

This file contains documents relevant to the MPCA rulemaking for Water Quality Standards – 2021-2022 Class 2 Use Designation Rule

Included are:

- Comments received in response to the Request for Comments on Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2 (45 SR 1087)

37415 Pollution Control Agency Request for Comments

Closed May 07, 2021 · Discussion · 4 Participants · 1 Topics · 6 Answers · 0 Replies · 0 Votes

4

PARTICIPANTS

1

TOPICS

6

ANSWERS

0

REPLIES

0

VOTES

SUMMARY OF TOPICS

SUBMIT A COMMENT

 6 Answers · 0 Replies

Important: All comments will be made available to the public. Please only submit information that you wish to make available publicly. The Office of Administrative Hearings does not edit or delete submissions that include personal information. We reserve the right to remove any comments we deem offensive, intimidating, belligerent, harassing, or bullying, or that contain any other inappropriate or aggressive behavior without prior notification.

Howard Markus · Citizen · (Postal Code: unknown) · Apr 16, 2021 4:02 pm

 0 Votes

Thank you for the opportunity to comment, which is attached as a Word document.

BROOKE DAVIS · Citizen · (Postal Code: unknown) · Apr 22, 2021 11:45 am

 0 Votes

Water is one of the most essential substances in our life. assisted living near me
Everyone must have water to survive. Also, it has an important role in one's health.
Drinking water helps increase metabolism, clean the body. Water quality is one of the dilemmas nowadays.

Howard Markus · Citizen · (Postal Code: unknown) · May 07, 2021 8:53 am

 0 Votes

To restate my posting from three weeks ago, fish aquaculture and paddy rice are commodity-driven resources and both clearly belong in Class 4 with its associated water quality standards to provide use protections. Wild fish and wild rice are not commodity-driven resources and both clearly belong in Class 2 with its associated water quality standards to provide use protections.

Aaron Johnson · Citizen · (Postal Code: unknown) · May 07, 2021 12:51 pm

 0 Votes

EPA Region 5 submits the attached comments on MPCA's draft revisions to Minnesota

37415 Pollution Control Agency Request for Comments

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Rules, Chapter 7050 regarding Class 2 use designations.

Paula Maccabee · Citizen · (Postal Code: unknown) · May 07, 2021 3:00 pm

👍 0 Votes

WaterLegacy submits the attached comments on the MPCA's planned revisions of rules regarding Class 2 use designations. Thank you.

Paula Maccabee · Citizen · (Postal Code: unknown) · May 07, 2021 3:00 pm

👍 0 Votes

WaterLegacy submits the attached comments on the MPCA's planned revisions of rules regarding Class 2 use designations. Thank you.

**REQUEST FOR COMMENTS on Planned Amendments to Rules Governing Water Quality Standards –
Use Classification 2, Minnesota Rules chapter 7050, Revisor’s ID Number R-04692**

Thank you for the opportunity to provide comments on the MPCA’s potential rule changes to Mn Rules Chapter 7050, Class 2.

The Clear intent of Class 2 and Class 4 language:

**7050.0222 SPECIFIC WATER QUALITY STANDARDS FOR CLASS 2 WATERS OF THE STATE;
AQUATIC LIFE AND RECREATION.**

Subpart 1. **General.**

- A. The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the **aquatic life and recreation designated public uses and benefits.**

**7050.0224 SPECIFIC WATER QUALITY STANDARDS FOR CLASS 4 WATERS OF THE STATE;
AGRICULTURE AND WILDLIFE.**

Subpart 1. **General.**

The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits. **Wild rice is an aquatic plant resource found in certain waters within the state. The harvest and use of grains from this plant serve as a food source for wildlife and humans. In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR] and listed in part 7050.0470, subpart 1.**

Class 4A waters.

The quality of class 4A waters of the state shall be such as to permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area, including truck garden crops.

