



February 3, 2023

Office of Administrative Hearings  
Administrative Law Judge Suzanne Todnem  
600 N. Robert St.  
P.O. Box 64624  
St. Paul MN 55164.0620

VIA OAH E-PORTAL

**Re: *Request for Comments on Possible Amendments to Rules Governing Water Quality Standards Use Classification 2, Minnesota Rules, chapters 7050 and 7053; Revisor's ID Number R-04737 OAH Docket No. 71-9003-38118***

Dear Judge Todnem:

The Minnesota Center for Environmental Advocacy (“MCEA”) is a nonprofit environmental advocacy organization with offices in St. Paul and Duluth. Since 1974, MCEA has defended Minnesota’s natural resources, water, air and climate, and the health and welfare of Minnesotans. MCEA is driven by the principle that everyone has a right to a clean and healthy environment, and that decisions must be based on fact, science, and the law.

MCEA submits these comments in response to the Minnesota Pollution Control Agency (“MPCA”) request for comments on proposed changes to water quality standards (“WQS”) as referenced above.

**1. MCEA supports the use of TALUs (Tiered Aquatic Life Uses) with regular data monitoring for scientifically accurate and timely rulemaking changes**

MCEA supports the use of the TALU framework in assessing stream reaches for aquatic life assemblages throughout the state’s freshwater streams. MCEA also supports the proposed future use of the TALU framework for lakes and other water bodies in the assessment of aquatic life assemblages. In establishing designated uses for Minnesota streams, we anticipate MPCA’s setting and upholding of protective goals for particularly high quality waterways while also recognizing the issues associated with waterways that may have been significantly altered, such as from agricultural drainage.<sup>1</sup> The TALU framework, and particularly the assessment of macroinvertebrates and fish assemblages in streams as bioindicators and as a tool for comprehensive stream management, may be beneficial in more accurately determining designated uses of water bodies across the state and in a changing climate.

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<sup>1</sup> Bouchard, R.W., Niemela, S., Genet, J.A. et al. A novel approach for the development of tiered use biological criteria for rivers and streams in an ecologically diverse landscape. *Environ Monit Assess* 188, 196 (2016). <https://doi.org/10.1007/s10661-016-5181-y>

Updates to the designated uses for stream reaches occur approximately every two to three years. The first update using the TALU framework was in 2017 with another occurring in 2020. Despite two previous designated use updates since data collection occurred, the current 2022-2023 designated uses rulemaking proposal is nevertheless based primarily on the 2016 and 2017 data collection and assessments, including temperature, indices of biological integrity, and other metrics. MPCA's Technical Guidance for Reviewing and Designating Aquatic Life Uses in Minnesota Streams and Rivers explains that in the data collection phase of the review the relevant data can be older than 10 years, and "following the initial (intensive watershed monitoring [IWM]) cycle, additional use designation work will stem from data collected on previously unmonitored reaches, improvements in biological condition, and some corrections, as more data is available." MPCA encourages older data to be included in the review, but does not specify any minimum requirements for data to be included. It is unclear from the MPCA what additional data availability (outside of the intensive watershed monitoring cycle) prompts redesignation and review including specific habitat or bioindicator data. There are significant lags in data collection and proposed changes to designated uses and the reviewed data may not be current and/or fully representative when considered in rulemaking proposals.

MCEA recommends proposed rulemaking changes as soon as practicable within each cycle of IWM data collection to ensure that the assessed data is still relevant to the water body in a rapidly changing climate. MCEA also recommends that the monitoring schemes and collected data for these redesignation efforts be made readily available to the public and that the collected data is sufficiently interpreted for the public.

**2. The MPCA must achieve the highest attainable uses for Minnesota's waters and should not downgrade based on little-to-no data.**

The principal function of designated uses in water quality standards is to communicate to interested stakeholders and the public the "desired state of surface waters."<sup>2</sup> Numeric and narrative standards are tied to the designated use. In addition, if a stretch of stream becomes polluted or is otherwise not attaining its designated use, the MPCA must attempt to restore it to the appropriate use. Designated uses are therefore critical to the overall framework of protecting water quality in Minnesota.

