was during this effort that the need for better defined and consistent variance rules was raised.
- B. The MPCA launched a specific water quality variance rule webpage on September 19, 2012.
- C. The MPCA initiated use of an electronic notification system (GovDelivery) on September 20, 2012, to send electronic bulletins regarding information relevant to this rulemaking, and all Agency rulemaking and notices.
- D. The MPCA published public notice of a Request for Comments on Planned Amendments to Rules Governing Water Quality Variances, chapters 7050 and 7053 in the *State Register* on October 1, 2012, and placed a copy of the notice on the Agency public notice webpage. The

MPCA received one comment letter on the planned rulemaking during the public comment period.

- E. The MPCA staff met with Minnesota Center for Environmental Advocacy on November 27, 2012, to discuss its comments submitted in response to the Request for Comments. MPCA staff considered these comments in developing the rule amendments, including Minnesota Center for Environmental Advocacy's recommendation to also amend chapter 7052 in this rulemaking.
- F. The MPCA staff presented at the annual Wastewater Operators Annual Conference in March 2013; information about improvements in the water quality variance process and an update on the water quality variance rulemaking was provided.
- G. The MPCA published a second public notice of a Request for Comments on Planned Amendments to Rules Governing Water Quality Variances to include chapter 7052 in the *State Register* on March 4, 2013, and placed a copy of the notice on the Agency public notice webpage.
- H. The MPCA staff met with Water Legacy on June 3, 2013, to discuss its comments submitted on April 30, 2013, in response to the second Request for Comments. The MPCA staff considered these comments in developing the rule amendments.
- I. The MPCA also received comment letters from Minnesota Center for Environmental Advocacy dated June 10, 2013, and from USEPA dated July 19, 2013. All comments were considered in developing the rule amendments.
- J. The MPCA staff conducted research about the rule concepts, benchmarked other states water quality variance rules, and discussed rule concepts with USEPA Region V.
- K. Preliminary draft rule language was posted on the MPCA's water quality variance rule webpage on July 2, 2013, to provide stakeholders and any other interested party the opportunity to consider the MPCA's approach to the rule amendments, and to provide input on the preliminary draft rule prior to the formal public comment period.
- L. The MPCA held a stakeholder meeting at the St. Paul office on July 22, 2013, to discuss the preliminary draft rule and to solicit input and informal comment on the draft rule prior to the formal public notice period. The meeting was available via webcast.
- M. The MPCA had follow-up discussions with USEPA Region V about the preliminary draft rule and USEPA's proposed changes to the federal WQS and variance regulations.

4. Statutory authority

The MPCA's authority to adopt WQS and to issue permits to prevent water pollution is found in *Minn. Stat.* § 115.03, specifically subdivisions 1(c) and 1(e). Subdivision 1(c) authorizes the Agency:

To establish and alter such reasonable pollution standards for any waters of the state in relation to the public use to which they are or may be put as it shall deem necessary for the purposes of this chapter and, with respect to the pollution of waters of the state, chapter 116;

Subdivision 1(e) authorizes the Agency to:

To adopt, issue, reissue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, rules, schedules of compliance, and stipulation agreements, under such conditions as it may prescribe, in order to prevent, control or abate water pollution...

Additionally, under *Minn. Stat.* §115.03, subd. 5, the Agency is authorized to:

...perform any and all acts minimally necessary including, but not limited to, the establishment and application of standards, procedures, rules, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the national pollutant discharge elimination system (NPDES);

Finally, the MPCA is authorized under *Minn. Stat.* § 116.07, subd. 5 to grant variances:

The Pollution Control Agency may grant variances from its rules as provided in section 14.05, subdivision 4, in order to avoid undue hardship and to promote the effective and reasonable application and enforcement of laws, rules, and standards for prevention, abatement and control of water, air, noise, and land pollution. The variance rules shall provide for notice and opportunity for hearing before a variance is granted.

Under these statutory provisions, MPCA has the necessary authority to adopt the proposed rules.

This rulemaking is an amendment of rules for which the Legislature has not revised the statutory authority; therefore, *Minn. Stat.* § 14.125, does not apply.

5. Statement of need for the proposed rules

Minn. Stat. ch. 14 requires the MPCA to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that MPCA must not be arbitrary or capricious in proposing rules. However, to the extent that need and reasonableness are separate, “need” has come to mean that a problem exists that requires administrative attention, and “reasonableness” means that the solution proposed by MPCA is appropriate. The basis of the need for this rule is described here; reasonableness is addressed in Sections 6 and 7.

Need for the proposed rule amendments as a whole

The MPCA is proposing amendments to the variance rules in three water quality rule chapters, 7050, 7052, and 7053, to address inconsistencies in the State’s variance rules. The procedures under which a variance may be granted are different in each rule. These multiple and different variance rules and procedures are confusing to the regulated community, and complicate MPCA’s ability to maintain consistency and comply with federal restrictions on the issuance of variances.

Historically demand for variances has been low and the variance process had been addressed on a specific case-by-case basis; however, as a result of new WQS, as well as revised (lowered) method detection limits developed by USEPA, MPCA anticipates requests for variances may increase. Going forward MPCA will benefit from a well-documented, communicated, and coordinated process for identifying and reviewing variance requests. These requests will come from permitted facilities that are unable to immediately meet the associated water quality-based effluent limit based on the new or revised WQS.

The MPCA determined that the existing water quality variance rules needed to be updated to promote consistent application of variances across the State. Currently, as the rules are written,

variance requests outside of the Lake Superior Basin are difficult to make and difficult to evaluate because the criteria in the existing rules is vague, overly burdensome, and inconsistent with the federal variance criteria. Under the existing rules, variances must be evaluated under two different sets of requirements: one for state rules and one for federal.

These rule amendments are needed to provide consistency between the variance procedures in the three water quality rule chapters, and consistency between the states variance rules and the most current USEPA variance policies. This will provide a clearer variance process for the regulated community and improved efficiencies in MPCA's processing of variance requests.

6. Reasonableness of the proposed rule amendments as a whole

Minn. Stat. ch. 14 requires the MPCA to explain the facts establishing the reasonableness of the proposed rule amendments. "Reasonableness" means that there is a rational basis for MPCA's proposed action. Because variance provisions currently exist in three water quality rule chapters and the procedures under which a variance may be granted by the MPCA are different in each rule, the MPCA believes that not only are these rule amendments needed to address the differences, they are also reasonable, as explained in this section.

There is a two-fold process required for approving a request for a WQS variance under chapters 7050 and 7052. First, the MPCA must submit to USEPA its preliminary determination to grant the variance request, with information supporting its' determination, for USEPA review. Next, the USEPA is required to review WQS variance requests and, ultimately, approve or deny the request. If USEPA approves the variance request, the MPCA may grant the WQS variance, and then must include in the permit, specific variance terms and conditions. Variances from discharge effluent limits granted by the MPCA under chapter 7053 are not required to be submitted to USEPA for approval.

Notably, the existing state rules in chapter 7052 for variance procedures are based on the USEPA's procedures in 40 CFR 132 and apply to variance requests from WQS in the Lake Superior Basin. The existing chapter 7050 and 7053 rules for variance procedures apply to the rest of the state and are different than the federal requirements for a variance.

The MPCA is proposing to amend chapters 7050 and 7053, such that the revised *Minn. R.* 7050.0190 and 7053.0195 are consistent with the USEPA's threshold criteria that Permittees must meet to be eligible for a variance and for USEPA to approve a variance under 40 CFR 132. These criteria are then consistent with USEPA's rules for removal of a designated use under 40 CFR 131.10(g).

The consistency with federal requirements will reduce delay in USEPA's review and approval process and subsequent MPCA permit issuance. The revised rules will also align with existing *Minn. R.* 7052.0280, the variance requirements in the Lake Superior Basin, which were adopted in 1997-1998 under a federal mandate (CWA section 118(c)(2)). *Minn. R.* 7052.0280 is already aligned with the federal language referred to above, and amendments proposed in this rulemaking will align all three rule chapters, 7050, 7052, and 7053.

Amending the water quality variance rules is reasonable because clear and consistent rules will clarify the process for Permittees requesting a variance and provide a concise list of criteria (consistent with federal requirements) a Permittee must meet to be eligible for a variance. The

proposed rule amendments will also streamline the MPCA's variance review process by clarifying expectations for Permittees.

7. Rule-by-Rule analysis: Statement of reasonableness of the proposed rules

The chapters of Minnesota's rules that will be amended in this rulemaking are 7050 (Waters of the State), 7052 (Lake Superior Basin Water Standards), and 7053 (State Waters Discharge Restrictions). The rule-by-rule analysis will be addressed in three separate sections, for each of the rule chapters, with the reasonableness of each proposed rule amendment provided below.

A. Chapter 7050, Waters of the State

Chapter 7050 applies to all waters of the state, both surface and ground water. This chapter also includes a classification system of beneficial uses applicable to waters of the State, narrative and numeric WQS that protect specific uses, nondegradation provisions, and other provisions to protect the physical, chemical, and biological integrity of waters of the state. (The MPCA's use of the term "beneficial use" has the same meaning as USEPA's term "designated use".) This chapter applies to point source and nonpoint source discharges and to the physical alterations of wetlands.

Water quality standards for protection of waters of the state

Part 7050.0190 Variance from standards.

Subpart 1. **Applicability.** This existing subpart is revised to align with the applicability requirements for variances under *Minn. R. 7052.0280* and *7053.0195*. By revising this subpart, the applicability requirements for a variance will be consistent under all three chapters of the water quality variance rules.

The subpart heading "Variance" has been deleted and replaced with "Applicability" which more accurately reflects the requirements of this subpart. This subpart is important to these rules because applicability establishes who may request a variance from WQS, and the conditions a Permittee must meet to be eligible for a WQS variance.

This subpart is also revised to remove the applicability requirements for new discharges. This revision is discussed in detail in item C of this subpart below.

Subpart 1 is revised by adding language to define what a variance is as it applies to part 7050.0190; a temporary change in a state WQS for a specified pollutant that reflects the highest attainable conditions for a Permittee during the term of the variance. Because a variance has certain characteristics specific to its use under part 7050.0190, it is reasonable to state these characteristics so affected Permittees understand its intended use and that variances are discharge and pollutant specific, and temporary in nature.

Subpart 1 is also revised to identify this part applies to variance requests from individual point source discharges. The applicability of variance requests from individual point source discharges to surface waters of the state has been added to identify who may request a variance under this rule part. This is reasonable, as it offers clarification concerning whom this rule impacts.

The requirement that USEPA be advised of any variances issued under this part, with the information as to the need for the variance, is deleted from subpart 1 and moved to subpart 2. This requirement is not an applicability requirement and does not fit with the requirements of this subpart. Applicability establishes who may request a variance and the conditions that must be met to be eligible for a variance. It is reasonable to delete this requirement from subpart 1 because it does not aid the Permittee in determining if they meet the applicability requirements for a variance.

Subpart 1 is next revised to establish that the Permittee must demonstrate that they meet the eligibility requirements for a WQS variance. To be eligible for a WQS variance, the Permittee must meet the conditions identified in items A to C of this subpart which align, in part, with existing *Minn. R. 7052.0280*, as discussed below. Because it is the Permittee, not the Agency, who requests the variance, it is reasonable that the Permittee make the demonstration of eligibility for a WQS variance.