The language in Class 2 is very clear - **The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the aquatic life and recreation designated public uses and benefits.**

Class 2 is written to protect aquatic animal and plant communities and ecosystems by protecting their water quality.

Class 4 is equally very clear – **The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits.**

Class 4 is written to protect agriculture and wildlife.

And Class 4A further describes the purpose of this class - **The quality of class 4A waters of the state shall be such as to permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area, including truck garden crops.**

Class 4A is clearly written to protect commodity crops by protecting irrigation water.

My specific concern is directed at the language specific to wild rice in the Class 4 introduction - Wild rice is an aquatic plant resource found in certain waters within the state. The harvest and use of grains from this plant serve as a food source for wildlife and humans. In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR]

By reading the clear intent of the language in Classes 2 & 4, aquaculture-raised fish are protected in Class 4 and wild fish are protected in Class 2. In the exact same way, paddy-raised rice should be protected in Class 4 and wild rice should be protected in Class 2.

Wild rice belongs in Class 2, similar to the protection provided to wild fish. It was a mistake in the past to put wild rice protection in Class 4 that must be corrected in this rulemaking.

Wild rice is mistakenly described in Class 4 as a commodity equivalent to paddy rice; clearly wild rice is not a commodity. The MPCA language recognizes the valuable and important ecological attributes that wild rice plays as an ecosystem keystone community. This clearly belongs in Class 2 and must be moved there.

To that end I request that the MPCA move wild rice water quality standards, and its accompanying language from Class 4 to Class 2.

My background

I have a strong background in the areas of water quality standards and rules development and the role they play in meeting the mission of the MPCA. I have a Ph.D. in Water Resources from Iowa State University [ISU] with an emphasis on the relationships between nutrients and algae.

I am also a retired Professional Engineer, with a focus on ecological engineering. My engineering degree was from the University of Missouri – Rolla, previously named the Missouri School of Mines.

Subsequently, I worked for about ten years at the Missouri Department of Natural Resources, studying wastewater discharges on downstream water resources and the use of constructed wetlands for further cleaning wastewater discharges, as well as Mississippi River Basin planning.

I then was employed by the Minnesota Pollution Control Agency starting in 1990 and retiring in 2013. Over my 22+ years employment, I had numerous responsibilities, some of which are as follows:

- Algal ecologist
- Coordinated the development of the Total Maximum Daily Load [TMDL] Impaired Water List from 1997 to 2010
- Developed the statewide Mercury TMDL
- Used several complex large river water quality models, such as WASP and QUAL2e to study the Mississippi and Minnesota Rivers in the Metro area
- Worked on many water quality standards rule developments, including, as examples, the following: wetlands, Index of Biotic Integrity (IBI), lake and river phosphorus, and turbidity

Again, thank you very much for being given the opportunity to provide comments. I appreciate it very much.

Respectfully,

A handwritten signature in black ink that reads "Howard D. Markus". The signature is written in a cursive, slightly slanted style.

Howard D. Markus, Ph.D.; P.E. [retired]
9175 Pinehurst Road
Woodbury, MN 55125

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By: OAH on 05/07/2021 @12:51pr

Aaron Johnson Attachment



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

WW-16J

The Honorable Administrative Law Judge Eric L. Lipman
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, Minnesota 55164-0620

Dear Judge Lipman:

On April 5, 2021, the Minnesota Pollution Control Agency (MPCA) published public notice of a public comment period on “Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2, *Minnesota Rules* chapter 7050, Revisor’s ID Number R-04692.”

The U.S. Environmental Protection Agency reviewed the draft rules and supporting documents posted on MPCA’s website for consistency with the requirements of Section 303(c) of the Clean Water Act and federal regulations at 40 CFR Part 131. EPA’s comments are enclosed. These comments do not constitute final Agency action, but are provided for your consideration as you develop your water quality standards revisions for adoption and subsequent submittal for EPA review under Section 303(c) of the Clean Water Act.