The largest proportion of stretches (123 stretches comprising 539 miles of stream) in this proposed rulemaking are being downgraded from a "general" use to a "modified" use. The effect of this change is that modified streams are only expected to be capable of supporting an aquatic community comparable to the median biological condition gradient level 5 as established in Calibration of the Biological Condition Gradient for Streams of Minnesota, Gerritsen et al. (2012).<sup>3</sup> General use streams, in contrast, are expected to be capable of supporting a level 4 aquatic

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<sup>2</sup> Yoder, Chris. Midwest Biodiversity Institute. Framework and Implementation Recommendations for Tiered Aquatic Life Uses: Minnesota Rivers and Streams, a report to Minnesota Pollution Control Agency. (2012).

<sup>3</sup> Minn. R. 7050.0222 subp. 4c(D).

community.<sup>4</sup> Level 5 stretches are ones where “sensitive taxa are markedly diminished,” the ecosystems are unbalanced and have reduced function. The biocriteria associated with the redesignation of stream reaches from 2Bg to 2Bm include lower numeric thresholds for aquatic life communities (both fish and macroinvertebrates). The change from 2Bg to 2Bm may therefore negatively impact water quality and the natural resource management of these streams, and MPCA can only take such action if it complies with the Clean Water Act’s limitations on downgrading attainable uses.

The Clean Water Act limits the ability to redesignate uses in a way that removes protections.<sup>5</sup> In order to remove a use that is not an existing use, MPCA must complete a use attainability analysis.<sup>6</sup> The Use Attainability Analysis to support the proposed downgrading of 539 miles of stream began with a review of the biological condition of these stretches. According to the proposed rule:

If one or both assemblages do not meet the General Use, then the process proceeds to a review of the habitat. . . . This step uses habitat models to predict if habitat is limiting the biology. . . . [I]f habitat is limiting, then it would need to be determined if this habitat condition is the result of legal alterations to the water body (e.g., ditching). . . . If the water body was legally altered, then the reach would be reviewed to determine if it is restorable or if it is likely to recover on its own in the next five years.

The last step is to determine if a General Use was attained or channel modifications occurred after November 28, 1975. If the stretch was illegally altered, or altered after 1975, it should remain as a general use, not a modified use.

MPCA’s review of the biological condition of the streams and its determination that these streams were habitat limited were based on data (albeit some of it relatively old). In contrast, the determinations that the habitat in these stretches cannot be restored, that the modifications were done legally and before 1975, and the fact that the stretch has not attained a general use at any point after 1975 are all based on little-to-no data. As MPCA stated in its 2018 Technical Guidance, “in most cases [drainage] records are difficult to obtain and this review may be limited until electronic versions of these records are available.” And yet nowhere in the proposed rule does MPCA admit that drainage records for any stretches were unavailable or not reviewed.

MPCA’s process for downgrading 123 stretches from general use to modified use is impossible to verify. The descriptions in the proposal provide little information. With respect to whether the ditches were modified legally, MPCA simply states “[t]his reach has been altered for drainage.” It does not appear that any records were examined to determine whether the drainage projects were done legally. With respect to whether the stretch might have attained a General Use

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<sup>4</sup> Minn. R. 7050.0222 subp. 4c(C).

<sup>5</sup> 40 C.F.R. § 131.10(g) (describing allowable reasons for removing a designated use).

<sup>6</sup> 40 C.F.R. § 131.10(j).

after 1975, MPCA simply states “available evidence (e.g., aerial imagery) indicates that it was maintained for drainage before November 28, 1975.” MPCA makes this statement 123 times, but no imagery is included. MPCA goes on to state, without support, that every single one of these stretches “cannot be feasibly restored.” It would aid public understanding if MPCA was able to indicate whether any currently ditched stream stretches were considered restorable (or illegally ditched). And if so, what criteria were used to make that determination. Lastly, MPCA states that “no evidence indicates that the [stream] attained the aquatic life use goals for Class 2Bg on or after November 28, 1975.” But there is no indication of what evidence was examined to make this determination.