In all three existing rule parts, 7050.0190, 7052.0280, and 7053.0195, the terms "issued," "granted," and "approved" are used when referring to the action the MPCA may take in acting on a variance request. Water quality variances are "granted" by the MPCA under these rule parts. Therefore, the terms "issued" and "approved" are deleted and replaced with "granted by the agency" or where the term "granted" is used, "by the agency" is added for clarification. It is reasonable to make this change because doing so clarifies what the action is (granting a variance) and who is taking the action to grant a variance request under these rule parts (the MPCA). The MPCA must first make a preliminary determination to grant or deny the variance request, and if granted, the variance must then be submitted to and approved by USEPA before it can be implemented through the permit issued by the MPCA. This revision first occurs in part 7050.0190, subpart 1 where the word "issued" is replaced with "granted by the agency." Revisions have also been made in subpart 2 and 9 of this part and in part 7053.0195 subparts 1 and 8.

New items A, B, and C are added under subpart 1 to establish the conditions a Permittee must meet to be eligible for a WQS variance. The first two conditions are also found in existing *Minn. R. 7052.0280*, which were adopted to satisfy the requirements of USEPA's GLI. The last condition is based on federal policy and proposed federal regulation which requires variances to meet the same criteria as removal of a designated use (as discussed in Section 2.B above). It is reasonable to list the conditions a Permittee must meet.

Item A is added to establish that to be eligible for a variance, the Permittee must demonstrate that the continued existence of endangered or threatened species would not be jeopardized or the species' critical habitat destroyed or adversely modified. This condition aligns with 40 CFR 132, procedure 2 of Appendix F and existing *Minn. R. 7052.0280*, subpart 1. This condition is based on adoption of the state rule in 1997-1998 as a result of USEPA consultation with the United States Fish and Wildlife Service under the Endangered Species Act. This condition is intended to protect endangered or threatened species and their habitat. It is reasonable to add item A because it informs Permittees that compliance with these federal regulations will have a bearing on whether or not a variance is approved by USEPA.

Item B is added to establish that the Permittee must implement effluent limitations required under sections 301(b) and 306 of the CWA, codified in United State Code title 33, sections 1311(b) and 1316. These regulations include such requirements as secondary treatment, pretreatment and toxic controls for Publicly Owned Treatment Works and effluent limits for

categories and classes of non-Publicly Owned Treatment Works, such as pulp and paper mills, iron and steel manufacturing, and dairy product processing. Permittees have been given ample time and resources to comply with the basic CWA requirements.

Item B also addresses nonpoint sources under the Permittee's control as established under state authority. Should a Permittee request a variance, it must prove to the MPCA that it has implemented cost-effective and reasonable best management practices for such nonpoint sources. One example is effective control of the pollutant of concern in stormwater that leaves the Permittee's site, such as stormwater sources of phosphorus at a permitted wastewater treatment facility. It is reasonable to add item B to alert Permittees that they will not be eligible for a variance under this condition.

Item C is added to establish that a Permittee will not be eligible for a variance if the variance would remove an existing use. This is based on 40 CFR 131.10(g), which does not allow the removal of a designated use if that use is considered "existing." The term "existing" is defined in 40 CFR 131.3(e) as "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." It is reasonable to alert the Permittee of this restriction on eligibility for a variance.

In the Water Quality Guidance for the Great Lakes System (40 CFR 132 Guidance), USEPA originally excluded new or recommencing dischargers (as defined in 40 CFR 122.2) for consideration from WQS variances. The USEPA received comments both objecting to and agreeing with the exclusion. Those objecting cited the presence of "ubiquitous" pollutants in the Great Lakes System. The USEPA responded by changing the term "new discharger" to "new Great Lakes discharger" (defined in 40 CFR 132.2).

In 1997-1998, the MPCA adopted modified language in *Minn. R. 7052.0280* that allowed variances for new dischargers if "the proposed discharge is necessary to alleviate an imminent and substantial threat to public health and welfare." The SONAR stated that the change was reasonable because it allowed variances in situations such as a new facility being built to treat wastes collected from an unsewered community with many failed septic systems.

The MPCA is proposing to delete the existing language in *Minn. R. 7052.0280*, subpart 1 and add language from 40 CFR 131.10(g). As explained in Section 2.B above, 40 CFR 131.10(g) regulates designated uses and prohibits removal of an existing use. It is unlikely, but possible, that a new discharger will be able to successfully demonstrate the need for a variance by satisfying one or more of the conditions that must be met for the Agency to submit a variance to the USEPA, and for the USEPA to approve the variance. However, if a new discharger is not able to meet the underlying WQS immediately and is able to satisfy one or more of the conditions in the amended subpart 4, and the Agency determines that the new discharge will protect existing uses, the proposed language would allow for consideration of a variance. The changing of a designated use is different from approval of a variance. Again, variances are discharge and pollutant specific, time-limited, and do not forego the currently designated use. Variances actively support the improved water quality goal. This restriction - not allowing a variance if it would remove an existing use - reasonably allows the designated use to remain the underlying goal.

Adding item C is also reasonable because it aligns state and federal regulations. It also allows for a case-by-case analysis to be conducted for all discharges, whether in the Great Lakes or other waters of the State, and whether a new or existing discharge. Variances are

not permanent; rather, they are restricted in time thereby allowing the designated use to be maintained in the long term. Finally, it allows the MPCA to review requests from facilities that discharge, both new and existing, for pollutants where the permit limit would cause “substantial and widespread negative economic and social impacts” (proposed rules at part 7050.0190, subpart 4, item A, subitem (6)).

Subp. 2. Listing. This existing subpart establishes the requirement for MPCA to prepare a list of the variances in effect and granted by the Agency under this part, make the list available for public inspection, and provide the list to USEPA. This subpart also specifies the information that must be provided on the list.

Subpart 2 is revised by adding the requirement (deleted from subpart 1) that USEPA be advised of any variances granted by the Agency under this part, with the information supporting the request for the variance. Advising USEPA of variances granted by the Agency is a part of the listing process for variances. Because subpart 2 requires that a list of the variances approved by USEPA be made available to the public and provided to USEPA, it is reasonable that USEPA be advised of variances granted by the Agency.

Subpart 2 is revised to clarify that the list is of variances that are currently in effect and approved by the USEPA or granted by the Agency under part 7053.0195. Water quality standards variances granted by the MPCA under chapters 7050 and 7052 must be submitted to and approved by USEPA; variances from discharge effluent limits granted by the MPCA under chapter 7053 are not required to be submitted to USEPA for approval.

Subpart 2 is also revised to specify that the list must identify the person that received the variance, the water body affected, the year approved by USEPA or granted by the Agency, and the date the variance expires. This is reasonable because variances are implemented through NPDES/SDS permits issued by the MPCA to the facility which received the variance, and variances must have an expiration date. It is reasonable to provide this list because doing so makes current information available to the public and informs them of the variances approved by USEPA or granted by the Agency.

The MPCA makes this list available to the public by posting it on the MPCA webpage for Water Quality Variances available at: <http://www.pca.state.mn.us/mvri148b>. This list of WQS and discharge effluent limit variances is posted on the Water Quality Variance webpage by October 1 of each year.

Subp. 3. Review. This existing subpart, which establishes the requirements for review of a variance, is proposed for repeal because the review requirements are being moved to a new subpart 9 and combined with the requirements for public notice. This revision keeps the numbering of subparts and the subpart topics in the same order in the three rule parts containing water quality variance provisions (7050.0190, 7052.0280, and 7053.0195), thus providing consistency between the variance rules.

Subp. 4. Conditions for approval. This new subpart is added to establish that a variance must be submitted to and approved by USEPA before it can become effective. The CWA requires that states submit to the USEPA Regional Administrator for review and approval, changes to WQS (40 CFR 131.20 (c)). The USEPA still requires approval of variances under this federal regulation even though variances do not change the underlying WQS, as noted in Section 2.B. This requirement is reasonable because it informs the public that the USEPA has a role in the full approval process for variances from WQS.

This subpart also establishes that to be eligible for a preliminary determination by the Agency to grant a WQS variance, the Permittee must demonstrate to the Agency that attaining the WQS and associated water quality-based effluent limit is not feasible according to one of the six conditions listed in item A. Because it is the Permittee, not the Agency, who requests the variance, it is reasonable that the Permittee make the demonstration of eligibility for the variance. The Permittee must meet the conditions of items A through D before the MPCA can make a preliminary determination to grant the variance and then submit the variance to USEPA for approval. The MPCA makes this preliminary determination under its authorities provided in *Minn. R. 7000.7000*. In practice, a WQS variance is the exception, not the norm; the decision on whether or not to grant a variance is not taken lightly by the Agency. The conditions in new items A through D of this subpart are used as the basis for the Agency's preliminary determination to grant a WQS variance. By establishing conditions in rule, rather than policy or guidance, it is clear that the Agency must give due consideration to the conditions in its granting of a variance.

These conditions are the same as those in existing *Minn. R. 7052.0280* variances from WQS or criteria in the Lake Superior Basin, which are based on USEPA's Water Quality Guidance for the Great Lakes System (40 CFR 132 Guidance), as discussed in Section 2.C chapter 7052, above.

Item A establishes that Permittees must demonstrate that attaining the WQS and associated water quality-based effluent limits is not feasible based on the conditions in subitems (1) to (6). This means that because the Permittee is requesting a variance, it is their responsibility to show why they cannot meet a WQS and the associated water quality-based effluent limit. Of the six conditions identified in item A, the Permittee must demonstrate that attaining the standard is not feasible based on at least one of the conditions. This is reasonable because variances are initiated by a Permittee that is seeking relief from a water quality-based effluent limit, and identifying the conditions in rule will aid the Permittee in knowing the information that is needed to support such a demonstration when submitting a variance request to the Agency.

With the exception of item A, subitem (1), these are the same conditions set forth in existing *Minn. R. 7052.0280* for GLI pollutant specific variance requests. This difference is based on the specific pollutants regulated in chapter 7052 called GLI pollutants. These pollutants are listed in part 7052.0100. They are not defined in the rest of the state.

Item A, subitems (1) through (6) are the same conditions used for removal of an existing use. The USEPA has supported through legal decisions, guidance, memorandums and approval actions that a variance may be granted if the state demonstrates that the variance meets the same requirements as a permanent designated use change. The USEPA also placed these conditions in its GLI Guidance, Appendix F, procedure 2. In 1998 MPCA adopted this federal language into *Minn. R. 7052.0280*. It is reasonable to amend chapters 7050 and 7053 to include these conditions for granting a variance because doing so aligns Minnesota rules and approval procedures with USEPA's procedures, streamlining the process by having the same conditions in the three water quality rule chapters under which a Permittee may be eligible for a variance.

Item B and C again align with existing *Minn. R. 7052.0280* and federal policy, guidance, and rule. Item B establishes that Permittees must comply with the State's nondegradation rules. In item C, the Permittee must characterize risk to human health and the environment such

that the Agency can conclude that the health, safety and welfare of the public will be protected, even if a variance is approved.

Item D requires the Permittee to provide water quality information so MPCA can determine the highest attainable conditions during the term of the variance. This is reasonable because it allows MPCA to assess the need for a variance, under what controls a variance may be granted, and if granted, to develop an interim limit that reflects the highest attainable conditions; thus protecting the water body to the greatest extent possible under the variance.