Thank you for the opportunity to comment on MPCA’s amended use designation rules. If you have any questions regarding our comments, please contact Aaron Johnson of my staff at 312-886-6845 or johnson.aaronk@epa.gov.

Sincerely,

David Pfeifer, Chief
Wetlands and Watersheds Branch

Enclosure

cc: Will Bouchard, MPCA (electronic)

Enclosure – Comments on Minnesota’s “Planned Amendments to Rules Governing Water Quality Standards – Use Classification 2, *Minnesota Rules* chapter 7050, Revisor’s ID Number R-04692”

Comment 1. For most of the proposed re-designations based on a cold water review, the draft technical support document (*Amendments to aquatic life (Class 2) use designations for streams*, December 2020, hereinafter referred to as “draft TSD”) provides data about the aquatic biota and/or the thermal regime found in that water body to document whether that water body either currently supports or would be expected to support cold water aquatic biota. However, for several of the proposed re-designations based on a cold water review, the draft TSD indicates that no MPCA biological data were available to perform a full cold water use review and no thermal data from the stream were provided. Based on the draft TSD, it appears that the primary reason that these streams are being proposed for re-designation is that the initial designation of these streams as Class 2A (cold water aquatic biota) was erroneous.

Regardless of the basis for the initial designation of a stream, federal regulations at 40 CFR § 131.10(g) require that states demonstrate that attaining the current use is not feasible because of one of the six factors found in that section whenever designating a use based on a required use attainability analysis. Because Minnesota’s WQS apply less stringent criteria for the Class 2B and 2Bd (cool and warm water aquatic biota) aquatic life subclasses than for the Class 2A aquatic life subclass, a use attainability analysis is required whenever re-designating a water body from Class 2A to Class 2B or 2Bd, per 40 CFR § 131.10(j)(2).

For the streams listed in Table 1 below, please provide further information and explanation to support MPCA’s determination that these streams do not currently support and would not be expected to support a cold water aquatic community consistent with Minnesota’s Class 2A aquatic life use subclass. Based on discussions with MPCA, EPA understands that MPCA considered the aquatic communities in downstream segments and the relevant segment’s hydrologic connection to those downstream segments. Such information would be relevant to this determination.

Table 1. List of waterbodies proposed to re-designated from Class 2A to Class 2B or 2Bd where the draft TSD indicates that no biological data were available to perform a full cold water use review.

Watershed	Segment Name	Water Body Identification
Lake Superior-North	Unnamed creek (Greenwood River Tributary)	04010101-A01
Lake Superior-North	Unnamed creek (Sugar Loaf Creek)	04010101-D87
Lake Superior-North	Unnamed creek (Greenwood Tributary)	04010101-D97
Lake Superior-South	Unnamed creek (Encampment River Tributary)	04010102-678
Lake Superior-South	Unnamed creek (Skunk Creek Tributary)	04010102-A25
Lake Superior-South	Unnamed creek (Split Rock River Tributary)	04010102-A39
Lake Superior-South	Unnamed creek	04010102-B70
Lake Superior-South	Unnamed creek (Encampment River Tributary)	04010102-C46
Nemadji River	Spring Creek	04010301-763
Nemadji River	Unnamed creek (Skunk Creek Tributary)	04010301-765

Watershed	Segment Name	Water Body Identification
Nemadji River	Unnamed creek (Skunk Creek Tributary)	04010301-767
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-874
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-875
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-876
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-877
Rainy River-Headwaters	Unnamed creek (Blackduck River Tributary)	09030001-887
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-924
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-929
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-932
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-A29
Rainy River-Headwaters	Unnamed creek (Blackduck River Tributary)	09030001-A30
Rainy River-Headwaters	Unnamed creek (Ash River Tributary)	09030001-A32
Rainy River-Headwaters	Unnamed creek (Ninemile Creek Tributary)	09030001-A34
Little Fork River	Unnamed creek (Lost River Tributary)	09030005-545
Little Fork River	Unnamed creek (Lost River Tributary)	09030005-546
Otter Tail River	Unnamed creek (Toad River Tributary)	09020103-665
Minnesota River-Mankato	Unnamed creek (Minnesota River Tributary)	07020007-627