MCEA cannot verify whether these stretches should be downgraded from 2Bg to 2Bm. Accordingly, until MPCA can provide the evidence it relied on to make these determinations, MCEA opposes these proposed changes.

Other proposed downgrades raise concerns for MCEA as well. MPCA proposes to downgrade several stream reaches in highly vulnerable watersheds. The St. Louis River (“SLR”) watershed is highly impaired,<sup>7</sup> while also being a heavily relied upon freshwater source for Tribal communities. MPCA should take extra precautions in understanding the cumulative impacts to aquatic life and water quality with these redesignations. The redesignation of several stream reaches within the SLR watershed, including from general cold (2Ag) to modified or cool/warm (2Bm or 2Bg), may result in lower numeric thresholds for water quality metrics in this region resulting in long-term or cumulative impacts to the SLR, and may ultimately result in changes in habitat restoration efforts. Although some drinking water components are maintained, aquatic life is the issue for many native communities, particularly with regard to subsistence fishing and the bioaccumulation of pollutants within these species. MCEA recommends that the MPCA prioritize the protection of sensitive and impaired watersheds and stream reaches in this rulemaking and others, with emphasis given to the SLR watershed. The MPCA should more closely coordinate with the Tribal nations in rulemakings that may impact subsistence fishing and drinking water.

### **3. The MPCA and Department of Natural Resources (DNR) should coordinate their management of agricultural ditches for aquatic life and water quality**

Interagency coordination is crucial in ensuring that drainage projects do not continue to negatively affect water quality and aquatic life. Although the DNR may be a regulator alongside local drainage authorities for drainage projects, its concern primarily lies within the potential for drainage to impact the course, current, or cross section of a public water or public water wetland, but DNR does not always consider the effect on aquatic life or water quality.

However, as discussed above, the modification of natural waterways to facilitate increased drainage from agricultural lands also has lasting and cumulative impacts on the aquatic habitat in

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<sup>7</sup> Minnesota Pollution Control Agency. St. Louis River Watershed Mercury TMDL. (2022). <https://www.pca.state.mn.us/business-with-us/st-louis-river-watershed-mercury-tmdl>  
Environmental Protection Agency 2022. Great Lakes AOC. St. Louis River AOC. <https://www.epa.gov/great-lakes-aocs/st-louis-river-aoc>

those waterways and the ability for those habitats to support balanced assemblages of aquatic life. The MPCA has recognized the impacts of drainage on these redesignation efforts in stating that “most maintained drainage ways are not presently restorable without a huge investment with uncertain results.”<sup>8</sup> Impacts from drainage are oftentimes permanent and irreparable. The 2018 Technical Guidance document also describes how agricultural drainage and protecting aquatic life assemblages have not yet been able to co-exist as priorities for management; “the ability to construct multi-use drainage ways (i.e., channels that provide drainage and protect aquatic life) has not been fully demonstrated—especially on a large scale.” MPCA has broad regulatory authority under the Minnesota Water Pollution Control Act to “prevent, control or abate water pollution,” which it can use to address water quality impacts from agricultural drainage projects, including effects on the management of aquatic life.

As a first step, and in order to allow review of MPCA’s proposals to downgrade 539 miles of stream to “modified,” it is critical to have publicly accessible data to verify whether these ditches were legally modified under Minnesota drainage law. MCEA recommends that MPCA and DNR work together to ensure that the extensive document record of legally established drainage projects across the state (1) directly informs MPCA’s Use Attainability Analysis, and (2) is available to the public. Because local drainage authorities and the DNR hold this project documentation in hard copy form, MCEA recommends the development of a comprehensive GIS drainage database that includes digital copies of drainage project documentation. While this type of a database would likely be administered by the DNR given their regulatory role over drainage systems, it would allow MPCA to cite a public record for any class use redesignations that stem from drainage modifications, and it would give the public adequate information to review those proposed redesignations.

Sincerely,

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<sup>8</sup> Minnesota Pollution Control Agency, Technical Guidance for Reviewing and Designating Aquatic Life Uses in Minnesota Streams and Rivers, (2018).