Subp. 5. **Submittal and notice requirements.** This new subpart is added to establish that the requirements for variance application submittal and public notice of the Agency's preliminary determination to grant the variance must conform to the Agency's procedural rules under *Minn. R. 7000.7000*. These rules contain the procedural requirements for all variances granted by the Agency including application and public notice requirements, and this subpart informs the reader that additional requirements for variances are contained elsewhere in Minnesota rules. It is reasonable to reference *Minn. R. 7000.7000* rather than to repeat requirements in this part. Doing so eliminates redundancy, and provides clarity and consistency by directing both the Permittee and MPCA to follow the variance procedures established under the Agency's procedural rules. This new subpart 5 aligns with the submittal and notice requirements of existing *Minn. R. 7052.0280*, subpart 4.

Further, public notice requirements are required to be included in the Agency's NPDES permit program in accordance with 40 CFR 123.25(a)(28). Because water quality permits are part of the federal NPDES permit program, these rules are consistent with state and federal regulations and the same public notice requirements apply to both processes.

Subp. 6. **Agency final decision; variance requirements.** As described in subpart 5 above, the Agency must public notice its' preliminary determination to grant a variance in accordance with the procedural rules in *Minn. R. 7000.7000*. This new subpart is added to establish that the Agency must then make a final decision on the variance request that conforms with these same procedural rules. Under *Minn. R. 7000.7000*, the Commissioner or MPCA Citizens' Board has the authority to make the final decision on variance applications pursuant to *Minn. Stat. § 116.02*, and to approve or deny each variance application. If the Agency makes the final decision to grant the variance, the variance must then be approved by USEPA. Water quality standards variances granted by the Agency under chapters 7050 and 7052 must be submitted to and approved by USEPA (see subpart 4).

This subpart clearly identifies that the Agency must make a final decision on the variance request, as long as the request meets the procedural requirements established in *Minn. R. 7000.7000*. These procedural rules are used as the basis for decisions on variance applications; therefore, it is reasonable that the Agency issue a final decision on a variance request if it is determined that the request meets procedural requirements. Additionally, identifying how the Agency will make its final decision on a variance request is reasonable because it informs the public of the process for doing so. This new subpart 6 aligns with the Agency final decision and variance requirements of existing *Minn. R. 7052.0280*, subpart 5.

Subpart 6 also establishes that if a variance is granted by the Agency and approved by USEPA, the permit issued by the Agency must include and incorporate into the permit the variance terms and conditions identified in the new items A through D of this subpart. These conditions are already established in *Minn. R. 7052.0280*, subpart 5, items A through E,

which are based on the GLI Guidance, Appendix F, procedure 2, which has been adopted into federal rule at 40 CFR 132, Appendix F. Item E in existing *Minn. R. 7052.0280* subpart 5 is not included in this part because it references bio-accumulative chemicals of concern (BCC) - pollutants that are identified and regulated only in the Lake Superior Basin. Item E is not needed in this part because BCCs are not regulated state-wide. Items A through D of this subpart identify the variance terms and conditions for the Permittee once the variance is approved by USEPA. It is reasonable to include items A through D in the subpart 6 variance requirements because listing these requirements gives notice to the Permittee that there are specific conditions to be applied and included in their permit, should a variance be approved.

Item A allows MPCA to incorporate an effluent limit that represents currently achievable treatment conditions or projected effluent quality. Also, if a variance renewal is being requested, the interim limit must be no less stringent than that covered under the previous permit. This item is reasonable because the Permittee has demonstrated that it is capable of consistently achieving current conditions which support the existing use of the water body. Potential reductions in interim limits through subsequent permits will insure that the discharger will make progress towards achieving the water quality standard as new technologies or methods may become available.

Item B allows for a schedule of compliance activities to improve water quality and move the Permittee towards attainment of the underlying standards. These are reasonable as they offer transparency to the Permittee by showing the type of requirements to be implemented in a permit.

Item C establishes that when the duration of the variance is shorter than the duration of the permit, the permit include an effluent limitation sufficient to meet the underlying WQS upon expiration of the variance. It is reasonable that the permit include this requirement because the permit is the regulatory mechanism that directs the Permittee to meet this goal. When the duration of the variance is shorter than the duration of the permit, then the permit must include a final effluent limit sufficient to meet the underlying standard.

Item D allows the Agency to reopen and modify a permit if a WQS is to change in the triennial review process; these requirements are already in permitting regulation at *Minn. R. 7001.0170*, subpart C and 40 CFR 122.44 (d). This item also complies with GLI Guidance, Appendix F, procedure 2 (40 CFR 132, Appendix F). This provision allows the Agency to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable WQS. It is reasonable that the variance include this provision because it supports the Agency's existing authority to reopen a permit to address a WQS revision in order to ensure that the effluent limitation is sufficient to meet the underlying WQS. Item D also gives notice to the Permittee that conditions exist that would allow the Agency to reopen or modify their permit.

Subp. 7. **Renewal.** This new subpart is added to establish the requirements for renewal of a variance. To be eligible for renewal of a variance, the Permittee is subject to the same requirements set forth in subparts 1 through 6 of this rule part. Because a variance is temporary and the conditions under which the variance was approved may have changed, a variance is not automatically renewed after it expires. Therefore, it is reasonable that the requirements for renewal of a variance are the same requirements as the initial request for a variance and it is reasonable to alert the Permittee to the requirements that must be met. Identifying the requirements for renewal informs the Permittee that the requirements in subparts 1 through 6 also apply to the renewal of a variance. This new subpart 7 aligns with

the renewal requirements of existing *Minn. R. 7052.0280*, subpart 6, as well as federal policy that renewals must be reviewed with the same rigor as first-time variances.

Subp. 8. **Term and expiration.** This new subpart is added to establish that the terms and conditions of a WQS variance are included and incorporated in the permit issued by the Agency, and that the term of the variance must be as short as possible but must expire no later than ten years after USEPA approval. This subpart is needed because the existing *Minn. R. 7050.0190* rules do not address variance term and expiration.

As referenced in Section 2.B, USEPA proposed new federal regulation concerning variances in 40 CFR 131.14 (FR Vol. 78 No. 171, September 4, 2013). At that time, USEPA proposed that a variance term not exceed 10 years. The MPCA finds this reasonable because it aligns the variance term and expiration to permit terms and expiration. NPDES/SDS permits expire after five years, so the proposed rule would allow the Permittee two permit terms, if needed, during which a variance would apply. Although USEPA proposed rules are not final, they indicate that two permit terms is an appropriate term for a variance. The proposed state rules do not require the Agency to approve a variance for ten years. Instead, a variance may be approved for any period of time up to ten years; however, the variance must expire no later than ten years. Because variances are considered temporary, it is reasonable that the proposed rules specify a finite period during which a variance may be implemented.

When a permit is being reviewed for reissuance, the MPCA also reviews any variance associated with the permit. These two reviews go hand in hand because the status of the variance will impact the permit limits. Because the MPCA implements variances through the variance terms and conditions included in the applicable permit, it is reasonable that the term of the variance should align with permit timelines to provide continuity in the permit re-issuance and variance review process.

Currently, the review interval for variances issued under this part is every three years. The three year review interval is based on USEPA rules that require states at least every three years to review applicable WQS, and modify them as appropriate (40 CFR 131.20). The MPCA will still request new information, if any is available, for existing variances based on the triennial review period, as discussed in subpart 9 below.

Subp. 9. **Public notice and review.** This new subpart is added to establish the requirements for public notice and review. These review requirements replace the existing *Minn. R. 7050.0190*, subpart 3 review requirements which are proposed for repeal.

New item A identifies the Agency's process for public notice of current and approved variances. Currently, the review interval for variances issued under this part is every three years. The three year review interval is based on USEPA rules that require states at least every three years to review applicable WQS, and modify them as appropriate (40 CFR 131.20). The MPCA proposes to retain this review requirement (from repealed subpart 3), but revise the language to clarify what variances are placed on public notice during this time period; that is, a list of variances currently in effect at the time of notice. Item A also includes the new requirement that the public notice include a statement that persons may submit to the Agency new information relevant to the variances on public notice. Because the conditions under which a variance has been approved can change over time, and the public may become aware of such changes sooner than the Agency, providing this statement gives notice to the public that such information may be submitted to the Agency.

This is reasonable as it informs the public and Permittees of the review process, and assists the Agency in its review of variances by receiving new information it may not have otherwise obtained.

Under new item B, the Agency will review the variance if the Permittee requests a renewal of the variance in accordance with subpart 7, as well as information submitted under new item A. This means that a variance is not automatically reissued when the term of the variance expires (subpart 8); the Permittee must reapply for the variance in accordance with the application submittal, notice requirements, and procedural requirements specified in this part. MPCA must also review any new information submitted during the triennial review concerning the variance as required in item A. It is reasonable that the Permittee be required to request a renewal of the variance, because a variance is temporary and the conditions under which the variance was approved may have changed.

The variance process and permitting process are related. The request for a variance to a WQS is associated with a particular discharge and the permit for the discharge. All the variances the Agency has granted to date are associated with a specific discharge and permit. This is true whether the variance is to a specific effluent limit (e.g. the 1 mg/L phosphorus limit), or to a WQS upon which an effluent limit is based (e.g. chloride standard). Thus, it is reasonable to tie the review of variances to the permit cycle. In its' review for renewal of the variance, the MPCA shall also consider information submitted under item A of this subpart. This is reasonable as item A provides that such information may be submitted, and the MPCA intends that this information is considered when the variance is reviewed.

Item B also includes a cross-reference to variances from discharge effluent limits and treatment requirements which are granted by the Agency under *Minn. R. 7000.7000* and *7053.0195*. It is reasonable to include this reference to other rules in order to refer the reader to the appropriate rules under which these types of variances are granted.

B. Chapter 7052, Lake Superior Basin water standards

Chapter 7052 establishes the aquatic life, human health, and wildlife protective water quality standards and criteria for the GLI pollutants, and nondegradation standards for surface waters of the state in the Lake Superior Basin. These rules also establish implementation procedures for deriving effluent limits from these standards and criteria.

Implementation of water quality-based effluent limits

Part 7052.0280 Variances from water quality standards.

The title of this part is revised by deleting "OR CRITERIA." Use of the term "or criteria" is being deleted throughout part 7052.0280 for the reasons given in subpart 1 below.

Subpart 1. **Applicability.** This existing subpart establishes that variances under this part apply to GLI pollutant-specific variance requests from individual point source discharges to surface waters of the state in the Lake Superior Basin, and the conditions under which a variance must not be granted. This subpart is revised to align with the applicability requirements for variances under *Minn. R. 7050.0190* and *7053.0195*. By revising this subpart, the applicability requirements for a variance will be consistent under all three chapters of the water quality variance rules.

Minn. R. 7052.0280 provides for variances from WQS or criteria. Subpart 1 is revised by deleting “or criteria” from the phrase “water quality standard(s) or criteria” in this part. The term “or criteria” is being removed because the term refers to water quality values that are derived using procedures in Minnesota rules. Often, this is a numeric expression derived from narrative water quality criteria. Once a water quality-based effluent limit is developed based on these criteria, the Permittee may request a variance for the effluent limit based on these rules. However, no variance to the procedural criteria will be granted and therefore the term is not needed and it is reasonable to delete it.

Subpart 1 is also revised to establish that the Permittee must demonstrate that they meet the eligibility requirements for a WQS variance. To be eligible for a WQS variance, the Permittee must meet the conditions as identified in existing items A to C of this subpart. Because it is the Permittee, and not the Agency, who requests the variance, it is reasonable that the Permittee make the demonstration of eligibility for a WQS variance.