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By: OAH on 05/07/2021 @3:00pm

Paula Maccabee Attachment

Paula Goodman Maccabee, Advocacy Director and Counsel

1961 Selby Ave., St. Paul, MN 55104 (651-646-8890)

paula@waterlegacy.org or pmaccabee@justchangelaw.com

May 7, 2021

The Honorable Administrative Law Judge Eric L. Lipman
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, Minnesota 55164-0620

RE: MPCA Planned Amendments to Rules Governing Water Quality Standards
Use Classification 2, *Minnesota Rules* chapter 7050, Revisor's ID Number R-04692

Dear Judge Lipman,

WaterLegacy submits this letter as comments on the Minnesota Pollution Control Agency (MPCA) Planned Amendments to Rules Governing Water Quality Standards for Use Classification 2. In brief:

1. WaterLegacy supports the MPCA's plans to upgrade certain waters from Class 2B (cool and warm water aquatic communities) to Class 2A (cold water aquatic communities) and from Class 2Bg general use to Class 2Be exceptional use.
2. Water Legacy opposes the MPCA's plans to downgrade certain waters from Class 2A to Class 2B and from Class 2Bg general use to Class 2Bm modified use. The MPCA has failed to assume its burden of proof or provide the analysis required under the Clean Water Act (CWA) in order to remove designated uses of waters, particularly aquatic life uses protected under CWA Section 101(a)(2).

WaterLegacy commends the MPCA for proposing additional protection for certain waters that can support cold water aquatic communities and exceptional uses. We agree with the MPCA that its findings of cold water aquatic fish or invertebrates in a waterbody are sufficient to establish a Class 2A use and that a high Index of Biological Integrity (IBI) score or Minnesota Stream Habitat Assessment (MSHA) score is sufficient to establish a Class 2Be exceptional aquatic use level. We would propose that the MPCA proceed to rulemaking to upgrade waters without delay. However, we believe that the MPCA's plan to downgrade waters from Class 2A to Class 2B or from Class 2Bg to Class 2Bm fails to meet CWA requirements and must be rejected at this time.

Clean Water Act Standards

The standard of proof for proposing a new or more protective designation under the CWA is simple. A state must only submit documentation justifying how its consideration of the use and value of water for supports the State's action. 40 C.F.R. § 131.10(a); *see also* §131.6(a). The

MPCA in its documentation supporting the Class 2 use amendments¹ has met this requirement under regulations implementing the CWA.

However, the MPCA's planned amendments to downgrade water bodies from Class 2A to Class 2B and from Class 2Bg general use to Class 2Bm modified use are legally insufficient under the CWA and its implementing regulations. If adopted, the planned amendments would reduce protection of the downgraded water bodies.

The MPCA's planned Class 2 amendments would downgrade 65 water bodies as identified by water body identification (WID) codes, representing 145.2 miles of river and stream reaches from waters protected for Class 2A trout/cold water communities to Class 2B waters not protected for cold water aquatic communities. (MPCA Class 2 Use Amendments, p. 2).

The planned amendments would also downgrade 123 WIDs, representing 539 river miles from Class 2Bg general use to Class 2Bm modified use, where expectations for fish and macroinvertebrate assemblages would be diminished. (*Id.* at 14). The MPCA's planned Class 2 Use Amendments propose far more downgrades than upgrades to use designations. MPCA's proposal would upgrade 24 WIDs reflecting 66.9 river miles from Class 2B to Class 2A, less than half of the waters and miles proposed to be removed as cold water aquatic community streams. (*Id.* at 2). The proposal would upgrade 19 WIDs representing 114.1 river miles from Class 2B general use to Class 2B exceptional use, constituting less than one-sixth as many waters and less than one-fourth as many river miles. (*Id.*).