Existing item A is revised by deleting “if it” and adding “the variance” at the beginning of this item. This change is reasonable because it adds clarity by identifying the subject matter of this item.

Existing item B is revised by adding “nonpoint sources under the Permittee’s control as established under state authority.” As described in the SONAR in part 7050.0190, subpart 1, this revision clarifies that a Permittee must control the pollutant to the full extent (including implementation of cost-effective and reasonable best management practices for such nonpoint sources) before eligibility for a variance would be considered. It is reasonable that the Permittee would not be eligible for a WQS variance if by implementing cost-effective and reasonable best management practices for such nonpoint sources the Permittee would attain the WQS for which they are requesting a variance.

Item C is added to establish the condition that a variance must not be approved if the variance would remove an existing use. This condition is based on 40 CFR 131.10(g), which does not allow the removal of a designated use if that use is considered “existing.” The MPCA is also proposing this same modification to the applicability requirements in part 7050.0190. As described in the SONAR in part 7050.0190, subpart 1, item C, the MPCA is proposing to directly adopt language from 40 CFR 131.10(g) that does not allow for the removal of an existing use. Adding item C is reasonable because it aligns state and federal regulations. It also allows for a case-by-case analysis to be conducted for all discharges, whether in the Great Lakes or other waters of the State. Variances are not permanent; rather, they are restricted in time thereby allowing the designated use to be maintained in the long term.

Subp. 2. **Term.** The heading in this existing subpart is revised by deleting “Maximum time frame” and adding “Term” which more accurately reflects the content of this subpart. The existing *Minn. R. 7052.0280*, subpart 2, which establishes that the term of the variance must not exceed five years, is not being revised as part of these proposed rule amendments (as discussed in Section 2.C of chapter 7052, above).

Subp. 3. **Conditions for approval.** The heading in this existing subpart “Conditions to grant a variance” is revised to “Conditions for approval”, and language added to establish that a variance must be submitted to and approved by USEPA before it can become effective. The CWA requires that states submit to the USEPA Regional Administrator for review and approval, changes to water quality standards (40 CFR 131.20 (c)). The USEPA still requires

approval of variances under this federal regulation even though variances do not change the underlying WQS, as noted in Section 2.B. This requirement is reasonable because it informs the public that the USEPA has a role in the full approval process for variances from WQS.

Subpart 3 is also revised to establish that to be eligible for a preliminary determination by the Agency to grant a WQS variance, the Permittee must demonstrate to the Agency that attaining the WQS and associated water quality-based effluent limit is not feasible according to one of the six conditions listed in item A. Because it is the Permittee, not the Agency, who requests the variance, it is reasonable that the Permittee make the demonstration of eligibility for the variance. The Permittee must meet the conditions of existing items A through D before the MPCA can make a preliminary determination to grant the variance and then submit the variance to USEPA for approval. The MPCA makes this preliminary determination under its authorities provided in *Minn. R. 7000.7000*. In practice, a WQS variance is the exception, not the norm; the decision on whether or not to grant a variance is not taken lightly by the Agency. The conditions of existing items A through D of this subpart are used as the basis for the Agency's preliminary determination to grant a WQS variance.

Existing item A, subitems (1) through (5), are revised to delete the terms "or criteria" from the reference to "water quality standard(s) or criteria."

Existing items A, B, and C are revised to delete "the Permittee" at the beginning of each item. This change is reasonable because stating that these items apply to the Permittee is no longer needed; "Permittee" was added to subpart 3 to clarify who the conditions of this subpart apply to.

Item B is revised by deleting the phrase "agency nondegradation procedures" and adding the reference to "parts 7050.0180 and 7050.0185." The Agency is currently amending the chapter 7050 nondegradation rules and plans to use the term "antidegradation" rather than "nondegradation" to be consistent with federal rules. It makes sense to reference the rule part rather than the content of the rule part due to the timing of when both of these rulemakings will be complete and the planned change in terminology. This change is reasonable because referencing the rule parts points the reader directly to the rules that contain the nondegradation procedures.

A new Item D is added that requires the Permittee to show sufficient information so that the Agency can determine if the Permittee will be taking the steps necessary to demonstrate that they will achieve the "highest attainable conditions for a Permittee during the term of the variance." Before a variance is granted, the Agency will need to determine an interim numeric effluent condition the Permittee would be required to meet during the term of the variance. In order to do this, the Agency will need sufficient information from the Permittee upon which to base the interim numeric effluent condition. This requirement is reasonable because such information will inform the Agency as to whether or not the Permittee would be doing all they can to achieve the highest attainable condition. In addition, this is reasonable because it will allow MPCA to collect information requested by USEPA prior to final approval, gives authority to MPCA to request monitoring that may not be in a current permit or regulatory document, and gives notice to the Permittee that monitoring may be requested prior to variance approval.

Subp. 4. **Submittal and notice requirements.** Existing subpart 4 informs the reader that additional requirements for variances are contained elsewhere in *Minn. R. 7000.7000*. The

heading of this subpart is revised by deleting "Variance application" and "public notice of preliminary determination." This change was made to provide brevity and eliminate redundancy in this subpart. The terms "variance application submittal" and "public notice of preliminary determination" are used in this subpart. This subpart is also revised to clarify that the Agency makes the preliminary determination to grant the variance.

Subp. 5. **Agency final decision; variance requirements.** Existing subpart 5 identifies the procedural requirements the Agency must follow regarding its decision on a variance request, and the requirement that if a variance is approved, it must include and incorporate certain conditions into the permit. Subpart 5 is revised to establish that if a variance is granted by the Agency and approved by USEPA, the permit issued by the Agency must include and incorporate into the permit the conditions identified in existing items A through E of this subpart. These conditions are based on the GLI Guidance, Appendix F, procedure 2, which has been adopted into federal rule at 40 CFR 132, Appendix F. Listing the variance terms and conditions in existing items A through E gives notice to the Permittee that there are specific requirements to be applied and included in their permit, should a variance be approved.

Existing Item A is revised to add the condition that an effluent limitation that represents currently achievable treatment conditions can also be based on projected effluent quality. Projected effluent quality means the estimated level of a pollutant in an effluent, and is especially important if there is limited or no data from which to calculate an effluent limit. This additional information provides clarity to any new Permittee that an effluent limit based on discharge monitoring or projected effluent quality will be applied in the permit. This subpart is also revised by adding the requirement that if the request is a renewal of an existing variance, the effluent limit must be no less stringent than that achieved under the previous permit. This is reasonable because the Permittee should be making progress toward meeting the WQS during the term of the variance. These changes will align with the USEPA approval process, and provide for a more efficient review of the variance because the state and federal requirements are the same.

Existing Item B is revised to provide for a schedule of compliance activities by adding "to improve water quality and move toward attainment of the underlying water quality standard." The existing language "...for attaining water quality standards or criteria" is deleted because the new language more specifically requires that the Permittee make progress toward meeting the WQBEL based on the underlying WQS. A schedule of compliance activities will require the Permittee to demonstrate progress by completing specific activities at specific milestones during the permit term. This is reasonable as it informs the Permittee of the compliance requirements to be implemented in a permit, and aligns with the existing requirements of item C. The proposed language aligns with the USEPA's expectations when reviewing variances.

Existing item C requires that the permit incorporate an effluent limitation sufficient to meet the underlying WQS. The following language, as part of the condition, "...upon the expiration of the variance, when the duration of the variance is shorter than the duration of the permit" is deleted. It is reasonable to make this change because the term of a variance is already addressed in subpart 2 and including it again in item C is duplicative and could cause confusion. The Agency would use tools other than a variance if the time needed to address an effluent limit was less than five years, such as a schedule of compliance in a permit separate from a variance.

Subp. 6. **Renewal.** The heading of existing subpart 6 is revised by deleting “of variance.” This change was made to provide brevity and eliminate redundancy in this subpart. The requirements for renewal of a variance are addressed in this subpart. This subpart is also revised to establish that the Permittee is subject to the same requirements set forth in subparts 1 through 5 of this part to be eligible for renewal of a variance. Because a variance is temporary and the conditions under which the variance was approved may have changed, a variance is not automatically renewed after it expires. Therefore, it is reasonable that the requirements for renewal of a variance are the same requirements as the initial request for a variance and it is reasonable to alert the Permittee to the requirements that must be met. This revised subpart aligns with federal policy that renewals must be reviewed with the same rigor as first-time variances.

Subp. 7. **Notice of variances.** The existing subpart heading is revised by deleting “Notice of variances” and adding the term “Listing.” It is reasonable to more accurately reflect the requirements of this subpart. The MPCA must provide a list of all variances to state WQS, not a notice of all variances. Subpart 7 is also revised by adding the requirement that USEPA be advised of any variances granted by the Agency under this part, with the information as to the need for the variance. Advising USEPA of variances granted by the Agency is a part of the listing process for variances. Because subpart 7 requires that a list of the variances approved by USEPA be made available to the public and provided to USEPA, it is reasonable that USEPA be advised of variances granted by the Agency.

Subp. 8. **Public notice and review.** This new subpart 8 is added to establish the requirements for public notice and review of variances under this part. Every three years, the Agency shall provide public notice and review all variances currently in effect and approved by the Agency under this part, as required in part 7050.0190, subpart 9. The three year review interval is based on USEPA rules that require states at least every three years to review applicable WQS, and modify them as appropriate (40 CFR 131.20). In adding new subpart 8, the public notice and review requirements for chapter 7052 are consistent with the public notice and review requirements for the chapter 7050 variance rules. This is reasonable as the same requirements for public notice and review of variances under part 7050.0190 apply to variances under this part; and this consistency between the variance rules eases understanding of the rules.

Subpart 8 also specifies that variances from discharge effluent limits and treatment requirements are approved under different rule chapters, 7000 and 7053. Chapter 7000 contains MPCA procedural rules, and chapter 7053 establishes requirements for variances from discharge effluent limits or treatment requirements. Because chapter 7052 only establishes the requirements for variances from WQS, it is reasonable to identify for the reader the rule parts that address these other types of variances and procedural rules for variance approval.

C. Chapter 7053, State waters discharge restrictions

Chapter 7053 establishes the effluent limits and treatment requirements that apply to all discharges of sewage, industrial, and other wastes to all waters of the state both surface and ground water.

Effluent limits and treatment requirements for discharges to waters of the State

Part 7053.0195 Variance from discharge effluent limits or treatment requirements.

The title of this part is revised by adding “DISCHARGE EFFLUENT LIMITS OR.” This revision clarifies that variances from discharge effluent limits or treatment requirements are the subject of this rule part.

In revising *Minn. R. 7053.0195*, MPCA proposes to cross reference much of the proposed revisions to *Minn. R. 7050.0190*; doing so will provide consistency in the implementation of these different variance rules and ease of understanding of variance request requirements by Permittees requesting a variance. Having a variance provision in both chapters 7050 and 7053 allows the two rules to function independently, as the rules provide for variances to a WQS, or a discharge effluent limit or treatment requirement, respectively.

Subpart 1. **Applicability.** This existing subpart is revised to align with the applicability requirements for variances under *Minn. R. 7050.0190* and *7052.0280*. By revising this subpart, the applicability requirements for a variance will be consistent under all three chapters of the water quality variance rules.

The subpart 1 heading “Variance” is deleted and replaced with “Applicability” which more accurately reflects the requirements of this subpart. This subpart is important to these rules because applicability establishes who may request a variance from discharge effluent limits or treatment requirements, and the conditions establishing eligibility for a variance.

As described in the SONAR at part 7050.0190, subpart 1, this subpart is revised by 1) adding language to define what a variance is as it applies to this part, 2) identifying that variances under this part apply to variance requests from individual point source discharges, 3) deleting language that does not fit with the requirements of this subpart, and 4) establishing the conditions the Permittee must meet to be eligible for a variance by adding a cross reference to these conditions specified in part 7050.0190.

Subpart 1 is revised by adding language to define what a variance is as it applies to part 7053.0195; a temporary change in a discharge effluent limit or treatment requirement for a specified pollutant that reflects the highest attainable conditions for a Permittee during the term of the variance. Because a variance has certain characteristics specific to its use under part 7053.0195, it is reasonable to state these characteristics so affected Permittees understand its intended use and that variances are discharge and pollutant specific, and temporary in nature.

Subpart 1 is also revised to identify this part applies to variance requests from individual point source discharges. The applicability of variance requests from individual point source discharges to surface waters of the State has been added to identify who may request a variance under this rule part. This is reasonable, as it offers clarification concerning whom this rule impacts.

The requirement that USEPA be advised of any permits issued under this part, with the information supporting the request for the variance, is deleted from subpart 1 and moved to subpart 2. This requirement is not an applicability requirement and does not fit with the requirements of this subpart. Applicability establishes who may request a variance and the conditions that must be met to be eligible for a variance. It is reasonable to delete this requirement from subpart 1 because it does not aid the Permittee in determining if they meet the applicability requirements for a variance.

Next, subpart 1 is revised to establish that the Permittee must demonstrate to the Agency that they meet the conditions for eligibility for a variance from discharge effluent limits or treatment requirements. To be eligible for a variance under this part, the Permittee must meet the conditions specified in part 7050.0190, items A to C. Because it is the Permittee, not the Agency, who requests the variance, it is reasonable that the Permittee make the demonstration of eligibility for a variance.

Subp. 2. **Listing.** Existing subpart 2 is revised by adding the requirement that USEPA be advised of any variances granted by the Agency under this part, with the information as to the need for the variance. Advising USEPA of variances granted by the Agency is a part of the listing process for variances. Because this subpart requires that a list of the variances approved by USEPA be made available to the public and provided to USEPA, it is reasonable that USEPA be advised of variances granted by the Agency.

Existing subpart 2 also establishes the requirement for MPCA to prepare a list of the variances in effect and approved by the Agency under this part, make the list available for public inspection, and provide the list to USEPA. Subpart 2 is revised by deleting the language requiring the list be available for public inspection, and provided to USEPA; and adding

a cross reference to these requirements as proposed in revisions to part 7050.0190, subpart 2. This revision requiring the Agency to list all variances as required in part 7050.0190, maintains the existing requirements of this part and eliminates redundancy between the two rule parts.

Subp. 3. **Review.** This existing subpart is proposed for repeal and the requirements for review of a variance moved to a new subpart 9 and combined with the requirements for public notice. This revision keeps the numbering of subparts and subpart topics consistent between the three rule parts containing water quality variance provisions, providing ease for the reader.

Subp. 4. **Conditions for approval.** This new subpart 4 establishes that to be eligible for a preliminary determination by the Agency to grant the variance under this part, the Permittee must meet the conditions specified in part 7050.0190, subpart 4, excluding the requirement for USEPA approval which does not apply to variances under this part. This subpart establishes the conditions that must be met for the Permittee to demonstrate to the Agency that attaining the discharge effluent limit or treatment requirement is not feasible. These conditions are the same conditions in the existing *Minn. R.7052.0280*, subpart 3, and proposed part 7050.0190, subpart 4 as described in the SONAR at these parts respectively.

Subp. 5. **Submittal and notice requirements.** This new subpart 5 establishes that the variance application submittal, public notice of preliminary determination to grant the variance, and notice requirements must conform to *Minn. R. 7000.7000*; and informs the reader that additional requirements for variances are contained elsewhere in Minnesota rules. This subpart aligns with the submittal and notice requirements of existing *Minn. R. 7052.0280*, subpart 4, and proposed part 7050.0190, subpart 5. It is reasonable to reference *Minn. R. 7000.7000* rules rather than repeat them; doing so eliminates redundancy, and provides clarity and consistency.

Subp. 6. **Agency final decision; variance requirements.** This new subpart 6 requires that the MPCA must make a final decision regarding the variance request that conforms to the

procedural requirements in *Minn. R. 7000.7000*. If the Agency grants a variance, the permit issued by the Agency must include and incorporate the variance terms and conditions specified in part 7050.0190, subpart 6. This new subpart aligns with the final decision and variance requirements of existing *Minn. R. 7052.0280*, subpart 5, and proposed part 7050.0190, subpart 6. This is reasonable as it provides consistency in the implementation of these variance rules and how variances are included and incorporated into the Permittee's permit.

Subp. 7. Renewal. The requirements for renewal of a variance are addressed in this new subpart. Subpart 7 establishes that the Permittee is subject to the requirements of subparts 1 to 6 of this part to be eligible for renewal of a variance. Because a variance is temporary and the conditions under which the variance was approved may have changed, a variance is not automatically renewed after it expires. Therefore, it is reasonable that the requirements for renewal of a variance are the same requirements as the initial request for a variance and it is reasonable to alert the Permittee to the requirements that must be met. This new subpart is consistent with *Minn. R. 7052.0280*, subpart 6, and proposed part 7050.0190, subpart 7, as well as federal policy that renewals must be reviewed with the same rigor as first-time variances.

Subp. 8. Term and expiration. This new subpart establishes that the terms and conditions of a variance from a discharge effluent limit or treatment requirement are included and incorporated in the permit issued by the Agency, and that the term of the variance must be as short as possible but must expire no later than ten years after the date the Agency grants the variance. This subpart is needed because the existing *Minn. R. 7053.0195* rules do not address variance term and expiration.

As referenced in Section 2.B, USEPA proposed new federal regulation concerning variances in 40 CFR 131.14 (FR Vol. 78 No. 171, September 4, 2013). At that time, USEPA proposed that a variance term not exceed 10 years. This approach aligns the variance term and expiration to permit terms and expiration. NPDES/SDS permits expire after five years, so the proposed rule would allow the Permittee two permit terms, if needed, during which a variance would apply. Although USEPA proposed rules are not final, they indicate that two permit terms is an appropriate term for a variance. The proposed state rules do not require the Agency to approve a variance for ten years. Instead, a variance may be approved for any period of time up to ten years; however, the variance must expire no later than ten years. Because variances are considered temporary, it is reasonable that the proposed rules specify a finite period during which a variance may be implemented.

When a permit is being reviewed for reissuance, the MPCA also reviews any variance associated with the permit. These two reviews go hand in hand because the status of the variance will impact the permit limits. Because the MPCA implements variances through the variance terms and conditions included in the applicable permit, it is reasonable that the term of the variance should align with permit timelines to provide continuity in the permit re-issuance and variance review process. Additionally, consistent with proposed part 7050.0190, subpart 9, the MPCA will request new information, if any is available, for existing variances based on the triennial review period, as discussed in subpart 9 below.

This new subpart 8 aligns with the term and expiration requirements of proposed part 7050.0190, subpart 8. This is reasonable as it provides consistency in the implementation of these variance rules and the term and expiration of variances under parts 7050.0190 and 7053.0195.

Subp. 9. **Public notice and review.** This new subpart 9 requires that the MPCA provide public notice of all variances currently in effect as required in part 7050.0190, subpart 9. Existing *Minn. R. 7053.0195*, subpart 3 required review of effluent limits or treatment requirements every five years. This timeframe for review was reasonable, as variances under this rule are included in permits, which have a term of five years. However, for consistency and ease of Agency publication of public notices, new information will be requested and reviewed for all variances currently in effect at the time of public notice. This will occur every three years as proposed in part 7050.0190. This new subpart aligns with the public notice and review requirements in proposed part 7050.0190, subpart 9, and 7052.0280, subpart 8. The current review period for variances to an effluent limit or treatment requirement under existing *Minn. R. 7053.0195*, subpart 3 is at least every five years.

8. Regulatory analysis

Minn. Stat. § 14.131 sets out eight factors for a regulatory analysis that must be included in a SONAR. Items (1) through (8) below quote these factors and then provide MPCA's response. Items (9) and (10) address additional requirements listed in *Minn. Stat.* §§ 14.002 and 14.14.

(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"*

Who is affected?

Affected parties are regulated entities that have an NPDES/SDS permit. Affected parties include those permitted facilities that produce and/or treat wastewater but are unable to comply with a discharge effluent limit, treatment requirement, or a water quality effluent limit based on an underlying WQS. These include both large and small municipal and industrial wastewater facilities, and others. Municipal wastewater facilities include publicly owned wastewater treatment facilities; industrial wastewater facilities include various industrial operations that use water and produce a wastewater, including mining operations, cooling tower discharges, and food manufacturers.

Who bears the cost of complying with these rules?

The cost of complying with these rules is born by the Permittee requesting the variance. The costs include the collection of information requested by MPCA and USEPA including, but not limited to, increased monitoring, pollution prevention and reduction plans and activities, and possible treatment system upgrades. Costs are impacted by the pollutant for which the variance is requested. For example, collection of additional pollutant information would be more costly for mercury than it would be for phosphorus simply based on testing costs.

A Permittee may request a variance based on a single factor or combination of factors, including a cost consideration (see Section 2.B). Without variances as a tool to comply with WQS, costs to the Permittee and customers would be higher because the cost impacts to comply would be immediate (see "Who benefits?" below). It is possible that Permittees could choose to pass on the costs of a variance request to their customers. For example municipal wastewater treatment facilities could increase rates for domestic users or industrial entities that send wastewater to the facility; however, the nature of variances allows for extra time to verify and plan for increased costs.

Who benefits?

The environment will benefit. The issuance of permits allows the MPCA to introduce new more restrictive requirements for multiple pollutant parameters. In some cases, technologies to meet some limitations may be feasible, while others may continue to be infeasible. Variances will allow for permits to be issued that will result in water quality improvements for some pollutant parameters while solutions are explored for others.

The environment will also benefit from looking at all non-water quality impacts from water treatment technologies during review of the variance. For example, it might be appropriate to grant a variance when using treatment technology will cause energy use that will result in more environmental harm than good.

The Permittee requesting a variance benefits from the variance, should one be approved, because the cost of noncompliance can be high due to federal and state authority to fine violators up to \$10,000 per violation per day. Accordingly, cost savings could be passed on to the customer when the Permittee has an approved variance. Additionally, other MPCA customers will benefit because reviewing and processing variance requests will be more efficient thus freeing up staff resources to work on other priority work.

(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"*

What are the costs to the MPCA of implementation and enforcement?

The proposed rule amendments clarify practices already taking place for a variance request. Therefore, the changes are unlikely to result in a significant increase in costs to the state. In fact, the intent of the proposed rules is to reduce staff time needed to process a variance request by aligning state and federal requirements, thus reducing duplication of effort to justify the variance under two different sets of regulatory requirements.

Cost associated with the implementation and enforcement of these proposed rules includes MPCA staff time and staff resources to review a variance request. This includes guiding the requester on information needs, and reviewing information submitted, including ambient water monitoring (if applicable). MPCA document preparation includes the variance preliminary approval, draft permit, permit factsheet, public notice, and finally, the required MPCA Citizens' Board Decision Item documents. Costs generally differ based on the complexity of the specific variance request.