The MPCA's planned downgrading of uses does not comply with the CWA and its implementing regulations. Federal requirements for upgrading and downgrading use protections are *not* symmetrical. To propose a new designated use, a state "must submit documentation justifying how their consideration of the use and value of water for those uses listed in this paragraph appropriately supports the State's action." 40 C.F.R. § 131.10(a); *see also* §131.6(a). To upgrade a designated use, that is all the MPCA must do. CWA regulations specifically state that states may remove an existing designated use if "a use requiring more stringent criteria is added." 40 C.F.R. § 131.10(h)(1). Documentation for the upgrade of certain waters in the MPCA's draft planned Class 2 Use Amendments is legally sufficient.

However, the CWA and its implementing regulations strongly disfavor removing existing and designated uses of water, particularly for aquatic life, which is a CWA section 101(a)(2) use. States may not remove an "existing use" actually attained at any time on or after November 28, 1975 and replace it with a use that does not provide more stringent criteria. 40 C.F.R. § 131.10(h)(1). There is no wiggle room in this prohibition.

A protected use includes an "existing" use of waters dating back to November 28, 1975. 40 C.F.R. 131.3(e); Minn. R. 7050.0255, subp. 15. In the case of Class 2A, the protected use is for a "community of cold water aquatic biota and their habitats." Minn. R. 7050.0420(B). "Aquatic

¹ MPCA, Amendments to aquatic life (Class 2) use designations for streams (Dec. 2020) ("MPCA Class 2 Use Amendments") <https://www.pca.state.mn.us/sites/default/files/wq-rule4-21aa.pdf>

biota” for a cold water community are not just trout, but “game and nongame fish, minnows and other small fish, mollusks, insects, crustaceans and other invertebrates, submerged or emergent rooted vegetation, suspended or floating algae, substrate-attached algae, microscopic organisms, and other aquatic-dependent organisms.” Minn. R. 7050.0150, subp. 4(C).

Even if a designated Class 2 use hasn’t been attained at any time since November 28, 1975, it cannot be removed without a detailed use attainability analysis (UAA) determining that attainment of the use is not feasible. 40 C.F.R. § 131.10(g), (j), (k). For example, in the case of human caused conditions, a UAA must demonstrate that the conditions preventing attainment “cannot be remedied.” 40 C.F.R § 131.10(g)(3). In the case of hydrologic modifications that prevent attainment of the use, the UAA must demonstrate that “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.” 40 C.F.R § 131.10 (g)(4). These CWA regulations are mirrored in Minnesota rules constraining variances from water quality standards, Minn. R. 7050.0190, and are referenced in rules setting criteria for “modified” Class 2 uses. Minn. R. 7050.0222, subp. 3c(D)(1).

Failure to Comply with Clean Water Act in Downgrading Classifications

Applying the requirements of the CWA and the definitions in Minnesota rules, the MPCA’s draft Class 2 Use Amendments to downgrade waters are legally insufficient. Three brief examples are provided below:

04010201-617 **Spider Creek** (Lake Superior watershed) is proposed for downgrading from 2Ag to 2Bdg based on DNR use review. The DNR removed Spider Creek from the trout waters list in 2008 due to temperature logs from 2003-2005 and “since its designation in the 1960s there has been no evidence of trout reproduction or any return from trout stocking efforts.” (MPCA Class 2 Use Amendments, p. 26). In 2009, MPCA found a cold water fish species and three cold water macroinvertebrate taxa, and “marginally cold” water temperatures. The draft states that “it is reasonable to remove” the Class 2A designation and the Class 2A designation of tributaries to this reach. (*Id.* at 26-27). However, the MPCA has made no finding that use for cold water biota was not an “existing use” at any time since November 28, 1975.