The USEPA estimated costs associated with additional development and documentation of variance requests by states and tribal government in its 2013 proposed rules. More information is available in Section 2.B above and 'Economic Analysis for the Water Quality Standard Regulatory Clarification (Proposed Rule), June, 2013 (EPA-HQ-OW-2010-0606). If the proposed federal rules are adopted, USEPA estimates that the development and documentation of a single variance request would require, on average, approximately 165 to 195 labor hours. The MPCA believes this value to be conservative and expects that preparing the necessary documentation and MPCA Board Item would add significant additional time, possibly doubling USEPA's cost estimate.

The USEPA currently estimates each state will receive three variance requests per year. It is very difficult for the state to project the number of requests per year. Factors that would impact this include a change to existing WQS, adoption of new WQS, changes in the economy, or change in

the method detection limits for sampling of a particular pollutant. This final factor would only require a variance if the detection levels drop below the WQS. This is unlikely as many of the current WQS are above method detection limits.

What are the costs to the other agencies of implementation and enforcement?

No other agencies would incur such costs unless that agency was requesting a variance under the rule. For this to happen, the agency must produce wastewater and be covered under an NPDES/SDS permit issued by the MPCA. To date, no state agencies have requested a variance.

What is the anticipated effect on State revenue?

Minn. R. ch. 7002 regulates water quality permit fees and the statutory basis is found in *Minn. Stat. § 116.07, subd. 4D*. Points are assigned to a permit action or an additional permit review process in accordance with the specific activities. A dollar per point value is then used to determine the actual fee amount, and is updated each biennium. As of this proposed rulemaking, the cost per point is \$310 and a variance request is 35 points; therefore, the revenue generated from variances applications is \$10,850 per variance at this time. Currently, the Agency only collects this fee at the time of a new variance request, not when a renewal is requested. There is no anticipated change in state revenue from this proposal. The cost to apply for a variance is not proposed to change. Because there is no fee for renewal of a variance, the MPCA will still incur the cost of processing the variance renewal request, without the benefit of additional revenue for the request. However, as noted above, the rule amendments are unlikely to result in a significant increase in costs to the state, as the intent of the proposed rules is to reduce staff time needed to process variance requests.

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

The MPCA's flexibility in rulemaking concerning variances is limited by USEPA's requirement that the state's program be consistent with USEPA rules and policy. The USEPA does not provide for a less intrusive or costly method of implementing variances. Therefore, the MPCA is limited in its ability to entertain different methods. The proposed rule amendments aim to increase clarity and understanding of variance reviews and submittals. A less intrusive method to achieve the purpose of the proposed rules may be to implement variances through policy; however, this would not provide for consistency in application across the state, would not carry the weight of law as compared to a variance implemented through a regulatory mechanism such as the proposed rules, and would be subject to claims of un-promulgated rulemaking. Additionally it is not clear that implementing variances through policy is consistent with existing state and federal regulations that require variances be granted by the MPCA Citizen's Board and approved by USEPA.

(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"

The only alternative method considered by the Agency was to leave the existing variance rules as written. However, this would not achieve the purpose(s) of the proposed rules, including compliance with federal regulations, consistency between state water quality variance rules, and clear expectations for Permittees that request a variance. Therefore, not amending the existing rules was rejected by the Agency in favor of the proposed rule amendments.

- (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"*

The estimated cost of complying with the proposed rules has been identified in item (1) above. Facilities able to meet the underlying WQS will not incur costs associated with this proposed rule. Only those Permittees that request a variance from a WQS would incur costs. The portion of costs to be borne by the affected parties is identified in item (1) above.

- (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"*

If the proposed rules are not adopted, MPCA will continue to incur costs processing a variance request based on state rules, which is subject to a different set of federal rules, and may or may not be eligible for approval by USEPA. As identified in item (2) above, the intent of the proposed rules is to reduce staff time to process a variance request by aligning state and federal requirements, thus reducing duplication of effort to process the variance under two different sets of regulatory requirements. Even without the proposed rules, Permittees must adhere to federal regulations to be granted a variance. Aligning state rules governing variances with federal requirements will reduce delay in USEPA approval and subsequent permit issuance, thereby saving the Permittee time and money.

As identified in item (1) above, costs are mainly borne by Permittees requesting a variance. To some extent, the State incurs costs when reviewing the variance. The latter is especially true when the state is required to process a variance under two sets of requirements, state and federal.

- (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"*

As identified above, one of the goals of the proposed rules is to better align state rules with federal regulation and policy. The current federal regulations simply state that states may adopt variance rules and policy (40 CFR 131.13). The USEPA has used policy to guide state implementation of variances, and is currently pursuing change in federal regulations concerning variances (see Section 2.B). Therefore, it is difficult to assess the differences between the proposed rules and existing federal rule; instead, the Agency has assessed the difference between the proposed rules and existing federal policy and proposed federal regulation.

The USEPA's current policy is to approve variances for a limited period of time. Upon expiration the Permittee must submit a new demonstration of the unattainability of the underlying WQS; the proposed rules align with this procedure. Proposed federal rules are more specific and require variances to be as short as possible but expire no later than 10 years after state adoption. The USEPA claims that establishing an expiration date will ensure that the condition of the variances will be thoroughly reevaluated and subject to public review on a regular basis. The USEPA claims this is reasonable as it aligns with the five year NPDES permit terms and is sufficient to reflect changing circumstances, such as the availability of new economic information or affordable treatment technology. The proposed rules at part 7050.0190, subpart 8 aligns with this. However, until the Great Lakes Water Quality Guidance rule (see

Section 2.B) is brought into alignment with federal policy (and proposed regulation), the Agency is required to maintain the expiration date of variances in the existing rule part 7052.0280, subpart 2.

(8) *“an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule... “cumulative effect” means the impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules”*

The main purpose of amending the existing water quality variance rules in the three chapters is to provide clarity and consistency between the rules, and to better align state rules with the most current federal variance policies. These rule amendments will reduce (with a goal to eliminate) duplication in variance information submitted to USEPA. These rule amendments will also streamline the review process by clarifying expectations for Permittees. The proposed rules include conditions for determining eligibility for USEPA approval of a variance, and variance application submittal and notice requirements; they do not include additional or new requirements for entities requesting a variance. Because the MPCA is proposing these rule amendments primarily to provide clarity and consistency for those Permittees that may choose to request a variance, there should be minimal cumulative impacts for those Permittees or facilities. No regulated facilities are required to apply for a variance under these proposed rules. However, should a Permittee decide that a variance is necessary to meet an effluent limit the proposed rule amendments do not add any additional level of regulation beyond the requirements in the existing variance rules.

The MPCA finds that the proposed rule amendments will not result in any cumulative effect in association with any other state or federal regulations. The MPCA believes that the rules will benefit Permittees in their understanding of the variance process by providing clear and consistent direction and regulatory requirements.

(9) *“describe how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002” Minnesota Statutes § 14.002 states: “...the legislature finds that some regulatory rules and programs have become over prescriptive and inflexible, thereby increasing costs to the state, local governments, and the regulated community and decreasing the effectiveness of the regulatory program. Therefore, whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulatory party and the agency in meeting those goals...”*

The MPCA is mindful of the economic resources needed for Permittees to request a variance, and therefore in developing these rule amendments has provided flexibility and less prescriptiveness in that:

- The nature of variances is to allow flexibility for Permittees who need additional time to meet an underlying WQS. In the granting of variances while moving the Permittee towards the ultimate goal of complying with the WQS, the objectives of the Agency are met, while allowing maximum flexibility.

- The regulations afford the flexibility to adopt a variance that temporarily serves as the basis for the permit limit.
- Affected Permittees can determine how they will demonstrate that attaining the WQS is not feasible, providing the justification for the condition(s) that the Permittee determines is most applicable to their affected facility.

(10) "describe the Agency's efforts to provide additional notification under section [14.14, subdivision 1a](#), to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made".

Minn. Stat. § 14.14, subd. 1a. Notice of rule hearing, item (a), states the following:

(a) Each agency shall maintain a list of all persons who have registered with the Agency for the purpose of receiving notice of rule proceedings. Persons may register to receive notice of rule proceedings by submitting to the Agency:

- (1) their electronic mail address; or*
- (2) their name and United States mail address*

The agency may inquire as to whether those persons on the list wish to maintain their names on it and may remove names for which there is a negative reply or no reply within 60 days. The agency shall, at least 30 days before the date set for the hearing, give notice of its intention to adopt rules by United States mail to all persons on its list, and by publication in the State Register. The mailed notice must include either a copy of the proposed rule or an easily readable and understandable description of its nature and effect and an announcement that a free copy of the proposed rule is available on request from the agency. In addition, each agency shall 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 intention in newsletters, newspapers, or other publications, or through other means of communication. The notice in the State Register must include the proposed rule or an amended rule in the form required by the revisor under section 14.07, together with an easily readable and understandable summary of the overall nature and effect of the proposed rule, a citation to the most specific statutory authority for the proposed rule, a statement of the place, date, and time of the public hearing, a statement that persons may register with the agency for the purpose of receiving notice of rule proceedings and notice that the agency intends to adopt a rule and other information required by law or rule. When an entire rule is proposed to be repealed, the agency need only publish that fact, along with an easily readable and understandable summary of the overall nature of the rules proposed for repeal, and a citation to the rule to be repealed.

The MPCA prepares and implements the Additional Notice Plan regularly with rulemaking. The MPCA considered these statutory requirements governing additional notification, and as detailed in the Additional notice plan in Section 9, intends to fully comply with them. Also, as detailed in Section 3, Public participation and stakeholder involvement in the rule process, the MPCA has made reasonable efforts, thus far, to notify and involve the public and stakeholders in the rule process, including holding various meetings and publishing public notice of a Request

for Comments on the planned amendments to rules governing water quality variances in the *State Register* on October 1, 2012, and on March 4, 2013.

9. Additional notice plan

Minn. Stat. § 14.131 requires that the SONAR describe how the MPCA provided additional notification of the rulemaking to potentially affected parties, if applicable.

Specifically, *Minn. Stat.* § 14.131 states that the SONAR:

“...must also describe the agency's efforts to provide additional notification under section [14.14, subdivision 1a](#), to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made”.

The MPCA intends to request that the Office of Administrative Hearings review and approve the Additional Notice Plan, pursuant to *Minn. R.* 1400.2060.

In early 2012, the MPCA implemented an electronic notification system called GovDelivery to send electronic bulletins to subscribers regarding public and rule notices. The notification system allows users to customize what topics they would like updates on and the frequency of those updates. This system is designed to provide additional notification to parties that we were not reaching before.

The MPCA alerted all parties on its former notification list (the M-List) to register on the Agency GovDelivery system. It made the option available for people to still receive paper copies via U.S. mail if they would like; however, the MPCA had very few requests for paper copies. The former M-List had about 300 subscribers for whom it was difficult to maintain accurate contact information using the former paper system. Now, through the GovDelivery system, interested parties can maintain their own contact information and easily self-subscribe/unsubscribe to specific topics or rules of interest.

In the new system, the MPCA created a topic that alerts interested parties to all new rulemaking activities so users can add these to their subscription list if they are interested. The MPCA now has approximately 14,000 subscriptions for rule notices in the new system. With this new strategy/system, the MPCA believes it is likely to reach far more people with rules notices than in the past.