09030002-648 **East Two River** (Vermillion River Watershed) is proposed for downgrading from 2Ag to 2Bdg based on cold water review (CWR). The East Two River analysis for WID (07020006-513)² states that surveys in 2016 did not sample any cold water species, although a 1992 DNR survey found at least one cold water fish species for the same reach. (*Id.* at 38) Based on this information and the fact that a 2015 temperature log found water temperatures in the stressful range for trout during part of the summer, the draft states “it is reasonable to remove” the class 2A designation although the upstream WID retains a cold water habitat designation. (*Id.*) However, the MPCA made no finding that use for cold water biota was not an “existing use” at any time since November 28, 1975. (*Id.* at 38-39)

² The MPCA Class 2 Use Amendments draft, p. 2 and p. 38-39, seems to use inconsistent WID numbers for the East Two River.

07010204-557 **Silver Creek** (North Fork Crow River Watershed) is proposed for downgrading from 2Bg to 2Bm based on data collected from one station in 2007 and 2017 showing that this reach “does not meet aquatic life use goals for General Use” waters. (*Id.* at 77) The scant data provided suggested that the reach Minnesota Stream Habitat Assessment (MSHA) may have declined between 2007 and 2017 and at least one measurement for phosphorus and dissolved oxygen exceeded water quality standard thresholds. (*Id.*). Despite the water quality exceedances, the MPCA concluded that “poor habitat” was the limiting factor. The MPCA then summarily noted, “The poor habitat condition cannot be reversed at this time and is not likely to recover naturally due to drainage maintenance.” (*Id.*). The MPCA noted that the creek was maintained for drainage before November 28, 1975 and stated that “no evidence indicates that either the fish or macroinvertebrate assemblages attained the aquatic life use goals for General Use on or after November 28, 1975,” effectively presuming the non-existence of a general class 2 use. (*Id.*)

The MPCA’s proposals to remove Class 2A uses for Spider Creek and East Two River are legally insufficient. In neither case did the MPCA make the minimum necessary finding to remove a Class 2A classification: that the water body has at no time since November 28, 1975 had an existing use for a cold water aquatic community. In fact, even the minimal information provided for these two water bodies suggests that such a conclusion would be unsupported. For Spider Creek, the MPCA found a cold water fish species, three cold water macroinvertebrate taxa and marginally cold temperatures in 2009. The lack of return on trout stocking efforts does not allow removal of protection for other cold water community species.

For the East Two River, a 1992 DNR survey found at least one cold water species and an upstream WID retains a cold water habitat designation. This evidence suggests that Class 2A use for cold water species was an existing use at some time since November 28, 1975. If species were present in 1992, but not found in 2016, it also raises the question about what factors in 2016 may have affected cold water species. The downgrading of Class 2A waters ensures that this question will not be asked or answered.

These are just two examples where the MPCA has planned to remove Class 2A designation without making the two requisite findings: first, that cold water aquatic life use has never been an existing use since November 28, 1975 and, second, that attainment of a cold water aquatic life use is not feasible as demonstrated with a UAA.

Silver Creek is just one of many examples where the MPCA has proposed a conclusory determination that the creek is only suitable for modified aquatic life use, Class 2Bm, rather than general aquatic life use, 2Bg. The scant data cited by the MPCA suggests that habitat may have declined between 2007 and 2017 and that biological stressors from pollution, as well as from habitat conditions, may contribute to low IBI scores.

Silver Creek is one of many waters where the MPCA has failed to meet the requirements of a UAA before proposing to downgrade a water body to “modified” use. In fact, approximately 90 times in the MPCA’s Class 2 Use Amendments draft, the MPCA presumes that Class 2B used

were not attained on the basis that the stream has been used for drainage since before November 28, 1975 as suggested by aerial imagery. Similarly, the summary conclusions that attainment is infeasible due to “poor habitat” that “cannot be reversed at this time and is not likely to recover naturally” found in the Silver Creek example are repeated verbatim dozens of times in the MPCA’s Class 2 Use Amendments. No evidence is provided in any individual case to support these conclusions, other than statements that a stream has long been used for drainage.

In the Triennial Review hearing on March 9, 2021, MPCA staff testified that some streams used for drainage support a general Class 2B use and some can be restored.³ (TR Hrg. 38:17-40). But the draft Class 2 Use Amendments describe no criteria by which the MPCA has assessed for any specific water body whether conditions preventing attainment can be “remedied,” the water body “restored,” or operations modified to attain general Class 2 uses, as required under regulations implementing the CWA. 40 C.F.R § 131.10(g); Minn. R. 7050.0222, subp. 3c(D)(1). The MPCA may not simply presume that a designated Class 2B water body cannot sustain general aquatic life, without evaluating the contributions of pollutants to low IBI scores and developing standards for remedy, restoration, or modified operations to protect designated aquatic life uses.

Consequences for Protection of Waters

The proposed Class 2 Use Amendments would affect the level of protection given to water bodies that are downgraded. The MPCA’s draft Class 2 Use Amendments suggest that some of the waters downgraded from Class 2A to Class 2B would be classified as Class 2Bdg and also “protected as a source of drinking water.” (*See, e.g.*, MPCA Class 2 Use Amendments p. 22). However, under existing rules, no drinking water standards apply to Class 2Bdg waters. *See* Minn. R. 7050.0222, subp. 4a. Waters downgraded to Class 2Bdg would be afforded no protection as sources of drinking water.

Under existing rules, Class 1B drinking water standards apply to Class 2A waters. Minn. R. 7050.0222, subp. 3a. The MPCA is not considering expanding this protection to include Class 2Bdg waters. In fact, the MPCA is reviewing whether to remove Class 1B protection from Class 2A waters. (MPCA Class 2 Use Amendments, p. 19, fn.10). Removing drinking water standards from Class 2A waters is only one more, seemingly inexorable, plan by the MPCA to remove or reduce protection of waters from sulfate and other pollutants.

The effects of downgrading water bodies from Class 2Bg to Class 2Bm are not explained in the MPCA’s planned Class 2 Use Amendments. It is likely this removal of general aquatic uses would have major consequences in determining whether any efforts will be made to remediate or improve waters that are impaired due to pollution and anthropogenic alterations.

In addition to listing waters as impaired when pollutant concentrations exceed water quality standards, the MPCA lists waters as impaired under CWA section 303(d) when the Index of Biological Integrity (IBI) for fish or macroinvertebrates falls below a target score. The trigger

³ MPCA, Triennial Review Hearing, Mar. 9, 2021 (“TR Hrg.”) videotape at about 38:17-40, at <https://minnesota.webex.com/recordingservice/sites/minnesota/recording/fa7eb6f037e74e4bb509e31308db8158/playback>.

IBI score depends both on the type of stream and its classification, as illustrated in the chart on the next page, copied from the MPCA’s Class 2 Use Amendments, page 17. In a Low Gradient stream, for example, the IBI criterion for fish is 42 for general use and 15 for modified use. With a downgraded classification, a stream with a fish IBI of 19 would go from being impaired as a “general” use to meeting the low criterion of a “modified” use. Thus, no inquiry would be made to determine stressors or institute practices to mitigate adverse conditions.

Table 4: Biological criteria for Exceptional, General, and Modified Uses (MPCA 2014a; Abbreviations: RR = high gradient, GP = low gradient).