The MPCA hosts a GovDelivery subscription system topic for these proposed rules on its webpage under “GovDelivery/Public Notices and Rulemaking/Rulemaking - active projects/Water/Rulemaking: Water Quality Variance Rule.” The MPCA plans to send its Dual Notice of Intent to Adopt Rules (Dual Notice) to all parties registered with the GovDelivery system for this rulemaking. As of May 21, 2014, the MPCA has had approximately 1,269 subscriptions for notices on this rulemaking. The MPCA plans to produce a list of persons registered to receive these rules on its GovDelivery system at the time of the Dual Notice.

To increase awareness of this rulemaking before notice of the Request for Comments was published, on September 20, 2012, the MPCA alerted 990 persons subscribed to receive notification of new rulemaking activities that a new rule topic “Water Quality Variance Rulemaking” was added to the “New Rules” topic list.

On October 1, 2012, the MPCA published public notice of a Request for Comments on Planned Amendments to Rules Governing Water Quality Variances, *Minnesota Rules* Chapters 7050 and 7053 (*State Register* (37 SR 492)). The same notice was also placed on the MPCA’s public notice

webpage. Notice of the Request for Comments was sent via GovDelivery on October 1, 2012, to approximately 722 interested persons who were registered with GovDelivery to receive information on these rules at the time notification was sent.

On March 4, 2013, the MPCA published a second public notice of a Request for Comments on Planned Amendments to Rules Governing Water Quality Variances to include *Minnesota Rules Chapter 7052 (State Register (37 SR 1292))*. The same notice was placed on the MPCA's public notice webpage. Notice of this second Request for Comments was sent via GovDelivery on March 4, 2013, to approximately 898 interested persons registered with GovDelivery to receive notifications on this rule.

The MPCA's Additional Notice Plan includes giving notice as required by statute.

- A. The MPCA plans to send an electronic notice with a hyperlink to electronic copies of the Dual Notice, proposed rule amendments, and the SONAR to all parties who have registered electronically (GovDelivery) with the MPCA for the purpose of receiving notice of rule proceedings, as required by *Minn. Stat. § 14.14, subd. 1a*, on the date the Dual Notice is published in the *State Register*, which shall be at least 33 days before the end of the public comment period. The MPCA plans to produce a list of persons registered to receive notice of these rules on its GovDelivery system at the time of the Dual Notice.
- B. Individuals and representatives of associations the MPCA has on file as interested and affected parties that do not wish to receive an electronic notice shall be mailed a paper copy of the Dual Notice and proposed rule amendments. The Dual Notice and the proposed rule amendments shall be sent at least 33 days before the end of the comment period.
- C. The MPCA plans to send a cover letter with a hyperlink to electronic copies of the Dual Notice, proposed rule amendments, and SONAR to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules, and to the Legislative Coordinating Commission, as required by *Minn. Stat. § 14.116*. The timing of this notice will occur at least 33 days before the end of the comment period.
- D. The MPCA plans to send a copy of the SONAR to the Legislative Reference Library in accordance with *Minn. Stat. § 14.131* when the notice of hearing is mailed under *Minn. Stat. § 14.14, subd. 1a*. The timing of this notice will occur at least 33 days before the end of the comment period.
- E. *Minn. Stat. § 14.116* also states that if the mailing of the notice is within two years of the effective date of the law granting the agency authority to adopt the proposed rules, the agency shall make reasonable efforts to send a copy of the notice and SONAR to all sitting house and senate legislators who were chief authors of the bill granting the rulemaking. This requirement does not apply because the MPCA is using its general rulemaking authority for these rules, and no bill was authored within the past two years granting special authority for this rulemaking.
- F. At least 33 days before the end of the comment period, the MPCA plans to send an electronic notice with a hyperlink to electronic copies of the Dual Notice, proposed rule amendments, and SONAR to the following associations:
 - Association of Metropolitan Municipalities
 - Association of Minnesota Counties
 - Coalition of Greater Minnesota Cities
 - Iron Mining Association of Minnesota
 - League of Minnesota Cities

- Metropolitan Council
- Minnesota Chamber of Commerce
- Minnesota City/County Management Association
- Minnesota Environmental Science and Economic Review Board
- Minnesota Municipal Utilities Association
- Minnesota On-Site Wastewater Association
- Minnesota Wastewater Operators Association
- Minnesota Center for Environmental Advocacy
- Minnesota Environmental Partnership
- Clean Water Minnesota Isaak Walton League (Minnesota Division)
- Sierra Club North Star Chapter
- Water Legacy

Note: members of some of these associations may have already subscribed to GovDelivery to receive notifications regarding this rulemaking; however, it is appropriate to send a separate e-mail notification to help ensure that these associations are notified of the proposed rule amendments.

- G. At least 33 days before the end of the comment period, the MPCA plans to send an electronic notice with a hyperlink to electronic copies of the Dual Notice, proposed rule amendments, and SONAR to the MPCA's list of NPDES/SDS permit holders with existing water quality variances.
- H. At least 33 days before the end of the comment period, the MPCA plans to provide notice in the following MPCA publications that it is amending its' Water Quality Variance rules and planning to publish notice of the proposed rules in early 2015: 1) Wastewater On Point News, which is a quarterly publication sent via GovDelivery to approximately 1,500 subscribers, including Publicly Owned Treatment Works (i.e. municipal wastewater treatment facilities) wastewater operators, and other industries with NPDES/SDS permit coverage, and 2) the Waterfront Bulletin, which is a monthly newsletter sent via GovDelivery to approximately 1,800 subscribers.

In addition, a copy of the Notice of Intent to Adopt Rules, proposed rule amendments, and SONAR will be posted on the MPCA's public notice webpage at: <http://www.pca.state.mn.us/yrwc6a9>.

The MPCA believes that by following the steps of this Additional Notice Plan, and its regular means of public notice, including publication in the *State Register* and on the MPCA's public notice webpage, the Agency will adequately provide notice of this rulemaking to persons interested in or affected by these rules, pursuant to *Minn. Stat. § 14.14, subd. 1a*.

10. Consideration of economic factors

In exercising its powers, the MPCA is required by identical provisions in *Minn. Stat. § 116.07, subd. 6*, and *Minn. Stat. § 115.43, subd. 1*, to give due consideration to:

"...the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, 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..."

As previously discussed, these proposed rules align state rules governing variances with federal requirements. Even without the proposed rules, Permittees must adhere to federal regulations and policy to be granted a variance. This alignment will reduce delay in USEPA approval of the variance and subsequent MPCA permit issuance, thereby saving the Permittee and the State time and money.

The proposed amendments to chapters 7050, 7052, and 7053 are administered by the MPCA as there are no local governmental entities that have authority to administer the CWA. No additional costs to implement the rule are anticipated for local units of government. Municipalities regulated by an NPDES/SDS permit that choose to pursue a variance will not incur additional costs beyond what would be incurred under the existing rules. The proposed amendments will offer additional flexibility and cost savings in an attempt to comply with underlying WQS.

11. Impact on farming operations

Minn. Stat. § 14.111 requires the Agency to provide a copy of the proposed rule changes to the Commissioner of Agriculture no later than 30 days prior to publication of the proposed rule in the *State Register*, if the rule has an impact on agricultural land. These rule amendments are not expected to impact agricultural land or farming operations. However the Commissioner of Agriculture in a letter dated July 30, 2014, to the Commissioner of the MPCA requests that the MPCA submit potential rule changes to the Minnesota Department of Agriculture (MDA). Therefore, the MPCA will notify the Commissioner of Agriculture and MDA staff as requested in the July 30, 2014, MDA letter.

12. Impact on Chicano/Latino people

Minn. Stat. § 3.9223, subd. 4 requires the Agency give notice to the State Council on Affairs of Chicano/Latino People for review and recommendation at least fifteen days before initial publication in the *State Register*, if the rules have their primary effect on Chicano/Latino People. These rule amendments are not expected to have a primary effect on Chicano/Latino people, thus, the State Council on Affairs of Chicano/Latino People will not be notified.

13. Consult with Minnesota Management and Budget on local government impact

Minn. Stat. § 14.131 requires the Agency to consult with Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and benefits of proposed rules on local governments. As required by *Minn. Stat.* § 14.131, the MPCA will consult with MMB and will accomplish this by sending MMB copies of the documents that will be sent to the Governor's Office for review and approval on the same day they are sent to the Governor's office. The MPCA will send the documents before the MPCA's publishing of the Dual Notice of Intent to Adopt. The documents will include: the Governor's Office Proposed Rule and SONAR form; the proposed rules; and the SONAR. The MPCA will submit a copy of the cover correspondence and any response received from MMB to Office of Administrative Hearings at the hearing or with the documents it submits for administrative law judge review.

14. Determination if local government will be required to adopt or amend an ordinance or other regulation to comply with proposed agency rule

Minn. Stat. § 14.128, subd. 1, requires the Agency to 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 or before the Agency submits the record to the administrative law judge if there is no hearing. The statute defines "local government" to mean "a town, county or home rule charter or statutory city."

This statute is intended to address situations where an agency requires local government to change their ordinances to, for example, be consistent with agency requirements. The MPCA has determined that the proposed rule amendments do not require local governments to amend their ordinances or other regulation to comply with these rules. These rules are administered by the MPCA and no local government has the authority to issue a water quality variance under the State NPDES permit program.

15. Determination if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for a small business or city

Minn. Stat. § 14.127, Subd. 1 requires the Agency to assess the potential economic impact to small businesses or cities of this proposed rule. The statutory provision is as follows:

An agency must 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. For purposes of this section, "business" means a business entity organized for profit or as a nonprofit, and includes an individual, partnership, corporation, joint venture, association, or cooperative.

The MPCA evaluated the possible costs of these proposed rules to a small business or a small city, and has determined that the cost of complying with the rules in the first year after the rules take effect will not exceed \$25,000 for any small business or small city.

The costs to a small business or small city are based on the probable cost of complying with the proposed rules, as described above in items (5) and (6) of the Regulatory Analysis at Section 8 of this SONAR. As mentioned previously, the option to request a variance is completely voluntary; if the facility can meet permit limits, no additional cost is incurred. If the Permittee wishes to pursue a variance, the cost of ultimately meeting the underlying WQS is delayed while economics and technology are considered by the Permittee. Also, in some cases, the Agency

may take the additional time allowed by the variance to consider the appropriateness of the underlying standard.

The MPCA has made this determination based on: 1) application fee, 2) cost of preparing an application (e.g. consulting, engineering, administrative costs), 3) any additional monitoring required to substantiate the variance request; and 4) any other regulatory relief provided by rules (e.g. schedule of compliance). Again, see the Regulatory Analysis at Section 8.

If the Agency or ALJ determines that the cost of complying with the proposed rules during the first year would exceed \$25,000 for a small business or a small city, that small business or small city may file a statement with the MPCA and could be held individually exempt from the rules until the Minnesota Legislature passes a law approving the rules. Again, variances are not a requirement. The request for a variance is optional; therefore, no exemption from the proposed amendments would be needed.

16. Assessment of differences between the proposed rule and federal standards, rules in bordering states and rules in states within USEPA Region V.

Minn. Stat. § 116.07, subd. 2 requires that for proposed rules adopting water quality standards, the SONAR include an assessment of any differences between the proposed rule and existing federal standards adopted under the CWA, United States Code, title 33, sections 1312(a) and 1313(c)(4); similar standards in states bordering Minnesota; similar standards in states within USEPA Region V; and a specific analysis of the need and reasonableness of each difference.