Class #	Class Name	Exceptional Use	General Use	Modified Use
Fish				
1	Southern Rivers	71	49	NA
2	Southern Streams	66	50	35
3	Southern Headwaters	74	55	33
4	Northern Rivers	67	38	NA
5	Northern Streams	61	47	35
6	Northern Headwaters	68	42	23
7	Low Gradient Streams	70	42	15
10	Southern Coldwater	82	50	NA
11	Northern Coldwater	60	35	NA
Macroinvertebrates				
1	Northern Forest Rivers	77	49	NA
2	Prairie Forest Rivers	63	31	NA
3	Northern Forest Streams RR	82	53	NA
4	Northern Forest Streams GP	76	51	37
5	Southern Streams RR	62	37	24
6	Southern Forest Streams GP	66	43	30
7	Prairie Streams GP	69	41	22
8	Northern Coldwater	52	32	NA
9	Southern Coldwater	72	43	NA

Recommendations:

Based on the foregoing discussion, WaterLegacy makes the following recommendations:

- 1) That the MPCA proceed to rulemaking on planned Class 2 Amendments that would upgrade water bodies from Class 2B to Class 2A uses and from Class 2Bg to Class 2Be uses. These planned changes in designated uses comply with the CWA and its implementing regulations.
- 2) That the MPCA defer planned Class 2 Amendments that would downgrade water bodies from Class 2A to Class 2B uses and from Class 2Bg to Class 2Bm uses. As proposed by MPCA, these removals of designated uses would violate the CWA, its implementing regulations, and state rules incorporating CWA standards.

- 3) That the MPCA discontinue plans to downgrade any Class 2A designations to Class 2B unless MPCA has met its burden of proof under the CWA and implementing regulations to establish individually for each water body:
 - A. That the water body did not support cold water aquatic communities at any time since November 28, 1975.
 - B. That the water body could not feasibly attain a use for cold water aquatic communities applying the criteria of a UAA.
- 4) That the MPCA discontinue plans to downgrade any Class 2Bg designations to Class 2Bm unless MPCA has met its burden of proof under the CWA and implementing regulations to establish individually for each water body:
 - A. That the water body did not support general aquatic use at any time since November 28, 1975.
 - B. That the water body could not feasibly attain general aquatic use applying the criteria of a UAA.
- 5) That for any waters proposed to be downgraded, the MPCA comply with its duty of candor under Minn. R. Minn. 7000.0300 and “with complete truthfulness, accuracy, and candor” disclose the following:
 - A. For each water body proposed to be downgraded from Class 2A to Class 2B disclose that drinking water standards, including the 250 mg/L limit on sulfate, will no longer apply to that water body.
 - B. For each water body proposed to be downgraded from Class 2Bg to Class 2Bm disclose the implications for impaired waters designation and restoration including: i) the IBI score for fish and macroinvertebrate assessments applicable to the water body under the current classification; ii) the IBI score that would apply under the proposed downgraded classification; iii) whether the water body is currently listed as an impaired water due to fish and/or macroinvertebrate assessments; and iv) whether the water body would be removed from Minnesota’s impaired waters list as a result of the reclassification.

WaterLegacy requests that the MPCA reconsider its planned Class 2 Use Amendments in order to comply with the CWA and its implementing regulations as described above.

Respectfully submitted,



Paula G. Maccabee
WaterLegacy Advocacy Director and Counsel

RECEIVED

By: OAH on 04/19/2021 @10:24am

1441 140th Ln NW
Andover, MN 55304
April 14, 2021

Dear Judge Lipman:

Re: Weaker Water Quality Standards

ORH APR19 '21 AM10:24

I read with interest the Star Tribune article on which you were asked to make a decision/judgment on weaker water quality standards and I have a comment to make about that decision.

As a retired Ph.D. Analytical Chemist, I have difficulty with replacing "numeric standards" with "narrative description" of water standards. Having worked in the field of water quality during my career "narrative standards" do not work when quality of any item is set, e.g., sulfate analyses or other possible ion. Not knowing the full and complete discussions on either side presented to you, I understand that I may be missing critical data.

I have campaigned/voted for both parties in this wonderful and beautiful country, but I had a suspicion that more than an "objective" decision was reached. The Internet can be extremely helpful, and so while looking for an accurate address for you, I found that you are a republican, N.B., no capital on purpose, but that may explain your decision.

Sincerely,

Lawrence E. Cook

Lawrence E. Cook, Ph.D.