Minn. Stat. § 116.07, subd. 2, item f, states:

(f) In any rulemaking proceeding under chapter 14 to adopt standards for air quality, solid waste, or hazardous waste under this chapter, or standards for water quality under chapter 115, the statement of need and reasonableness must include:

(1) an assessment of any differences between the proposed rule and:

(i) existing federal standards adopted under the Clean Air Act, United States Code, title 42, section 7412(b)(2); the Clean Water Act, United States Code, title 33, sections 1312(a) and 1313(c)(4); and the Resource Conservation and Recovery Act, United States Code, title 42, section 6921(b)(1);

(ii) similar standards in states bordering Minnesota; and

(iii) similar standards in states within the Environmental Protection Agency Region 5; and

(2) a specific analysis of the need and reasonableness of each difference.

The amendments the MPCA is proposing to *Minn. R. chs. 7050, 7052, and 7053* do not establish new standards for air quality, solid waste, or hazardous waste under *Minn. Stat. ch. 116*, nor do they propose any new standards for water quality under *Minn. Stat. ch. 115*. As described in this SONAR in Section 5, the proposed amendments to existing water quality variance rules are necessary to provide clarity and consistency between the rules, and to better align state rules

with the most current federal variance policies. The Agency is also taking this opportunity to provide clarification to certain processes in existing rules, without changing the intent of the existing rules.

The MPCA has reviewed variance-related rules for the states that border Minnesota (Iowa, Wisconsin, Michigan, South Dakota, and North Dakota) and non-border states in USEPA Region V (Ohio, Illinois, Indiana). The review focused on variance rule language and, to some extent, implementation. All states in Region V have authority to issue variances from WQS. Also, most Region V states' variance provisions are in their WQS rules. However, Illinois's variance provisions are in the state's Environmental Protection Act and Wisconsin's are in the state's Permit Regulations. A summary of this information is provided in Attachment 1.

Minn. Stat. § 116.07, subd. 2, item (f) also requires a specific analysis of the need for and reasonableness of each difference from federal and neighboring state WQS. The specific need for and reasonableness of each of the listed criteria is fully described in this SONAR. When comparing the proposed rules to other state rules, the specific need and reasonableness under each of the criteria are compared with other states.

17. List of authors, witnesses and SONAR attachments

A. Authors

- Elise Doucette
- Mary H. Lynn

B. Witnesses

The MPCA anticipates that the proposed amendments will be controversial, and that public hearings will be necessary. The MPCA anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

- 1) Elise Doucette, MPCA. Ms. Doucette is the project technical lead and will testify on technical and economic aspects of the rule.
- 2) Mary H. Lynn, MPCA. Ms. Lynn is the project rule coordinator and will testify on any Minnesota Administrative Procedures Act process questions; and on questions pertaining to the overall development of the rule.
- 3) Carmen Netten, MPCA. Ms. Netten is a staff attorney for the Minnesota Pollution Control Agency and will introduce the required jurisdictional documents into the record.
- 4) Katrina Kessler, MPCA. Ms. Kessler is an engineer and Manager of the Water Assessment Section, and will testify on technical and implementation aspects of the rule.
- 5) Steve Weiss, MPCA. Mr. Weiss is Supervisor of the Effluent Limits Unit, Water Assessment Section, and will testify on technical and implementation aspects of the rule.

C. SONAR attachments

- 1) Summary of Rules in USEPA Region V States and Rules in Bordering States.

18. Conclusion

In this SONAR, the MPCA has established the need for and the reasonableness of each of the proposed amendments to *Minn. R. chs. 7050, 7052, and 7053*. The MPCA has provided the necessary notifications and in this SONAR documented its compliance with all applicable administrative rulemaking requirements of Minnesota statute and rules.

Based on the forgoing, the proposed amendments are both needed and reasonable.

Date

6/8/15



John Linc Stine, Commissioner
Minnesota Pollution Control Agency

Summary of Rules in USEPA Region V States and Rules in Bordering States

USEPA Region V States

State	Water quality variance regulation
Illinois	<p>Title 35, Subtitle A, Chapter II, Part 180 of the Illinois Environmental Protection Act.</p> <ul style="list-style-type: none"> • Illinois regulations state that “provisional variances” can be granted upon adequate proof that compliance with any rule, regulation, requirement or order that on a short term basis would impose an arbitrary or unreasonable hardship. • No conditions are specifically stated under which a variance may be granted. • No reference to requirements to be put in place once a variance is granted. • No reference to implementation in permits, since variances are to all state rules, regulation, requirement or order (not specifically Water Quality Standards (WQS)). • Variances must state the period for which it is requested, but must not exceed 45 days. • Renewal of a variance must meet the same requirements as the original request. • Illinois rule language varies significantly from federal policy.
Indiana	<p>327 Indiana Administrative Code 5-3-4.1</p> <ul style="list-style-type: none"> • Indiana water quality rules authorize dischargers to apply for a variance from a WQS used to derive a water quality-based effluent limit contained in an National Pollutant Discharge Elimination System (NPDES) permit for a specific substance (327 IAC 2-1-8.8 for non- Great Lakes basin and 327 IAC 2-1.5-17 for waters in Great Lakes basin). • All applications for WQS variances must review the types of technology capable of treating the pollutant of concern, as well as the social and economic costs of installing and operating each type of technology. • Indiana's rule outlines a robust application process, where the Permittee must research feasible technology and alternatives, as well as financial considerations. • Approval process (public notice, comment period, hearing options) and components of the permit (interim limit, compliance activities) are similar to Minnesota's proposed rules. • When the duration of the variance is shorter than the duration of the permit, compliance with effluent limits sufficient to meet the WQS upon expiration of variance shall be required. • Variances are appended to the WQS rule during the triennial review process. • Renewal of a variance must meet the same requirements as the original request.
Michigan	<p>Michigan Administrative Code R 323.1103</p> <ul style="list-style-type: none"> • Rules apply to individual point source discharges for water quality based effluent limit (WOBEL) included in a permit. Does not apply to new discharges unless necessary to alleviate an imminent/substantial danger to public health and welfare. • Approval process and components of the permit adhere to federal regulations and policy. Specifically, the factors under which a variance may be granted under United States Environmental Protection Agency (USEPA) regulation (131.10(g)) are specifically stated.

- Renewal of a variance must meet the same requirements as original request
- All variance must be public noticed, but special notice must occur to Great Lakes states if occurring in a Great Lakes basin.

Ohio Ohio Administrative Code 3745-33-07 (D)

- Variance rules apply to individual point source discharges for WQBEL included in a permit. However, applicability is limited to dischargers that commenced construction after 3/23/1998 unless they meet one of five different factors.
- Approval process and components of the permit adhere to federal regulations and policy. Specifically, the factors under which a variance may be granted under EPA regulation (131.10(g)) are specifically stated.
- Renewal of a variance must meet the same requirements as original request
- Ohio rules provide further information on how to evaluate substantial and widespread economic and social impact [(D)(3)(a)(vi)]; specifically, the rule states what must be submitted by municipal discharges and industrial discharges if requesting a variance under this factor.
- A plan of study is required if the variance is for a bioaccumulative chemical of concern in the Lake Erie basin. Rules include specifics on influent and effluent monitoring, as well as monitoring of fish tissue in receiving water species and sediments in the vicinity of the discharge.

Wisconsin s. 283.15, Wis. Stats.

- Definition is limited to "variance to a water quality standard adopted under s. 281.15".
- A variance applies only to the Permittee requesting the variance and to the pollutant specified. Variances are issued through individual permits (specifically distinguished from general permits).
- A variance does not affect nor require the state to modify the corresponding WQS.
- Subp 5(c) states that the initial and interim effluent limit must be no less stringent than the categorical effluent limit or a toxic effluent standard (with references to other Wis. Rules).
- Factors under which a variance may be granted (federal regulation 131.10(g)) are specifically stated. However, other conditions are not specifically stated (i.e. no removal of an existing use; must have cost-effective and reasonable best management practices for nonpoint sources).
- Requirements once the variance is approved adhere to federal regulations and policy, such as a compliance schedule and an interim effluent limit that is achievable during the term of the variance.
- Initial and interim effluent limits apply for the term of the underlying permit as reissued or modified OR by administrative continuance (227.51(2)).
- Language concerning the expiration of variances and other language align well with NPDES/ State Disposal System (SDS) implementation of variance, similar to Minnesota's proposal.

States Bordering Minnesota

State Water quality variance regulation

- Iowa 561 IAC 10 (Waivers or Variances from Administrative Rules) and 567 IAC 60 (Scope of Title, Definitions, Forms, etc.)
- Rule defines waiver or variance to mean "an action by the department which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person."
 - Program specific variance language exists for media such as drinking water (455B.181), water supply wells (455B.188), animal feedlots (459.310) private sewage disposal systems (455B) and water resource restoration programs (433B.) However, no specific variance language exists in the state water quality standards rule (Chapter 61, 62, and 63, all in 455B). Therefore, Chapter 13 provides administrative language for all administrative rules, including WQ Standards.
 - Factors under which a variance may be granted are not specifically stated (i.e. EPA regulations 131.10(g)). As for requirements following approval, "the department may condition the granting of a variance on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means."
 - Rules allow a schedule of compliance to be prescribed by the director, at the time the variance is granted. The director shall also require the interim measures to minimize the contaminant levels of systems subject to the variance (as may reasonably be implemented).
 - Pertaining to NPDES Permits, variances are only allowed in individual permits (not general permits). A variance shall not be permanent unless the petitioner can show that a temporary variance would be impracticable. Also, all final rulings shall be indexed and available to members of the public.
- North Dakota 33-16-02.1 Standard of Quality for Waters of the State, and 33-16-02.1-05 Variances.
- North Dakota has general language concerning variances based on widespread economic and social impacts in 'Standards for Quality for Waters of the State', Chapter 33-16-02.1. State rules pertaining to NPDES permits (Chapter 33-16-01) incorporate federal regulations directly by reference, eliminating the need for specifics.
 - The only criterion for a variance listed specifically is "substantial and widespread economic and social impacts". Other criteria are technology-based and referenced in federal rules.
 - The rules do not incorporate USEPA policy allowing variances based on 131.10(g), but do incorporate the requirement that variances not remove an existing use.
 - Rules specify that variances are issued through permits and contingent upon USEPA approval.
 - Requirements once the variance is approved adhere to federal regulations and policy, such as a compliance schedule and interim effluent limit that is achievable during the term of the variance.
 - Requirements following approval are not specific, but rules do state that conditions and time limitations shall be put in place, with the intent that progress toward improvements in water quality will be made.

- Conditions and time limitations set by the state "...can include interim criteria which must be reviewed at least once every three years"; although this only applies to variances granted based on substantial and widespread social and economic impact.

South Dakota 74:51:01 Surface Water Quality Standards; 74:52:01 General Provisions of Surface Discharge Permits

- South Dakota's WQS allow for technology-based effluent limits, but do not address water quality-based effluent limits. Prescriptive variance criteria and requirements are contained in chapter 74:54:01 Groundwater Quality Standards and 74:54:02 Groundwater Discharge Permits.
- South Dakota does not often use variances, instead relying on compliance schedules and site-specific criteria if Permittee can show a need.
- The variance approval process and components of the permit are not specifically stated in rule.